From: Whelan, Melinda
To: Garciamay, Ruby; Lee, Amanda
Subject: FW: Declaration of Roberta Fesler and Exhibit Thereto in Opposition to Moores' Application for Reasonable Accommodation - additional public comments
Date: Tuesday, July 30, 2019 7:39:15 AM
Attachments: Scanned Documents.pdf

From: ROBERTA FESLER <bobbief100@me.com>
Sent: Monday, July 29, 2019 10:34 PM
To: Whelan, Melinda <MWhelan@newportbeachca.gov>
Subject: Declaration of Roberta Fesler and Exhibit Thereto in Opposition to Moores' Application for Reasonable Accommodation

Ms. Whelan:

Please find attached a Declaration and Exhibit from me, in opposition to the Moores' application for reasonable accommodation. I request that you forward this attachment to the Hearing Officer and arrange to have it included in the official record of the upcoming hearing.

Thank you.

Roberta Fesler

DECLARATION OF ROBERTA FESLER IN OPPOSITION TO THE MOORE'S APPLICATION FOR A REASONABLE ACCOMMODATION

Submitted July 29, 2019

DECLARATION OF ROBERTA FESLER

I, Roberta Fesler, declare:

1. I have firsthand knowledge of the facts stated herein, and if called as a witness, I could and would competently testify thereto under oath.

2. Since 1995, along with my husband, Don Fesler, I have owned the home at 105 Via Undine, Newport Beach, CA, which is next door to the home at 101 Via Undine, Newport Beach, CA, that is the subject of this hearing.

3. In 1974, I was admitted to practice law in the State of California. I am now retired and an inactive member of the Bar.

My entire 36-year career was spent as an attorney for local government agencies. I worked for the Los Angeles Office of the County Counsel for nearly 34 years, where I rose to become the third highest manager in the office. Before my retirement, I served for nearly 2 years as the General Counsel of the Los Angeles Unified School District.

During my career, among other things, I oversaw the analysis and provision of advice to my clients on applications for reasonable accommodations. For the facts and reasons discussed herein, it is my professional opinion that there are not sufficient facts in the record of this proceeding to support the findings required to grant the reasonable accommodation which has been requested, and the Application fails to meet the tests required to justify exempting the Applicants from compliance with the Municipal Code of the City of Newport Beach.

4. In the summer of 2017, with the consent of his mother, Leora Tilden (the owner of the home located at 101 Via Undine, Newport Beach), Rex Moore, his wife, Rhonda, and their adult children moved into that home.

5. On October 11, 2017, my husband and I went to the Moores' home to discuss with them their plans for the several dozen 60+-inch plants that had been delivered to their home that day.

6. We met with Mr. Moore, who advised us that they intended to create a hedge around the entire perimeter of the front setback area, by planting all of the 60+-inch plants about 4 inches apart, so they could eventually grow together to form a hedge. We expressed our concerns about this plan, and we asked Mr. Moore whether the Lido Isle Community Association ("LICA") had approved it, as we had received no notice of the project. He advised us that he had already obtained approval from LICA. He lied.

7. Coincidentally, the monthly meeting of LICA's Board of Directors was that night, so I advised the Association's staff that we would be attending the meeting to address the Board about our concerns and the failure of LICA to notify us before the Moores' project was approved.

8. When we arrived at the Board meeting a few hours later, before we could address the Board, we were advised that, contrary to what Mr. Moore had told us, LICA had never approved any landscaping plan for them (as required by LICA's Covenants, Conditions, and

Restrictions ("CC&Rs")). The staff also stated that, after we brought the matter to their attention, they hand-delivered a letter to the Moores, advising them that they could not proceed with any changes unless and until they applied for and received approval of their plans from LICA's Architectural Committee. They also provided them with the application packet they should use to seek that approval. Finally, the staff advised us and the Board that the Moores assured them that they would follow the rules and complete the process before making any changes to the existing landscaping. These promises were also lies.

9. Early the following morning, October 12, 2017, the Moores deployed a crew of at least 6 or 8 landscape workers, to totally destroy the existing landscaping and quickly plant the several dozen 60+-inch plants, and make the rest of their changes to the front setback area, before we or LICA could take any action to prevent them. When we objected and told them we knew of the letter that LICA hand-delivered the prior afternoon, Mrs. Moore responded that the letter wasn't addressed to them, so they didn't have to abide by it. (Presumably, the letter was addressed to Mrs. Tilden, as the owner of the property. Under LICA's rules, only property owners are entitled to apply for approval of landscaping plans.)

10. A few days later, after we had contacted Mrs. Tilden to express our dismay at these events, Mr. Moore proposed that we meet, to see if we could reach a mutually acceptable arrangement. We met on October 20, 2017.

During the meeting, Mr. Moore explained that they wanted a hedge along the strada, because the bedroom that his daughter would be using whenever she was home from college had a sliding door that opened onto the front setback area along the strada. We discussed a number of alternatives we suggested to create privacy, many of which we had explored and/or used ourselves. Among others, we mentioned window tinting that blocks anyone from looking through a window into the inside, window blinds, shutters, shades, and sliding doors with enhanced locks and/or built-in blinds. We even invited Mr. Moore to come into our house to see some of these suggestions in place. He declined.

11. The side setbacks on Lido Isle are only 3 feet, so the exterior of our house is only 6 feet away from the exterior of the house where the Moores live. Because our trash cans were on that side of the house, I was in that side setback area at least once and often several times each day. As a consequence, I was able to observe if lights were on, whether shades were open or closed, if there were sounds (music, TV, etc.) or other signs of life in the rooms along that side of their house during those trips.

During the 18 months we lived next to the Moores, the bedroom they now claim is used by the son for whom they are seeking a reasonable accommodation ("son") appeared to be unoccupied the majority of the time. The only time I ever noticed any signs of life in that room was when the Moores' other children were home on breaks from college.

12. Contrary to their current claim that their son uses the room that faces onto the strada, for the entire 18 months we lived next door to the Moores, their son occupied the bedroom on the opposite side of the house, which faces directly on Via Undine, adjacent to our front porch and front door. That bedroom has corner windows, facing the street and the side setback area that runs between our property and their house.

Virtually every time I went into or out of the front of my house, the window in that bedroom that faced the street, and often the one facing the side setback, were wide open for viewing into and out of the bedroom. The shutters for those windows, which had been closed almost 100% of the time before the Moores moved in, were now wide open nearly 100% of the time. I became aware of this change because the TV in that bedroom played nearly constantly, all day and well into the night. Each time we walked our dogs before bed, for example, the TV was playing and the shutters were wide open.

13. It was my custom and practice to drink a cup or two of coffee each morning as I read the morning newspapers. I would do this while sitting in my family room, which has a full wall of windows and a French door overlooking and opening onto the strada that runs along the front setback area. I opened our blinds in the mornings, to enjoy the sunlight and the view. During the 18-month period we lived next door to the Moores, I regularly watched through our windows as the Moores' son jogged down the strada, past our house. I didn't keep an actual tally of how often he jogged by, but based on my recollection, I would estimate that I saw him at least 4 times a week, often more than once during the same jog.

I also saw the Moores' son skateboarding around Lido on several occasions. Again, I had no idea the number of times I saw him would become relevant to any official proceeding, so I didn't keep any official record of how frequently that occurred. My estimate is I saw him skateboarding at least 6 times, possibly more often.

Finally, I frequently saw the Moores' son driving his black truck, either leaving home or arriving back from someplace he'd gone.

On none of these instances – whether jogging, skateboarding, or driving his truck – did the Moores' son appear to be apprehensive or otherwise anxious or concerned about being out among the general public. In fact, his demeanor was no different than that of any of the other dozens of people who walked, biked, skate boarded, or jogged around Lido Isle every day.

And, he didn't use the shutters that were available to shield himself from seeing and being seen by us and the many others who made multiple trips past his bedroom every day. In fact, prior to the Moores' moving in and continuing until we moved out in February of this year, construction was going on to build a home directly across the street from our house. For a good portion of that time, there were large pieces of equipment in use, and many construction workers on the scene every weekday from 7 a.m to 4 p.m. or later. Throughout that entire time, the Moores' son kept his shutters open, exposing him to the sights and noise of that construction project.

As my husband has noted, the absence of any useful medical information in the record of this proceeding makes it impossible to know the medical basis for the alleged need for the seclusion of a 78-inch high hedge. But, I can confidently say that, on practically a daily basis for at least the 18 months that I lived next door to them, the Moores' son voluntarily subjected himself to being out and about among and otherwise exposed to the ". . . passing pedestrians, gardners [sic], construction workers, dogs, noise and lights" that Dr. Rimal Bera, MD, describes as "triggers" for his symptoms. I would expect someone suffering from a condition serious enough to require a hedge 3 feet higher than that allowed by the Municipal Code to

avoid regular, voluntary exposure to things that aggravate that condition. I saw no evidence whatsoever that the Moores' son made any such attempt.

14. The house in which the Moores live has a shower on the side adjacent to the side setback next to our house. The shower has a door that opens into the setback, and apparently also can be accessed from inside the house. The exterior shower door is across from where our trash cans were kept, which, as noted above, allowed me to view it every day when I took out our trash.

Prior to the Moores moving in, I never noticed anything that suggested that shower was being used. However, after the moved in, there was always water on the ground, just outside the exterior shower door. And, the latch seemed to be broken, because sometimes the exterior shower door would not be tightly closed. I mentioned this to my husband and asked him to contact Mr. Moore about the problem, to avoid any concerns that might be created by my daily trips to the trash cans. My husband emailed Mr. Moore, and shortly after that, the Moores used various things to hold the exterior shower door closed (e.g., a garden hose, wound on its holder, a screen made of bamboo or something similar, boogie boards or other water sports equipment, etc.).

Because the Moores' son was obviously using the bedroom adjacent to that bathroom, and because there were no indications that anyone other than the Moores (whose bedroom and bathroom are on the second floor of the home) and their son were living at the house, except during sporadic times when the other children were on college breaks, I concluded that the Moores' son was the individual using that shower during the 18 months that I lived next door to them. As I stated above, that shower was and is directly accessible to the outside of their house, through a shower door that is kept shut not by a lock or any other form of true security, but by a garden hose or other things laying around the house.

15. Several years before the Moores moved in, my husband and I became close friends with Mr. Moore's mother, Leora Tilden, and her husband, Dr. Tom Tilden.

The Tildens' primary home was on a ranch in Idaho, but as Mrs. Tilden explained to me several years ago, she decided they should spend the winters at their Newport Beach home. With Dr. Tilden getting older, she was concerned about him getting hurt in the icy, snowy conditions at their ranch during the winter. So, spending 5 or 6 months in Newport Beach became the solution to that problem.

While they were living next door to us, we frequently socialized with them. As a result, I was inside their home many times, and Mrs. Tilden took me on a tour at least twice – once with just me, and a second time when our daughter and her family were included in the tour and visit. During those visits and tours, I saw and even sat in the fully enclosed interior patio of the home. It is a large patio, which is along the side of the house bordering Via Lido Soud. It is fully enclosed from public view and opens into the main living area of the home. It has a nice fountain which makes a pleasant, relaxing sound when it's going, as well as a barbeque. The Tildens spent a great deal of their time in that patio when they stayed at the house.

This enclosed patio is open to the sky, but has no areas open to the public, unless the Moores were to open the lockable entry door that opens onto Via Lido Soud. It could provide their son access to the outside without exposing him to the "triggers" that are Dr. Bera's concerns. In fact, the enclosed patio provides better protection from those "triggers," because it is enclosed with solid stucco walls instead of leaves, providing total privacy from seeing and being seen by the outside world. It is also fully enclosed, as opposed to the front setback area, which, in order to provide a clear sight path for motorists and pedestrians, will be required to have the hedge trimmed to no more than 36" in a 5' by 5' triangle at the street end. That triangular sight path will allow people to look into the front setback area, as well as exposing the Moores' son to the sights and sounds of the world outside.

16. On January 30 of this year, I contacted the City's Code Enforcement Division to request that the Moores' hedge be inspected, as it was much higher than the 42" permitted under the City's Municipal Code. In fact, the main portion of that hedge has never been trimmed to anything close to 42" since it was planted in a hurry on October 12, 2017. The area around the triangular sight path has been kept shorter than the rest of the hedge, but it has also usually exceeded 42".

On February 20, 2019, I followed up by emailing the Code Enforcement Officer assigned to my request. He advised me by return email that he had inspected the hedge and determined that it did, indeed, violate the City's limit of 42". He further advised me that he intended to issue a Notice of Violation, which would be mailed within the next few days. In fact, that Notice of Violation is dated February 25, 2019.

Because the hedge had not been trimmed or modified in any way (other than growing a little higher each day), I emailed the Code Enforcement Officer again on March 13, 2019, inquiring about the status of the enforcement action. He notified me that the Moores had responded to the Notice of Violation by applying for a reasonable accommodation. He was unable to provide me any information about that process or how long it might take, so he promised to send me the name of the assigned planner, as soon as the assignment had been made. Eventually, he gave me contact information for Melinda Whelan.

During the first week of May, I unsuccessfully attempted to contact Ms. Whelan. With the Code Enforcement Officer's assistance, Ms. Whelan and I finally connected by telephone, during which time she briefly outlined the procedure the City follows to process applications for reasonable accommodations. During our conversation, I advised Ms. Whelan that we intended to oppose the Moores' application for a reasonable accommodation, and I also requested a copy of <u>all</u> written materials related to the request. She told me they were not yet compiled, but she assured me we would be receiving a mailed notice of the hearing and that I could have a copy of the materials when they were compiled. She stated that she could not provide any submitted medical records, because they would be confidential under HIPAA.

17. On July, 18, 2019, I inadvertently discovered that this hearing had been calendared and notice of it posted on the subject property. So, I emailed Ms. Whelan and again requested all the documents upon which the application was being considered. Prior to sending my email, I did extensive legal research and confirmed what I had suspected – that, in this instance, the City of Newport Beach is neither a "covered entity" nor a "business associate" as those terms

are defined in HIPAA. As a result, nothing in that body of law restricts the City from providing access to medical records upon which an application for reasonable accommodation is made.

I also researched the due process rights that attach to participants in a quasi-judicial proceeding such as this hearing. I again confirmed what I remembered from my days of practicing local government law, and advised Ms. Whelan that the City was required to provide access to all evidence upon which the decision of whether to grant the Moores' requested reasonable accommodation will be made. I copied the City Attorney on this email.

Ms. Whelan responded by saying the staff report was not yet completed, but she would send it along in a few days, when it was finalized. As for my records request, she again stated her view that any medical records were protected by HIPAA and required to be kept confidential, so she refused to provide those to me. My response to her was to urge her to consult with the City Attorney's Office, so the process followed by staff would fulfill the City's obligations under federal and state constitutional and statutory provisions.

To date, I have only received the Staff Report and a heavily redacted copy of a one-page letter from Dr. Bera. Upon my inquiry, Ms. Whelan has advised that those are the only materials that have been submitted to the Hearing Officer for consideration. I understand, however, that writings the City receives from members of the public such as my husband and myself will be available on the City's website and will also be given to the Hearing Officer in advance of the hearing.

18. Attached hereto as an exhibit is a summary of the reasons, arguments, and laws that require denial of the Application for Reasonable Accommodation filed by the Moores.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of July, 2019, in Long Beach, California.

ROBERTA FESLER

EXHIBIT TO DECLARATION OF ROBERTA FESLER IN OPPOSITION TO THE MOORE'S APPLICATION FOR A REASONABLE ACCOMMODATION

Submitted July 29, 2019

ARGUMENTS IN OPPOSITION TO THE GRANTING OF A REASONABLE ACCOMMODATION AS REQUESTED FOR PROPERTY LOCATED AT 101 VIA UNDINE, NEWPORT BEACH, CA (NO. RA2019-050

Introduction

Rhonda and Rex Moore filed an Application for Reasonable Accommodation, pursuant to City of Newport Beach Municipal Code ("NBMC") section 20.52.70. Through abuse and misuse of the right created by the City Council to assist residents *genuinely* in need of relief from one or more of the City's laws or rules, the Moores are attempting to avoid complying with a Notice of Violation ("NOV") issued on February 25, 2019. That NOV ordered them to trim a hedge in their front setback yard.

Contrary to representations made in the Staff Report prepared and submitted in connection with this matter, for its nearly 2-year existence, and continuing until today, the hedge has never been in compliance with the 42-inch maximum height established by NBMC section 20.30.40 A.1. From the day it was planted, it has been at least 60 inches high.[1] It is even higher than 60 inches today.

The Moores have steadfastly clung to the position that they aren't required to comply with any laws, rules, or regulations that stand in the way of them doing whatever they please. When the City finally issued the NOV and they saw no other way out, they decided to find any loophole they could use to continue to do as they pleased. They hit upon seeking a "reasonable accommodation," claiming their adult son has a medical need for an outdoor area enclosed by a hedge higher than what the NBMC permits.

Adding insult to injury, the Moores don't just seek to be allowed to maintain their hedge at its current height. Instead, they decided to "go for the gusto," as the saying goes, claiming the City must permit the hedge to grow another 18 inches above its current illegal height, to a whopping 78 inches – or nearly double the height permitted by the NBMC.

As discussed below, there are many reasons why the Application should be denied and the Moores be required to comply with the same Property Development Standards as all the other residents of the City of Newport Beach.

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[1] In early 2018, the City Traffic Engineer determined that the safety of motorists and pedestrians required the creation of a "clear sight path" by trimming to no more than 42 inches in height a 5 foot by 5 foot triangular area at the street end of the hedge. The Moores did trim that area, but even then, it has consistently exceeded and even today exceeds the 42-inch maximum authorized by the City. (According to the Staff Report, the City Traffic Engineer has now determined that triangular area needs to be maintained at no more than 36 inches to protect against vehicle-pedestrian accidents.)

I.
There is Insufficient Evidence to Support the Findings Required to Approve This Request for Reasonable Accommodation

NBMC section 20.52.070 D.2.a. sets out the findings that are **required** to support an approval of an application for reasonable accommodation. There is insufficient evidence in the record to support the required findings.

The only evidence in the record offered in support of the allegation that the Moores' son is an "individual ... with a disability protected under the Fair Housing Laws," the first required finding, is a one-page, heavily redacted letter from a Dr. Rimal Bera, MD. Due to the redactions, the condition from which their son allegedly suffers cannot be determined, so there is absolutely no way to conclude that it is a condition that entitles him to protection under the Fair Housing Laws. Dr. Bera's conclusory statement in the last sentence of the letter does not constitute evidence. It is nothing other than an unsubstantiated statement for which he has provided no medical support.

The second required finding, that "[t]he requested accommodation is necessary to provide [that] individual an equal opportunity to use and enjoy a dwelling" (emphasis added) is also wholly unsupported by any evidence in the record. Dr. Bera's letter, written more than 3 months after the Moores filed the application, does nothing more than claim a need for the same 78-inch height limit requested in their application. To suggest that it is suspicious that he just happened to conclude that the hedge height needed to be precisely the height they had requested 3 months earlier would be a gross understatement.

Beyond the suspicious nature of his "finding," he offers absolutely nothing to support this conclusion. Why is 42 inches insufficient? What makes 78 inches the magic height? Why is this particular piece of the property the one and only place that satisfies his patient's alleged medical need? Was he aware that the 5 foot by 5 foot triangular area required to be maintained at a much reduced height, for the safety and protection of the community, will completely negate any privacy or protection which he apparently believes will be created by a 78-inch high hedge? Was he told about the fully enclosed outdoor patio that better provides both privacy and protection from noise and lights? His letter fails to offer any support for this required finding.

On the other side of the ledger is firsthand, eye-witness testimony providing actual facts demonstrating that Dr. Bera's claims about what triggers his patient's unknown symptoms are specious. The Declarations of Don Fesler and Roberta Fesler clearly establish that the Moores' son routinely and voluntarily engaged in activities which exposed him to the very conditions from which Dr. Bera claims he needs protection.

Furthermore, those Declarations also establish that, up to at least the day the NOV was issued to the Moores, their son used a different bedroom and bathroom from the one Dr. Bera was told he used. There is no indication that Dr. Bera was ever made aware of the existence of a different bedroom available to his patient which would not require an exemption from a local law limiting the height of hedges. Nor is there anything to suggest that Dr. Bera was told about how his patient always kept his shutters open, so he could see all the activity outside of his bedroom, day and night, and anyone going by could likewise see him.

NBMC 20.52.70 D.3. authorizes the Hearing Officer to consider the "necessity" of the requested reasonable accommodation. As explained above, not only is a 78-inch hedge not "necessary," it is not even desirable.

First of all, as the facts set out in the referenced Declarations make clear, the Moores' son has seen no need to be sheltered from ". . .passing pedestrians, gardners [sic], construction workers, dogs, noise and lights." In fact, on a daily basis, he engages in activities that expose him to all of these things.

Furthermore, as the Declarations also establish, if anyone believes the Moores' son actually requires outdoor space that can be secluded from these "triggers," the existing fully enclosed outdoor patio provides such an area. Indeed, it is <u>better suited</u> to provide the kind of protections Dr. Bera claims in his letter that his client needs.

II.
The City Has Failed to Comply With the Due Process Requirements of Federal and State Law, Prohibiting Any Approval of The Subject Application

As a matter of law, this hearing is quasi-judicial in nature. As such, the City is required to conduct it in compliance with the requirements of federal and state due process requirements, as well as the fair hearing requirements established in Code of Civil Procedure section 1094.5. Among other things, constitutional due process and California statutory law require that all materials relied upon in support of a decision to approve such an application be provided to anyone wishing to object to that approval.

Notwithstanding my repeated requests to the City, I have not received materials relied upon by the staff in preparing and issuing its Hearing Officer Staff Report. That Report references "medical records" which have been reviewed, but they have been withheld under an incorrect determination that the City is obligated to maintain their confidentiality, which is based on an invalid interpretation of HIPAA.

Furthermore, I have even been denied the right to see the application submitted by the Moores. Without the opportunity to review the Moores' allegations, I am at a significant disadvantage in developing facts and arguments to counter those allegations. As the referenced Declarations show, the credibility of the Moores is subject to serious

question, so the inability to review their representations results in a great likelihood that more of their misleading, inaccurate, or downright false statements will go unchallenged.

Finally, I have no way of knowing what other materials have not been provided to me, because the City has refused to even identify what records other than the category of "medical records" it is withholding. So, there is no way to determine whether the evidence and arguments contained in the referenced Declarations address all of the information upon which the Staff Report is based.

I have been told by City staff that the only document (other than the Staff Report) which is being provided to the Hearing Officer is the one-page, heavily redacted letter from Dr. Bera. Assuming this statement is accurate, it is obvious the record is insufficient to support a decision approving the subject application. If this statement is no correct, that fact is further failure on the City's part to comply with the due process required by federal and state law.

The due process safeguards provided in Art. 1, section 7 of the California Constitution are arguably even broader than those required by the US Constitution. California due process includes a liberty interest in "freedom from arbitrary adjudicative procedures." People v. Ramirez (1979) 25 Cal.3d260, 268-69. In that case, at pp. 268-69, the California Supreme Court articulated the California due process factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional safeguards; (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible government official; and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail."

In the matter at hand, granting the requested reasonable accommodation will create a severe negative impact on the use, enjoyment, and value of my property, by creating a very significant impediment to my view and the availability of light and air, and by positioning my property directly next to what will be the biggest eyesore on all of Lido Isle. Without access to all materials upon which an approval would be based, my ability to effectively respond to and/or counter the information contained in those materials is seriously compromised. Under California law, an individual facing possible deprivation of a recognized interest has the right to defend himself or herself. I cannot achieve that right without the opportunity to review all materials upon which an approval of the application might be determined.

Respectfully submitted,

Roberta Fesler