RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION
1 Civic Center Circle, P.O. Box 1059, Brea, California 92822-1059
Telephone 714.990.0901 Facsimile 714.990.6230

to: File

from: James L. Markman

date: January 4, 2008

subject: Legal Bases for Approach Reflected in Group Home Ordinance

---

A. Goals of Ordinance.

The core goals of the regulatory ordinance which is presented are to further regulate group home uses and residential care facilities within the City of Newport Beach in order preserve the residential nature of affected neighborhoods and to eliminate the secondary effects of the group home uses which have occurred or could occur in those neighborhoods. "Secondary effects" are actual negative consequences caused by the proximity of the regulated uses to residences, principally of a physical nature.

B. Basic Legal Constraints.

There are two basic legal constraints with which the regulations must deal. They are:

a. The fact that persons in recovery are considered handicapped under federal housing laws and, therefore, constitute a protected class under those laws; and

b. Under state law, six or under facilities for recovery licensed by ABP with six or less patients (for non-medical care) must be treated as single family homes.

C. Basic Proposed Regulations.

The above-referenced considerations generated an ordinance proposal which, of course, excludes any attempt to regulate six or under licensed care facilities which are allowed to be established in any zone in which a single family residence may be established without a discretionary permit. The two basic regulations established by the ordinance are as follows:

a. Other than six or under licensed facilities, no new care facility may be established except in the MFR zone and then only subject to the issuance of a conditional use permit. Of course, such uses are entitled to seek reasonable accommodations under federal law based on the fact that they are occupied by a protected class of handicapped persons. Accordingly, the ordinance also has a process by which a reasonable accommodation may be sought administratively.

b. The ordinance renders nonconforming any present non-licensed care facilities which are located in the R-1, R-1 1/2, or R-2 zones, subject to any person conducting such an operation being allowed to seek a conditional use permit to allow the use to remain in operation. That conditional use permit must be sought within ninety days of the effective date of the ordinance. In regard to those present uses, assuming that a conditional use permit is not sought or received by an operator, that operator still has available to it the right to seek a reasonable accommodation under federal law or to seek to extend the amortization period prior to abatement. Those extensions may occur based upon the fact that the operator is processing use permit or reasonable accommodation applications or to seek an extension in order to amortize an economic investment which allows the City to avoid any claim of an unlawful taking of property. It is anticipated that there will be few requests for such extended amortization based upon the defrayment of investment because most of the facilities are operated on a leasehold basis.

D. Regulations Considered and Not Proposed.

At this point, we would like to point out some of the regulations suggested by others which are not being recommended. The reasons for not making such recommendations will become clear based upon the legal authorities discussed in this memorandum. The regulations not contained within the recommended ordinance include:

a. The adoption of a remediation plan with a target number of remaining facilities after the passage of a certain period of time which would mean automatic elimination of some of the operations whether or not they create secondary effects which detract from the residential nature of the neighborhood;

b. The elimination of all unlicensed facilities on an immediate basis; or

c. The adoption of a 1,000 feet disbursement standard to be applied to present uses as well as future uses.

E. Avoidance of Facial Discrimination.

In choosing the approach for the regulations, the key legal consideration was to avoid suggesting that the Council pass a facially discriminatory ordinance. A facially discriminatory ordinance is an ordinance which when reviewed by a court discloses discriminatory treatment which disfavors handicapped persons from other persons similarly situated. Examples of facially discriminatory

ordinances dealing with care facilities and housing are discussed later in this memo. The ordinance was drafted in a way to avoid facial discrimination particularly based upon the following two features of the ordinance:

1. The ordinance continues in effect a prohibition against the establishment of any group homes other than residential care facilities within any residential area of the City of Newport Beach. Other types of group homes include parolee homes, fraternities, and boarding houses. Accordingly, residential care facilities are actually treated more favorably and, accordingly, handicapped persons are treated more favorably than other persons similarly situated under the zoning laws of the City of Newport Beach. This is an important fact to counterbalance the argument that may be made to the effect that the ordinance itself increases the regulatory authority and decreases opportunities for the establishment or continued operation of residential care facilities. However, we think it to be appropriate to compare the treatment of residential care facilities with other like facilities in the community in order to ascertain whether discrimination occurs on the face of the ordinance.

2. This ordinance does not put any single care facility operator in a position to represent to a court that it cannot continue to operate or cannot establish an operation for a care facility in Newport Beach. This is due to the fact that there are administrative processes available through the conditional use permit process, the reasonable accommodation process and the extended amortization process which we feel must be exhausted before an operator could complain that the ordinance is discriminatory. And at that point, any such claim would be judged under the "as applied" legal test under federal law rather than the "facial discrimination" test provided by federal law.

If an ordinance is found to be facially discriminatory, the validity of the ordinance still could be preserved if articulated federal standards are met. The federal appellate districts have adopted different standards which are applied to preserve ordinances which are facially discriminatory. The case most relied upon by Concerned Citizens of Newport Beach is an 8th Circuit Case, *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 Fed.2d 91 (8th Cir., 1991). In that case, a group home operator for mentally disabled persons challenged state and local laws which had a hardwired disbursal requirement for such group homes. In other words, those homes could only be established if they were a certain number of feet away from any other similar operation. The 8th Circuit Court of Appeal held that there was facial discrimination with respect to those local laws. However, the 8th Circuit held that if there was a rational basis for the discriminatory approach, the validity of the ordinance would be preserved. The court went on to hold that even

though the disbursal requirements limited housing options for the disabled on the face of the ordinance, they were sufficiently related to the state's goal of deinstitutionalizing areas where such operations existed to be held valid under the "rational basis" test.

Unfortunately, the 8th Circuit test was rejected explicitly in the 9th Circuit, the location of the City of Newport Beach. That rejection occurred last summer in *Community House, Inc. v. City of Boise*, 490 Fed.3d 1041 (9th Circuit 2007). In *Boise*, a nonprofit corporation which formerly had managed a city-owned homeless shelter sued the city under the Fair Housing Act after a religious organization for which the city had later leased the shelter instituted a male-only policy. The plaintiff claimed that a male-only policy facially discriminated on the basis of gender and familial status and a preliminary injunction was requested. In considering the issuance of that injunction, the 9th Circuit held that a *prima faci*a case for facial discrimination under the Fair Housing Act was likely to be established since the plaintiffs showed that there was intentional discrimination under the Fair Housing Act by showing that a protected group had been subjected to explicit differential treatment. The 9th Circuit then explicitly rejected the "rational basis" test used by the 8th Circuit to validate a facially discriminatory ordinance. The 9th Circuit instead established the following standard which applies in Newport Beach when a city adopts zoning rules which are facially discriminatory:

> To avoid invalidity, it must be shown either that (1) the restriction in question benefits the protected class or (2) that the restriction responds to the legitimate safety concerns raised by individuals affected, rather than being based on stereotypes.

Based upon the evidence which exists in the record before the Newport Beach City Council, it seems highly unlikely that either one of those avenues would be available to validate a Newport Beach ordinance which is held to be facially discriminatory.

Following are examples of housing cases where a facial discrimination invalidated an ordinance or statute:

1. In *Nevada Fair Housing Center Inc. v. Clark Co*., 2007 WL 610640 (D.Nev. February 23, 2007), Clark County's group home ordinance prohibited group homes for the disabled which housed more than six persons from locating within 1500 feet of a similar home. The court held that the ordinance was facially discriminatory and that neither of the 9th Circuit tests were met which could have validated the facially discriminatory ordinance.

2. In *Children's Alliance v. City of Bellevue*, 957 Sup. 1491 (W.B. Wash. 1997), an ordinance required group homes to be separated by 1000 feet and to be limited to six or fewer residents. The defining difference between a "family" and a group home under that ordinance was the addition of staff operating at the group home. The District Court held that the use of "staff" as a distinguishing factor simply served as a proxy for a classification based on the presence of individuals who were under 18 and the handicapped since both groups required supervision and assistance. The ordinance was held to be facially discriminatory. The court went on to indicate that the disbursal requirement did not sufficiently benefit the handicap by preventing the development of an institutional ghetto because the City then had no group homes at all.

3. In *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 Fed. 3rd 725 (1999), the operators of a methadone clinic announced their plans to locate in the city which then enacted an ordinance against substance abuse clinics. The basis for the moratorium was a finding made by the city that the clinic would attract drug dealers and lead to an increase in crime in the surrounding area. The clinic filed suit under Federal law and asked for a preliminary injunction. While the District Court denied the request for an injunction the 9th Circuit Court of Appeals reversed. That Court held that the federal laws against housing discrimination apply to local zoning controls. The court then went on to hold that the moratorium ordinance was facially discriminatory and could not be validated.

Of course, there are many more examples of ordinances held to be facially discriminatory, particularly when seemingly arbitrary disbursement requirements are applied to group uses which serve the handicap. In that regard, reference is made to the Goldfarb Lipman letter dated July 19, 2007 which we understand was provided to the Council. That letter describes the various levels of risk inherent in taking different regulatory approaches to residential care facilities. The scholarship reflected in the memorandum is exemplary and, in fact, the ordinance being recommended to the Council is constructed in a way which generally is in accord with the Goldfarb Lipman observations.

F. <u>Administrative "as applied" Approach</u>.

As distinguished from an approach to an ordinance which could be found to be facially discriminatory, the ordinance approach recommended is to make available to any present operator or potential future operator of a residential care facility administrative processes by which an operation could be continued or established. As pointed out, those processes include a

conditional use permit opportunity, a reasonable accommodation process and a process to seek extended amortization of an operation. There are two purposes for making such administrative processes available to present and future operators. The first is to gather the actual facts and circumstances concerning any particular operation and whether that operation itself or together with others clustered around it have institutionalized an area or otherwise created negative secondary effects to the residents of the area. Again, this is the purpose of regulation rather than attempting to fence out of the City a certain category of persons, particularly persons who are treated as handicapped persons under federal law. The second reason for the administrative process approach is to cause the federal "as applied" standard to be the benchmark by which any specific decision will be judged. In that regard, an ordinance may be facially discriminatory or may be discriminatory "as applied" to a given operation involving the handicapped. An example of the application of the federal "as applied" in a 9th Circuit case is *Gamble v. City of Escondido* (1997), 104 Fed.3d 300. *Gamble* is a bit different from other cases discussed in this memorandum in that it did not involve the processing of the use presented by a group home but did consider the physical size of the structure being proposed in order to house the group home. There was a building permit application by which the plaintiffs sought to construct a complex for physically disabled elderly adults in an Escondido single family residential area. The City denied the building permit application because the proposed building was too large for the lot and was out of conformity in size and bulk with the neighborhood. The first decision was made by the City Planning Department. The department (staff) concluded that the building would not be typical for a single family residence. This conclusion triggered a CUP requirement and process. The plaintiff applied for the CUP and ultimately was denied. The process went through three stages, one before Design Review Board, one before the Planning Commission and one before the City Council. In the resulting lawsuit, the plaintiff argued that the Fair Housing Act had been violated due to the decision made. The first issue presented was whether the case involved a circumstance by which it was demonstrated that the City had given disparate treatment under the Fair Housing Act which disqualified the application. Deciding that that was not the case, the court set forth the "as applied" criteria applicable to this situation. That criteria applied was as follows:

Plaintiffs would have to make out a *prima facia* case showing elements including that plaintiff is a member of a protected class, plaintiff applied for the use permit and was qualified to receive it, the use permit was denied despite plaintiff being qualified, and the defendant had approved a conditional use permit for a similarly situated party during a period relatively near the time when plaintiff was denied. Assuming that a *prima facia* case could be made, the burden would shift to the city to articulate a legitimate, nondiscriminatory reason for its actions. If that test was

satisfied, the plaintiff would then have to prove by a preponderance of the evidence that the reason asserted by the city was a mere pretext.

On the facts presented in *Gamble*, the court found that plaintiff had not made the *prima facia* case because the plaintiff had not alleged that the city had granted a permit to a similarly situated party relatively near the time when the denial had occurred. Further, in looking at stage two of the test, the court concluded that the reason the city advanced for its decision, "concern for the character of the neighborhood" was legitimate and nondiscriminatory. Accordingly, at best, plaintiff was put into the third stage of the test and had not provided evidence that the city's reason for denial was pretextual. There were no statistics or other proof presented to the effect that the city's permit processes had significant adverse impacts on the physically disabled or elderly.

Clearly, the "as applied" test by which the results of administrative processes would be judged afford an opportunity for the courts sustaining actions of the Council involved in greater regulation of the recovery facilities. Following are administrative process cases in this area of concern which have generated favorable results for the regulating authority:

1. In *United States v. Village of Palatine, Illinois* (October, 1995) 37 Fed.3d 1230, Oxford House, a large organization managing recovery homes nationwide attempted to establish a group home for recovering substance abusers in Palatine. The operation which was intended to not include paid professional staff, provided for up to twelve residents to live at the home in question. Because of those two facts, the operation did not fit into the definition of licensed "group home" or "family" which would have allowed the use to be established without a use permit under the applicable ordinance. Accordingly, Palatine sought to apply its ordinance process to the subject operation which was ongoing without city approval. It was Oxford House's policy not to submit to any special use approval process and the organizers of the particular operation were aware of the city's zoning restrictions. Before the Court of Appeal, the city argued that it could not be found that it failed to make a reasonable accommodation necessary to afford the residents of the house an equal opportunity to use and enjoy their dwelling because the company never invoked the procedures that would have allowed the Village to make such an accommodation. The Court of Appeal agreed and essentially found that the issue was not "ripe" and would not be justiciable unless and until Oxford House took advantage of the available city processes to seek approval.

2. In *Oxford House v. City of St. Louis* (February, 1996) 77 Fed.3d 249, the St. Louis Zoning Ordinance defined single family dwellings to include group homes with eight or fewer unrelated handicapped residents. City inspections indicated that the Oxford House at issue housed more than eight persons. Rather than applying for a variance which was an available process, Oxford House brought a lawsuit against the City contending that the City's attempt to enforce its ordinance violated the Fair Housing Act. The City counterclaimed and asked the district court to enjoin Oxford House from violating the ordinance. The district court held in favor of Oxford House and enjoined the City from using its zoning ordinance to prevent Oxford House from operating with the existing number of residents which were ten at one location and twelve in another. The District Court of Appeal reversed, vacated the judgment and remanded the counterclaim for further consideration. In doing so, the Court noted that rather than discriminating against the Oxford House handicapped residents, the City's zoning code seemed to favor them on its face since the zoning code allowed only three unrelated non-handicapped residents to reside together in a single family zone, but allowed group homes to have up to eight handicapped residents. The Court made the following statement:

> "We conclude the eight person rule is rationale. Cities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas and ordinances restricting the number of unrelated people who may occupy a single family residence are reasonably related to these legitimate goals. The City does not need to assert a specific reason for choosing eight as the cut-off point rather than ten or twelve."

The Court also made the following statement:

> "Also, the City did not fail to accommodate the Oxford Houses as the Act requires. [citation] The Oxford Houses want the City to let them operate with more than eight residents. The City has consistently said it cannot make an exception to the zoning code unless the Oxford Houses apply to the City's Board of Adjustments for a variance, [citation], and the Oxford Houses refused to apply. Their refusal is fatal to their reasonable accommodation claim. The Oxford Houses must give the City a chance to accommodate them through the City's established procedures for adjusting the zoning code. [citation] The Fair Housing Act does not 'insulate [the Oxford House residents] from legitimate inquiries designed to enable local authorities make the informed decisions on zoning issues.' [citation] Congress did not intend for the Act to remove

> handicapped people from the 'normal and usual incidents of citizenship, such as the public components of zoning decisions, to the extent that participation is required of all citizens whether or not they are handicapped.' [citation] In our view, congress also did not intend the federal courts to act as zoning boards by deciding fact intensive accommodation issues in the first instance."

There are many other cases supporting the application of administrative processes to applications for operations which involved handicapped persons.

The above-discussed legal authorities generated the conclusion of this office that the regulatory approach which might have a practical impact on the problem addressed would be to deal with present and future recovery facility operations under available administrative processes. This would make the "as applied" test applicable to decisions instead of the difficult test applicable to validate a facially discriminatory ordinance. In addition, this approach provides a process which will cause disclosure of the actual physical circumstances involved in each operation which either seeks to establish itself in the MFR zone or which seeks to continue in the other residential zones under the use permit, reasonable accommodation and/or amortization process.

Following are discussions of the integral facility, integral use provisions of the ordinance and the approach taken for judging whether a reasonable accommodation is required.

Integral Facilities and Integral Uses.

There is a concern that operations with ADP licenses for six or under which are shielded against City regulations really are not individual operations but, rather, are components of larger operations. Those larger operations might include placing several such facilities and other unlicensed facilities in close proximity to each other in order to rotate service providers from one facility to the other or providing for structured group recovery activities offsite while only using the facility licensed as six or under simply as sleeping quarters. It has been decided to treat such a larger operation as an "integral" operation rather than agreeing to the conferring of exempt status on those facilities. Such an operation could include housing persons in one building at one address and providing services at another address or combining persons from different programs in integrated recovery activities.

The ordinance creates two definitions to deal with integration of operations. The first is a definition of "integral facilities". These are defined as operations where it is not necessarily true

that persons from different licensed or unlicensed programs are commingled for purposes of providing recovery services or engaging in recovery activities. For example, a large operator could have several six or under unlicensed facilities essentially located on the same parcel in different units on that parcel or on adjacent parcels and rotate service providers from one unit to the next generating an integrated program which simply "stacks" one unlicensed facility on top of another. There is a legal issue whether such an operation was contemplated when the six or under unlicensed exemption was created since that exemption envisioned having persons in small facilities in residential areas take advantage of a residential atmosphere while in recovery. The type of "stacked" operation described in this paragraph clearly is the antithesis of recovering in a small facility which maintains a residential atmosphere.

There also is a new definition in this ordinance of "integral use." An integral use is an operation which provides recovery activity simultaneously to persons from a six or under unlicensed program with any person in another program not being operated under that license. For example, if a large operator transports persons from several programs in a van or requires them to transport themselves by bicycle to a building some distance from the building in which they sleep, the program itself may not be accurately characterized as six or under because the program is delivering services to more than six people at a time.

The reason why the second definition was added is because ADP regulations, particularly, regulation 10508(a) as authorized by state law (Health & Safety Code Section 11834.09(a)(2)) allows for a licensed operation to include the use of more than one building. Further, those sections do not specify whether the multiple buildings may be located on multiple parcels of property. Accordingly, the definition of integral use was added because no regulation or provision of state law has been located which would indicate that persons in a six or under licensed program may participate simultaneously with persons in other programs while retaining an exemption from local control.

There has been no reported case or, to our knowledge, completed litigation involving the question of the correct definition of a six or under licensed facility according to state law. Stated conversely, there has been no reported decision or case litigated to conclusion in which a city has passed an ordinance which purports to regulate these integrated operations as does the ordinance presented to Newport Beach. It is the feeling of our firm and staff that pushing this issue forward for possible court review is important to the regulatory process which is sought to be enacted because large operators constitute a significant percentage of the total recovery operations and, a significant percentage of responsibility for secondary effects may be that of the

large operations. Stated simply, if no attempt is made to deal with large integrated operations, the ordinance may not result in the practical result sought, a decrease in secondary effects.

The Council has heard statements from attorneys for Sober Living by the Sea that they consider the attempt to define and regulate integral uses and integral facilities as being preempted by state law. While not yet determined in a lawsuit, we do not agree with that assessment because there is no attempt here to regulate operations which truly are six or under licensed operations as contemplated by the Health & Safety Code and the regulations adopted by ADP. The position taken here is that the licenses have been issued and maintained in error and that a city may seek to regulate operations which may be based on a license so issued or maintained in error. Of course, again, this issue has not been litigated but staff and this office feel that the issue needs to be pushed forward and this office also feels there is a substantial opportunity for the City to succeed in defending its position on integral uses and integral facilities. The ordinance does has a "severability clause" which would allow the remainder of the ordinance to be implemented should a court invalidate the provisions dealing with integral facilities and integral uses.

H. <u>Provisions on Reasonable Accommodations</u>.

We wish to alert the Council to a provision contained within the reasonable accommodation section of the ordinance by which the City is pressing a legal point not finally established in case law, although based on some supporting authority. The concept under discussion is that if a person applies for a reasonable accommodation in the zoning context seeking to establish a group home or residential care facility which otherwise would not be allowed, the City is requiring the applicant (which can be the operator, one or more handicapped persons seeking to be serviced in the facility or even a public interest advocacy group), to establish the "need" for the use of the particular facility in the context of reasonable accommodation. In other words, the ordinance requires the City in issuing a reasonable accommodation to an applicant to consider "…,whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting." (See proposed subsection 20.98.025 C 4 on page 70 of draft ordinance.) In short, this ordinance requires a showing of "necessity" in order to support the granting of reasonable accommodation.

Some federal authorities on reasonable accommodation in the context of housing discrimination and zoning ordinances leave one with the impression that a person is entitled to seek a reasonable accommodation at exactly the location suggested in an application and that the

availability of other facilities cannot be used to deny such an application. However, there is also authority for the proposition that in showing a necessity or need for a reasonable accommodation, the concept of "other available facilities" may be considered. There are two cases which are particularly helpful in that regard. The first is *Bryant Woods Inn, Inc. v. Howard County*, 124 Fed.3d 597 (4th Circuit 1997). There, a group home for elderly and infirm requested a variance from the County to expend from eight to 15 disabled and elderly residents. The County denied the variance and the operator sued claiming intentional discrimination and failure to make a reasonable accommodation which also was requested during the process. The court held that the plaintiff did not carry its burden to show that the requested accommodation was necessary to provide the disabled with an equal opportunity to use and enjoy a dwelling. The court pointed out that the County zoning ordinance already allowed group homes and 30 other facilities were already operating in the County.

The second precedent which is helpful on this point is *Smith and Lee Associates v. City of Taylor*, 102 Fed.3d 781 (6th Circuit 1996). There, a residential home for the elderly and disabled sought to rezone its property to enable it to expand from six to nine residents. The court held the City failed to provide a reasonable accommodate when it denied the request. In so noting, the court stated that the expanded facility was necessary because (1) disabled seniors cannot live in residential areas without assistance; and (2) there was an insufficient supply of assisted living facilities in the area. This second stated reason for overruling the City's denial is useful because the concept of "other available facilities" is used by the court to rationalize its decision.