RESOLUTION NO. HO-2009-019

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH APPROVING REQUEST NO. 3 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001 FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 3309 CLAY STREET, 492 ORANGE AVENEUE, 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 the following findings, all of which are required for approval.

WHEREAS, with respect to Reasonable Accommodation Request No. 3, that the City treat the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use, the required findings of Section 20.98.025(B) of the NBMC, and facts in support of such findings can be made 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.**

Facts in support of the finding. The applicant requested that the use of the dwellings be "grandfathered" as a nonconforming use, with the intent that classifying the facility as a nonconforming use meant that Pacific Shores could legally continue to operate as it had before Ordinance No. 2008-005 was adopted, and that the ordinance would have no effect on Pacific Shores. However, the City was already treating the dwellings as a nonconforming use. If the Pacific Shores facility were not treated as a nonconforming use, it would be considered an illegal use and thus subject to abatement, both before and after adoption of Ordinance No. 2008-05.

Under NBMC Section 20.62.090(A), nonconforming uses in residential zones that had not received a use permit or reasonable accommodation became subject to abatement on the effective date of the ordinance, February 22, 2008. For nonconforming uses not involved in the administrative process through a use permit or reasonable accommodation application, abatement was to proceed by February 22, 2009, unless the use had applied for and received an extension of the abatement period for amortization purposes.

Evidence exists that some or all of the applicant's dwelling units at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue had not established as residential care occupancies in accordance with requirements of the Newport Beach Municipal Code. The facility appeared to exceed six residents, and had not received a Federal Exception Permit (FEP), required for facilities housing more than six residents under the ordinance in effect prior to the effective date of Ordinance No. 2008-05.

Pacific Shores expressly declined to apply for a use permit required for Residential Care Facilities, General Unlicensed after the effective date of Ordinance No. 2008-05, and did not submit an application for reasonable accommodation until September, 2008. Therefore, prior to September 24, 2008, the date the applicant's first reasonable accommodation application was filed with the City, the use was subject to abatement as an illegal use. As a result, disabled residents residing at the facility at that time would have been deprived of their current housing if abatement had occurred. Therefore, treating the facility as a nonconforming use was necessary to avoid depriving disabled individuals of their housing.

The Hearing Officer determined that the use could continue to be *treated* as a nonconforming use, but was not willing to permanently *classify* the use as nonconforming, or exempt it from the provisions of Ordinance No. 2008-05. Permanently designating an illegal use as a legally established nonconforming use is a broader accommodation than necessary to afford disabled individuals an opportunity to use and enjoy a dwelling. Therefore, although the City cannot "classify" or "grandfather" an illegal use as a nonconforming use through the reasonable accommodation process, it can continue to accommodate the needs of disabled residents by treating the facility as if it were a nonconforming use, for purposes of the current provisions of Ordinance No. 2008-05.

Pursuant to NBMC Section 20.98.025(C), the City may consider the following factors in determining whether the 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.*

As stated above, had the City not treated Pacific Shores as if it were a nonconforming use in a residential zone, the facility would have been subject to abatement prior to Pacific Shores' September 2008 filing of an application for reasonable accommodation. Presumably, the quality of life for disabled individuals living on the premises during this time was affirmatively enhanced because residents were not required to leave their current dwelling.

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.*

If the City had not treated Pacific Shores as if it were a nonconforming use in a residential zone, the facility would have been subject to abatement prior to Pacific Shores' September 2008 filing of an application for reasonable accommodation, and facility residents could have been denied the housing of their choice.

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.*

The applicant has expressly declined to submit information on financial viability. Therefore, staff was unable to analyze this factor.

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.*

The NBMC authorizes the City to consider other facilities that are of a "similar nature and operation." Through implementation of Ordinance No. 2008-005, it is estimated approximately 233 sober living beds have been approved within the City. Operators of sober living facilities within the City have reported a substantial number of vacant beds, which could provide Pacific Shores' residents with an equal opportunity to live in a sober living environment without the requested accommodation.

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. Treating Pacific Shores as if it were a nonconforming use has not created an undue financial or administrative burden on the City.

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 finding. The applicant requested that the use of the dwellings be "grandfathered" as a nonconforming use, with the intent that classifying the facility as a nonconforming use meant that Pacific Shores could legally continue to operate as it had before Ordinance No. 2008-005 was adopted, and that the ordinance would have no effect on

Pacific Shores. There is evidence on file at the City that some or all of the applicant's dwelling units at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue had not established as residential care occupancies in accordance with requirements of the Newport Beach Municipal Code.

The Hearing Officer has determined that permanently designating an illegally established use as a legal nonconforming use, as requested by the applicant, would fundamentally alter the nature of that portion of the zoning program that seeks to discourage illegal uses and treat legally established nonconforming uses in a neutral manner. Treating Pacific Shores more favorably than other nonconforming uses in residential districts by exempting it from the provisions of Ordinance No. 2008-05, as requested by the applicant, would fundamentally undermine some of the purposes for adopting the Ordinance. One of the stated purposes is to:

> . . .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.

and:

> . . . 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.

However, *treating* Pacific Shores as if it were a nonconforming use prior to submittal of its reasonable accommodation application did not fundamentally undermine the basic purposes which Ordinance No. 2008-05 was put in place to achieve. The Hearing Officer has determined that the use could continue to be *treated* as a nonconforming use, but not be permanently *classified* as a nonconforming use or exempted from the provisions of Ordinance No. 2008-05. Permanently designating an illegal use as a nonconforming use is a broader accommodation than necessary to afford disabled individuals an opportunity to use and enjoy a dwelling. Therefore, the Hearing Officer has determined that although the City cannot "classify" an illegal use as a nonconforming use through the reasonable accommodation process, it can continue to accommodate the needs of disabled residents by treating the facility as if it were a nonconforming use, for purposes of the current provisions of Ordinance No. 2008-05.

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.*

Treating Pacific Shores as if it were a nonconforming use will not fundamentally alter the character of the neighborhood. The facility has continued to operate and was not abated. Testimony from neighbors indicated that the facility had an impact on the neighborhood during this period. However, the impacts should not be permanent, as the Hearing Officer's denial of the other reasonable accommodation requests will result with the impacts being mitigated through the discontinued use of the dwellings as a sober living facility. Therefore, treating Pacific Shores as a nonconforming use has not resulted in a permanent fundamental alteration of the character of the neighborhood.

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

For the same reasons given in Factor A, treating Pacific Shores as if it were a nonconforming use has not resulted in a substantial permanent increase in traffic or insufficient parking.

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

The General Plan Policy LU 6.2.7 provides that the City shall regulate residential care facilities to the maximum extent allowed by federal and state law to minimize impacts on residential neighborhoods. For the same reasons given in Factor A, treating Pacific Shores as if it were a nonconforming use will not substantially undermined the express purpose of 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.*

For the same reasons given in Factor A, treating Pacific Shores as if it were a nonconforming use will not permanently create an institutionalized environment in the neighborhood. In analyzing other requests for reasonable accommodation from Pacific Shores, staff found that granting Pacific Shores approval to continue to operate all three dwelling units at the population levels requested by the applicant (50

residents) would have created an institutionalized environment due to the number of resident clients, and number and proximity of units on a single block housing residential care uses. However, treating Pacific Shores as a nonconforming use did not exempt Pacific Shores from the reasonable accommodation process that would have required any accommodation granted to contain conditions to mitigate institutionalization.

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.

This finding can be made. 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 approves Request No. 3 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