**RESOLUTION NO. HO-2009-009**

**A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING REASONABLE ACCOMMODATION NO. 2009-06 TO ALLOW RESIDENTS OF AN EXISTING RESIDENTIAL CARE FACILITY LOCATED AT 1571 PEGASUS STREET, NEWPORT BEACH, CALIFORNIA, TO BE TREATED AS A SINGLE HOUSEKEEPING UNIT (PA 2008-107)**

**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 Yellowstone Women's First Step House, Inc., with respect to property located at 1571 Pegasus Street, and legally described as Lot 8, Tract 4307 in the City of Newport Beach, County of Orange, State of California (APN 119-361-14), as per map recorded in Book 153, Pages 18-20 of Miscellaneous Maps, requesting approval of a Reasonable Accommodation for the residents of the facility to be treated as a Single Housekeeping Unit as defined in Section 20.03.030 of the Newport Beach Municipal Code (NBMC); and

**WHEREAS**, a public hearing was held on February 20, 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 the hearing was continued to March 12, 2009 for action on the resolutions and where the public hearing was reopened to receive additional evidence, both written and oral from the applicant, staff and the public; and

**WHEREAS,** both hearings were 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.

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 written statement that every resident of the facility is in recovery from alcohol 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: The exemption requested by the applicant is unnecessarily broad to achieve the goal of providing disabled housing. The request to be considered a Single Housekeeping Unit is essentially a request to be exempted from *all* of the provisions of Ordinance No. 2008-05 which place any sort of reasonable regulation on the operations of residential care facilities. This is not necessary, because there are many more narrowly tailored accommodations that could enable facility residents to enjoy the housing of their choice without depriving the surrounding neighborhood of reasonable conditions that mitigate any adverse secondary impacts that emanate from this facility.

The applicant's counsel asserts in a letter dated January 29, 2009 that being treated as a Single Housekeeping Unit is necessary "because the Property is not transient or institutional in nature such that it fits the definition of a non-licensed residential care facility." Even if the facility were not transient or institutional in nature, and did not clearly fit the definition of a sober living home, or unlicensed residential care facility, an exemption from the provisions of Ordinance No. 2008-05 is not necessary to afford its residents the opportunity to live in and enjoy a dwelling.

However, the applicant raised the issue of how the facility should be characterized in its necessity argument, and asserted the facility more closely resembles a Single Housekeeping Unit than any other type of residential use. Staff analyzed the facility's appropriate use classification based on the applicant's submitted materials.

The nature of applicant's facility operations, as reported in the original application for reasonable accommodation submitted in May 2008, closely resembles a boarding house use. But for the fact 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. (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 . . . ")

The applicant's May 2008 application for reasonable accommodation states, "The residents at the property reside separately at the property and interact within the property. There is individual use of common areas. The residents are responsible for their own meals, expenses and chores. Each individual resides at the property subject to a separate contractual arrangement with the applicant."

Dr. Anna Thames, CEO of Yellowtstone, has also stated that the facility has no written leases with any of the residents. Rental agreements with residents are verbal. Again, the description of operations is much closer to the NBMC's definition of a boarding house or group residential use than a Single Housekeeping Unit, as the NBMC's definition of Single Housekeeping Unit requires dwellings rented to bona fide Single Housekeeping Units to be occupied under a single written lease.

The self-reported pattern of facility operations and resident interaction in no way resembles the NBMC definition of a Single Housekeeping Unit. NBMC Section 20.03.030 (Definitions) defines a Single Housekeeping Unit as: "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."

Applicant's resident clients may be an interactive group of persons jointly occupying a single dwelling unit who share common areas, but the applicant's own submittals indicate there is no joint responsibility for meals or expenses, no single written lease (or any written leases at all), and the makeup of the household is determined by the applicant rather than the residents.

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.*

If the requested accommodation is granted, any number of the applicant's current and potential clients will be able to live in a home in a single-family zone with other recovering alcoholics. This is a situation that can 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 residents' re-integration into society. The applicant's sliding scale of rental rates offers a sober living environment to residents who might not otherwise be able to afford to live in a single-family home in this area.

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 exemption requested by the applicant is broader than necessary to achieve the goal of enabling disabled individuals an equal opportunity to enjoy the housing type of their choice. There are more narrowly tailored exemptions that could enable disabled individuals to reside at the applicant's facility.

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 does not state why being treated as a Single Housekeeping Unit is necessary to make its facilities viable in light of the current market for the type of services it provides. The applicant states that each facility requires 15 residents in order to be financially viable, and provides a general summary of average income and expenses for all four facilities. The evidence presented does not lead to the conclusion that being treated as a Single Housekeeping Unit is necessary to make applicant's facilities 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.*

In 2007, the City estimated that there were more than 315 sober living beds in the city (these are exclusive of the up to 213 ADP-licensed treatment beds). These numbers were compiled before applicant's facilities, with a total of 58 sober living and eight staff beds, were added to the city's supply. Operators of many sober living facilities within the city have reported decreased census and vacant beds, which could provide potential Yellowstone clients with an equal opportunity to live in a sober living environment without granting the accommodation. A recent agreement with Sober Living by the Sea, Inc., authorized SLBTS to provide up to 204 beds citywide. Many of these alternate sober living beds are probably not offered on a sliding fee scale based on ability to pay. However, evidence does not support the applicant's contention that treating residents of its facility as a Single Housekeeping Unit will change the availability of the existing supply of facilities of a similar nature, or afford them a substantially greater access to an equal opportunity to live in a residential setting.

Based on the foregoing analysis, the finding of necessity cannot be made in that the request is unnecessarily broad, the unit does not operate as the

functional equivalent of a single family unit, and the unit does not otherwise meet the criteria of a Single Housekeeping unit.

Even when an applicant can demonstrate necessity, the City is not required to grant a request for accommodation that is not reasonable. Cities may find a requested accommodation unreasonable if it either (1) imposes an undue financial or administrative burden on the city, or (2) results in a fundamental alteration in the nature of a city program, often described as undermining "the basic purpose which the requirement seeks to achieve."

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 the facility as a Single Housekeeping Unit would not impose a currently identifiable undue financial or administrative burden on the City. If this reasonable accommodation request were granted for all four Yellowstone facilities, the applicant would be able to house a number of residents far in excess of the 66 individuals currently residing in the four homes. 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 purpose of the NBMC's definition of Single Housekeeping Unit is to allow the determination of whether groups of related or unrelated individuals are living together in a dwelling as a single housekeeping unit. This definition is necessary because of the persistent attempts by landlords to establish illegal boarding houses, and illegal dwelling units in dwellings within the City.

Groups living as a single housekeeping unit can live together in any residential zone in Newport Beach. Groups not living as a single housekeeping unit are prohibited from establishing residences in any of the City's residential zones. There is an important exception to the total prohibition of groups not living as a single housekeeping unit -- groups not living as a single housekeeping unit in residential care facilities of any size.

All residential care facilities in the City have received a reasonable accommodation from the NBMC's restrictions on groups not living as a single housekeeping unit. The NBMC provides many opportunities for new facilities to establish, and has provisions for existing facilities to continue in their current locations with appropriate impact residential zone of the City.

The NBMC's Zoning Code also applies regulations to unlicensed and larger (more than seven residents) licensed facilities. These regulations are in place to ensure that the fundamental purposes of the Zoning Code can be achieved, and so the adverse secondary impacts higher density residential care facilities have on the surrounding neighborhood can be mitigated.

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.*

There were numerous letters, emails and phone calls from neighbors of the facilities that reported increasing negative secondary impacts on the neighborhood as more of the applicant's facilities established there in recent years. The impacts reported include: family and other visitors to the facilities; litter in the neighborhood which complainants attribute to the applicant's facilities, including cigarette butts, soda cans, and beer cans and bottles; facility residents traveling in groups between one facility and the others; meetings held regularly at one or more of the applicant's facilities, with outside attendees; excessive use of on-street parking by facility residents and their guests.

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

Parking - The enclosed garage spaces and driveway parking spaces would allow for the staff vehicles to be accommodated without impacting neighborhood parking.

Traffic and Generated Trips - The Institute of Transportation Engineers (ITE) establishes and publishes 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 based on 9.57 average daily trips per dwelling. Trip rates for residential care facilities are based on 2.74 average daily trips per each occupied bed. Based on these standards, an 18-bed residential care facility is estimated to generate approximately 49.32 average daily trips. Applying this formula, the facility will generate average daily trips substantially in excess of surrounding single family dwellings. If the facility's bed count is reduced to the 13 beds permitted under the use permit operating standards of NBMC Chapter 20.91A.050, the facility could generate approximately 35.62 average daily trips.

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." *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**, 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 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 Reasonable Accommodation No. 2009-06, Request No. 1, that the residents of the facility be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code (NBMC).

**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** 14th **DAY OF** April 2009.

By: _____
Thomas W. Allen, Hearing Officer

ATTEST:

_____
City Clerk