RESOLUTION NO. HO-2009-020

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE REQUEST NO. 4 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. 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, 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 has provided a signed statement certifying that all residents of the facility, excluding staff, are individuals in recovery from alcoholism or drug addiction. Federal regulations classify such individuals as disabled.

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 Hearing Officer has determined that the requested accommodation is not necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling. The Newport Beach Fire Marshal has indicated that the changes needed for the facility to comply with the California Building Code can be achieved and are not cost prohibitive.

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.*

In light of the improvements necessary to bring the facility into compliance with the

California Building Code, the granting of the accommodation to waive the requirements of the California Building Code would place the life of the facility's residents at greater risk, thereby negatively affecting the quality of life of one or more individuals 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.*

The Hearing Officer finds that denying the accommodation will not deprive facility residents an opportunity to enjoy the housing type of their choice, assuming the facility residents have an interest in residing in a safe environment.

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 presented evidence that bringing the facility into compliance with the California Building Code requirements for R4 occupancies would be financially infeasible or that the facility will not be economically viable as a result of compliance with the California Building Code.

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.*

Through implementation of Ordinance No. 2008-005, it is estimated approximately 233 sober living beds have been approved within the City. Most of these beds are in facilities that have similar population density or less population density than the applicant's facility. As operators of other sober living facilities have reported decreased occupancy levels, prospective residents seeking a sober living environment of this type will not be deprived of an equal opportunity to live in a residential setting of similar type.

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. Granting the requested accommodation would not impose an undue financial or administrative burden on the City. Treating the facility as a single family residential use would not impose a currently identifiable undue financial or administrative burden on the City, however, this finding is made with an acknowledgment of the history of

code violations by the applicant. Plans on file with the City indicate that approximately 56 to 58 individuals could be housed at the three facilities if some rooms not labeled as "bedrooms" on plans were used as bedrooms. If resident populations were unregulated, and code violations 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 a City program, as "fundamental alteration" is defined in Fair Housing Laws and interpretive case law.

Facts do not support the finding. The State Fire Marshal made the determination that residential care occupancies with more than six residents have characteristics that require a degree of extra protection for their residents. Requirements for sprinklers, adequate egress, fire alarm pull stations and smoke alarms were adopted to provide a greater degree of life safety protection for a population of disabled individuals who live together. The Hearing Officer has determined that waiving such requirements would result in a fundamental alteration of the California Building Code because it undermines the basic purpose the California Building Code's life safety protections.

According to the current 2007 California Building Code, facilities such as the applicant's are considered as R4 occupancies. The California Building Code requires extra protection for R4 occupancies in recognition of the fact that the same disabilities that require federal fair housing protection may also impact or impede the disabled individual's ability to safely and quickly exit a building during a fire. The Hearing Officer has determined that waiving required life safety protections for residents of the facility would fundamentally undermine the basic resident safety standards the California Building Code seeks to achieve.

Granting the accommodation would also place neighboring properties at risk. The 2007 California Building Code requires that R4 occupancies have commercial sprinkler systems installed rather than residential sprinkler systems. Residential sprinklers are intended to protect the occupants of a residence and give them sufficient time to evacuate a building. Commercial sprinklers are intended to extinguish a fire and prevent it from spreading to other structures. The Hearing Officer has determined that waiving this requirement would undermine the basic purpose to provide fire protection to neighboring properties that the regulation seeks to achieve.

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.

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

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

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.*

These factors pertain to Zoning Code issues rather than California Building Code issues; and therefore, were not analyzed as part of this request. These factors were analyzed in the applicant's Reasonable Accommodation Request No. 1, which was to apply the Zoning Code provisions to the properties in the same manner as a single housekeeping unit as defined in NBMC Section 20.03.030, and Request No. 2, which was to not treat or classify the properties as "Residential Care Facilities" as defined by NBMC Section 20.05.010.

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 do not support the finding. Many of the California Building Code requirements, including the requirement for commercial sprinkler systems, were adopted to protect neighboring structures as much as facility residents. The Hearing Officer finds that granting the requested accommodation would result in a potential direct threat to the safety of neighboring properties and could result in substantial physical damage to the property of others.

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. 4 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