STEVEN G. POLIN, ESQ.
Attorney At Law

3034 TENNYSON ST. N.W.
WASHINGTON, D.C. 20015

TEL (202) 331-5848
FAX (202) 537-2986
SPOLIN2@EARTHLINK.NET

July 29, 2009

SENT VIA ELECTRONIC MEAN

Mr. Tom Allen
Hearing Office
City of Newport Beach
Newport Beach, CA

Re: Reasonable Accommodation Request
Newport Coast Recovery

Dear Mr. Allen:

Please consider this as additional supplemental to the record of the request of Newport Coast Recovery ("NCR") for a reasonable accommodation in the application of the City of Newport Beach's zoning code.

STATE LICENSING AND COMPLIANCE WITH STATE LICENSING

In 2007, the City of Newport Beach commenced a campaign to convince state officials that the Department of Alcohol and Drug Programs ("ADP") should take into consideration whether a city has more than its fair share of substance abuse treatment facilities and whether overconcentration of such facilities should be part of the licensing criteria for application for new and renewed licenses. (See Exhibits A and B) (Health & Safety Code §§ 11834.01-11834.50. The City's position was rejected by the California Attorney General in opinion number *90 Ops. Cal. Atty. Gen. 109.* (See Exhibit C) The Attorney General opined in the negative to the question of whether the Department of Alcohol and Drug Programs can deny an application for licensure or suspend or revoke the license of an alcoholism or drug abuse treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need. Specifically, the Attorney General stated "... each licensure applicant must complete an application form, obtain a fire clearance, and pay a fee to the Department. (See also § 11834.09, subd. (b).) Sections 11834.01 and 11834.03 provide no authority for the Department to deny a license because the community already has an overconcentration of such facilities." The City is pre-empted by Health & Safety Code §11834.01-11934.50 from denying a use permit or reasonable accommodation request by a facility licensed by ADP on the basis of overconcentration.

In the same opinion, the Attorney General opined that only ADP has the authority to deny, suspend or revoke a license based on the standards set by the State Legislature. The City seeks to sidestep this requirement and use permit process as a vehicle to determine NCR's compliance with

its licensure requirements. The City seeks to make a record and convince the Hearing Officer that NCR acted in violation of state law in the admission of two minors into its facility. Both the City and the parents of the minors have complained to both the Department of Social Services ("DSS") and ADP about this incident. The City's only legal recourse is to complain to DSS and ADP about what it perceives to be NCR's violation of its licensure.

A request for a reasonable accommodation is not a licensure compliance hearing or an adjudication on compliance with state licensure standards. The City alleges that NCR has engaged in a "pattern and practice" of violating state and local law. The City cannot deny a request for a reasonable accommodation on the basis of incident that may be a minor violation of its licensure requirements. One incident does not a "pattern and practice" make. *See, United States v. Parma*, 661 F.2d 562, 573 (6th Cir. Ohio 1981)(A pattern and practice suit necessarily involves a number of discriminatory acts.) The City erroneously asserts that an investigation by two state agencies involving the same incident constitutes a pattern and practice of violating state or local law. DSS closed out its investigation without taking any action. ADP allegedly has stated that it will investigate the incident.

Regardless of the outcome of the ADP investigation, this tribunal is without authority to use an alleged licensing violation as the basis for denying NCR's request of a reasonable accommodation. Matters relating to licensure are not proper matters for consideration in a zoning hearing. *See, Oconomowoc Residential Programs v. City of Greenfield,* 23 F. Supp. 2d 941, 958 (E.D. Wis. 1998); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785 (7th Cir. Wis. 2002)(Complaints about mistreatment of patients which does not result in refusal, revocation or suspension of license by the State agency found not to have a causal connection to matters relating to zoning.) The crux of the dispute raised by the parents of the minors is contractual in nature. It's a business dispute. It may or may not be a violation of NCR's license, and if it is it may be considered a minor infraction. There are appropriate forums and means for addressing such a dispute. Unfortunately for NCR, the Hearing Officer accepts the complaints of the parents at face value and has included the complaints to the findings in denying NCR's request for a reasonable accommodation.[1] NCR has operated as NCR at this location since 2002. It is quite obvious that the City staff has expended a considerable number of man hours to secure the testimony of the two parents, emailing ADP, amending and appending the staff report to put before the Hearing Officer one incident, which occurred in March, 2009. Staff has alluded to other complaints it has received since the hearing which has not been shared with NCR or its attorneys. Notwithstanding the

---

[1]Many of the allegations of one of the parents about her contact with NCR cannot be verified. For instance, one of the parent's claims a demand has been made to both Mr. Newman and the attorneys for NCR. There is no such record of such a demand being made. The City has muddied the waters by bringing the parents into the hearing and giving a statement that is not subject to cross examination to complain about NCR.

immense expenditure of resources to convince by the City's Staff, it has failed to demonstrate a connection between issues of licensure and zoning.

The City intentionally placed NCR in a position of facing serious allegations in a public forum without the ability or the legal means to respond. It is error and a violation of federal law to find that "NCR refused to respond to the allegations." NCR is prohibited by federal law from disclosing much less discussing its clients and substance abuse treatment history. *See* 42 U.S.C. 290DD-2; 42 CFR 2.22, et seq.

REASONABLE ACCOMMODATION ANALYSIS

The staff recommendation is that a finding cannot be made as to future residents concerning the necessity of residing in NCR. The staff concluded that there exist other similar facilities in close proximity to NCR that future residents could choose. (Staff report, page 13) This conclusion is contrary to the law on reasonable accommodation. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1225-1226 (11th Cir. 2008)(The availability of another dwelling somewhere within the City's boundaries is irrelevant to whether local officials must accommodate recovering substance abusers in the halfway houses of their choice.) See *Howard v. City of Beavercreek*, 276 F.3d 802, 806-07 (10th Cir. 2002) (analyzing whether the requested accommodation was necessary to afford the plaintiff an "equal opportunity to enjoy the housing . . . of his choice"); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)(rejecting argument that township reasonably accommodated plaintiff by allowing construction of a nursing home in another area of town).

42 U.S.C. 3604(f)(3)(B) contains three operative elements: "equal opportunity," "necessary," and "reasonable."

With respect to the phrase "equal opportunity," the House Report on the Fair Housing Act offers relevant context:

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. House Comm. on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179 (footnote omitted) (hereinafter 1988 U.S.C.C.A.N.) (emphasis added).

A cogent analysis of "equal opportunity" can be found in *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 794-795 (6th Cir. 1996). The Court stated:

> We find persuasive the analysis of courts that define equal opportunity under the FHAA as giving handicapped individuals the right to choose to live in single-family

> neighborhoods, for that right serves to end the exclusion of handicapped individuals from the American mainstream: The Act prohibits local governments from applying land use regulations in a manner that will exclude people with disabilities entirely from zoning neighborhoods, particularly residential neighborhoods, or that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities. *Bryant Woods Inn, Inc. v. Howard County*, 911 F. Supp. 918, 946 (D. Md. 1996) (citation omitted); see also *City of Edmonds v. Washington State Bldg. Code Council,* 18 F.3d 802, 806 (9th Cir. 1994), aff'd, 115 S. Ct. 1776 (1995) ("Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community."). Moreover, the phrase "equal opportunity," at least as used in the FHAA, is concerned with achieving equal results, not just formal equality. *See City of Edmonds*, 18 F.3d at 806 ("The FHAA imposes an affirmative duty to reasonably accommodate handicapped people."); *Proviso Ass'n of Retarded Citizens v. Village of Westchester, Ill.*, 914 F. Supp. 1555, 1563 (N.D. Ill. 1996) (rejecting city's argument that "because Plaintiffs are subject to requirements imposed on all groups of unrelated non-disabled people, they have an 'equal opportunity' to live in the . . . dwelling").

The City Staff ignores the requirement that a future resident's "equal opportunity" is a choice that person gets to make, not a choice the City can make by making one less dwelling unavailable or asserting as long as there are other facilities of a similar nature, then a residents "choice" of housing will be preserved.

The Staff Report states that NCR failed to provide information as to what the optimum number of residents would make it financially viable. (Staff report, page 15). NCR is not required to put forward any information on financial viability unless it is seeking an accommodation in whole or in part on financial viability. The City has not put forward any case law that an applicant is required to demonstrate financial viability if it is not seeking an accommodation based on the same. The burden is on the City to show that the requested accommodation is unreasonable. The City has failed to do so. As was argued above, the City cannot claim that NCR committed "illegal acts" on issues involving licensing and refuse to grant an accommodation that involve land use and zoning.

The City has consistently applied the wrong standard in determining whether the applicant's requests are reasonable. The standard is whether the request seems reasonable on its face. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002). The burden then shifts to the City to demonstrate that the requested accommodation is an undue burden financially or administratively or will fundamentally alter its zoning scheme. The City concedes that it will not be burdened financially or administratively.

The City posits that granting the requested accommodation will cause a fundamental alteration to the City's general plan because it would allow more than one such facility per block and

would cause overconcentration. All requests for a reasonable accommodation in the land use context require an alteration to a "rule, policy, practice or procedure." An alteration is not a fundamental alteration. Allowing NCR to continue at a location it operated at since 2002 is not a "fundamental alteration" of the City's zoning ordinances. This is supported by the fact that the City has approved use permits for similar facilities in the same vicinity. The City's erroneously believes that granting the requested accommodation would result in an overconcentration of residential care facilities. Overconcentration arguments have been rejected as violating the Fair Housing Act. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 787 (7th Cir. 2002)(City's overconcentration argument resulting in disproportionate costs to emergency services for those facilities rejected); *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 50 (2d Cir.2002)(Argument that granting variance would cause an overconcentration of residential and social services facilities in the City found to be pretext for discrimination). *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1577 (E.D. Mo. 1994), *rev'd in part*, 77 F.3d 249 (8th Cir. 1996)(City's fear that it was being unduly singled out for an over-concentration of social service institutions has some basis in fact. These concerns, however, do not justify discrimination against the handicapped. Simply put, the complaint of "no more in my back yard" is just as unacceptable an excuse for discrimination against the handicapped as the discriminatory cry of "not in my back yard."), See also, *See Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 698 ("the FHAA rejects any notion that a Township can somehow avoid the anti-discrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities"), *aff'd* 995 F.2d 217 (3rd Cir. 1993).

Adopting the discriminatory animus of the community opposition to the granting of the request for a reasonable accommodation and to support the overconcentration argument in a violation of the Fair Housing Act. Adopting assertions put forward to those who oppose NCR on the basis that the presence of the recovering alcoholics and substance abusers diminishes the quality of life becomes actionable discrimination becomes discriminatory when it is adopted by a city official in decisions to deny land use permits or requests for reasonable accommodations.

The record is quite clear that the Hearing Officer is more than willing to accept without question each statement made by each member of the community concerning complaints about the conduct of what is thought to be residents of NCR. It should be noted that these same citizens appeared before the same Hearing Officer and presented the same complaints about the applications made by Ocean Recovery and Balboa Horizons. It is ironic that the complaints were not credited in those applications but were credited against NCR.

The law is quite clear that "even where individual members of government are found not to be biased themselves," a group home provider may demonstrate a violation of the FHAA if it can show that "discriminatory governmental actions are taken in response to significant community bias." *Tsombanidis v. City of West Haven*, 129 F. Supp. 2d 136, 152 (D. Conn. 2001), *rev'd on other grounds*, 352 F.3d 565 (2d Cir. 2003). Accordingly, "a decision made in the context of strong,

discriminatory opposition becomes tainted with discriminatory intent even if the decision-makers personally have no strong views on the matter." *Innovative Health Sys, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997); *see also Samaritan Inns v. District of Columbia*, 1995 U.S. Dist. LEXIS 9294,rev'd on other grounds, 114 F.3d 1227 (D.C. Cir 1997) (finding a violation of the FHAA when government officials were influenced by political pressure exerted by the area residents); *McKinney Found. v. Town Plan & Zoning Comm'n*, 790 F. Supp. 1197, 1212 (D. Conn. 1992) (same); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 134 (N.D. N.Y. 1992) (finding that zoning officials violated the FHAA when they bowed to political pressure exerted by those hostile to persons with alcohol and drug-related disabilities); *United States v. Audubon*, 797 F. Supp. 353, 361 (D.N.J. 1991)(Discriminatory intent found where Audubon officials stated they agreed with or were responding directly to community opposition). See also *Cmty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 226 (D.D.C. 2003).

Unfortunately for all concerned, the unsupported discriminatory animus of the those opposed to NCR's applications have infected the proceedings and now forms the crux of the denial by the Hearing Officer.

HOUSING ELEMENTS AND CONSOLIDATED PLANS

The City misstates the actions of the Department of Housing and Community Development("HCD") in its review of the City's Housing Element Plan. In a letter dated October 24, 2008 to David Lepo, Planning Director, City of Newport Beach, the Deputy Director of HCD which advised the City that revisions were required in the City's Housing Element Plan to bring it into compliance with State law. In particular HCD found that the City's group home ordinance constituted a "constraint on persons with disabilities." HCD is requiring the City to provide a detailed description of the City's group home ordinance and analyze it for requirements that may constrain housing for persons with disabilities. (See Attached Exhibit D, at HCD 6). The other deficiency HCD found that is relevant to this applicant is that when the City amended its zoning code to address the issue of group homes, it failed to identify zones where transitional housing will be permitted and conditionally permitted. State Law, specifically SB 2, requires the City to demonstrate that transitional and supportive housing are treated as residential uses subject only to those restrictions that apply to other residential uses of the same type in the same zone. (Exhibit D, at HCD 5).

Please contact me or my co-counsel, Christopher Brancart, if you need to discuss these issues further, or in need of additional information.

Sincerely yours,

Steven G. Polin

cc: Patrick Bobko
Catherine Wolcott
Christopher Brancart
Newport Coast Recovery
Dana Mulhauser
Paul E. Smith

1 of 1 DOCUMENT

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

No. **07-601**

2007 Cal. AG LEXIS 17; 90 Ops. Cal. Atty. Gen. 109

December 18, 2007

QUESTION:

[*1]

THE HONORABLE TOM HARMAN, MEMBER OF THE STATE SENATE, has requested an opinion on the following questions:

1. May the Department of Alcohol and Drug Programs deny an application for licensure or suspend or revoke the license of an alcoholism or drug abuse treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need?

2. May a city limit the establishment of alcoholism or drug abuse treatment facilities serving six or fewer persons because the particular community already has more than a sufficient number of treatment facilities to meet the local need?

CONCLUSIONS

1. The Department of Alcohol and Drug Programs may not deny an application for licensure or suspend or revoke the license of an alcoholism or drug abuse treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

2. A city may not limit the establishment of alcoholism or drug abuse treatment facilities serving six or fewer persons because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

OPINIONBY:

EDMUND G. BROWN **[*2]** JR., Attorney General; GREGORY L. GONOT, Deputy Attorney General

OPINION:

ANALYSIS

The Department of Alcohol and Drug Programs (*Health & Saf. Code, § 11750*; "Department") n1 licenses residential facilities that provide nonmedical recovery, treatment, and detoxification services for users of alcohol and other drugs. (§§ 11834.01-11834.50; *Cal. Code Regs., tit. 9, §§ 10500-10631*; 76 Ops.Cal.Atty.Gen. 173, 175 (1993).) Such a treatment facility is defined as "any premises, place, or building that provides 24-hour residential nonmedical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug misuse or abuse, and who need alcohol, drug, or alcohol and drug recovery treatment or detoxification services." (§ 11834.02, subd. (a); see *Cal. Code Regs., tit. 9, § 10501.*)

n1 All further references to the Health and Safety Code are by section number only.

[*3]

These treatment facilities are different from residential care facilities that are subject to the California Community Care Facilities Act (§§ 1500-1567.8) and from facilities that simply provide a cooperative living arrangement for

persons recovering from alcohol and other drug problems. The latter "sober living environments" are not subject to licensing by the Department.

We are asked to determine whether the Department has the authority to deny an application for operating a treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need. Additionally, may a city limit the number of treatment facilities within its jurisdiction to prevent an overconcentration of such facilities?

1. Department's Authority to Deny Licenses

With respect to the scope of the Department's authority to limit the licensing of treatment facilities, we will assume that the extent of the local need is ascertainable through an appropriate fact-finding process, and the determination will be based upon the incidence of alcoholism and drug abuse and the percentage of substance abusers seeking treatment in the community. What authority **[*4]** does the Department have to prevent an overconcentration of treatment facilities in a particular locality?

Section 11834.01 states in part:

> The department has the sole authority in state government to license adult alcoholism or drug abuse recovery or treatment facilities.
>
> (a) In administering this chapter, the department shall issue new licenses for a period of two years to those programs that meet the criteria for licensure set forth in Section 11834.03.

Section 11834.03, in turn, provides:

> Any person or entity applying for licensure shall file with the department, on forms provided by the department, all of the following:
>
> (a) A completed written application for licensure.
>
> (b) A fire clearance approved by the State Fire Marshal or local fire enforcement officer.
>
> (c) A licensure fee, established in accordance with Chapter 7.3 (commencing with Section 11833.01).

Accordingly, each licensure applicant must complete an application form, obtain a fire clearance, and pay a fee to the Department. (See also § 11834.09, subd. (b).) Sections 11834.01 and 11834.03 provide no authority for the Department to deny a license because the community already has an overconcentration of **[*5]** such facilities.

The Department is also authorized to determine "that the prospective licensee can comply with this chapter and regulations adopted pursuant to this chapter" before issuing a license. (§ 11834.09, subd. (a).) Subdivision (c) of section 11834.09 states:

> Failure of the prospective licensee to demonstrate the ability to comply with this chapter or the regulations adopted pursuant to this chapter shall result in departmental denial of the prospective licensee's application for licensure.

Thus, a prospective licensee may be denied a license if he or she fails to demonstrate "the ability to comply" with sections 11834.01-11834.50 and the Department's regulations. However, neither the statutory scheme nor the implementing regulations make any reference to a community's current level of need for treatment facilities or to the sufficiency of existing facilities to meet the local need. No basis for the denial of an application is given in section 11834.09 other than the inability of the applicant to comply with the requirements for *operating* a facility.

Next, we examine the Department's authority to suspend, revoke, or deny a license contained in subdivision (a) of **[*6]** section 11834.36, which states:

> The director may suspend or revoke any license issued under this chapter, or deny an application for licensure, for extension of the licensing period, or to modify the terms and conditions of a license, upon any of the following grounds and in the manner provided in this chapter:

(1) Violation by the licensee of any provision of this chapter or regulations adopted pursuant to this chapter.

(2) Repeated violation by the licensee of any of the provisions of this chapter or regulations adopted pursuant to this chapter.

(3) Aiding, abetting, or permitting the violation of, or any repeated violation of, any of the provisions described in paragraph (1) or (2).

(4) Conduct in the operation of an alcoholism or drug abuse recovery or treatment facility that is inimical to the health, morals, welfare, or safety of either an individual in, or receiving services from, the facility or to the people of the State of California.

(5) Misrepresentation of any material fact in obtaining the alcoholism or drug abuse recovery or treatment facility license.

(6) Failure to pay any civil penalties assessed by the department.

All of the grounds specified in section 11834.36 **[*7]** involve the *conduct* of the license holder or applicant. None focuses upon whether the community already has a sufficient number of facilities to meet the local need.

We recognize that a community's need for treatment facilities is mentioned in section 11834.20: "The Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." However, this reference is only an expression of legislative intent that cities should *encourage* development of treatment facilities, and cannot be reasonably read to impose a limit on such development. The affirmative policy articulated by the Legislature in section 11834.20 does not afford a basis for *denying* a license where the applicant meets all basic qualifications for the license.

As stated in *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104: "It is settled principle that administrative agencies have only such powers as have been conferred upon them, expressly or by implication, by constitution or statute. **[*8]** [Citations.] An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers." (See 76 Ops.Cal.Atty.Gen. 11, 15-16 (1993).) And, of course, we are not at liberty to add, in the guise of statutory interpretation, an additional licensing requirement. (See 89 Ops.Cal.Atty.Gen. 159, 165; 83 Ops.Cal.Atty.Gen. 111, 116 (2000); 82 Ops.Cal.Atty.Gen. 246, 248 (1999); 78 Ops.Cal.Atty.Gen. 137, 142 (1995).) Here, the Legislature has not given the Department any authority to consider the number of treatment facilities in a particular area when granting, suspending, or revoking a license to operate a treatment facility.

Finally, we note that the California Community Care Facilities Act, referenced above, requires the Department of Social Services to take "overconcentration" of residential care facilities into account when making its licensing decisions for such facilities. (§ 1520.5.) If the Legislature wishes to grant a similar authorization when the Department licenses the treatment facilities **[*9]** in question; it knows how to do so. (See *Safer v. Superior Court* (1975) 15 Cal.3d 230, 237-238; *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 927; 73 Ops.Cal.Atty.Gen. 13, 23 (1990).)

We conclude in answer to the first question that the Department may not deny an application for licensure or suspend or revoke the license of a treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

2. City's Authority to Limit Treatment Facilities

The second question concerns whether a city may limit the number of treatment facilities serving six or fewer persons within its boundaries. For example, may a city enact an ordinance requiring that in addition to licensure by the Department, the prospective operator of a treatment facility must obtain the city's approval if the facility will be located within 500 feet of an existing treatment facility? We conclude that it may not.

The Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations **[*10]** not in conflict with general laws." (Cal. Const., art. XI, § 7.) The rules to be applied in determining whether a city's ordinances would conflict with general laws were recently summarized in *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 548:

> The California Constitution reserves to a county or city the right to "make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." [Citation; footnote omitted.] "'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.'" [Citations.] A prohibited conflict exists if the local ordinance duplicates or contradicts general law or "enters an area either expressly or impliedly fully occupied by general law." [Citations.]
>
> "'[I]t is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute.' [Citation.] '[L]ocal legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area [citation], **[*11]** or when it has impliedly done so in light of one of the following indicia of intent: "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the" locality [citations].' [Citation.]" [Citation.]

With these principles in mind, we return to the provisions of sections 11834.01-11834.50. Two statutes are relevant to our inquiry. First, section 11834.22 provides that treatment facilities serving six or fewer persons may not be made subject to any business taxes, local registration fees, use permit fees, or other fees to which ordinary single-family dwellings are not subject. Second, and even more in point, section 11834.23 states with respect to local zoning ordinances governing **[*12]** such facilities:

> Whether or not unrelated persons are living together, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property for the purposes of this article. In addition, the residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property pursuant to this article.
>
> For the purpose of all local ordinances, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall not be included within the definition of a boarding house, rooming house, institution or home for the care of minors, the aged, or the mentally infirm, foster care home, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the alcoholism or drug abuse recovery or treatment home is a business run for profit or differs in any other way from a single-family residence.
>
> This section shall not be construed to forbid any city, county, or other local public entity from placing restrictions-on building heights, setback, lot dimensions, or placement of signs **[*13]** of an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons as long as the restrictions are identical to those applied to other single-family residences.
>
> This section shall not be construed to forbid the application to an alcoholism or drug abuse recovery or treatment facility of any local ordinance which deals with health and safety, building standards, environmental impact standards, or any other matter within the jurisdiction of a local public entity. However, the ordinance shall not distinguish alcoholism or drug abuse recovery or treatment facilities which serve six or fewer persons from other single-family dwellings or distinguish residents of alcoholism or drug abuse recovery or treatment facilities from persons who reside in other single-family dwellings.
>
> No conditional use permit, zoning variance, or other zoning clearance shall be required of an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons that is not required of a single-family residence in the same zone.

Accordingly, a city may not make its land use decisions in a manner that will disadvantage treatment facilities serving six or fewer **[*14]** persons when compared to decisions applicable to ordinary single-family residences.

The hypothetical ordinance described above would allow the city to ban the operation of a new treatment facility within 500 feet of an existing facility. Such an ordinance would be in conflict with section 11834.23, and thus be

preempted by state law. (See, e.g., *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 [local law may not impose additional licensing requirements when state law specifically prohibits such requirements].)

Would our analysis and conclusion be different in the case of a charter city? A charter city, in contrast to a general law city, is not subject to state statutes involving "municipal affairs." (Cal. Const., art. XI, § 5, subd. (a); *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, fn.1; *California Veterinary Medical Assn. v. City of West Hollywood, supra,* 152 Cal.App.4th at p. 548, fn. 6.) "[T]his constitutional 'home rule' doctrine reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided **[*15]** the subject of the regulation is a 'municipal affair' rather than one of 'statewide concern.' [Citation.]" (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 45.)

Here, section 11834.23 has been made applicable to all cities, both general law and charter (§ 11834.20), and forbids the use of zoning or other regulatory powers to treat small treatment facilities differently from other residential dwellings (§§ 11834.22-11834.24). Section 11834.23 addresses a matter of "statewide concern" because it seeks to ensure that persons throughout the state who are recovering from problems related to alcohol or other drugs will have access to residential settings that provide treatment.

"[I]n articulating the test for preemption, the Supreme Court was concerned with ensuring that a state law does not infringe legitimate municipal interests *other than that which the state law purports to regulate as a statewide interest.*" (*City of Watsonville v. State Department of Health Services* (2005) 133 Cal.App.4th 875, 889 [state law requiring fluoridation of local water supplies narrowly tailored to state's interest in **[*16]** improving dental health], italics added.) Here, the state law in question has the precise aim of regulating local zoning requirements in pursuance of a statewide interest. The Legislature clearly intended to prevent local governments from applying any zoning clearances to small treatment facilities by mandating that they be treated the same as other single family residences for zoning purposes. The Legislature may properly look to the statewide need, rather than the local need, to overcome a charter city's municipal interests.

We conclude in answer to the second question that a city may not limit the establishment of alcoholism or drug abuse treatment facilities serving six or fewer persons because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationEffect & OperationGeneral OverviewGovernmentsLocal GovernmentsChartersGovernmentsLocal GovernmentsLicenses

CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

Robin Clauson, City Attorney

August 3, 2007

Mr. Gregory Gonot
Deputy Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA, 94244-2550

VIA EMAIL Gregory.Gonot@doj.ca.gov
AND U.S. REGULAR MAIL

Dear Mr. Gonot:

The Newport Beach City Attorney's Office appreciates the opportunity to provide information relevant to Opinion No. 07-601. Our city has had extensive experience attempting to reasonably regulate alcoholism and drug abuse recovery and treatment facilities within the city while providing fair housing opportunities for persons in recovery. The Attorney General's Office's opinion on these questions will be helpful to many cities that are seeking resolution of divergent interpretations of existing state law.

Background

On March 8, 2007, our office sent notice that our city has more than met its local need for licensed alcohol and drug recovery and treatment facilities to the Licensing Division of the California Department of Alcohol and Drug Programs (hereinafter "ADP"), and requested that ADP curtail issuing more licenses in Newport Beach so long as local need remained met. ***(Attachment A)*** Our March, 2007 analysis of the numbers of licensed alcoholism and drug abuse recovery and treatment facilities produced the following statistics:

- In March 2007, with 2.63 licensed recovery beds per thousand residents, Newport Beach had the highest per capita ratio of recovery beds in Orange County. Newport Beach is home to only 2.7 – 2.8% of the total population of Orange County, but is host to approximately 14.6% of all licensed residential beds in the County. By contrast, in March, 2007, 18 of the 33 other cities in Orange County had no ADP-licensed residential beds at all, and six Orange County cities had only one or two licensed residential recovery facilities. Despite the inequitable distribution of licensed facilities, the number of licenses granted by ADP in Newport Beach more than doubled (from 10 to 22) in a two-month period in 2006, and more licenses are currently pending.

- In Newport Beach, all but one of the ADP-licensed facilities are located on or immediately adjacent to a narrow, 2.5 mile stretch of the city within West Newport and the Newport Peninsula. Over half of the licensed recovery facilities are concentrated within a mile of each other. One of our largest facility operators advertises that it has 30 homes (licensed and unlicensed) in a linear 1.3 mile area of West Newport.

- Publicly available information on several of the facilities' marketing practices, as well as reports by Newport Beach recovery facility residents,[1] indicate that a high percentage of the residents in these 22 facilities are not Newport Beach residents, and many are residents of other states

[1] Submitted either as complaints or during a series of City hearings in 2004.

3300 Newport Boulevard · Post Office Box 1768 · Newport Beach, California 92658-8915
Telephone: (949) 644-3131 · Fax: (949) 644-3139 · www.city.newport-beach.ca.us

brought to California specifically to enter the Newport Beach recovery facilities. Furthermore, the operational characteristics of these commercial businesses is to offer transitory recovery programs from as little as 28 days in a residential setting.

This led the City to believe that Newport Beach had existing numbers of alcohol and drug recovery facilities that were commensurate with local need. "Webster's Third International Dictionary defines "commensurate" as "equal in measure or extent; corresponding in size, extent, amount or degree, proportionate." (Webster's Third International Dictionary, G&C Merriam Co, 1976) A subsequent analysis of Newport Beach's presumed local need indicated that Newport Beach currently has a significant excess of licensed residential recovery beds relative to the incidence of alcoholism and drug abuse in the general population, and the percentage of substance abusers seeking treatment. ***(Attachment B)*** The 2003-2004 National Survey on Drug Use and Health (NSDUH), sponsored by the Substance Abuse and Mental Health Services Administration (SAMHSA), a division of the Department of Health and Human Services, provides estimates of national and state substance abuse levels. The 2003-2004 NSDUH estimated that 10.10% of the population of California was dependent upon or abused alcohol or illicit drugs. The 2002 NSDUH indicated that, of all people abusing alcohol or illicit drugs, more than 94% do not believe they need treatment, leaving approximately 6% likely to be actively seeking treatment.

Applying these numbers to our city's population of 83,000, that would give Newport Beach approximately 8,300 residents dependent on alcohol or illicit drugs, with 498 of them actually likely to seek treatment. Attachment B details how this results in a significant surplus of beds in Newport Beach. (We believe these numbers are conservative, since we have not included in our analysis the fact that Newport Beach is home to only 63,800 adults.) With 219 licensed recovery beds for adults that offer recovery stays of varying lengths (28 days to five months are the length of stays reported by recovery facility operators in our city) and an additional estimated 25 dwelling units being used as sober living facilities, local recovery needs can easily be met on an annual basis with fewer than the currently existing licensed facilities.

It was these facts which made us determine that the local need for alcoholism and drug abuse recovery and treatment services has been met in Newport Beach, and that continued unfettered licensing would have an adverse impact on the welfare of our community. We asked ADP to deny further licenses in Newport Beach so long as this city bears more than its regional fair share and local need is met. Based, in part, on Section 11834.20 of the Health and Safety Code, which states that it is the policy of the state "that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." (Health & Safety Code § 11834.20) ADP licensing representatives agreed that some aspects of the situation created in Newport Beach were probably not what the Legislature intended. However, ADP appears to believe it lacks the statutory authority to deny licenses except under certain narrow circumstances. We believe the Legislature intended and the statute permits otherwise.

Questions Presented:

1) **Question One – May the Director of the State Department of Alcohol and Drug Programs suspend or revoke a license or deny an application for licensure of an alcoholism or drug abuse treatment facility where the current number of such facilities in the city is in excess of local need?**

Yes. In our opinion, the Health and Safety Code provides authority for ADP to deny licenses when operation of a recovery and treatment facility creates a situation adverse to the best interests of the facility's residents or the public. Health and Safety Code section 11834.36 (Grounds for suspension, revocation, or denial; temporary suspension) sets forth criteria under which ADP may deny, revoke or suspend a license. These criteria include "[c]onduct in the operation of an alcoholism or drug abuse recovery or treatment facility that is inimical to the health, morals, welfare, or safety of either an individual in, or receiving services from, the facility, or to the people of the State of California." (Health & Safety Code § 11834.36(a)(4))

Pursuant to the rules of statutory construction. When interpreting or applying statutes, the interpretation or application should be consistent with the purpose of the statute and the statutory scheme as a whole. *Andersen v. Workers' Comp. Appeals Bd.,* 57 Cal.Rptr.3d 839 (2007) In attempting to determine legislative intent, when possible, effect should be given to the statute as a whole, and to every word and clause, leaving no part of the provision useless or deprived of meaning. *In re Estate of Rossi,* 42 Cal.Rptr.3d 244 (2006). Instead of following these rules of interpretation, the ADP has chosen to interpret this provision of the Health and Safety Code narrowly and not considered "local need" as provided for in Section 11834.20 when making determinations under Section 11834.36. The City contends that the Legislature would not have included a local needs analysis in Section 11834.20 if it did not want the ADP to consider this matter in making its determinations under 11834.36.

In addition, the Legislature would not have included "the people of the State of California" in the class of persons whose welfare is to be protected if it had intended a narrow interpretation of Section 11834.36.

Because a complex web of state and federal laws severely restricts cities authority to address land use impacts from excessive proliferation or clustering of licensed recovery facilities in residential neighborhoods, the Legislature gave ADP the authority to consider whether a city's local need has been met in making its determination whether or not to grant a license. Specifically, as ADP is the sole licensing authority (see Question 2, below), ADP has been legislatively directed to protect the general welfare of the people of the State of California and those persons receiving recovery treatment.

A. An excessive number of closely clustered recovery and treatment facilities create an environment that is inimical to the welfare of the people of the State of California and be considered by ADP under Section 11834.36.

The conduct of operating commercial recovery services whose operators' business models include economies of scale, national marketing and clustered facilities operating more as a boarding house than a single family home in residential neighborhoods can be detrimental to the welfare of recovery facility clients and the neighborhoods in which the facilities locate. Hence, in considering applications for licenses, it is appropriate for ADP to consider whether local need has been met and whether the issuance of additional licenses is appropriate under Section 11834.36.

For example, the welfare of the people of the State of California can be negatively impacted when a family's residence becomes, or is faced with being, surrounded on two or three sides by recovery facilities, or when 50% of a city census block's population is housed in licensed and unlicensed recovery facilities, as has occurred on 39th Street in Newport Beach. (Source: ADP website, Code Enforcement inspections, self-reporting, and 2000

Census statistics) In 2000, this census block had a population of 79. In July 2006, four ADP licenses were granted on this block, with a total licensed capacity for all licenses of 24 residents. Conservatively assuming these four units housed only three persons in 2000 and are now known to house six residents in each, and that two sober living facilities also had a lower population in 2000 than their current population of approximately 28 combined, we estimate the 2007 population of this census block at 103. Fifty percent of that overall population is housed in a combination of licensed and unlicensed facilities; approximately 23% of the overall population is housed in the licensed facilities alone. Whether the City has met its "local need" and determining whether additional facilities should be licensed in this immediate area should be considered by ADP because additional facilities will contribute further to the change of the use character of this neighborhood from residential to semi-institutional boarding houses.

Furthermore, as stated above, California cities have no regulatory protection from licensed facilities that offer sober living as part of their residential treatment process. ADP representatives have told our office that most of the licensed facilities located Newport Beach also have sober living homes, whose resident numbers are not included in the licensing information and are acting as integral facilities. This pattern of operation further contributes to the process of institutionalizing a residential neighborhood, and multiplies the secondary effects because the licensed facilities and non-licensed facilities interact with and are dependent upon each other.

In a similar setting, the Legislature has acknowledged the disadvantageous secondary effects of having group residential facilities in communities that exceed the local need of the community. Specifically, it was the pattern of clustering and proliferation that caused the Legislature to declare a state policy against overconcentration of community care facilities. In fact, Health and Safety Code section 1520.5 provides that "The Legislature hereby declares it to be the policy of the state to prevent overconcentration of residential care facilities that impair the integrity of residential neighborhoods." (Health & Safety Code § 1520.5)

B. An excessive number of closely clustered recovery and treatment facilities create an environment that is inimical to the welfare of facility residents.

The loss of the residential characteristics of a neighborhood in which recovery facilities cluster also has an adverse effect on the welfare of the individuals receiving services from the facility and defeats the purpose of community-based recovery. The current ADP counsel interpretation of the Health and Safety Code, however, makes no provisions for this.

In *Corporation of the Episcopal Church v. West Valley City,* (D. Utah 2000) 119 F.Supp.2d 1215, the court said, "Those recovering from addiction have been shown to benefit from living with others in similar situations, and their presence in residential neighborhoods allows the recovering individuals to re-integrate into the community at large." 119 F.Supp.2d at 1222, citing *Oxford House v. Town of Babylon,* (E.D.N.Y. 1993) 819 F.Supp. 1179. Similarly, the court in *Oxford House, Inc. v. Township of Cherry Hill,* (D.N.J. 1992) 799 F.Supp. 450, noted, "Plaintiffs have presented evidence demonstrating that the ability of recovering alcoholics and drug addicts to live in a quiet residential area is critical to their recovery." 799 F.Supp. at 463.

Even the American Planning Association's Policy Guide on Community Residences ***(Attachment C)***, which supports community residences, states:

> "Community residences should be scattered throughout residential districts rather than concentrated in any single neighborhood or block.
>
> For a group home to enable its residents to achieve normalization and integration into the community, it should be located in a normal residential neighborhood. If several group homes were to locate next to one another, or be placed on the same block, the ability of the group homes to advance their residents' normalization would be compromised. Such clustering would create a *de facto* social service district in which many facets of an institutional atmosphere would be recreated and would change the character of the neighborhood.
>
> Normalization and community integration require that persons with disabilities be absorbed into the neighborhood's social structure. The existing social structure of a neighborhood can accommodate no more than one or two group homes on a single block. Neighborhoods seem to have a limited absorption capacity for service dependent people that should not be exceeded. Social scientists note that this level exists, but they can't quite determine a precise level. Writing about service dependent populations in general, Jennifer Wolch notes, At some level of concentration, a community may become saturated by services and populations and evolve into a service dependent ghetto.
>
> According to one leading planning study, while it is difficult to precisely identify or explain, saturation is the point at which a community's existing social structure is unable to properly support additional residential care facilities [group homes]. Overconcentration is not a constant but varies according to a community's population density, socioeconomic level, quantity and quality of municipal services and other characteristics. There are no universally accepted criteria for determining how many group homes are appropriate for a given area.
>
> Nobody knows the precise absorption levels of different neighborhoods. However, the research strongly suggests that as the density of a neighborhood increases, so does its capacity to absorb people with disabilities into its social structure. Higher density neighborhoods presumably have a higher absorption level that could permit group homes to locate closer to one another than in lower density neighborhoods that have a lower absorption level.
>
> This research demonstrates there is a legitimate government interest to assure that group homes do not cluster. While the research on the impact of group homes makes it abundantly clear that group homes a block or more apart produce no negative impacts, there is concern that group homes located more closely together can generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all, their raison dtre." [2]

---

[2] The City is in the process of obtaining the supporting studies cited in the footnotes of this section of the APA Policy Guide, and will be happy to forward them when available.

Policy Guide on Community Residences, American Planning Association, September, 1997, Section 5 (footnotes omitted) (emphasis in original)

The policy stated by the American Planning Association is echoed by the Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act ***(Attachment D)***. On page 5 of the Joint Statement, the agencies give their opinion on when, if ever, a local government can limit the number of group homes that can locate in a certain area. While taking the position that strict separation requirements and density restrictions are generally inconsistent with the Fair Housing Act, the Departments of Justice and Housing and Urban Development stated their belief that "if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned with the setting for a group home." Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act. August 18, 1999.

As stated above, the current ADP interpretation of Health and Safety Code section 11834.36(a)(4) does not allow for any consideration of the welfare of potential recovery facility residents in this context in its decision to grant or deny a license, which is inconsistent with the express language of the Health and Safety Code and the foregoing authorities.

C. Statutory construction of Health and Safety Code Section 11834.20's "commensurate with local need" language indicates local need should be considered by ADP.

Our City has conducted a detailed review of the legislative history surrounding the adoption of Health and Safety Code Section 11834.20. There is no specific explanation for the inclusion of the words "commensurate with local need" in the legislative history. Therefore, the rules of statutory construction must be applied.

In attempting to ascertain the legislative intention, effect should be given, whenever possible, to the statute as a whole, and to every word and clause within, leaving no part of the provision useless or deprived of meaning. *In re Estate of Rossi*, 42 Cal.Rptr.3d 244 (2006). Legislative intent will be determined as far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. *California Department of Corrections v. California State Personnel Bd.*, 54 Cal.Rptr.3d 665 (2007)

The language "commensurate with local need" is not ambiguous. Nevertheless, in his May 24, 2007 letter to our office, ADP's legal counsel interpreted the language of Health and Safety Code section 11834.20 to be only a "precatory introduction to the more specific provisions that follow." If this interpretation is followed, it deprives an entire section of meaning and renders it useless as anything other than a verbal flourish.

Our city interprets section 11834.20 otherwise. The provisions of the Americans with Disabilities Act, the federal Fair Housing Act, the California Fair Employment and Housing Act, and the cases interpreting those statutes, combine to make city encouragement of the

development of alcoholism and drug abuse recovery or treatment facilities unnecessary. We interpret Section 11834.20 to charge California cities, counties and ADP with ensuring that local recovery services are available for local needs. Our city's challenge has not been having enough residential recovery facilities to meet local needs; rather, it has been finding a legally defensible way of maintaining the character of the residential neighborhoods surrounding a proliferation of clustered facilities resulting from the unfettered granting of ADP licenses. Licensed and unlicensed facilities have located freely within our City because of existing state and federal fair housing laws; in one two-month period in 2006 the number of state-licensed alcoholism and drug abuse recovery or treatment facilities in Newport Beach more than doubled (from 10 to 22.)

The logical interpretation of the legislative intent behind Health and Safety Code section 11834.20 is that this section sets the standard that the State should encourage and cities are expected to help achieve – enough recovery facilities to meet the needs of each city's own residents. It is logical that the California State Legislature would wish every city and county in California to have enough local recovery facilities to serve its citizens. It is not logical that the State Legislature would encourage California cities to develop into recovery destinations for a national market, as Newport Beach and several other cities in coastal areas of Los Angeles and Orange County (Malibu, Laguna Beach, Costa Mesa) have become. National need for recovery services far exceeds the capacity of what these cities can absorb, and can overwhelm residential neighborhoods and change them forever. This result would not be consistent with the Legislature's stated concern for the welfare of the people of California. (Health & Safety Code §§ 11834.14, 11834.35(a)(4))

2) **Question Two – May a city prevent the licensure of an alcoholism or drug abuse treatment facility in the city where the current number of such facilities in the city is in excess of local needs?**

No, a city itself does not have the authority to prevent licensure. The Legislature has indicated its intent to occupy the field of licensing alcoholism and drug abuse recovery or treatment facilities, and has delegated licensing authority to ADP. Health and Safety Code section 11834.01 states, "The department has the sole authority in state government to license adult alcoholism or drug abuse recovery or treatment facilities." No provisions for licensing authority, or the corresponding authority to deny a license, is provided below the state level in the Health and Safety Code. The wording of Health and Safety Code section 11834.01 does not appear to leave cities any independent ability to prevent licensure, even when they can demonstrate that their local need has already been met.

However, ADP is authorized to consider information from cities relative to the welfare of facility clients and the general public as a factor in granting or denying a license, with a certain amount of deference. Health and Safety Code section 11834.14 says that the goal of licensure regulations is protecting the public while promoting the public welfare. This goal is broadly worded to encompass the welfare of the neighborhoods and community surrounding the licensed facilities as well as the welfare of potential residents of the facility seeking licensure.

Individual cities and counties are often in the best position to give the state-appointed licensing department information about the state of their community, and the actual impact of recovery facilities within that community. There is nothing in the Health and Safety Code that precludes ADP from considering information from cities about the impact granting an additional license will have on the health and welfare of the community or facility residents. This is particularly true

when a city can demonstrate that it has fulfilled the statutory goals of Health and Safety Code section 11834.20, and its local need for recovery facilities has already been met.

Conclusion

Protection of the welfare of alcoholism and drug abuse recovery and treatment facility clients and the general public must be considered by *some* entity before a license is granted or renewed, and ADP is currently the only government entity with that authority. We hope that your opinion will help clarify these questions for us, for ADP, and for California cities in situations similar to ours.

Sincerely,

Robin Clauson,
City Attorney

Enc. Attachment A – City's Notice dated March 8, 2007
Attachment B – City's Alcohol and Drug Treatment Analysis
Attachment C - American Planning Association's Policy Guide
Attachment D - Joint Statement of the DOJ & the DHUD on Group Homes, Local Land Use, and the Fair Housing Act

ATTACHMENT - A

CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

Robin Clauson, City Attorney

March 8, 2007

Ms. Joan Robbins
Manager, Licensing and Certification
California Department of Alcohol and Drug Programs
1700 K Street
Sacramento, CA, 95814

VIA EMAIL AND REGULAR U.S. MAIL

Dear Joan:

On behalf of the City, the residents of Newport Beach, and the residents of the licensed alcohol and drug abuse recovery and treatment facilities currently operating within the City, I request that ADP deny the license applications pending in Newport Beach. I also request that ADP deny future new license applications in Newport Beach for the following reasons:

1. Local need for recovery services in Newport Beach has been met, and probably exceeded. Newport Beach's fair share of regional need has been substantially exceeded.

ADP's charge for licensing alcohol and drug recovery and treatment facilities is based on the policy stated by the California State Legislature in Health and Safety Code § 11834.20:

> "The Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are **commensurate with local need.**" Cal. Health & Safety Code § 11834.20 (emphasis added)

Currently available evidence indicates that the local need for alcohol and drug abuse recovery and treatment facilities in Newport Beach has been met, and possibly exceeded.

- Newport Beach already has 2.63 licensed recovery beds per thousand residents, the highest ratio of any city in Orange County.
- Newport Beach is home to only 2.7 – 2.8% of the total population of Orange County, but is host to approximately 14.6% of all licensed residential beds in the County.
- Based on the January 8, 2007 list of licensed facilities posted on the ADP's website, Newport Beach has at least 22 licensed residential alcohol and drug treatment and recovery facilities. Those facilities provide a total of 219 licensed residential beds, and are licensed for a total occupancy of 244 individuals.

We are in the process of researching other indicators of the City's local need for recovery services, and are seeking statistics on the number of persons per thousand in the population who actively seek or are placed in recovery during a given time period. Based on the disproportionately generous supply of licensed and unlicensed recovery beds available in Newport Beach, however, it is apparent that our residents already have ample opportunities for housing and treatment in their local area

during recovery. We believe that the City of Newport Beach has not only met its local need, but has also exceeded any fair share of regional need the City should bear. Of the 34 cities in Orange County, 18 have no ADP-licensed residential beds at all, and six cities have only one or two licensed residential recovery facilities.

In addition, there are a high number of unlicensed residential facilities and outpatient programs currently operating in Newport Beach. Newport Beach residents have gathered information that indicates there may be as many as 100 sober living facilities in addition to the licensed facilities, and Orange County Probation has confirmed that these numbers are probably not exaggerated. Guidelines provided by ADP officers indicate that many of these unlicensed facilities are providing services that make them subject to licensure by either ADP or Department of Social Services Community Care Licensing.

Federal fair housing laws require that cities and states make exceptions from their established laws when necessary to provide disabled residents with access to housing. The City of Newport Beach has always respected this protection, and has routinely accommodated the needs of the disabled. As a result, there are abundant housing opportunities for handicapped residents, including those in recovery from alcohol and drug dependencies, already in existence in Newport Beach. Unfettered grants of licenses for more facilities are unnecessary to meet existing need.

2. Granting currently pending license applications is not necessary to meet local need for recovery services, and can cause irreparable harm to specific residential neighborhoods.

a. Local overview – In Newport Beach, all but one of the ADP-licensed facilities are located on or immediately adjacent to a narrow, 2.5 mile stretch of the city within West Newport and the Newport Peninsula. Over half of the licensed recovery facilities are concentrated within a mile of each other. One of our largest facility operators advertises that it has 30 homes (licensed and unlicensed) in a linear 1.3 mile area of West Newport. Publicly available information on several of the facilities' marketing practices, as well as reports by Newport Beach recovery facility residents,[1] indicate that a high percentage of the residents in these 22 facilities are not Newport Beach residents, and many are residents of other states brought to California specifically to enter the Newport Beach recovery facilities. If true, Newport Beach's limited housing stock is being used by commercial organizations to provide accommodations and services in excess of our local need, and may be limiting available housing and services to address our local need. National need for recovery services far exceeds the capacity of what our city can absorb, and could overwhelm our residential neighborhoods and change them forever.

b. Morningside Recovery – 112 A and B 39th Street - Based on ADP licensing numbers and census data, we estimate that on the city block that begins across the street from the proposed Morningside Recovery facility (39th – 40th Street), 30% of the block's population is already housed in licensed recovery facilities. Between four and five sober living homes already present on the same block add to the concentration of recovery facilities and create an environment that is not consistent with the goals of community-based recovery. Adding an additional licensed facility at 112 39th Street would exacerbate this situation, and will not add a commensurate benefit to the residents in Newport Beach in need of recovery services.

[1] Submitted either as complaints or during a series of City hearings in 2004.

In addition, Morningside Recovery has already displayed disregard for the zoning restrictions of the City of Newport Beach and the licensing restrictions of the ADP during its start-up phase. Although it was not yet in possession of a license from ADP, Morningside Recovery moved residents into the property at 112 39th Street in Fall, 2006. Fire clearance provided for Morningside's ADP license application was for six residents.

The Newport Beach Fire Marshall received a credible complaint that there were eight beds in the facility, and that two beds were temporarily removed from the facility in honor of an announced ADP inspection. In December 2006, Newport Beach Code Enforcement officers inspected 112 39th Street, confirmed that there were eight residents, and cited Morningside Recovery for exceeding six residents without the proper zoning clearance. Morningside Recovery is applying for a license for each unit in a duplex building. Integral facilities with over six residents tend to develop in duplexes with two licenses, and when this occurs Morningside will require a Federal Exception Permit (FEP) from the City of Newport Beach. (The FEP is our local permitting requirement for facilities with seven or more residents, which makes provision for accommodations specific to a disabled group's housing needs)

c. Ocean Recovery – 1217 and 1217 1/2 West Bay Avenue – This expansion of the existing Ocean Recovery women's program proposes to locate in an area in which approximately 17% of the population of a two-block cross-section of the Peninsula is already housed in three large licensed recovery facilities. The addition of an additional Ocean Recovery facility, in conjunction with the residents who have recently moved into the sober living expansion of the Newport Coast Recovery facility across the alley, would bring the population of residential recovery facilities in that area to 20%.

Unfortunately, Ocean Recovery does not appear to be following a pattern of openness and honesty with either its proposed neighbors or the City in its siting process. After Ocean Recovery purchased the property, neighbors report that they asked an Ocean Recovery representative present on the property what the property would be used for, and he replied that he and his family would be living there while their house was being remodeled. (This nullified the subsequent efforts of City representatives who encouraged neighbors to approach Ocean Recovery and work with them to protect the quiet residential character of Bay Avenue.)

Originally, Ocean Recovery indicated an intent to apply for a single license for the property at 1217 and 1217 ½ West Bay Avenue, with a licensed capacity of eight. When Ocean Recovery was informed by the City that this would require a FEP, facility operators told Planning Department representatives that they had made "a mistake in their application," and that they had intended to apply for two licenses, one for six residents, and one for two residents.[2] This does not

[2] To clarify the issue, the Planning Department asked Ocean Recovery to submit a written description of the operational patterns they anticipate following at 1217 and 1217 ½ West Bay, and the services to be provided in each unit. The document that Ocean Recovery provided described what is effectively an expansion of the Ocean Recovery women's program currently in operation at 1601 West Balboa, an existing nonconforming use. Because the additional facility will involve the expansion of an existing nonconforming use, the City intends to require a Federal Exception Permit in order to allow Ocean Recovery to operate its program as described at 1217 and 1217 ½ West Bay.

change our determination that the application is for a facility with operations integral to other licensed facilities that will serve more than six residents, which therefore must have an FEP.

d. Kramer Center Newport Beach – The Kramer Center Newport Beach knowingly began supplying residential treatment services to adolescent girls without a license from either ADP or DSS in December, 2006. Although I cannot give details on an ongoing criminal investigation, before granting any license for the Kramer Center, ADP should be aware that the Newport Beach Police Department has received and is investigating complaints against this entity and some of its employees. ADP and DSS Community Care Licensing are also investigating the allegations.

I hope that the ADP will carefully consider our position before granting more licenses for residential alcohol and drug abuse recovery and treatment facilities in the City of Newport Beach. Changing the character of our neighborhoods from residential to institutional benefits neither our permanent residents, nor the clients of the existing facilities who are undergoing the difficult process of recovery. We appreciate any assistance you can give us in preventing the irreparable harm that could result from the unfettered expansion of the commercial operations in residential neighborhoods.

Sincerely,

Robin Clauson,
City Attorney

cc: Mayor and Members of Newport Beach City Council
City Manager

STATE OF CALIFORNIA -BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
1800 Third Street, Suite 430
P. O. Box 952053
Sacramento, CA 94252-2053
(916) 323-3177 / FAX (916) 327-2643
www.hcd.ca.gov

October 24, 2008

Mr. David Lepo, Planning Director
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92658

Dear Mr. Lepo:

RE: Review of the City of Newport Beach's Draft Housing Element

Thank you for submitting Newport Beach's draft housing element received for review on August 25, 2008. The Department is required to review draft housing elements and report the findings to the locality pursuant to Government Code Section 65585(b). A telephone conversation on October 20, 2008 with Mr. Gregg Ramirez, Senior Planner, and Ms. Linda Tatum and Ms. Jessie Barkley from PBS&J, the City's consultants, facilitated the review. In addition, the Department considered comments from Mr. Cesar Covarrubias, from the Kennedy Commission, Ms. Kathy Lewis, from the Newport Beach Housing Coalition, and Mr. Ezequiel Gutierrez, from the Public Law Center, pursuant to Government Code Section 65585(c).

The draft element addresses many of the statutory requirements; however, revisions will be necessary to comply with State housing element law (Article 10.6 of the Government Code). In particular, the element should include analyses of the adequacy of identified sites to accommodate the regional housing need for lower-income households and revise programs to demonstrate the City's commitment to assist in the development of housing affordable to extremely low-income households. The enclosed Appendix describes these and other revisions needed to comply with State housing element law.

Furthermore, in September of 2007, the Department reviewed draft changes to the adopted housing element from the previous housing element planning period and determined revisions relating to the adequacy of sites would be necessary to comply with State housing element law. As the current draft contains much of the same site related information, many of the findings described in the September 10, 2007 review are still necessary to comply with State housing element law (Article 10.6 of the Government Code).

The Department would be happy to arrange a meeting in either Newport Beach or Sacramento to provide any assistance needed to facilitate your efforts to bring the element into compliance. If you have any questions or would like assistance, please contact Melinda Coy, of our staff, at (916) 445-5307.

Sincerely,

Cathy E. Creswell
Deputy Director

Enclosure

cc: Gregg Ramirez, Senior Planner, City of Newport Beach
Kathy Lewis, Newport Beach Housing Coalition
Cesar Covarrubias, Kennedy Commission
Ezequiel Gutierrez, Public Law Center

APPENDIX

CITY OF NEWPORT BEACH

The following changes would bring Newport Beach's housing element into compliance with Article 10.6 of the Government Code. Accompanying each recommended change, we cite the supporting section of the Government Code.

Housing element technical assistance information is available on the Department's website at www.hcd.ca.gov/hpd. Refer to the Division of Housing Policy Development and the section pertaining to State Housing Planning. Among other resources, the Housing Element section contains the Department's latest technical assistance tool *Building Blocks for Effective Housing Elements (Building Blocks)* available at www.hcd.ca.gov/hpd/housing_element2/index.php, the Government Code addressing State housing element law and other resources.

A. Housing Needs, Resources, and Constraints

1. *Include an inventory of land suitable for residential development, including vacant sites and sites having the potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites (Section 65583(a)(3)). The inventory of land suitable for residential development shall be used to identify sites that can be developed for housing within the planning period (Section 65583.2).*

   Newport Beach has a Regional Housing Need Allocation (RHNA) of 1,769 housing units, of which 708 units are for lower-income households. To address this need, the element relies primarily on underutilized and non-vacant sites within newly designated mixed-use areas. However, to demonstrate the adequacy of these sites and strategies to accommodate the City's share of the RHNA, the element must include more detailed analyses, as follows:

   Addressing Unaccommodated Need from the Previous Planning Period: Pursuant to Chapter 614, Statutes of 2005 (AB 1233), as Newport Beach failed to adopt a housing element demonstrating sufficient sites to accommodate the City's RHNA for the 2000-2008 planning period, the element must include specific actions in its 2008-2014 update to address any unaccommodated need resulting from the previous planning period within the first year of the 2008-2014 planning period. To assist you in meeting this statutory requirement, including instructions on calculating the unaccommodated need, see the Department's AB 1233 memo at http://www.hcd.ca.gov/hpd/hrc/plan/he/ab_1233_final_dt.pdf. For additional assistance, please refer to the *Building Blocks'* website at http://www.hcd.ca.gov/hpd/housing_element2/GS_reviewandrevise.php.

   Realistic Capacity: To calculate the potential residential capacity of sites in the inventory, the element assumes the sites will be built at either maximum allowed densities or to the maximum build out allowed under the general plan. The element must describe the methodology for determining capacity assumptions and demonstrate how the calculation accounts for land-use controls and site improvements, including height limits, and floor area ratios. The element could also describe the density yield of projects recently built or under construction. In addition, the element must provide a parcel specific estimate of the number of units that could be accommodated on all sites in the inventory including those within the John Wayne Airport Area.

Furthermore, as many of the sites are zoned for mixed-use, the residential capacity analysis must account for the potential development of non-residential uses and could consider any performance standards such as those mandating a specified portion of a mixed-use site be non-residential (i.e., first floor, front space as commercial) when estimating the potential residential capacity.

Sites to Accommodate the RHNA for Lower-Income Households: Given allowed densities, the John Wayne Airport Area appears to have the greatest potential to accommodate Newport Beach's share of the regional housing need for lower-income households. However, the element must demonstrate how existing uses, parcel sizes, land-use regulations, and General Plan Policy LU 6.14.6 impact the viability of this strategy to accommodate the RHNA for lower-income households within the planning period. For example:

- Non-Vacant Sites: As the element relies primarily on non-vacant and underutilized sites to accommodate the regional housing need (Appendix H-4), it must describe the existing uses of each of the identified sites within the parcel specific inventory and analyze the extent to which those uses may impede additional residential development. The element should also describe any existing or proposed regulatory incentives and standards to encourage and facilitate more intensive residential development on the identified underutilized sites. For further information, refer to the *Building Blocks'* website at http://www.hcd.ca.gov/hpd/housing_element2/SIA_zoning.php.

- Small Sites: Should the City need to rely on very small sites to accommodate a portion of the remaining regional housing need for lower-income households, the element must include an analysis demonstrating the development potential of smaller sites, including their capacity to facilitate the development of housing for lower-income households. The element could use development trends to facilitate this analysis. This is particularly important given the necessary economies of scale to facilitate the development of housing affordable to lower-income households. For example, most assisted housing developments utilizing State or federal financial resources typically include at least 50 to 80 units.

- Lot Consolidation: General Plan Policy LU 6.14.6 requires residential neighborhoods to include 10 continuous acres centered on a neighborhood park (page 5-44). The element should analyze the impacts of this policy on the availability of development opportunities within the Airport Area for a variety of housing types, including multifamily rental. While larger developers may have the ability to assemble the necessary sites to meet the 10 acre requirement, the analysis should consider the impact on smaller scale development proposals such as a low-income housing tax credit project and indicate the impact of LU 6.14.6 on such projects.

Sites with Zoning for a Variety of Housing Types: The housing element must demonstrate the availability of sites, with appropriate zoning, that will *encourage and facilitate* a variety of housing types, including supportive housing, single-room occupancy (SRO) units, emergency shelters, and transitional housing. An adequate analysis should, at a minimum, identify whether and how zoning districts explicitly allow

the uses, analyze whether zoning, development standards and permit procedures encourage and facilitate these housing types. If the analysis does not demonstrate adequate zoning for these housing types, the element must include implementation actions to provide appropriate zoning.

SROs: While the element indicates SROs are conditionally permitted in the RSC and APF zones, it must also demonstrate how the City's permit processing procedures, development standards, and standard conditions of approval encourage and facilitate the development of SROs.

Emergency Shelters: The element includes Program 5.1.6 committing the City to amend the zoning code to permit emergency shelters pursuant to Chapter 633, Statutes of 2007 (SB 2). In conjunction with the City's program strategy, the element must also identify the zone(s) being considered for emergency shelters and demonstrate sufficient capacity in the zone(s) to accommodate the need for emergency shelters, including sufficient capacity for at least one (year-round) emergency shelter. For further information, please see the Department's memo at http://www.hcd.ca.gov/hpd/sb2_memo050708.pdf.

Transitional and Supportive Housing: The element includes Program 5.1.6 to amend the zoning code to identify zones where transitional housing will be permitted and conditionally permitted. Pursuant to SB 2, the element must demonstrate transitional and supportive housing are treated as residential uses subject only to those restrictions that apply to other residential uses of the same type in the same zone. For example, if the transitional housing is a multifamily use proposed in a multifamily zone, then zoning and permit processing should treat transitional housing the same as other multifamily uses proposed in the zone.

2. *Analyze potential and actual governmental constraints upon the maintenance, improvement, and development of housing for all income levels, including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures. The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need in accordance with Section 65584 (Section 65583(a)(5)).*

   Land-Use Controls: While the element includes Table H35 summarizing development standards for residential zoning districts and Table H34 describing FAR and density standards for the mixed-use areas, as stated in the Department's September 10, 2007 review, it must also analyze how implementation of these standards, particularly the Planned Community (PC) zone, will facilitate and encourage housing for all income groups. For example, the element must analyze how implementation of General Plan Policy LU 6.14.6 could impact the development of housing affordable to lower-income households. Should the requisite analysis determine the City's new land-use controls will impede residential development, the element must include a program to mitigate and/or remove any identified constraints.

Local Processing and Permit Procedures: As indicated in the element, City staff is currently working on a comprehensive zoning ordinance update to address inconsistencies between recently established general plan land-use designations and outdated zoning categories and the City Council adopted a resolution (as an interim measure) that allows projects to be "reviewed" in spite of this general plan/zoning inconsistency (page 5-77). However, as stated in the Department's September 10, 2007 review, the element must be expanded to demonstrate that in addition to "reviewing" residential projects, they can actually receive final approval during the time period which the zoning ordinance is being updated.

Affordable Housing Implementation Plan (AHIP): The draft element indicates the City requires an AHIP be prepared for projects with more than 50 residential units (page 5-51). While the element describes threshold requirements for the preparation of an AHIP and in-lieu options, the element should be expanded to include a more specific analysis of the program's proposed implementation framework and demonstrate the ordinance will not act as a constraint on development of market-rate units. For example, the element should include a more specific description and analysis of the types of incentives the City will adopt to encourage and facilitate compliance with inclusionary requirements, what options are available for developers to meet affordability requirements, how the ordinance interacts with density bonus laws, and the current amount of any in-lieu fee.

Constraints on Persons with Disabilities: The element must include a detailed description of the City's recently adopted policies regarding group home development and analyze this policy for requirements that may constrain housing for persons with disabilities.

3. *Analyze the opportunities for energy conservation with respect to residential development (Section 65583(a)(8)).*

The element states Newport Beach's updated natural resources element contains polices that promote energy efficient construction and encourage provision of energy alternatives (page 5-65), but does not provide a description of those policies. Given the importance of promoting strategies to address climate change and energy conservation, the City's analysis could facilitate adoption of housing and land-use policies and programs in the housing element that meet housing and conservation objectives. Planning to maximize energy efficiency and the incorporation of energy conservation and green building features can contribute to reduced housing costs for homeowners and renters. For example, the element could include incentives to encourage green building techniques and materials in new and resale homes, promote energy audits and participation in utility programs, and facilitate energy conserving retrofits upon resale of homes. Additional information on potential policies and programs to address energy conservation are available in the *Building Blocks*' website at http://www.hcd.ca.gov/hpd/housing_element2/SIA_conservation.php.

B. Quantified Objectives

Establish the number of housing units, by income level, that can be constructed, rehabilitated, and conserved over a five-year time frame (Section 65583(b)(1 & 2)).

The element does not address this requirement. It must quantify the number of housing units by income category that can be constructed, rehabilitated, and conserved over a five-year time period. This requirement could be addressed by utilizing a matrix like the one illustrated below:

	New Construction	Rehabilitation	Conservation
Extremely Low-Income			
Very Low-Income			
Low-Income			
Moderate-Income			
Above Moderate-Income			
TOTAL			

C. Housing Programs

1. *Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing, mobilehomes, and emergency shelters and transitional housing. Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, the program shall provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low- and low-income households (Section 65583(c)(1)).*

   As noted in finding A1, the element does not include a complete site analysis and therefore, the adequacy of sites and zoning were not established. Based on the results of a complete sites inventory and analysis, the City may need to add or revise programs to address a shortfall of sites or zoning available to encourage a variety of housing types. For your information, where the inventory does not identify adequate sites pursuant to Government Code Sections 65583(a)(3) and 65583.2, the element must provide a program to identify sites in accordance with subdivision (h) of 65583.2 for 100 percent of the remaining lower-income housing need with sites zoned to permit owner-occupied and rental multifamily uses by-right during the planning period. These sites shall be zoned with minimum density and development standards that permit at least 16 units per site at a density of at least 20 units per acre. Also, at least 50 percent of the remaining need must be planned on sites that exclusively allow residential uses.

   Furthermore, as noted in finding A1, pursuant to AB 1233, the element must identify the unaccommodated housing need by income level in the previous planning period and include programs to make sufficient capacity available by June 30, 2009. This demonstration is separate and in addition to adequate sites for the new planning period.

At a minimum, the element should be revised as follows:

- Programs 3.2.1 and 3.2.2 must be revised to include timeframes for the adoption of the proposed development standards and zoning districts that implement general plan land-use designations and policies.

- As stated in the Department's September 10, 2007 review, given Newport Beach's reliance on a combination of mixed-use and redevelopment to accommodate its remaining housing need, Policy H.2.3 must be complemented with strong programs and implementation actions to facilitate such development (i.e., specific commitment to provide regulatory and/or financial incentives and promote the development of underutilized and/or mixed-use sites).

- To comply with the provision of Chapter 633, Statutes of 2007 (SB 2), Program 5.1.6 must be modified to identify a zone(s) where emergency shelters will be permitted without a conditional use permit (CUP) or other discretionary action within one year of adoption of the housing element, and demonstrate sufficient capacity is available within this zone to accommodate at least one shelter. The zoning code must also permit transitional and supportive housing as a residential use and only subject to those restrictions that apply to other residential uses of the same type in the same zone.

2. *The housing element shall contain programs which "assist in the development of adequate housing to meet the needs of extremely low-, low- and moderate-income households (Section 65583(c)(2)).*

   While the element includes some programs to assist the development of very low-, low-, and moderate-income households, programs should be expanded or added pursuant to Chapter 891, Statutes of 2006 (AB 2634), to specifically assist in the development of a variety of housing types to meet the housing needs of extremely low-income households.

3. *The housing element shall contain programs which "address, and where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing" (Section 65583(c)(3)).*

   As noted in finding A2, the element requires a more detailed analysis of potential governmental constraints. Depending upon the results of that analysis, the City may need to strengthen or add programs and address and remove or mitigate any identified constraints.

4. *The housing program shall preserve for low-income household the assisted housing developments identified pursuant to paragraph (8) of subdivision (a). The program for preservation of the assisted housing developments shall utilize, to the extent necessary, all available federal, state, and local financing and subsidy programs identified in paragraph (8) of subdivision (a), except where a community has other urgent needs for which alternative funding sources are not available. The program may include strategies that involve local regulation and technical assistance (Section 65583(c)(6)).*

   The element identifies 46 units as at-risk within the immediate planning period and another 87 units in the subsequent five years. Therefore, the element should strengthen Policy H.3, to include specific actions to address the potential loss of units. For example, the program should develop a strategy to quickly move forward in case units are noticed to convert to market-rate uses. In addition, Programs 4.1.1 through 4.1.3 should include specific timeframes for implementation.

D. Public Participation

Local governments shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the element shall describe this effort (Section 65583(c)(7)).

While the element provides a detailed listing of organizations and individuals notified regarding workshops for the housing element update, it should also describe the success of the outreach and how comments received as part of the public participation process were incorporated into the housing element. Newport Beach should continue to engage the community, including the parties commenting on the element, through any revisions and subsequent adoption of those revisions to the housing element.