



Mr. Ed Rast, Chair, Sunshine Reform Task Force
San Jose City Hall
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San Jose, CA 95113
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January 26, 2007

Re: Request to Agendize Sunshine Issues Involving Residential Care Facilities and “Reasonable Accommodations” Requests

Dear Mr. Rast:

The board of the Hensley Historic District, the only federally recognized historic district in San Jose, hereby requests that the Sunshine Task Force agendize, at its earliest opportunity, discussion and action on a significant “sunshine” issue besetting San Jose neighborhoods, especially in downtown District 3. At issue is the use of residential care facilities “reasonable accommodation” applications under federal disability law, by for-profit owners, as a means of circumventing the City of San Jose’s ordinary conditional use permit (CUP) procedures designed to afford open access to government for residents.

Under current state law, a residential care facility may operate in San Jose with up to six unrelated residents without a CUP.

Under the city’s current procedures, a residential care facility applicant seeking a CUP to operate with more than six unrelated residents is subject to the city’s Outreach Policy 6-30, which, as you know, was recently re-written in conjunction with a task force of Strong Neighborhoods Initiative (SNI) Project Area Committee (PAC) members to ensure that residents – including neighborhood association leaders – receive timely and sufficient notice of planning projects in their neighborhoods. **Further, the granting of a CUP application may be appealed by residents to the city council, ensuring that the ultimate responsibility for a CUP is made by officials elected by the people of San Jose.**

Alternatively, under the city’s current procedures, a residential care facility applicant may circumvent the CUP process by seeking to operate with more than six unrelated residents through a “reasonable accommodation” from the city. A reasonable accommodation request is not subject to the city’s Outreach Policy No. 6-30. Further, there is no right of appeal of the granting of a reasonable accommodation request to the city council.

Thus, two important protections of “sunshine”, - protections of basic due process (the right to be heard at a meaningful time in a meaningful manner) - are denied to San Jose residents when a residential care facility applies for and is granted a reasonable accommodation by the city planning staff as a substitute for a CUP. First, notice of the application (otherwise available for a CUP) is greatly constricted. Neighborhood leaders have no right to receive notice, even though these facilities are invariably of significant interest to the entire neighborhood, not simply those residents within a few hundred square feet of the facility. Second, there is no required community meeting as would be the case under the Outreach

Policy No. 6-30. *The absence of any right to appeal to the city council (otherwise available for a CUP) means that the decision whether to grant a reasonable accommodation request is undertaken entirely by unelected officials unanswerable to the voters of San Jose.*

There is no good explanation for the differential treatment of a CUP application and a reasonable accommodation application by the planning staff. Neither federal nor state discrimination law requires dispensing with ordinary procedures.

The reasonable accommodation procedure has been and is being employed by residential care facility applicants, with the connivance of city planning staff, in a calculated effort to circumvent the ordinary procedures in CUP applications. The Hensley Historic District, which already has far more than its fair share of residential care facilities in its beleaguered neighborhood, became very aware of this fact on December 6, 2006, at a Planning Commission hearing on a CUP application for a residential care facility on N. 5th Street. At the hearing, in the early hours of the morning of December 7, the applicant was counseled by planning staff and planning commissioners, with a deputy city attorney listening to and approving every word, that if the CUP application was defeated for any reason, the applicant should return with a reasonable accommodation request. In other words: city officials invited the applicant, “if you don’t like the initial ruling, come back for a second bite of the apple and we will dispense with the ordinary rules of sunshine which have resulted in our being bothered here tonight by these pesky residents.” Although the hour was late, all of this was said in public and on the record and evidenced a haughty disdain for the ordinary residents of San Jose.

We are informed by our neighbors in the adjoining Northside neighborhood that they have already had to contend with a reasonable accommodation request from a for-profit residential care facility provider as a second-bite-at-the-apple after the original CUP application for the same facility was denied. Our Northside neighbors inform us that the planning staff’s decision to grant the reasonable accommodation request (fundamentally a legal determination), after denying the CUP, was made without reference to legal authorities, without advice of counsel (at least that staff will admit to), and without following even those limited procedures for appeal of the planning director’s decision that supposedly apply.

The Hensley feels that existence of a secondary set of abbreviated procedures for approving the expansion of residential care facilities by characterizing the approval as a “reasonable accommodation” and thereby circumventing such sunshine as would otherwise be provided by Outreach Policy No. 6-30 and the right of appeal to the city council, merits scrutiny by this Sunshine Reform Task Force. We thank you in advance for your consideration in this matter.

Sincerely,

Lenora Porcella
President

cc:

Hon. Zoe Lofgren, U.S. Representative
Hon. Chuck Reed, Mayor
Hon. Sam Liccardo, Councilmember, District 3
Joe Horwedel, Director, Planning & Code Enforcement
Susan Goldberg, Executive Editor, San Jose Mercury News
Dan Pulcrano, Publisher, Metro
Ken Podgorsek, President, United Neighborhoods of Santa Clara County
Ernest Guzman, Chair, SNI PAC
Don Gagliardi, President, 13th St. NAC