RESOLUTION NO. HO-2009-024

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE REQUEST NO. TWO OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2009-009 FOR AN EXISTING LICENSED ADULT ALCOHOL AND/OR DRUG ABUSE RECOVERY AND TREATMENT FACILITY LOCATED AT 1216 WEST BALBOA BOULEVARD, NEWPORT BEACH, CALIFORNIA (PA 2008-104)

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 Newport Coast Recovery, LP, ("applicant") with respect to property located at 1216 West Balboa Boulevard, and legally described as Lots 5 and 6, Block 112, Tract 234 in the City of Newport Beach, County of Orange, State of California (APN 047-234-14), as per map recorded in Book 013, Pages 36-37 of Miscellaneous Maps, requesting approval of the following requests for one of two alternate reasonable accommodations:

1. Request No. One - An exemption from the portions of NBMC Section 20.10.020 (Residential Districts: Land Use Regulations) that require Residential Care Facilities, General to be established only in residential districts zoned Multifamily Residential (MFR) with a use permit, subject to the operational conditions recommended by City staff in the January 12, 2009 staff report for Use Permit No. 2008-33, including a maximum occupancy of 14 residents, which was denied by the Hearing Officer;

   or, in the alternative,

2. Request No. Two - An exemption from the requirements specified in NBMC Section 20.91A.050 (Development and Operational Standards), including:

   - A waiver of the occupancy restriction of two persons per bedroom plus one staff member, and to allow a total occupancy of 18 residents;
   - An exemption from parking requirements specified in NBMC Section 20.66.030 and to impose parking requirements that treat the residents and the visitors of the residents in the same manner as any other resident or visitor to Newport Beach, particularly those requirements that pertain to weekend visitation;
   - Treat the use of the licensed residential care facility as a legal nonconforming use;

- Apply the California Building Code provisions that were applicable at the time the residential care facility was established as relates to life and fire safety matters; and
- A waiver of the required finding specified in NBMC Section 20.91A.060 (D), relative to the compatibility of the use with the character of the surrounding neighborhood, which requires a finding that the continued use will not contribute to the changing of the residential character of the neighborhood, such as creating an overconcentration of residential care uses in the vicinity, and waiving the impact analysis contained in the Factors A through C which the Hearing Officer must consider in making or sustaining the finding with regard to the proximity of the use to schools, churches, playgrounds, day care centers, and alcoholic beverage outlets, and the application of the American Planning Association standard of permitting one or two such uses per block.

WHEREAS, a public hearing was held on July 7, 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, both written and oral from the applicant, City staff and the public; and

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

WHEREAS, after considering the testimony presented by the applicant, City staff and the public during the July 7, 2009 public hearing, the Hearing Officer established a two-week period of time during which the applicant and City staff were granted additional time to present additional information relevant to the applicant to the Hearing Officer in the form of a written letter brief by July 21, 2009; and

WHEREAS, the City of Newport Beach submitted additional written information to the Hearing Officer within the two-week period; however, the applicant did not file a letter brief until July 29, 2009 which included a response to the City's July 21, 2009 letter brief therein; and

WHEREAS, in response to the City's objection to the late filing, the Hearing Officer accepted the applicant's late filing but allow the City an additional period of five days to file a response; and

WHEREAS, the Hearing Officer considered the written letter briefs in addition to the oral testimony presented at the July 7, 2009 public hearing; 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 five findings, all of which are required for approval; and

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WHEREAS, with respect to Reasonable Accommodation Request No. Two (Request No. One is analyzed separately in Resolution No. HO-2009-023), the Hearing Officer determined that not all five of the required findings can be made pursuant to NBMC Section 20.98.025(B), based on the following facts:

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: This finding can be made. The applicant submitted a statement that every resident of the facility is in recovery from alcohol and/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.**

   Occupancy Restriction Waiver: This finding cannot be made. NBMC Section 20.91A.050(C.2) sets a development and operational standard that requires no more than two residents per bedroom plus one additional resident. The Newport Coast Recovery facility is housed in a seven-unit apartment building. Even if subtracting the bedrooms used for office rather than residential functions, the Newport Coast Recovery facility still provides nine bedrooms. Under the standards of NBMC 20.91A.050(C.2), this would set the maximum number of residents that a use permit could allow without additional accommodation at 19. Newport Coast Recovery requests a maximum of 18 residents. Therefore, the Hearing Officer has determined this requested accommodation is not necessary to provide an equal opportunity for disabled residents to reside at Newport Coast Recovery.

   Accommodation of 18 Residents. It is the applicant's burden to demonstrate that the requested accommodation is necessary. "The 'necessary' element requires the demonstration of a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the handicapped person." *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 460 (3rd Cir. 2002) Similarly, when an applicant requests a higher number of disabled residents than a city code has authorized, the Ninth Circuit has required the applicant to first show that that the accommodation is necessary for financial viability or therapeutic benefit to residents to demonstrate necessity for accommodation. *City of Edmonds v. Washington State Building Council*, 18 F.3d 802, 803 (9th Cir. 1994)

   Staff originally recommended, and the Hearing Officer considered, an occupancy limit of 14 residents. In Request No. Two, the applicant requested an accommodation of 18 residents. In order to demonstrate necessity for an increased number of residents,

the applicant needed to provide evidence showing that: 1) the accommodation is necessary for the facility's financial viability (which courts appear to equate with giving the disabled an equal opportunity to use and enjoy a dwelling), or 2) the requested accommodation is necessary to provide a therapeutic benefit (and thus directly ameliorate an effect of the handicap.) The applicant did not provide evidence to support either argument.

As to current residents, this finding can be made. The applicant stated that individuals in recovery from alcohol or drug addiction need to maintain daily living skills closely related to those that are not addicted and that having a setting of family dwellings surrounding the facility will help maintain sober living and relapse prevention. The applicant stated that the reasonable accommodation is necessary because if Newport Coast Recovery is required to cease providing residential treatment services, current residents will lose the housing of their choice. As the Hearing Officer has denied Newport Coast Recovery's use permit application on remand, if the requested accommodation is not granted, the facility will be subject to abatement. The Hearing Officer finds that the facility currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility; and therefore, has determined that granting Request No. One of Reasonable Accommodation No. 2009-009 is necessary to provide current residents only an equal opportunity to use and enjoy a dwelling. Pursuant to the directive of the Hearing Officer, a condition of the denial of Request No. One of Reasonable Accommodation No. 2009-009 is included in Resolution No. HO-2009-023 stating that current client residents of Newport Coast Recovery be allowed to remain at the facility until they choose to leave, or until their original intended stay is complete subject to the terms of their contract, whichever occurs first.

As to prospective residents, this finding cannot be made. The applicant seeks to provide housing for 14 to 18 residents in a seven-unit apartment building. The applicant has provided no information or evidence that suggests Newport Coast Recovery requires 18 residents in order to be financially viable. Further, no information was presented at the public hearing or in the letter brief by the applicant regarding the unique program and therapeutic benefit offered by Newport Coast Recovery for 18 residents. The Hearing Officer finds that prospective residents seeking to live in a licensed recovery facility with 14 to 18 residents in an apartment building have alternative available housing opportunities, offering similar therapeutic benefit in a similar location and residential setting on the Balboa Peninsula and in the immediate neighborhood of Newport Coast Recovery. All of these alternate facilities are surrounded by family dwellings similar to those that surround Newport Coast Recovery, and can provide a similar example of and support for sobriety and daily living skills. The Hearing Officer has determined that granting the requested accommodation is not necessary to provide prospective residents with an equal opportunity to use and enjoy the dwelling of their choice within the community.

Parking Requirements and Visitor Parking Restriction Waivers: This finding cannot be made. The Hearing Officer finds that the applicant's request to be subject to residential parking standards rather than the parking standards applicable to group homes is not necessary with respect to either current or prospective residents. At the maximum requested resident occupancy of 18 residents, the facility already meets off-street parking requirements established by NBMC Section 20.66.030 of one off-street parking space for every three resident beds for Residential Care Facilities, General. Newport Coast Recovery provides the six off-street parking spaces required for a facility providing 18 resident beds.

The Hearing Officer finds that the applicant's request that no restrictions be imposed on visitor parking is not necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling. Restrictions on visitor parking were originally proposed by staff in conjunction with the applicant's use permit application. The applicant stated that family members of residents attend a two-hour group educational session to learn about alcoholism and drug addiction, and park their vehicles either in the on-site carports which are part of the off-street parking required for residential care facilities under the NBMC, or in metered and unmetered spaces on West Balboa Boulevard. As the proposed conditions were ad hoc conditions on a use permit that was not granted, it is doubtful whether this request is a legally distinct reasonable accommodation request. Moreover, the applicant made no showing that the conditions placed on visitor parking would prevent family members from attending educational sessions at the facility. In addition, the applicant made no argument or showing that a waiver of the proposed visitor parking conditions in any way hindered the applicant's ability to provide housing and related services to the disabled. Thus, the Hearing Officer finds the applicant's request for an exemption from the parking standards related a use designated as a "Residential Care Facility, General" and a waiver of restrictions on visitor parking is not necessary to provide one or more individuals an equal opportunity to use and enjoy a dwelling.

Classification of Newport Coast Recovery as a legal nonconforming use: This finding cannot be made. The Hearing Officer finds that the City has already treated Newport Coast Recovery as a legal nonconforming use under NBMC Section 20.91A.020. Any use in a residential district that was rendered nonconforming by the adoption of Ordinance No. 2008-05 could seek the issuance of a use permit during a certain period of time following the ordinance's effective date. As a use in a residential district rendered nonconforming by the passage of Ordinance No. 2008-05, Newport Coast Recovery was eligible to, and did, apply for a use permit to continue operating at its current location. Newport Coast Recovery's use permit application was processed in a manner consistent with the processing of all other use permit applications submitted to continue existing nonconforming uses in residential areas. Therefore, the Hearing Officer finds the requested accommodation is not necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling.

By this request, the applicant may have attempted to request a waiver from the application of *any* conditions imposed by Ordinance No. 2008-05. The Hearing Officer finds that this is not necessary to afford disabled residents an equal opportunity to use and enjoy a dwelling. Disabled individuals do not need such a broad waiver to be able to use and enjoy a dwelling within the City. The appropriate conditions which a use permit or reasonable accommodation can impose are intended to mitigate negative secondary impacts on surrounding residences, but do not prevent disabled individuals from residing in the facility or receiving the services their disability requires in order to remain at the facility and maintain their sobriety.

California Building Code provisions pertaining to life safety – Application of code provisions in effect at the time the facility was established: This finding cannot be made. The Hearing Officer concurs with staff's determination that the California Building Code requires that when the use of a structure changes from one occupancy type to another, the new occupancy can establish only if the structure can be made to conform to the current Building Code requirements for the new occupancy type. If subsequent code changes create different requirements for that occupancy type, the occupant may choose to make changes to comply with those code requirements, but is not required to do so.

The use of the structure at 1216 West Balboa Boulevard changed in 1997 from an apartment building occupancy to a residential care facility occupancy with more than six residents. The correct version of the California Building Code to apply would be the 1994 California Building Code. In some areas (such as restrictions on openings in walls less than five feet from the property line) the 2008 Building Code is more permissive than earlier codes. In the staff report for this reasonable accommodation, staff noted that because the 2008 Building Code supplies alternate and equally effective life safety protection provisions, the Newport Beach Fire Marshal was willing to apply the 2008 Building Code rather than the code in effect the year a facility established, but did not require it. Therefore, the Hearing Officer finds that this requested accommodation is not necessary.

Waiver of factors to consider under NBMC Subsection 20.91A.060(D) – proximity of use to schools, parks, other residential care facilities and alcoholic beverage outlets: This finding cannot be made. The applicant requested that the City waive any consideration of (1) whether the facility would contribute to an overconcentration of similar facilities in the neighborhood; (2) whether the facility's location would be contrary to the APA's recommended standard of permitting only one or two such uses per block; and (3) the proximity of the facility to schools, churches, parks, and outlets for alcoholic beverages.

The Hearing Officer has determined that the considerations to which the applicant referred were not prohibitions or standards that stand as absolute bars to granting a use permit for a residential care facility. Rather they are *factors* taken into

consideration in the context of a use permit hearing when determining whether the proposed use would be compatible with surrounding uses.

In analyzing overconcentration factors, and proximity to schools, parks and alcoholic beverage outlets in a reasonable accommodation setting, the Hearing Officer contemplated whether a waiver of considering those factors was *necessary* in order to afford disabled individuals an equal opportunity to use and enjoy a dwelling.

All three factors were considered at the January 12, 2009 use permit hearing by the Hearing Officer, who cited overconcentration, and proximity to schools and alcoholic beverage outlets among reasons for denying the applicant's use permit. Therefore, the applicant may have believed that a waiver of these considerations alone would have resulted in a grant of a use permit or reasonable accommodation. However, the Hearing Officer also considered other factors, including evidence of persistently disruptive resident behavior, impacts of facility vans, and impacts of secondhand smoke.

Some of the impacts of the latter category could be controlled with appropriate conditions. However, public testimony of continued disruptive conduct on the part of Newport Coast Recovery's facility residents presented evidence of impacts on neighbors that are not consistent with stated purposes of NBMC Chapter 20.91A, which is to protect public health, safety and welfare. Staff proposed a reduced occupancy of 14 residents to the Hearing Officer to allow greater supervision of residents,. However, the evidence presented at the January 12, 2009 hearing led the Hearing Officer to conclude that Newport Coast Recovery could not adequately control and supervise its facility in a manner that allows neighbors to have quiet enjoyment of their properties. The Hearing Officer finds that evidence presented after the January 12, 2009 hearing to City staff by former facility residents and/or their parents, the appearance at the July 7, 2009 hearing of a former minor facility resident, and testimony at the July 7, 2009 hearing of the mothers of two minors admitted to the facility has confirmed this conclusion. Thus, even if the factors which NBMC Section 20.91A.060(D) directs the Hearing Officer to consider are *not* considered, the findings necessary for a use permit still cannot be made for purposes of Newport Coast Recovery's request for a reasonable accommodation. Therefore, the Hearing Officer finds the requested waiver is not necessary to provide disabled individuals with an equal opportunity to use and enjoy a dwelling.

NBMC Section 20.98.025(C) allows the City to 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.*

Waiver of occupancy restrictions – As the occupancy restrictions pose no barrier to the applicant's ability to house up to 18 residents at the facility, granting the accommodation would not affirmatively enhance the quality of life of an individual with a disability.

Resident occupancy of 18 residents – As discussed above, there are a number of alternate similar housing opportunities for disabled individuals living in a large licensed recovery facility setting, some in the immediate neighborhood of Newport Coast Recovery. Granting the requested accommodation so that potential residents can live in this facility rather than any of the alternate facilities will not affirmatively enhance the quality of life of an individual with a disability.

Parking requirements and visitor parking conditions – As the parking requirements pose no barrier to the applicant's ability to house up to 18 residents at the facility, and applicant has not demonstrated that imposing visitor parking restrictions will prevent residents from receiving a therapeutic benefit, granting the accommodation would not affirmatively enhance the quality of life of an individual with a disability.

Waiver of factors to consider under NBMC Subsection 20.91A.060(D) – proximity of use to schools, parks, other residential care facilities and alcoholic beverage outlets – As stated above, other factors, such as reports of continued disruptive conduct on the part of the Newport Coast Recovery facility's residents presented evidence of impacts on neighbors that were not consistent with stated purposes of NBMC Chapter 20.91A, that is to protect public health, safety and welfare. Even if the factors which NBMC Section 20.91A.060(D) directs the Hearing Officer to consider in analyzing the finding that the use will be compatible with the character of the surrounding neighborhood are *not* considered, the findings necessary to grant a use permit or reasonable accommodation cannot be met. Therefore, the requested waiver would not produce the result desired by the applicant, and would not affirmatively enhance the quality of life of an individual with a disability.

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.*

Waiver of occupancy restrictions - as the occupancy restrictions pose no barrier to the applicant's ability to house up to 18 residents at the facility, no individual with a disability will be denied an equal opportunity to use and enjoy the housing type of their choice absent the accommodation.

Resident occupancy of 18 residents - as discussed above, there are a number of similar alternate housing opportunities for disabled individuals living in a large licensed recovery facility setting, some in the immediate neighborhood of Newport Coast Recovery. Individuals with disabilities will not be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

Parking requirements, visitor parking conditions - as the parking requirements pose no barrier to the applicant's ability to house up to 18 residents at the facility, and applicant has not demonstrated that imposing visitor parking restrictions will prevent residents from enjoying the housing type of their choice absent the accommodation, individuals with disabilities will not be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

Waiver of factors to consider under NBMC Subsection 20.91A.060(D) – proximity of use to schools, parks, other residential care facilities and alcoholic beverage outlets – As stated above, other factors, such as reports of continued disruptive conduct on the part of Newport Coast facility residents presented evidence of impacts on neighbors that were not consistent with stated purposes of NBMC Chapter 20.91A - to promote public health, safety and welfare. Even if the factors which NBMC Section 20.91A.060(D) directs the Hearing Officer to consider are *not* considered, the findings necessary for a use permit or reasonable accommodation cannot be met. Therefore, individuals with disabilities will not be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.

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 provide information or evidence demonstrating that the size or type of facility requested is necessary for the facility's financial viability. Instead, the applicant stated in their application that they objected to the application requirement to provide an explanation of why the requested accommodation is necessary to make the facility economically viable in light of the relevant market and market participants.

The Hearing Officer notes that when required findings allow staff to make a recommendation in favor of granting accommodations that would allow facilities to operate at a requested location, but at a population level lower than the number of residents requested by the applicant, the facility operator has the

opportunity to present financial and other information that demonstrates it needs a higher resident population to be financially viable.

In the case of Request No. Two, Newport Coast Recovery requested a population level that is higher than that which was recommended by staff in its January 12, 2009 use permit staff report, but declined to provide information about its need for more residents for financial viability reasons. Therefore, the Hearing Officer finds the applicant has not carried its burden to demonstrate necessity at the higher occupancy level. Absent financial information from the applicant, the Hearing Officer was unable to consider this factor in determining whether the requested accommodation is necessary to provide a disabled individual an equal opportunity to use and enjoy a dwelling.

The applicant did not present evidence that any of the other accommodations requested in Request No. Two were necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.

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 applicant stated in their application that they object to the application requirement to provide an explanation of whether the requested accommodation is necessary to provide individuals with a disability an equal opportunity to live in a residential setting by providing evidence regarding the existing supply of facilities of a similar nature and operation in the community.

NBMC Section 20.98.025(C.4) authorizes the Hearing Officer to consider whether the existing supply of other facilities that are 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" when determining whether the accommodation is necessary. Based on ADP's most recently published list of licensed facilities (list current as of December 12, 2008) and use permits granted by the Hearing Officer, City staff has prepared a revised estimate of the number of licensed beds for alcohol and drug recovery in Newport Beach. Including the applicant's ADP license for 29 beds, staff estimates that there are currently approximately 236 ADP-licensed treatment beds in the City, many of which are located in duplex and apartment units on the Balboa Peninsula and West Newport. Without the applicant's 29 beds, there are still 207 licensed recovery beds in Newport Beach. Like the applicant's facility, the majority of these facilities are located near the beach in residential districts zoned R-2. At the July 7, 2009 public hearing, Assistant City Manager Dave Kiff reported he was informed by residential care facility operators in the City of Newport Beach

that there is a high vacancy of residential care facility beds. Based on this information, and given there was no controverting evidence presented, the Hearing Officer finds there is a sufficient supply of facilities of a similar nature and operation in the community and that denial of the reasonable accommodation would not deprive prospective residents of the opportunity of live in a similar residential setting in Newport Beach.

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.**

With regard to current residents, this finding can be made. Allowing the facility to remain at its current location for a period of time that allows current residents to complete their intended stay would not impose a financial or administrative burden on the City that is undue in relation to requiring disabled residents to leave their present housing. Therefore, the Hearing Officer has determined this finding can be made with regard to current client residents only. A condition of the denial of Request No. One of Reasonable Accommodation No. 2009-009 is included in Resolution No. HO-2009-023 stating that during abatement proceedings current client residents of Newport Coast Recovery shall be allowed to remain at the facility until they choose to leave, or until their original intended stay is complete subject to the terms of their contract, whichever occurs first.

With regard to prospective residents, this finding cannot be made. Numerous residents in the vicinity of this use testified at public hearings regarding the conduct of Newport Coast Recovery and its impacts on neighboring uses. This conduct may in the future require administrative, code enforcement and law enforcement staff time to be expended to address complaints, as it has in the past.

In addition, on April 1, 2009, a California Department of Social Services (DSS) officer investigated allegations of minors being admitted to treatment at the facility and confirmed that Newport Coast Recovery had provided unlicensed care and supervision of minors at its 1216 West Balboa Boulevard facility. The DSS officer issued a Notice of Operation in Violation of Law to Newport Coast Recovery for providing unlicensed care and supervision to minors. This violation of law resulted in the involvement of staff in several City departments, who spent substantial time assisting complainants and assisting in the location of one of the minors whom Newport Coast Recovery had placed in another facility. The Hearing Officer finds that granting the requested accommodation to a facility that operates in this manner would create an undue 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.**

This finding cannot be made. The Hearing Officer granted Request No. One as to current residents, because most recovery facilities operating in the City have reported an average length of resident stay of 30 to 90 days. Because of potential hardship to current residents of Newport Coast Recovery's treatment program, the Hearing Officer found that allowing current residents in treatment to remain at the facility for the remainder of their intended stay under the conditions incorporated in Request No. One would not result in a fundamental alteration in the nature of the City's zoning program. However, Request No. Two asks for a number of waivers which the Hearing Officer finds, if granted, would create a fundamental alteration in the City's zoning program.

Like Request No. One, Request No. Two contains an unstated but implicit request that the City waive Ordinance No. 2008-05's requirement that a use permit must be granted to allow existing nonconforming uses in residential zones to continue operation. As in the analysis of Request No. One, the Hearing Officer must consider whether waiving the use permit requirement would undermine the basic purpose the use permit requirement was put in place to achieve. To analyze this, the Hearing Officer considers whether the purposes, requirements and protections of a use permit can be met by the reasonable accommodation, without the grant of a use permit.

The Hearing Officer was unable to make required Finding No. Four of the applicant's reasonable accommodation Request No. One, in part because of the applicant's verified violations of state law. The granting of the applicant's reasonable accommodation Request No. Two would allow an even higher occupancy limit and fewer controls on secondary impacts, which would result in a fundamental alteration of the nature of the City's zoning program.

In Request No. One, the Hearing Officer analyzed whether waiving a use permit requirement while allowing the applicant to continue operation with 14 residents, with conditions of approval imposed by the use permit, would have undermined a basic purpose the use permit requirement was meant to achieve. The Hearing Officer incorporates by reference the discussion of Finding No. Four in the Resolution of Denial of Request No. One of Reasonable Accommodation No. 2009-009. By incorporating by reference, the Hearing Officer finds that this discussion applies to Request No. Two as relates to how the determination of granting the requested accommodation would fundamentally alter the basic purposes of the Zoning Code, the requirements for use permits in residential zones, and the General Plan

Specifically, the Hearing Officer finds that the use does not conform to all applicable provisions of NBMC Section 20.91A.050, (Development and Operational Standards) required for use permits in residential zones, and in particular, Section 20.91A.050(B). In March 2009, while its appeal of the Hearing Officer's denial of its use permit application was pending before the City Council, the applicant twice violated state law by accepting minor clients without a DSS license or the ADP adolescent waiver

required to provide residential treatment, care and supervision to minors. On April 1, 2009, a California Department of Social Services (DSS) officer investigated allegations of minors being admitted to treatment at the facility and confirmed that Newport Coast Recovery had provided unlicensed care and supervision of minors at its 1216 West Balboa Boulevard facility. The DSS officer issued a Notice of Operation in Violation of Law to Newport Coast Recovery for providing unlicensed care and supervision to minors.

NBMC Section 20.91A.050(B) requires that all facilities within the City be operated in compliance with applicable State and local laws. In order to grant a use permit, the Hearing Officer must make all findings required by NBMC Section 20.91A.060, and one of those required findings is that the facility operates in accordance with all operational standards of NBMC Section 20.91A.050. Because the facility has not operated in compliance with state law, the facility does not operate in accordance with all operational standards of NBMC Section 20.91A.050. The Hearing Officer finds that the results of the DSS officer's investigation constitute a basis for finding the applicant does not operate its facility in accordance with applicable law, as required by NBMC Section 20.91A.050(B), which requires that the facility be operated in compliance with state and local law. Ignoring these violations would undermine one of the basic purposes the use permit requirement was put in place to achieve: "to protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery." Granting discretionary permits only to applicants that operate their facilities in compliance with state laws protecting their potential clients is necessary to protect and implement the recovery of the disabled.

Waiver of occupancy restrictions – As granting this request is not necessary to afford the maximum requested number of residents the opportunity to use and enjoy the dwelling, the Hearing Officer finds it is not necessary to determine whether granting the request would result in a fundamental alteration in the nature of the City's zoning program.

Parking requirements and visitor parking conditions waiver - As granting this request is not necessary to afford the maximum requested number of residents the opportunity to use and enjoy the dwelling, the Hearing Officer finds it is not necessary to determine whether granting the request would result in a fundamental alteration in the nature of the City's zoning program.

However, see Factor B analysis of whether granting the requested accommodation would result in a substantial increase in traffic or insufficient parking, below.

Treatment as legal nonconforming use, application of California Building Code provisions in place at time of change of occupancy - As granting these requests are not necessary to afford the maximum requested number of residents the opportunity to

use and enjoy the dwelling, the Hearing Officer finds it is not necessary to determine whether granting the request would result in a fundamental alteration in the nature of the City's zoning program.

As noted above, the applicant may believe this request, if granted, would allow it to continue operation without the imposition of reasonable conditions required under a use permit. This is not the case, as the applicant is already being treated as all other nonconforming uses in residential districts are being treated. However, the Hearing Officer finds that if all provisions of Ordinance No. 2008-05 applicable to this facility *were* waived, it would result in undermining two of the basic purposes the ordinance was put in place to achieve – to promote public health, safety and welfare; to implement the policies of the General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods; and, to protect the recovery and residential integration of the disabled (NBMC Section 20.91A.010).

<u>Waiver of overconcentration considerations</u> – The Hearing Officer finds that preventing overconcentration and excessive clustering of residential care facilities, so that facilities are not congregated or overconcentrated to the extent of institutionalizing an area, is one of the primary purposes the provisions of the current Zoning Code were put in place to achieve. (See NBMC Section 20.91A.010) Similarly, courts have recognized that the presence of too many group homes in a residential neighborhood can potentially undermine the very purpose of such a district and therefore be unreasonable. In *United States. v. City of Chicago Heights*, 161 F.Supp.2d 819, 837 (N.D.Ill. 2001), the District Court stated:

> "There may be situations in which the distance between the homes is so little, where there is already more than one group home within 1000 feet, or where the homes are so similar in nature or operation, under which a request for a special use permit would fundamentally alter the City's purpose of avoiding clustering and preserving the residential character of certain neighborhoods."

Concern about overconcentration is consistent with the position taken by the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) in their "*Joint Statement on Group Homes, Local Land Use and the Fair Housing Act.*" This joint statement was duly considered by the Hearing Officer in making a determination that more than one facility within a 617-foot calculable median block length in a nonstandard subdivision area would create an overconcentration of such uses. Therefore, the Hearing Officer finds that waiving overconcentration considerations entirely is an unreasonable request, as it would undermine one of the basic purposes Ordinance No. 2008-05 was put in place to achieve, and would result in a fundamental alteration of the Zoning Code.

Waiver of considerations of proximity of schools, parks and alcoholic beverage outlets – As the applicant has not demonstrated the necessity of this accommodation, the Hearing Officer finds it is not necessary to determine whether granting the request would result in a fundamental alteration in the nature of the City's zoning program. The factors that the applicant requested not be considered were factors for consideration only. The existence of a potential overconcentration of recovery facilities, or the proximity of schools, parks or alcoholic beverage outlets do not present an automatic bar to the issuance of a use permit or a reasonable accommodation.[1]

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.*

Waiver of occupancy limit, occupancy of 18 residents: Request No. Two asked for an occupancy level that exceeded the number of residents the Hearing Officer believes the applicant could adequately supervise to prevent a fundamental alteration of the character of the neighborhood. The Hearing Officer finds that granting the requested accommodation would fundamentally alter the character of the neighborhood, particularly with the new information received after the applicant's first use permit denial that demonstrated the applicant's inability to adequately supervise its residents,.

Parking requirements and visitor parking conditions waiver: NBMC Section 20.66.010 establishes the purposes of the off-street parking and loading regulations. They are (A) to ensure that off-street parking and loading facilities are provided for new land uses and major alterations of existing uses in proportion to the need for such facilities created by each use; (B) to establish parking standards for uses consistent with need and with feasibility of providing parking on specific sites; and (C) to ensure that off-street parking and loading facilities are designed in a manner that will ensure efficiency, protect the public safety, and, where appropriate, insulate surrounding land uses from adverse impacts. With the applicant's history of using its off-street parking for uses other than parking, the historically high occupancy of the facility, and the applicant's practice of

[1] The Hearing Officer recently issued a reasonable accommodation for a sober living facility which operates in close proximity to a high number of alcoholic beverage outlets in the McFadden Square area of the Balboa Peninsula. The Hearing Officer granted the accommodation in part because that applicant was able to demonstrate that under the circumstances of that facility, the proximity did not undermine the recovery of the disabled residents, and therefore, did not undermine a basic purpose of the use permit requirement.

providing counseling to individuals who do not reside onsite, the Hearing Officer finds that waiving the parking requirements of NBMC Section 20.66.030 would undermine the basic purpose those requirements were put in place to achieve.

The visitor parking conditions proposed for family members coming to the facility to receive education and counseling that were considered as part of the applicant's use permit analysis could be compared to the requirements the City would place on any other business or home occupation in a residential district. The Hearing Officer finds that waiver of parking conditions applied to businesses that receive business visitors would also fundamentally undermine the purpose offsite parking requirements were put in place achieve.

Treatment as a legal nonconforming use, application of California Building Code provisions in place at time of change of occupancy: The Hearing Officer found these accommodations were not necessary, as the City was already treating the applicant's facility as a nonconforming use and was willing to apply the California Building Code provisions in place at the time of change of occupancy. No alteration of the fundamental purpose of the City's zoning program would result. However, the applicant appeared to believe that being treated as a nonconforming use would exempt it from all requirements of Ordinance No. 2008-05. The Hearing Officer finds that if all provisions of Ordinance No. 2008-05 were waived as to the applicant, the basic purposes the ordinance was put in place to achieve would be undermined. Those purposes include promoting public health, safety and welfare, and to implement the policies of the General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods, and protecting the recovery and residential integration of the disabled (NBMC Section 20.91A.010).

Waiver of overconcentration requirements: The Hearing Officer finds that preventing overconcentration that results in the institutionalization of an area is one of the primary purposes Ordinance No. 2008-05 was put in place to achieve. As noted above, courts have recognized that the presence of too many group homes in a residential neighborhood can potentially undermine the very purpose of such a district and therefore would be unreasonable.

Waiver of considerations of proximity of schools, parks and alcoholic beverage outlets: The Hearing Officer notes that consideration of this factor (proximity of the facility to schools, parks and alcoholic beverage outlets) is not a bar to the granting of a reasonable accommodation or use permit, but is only a factor to be considered. There may be individual situations in which it would not undermine a basic purpose of the Zoning Code to waive consideration of the proximity of nearby schools, parks and alcoholic beverage outlets when reviewing whether a particular proposed use will fundamentally alter the character of the surrounding neighborhood, or whether the location of a

proposed use will undermine the purpose of protecting the recovery of disabled individuals.

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

Staff analyzed whether Newport Coast Recovery had sufficient on-site parking for the use and whether traffic and transportation impacts had been mitigated to a level of insignificance in its January 12, 2009 staff report. However, that analysis was performed with staff's recommended conditions regarding visitor parking in mind. The Hearing Officer finds that if Newport Coast Recovery continued operation with 18 residents, and without requirements for the purchase of master parking permits, requirements that on-site parking be used by facility residents and staff, and visitor parking regulations, a substantial increase in insufficient parking would result.

As discussed above, the visitor parking conditions proposed as part of a use permit could be compared to the requirements the City would place on any other business in a residential district offering outpatient counseling.

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. 2008-05 to implement General Plan Policy LU 6.2.7. Under the conditions described in the Finding No. 4 analysis above, the Hearing Officer has determined that granting some elements of the requested accommodation would substantially undermine an express purpose of the General Plan.

<u>Waiver of overconcentration requirements</u>: The Hearing Officer finds that preventing overconcentration that results in the institutionalization of an area was one of the express purposes Ordinance No. 2008-05 was put in place to achieve, and is consistent with an 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.*

The Hearing Officer determined that granting use permits, or reasonable accommodations that waive use permit requirements, which resulted in more than one such use within a 617-foot calculable median block length would

create an institutionalized environment. As a use permit has already been granted to another existing facility located within 300 feet of Newport Coast Recovery and within the same median block length of the applicant's facility, the Hearing Officer determined that granting the requested accommodation would create an institutionalized environment in the surrounding neighborhood.

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. However, staff recommends and the Hearing Officer makes this finding with caution and reservations, given the lack of supervision the facility appears to have been providing for its disabled residents during recent months.

WHEREAS, to approve a request for Reasonable Accommodation all five required findings contained Section 20.98.025(B) of the NBMC must be made; and

WHEREAS, specifically, Findings Nos. 2, 3 and 4 of Section 20.98.025(B) of the NBMC cannot be made; and

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section 15301 of the California Environmental Quality Act (CEQA) under Class 1 (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 (Section15061(b)(3) 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 it is not subject to CEQA; and

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies with prejudice Request No. Two of Reasonable Accommodation No. 2009-009.

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 17th DAY OF SEPTEMBER, 2009.

By: _____
Thomas W. Allen, Hearing Officer

ATTEST:

_____
City Clerk