

**BLUFFDALE CITY COUNCIL
SPECIAL MEETING MINUTES
Tuesday, May 19, 2020**

Present: Mayor Derk Timothy
Wendy Aston
Traci Crockett
Jeff Gaston
Mark Hales
Dave Kallas

Staff: Mark Reid, City Manager
Todd Sheeran, City Attorney
Bruce Kartchner, Finance Director
Grant Crowell, City Planner/Economic Development Director
Natalie Hall, Emergency Preparedness Manager
Jennifer Robison, Senior City Planner
Wendy Deppe, City Recorder

Mayor Timothy called the meeting to order at 6:00 p.m. The meeting was held electronically.

SPECIAL CITY COUNCIL MEETING

1. Roll Call, Invocation, Pledge of Allegiance.

All Members of the City Council were present.

2. Consideration and Vote on Resolution 2020-37, Regarding a Notice of Pending Ordinance about a Text Amendment to Title 11, Chapter 27 (Residential Facilities for Elderly or Disabled Persons), Staff Presenter, Todd Sheeran.

City Attorney, Todd Sheeran, made a PowerPoint presentation and reported that he was contacted by Council Member Kallas regarding the City Code on this topic. The first slide provided an overview of Mr. Sheeran's personal and professional background and interest in addressing the types of handicaps people may experience and who may need reasonable accommodation.

Mr. Sheeran provided a historical overview of housing discrimination and stated that in 1968, Congress passed the Fair Housing Act ("FHA"), which prohibited discrimination based on race, gender, or national origin. Unfortunately, the original legislation did not address discrimination against disabled persons. That deficiency was remedied by the Fair Housing Act Amendment of 1988 ("FHAA"), which was intended to end the unnecessary exclusion of persons with handicaps. The FHAA is referenced in multiple federal agencies and laws.

Mr. Sheeran reviewed the following three types of discrimination claims that occur:

- **Disparate Treatment:** Intentional discrimination against handicapped persons from living in a residential zone.

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- **Disparate Impact:** Unintentional discrimination resulting from classifying a treatment facility as a medical facility instead of a residential facility, thereby denying a disabled person to receive the same kind of treatment as a non-disabled person.
- **Failure-to-Accommodate:** Refusal to grant reasonable accommodations, such as a variance request to provide a disabled person the same opportunity that a non-disabled person has. The majority of claims fall into this category, particularly within the zoning context.

Mr. Sheeran reviewed elements associated with a failure-to-accommodate claim. First and foremost, to qualify for accommodation, a person must meet the definition of “handicap” as stated in the FHAA. In the ADA, “disabled” is used instead of “handicapped.” A handicap occurs if a major life activity is substantially impaired. People who are on a controlled substance do not qualify for accommodation under FHAA. There is an ongoing debate in the courts on the dichotomy between a person who is recovering from substance addiction and a person who is currently experiencing a substance addiction.

The following three elements are used to judge whether discrimination has occurred against handicapped individuals:

1. **Reasonable:** Whether the change would be a substantial or fundamental alteration to the zoning schemes as they pertain to safety, parking, and traffic.
2. **Necessary:** Whether something is indispensable as opposed to being merely helpful.
3. **Equal Opportunity:** Ensuring disabled persons have the same—not better—opportunity for housing.

Mr. Sheeran explained that one issue cities wrestle with is determining the number of handicapped residents who can live in the same home. Accommodations typically occur with requests for variances on the number of handicapped residents allowed in a home. Making determinations for accommodations is an extremely complex legal matter.

When determining whether an accommodation request is warranted, the following may be considered:

- The type of facility seeking accommodation, such as:
 - Detox facility,
 - Short-term in-patient or out-patient,
 - Long-term in-patient or out-patient,
 - Group home, or
 - Elderly care facility.

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- Potential modifications to the home that may be needed, particularly whether or not it will look like a residential home after the modifications are made.
- Determining whether the facility can appropriately be in a residential neighborhood, or if it needs to be therapeutic in nature and scope.
- The number of employees that will be needed, especially live-in employees. Some facilities require staff to be on-site at all times, and some facilities do not have such requirements.
- The rationale for the number of residents being requested in the variance. The reason needs to be detailed and justifiable.
- Vehicles and associated traffic.
- Safety concerns, which cannot include the fact that the residents are recovering from drug addictions. Safety can take into account the behavioral patterns of prospective residents.

However, when determining whether an accommodation request is warranted, the following things may NOT be considered:

- House size, which is dictated by the Utah Administrative Code (UAC).
- Additional parking beyond the specifications established by the UAC.
- Zoning.
- Lot size.
- Stereotypical safety, as opposed to the safety concerns previously referenced.
- What neighbors think because federal law does not take this issue into account.

If the request meets the requirements under federal law, the accommodation should be granted.

Mr. Sheeran read through the current City Code and found some items that were appropriate and some that needed to be changed. He enumerated things that are appropriate and inappropriate.

Items currently in the City Code that are appropriate include the following:

- Permitting residential facilities in all residential zones.
- Requiring compliance with all developmental standards.
- Establishing a resident number cap. It was noted that this number is not consistent between the different types of treatment facilities. This is an issue that needs to be addressed and remedied.

The things currently in the City Code that are inappropriate include the following:

- The citing of portions of the Utah Code that no longer exist.
- Requiring the City Council to determine all reasonable accommodations. Since this is a legal determination and not a political determination, it could create unnecessary conflicts.

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- Absence of a clear application process.
- Lack of clear decision-making authority, guidelines, or procedures.
- Limiting the definition of “family” to two unrelated people, among other concerns.

As a result of his analysis of the current City Code, Mr. Sheeran proposed the following changes:

- Moving the regulations to their Title and out of the Land Use section of the City Code to eliminate confusion about land use and business licensing.
- Clarifying that all FHAA-qualifying facilities have a cap of eight persons. That number is subject to change by the City Council. The higher the cap the fewer the requests for variances that will occur.
- Adding a section for business license application requirements.
- When considering requests for reasonable accommodations, doing the following:
 - Laying out the process to obtain a request;
 - Having a neutral third-party hearing officer who is trained in this area of the law, thereby making this a quasi-judicial determination with a clear path for appealing the decision;
 - Determining who would pay for the hearing officer’s time.
- Clarifying the appeal process, whether it’s a business license appeal or a reasonable accommodation appeal.
- Completing other general clean-up of the City Code.

Mr. Sheeran noted that the City Code changes he proposed were substantially different from the current City Code. Mr. Sheeran explained that the purpose of a Notice of Pending Ordinance about a Text Amendment was to notify future business license applicants to have a treatment facility in a residential neighborhood that they would have to follow the guidelines passed by the City Council at this meeting. Applicants would therefore not be able to rely on the City Code that is in effect as of right now. With the Notice of Pending Ordinance, the City Council would have six months to craft the new City Code. He would also like to consult with an attorney whose sole practice is in this area of the law to ensure nothing is missed.

Council Member Kallas thanked Mr. Sheeran for his work on the proposed ordinance. He believes it is well written and demonstrates Mr. Sheeran’s expertise in this area of the law. Council Member Kallas addressed the following:

1. He believes the City may want to be stricter by saying an accommodation is not permitted if it does have a fundamental change in character.
2. He asked if it might be appropriate to specify that a business could be reviewed if there was a legitimate complaint about rules violations.
3. He wanted to be clear that transferability referred to the sale of a business. Mr. Sheeran confirmed that such was the case. Council Member Kallas suggested that that requirement remain in the City Code.

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4. He wanted to know if it would be legal to have the business license requirements include assurances about security that will be provided on the premises. Mr. Sheeran stated that the issue would be regulated by the Utah Administrative Code. The security of the facility would be contingent on the type of facility.
5. He opined that the occupancy cap of eight is too high. Regardless of what the cap is, a reasonable accommodation request would be very likely.
6. He had mixed feelings about relegating the decision to a Hearing Officer because he could see the pros and cons of opting for a Hearing Officer or staying with the City Council to make the accommodation decision.

Council Member Kallas asked if a cap could be placed on what would constitute a reasonable accommodation for occupation. Mr. Sheeran was very hesitant to include that in the City Code for the following reasons:

1. He has never seen it done.
2. The accommodation is so specific to the site that setting a generic cap would be problematic. The limit would be determined under the analysis. The applicant must show why the accommodation is therapeutically necessary and not for financial reasons. The 10th Circuit Court, of which Bluffdale is a part, does not take financial viability into the accommodation analysis.

Concerning the Resolution being proposed, Council Member Kallas asked if any existing facility or applicant in Bluffdale would be subject to the new appeal process. Mr. Sheeran said it would be debatable because of the question of whether the business vested when it filed its application and whether it vested in its appeal rights, which is different. Mr. Sheeran stated that if the City Council passed the resolution under consideration, applicants requesting a Reasonable Accommodation would likely want to go through a Hearing Officer because if they did not like the decision of the City Council, they could appeal to the Appeals and Variance Hearing Officer. If they did not like that decision, they would then appeal to the District Court. Having a Hearing Officer would shorten the appeal timeline for applicants who are not happy with the first decision. In addition, if the case went to the City Council, it would entail a public hearing in a public meeting. Instead, someone who is legally trained in this aspect of the law would make the decision in a quasi-judicial capacity.

Council Member Aston agreed with reducing the cap from eight to four or five. Concerning the cost of the Hearing Officer, she does not believe the City should have to share in the cost. Instead, the cost should be the sole responsibility of the business submitting the variance request. Council Member Gaston agreed regarding the responsibility of the applicant to pay the cost of the appeal process and to reduce the cap size.

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Mr. Sheeran suggested that the motion include the number that should be considered the cap.

In response to Mayor Timothy's request for clarification on the immediate impact of the Resolution, Mr. Sheeran explained that it would give the residents an idea of where the City is headed so there is clear guidance on how future appeals and business license applications will be treated until the new Ordinance is passed. Mayor Timothy expressed concern over the motions including a change and then having it be perceived as a final decision before the new Ordinance is passed by the City Council. Mr. Sheeran stated that if the resolution is passed, the process will follow the normal text amendment process. Since it is currently in the Land Use section of the City Code, it would likely first go to the Planning Commission for consideration and recommendation. Even if the cap in the motion is five, it would still be subject to change in the final version of the City Code.

Mayor Timothy complimented Mr. Sheeran for his expertise and work in developing the first draft of the proposed text amendment to the City Code.

Dave Kallas moved to pass Resolution No. 2020-37 regarding a Notice of Pending Ordinance about a Text Amendment to Title 11, Chapter 27 (Residential Facilities for Elderly or Disabled Persons), and to consider a potential reduction in capacity from 8 to 5 in the new ordinance. Wendy Aston seconded the motion. Vote on motion: Council Member Aston-Aye, Council Member Gaston-Aye, Council Member Crockett-Aye, Council Member Hales-Aye, Council Member Kallas-Aye. The motion passed unanimously.

3. **Closed Meeting Pursuant to Utah Code §52-4-205(1) to Discuss the Character, Professional Competence, or Health of an Individual, Collective Bargaining, Pending or Imminent Litigation, Strategies to Discuss Real Property Acquisition, Including any Form of a Water Right or Water Share, Security Issues, or any Alleged Criminal Misconduct.**

There was no Closed Meeting.

4. **Adjournment.**

The City Council Meeting adjourned at approximately 6:44 p.m.



Wendy L. Deppe, CMC
City Recorder

Approved: June 10, 2020

DRAFT – FOR DISCUSSION PURPOSES ONLY

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2 it is well written and demonstrates Mr. Sheeran’s expertise in this area of the law. Council Member
3 Kallas addressed the following:

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6 permitted if it does have a fundamental change in character.
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8 2. He asked if it might be appropriate to specify that a business could be reviewed if
9 there was a legitimate complaint about rules violations.
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11 3. He wanted to be clear that transferability referred to the sale of a business.
12 Mr. Sheeran confirmed that such was the case. Council Member Kallas suggested
13 that that requirement remain in the City Code.
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15 4. He wanted to know if it would be legal to have the business license requirements
16 include assurances about security that will be provided on the premises.
17 Mr. Sheeran stated that the issue would be regulated by the Utah Administrative
18 Code. The security of the facility would be contingent on the type of facility.
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20 5. He opined that the occupancy cap of eight is too high. Regardless of what the cap
21 is, a reasonable accommodation request would be very likely.
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23 6. He had mixed feelings about relegating the decision to a Hearing Officer because
24 he could see the pros and cons of opting for a Hearing Officer or staying with the
25 City Council to make the accommodation decision.

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2 problematic. The limit would be determined under the analysis. The applicant must
3 show why the accommodation is therapeutically necessary and not for financial
4 reasons. The 10th Circuit Court, of which Bluffdale is a part, does not take financial
5 viability into the accommodation analysis.

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7 Concerning the Resolution being proposed, Council Member Kallas asked if any existing facility
8 or applicant in Bluffdale would be subject to the new appeal process. Mr. Sheeran said it would
9 be debatable because of the question of whether the business vested when it filed its application
10 and whether it vested in its appeal rights, which is different. Mr. Sheeran stated that if the City
11 Council passed the resolution under consideration, applicants requesting a Reasonable
12 Accommodation would likely want to go through a Hearing Officer because if they did not like
13 the decision of the City Council, they could appeal to the Appeals and Variance Hearing Officer.
14 If they did not like that decision, they would then appeal to the District Court. Having a Hearing
15 Officer would shorten the appeal timeline for applicants who are not happy with the first decision.
16 In addition, if the case went to the City Council, it would entail a public hearing in a public meeting.
17 Instead, someone who is legally trained in this aspect of the law would make the decision in a
18 quasi-judicial capacity.

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20 Council Member Aston agreed with reducing the cap from eight to four or five. Concerning the
21 cost of the Hearing Officer, she does not believe the City should have to share in the cost. Instead,
22 the cost should be the sole responsibility of the business submitting the variance request. Council
23 Member Gaston agreed regarding the responsibility of the applicant to pay the cost of the appeal
24 process and to reduce the cap size.

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26 Mr. Sheeran suggested that the motion include the number that should be considered the cap.

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28 In response to Mayor Timothy’s request for clarification on the immediate impact of the
29 Resolution, Mr. Sheeran explained that it would give the residents an idea of where the City is
30 headed so there is clear guidance on how future appeals and business license applications will be
31 treated until the new Ordinance is passed. Mayor Timothy expressed concern over the motions

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5 recommendation. Even if the cap in the motion is five, it would still be subject to change in the
6 final version of the City Code.

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9 of the proposed text amendment to the City Code.

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12 **about a Text Amendment to Title 11, Chapter 27 (Residential Facilities for Elderly or**
13 **Disabled Persons), and to consider a potential reduction in capacity from 8 to 5 in the new**
14 **ordinance. Wendy Aston seconded the motion. Vote on motion: Council Member Aston-**
15 **Aye, Council Member Gaston-Aye, Council Member Crockett-Aye, Council Member Hales-**
16 **Aye, Council Member Kallas-Aye. The motion passed unanimously.**

17
18 **3. Closed Meeting Pursuant to Utah Code §52-4-205(1) to Discuss the Character,**
19 **Professional Competence, or Health of an Individual, Collective Bargaining, Pending**
20 **or Imminent Litigation, Strategies to Discuss Real Property Acquisition, Including**
21 **any Form of a Water Right or Water Share, Security Issues, or any Alleged Criminal**
22 **Misconduct.**

23
24 There was no Closed Meeting.

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26 **4. Adjournment.**

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28 The City Council Meeting adjourned at approximately 6:44 p.m.

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30
31 _____
32 Wendy L. Deppe, CMC
33 City Recorder

34
35 Approved: _____