RESOLUTION NO. HO-2009-021

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITHOUT PREJUDICE REQUEST NO. 5 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;

2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;

3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;

4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and

5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and

purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; and

WHEREAS, pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 5, that the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit, not all of the five findings required can be made pursuant to Section 20.98.025 (B) of the NBMC, as follows:

1. Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.

Facts in support of finding. The applicant submitted a statement signed by the facility manager that every resident of the facility is in recovery from alcohol or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.

While the dwelling unit at the subject facility located at 3309 Clay Street is not currently occupied, the applicant wishes to provide housing for residents in recovery upon resolution of code compliance issues. The dwelling units at the subject facility located at 492 and 492 ½ Orange Avenue are occupied. With all three dwelling units occupied, the applicant proposes to house up to 50 residents at the facility. Such land uses would be classified as "Residential Care Facilities, General" and pursuant to Ordinance No. 2008.005, are permitted in MFR (Multifamily Residential) Districts only, subject to approval of a use permit. Under Ordinance No. 2008-005, such nonconforming uses had the option to apply for a use permit within 90 days following the adoption of the ordinance, or be subject to abatement. As the abatement period established by NBMC Section 20.62.090(A)(2)(a) has passed and the facility chose not to apply for a use permit at this location, this facility is now subject to abatement by the City.

Facts in support of finding - ***As to current residents:*** There are currently no residents in the 3309 Clay Street building, but the duplex units on Orange Avenue are occupied. The

Hearing Officer finds that the facility at 492 and 492 ½ Orange Avenue currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility.

Facts do not support the finding - ***As to prospective residents:*** The Hearing Officer has determined this finding cannot be made at the population level requested by the applicant. The applicant seeks to house up to 50 disabled individuals in three dwelling units. It proposes 12 residents in one six- (or three) bedroom single-family home, 20 in an adjacent duplex with one 10- (or six) bedroom unit, and 18 in the 9-(or six) bedroom unit.[1] Prospective residents seeking a large sober living environment in Newport Beach have an ample supply from which to choose. Through implementation of the ordinance and this process, it is estimated approximately 233 sober living beds have been approved within the City, which could provide prospective residents of Pacific Shores with an equal opportunity to reside in this type of sober living environment. The applicant rejected a staff recommendation that the size of the facility be reduced from three dwelling units to one, with the population of that dwelling unit limited to no more than 12 resident clients, plus one on-site resident manager.

NBMC Section 20.98.025(C) allows the City to consider the following factors in determining whether a requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

The applicant's proposed population level of 50, with 20 residents in one dwelling, 18 in another, and 12 in a third, will likely lead to overcrowding, a condition that will not enhance the residents' quality of life. While living in a supportive environment with other recovering individuals has therapeutic benefits at certain population levels, living in a 50-person facility can also be detrimental to the recovery process of the residents. The purpose of community-based care is to allow residents to re-integrate into the community as their recovery progresses. An environment primarily comprised of others in recovery presents reduced opportunities to interact with non-disabled neighbors and re-learn the norms and standards of living as fully functioning members of society.

[1] Number of bedrooms reported by applicant. Plans filed with the City by the applicant show three rooms identified as bedrooms at 3309 Clay Street, and six bedrooms each in 492 and 492 ½ Orange Avenue. It has been assumed that rooms identified on plans as "sewing room," "office," "computer room," etc. are being used as bedrooms. Compliance with California Building Code requirements for bedrooms cannot be confirmed without inspection. Until this discrepancy is resolved, where the number of bedrooms is relevant to analysis, analysis is provided for the reported number of bedrooms, and the assumed number of bedrooms on the applicant's plans.

B. *Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

Denial of the requested accommodation could result in abatement proceedings commencing against the facility. After abatement, current and potential residents of this facility could be denied the opportunity to live in a large three-dwelling sober living facility located in a residential district zoned for R-2 use. However, a number of similar facilities are located in the City offering sober living in two dwelling units on a single parcel. Operators of those alternate facilities have informed the City that they are currently occupied at approximately 50 percent of capacity. Therefore, recovering individuals who are denied housing at the subject facility have access to alternate housing opportunities of a similar type at other existing facilities.

C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

In its September 24, 2008 application for reasonable accommodation the applicant declined to provide information regarding this factor. Therefore, the number of residents required to make the facility financially viable cannot be established.

D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

In its September 24, 2008 application for reasonable accommodation, the applicant declined to address this factor. The applicant stated that the requested accommodation was necessary for the present and future residents of the facility to enjoy the housing of his or her choice. The City has estimated that there are approximately 233 approved sober living beds in the City. There are many existing facilities that provide sober living environments that occupy more than one unit of a building, or are adjacent to other sober living facilities with a similar client/bedroom ratio, assuming all the bedrooms reported by the applicant prove to meet code requirements for bedrooms. If not, the applicant's proposed population would be substantially more densely populated than a typical 12-person facility found in other areas of the City such as the Balboa Peninsula and West Newport areas.

3. **Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as "undue financial or administrative burden" is defined in Fair Housing Laws and interpretive case law.**

Facts in support of finding - **As to current residents**: While the applicant did not report the average length of resident stay, other sober living facilities have reported that their resident stays range from 45 days to 180 days, with an average stay of 90 days. Assuming the applicant's facility has similar lengths of resident stays, the Hearing Officer has determined that allowing current residents to remain at the facility for the remainder of their stay will not impose an undue financial or administrative burden on the City.

Facts do not support the finding - **As to prospective residents:** At the applicant's proposed population level, this finding cannot be made. In most cases, allowing a facility to remain at its current location when it is necessary to provide disabled individuals with an equal opportunity to use and enjoy a dwelling would not impose an undue financial or administrative burden on the City. However, due to the 2007 illegal construction at 3309 Clay Street, the ongoing delays in obtaining applicant's compliance with Building Code requirements, complaints received from neighbors about the intensity of facility use, the applicant's violation of the 2007 moratorium at 492 Orange Avenue, and the applicant's history of obfuscation regarding the type of use occurring at the facility, substantial financial and administrative burdens have already been incurred with regard to this facility.[2] The Hearing Officer has determined that if the facility continues at the same intensity of use, negative secondary impacts on neighboring properties seem likely, and the City will have to expend additional resources to get the applicant to reduce those impacts.

4. Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City's zoning program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.

Facts in support of the finding – **As to current residents:** As the abatement period established by NBMC Section 20.62.090(A)(2)(a) has passed and the facility chose not to apply for a use permit at this location, this facility is now subject to abatement by the City. While the applicant did not report the average length of resident stay, other sober living facilities have reported that their resident stays range from 45 days to 180 days, with an average stay of 90 days. Assuming the applicant's facility has similar lengths of resident stays, the Hearing Officer has determined that allowing current residents to remain at the facility for the remainder of their intended stay will not result in a fundamental alternation in the nature of the City's zoning program.

Facts do not support the finding - **As to prospective residents:** At the applicant's proposed population level, the Hearing Officer has determined that this finding cannot be made.

[2] In 2007, applicant's representative Mark Manderson, Sr. informed a City Code Enforcement officer verbally and in writing, and an ADP complaint officer verbally, that Pacific Shores was renting rooms to tenants and was not a recovery facility. Code Enforcement resources were required to clarify whether the property was being used as an illegal boarding house, or as housing for disabled individuals. In addition, the applicant's May 2007 moratorium violation led the City to file a state court action against the applicant, which incurred additional financial burden.

Ordinance No. 2008-05 places regulations on all groups not living in either a single housekeeping unit or a residential care facility classified as "Residential Care Facilities, Small Licensed." The basic purpose of these regulations is to ensure that the fundamental purposes of the NBMC can be achieved, and to mitigate adverse secondary impacts residential care facilities may have on the surrounding neighborhood.

The applicant has applied for reasonable accommodation requesting that the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit. Section 20.10.20 of the NBMC, "Land Use Regulations," prohibits large residential care facilities within the R-2 District and permits these facilities in the MFR District subject to approval of a use permit. Ordinance No. 2008-05 was adopted to regulate large residential care facilities and states that such nonconforming facilities are subject to abatement unless the owner or occupant of the facility has timely applied for a use permit or reasonable accommodation pursuant to Chapter 20.91.A or Chapter 20.98 of the NBMC.

Purpose and intent of establishing two-family and multi-family residential zoning districts

The basic purposes NBMC Chapter 20.10 seeks to achieve are set forth in NMBC Section 20.10.010. Those purposes include locating residential development in areas which are consistent with the General Plan and with standards of public health and safety established by the Municipal Code, ensuring adequate light, air and privacy for each dwelling, protecting residents from the harmful effects of excessive noise, population density, traffic congestion and other adverse environmental effects, and providing public services and facilities to accommodate planned population and densities.

The specific purpose of the Two-Family Residential (R-2) District is to provide "areas for single-family and two-family residential land uses," and purpose of the MFR District is to provide areas
for medium-to-high density residential development up to approximately 36 dwelling units per gross acre, including single-family (attached and detached), two-family and multi-family." Residential districts in the Newport Heights area zoned R-2 provide for medium-density development."

The applicant requests the ability to house 50 residents in the three dwellings at the facility. Thirty-eight residents are proposed for a single parcel resulting in a high level of population density. The Hearing Officer has determined that permitting the facility to remain in its current location in the R-2 District at the applicant's proposed population level would undermine the City's basic zoning program, the purpose of which is to group uses of similar densities in the same zoning districts.

Purpose and intent of the use permit requirement

Use permits are required by the Municipal Code for use classifications typically having operating characteristics that require special consideration, so that they may be located and operated compatibly with uses on adjoining properties and in the surrounding area. NBMC Section 20.91A.010 sets forth the purposes of requiring use permits in residential districts. The first stated purpose is:

> ". . .to promote the public health, safety, and welfare and to implement the goals and policies of the Newport Beach General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods as primarily residential communities."

The second purpose is:

> " . . . to protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery. In doing so, the City seeks to avoid the overconcentration of residential care facilities so that such facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area."

Even if the facility is exempted from Section 20.10.020 and permitted to remain in its current location without a use permit, it is not exempt from reasonable controls the City might place on it. NBMC Section 20.98.015 states that the Hearing Officer shall approve, *conditionally approve* or deny applications for reasonable accommodation. The Hearing Officer may impose the same conditions through the reasonable accommodation process that it can impose under through the use permit process. A reasonable accommodation with appropriate conditions can mitigate adverse secondary impacts such as noise, overcrowding, parking and traffic impacts, excessive second-hand smoke, and unruly behavior by residents of applicant's facility to the detriment of neighbors.

There are situations where the reasonable accommodation mandates of fair housing laws require the Hearing Officer to grant an exemption from the use permit requirement. However, these situations should be limited to those in which the applicant can demonstrate that the accommodation would not undermine the basic purposes of the use permit requirement by demonstrating that:

> (a) the applicant's facility can meet all standards required for issuance of a use permit, including the operational standards of NBMC Section 20.91A.050, and the required findings of NBMC Sections 20.91A.060 and 20.91.035(A); <u>or</u>

(b) if all standards required for issuance of a use permit cannot be met, or required findings made, the applicant can demonstrate that in its particular case the inability to meet a specific standard or make a required finding does not undermine either of the two basic purposes of the use permit requirement; and

(c) the applicant is willing to meet conditions that would have been required under a use permit to ensure that the character of the surrounding neighborhood is not changed, and that residential care facilities are reasonable dispersed throughout the community and are not congregated or over concentrated in any particular area so as to institutionalize that area.

The Hearing Officer finds that the applicant is unable to meet the standard stated in Section 20.91A.050(C)(4). This subsection establishes a requirement that all persons with an ownership or leasehold interest in the facility, or who will participate in the operation of the facility, shall not have a demonstrated pattern or practice of operating similar facilities in violation of state or local law. Therefore, the finding that the accommodation will not result in a fundamental alteration of the nature of the City's zoning program cannot be made. In 2007, the dwelling at 3309 Clay Street housed either sober living residents or a prohibited Group Residential use in a dwelling with unpermitted construction. The dwelling at 3309 Clay Street appeared to be used by more than six residents in 2007, in violation of the NBMC requirement at that time that unlicensed facilities with more than six residents must apply for and receive a Federal Exception Permit (FEP) to establish such uses. The use at 492 Orange Avenue was established during 2007 the moratorium. Also in 2007, one facility manager made false statements to both City and state code enforcement officers and inspectors. This same manager has a long-standing history of establishing illegal units in other areas of the City. The City regards illegal dwelling units as one form of prohibited Group Residential or boarding house use, as it results in groups not living as a single housekeeping unit in what was originally intended to be a single dwelling unit. The applicant did not demonstrate that the facility manager's past practices of housing tenants in buildings with illegal construction and illegal units, as well as ignoring the City's moratorium ordinance, would not undermine the basic purpose of the use permit requirement.

Furthermore, the applicant was not willing to meet certain conditions that would have been required under a use permit. One of the stated purposes of a use permit for uses in residential districts is to ensure that the character of the surrounding neighborhood is not changed, and that residential care facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area. The Hearing Officer has the discretion to apply any degree of separation of uses which he or she deems appropriate in any given case, and to apply the American Planning Association (APA) standard of permitting one or two uses per block. .At the applicant's proposed population level of 50 residents, the Hearing Officer finds it is unlikely that a reasonable accommodation with conditions similar to those imposed through a use permit could ensure that the primarily residential character of the neighborhood is not

changed. With 50 people in three adjacent buildings, the facilities are not reasonably dispersed throughout the community, and are concentrated in a specific area to a degree that institutionalizes that area.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

At the population levels proposed by the applicant nearly one-quarter of the block that fronts Clay Street would be transformed into a large residential care facility with up to 50 residents thereby fundamentally altering the character of the neighborhood.

B. *Whether the accommodation would result in a substantial increase in traffic or insufficient parking.*

The dwelling addressed as 492 Orange Avenue includes an attached tandem two-car garage, and the dwelling addressed as 492 ½ Orange Avenue includes a two-car garage (side-by-side parking spaces). The parcel located at 3309 Clay Street is developed with a single-family dwelling with an attached tandem two-car garage. The on-site parking provided at each building is consistent with the Zoning Code requirement for single-family and two-family residential development. However, the NBMC requires that a residential care facility provide one on-site parking space for every three residential care beds. At the applicant's proposed population of 50 residents, 17 on-site parking spaces are required. The facility provides only six. The off-street parking requirements in R-2 zoning districts were not intended to accommodate a use of density proposed, and the on-street parking was not designed to accommodate the degree of overflow parking that would result from a use of this intensity. The operations and management of the facility require the use of on-street parking for residents, staff, and visitors which impacts the availability of on-street parking for use by residents of the subdivision. In addition, meetings held at one or more of the facilities are served by on-street parking, further impacting the availability of on-street parking for use by residents of the subdivision.

The Institute of Transportation Engineers (ITE) establishes standards for trip generation rates based on the use classification of a site. For a single-family home, the standard trip rate is 9.57 average daily trips per dwelling. For a duplex, the standard trip rate is 6.72 average daily trips per dwelling unit. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. At the applicant's proposed population level and based on the ITE standards, a 50-bed residential care facility would generate approximately 137 average daily trips. A duplex would

generate approximately 13.44 average daily trips. A single-family home would generate approximately 9.57 average daily trips per dwelling. If occupied by single housekeeping units, the ITE formula projects a total of 23.01 average daily trips for one single-family dwelling and the two units of the duplex. The evidence shows this facility will generate trips substantially in excess of average daily trips of the single housekeeping units in surrounding duplexes and single-family homes.

C. *Whether granting the requested accommodation would substantially undermine any express purpose of either the City's General Plan or an applicable Specific Plan.*

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law. A request for reasonable accommodation is consistent with this policy. The City adopted Ordinance No. 2008-005 in order to implement General Plan Policy LU 6.2.7. Granting the reasonable accommodation request to waive the requirement that unlicensed residential care facility may only be located in a MFR District with a use permit, without imposing operational conditions similar to take of a use permit would undermine the General Plan.

D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

There are no other documented facilities, similar in nature or operation to the subject facility, within the vicinity of the subject facility. In considering whether granting the requested accommodation would create an institutionalized environment, however, it is noted that at the applicant's proposed occupancy, approximately 56 to 58 individuals could be housed at the three subject facilities if some rooms, not currently labeled as "bedrooms" on the plans on file at the City, were used as bedrooms. An unregulated occupancy of the facility would result in an overconcentration of the use of the facility and the potential institutionalization of the residential neighborhood with associated adverse secondary impacts such as noise, overcrowding, unruly behavior by residents of the facility, a disproportionate utilization of available on-street parking by the facility, and traffic impacts.

5. Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.

Facts in support of the finding. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others," (*See* 42 U.S.C. § 3604(f)(9). This is a

very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the FHAA indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons.

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section (Section 15061(b)(3) (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies without prejudice Request No. 5 of Reasonable Accommodation No. 2008-001.

Section 2. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 2ND DAY OF JULY, 2009.

By: _____
Thomas W. Allen, Hearing Officer

ATTEST:

_____
Deputy City Clerk