RESOLUTION NO. HO-2009-018

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE REQUEST NO. 2 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. 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; 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.**

Facts do not support the finding. In the request for reasonable accommodation, the applicant requests that the facility not be treated as a residential care facility, and states that it is necessary the facility be treated as a single housekeeping unit. The applicant asserts that the residents cannot live independently without the threat of relapse, because the environment provided by the facility is necessary to achieve an opportunity for residents to live in a setting which is a self-paced recovery option that provides time for personal psychological growth while avoiding the use of alcohol and other substances. The applicant also asserts that without the sober living environment offered by the facility, residents of the facility would not be able to live in a supportive environment in a residential area. The Hearing Officer finds that the requested accommodation is not necessary because the requested exemption goes beyond that which is necessary to achieve the goal of enabling disabled individuals to reside at the applicant's facility.

The residential use classifications listed in Section 20.10.020 of the NBMC are limited to:

- Day Care, Limited *(Large and Small Child Care Homes – not applicable)*
- Group Residential *(Not Single Housekeeping Units – prohibited in all residential districts)*
- Multifamily Residential *(Single Housekeeping Units a prerequisite to be considered MFR use)*
- Parolee/Probationer Homes *(Prohibited in all residential districts)*
- Residential Care (General Licensed, General Unlicensed, Small Licensed, Small Unlicensed) *(Not Single Housekeeping Units, but not prohibited Group Residential because residents are disabled)*
- Integral Facilities/Integral Uses *(Two or more residential care facilities that are integrated components of one operation)*
- Single-Family Residential (*Single Housekeeping Unit a prerequisite to be considered a single family residential use of a dwelling)*
- Two-Family Residential (*Single Housekeeping Units a prerequisite to be considered a two-family residential use of a dwelling.)*

NBMC Section 20.05.030 defines the various Residential Care use classifications as follows:

> Residential Care Facilities, General. Any place, site or building, or groups of places, sites or buildings, licensed by the State or unlicensed, in which seven or more individuals with a disability reside who are not living together as a single housekeeping unit and in which every person residing in the facility (excluding the licensee, members of the licensee's family, or persons employed as facility staff) is an individual with a disability.
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> Residential Care Facilities, Small Licensed. State-licensed facilities that provide care, services, or treatment in a community residential setting for six or fewer adults, children, or adults and children and which are required by State law to be treated as a single housekeeping unit for zoning purposes. Small licensed residential care facilities shall be subject to all land use and property development regulations applicable to single housekeeping units.
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> Residential Care Facilities, Small Unlicensed. Any place, site or building, or groups of places, sites or buildings, which is not licensed by the State of California and is not required by law to be licensed by the State, in which six or fewer individuals with a disability reside who are not living together as a single housekeeping unit and in which every person residing in the facility (excluding persons employed as facility staff) is an individual with a disability.

The applicant's facility is also considered an Integral Facility. Integral Facility residential use classifications are defined as follows:

> Integral Uses. Any two or more licensed or unlicensed residential care programs commonly administered by the same owner, operator, management company or

> licensee, or any affiliate of any of them, in a manner in which participants in two or more care programs participate simultaneously in any care or recovery activity or activities so commonly administered. Any such integral use shall be considered one use for purposes of applying Federal, State and local laws to its operation.

If the facility is not treated and classified as a residential care facility or integral facility land use, the most similar land use classification for the subject use is a group residential use, as defined in NBMC Section 20.05.030(C). The group residential use classification is defined as:

> Group Residential. Shared living quarters, occupied by two or more persons not living together as a single housekeeping unit. This classification includes, without limitation, boarding or rooming houses, dormitories, fraternities, sororities, and private residential clubs, but excludes residential care facilities (general, small licensed, and small unlicensed) and residential hotels (see Single-Room Occupancy (SRO) Residential Hotels, Section 20.05.050(EE)(4)).

Group residential uses include boarding houses, rooming houses, dormitories, fraternities, sororities, and private residential clubs but expressly exclude residential care facilities; however, group residential uses are not permitted in any residential district in the City. Parolee/Probationer homes are also prohibited in all residential districts.

The remaining applicable land use classifications provided by Section 20.10.020, Single-Family, Two-Family and Multifamily Residential, are land use classifications that are also considered for use by single housekeeping units. If occupancy of a dwelling categorized as a single-family residential use was not conducted as a single housekeeping unit, the occupancy would transform the use of that dwelling to a prohibited group residential use.

The Hearing Officer finds that the facility does not operate in manner consistent with the NBMC definition of a single housekeeping unit, NBMC Section 20.03.030 (Definitions):

> "The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and sharing household activities and responsibilities such as meals, chores, household maintenance, and expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager."

The facility's operations most closely resemble a boarding house use. Copies of leases submitted to ADP, entitled "Agreement to Stay in My House," indicate that each resident enters a separate written agreement to reside at the facility. The applicant characterizes the facility as one of leased rooms to tenants with a use pattern described by the individual lease

that more closely resembles the NBMC definition of a boarding house or group residential use than a single housekeeping unit. Except for the fact that facility residents are recovering alcoholics, the facility would be classified as a prohibited group residential use, or a boarding or rooming house as that term is defined in NBMC 20.05.030. A and C, "Residential Use Classifications, "A residence or dwelling unit, or part thereof, wherein a room or rooms are rented under two or more separate written or oral rental agreements, leases or subleases or combination thereof...," and "Shared living quarters, occupied by two or more persons not living together as a single housekeeping unit."

There was no evidence provided that clients may be an interactive group of persons jointly occupying a single dwelling unit and sharing common areas, of joint responsibility for meals or expenses, or of a single written lease. Additionally, the members of the household are determined by the facility operator and not by other residents. Contradictory information exists in the record, submitted by the applicant in 2007, regarding whether the facility was a sober living facility or a group of boarding houses.

The Hearing Officer has determined that the requested accommodation to not be classified or treated as a residential care facility is not necessary to achieve the goal of providing individuals with a disability an equal opportunity to use and enjoy a dwelling.

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.*

If the requested accommodation were to be granted, that the applicant's current and potential clients could live in the home located in an R-2 District along with other individuals in recovery. This is a situation can serve to affirmatively enhance the quality of life of a person in recovery from addiction, unless overcrowding of the facility or institutionalization of the neighborhood interferes with the resident's re-integration into society.

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.*

The Hearing Officer has determined the exemption requested goes beyond what is necessary to achieve the goal of enabling disabled individuals an equal opportunity to enjoy the housing type of their choice. The City indicated that more narrowly tailored exemptions could enable disabled individuals to reside at the applicant's facility, and the applicant submitted additional requests as a result.

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 did not submit evidence that not treating the facility as a residential care facility is necessary to make the facility viable in light of the current market for the type of services it provides. The applicant did not respond to requests by the City for such evidence. Therefore, is the Hearing Officer has concluded that not being treated as a use classification other than a residential care facility use is not necessary for the facility to be financially viable.

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 City has estimated that there are approximately 233 approved sober living beds in the City. Operators of many sober living facilities within the City have reported decreased census and vacant beds, which could afford potential Pacific Shores clients an equal opportunity to live in a sober living environment. The evidence presented as part of the application does not support the applicant's contention that not treating the facility as a residential care facility use will change the availability of the existing supply of facilities of a similar nature, or afford disabled individuals a substantially greater access to an equal opportunity to live in a residential setting.

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. The Hearing Officer has determined that treating the facility as a a residential care facility would not impose a identifiable undue financial or administrative burden on the City. However, in making this finding, it is noted that approximately 56 to 58 individuals could be housed at the three properties if some rooms not currently labeled as "bedrooms" on plans, on file at the City, were used as bedrooms. If resident populations are unregulated and previous code violations associated with the property were continued, currently unidentifiable financial or administrative burdens could arise as a result.

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 do not support the finding. The Hearing Officer finds that other than being treated as a single housekeeping unit, there was no benefit to the applicant for being treated as anything other than a residential care facility. The Hearing Officer also found in the applicant's request for Reasonable Accommodation Request No. 1 that treating the applicant's facility as a single housekeeping unit would fundamentally alter the nature of the City's zoning program. Groups living as a single housekeeping unit are permitted to live together in any residential zone in Newport Beach. The NBMC states that, with the exception of groups living together in a residential care facility, groups not living as a single housekeeping unit are prohibited from establishing residences in any of the City's residential zones.

All residential care facilities in the City have already received a reasonable accommodation from the NBMC restrictions on groups not living as a single housekeeping unit pursuant to provisions of the NBMC allowing new facilities to be established and existing facilities to continue in their current locations, subject to approval of a use permit with appropriate impact mitigation. Licensed facilities housing six or fewer residents are permitted in any residential zone of the City.

Although the residents of residential care facilities receive preferential treatment because of their disabled status, the NBMC applies regulations to unlicensed facilities and large licensed facilities of seven or more residents. These regulations are in place to ensure that the fundamental purposes of the Zoning Code can be achieved and to mitigate the adverse secondary impacts that higher density residential care facilities may have on the surrounding neighborhood. Treating a residential care facility as a single housekeeping unit entirely exempts the facility from any reasonable controls allowed by the City. As such the City is unable to make any reasonable effort to reduce the adverse secondary impacts such as noise, overcrowding, or unruly behavior by residents of the facility, disproportionate use of available on-street parking to the detriment of the neighborhood, and to insure that an overconcentration of facilities within a single block does not occur resulting in a quasi-institutional environment for the neighborhood.

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.*

Since the establishment of the first of the dwellings as a sober living environment, a number of adverse secondary impacts have been reported to the City by residents of the neighboring properties, thereby altering the character of the neighborhood. Some of the impacts reported associated with the operation of the facility include, but are not limited to:

- Meetings held at one or more of the applicant's facilities
- Excessive use on on-street parking by facility residents and their guests
- Secondhand smoke
- Noise late at night

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

The applicant has stated that residents are permitted to have personal vehicles at the properties, but that few residents own cars. The applicant has stated that "all park along Old Newport or along the commercial park area on Orange. No resident parks along Clay or the non-commercial parking area along Orange (i.e., Orange NE of Clay)."

Each building at the subject site provides two enclosed parking spaces, consistent with the NBMC parking requirement for single-family and two-family residential uses. The NBMC parking requirement for residential care facilities is one off-street parking and loading space for every three beds. As a residential care facility, with 50 resident clients, the Pacific Shores facility would be required to provide 17 off-street parking spaces. Since the facility does not provide the required 17 off-street parking spaces, granting the requested accommodation would result in insufficient on-site parking.

The Institute of Transportation Engineers (ITE) establishes standards for trip generation rates based on the use classification of a site. In the case of a single family dwelling, the standard trip rate is 9.57 average daily trips per dwelling, and for duplexes the standard trip rate is 6.72 average daily trips per dwelling. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. Based on these standards, a 50-bed residential care facility would generate approximately 137 average daily trips. The evidence shows this facility will generate average daily trips substantially in excess of surrounding single- and two-family dwellings.

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 to minimize impacts on residential neighborhoods. The City adopted Ordinance No. 2008-005 in order to implement General Plan Policy LU 6.2.7. Granting the reasonable accommodation request to not classify or treat the facility as a residential care facility, but rather to treat the facility as a single housekeeping unit, would exempt the facility from the provisions of Ordinance No. 2008-005, and preclude the City from applying

any reasonable regulations on the facility, thereby undermining the express purpose of the General Plan with regard to these facilities.

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 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.

The Hearing Officers finds that the unregulated occupancy of the facility could result in an overconcentration of the use of the facility and the potential institutionalization of the residential neighborhood with potentially 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.

Each building at the subject site provides two enclosed parking spaces, consistent with the NBMC parking requirement for single-family and two-family residential uses. The NBMC requires one off-street parking and loading space be provided for every three beds in a residential care facility. As a residential care facility, with 50 resident clients, the Pacific Shores facility would be required to provide 17 off-street parking spaces. The facility does not provide the required 17 off-street parking spaces and the facility utilizes on-street parking for staff and visitors.

The Institute of Transportation Engineers (ITE) establishes standards for trip general rates based on the use classification of a site. The standard trip rate for a single-family dwelling is 9.57 average daily trips per dwelling, and for duplexes the standard trip rate is 6.72 average daily trips per dwelling. Trip rates for residential care facilities are 2.74 average daily trips per each occupied bed. Based on these standards, a 50-bed residential care facility would generate approximately 137 average daily trips.

Based on this evidence, the facility would generate average daily trips substantially in excess of the surrounding single- and two-family dwellings, thereby altering the residential character of the neighborhood to a more institutionalized environment.

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 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," (refer to 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 Fair Housing Amendments Act, adopted in 1988, 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 with prejudice Request No. 2 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