

ATTACHMENT “1”

to City Council Agenda Item Summary

Memorandum by R. Gregory Hyden, Esq.

Special Legal Counsel

Revision to Reasonable Accommodation Procedures

Section 158.233 of the Code of Ordinances



MEMORANDUM

TO: O. Reginald Osenton, City Attorney

FROM: Gregory Hyden, Esq., Special Outside Counsel ~~10/31~~

DATE: October 30, 2017

SUBJECT: Reasonable Accommodation Request Ordinance Revision

Background

The United States is experiencing an opioid crisis claiming over 59,000 lives in 2016. Earlier this month, the Trump Administration directed the Department of Health and Human Services to declare the opioid crisis a public health emergency. In Florida alone, approximately 4,000 people died as a result of opioids last year. Not only is there a tragic human cost, but there is a tremendous financial cost to local governments. It cost the Port St. Lucie Police Department approximately \$32,000 in responding to overdose calls in the last 17 months. That cost does not include the costs of any first responders or subsequent medical or social services. For many local governments, the human and financial costs are staggering.

Against this backdrop, the role of Recovery Residences is being widely discussed by local governments. Recovery Residences, also referred to as group homes and sober homes, are where individuals in recovery from drug and/or alcohol addictions reside in a drug and alcohol-free residential dwelling. It cannot be stated enough that Recovery Residences provide a tremendous service to these disabled individuals and to communities in which they are located. There are two primary laws that form the basis of the applicable legal analysis: the federal Fair Housing Act ("FHA") and the Americans With Disabilities Act ("ADA"). Under both the FHA and ADA, individuals in recovery for drug and/or alcohol addictions are deemed disabled/handicapped and thus local governments are prohibited from discriminating against them. This issue most frequently arises when local governments refuse to grant a reasonable accommodation of zoning or land use ordinances to individuals wishing to locate a Recovery Residence in a single-family

residential zone. As a result, most local governments now have reasonable accommodation procedures.

Prior to 2013, the City of Port St. Lucie ("City") did not have formal reasonable accommodation procedures but, in response to two pending reasonable accommodation requests, passed an emergency ordinance adopting reasonable accommodation procedures so that the City could consider the pending requests. That emergency ordinance created Section 158.233 of the City's Code of Ordinances. However, since 2013, the Department of Housing and Urban Development and the Department of Justice issued an updated Joint Statement on State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, the State of Florida funded the creation of the Palm Beach County Sober Home Task Force, and during the 2017 legislative session, the Florida legislature passed HB 329 and HB 807. As a result, a number of local governments, including the City, are updating their reasonable accommodation procedures.

Reasonable Accommodation Procedures

For the last several years, it has become increasingly apparent that the City's existing reasonable accommodation procedures needed to be clarified and revised in light of issues raised by Recovery Residences. For example, the current language in Section 158.233 is not clear as to when a Special Magistrate is utilized, how a revocation of a previously approved reasonable accommodation request would operate, whether immediate reapplication could occur after a denial, etc. After review of the best practices from other local governments, the City undertook a revision of its reasonable accommodation procedures. In doing so, the City takes seriously its responsibility pursuant to the FHA and ADA to make reasonable accommodations in rules, policies, practices and services when necessary to afford disabled individuals an equal opportunity to use and enjoy a residential dwellings.

Proposed Revisions to the Reasonable Accommodation Procedures

The City Council has consistently asked that several key areas of the reasonable accommodation requests be addressed. This memo shall lay each out and address what the proposed revisions seek to do.

A. *Appeals*: Given the state and federal legal issues that are raised in an appeal of a denial of a reasonable accommodation, the ordinance has been revised so that appeals go to a Special Magistrate. This will allow both the City and the applicant to focus on the legal and/or technical issues before someone familiar with that area of the law. The new ordinance states

“[w]ithin thirty (30) days after the City Manager’s, or designee’s, determination on a reasonable accommodation request is mailed to the Applicant, such Applicant may appeal the decision. All appeals shall contain a statement containing sufficient detail of the grounds for the appeal. Appeals shall be to the Special Magistrate who shall, after public notice and a quasi-judicial public hearing, render a determination as soon as reasonably practicable, but in no event later than thirty (30) days after an appeal has been filed. An appeal of a decision by the Special Magistrate shall be handled exclusively in the Nineteenth Judicial Circuit in and for St. Lucie County, Florida. Such appeal shall be taken by filing a petition for writ of certiorari within thirty (30) days from the date of filing of the written order by the City Clerk.”

B. *Continuing obligation to verify disabilities:* Unfortunately, the City has discovered that a number of Recovery Residences have allowed a blended group of individuals to reside in a residential dwelling, not all of which are disabled under the FHA and ADA. As a result, the new ordinance states “[i]f the request for a reasonable accommodation is made by a qualifying entity on behalf of disabled individuals: (i) it is the continuing obligation of the qualifying entity to submit Verification of Disability Status forms on behalf of each of the disabled individuals. The Verification of Disability Status Form is maintained by (and shall be submitted to) the City Attorney’s Office....”

C. *Reapplication after denial:* The proposed ordinance states that “[n]o reasonable accommodation request shall be considered by the City if the Applicant’s same or substantially similar reasonable accommodation request was denied, and not overturned by subsequent order, within the previous twelve (12) months absent a material and substantial change in circumstances from the date of the denial. It shall be in the City Attorney’s sole discretion to determine whether a material and substantial change in circumstances has occurred.” This has not been extended to related entities of the applicant (if a corporate applicant) or to a reasonable accommodation request by the applicant for a different property as each property and each applicant are distinctly unique.

D. *Spatial considerations:* Consistent with the guidance provided by the Joint Statement of the Department of Housing and Urban Development and the Department of Justice on State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, the proposed ordinance takes a case-by-case analysis. It states “[i]f the clustering of Recovery Residences would occur by the granting of an Applicant’s reasonable accommodation request, it shall be the obligation of the Applicant to establish that such clustering would not create a

fundamental alteration of a residential neighborhood and will best meet the needs of the Applicant.”

E. *Renewal*: As it currently stands, the City does not know if Recovery Residences continue to operate after they have received an approval. As a result, the ordinance will now require an annual renewal. The ordinance states “[a]n approval of a reasonable accommodation request shall be valid for twelve (12) months. An Applicant may renew the reasonable accommodation request approval by completion of a renewal reasonable accommodation request form, which form is maintained by (and shall be submitted to) the City Attorney’s Office. The renewal reasonable accommodation form shall contain such questions and requests for information as are necessary for processing the reasonable accommodation renewal request. Said form must be received by the City Attorney no later than the last day of the eleventh month from when the last approval was granted. All forms submitted after that date shall result in a denial.”

F. *Revocation procedures*: One of the main issues that the City’s current reasonable accommodation requests need clarity on are revocation procedures. As a result, the ordinance has been revised to include not only the grounds for revocation but also for procedures. The ordinance states “[t]he City Manager, or designee, may initiate an action to revoke an approval for a reasonable accommodation request, when he or she finds by competent and substantial evidence that: (i) [t]he Applicant provided false or misleading information on the reasonable accommodation request; (ii) [t]he property subject to the reasonable accommodation request has been found to be in violation of the conditions of approval of the reasonable accommodation request; (iii) [a]ny applicable state or federal certification has expired or been revoked; (iv) [s]ince the granting of the reasonable accommodation request, the reasonable accommodation has become injurious to the health, safety or welfare of the public.” The revocation procedures are thus “[i]f the City Manager, or designee, finds cause exists to revoke a reasonable accommodation, he or she shall cause to be served upon the Applicant a written notice of intent to revoke which shall contain the grounds upon which such revocation is proposed. The applicant shall have ten (10) days in which to respond....[i]f the Applicant fails to show compliance with the order approving the reasonable accommodation request, the City Manager, or designee, shall schedule a publicly noticed quasi-judicial hearing to occur no later than thirty (30) days from the date the Notice of Intent to Revoke was served upon the Applicant before the Special Magistrate and shall cause to be served upon the Applicant a Notice of Hearing....[t]he Special Magistrate shall, after public

notice and a quasi-judicial public hearing, render a determination as soon as reasonably practicable, but in no event later than thirty (30) days after the Notice of Hearing has been filed. An appeal of a decision by the Special Magistrate shall be handled exclusively in the Nineteenth Judicial Circuit in and for St. Lucie County, Florida. Such appeal shall be taken by filing a petition for writ of certiorari within thirty (30) days from the date of filing of the written order by the City Clerk.”

G. *Compliance with NARR and FARR:* Certification is voluntary in both state and federal law. However, in an effort to encourage compliance, the City has defined Recovery Residences as “[a]n alcohol and drug-free residential dwelling, for individuals deemed disabled/handicapped by the Fair Housing Act and/or the Americans With Disabilities Act as a result of alcohol and/or drug addictions, that is in compliance with the standards set forth by the National Association of Recovery Residences and the Florida Association of Recovery Residences as much as is practicable.”

Beyond the above revisions, the following are the other main changes. The original section 158.233(a) has been split into an (a) and (b) to read more cohesively. Section 158.233(b)(1) has been revised to clearly explain the requirements for filing a reasonable accommodation request including the applicant’s obligations. Section 158.233(b)(2) removes Planning and Zoning and instead shifts the receipt of reasonable accommodation requests to the City Attorney’s Office in an effort to streamline the process for applicants. As noted above, Section 158.233(b)(3) will now require a continuing obligation to complete a Verification of Disability Status Form for each new resident. Also, the owner of a property along with the applicant, if different persons, must sign the application. This is because the City gets dragged into landlord/tenant disputes with regard to Recovery Residences all too often. Should you have any other questions or concerns, please do not hesitate to contact me.