



TOWN COUNCIL
**Committee to Assess Homelessness
in the Town of Barnstable**
367 Main Street, Hyannis, MA
Selectmen's Conference Room
2nd floor, Selectmen's Conference Room

January 15, 2019

6:00pm

MEETING MINUTES

I. BUSINESS

A. Roll Call:

Members present: Chair of Committee Councilor Jennifer Cullum; Member at Large, Deb Krau; Councilor Britt Beedenbender; President of the Town Council; James H. Crocker Jr.; Representative Will Crocker 2nd District; Mark S. Ells, Town Manager, Ruth Weil, Town Attorney; LT Jeannie Challies, Barnstable Police, SGT Jennifer Ellis, Barnstable Police; **Absent:** Vice President of the Council, John G. Flores; Councilor Debra Dagwan

Chair of the Committee called the meeting to order at 6:05pm. Chair of the Committee asked Representative Crocker give the Committee and update on the Dover Amendment.

Rep Crocker updated the Committee on where it is in the State House. Refiling of the Dover Amendment, hold off for the time being because there is a Committee doing research medically assisted treatment that may be able to add some information that the Town may or may not want to file, so holding off until the results of that Committee comes out may benefit the Town; Chairman Garlick offered to set up a meeting with some of the other community leaders around the Commonwealth, and he has reached out to talk to the Representatives of Springfield and Methuen as they have the same issues as we have here and he has spoken to them about how they are handling there situation as well and possible legislation that they were crafting that also did not work, we were notified by the Committee Chair at the State House that this bill would never come out of Committee as drafted today because they felt there was going to be push back by the ADA (American Disabilities Act), so he did not know if there is consideration for language on how to get around that or not, however it is his suggestion that the Town hold off for now until the Committee on Medically Assisted Treatment has had a chance to put together their findings and recommendations, Representative Crocker will file anything that the Town wants him to file, however it is urged that we wait to do anything or file anything. Councilor Cullum asked about a timeline and when Representative Crocker thought that the Committee would have any information or findings, it is believed to be sometime in April. Councilor Cullum asked about when he may be able to meet with other Representatives from the pother Districts on this; Representative Crocker stated he has not set up anything yet because it is a crazy time when over 6, 000 to 7, 000 bills are being rushed to the floor to get them all in before the deadline occurs, so it is a very busy time right now, but as soon as the filing date is over the meetings will be scheduled.

Councilor Cullum asked about the Communities that he was going to ask about, they are the following: Fall River, Springfield, and Methuen. Deb Krau mentioned the fact that all the things that may be at a reach for the areas you mentioned for funding and such does not often apply to Barnstable because of they way we are looked at, Hyannis certainly has all the problem of an inner city, but when it comes to funding to help, we do not qualify, and Hyannis suffers once again. Councilor Cullum asked if there was an intention to craft something that pertains to only Hyannis, but that is not a possibility that Ms. Krau is aware of. When the Chase Street group talked to the Fall River Mayor, they were looking to

attach something to the Fire Districts, but they had no zoning. The Challenge is what we can do for Hyannis that will work for Hyannis, because whatever is crafted will work for those areas because they qualify as a whole, Barnstable never does because of the income per capita. Attorney Ruth Weil wanted to clarify some information regarding the legislation the Town crafted just talked about nonprofit organizations, the Town of Barnstable narrowed it and did not include people with disabilities in the legislation. The Town of Barnstable was dealing with the nonprofit educational services, so Attorney Weil was asking if the Legislators are aware of that, and if not we could clarify it for them.

The members of the Committee addressed the next Item on the Agenda which is the definition of Group Homes. The members of the Committee had posed a question to Attorney Kevin Batt (retained by the Town) to look at the definition of "Group Homes" Attorney Batt joined the Committee via phone (due to weather conditions in Boston) Chair of the Committee asked Attorney Batt to answer some of the questions that were sent to him. Attorney Batt explained the Rental registration process requires the owner to register his/her house with the Town and what it is they are renting out a room or the entire house. This rental registration Ordinance does not seem to apply to the Homeless not Hopeless because they do not charge a rent or collect rent from the individuals that stay there according to the lawyers that represent them. Could it be possibly to broaden the Ordinance to include payment of incidentals, it is a possibility, but right now as it stands it does not cover those types of homes. There may be a way to craft an Ordinance to include these types of homes, but that will have to be looked into. Attorney Batt stated he would be willing to look into it with Attorney Weil if it was the Committees response. Deb Krau questioned the no rent stated by the lawyers of these homes, there are clients that pay \$450.00 a month to be in some of the Homeless not Hopeless Homes, she believes that is what the client receives for a housing allowance, there is also a problem with them being allowed to use their food stamps to pay for utilities in some of these homes as well, so if there are 20 people living in these Homeless not hopeless homes at \$450.00 a month being charged to them and calling it a community fee those homes are collecting \$9,000 in community fees a month, and then are allowed to use their food stamp monies for utilities, you can call it what you want, but they are paying rent and utilities in those homes. Town Manager Mark Ells asked if there was a definition of rent identified. Attorney Weil stated she had not looked into that. Attorney batt stated there is not a specific definition for rent. Ms. Krau stated that she knows that you can't stay in any of these homes unless you are on a subsidy from the State which is housing and food stamps. Councilor Cullum stated that maybe the way around this is to change the Ordinance.

Mark Ells, Town Manager asked on the subsidy side is there a review on how funds are distributed by the State, if we went to the State and asked about how the client used the funds to find out how the funds were spent, Attorney Batt stated that would be a challenge because of privacy. Town Manager Ells stated that he is aware of the Social Security change on how funds are distributed and accounted for; it is no longer required by anyone receiving Social Security to report on how those funds are spent. Attorney Batt said that if there were any clients willing to state they pay for certain things in the house and they are aware it is for rent and incidentals then you could craft a letter and send it stating the obvious. President Crocker offer an alternative to see if there is a way to look at the single family zoning in our neighborhoods to say that single family is living there, we have these group homes in residential areas that say that no one individual is paying rent and we force them to declare they are not collecting rent and make them declare they are running a business in a residential zone. Attorney Batt stated they said that the homes are running an educational facility in a residential zone, which makes them fall under the Dover Amendment, then a whole set of other regulations come into play which allows them to operate this way. President Crocker stated so there is no way to disqualify them from being in a residential zone, State law would make it very difficult for the Town to win that case. Can we constrain them in the licensing process so that they are monitored either once or twice a year. Attorney Batt stated no. President Crocker asked is there any way to hold them accountable for what they deliver as a service when they come in for permitting. Attorney Batt said that if the home violated any of the original permitting process with parking or vehicle registration then yes you would have the ability at that point to issue fines regarding the violations. Attorney Weil stated that the Building Commissioner

would issue a cease and desist order. Mark Ells, Town Manager clarified the process regarding site plan review; anything we do has to be uniformly applied as it applies to all and not any given area. Attorney Batt stated it applies to all with similar uses. Town Manager Ells asked if we believe the monies collected are rent even though they are not calling it rent, if the Town requires anything that pays anything to the household be required to register; what is the risk for the Town. Attorney Batt stated he does not see the rental registration ordinance being very burdensome, so to come into compliance with the rental registration is to register the residence and require periodic inspections. Attorney Batt said it would apply to all group homes, not just Homeless not Hopeless.

Chair of the Committee mentioned now is the time to get everyone on board with the rental registration process with Air B n B being required to register, it seems that any home being rented or collecting monies be required to register. (see document below on definition of group homes)

ANDERSON

KREIGER

MEMORANDUM

To: Committee to Assess Homelessness in Hyannis
cc: Mark Ells, Town Manager
Ruth Weil, Town Attorney
Arthur P. Kreiger, Anderson & Kreiger LLP
From: Kevin D. Batt
Re: Regulation of Group Homes
Date: November 20, 2018

This memorandum responds to questions arising from a presentation that I made to the Committee to Assess Homelessness in Hyannis ("Committee") on August 7, 2018. I reported to the Committee at that meeting our conclusion that the Town would incur legal risk and likely be found liable if it attempted to prohibit or unnecessarily circumscribe Group Homes under most factual circumstances. The Committee asked for responses to additional follow-up questions. This memorandum provides those responses.

I. Define "Group Home" and add it to definition section of the Town zoning ordinance.

This request presupposes that some operative zoning regulation would apply to Group Homes. A definition standing alone, without its use in an operative regulation, has no legal effect. The objective of a regulation – its purpose consistent with other applicable law – and the regulatory provisions to achieve the objective need to be developed before drafting of a definition for "Group Home" makes any sense.

Moreover, any definition of "Group Home" will likely be treated by a court as a facial classification that discriminates against disabled persons under federal and state law. A court would likely rule unlawful and discriminatory any facial classification in a zoning regulation relying on such definition.

a. Risks in Defining "Group Home" under the Fair Housing Act.

The federal Fair Housing Act (FHAA) prohibits discrimination against persons in the sale, rental or otherwise securing of housing on the basis of a number of classifications, including being "handicapped." Most, if not all Group Homes, house some or all residents who would be qualified as handicapped.

A zoning or other regulation that expressly distinguishes on its face between group homes serving disabled populations and other dwellings establishes a *prima facie* case of intentional discriminatory treatment under the FHAA. Federal courts in most circuits subject such facial discrimination to a heightened standard of review, requiring the municipality to justify the discrimination by showing that the restriction serves legitimate public safety concerns or benefits the protected class. *Id.* However, the exceptions to the FHAA's prohibitions on discrimination should be narrowly construed.¹

In speaking to the Committee in August, I referred to the kind of justification – benefits to Group Home residents from a local regulation – that might overcome a claim of unlawful discrimination under the FHAA. Because my comments were largely addressed to discrimination under federal law, I failed to make clear that state law is even more restrictive on local authority to enact zoning or other classifications of Group Homes for purposes of regulation.

b. Group Homes Exempt from Discriminatory Land Use and Safety Regulations Under G.L. c. 40A, §3, fourth paragraph.

In addition to protection for Group Homes for handicapped persons under the FHAA, similar, but more absolute protection is provided under state law. Chapter 40A, § 3, 4th para. provides:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination.

By virtue of this statute, the Commonwealth prohibits localities and reserves to itself licensing authority and other health and safety regulation of Group Homes. As an example of application of this provision of G. L. c. 40A, §3, a federal court in 2016 granted summary judgment protecting a "sober home" from application of the state's Sprinkler Law, because the Sprinkler Law did not apply to homes with similar numbers of family-related persons, nor to dormitories and fraternity houses.

¹ A Joint Statement by the United States Department of Housing and Urban Development and the Department of Justice, dated November 10, 2016 ("Joint Statement"), a copy of which you provided me through the Town Attorney's office, notes that FHAA violations by local government may occur in "imposing restrictions or additional conditions on group housing for persons with disabilities that are not imposed on families or other groups of unrelated individuals . . ." and "imposing restrictions on housing because of alleged public safety concerns . . . by, for example, requiring a proposed development to provide additional security measures based on a belief that persons of a particular protected classes are more likely to engage in criminal activity." Joint Statement at 3.

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c. Conclusion

Because both federal and state laws strictly circumscribe local authority to regulate Group Homes, even for a beneficent purpose to protect their residents, we strongly recommend against any attempt to define "Group Home" and subject such residential facilities to zoning or other local regulation. In addition to protections under the FHAA and G.L. c. 40A, § 3, 4th para., some Group Homes will likely be covered by the so-called Dover Amendment, protecting non-profit educational uses of property. We understand that the non-profit organization Homeless Not Hopeless ("HnH") claimed and was granted such protection pursuant to Site Plan Review by the Barnstable Zoning Board of Appeals for one of its facilities in Hyannis.

II. Because the individual residents pay rent, is HnH subject to the same guidelines that a bed & breakfast or boarding house is? Application for license to operate/potential revoking of license if violations occur and fines for repeat violations in a calendar year?

As a preliminary matter, it is my understanding that bed and breakfast establishments and boarding houses are licensed under Chapter 506 of the Barnstable Code, the Town's lodging house regulation. Both under the state law which authorizes licensing of lodging houses and the Barnstable regulation, "dormitories of charitable or philanthropic institutions" are excluded from licensing as lodging houses. HnH appears to be a charitable organization that would likely be exempt from Chapter 506.

In further response to this question, a preliminary point needs to be highlighted – the premise of the question – that HnH residents pay rent – is not clear. In a submission for Site Plan Review dated April 4, 2017, HnH's attorney Peter Freeman states: "[residents] do not pay rent, rather, they pay a small monthly community fee, and they do not sign a lease, rather the agreement they sign is for occupancy only . . ." Mr. Freeman reiterated this position in recent conversations with the Town's Director of Public Health. The HnH Residential Educational Program Agreement requires residents "to contribute a monthly community fee of \$___" (amount presumably determined on a case by case basis) and "to contribute personal food stamps in lieu of \$125 towards utilities of the community." The provisions in the agreement seem consistent with Mr. Freeman's statements. Whether a court would determine that such community fees constitute "rent" is an open question both of law and of fact. If community fees are collected and spent solely for food and incidental living and operational expenses, a court would likely not classify such payments as rent.

The premise of the question from the Committee may be based upon statements made at its January 23, 2017 meeting. Minutes of that meeting report that HnH Treasurer Dick Murphy stated that "a small portion of [residents'] benefits are collected as rent." Assuming the accuracy of the minutes, Mr. Murphy's statement (or mis-statement) would be only one fact among many that a court might consider in deciding whether residents pay "rent."

If the Town decides that the payment of community fees constitutes rent, that conclusion may trigger regulation of HnH under the Town's Rental Registration ordinance (Chapter 170 (Rental Properties) of the Town's General Ordinances). Section 170-4 states that "[n]o person shall rent or lease, or offer to rent of lease, any dwelling or any portion of a dwelling to be used for human

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habitation without first registering with the Board of Health.” Thus, such an ordinance applies by its terms to many other rentals, and would thus not facially discriminate against group homes housing the disabled. As a facially neutral law, it would stand a better chance of surviving a court challenge based on federal and state discrimination laws. Such registration may be resisted by HnH because it contests its applicability to the community fee arrangement. Any attempt by the Town to enforce the Rental Registration Ordinance over HnH’s objection could lead to litigation with the outcome very uncertain.

As an alternative, the Town could amend the Rental Registration Ordinance, by including a registration requirement for any non-owner-occupied dwelling unit which offers occupancy without payment to any person not a family member of the owner of the dwelling unit. I leave to Town officials’ consideration of the wisdom of such a broad requirement that may then be applied with unintended consequences to dwellings not foreseen in enacting such an amendment.

III. What (ordinances) can we write that is enforceable to protect the residents of these homes?

Any ordinance that targets the residents of Group Homes as a facially classified group is likely unenforceable for the reasons set forth in Section I of this memorandum.

Existing police, fire and other health and safety laws that apply equally to all residents of the Town are enforceable to protect the residents of Group Homes.

Chair of Committee asked that the Committee look at drafting an Amendment to the Rental Registration Process and also if Attorney Batt looking into the taxation portion of this as well. The Committee thanked Attorney Batt and look forward to the answers to the taxation portion.

ADJOURN: 7:00pm

NEXT MEETING: March 19, 2019 at 6pm Selectmen’s Conference Room