Agenda Item 433

TESTIMONY

2:00 PM TIME CERTAIN

# SUPPORT APPEAL

# **GROUP LIVING FACILITY**

APPEAL OF E PORTLAND LAND USE TRANSPORTATION COM

2027 SE 174<sup>TH</sup> AVE LU 11-146609 CU AD

IF YOU WISH TO SPEAK TO CITY COUNCIL, PRINT YOUR NAME, ADDRESS, AND EMAIL.

NAME (print)	ADDRESS AND ZIP CODE	Email
Linda BALER	Sauce	Abara
Tom Lewis	1333 DE 148th PDX 97233	Gamodate sol.com
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04-26		

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# OPPOSE APPEAL

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5/000	NAME (print)	ADDRESS AND ZIP CODE	Email
crist.	tom LEWIS	1333 S.E. 1487 PDX 97233	GAMODATO GAL. COM
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Date 03-08-12

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HARRIS BERNE CHRISTENSEN LLP ATTORNEYS AT LAW

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**503-968-1475** *fax* 503-968-2003 www.HBClawyers.com

April 26, 2012

Thomas H. Cutler, of counsel

email: thomas@HBClawyers.com

# VIA HAND DELIVERY

City Council City of Portland.

### Re: Group Living Facility, Conditional Use Application LU 11-146609 CU AD; HO No. 4110029

Dear Mayor and City Council members:

The proposed group living facility, which will serve the ever growing needs of our elderly and disabled communities offers outstanding function, beautiful design, and full compliance with all applicable approval criteria, all with minimal impact on its surrounding neighborhood. The concerns raised in this appeal were fully addressed the applicant, and resolved by the city's planning staff, and the hearings officer. As the appellants have submitted no new arguments or materials in connection with this appeal other than the brief statement contained in the notice of appeal, I enclose for your review a narrative prepared by the applicant's architect and representative, Eddie Radulescu, in response to the appellant's last submissions i.e. the January 6, 2012 submissions of Bonnie McKnight on behalf of the East Portland Neighborhood Associations Land-Use and Transportation Committee and Centennial Associations of Neighborhoods. This letter will serve to supplement applicant's testimony, evidence and arguments, and further respond to appellant's concerns.

While Ms. McKnight's arguments are undoubtedly well-intentioned, they are not supported by the evidence in the record, nor are they based on the city development code provisions and applicable approval criteria as currently written. She appears to be arguing that current code provisions are inadequate and that further code provisions, definitions in particular, need to be added to the code before a facility of the nature and scale proposed can be allowed. She describes the proposed group living structure as a "yet to be defined in code, facility." With respect to neighborhood scale, she then engages in a hypothetical analysis of a maximum number of unrelated adult residents which could purportedly live on three lots, presumably in three small group homes. Her calculations lead her to conclude that 19 individuals is the appropriate maximum number of residents which should be allowed at this site.

Opponent's arguments are not well taken for several reasons. First, the applicable code provisions and approval criteria are those which were in effect at the time the applicant submitted its application. Neither the city nor anyone involved in this land-use proceeding may now change the code provisions or create definitions or limitations which do not currently exist in the code. To do otherwise would be in violation of the "changing of the goalposts" statute, i.e. ORS 215.427.

### April 26, 2012 Page 2

Second, nothing in the city's current code limits conditional use approvals for group living facilities to 5 unrelated individuals, +1 caretaker. Again, as noted at the hearing, the five unrelated individual criteria only applies to "group homes," which are uses permitted out right in all of the residential zones. Similarly, nothing in the city's current code requires this parcel to be partitioned into three lots, or otherwise establishes any specific lot size to be used in a conditional use application. In fact, as noted in the applicant's prior submissions, the staff report, the hearings officer's decision, and in the attached narrative, the only existing criteria in this regard is based on the number of residents per 1000 ft, <sup>2</sup> i.e., 45 beds for this facility. The applicant is only proposing 39 beds. Similarly, as is further noted in the attached narrative, the applicant has, in cooperation with city staff, scaled back from virtually every maximum scale, intensity/and/or impact related criteria that would otherwise be applicable for this project, including reducing the number of residents, increasing setbacks, decreasing lot coverage, decreasing building height, etc..

With respect to the argument regarding the "nature of the facility," opponents attempt to impose standards, criteria and definitions which simply are not found in the current code. For purposes of this application, the applicant has provided ample information in its plans, narratives, letters and oral testimony regarding the nature of the residents to be served and regarding staffing. In fact, the applicant has been open and cooperative with opponents, meeting with them and offering any clarification opponents desired with respect to the physical characteristics of the facility and its intended use. Moreover, such facilities are thoroughly regulated by other government agencies throughout their operation, and opponents' concerns are unfounded. Most importantly for present purposes, however, no greater specificity than has been provided with regard to the particular residents' needs or care or regarding staff characteristics or qualifications is required of the applicant under any of the approval criteria applicable to this conditional use application.

With respect to opponent's arguments regarding "lack of information to define conditions of use," opponents again attempt to impose definitions and standards which simply do not exist in the City of Portland's development code. County code definitions, County or State enforcement or other such considerations raised are simply not relevant and are not applicable approval criteria in this matter. Again, Ms. McKnight appears to be arguing that the code needs to be modified or better defined before this facility can be allowed. Not only would this be a violation of the goal-posts rule, it would turn traditional notions of code interpretation, land-use regulations and basic freedom on its head. Code provisions must be interpreted and applied in light of other existing code provisions and the code as a whole. With respect to permissible land uses owners are generally free to enjoy and use their property as they see fit, as long as such use is not properly and legally prohibited by a specific federal, state or local law or regulation. In this instance, a "group living" facility is clearly allowed as a conditional use in the R-7 zone. The code's language, the various code provisions discussed and analyzed by the applicant in the attached narratives, in its prior submissions, in the submissions of city staff, and in the hearings officer's decision all amply demonstrate that this kind of facility was in fact contemplated and allowed by the City Council in enacting the current code provisions. Most importantly, however, nowhere in the city's code is this facility prohibited.

Finally, opponents suggested overly restrictive and prohibitive interpretations of the city's

### April 26, 2012 Page 3

code provisions are inappropriate in light of the heightened scrutiny and caution which must be taken when the residential and accommodation concerns of elderly and disabled individuals is at stake. Both the federal Fair Housing Act and the federal Americans with Disabilities Act prohibit discriminatory code provisions on their face, and prohibit discriminatory impacts on the elderly and/or disabled, even if the code's language is neutral. Imposing an arbitrary cap on the size of the facility, the number of residents that can be housed in it, can have very significant impacts on elderly and disabled individuals. As I noted at oral argument, I firmly believe that it is these considerations that have come into play in the city councils restraint in not setting specific caps and unnecessary limitations on facilities intended to take care of the needs of the elderly and disabled. It does not appear that any of the code provisions which actually currently exist in the code are discriminatory on their face. From the City Council's position, this is likely intentionally so. Considerable latitude must be given in designing and proposing such facilities so as to not unduly restrict the opportunities, locations, and nature of care and housing to be provided to the elderly and disabled.

Moreover, if the code were to be interpreted or redefined as opponents propose, this would have a very significant discriminatory impact on these protected classes of individuals, namely the elderly and disabled. The future residents of this facility and the aging and disabled communities at large have just as much right to live in a residential setting, as any single family in this neighborhood. The arguments opponents make would apply across the board to any single residential zone, as all of them allow group living facilities as a conditional use without the added conditions and restrictions which opponents proposed. e board to any single residential zone, as all of them allow group living facilities as a conditional use without the added conditions and restrictions which opponents proposed. Interpretation or application of the code as appellants propose would force those aging individuals or those with special needs to restrict their housing choices to largely commercially zoned settings. The impact regarding costs would directly reduce the number of individuals who could afford to choose, and live in this kind of facility. The letter from the applicant's realtor and in the various governmental and organizational studies provided at the hearing below relating to the aging and disabled populations, the economic crisis and its impact, and the ever increasing need for affordable solutions for housing of these individuals support the arguments regarding the adverse impacts on such classes of protected individuals.

In conclusion, again, the applicant respectfully requests that its conditional use application be approved, allowing development of this facility, as set forth and conditioned in city staff's report, and that the hearings officer's decision be upheld in this appeal.

Thank you for your attention to this matter.

Very truly yours, Thomas H. Cutler

RESPONSE TO INFORMATION SUBMITTED ON BEHALF OF BONNIE MCKNIGHT ON JANUARY 6, 2012.

LAND USE NUMBER:	LU 11-146609 CU AD
HO CASE:	4110029
SUBMITTED TO:	OFFICE OF CITY AUDITOR
	HEARING OFFICER GREGORY J. FRANK

Hearings officer Gregory J. Frank,

In response to the additional information submitted by Bonnie McKnight on January 6, 2012; I would like to clarify that this proposal is in compliance with all applicable zoning code standards for the base zone as well as the group living standards outlined in previous submissions by myself and the City of Portland Land Use Planner - Sylvia Cate; and outlined in Chapter 33.239 of title 33, planning and zoning. Contrary to what Bonny McKnight states, the proposal meets or exceeds all zoning standards as well as meets or better meets all of the approval criteria for this conditional use and as recommended for approval by the City of Portland.

NEIGHBORHOOD SCALE:

Relative approval criteria-

**B.)** Physical Compatibility

**B.2** - The proposal will be compatible with adjacent residential developments based on characteristics such as the site size, building scale and style, setbacks, and landscaping or;

B.3 - The proposal will mitigate differences in appearance or scale through such means as setbacks, screening, landscaping, and other design features.

As addressed in the approval criteria submitted previously with this application, the overall proposal will still be compatible with the adjacent residential developments in several aspects. The proposal will not increase the overall site size but will be confined to the existing site size of the existing single family residence (existing 31,200 square feet site area). The building will be designed to have a residential appearance with only 2 levels and with similar design, roof pitch, windows, finish material, etc. as the surrounding neighborhood homes as well as meet or exceed all the single dwelling zone requirements for the R7 base zone and the group living standards with respect to setbacks, building height, parking and parking location, landscaping, outdoor areas, lot coverage, and allowable intensity. The allowable intensity for group living facilities is outlined in Chapter 33.239.030 Development Standards in subsection A.3. which states: RF through R5 zones (single dwelling zones, R7 inclusive) is 1.5 residents per 1,000 square feet of site area. This standard defined in the zoning ordinance allows for a group living facility on the subject site to have a maximum density of 45 residents. This proposal is for 39 residents.

In addition to meeting this density standard the proposal further meets the approval criteria by mitigating its appearance through the design and layout of the proposal. Subsections B.2 and

B.3 are written in the conjunctive. In other words, even if the proposed conditional use project were deemed not compatible with adjacent residential developments due to the site size or the building scale or style, the project would still comply with the approval criteria through Thomas kept him a missionary who mitigation of such differences in appearance or scale. Because the site is longer than it is narrow the overall appearance from the street of building width and scale, will be congruent to many of the surrounding homes. Although the north and south sides of the building are larger than the surrounding homes, additional setback distance has been given to all the sides of the site rather than the minimum required. The north and south sides have substantially enhanced, voluntarily proposed 10' setbacks at majority of the building with areas that have been given up to 24' of setback distance to allow for additional landscape screening and to break up the large north and south side walls. The proposal is for a building that is 2levels and a parking area that would be less paving than a road provided to subdivide the lot into 3 home sites. The building foot print covers substantially less than 50% of the site area and provides extensive landscaping for appeal and screening. Again, in cooperation with city staff. The applicant has voluntarily reduced the lot coverage and scale in order to maximize compatibility and mitigate any differences of appearance or scale.

The building will have a substantial overall mass and for this reason the sides of the building have been broken up to create 2 to 3 building volumes by pushing portions of the building in, creating larger setback areas in order to mimic the surrounding home layouts. The plans and in particular the photos we submitted at the hearing demonstrate this point. The rear of the building has been setback over 39' from the property line and the front of the building is setback approximately 60'(covered entry) to 75'(main building) from the street property line. Again, these are far in excess of the setbacks otherwise required by the code. The parking area has more than the required parking lot and perimeter landscaping in order to screen and create a softer appearance. The entire perimeter of the site will also be screened with landscaping and large mature trees in order to mitigate for building size and allow for privacy to the site and the surrounding neighbors.

As a proposed condition by city staff, and with that the applicant's full agreement a minimum of 12' high arborvitaes will be planted to create an obscure continuous green fence for screening for the adjoining neighbors. Again, such vegetative screening far exceeds any applicable code requirements. Furthermore, additional landscaping will be provided in the larger setback areas to further break apart the overall building scale and appearance. The owner has cooperated with adjoining neighbors in the most recent proposal by shortening the building length to allow for a larger setback and more open space at the rear of the north neighbor.

The proposal meets and has been determined by staff to meet all relevant approval criteria for this Conditional Use and therefore should be approved as proposed.

### NATURE OF FACILITY:

The City of Portland definition of Group Living Structure can be found in chapter 33.190 as "A structure that contains sleeping areas and at least one set of cooking and sanitary facilities that is used as a residence for Group Living Uses." As the applicant's submitted plans and application materials demonstrate, the proposed building will have sleeping units and a common kitchen and dining area for the residents. This proposed facility will be licensed upon its completion by the State of Oregon Department of Human Services at the time of completion and approval of Facilities Planning and Safety's final inspection as a building with an occupancy classification of Group I-1. This occupancy type is described in the Oregon Structural Specialty Code under section 308.2 as "buildings, structures or parts thereof housing more than 16 persons, on a 24-hour basis, who because of age, mental disability or other reasons, live in a

supervised residential environment that provides personal care services." The section outlines the building types which fall under this category as: Residential board and care facilities, assisted living facilities, group homes, congregate care residences, etc. all of which fall under group living structures in the City of Portland Zoning Ordinance.

The proposed building will be classified as a licensed assisted living facility capable of providing safe housing and administration of care for elderly disabled citizens on a 24-Hr. basis. As mentioned in the letter submitted by the owner and the state licensing it will be monitored by DHS periodically to provide oversight and ensure that all the facility is functioning to the standards set forth by the Department of Human Services and applicable licensing requirements. Further, in order for this facility to be approved and built, not only does the proposal need to meet all the Oregon Structure Specialty Code requirements outlined for the I-1 occupancy use which include standards for fire safety, life safety, structure, and ADA standards it also has to meet Facilities Planning and Safety building requirements as outlined in OAR 411-54. These code standards and requirements ensure the building is adequately designed and built to house this specific use. As noted in the applicant's previously submitted narratives, staff will consist of licensed professionals. As a matter of legal requirement, the care providers will be registered nurses, certified nurse assistants, med-aids, and licensed care givers who are trained and licensed to provide care for these residents. The number of staff required is determined by the number of residents as set forth by DHS. The level of staff needed and their shifts for this proposal is outlined in the project narrative and traffic study submitted previously.

Because the proposed use of providing care for 16 or more residents on a 24-Hr. basis falls under group living structures as outlined in the City of Portland Zoning Ordinance and group living is allowed in an R-7 zone through a Conditional Use Approval and the proposal meets all applicable requirements for the base zone, group living, and approval criteria; the proposal should be approved as outlined in the staff report.



# City of Portland, Oregon

**Bureau of Development Services** 

Land Use Services

Dan Saltzman, Commissioner Paul L. Scarlett, Director Phone: (503) 823-7300 Fax: (503) 823-5630 TTY: (503) 823-6868 www.portlandoregon.gov/bds

### FROM CONCEPT TO CONSTRUCTION

## MEMO

Date: December 29, 2011

To: From: Gregory Frank, Hearings Officer Sylvia Cate, Land Use Services Phone number 503 823 7771

Re:

LU 11-146609 CU AD: Asa Group Living Proposal @ SE 174<sup>th</sup> Avenue

A public hearing for the above referenced Land Use application was held on December 19, 2011 at 1:30 PM. At the end of the hearing, there was a request to hold the record open for all parties to submit new evidence until January 6, 2012.

At the hearing there was both oral and written testimony from opponents arguing that the proposal is essentially an 'SRO' use and that use is prohibited in the Single Dwelling zones. This memo serves to provide additional clarification regarding the Zoning Code definitions and use categories as they relate to this proposal.

The Staff Report, under the Analysis Section, notes that there are several pertinent definitions and or Use Categories that are helpful in evaluating the proposal and determining the Use Category. However, after reviewing the written testimony, staff offers the following comments to further clarify the Group Living Use and the related code requirements for this use in the Single Dwelling Zones. As noted in the Analysis Section, while there is no definition of Group Living per se in Chapter 33.910, *Definitions*, there is a description of Group Living as a separate use within the *Residential Use Categories*, in Chapter 33.920, which states the following:

#### **Residential Use Categories**

#### 33.920.100 Group Living

- A. Characteristics. Group Living is characterized by the residential occupancy of a structure by a group of people who do not meet the definition of Household Living. The size of the group will be larger than the average size of a household. Tenancy is arranged on a month-to-month basis, or for a longer period. Uses where tenancy may be arranged for a shorter period are not considered residential. They are considered to be a form of transient lodging (see the Retail Sales And Service and Community Service categories). Generally, Group Living structures have a common eating area for residents. The residents may or may not receive any combination of care, training, or treatment, as long as they also reside at the site. Group Living may include the State definition of residential facility (see Chapter 33.910, Definitions).
- B. Accessory Uses. Accessory uses commonly found are recreational facilities, parking of autos for the occupants and staff, and parking of vehicles for the facility.

C. Examples. Examples include dormitories; communes; fraternities and sororities; monasteries and convents; nursing and convalescent homes; some group homes for the physically disabled, mentally retarded, or emotionally disturbed; some residential programs for drug and alcohol treatment; and alternative or post incarceration facilities.

### D. Exceptions.

- 1. Lodging where tenancy may be arranged for periods less than one month is considered a hotel or motel use and is classified in the Retail Sales And Service category. However, in certain situations, lodging where tenancy may be arranged for periods less than one month may be classified as a Community Service use such as short term housing or mass shelters.
- 2. Lodging where the residents meet the definition of Household, and where tenancy is arranged on a month-to-month basis, or for a longer period is classified as Household Living.
- 3. Facilities for people who are under judicial detainment and are under the supervision of sworn officers are included in the Detention Facilities category.

There is also additional discussion of Group Living as a use category under the Use Category of *Household Living*, on page 4 of Chapter 33.920, which states:

#### 33.920.110 Household Living

- A. Characteristics. Household Living is characterized by the residential occupancy of a dwelling unit by a household. Tenancy is arranged on a month-to-month basis, or for a longer period. Uses where tenancy may be arranged for a shorter period are not considered residential. They are considered to be a form of transient lodging (see the Retail Sales And Service and Community Service categories). Apartment complexes that have accessory services such as food service, dining rooms, and housekeeping are included as Household Living. Single Room Occupancy housing (SROs), that do not have totally self contained dwelling units are also included if at least two thirds of the units are rented on a monthly basis. SROs may have a common food preparation area, but meals are prepared individually by the residents. In addition, residential homes as defined by the State of Oregon are included in the Household Living category (see Chapter 33.910, Definitions).
- **B.** Accessory Uses. Accessory uses commonly found are recreational activities, raising of pets, hobbies, and parking of the occupants' vehicles. Home occupations, accessory dwelling units, and bed and breakfast facilities are accessory uses that are subject to additional regulations.
- **C. Examples.** Uses include living in houses, duplexes, apartments, condominiums, retirement center apartments, manufactured housing, houseboats, and other structures with self-contained dwelling units. Examples also include living in SROs if the provisions are met regarding length of stay and separate meal preparation.

#### D. Exceptions.

1. Lodging in a dwelling unit or SRO where less than two thirds of the units are rented on a monthly basis is considered a hotel or motel use and is classified in the Retail Sales And Service category.

- 2. SROs that contain programs which include common dining are classified as Group Living.
- 3. Guest houses that contain kitchen facilities are prohibited as accessory to Household Living uses.
- 4. In certain situations, lodging where tenancy may be arranged for periods less than one month may be classified as a Community Service use, such as short term housing or mass shelter.

Both of these code sections include a discussion regarding SRO's and Group Living uses and their distinguishing characteristics. Section 33.920.030.A states that "Uses are assigned to the category whose description most closely describes the nature of the primary use."

The proposed facility most closely matches the description of Group Living and not SRO because the residents of the proposed facility will not have any independent kitchen facilities available to them nor will they be engaged in separate meal preparations. In addition, the anticipated tenancy of these residents would be on a month to month basis, or longer. Additionally, the proposed facility does not match the language at 33.920.110.D.1, because all of the proposed units will be available for monthly, or longer, tenancy. Each of the residents will have health situations in which they need assistance in normal daily activities, such as personal hygiene, eating, dressing, etc. Individuals requiring a higher level of oversight, such as memory care or skilled nursing supervision would not be eligible for residency in the proposed adult care facility, primarily because the applicant states in their application that they will not accept such residents, nor are the caretaking family members and employees licensed to provide additional levels of care.

Therefore, staff concludes that the proposal is for a 39 unit Group Living facility. This use is not allowed in any of the Single Dwelling zones without Conditional Use approval.



PUBLIC HEALTH DIVISION Facilities Planning and Safety

John A. Kitzhaber, MD, Governor

March 1, 2012



880 Winter Street, NE Salem, OR 97301-2435 P: 503.373.7201 F: 503.373.0313 www.healthoregon.org/fps

Ben Howell Building Official, City of Portland 1900 SW 4<sup>th</sup> Avenue, Suite 5000 Portland, Oregon 97201

RE:LICENSING AGENCY DOCUMENTATION PER OSSC SR 101.3FACILITY:WHITEWOOD RCFPROJECT:TWO LEVEL RCF LICENSED FOR 39 BEDSADDRESS:12027 SE 174<sup>TH</sup> AVENUE, PORTLAND, OREGON 97233PR#:11-139

Dear Mr. Howell,

The licensing entity for Residential Care Facilities in the State of Oregon, Seniors and People with Disabilities, has acknowledged the applicant, Rodelo Asa, and have granted an approval to provide a 39 bed residential care facility. I have attached the approval letter from SPD dated May 13, 2009.

Mr. Asa has provided a letter to Facilities Planning and Safety assuring they will have no more than 39 residents and evacuation drill times will be performed within 13 minutes. Please see the attached letter from Rodelo Asa dated March 1, 2012.

With this information, Facilities Planning and Safety is recommending the Occupancy Class be "SR-1" per the 2010 Oregon Structural Specialty Code.

Respectfully,

Marcy E Renfrow Health Facilities Consultant FACILITIES PLANNING AND SAFETY

Attachments (2)

 cc: Edward Radulescu, EPR DESIGN, INC.
Chris Warden, EMPIRE BUILDING COMPANY Ted Megert, Oregon State Fire Marshal Jan Karlen, SENIORS & PEOPLE WITH DISABILITIES