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July 21, 2009

VIA FACSIMILE

Mr. Tom Allen
Hearing Officer
City of Newport Beach

Re: *Reasonable Accommodation*

Dear Mr. Allen:

This letter-brief is submitted on behalf of the City of Newport Beach in connection with the hearing concerning an application for reasonable accommodation from Newport Coast Recovery (“Newport Coast”). This letter-brief responds to your request at the hearing on July 7, 2009, for further briefing regarding the meaning of “pattern and practice” as defined in the Newport Beach Municipal Code, as well as explanations of the documents presented by Newport Coast at the hearing.

Counsel for the City has provided the applicant with a copy of this letter.

“Pattern and Practice”

Newport Beach Municipal Code (“NBMC”) section 20.91A.050 provides standards for the development and operation of residential care facilities in the City’s residential zones. The Code requires these facilities operate in compliance with federal, state and local law.

NBMC section 20.91A.050 subdivision B applies to a *specific facility* in Newport Beach and states “[t]he property shall be operated in compliance with applicable State and local law....”

Subdivision C of the same section requires owners or operators of residential care facilities demonstrate that they do not have a “pattern or practice” of operating *similar facilities* in violation of state or local law:

“C. In order to ensure that unlicensed residential care facilities (small or general) are operating in a manner that is consistent with State and Federal law and established industry standards *and to ensure that operators do not*

Mr. Tom Allen
July 21, 2009
Page 2

have a pattern or practice of operating similar facilities in violation of State or local law, the standards listed below shall apply:

...

4. The names of all persons and entities with an ownership or leasehold interest in the facility, or who will participate in operation of the facility, shall be disclosed in writing to the City, *and such persons and entities shall not have a demonstrated pattern or practice of operating similar facilities in or out of the City of Newport Beach in violation of State or local law.*"

(Emphasis added).

There are two separate standards at play here. Subdivision B applies to facilities operating in Newport Beach – and these facilities must comply with state law, period. It is unnecessary to show a “pattern or practice” of non-compliance with local, state or federal law.

Subdivision C applies to owners or operators of “unlicensed residential care facilities” in or outside of Newport Beach, and these facilities must not have a “pattern or practice” of violating state law.¹ And although Staff maintains the evidence adduced against Newport Coast at the July 7th hearing is enough to show a “pattern or practice” of violating state law, this subdivision is inapplicable because Newport Coast is a “licensed” recovery facility. Subdivision C applies only to “unlicensed” facilities.

As evidenced in the “Notice of Violation” attached to the Staff Report, Newport Coast’s admission of minors into its facility was a violation of state law.² Staff maintains this

¹ The NBMC does not define the phrase “pattern or practice.” Analogizing to other areas of the law, federal civil rights cases have held it “takes more than one unlawful practice to constitute a ‘pattern or practice’ of discrimination.” See *U.S. v. Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1096 n.5 (9th Cir. 1979). Within the context of civil rights, the Ninth Circuit held the words “pattern or practice” meant any situation where there were not “isolated, peculiar, or accidental events. The words were not intended to be words of art.” See *U.S. v. Ironworkers Local 86*, 43 F.2d 544, 551-53 (9th Cir. 1971). Within the context of criminal law, the phrase “pattern or practice” means “at least two acts.” For instance, the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) defines a “pattern” of racketeering as “at least two” acts of racketeering. See e.g., *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004).

² Undoubtedly due to the recent publicity the “group home” issues have gotten in the community, Staff has received additional phone calls and e-mails from individuals with similar experiences to those who testified at the hearing on July 7, 2009. If the Hearing Officer believes

Mr. Tom Allen
July 21, 2009
Page 3

alone is sufficient to show that Newport Coast has not operated its facility “in compliance with applicable state and local law” as required by NBMC section 20.91A.050 B.

Housing Element and Consolidated Plans

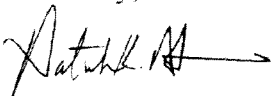
Counsel for Newport Coast has provided the Hearing Officer with a series of documents prepared by the City of Newport Beach and submitted pursuant to federal law to HUD that allegedly contradict the information Staff provided at the July 7th hearing. Counsel for Newport Coast also alleged there were “violation letters” issued by the State of California against the City regarding non-compliance with the State’s housing elements requirements.

Counsel for Newport Coast gave these documents a very cursory treatment at the hearing, and according to the attached declaration of Assistant City Manager Sharon Wood, largely mischaracterized them. The lion’s share of the documents concerned Community Development Block Grant (“CDBG”) monies that must be used for low-income individuals, and have no bearing at all on Ordinance 2008-05.

Likewise, Counsel for Newport Coast suggested the City’s Housing Element was out of compliance with state law, with the intimation that Ordinance 2008-05 was the culprit. Not so. First, the State has not issued “violation letters” to the City. In fact, the letter of October 24, 2008 is a “Review of the City of Newport Beach’s Draft Housing Element.” As the declaration of Assistant City Manager Wood explains, the comments from the State Department of Housing and Community Development were related to the City’s required update of its Housing Element in 2008.

As always, if you have any questions or require clarification on any of the points contained herein, please let me know.

Sincerely,



Patrick K. Bobko

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this information would help inform his decision on these issues, Staff recommends the hearing be re-opened for the limited purpose of presenting this newly acquired information.