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PUBLIC HEARING ON
OCEAN RECOVERY, INC.

and

YELLOWSTONE WOMEN'S FIRST STEP HOUSE, INC.
BEFORE THOMAS W. ALLEN, ESQ., HEARING OFFICER

NEWPORT BEACH, CALIFORNIA

THURSDAY, MARCH 12, 2009



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Public hearing was taken on behalf of
the City of Newport Beach at 3300 Newport Boulevard,
Newport Beach, California, beginning at 4:00 p.m., and
ending at 6:16 p.m., on Thursday, March 12, 2009, before
LAURA A. MILLSAP, RPR, Certified Shorthand Reporter No.
9266.

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1 NEWPORT BEACH, CALIFORNIA; THURSDAY, MARCH 12, 2009

2 4:00 P.M. - 6:16 P.M.

3
4 MR. ALLEN: We'll open the hearing again.

5 Let's see. My name is Thomas W. Allen, and I've been
6 designated by the City as the Hearing Examiner for the
7 matters that are before us today.

8 We have four continued hearings from a
9 previously meeting, all involving the Heights area and
10 Yellowstone. The addresses are 1561 and 1621 Indus,
11 20172 Redlands, and 1571 Pegasus. And as I indicated,
12 Yellowstone Recovery is the Applicant in each of these
13 instances.

14 The City staff has requested that we reopen the
15 hearings on all of these, that is, the use permit
16 hearings on the basis of later discovered information.
17 The staff will explain that in more detail.

18 But basically, the contention is that the four
19 units that were acted upon at the previous meeting were
20 not lawfully established at the time they were annexed
21 into the City, and, therefore, they don't qualify for use
22 permits.

23 However, before going any further with those, I
24 need to step back in the agenda for the purpose of the
25 adoption of Resolution Number One, Resolution of Approval

1 for Ocean Recovery. And this is not a public hearing.
2 It's simply an administrative action. So the Hearing
3 Officer hereby adopts the Resolution.

4 MR. KIFF: Actually, Mr. Allen, it's 2009-003.
5 That's the number that it would be assigned.

6 MR. ALLEN: Thank you. So I hereby adopt
7 Resolution Number 2009-003 Resolution of Approval for
8 Ocean Recovery at 1601 Balboa Boulevard.

9 And then back to the Indus matters. I think I
10 gave a sufficient opening.

11 MR. KIFF: We'll have you sign that now.
12 Sorry. I didn't mean to interrupt.

13 MR. ALLEN: And we can proceed with the initial
14 staff report on the Yellowstone matters. And as we do at
15 the previous meeting, we'll open consideration of all
16 four of these together, simply because they are all the
17 same Applicant and virtually identical, unless staff
18 disagrees with that approach?

19 MR. KIFF: We agree.

20 MR. ALLEN: So let's proceed in that fashion.

21 MR. KIFF: Okay. Thank you.

22 Mr. Allen, just as a reminder, as you noted,
23 this is a public hearing item per our ordinance on group
24 residential uses involving four facilities in West Santa
25 Ana Heights.

1 We did do a presentation. There is a staff
2 report available at the table out front of our
3 presentation, generally, at the last meeting. I'll let
4 Janet Brown explain some of the additional information
5 evaluated in between the last meeting and this meeting.

6 MS. BROWN: Thank you, and good afternoon.

7 I am going to take a couple of moments to just
8 recap what occurred at the February 20th hearing. At
9 that hearing, staff recommended that the Hearing Officer
10 approve the use permits with operational conditions for
11 the Redlands property and the property located at 1621
12 Indus to allow the sober living facilities to continue
13 operating with the reduced occupancy of 15 beds.

14 Staff also recommended denial of the use
15 permits for the properties located on Pegasus Street and
16 at 1561 Indus. Our recommendations were based on
17 documentation that had been provided by the Applicant and
18 information that was available to us at the time that the
19 reports were written.

20 We noted at that hearing that there might be
21 new information introduced that may require further
22 evaluation by staff and the Hearing Officer to help us
23 determine whether or not our recommendations were
24 correct.

25 At the conclusion of the hearing, the Hearing

1 Officer concurred with staff recommendation and
2 determined, based on the information provided, that the
3 Pegasus property and the 1561 Indus property be closed,
4 and that the Redlands property and the 1621 Indus
5 property continue to operate a sober living facility.

6 Staff was directed to prepare the appropriate
7 Resolutions, and the hearing was continued for action to
8 March 12th.

9 Due to testimony provided by the Applicant's
10 Counsel and new information that is provided in this
11 latest staff report, staff recommends that the hearing
12 for the use permit be reopened. During the February 20th
13 hearing, the Applicant's Counsel made an argument that
14 had never been raised during the prior discussions with
15 staff during the past nine months that we had worked with
16 he and his clients to bring the applications to the point
17 of completeness.

18 At the hearing, the Applicant's Counsel
19 characterized the Yellowstone facilities as established
20 non-conforming uses, and cited a number of California
21 cases that held that established uses generally retain
22 the same rights they had before the law was changed.

23 In response to this argument, staff conducted
24 an investigation into the circumstances and laws that
25 were applicable to the properties at the time the uses

1 were established in 2003, 2005 and 2007.

2 We were informed by the County Planning and
3 Code Enforcement staff that a sober living facility would
4 have been classified as either a community care facility
5 or a congregate care facility.

6 The Orange County Zoning Code defines a
7 community care facility as "any facility which may or may
8 not require a state license, to provide non-medical
9 residential care, or day care for children, adults, or
10 both, including physically handicapped and mentally
11 incompetent persons. This includes day care facilities,
12 day care nurseries, and family day care homes."

13 This use classification most closely matches
14 the uses of the Yellowstone facilities. As noted in the
15 staff report, at the time the uses were established, the
16 properties were located in the Santa Ana Height Specific
17 Plan and were zoned RSF, or Residential Single Family.

18 The Specific Plan, which was last revised by
19 the County in 2001, included land use regulations for the
20 RSF district that allowed certain principal uses,
21 including singlely attached family dwellings, and
22 community care facilities serving six or fewer persons,
23 and large family day care homes.

24 The Specific Plan also included provisions that
25 stated that "The following principal uses are permitted

1 subject to a use permit by the Planning Commission, per
2 Zoning Code Section 7.9.150. Any other use which the
3 Planning Commission finds consistent with the purpose and
4 intent of this district."

5 Section 7.9.141 of the Orange County Zoning
6 Code provided requirements for community care facilities
7 basically stating that "a facility serving six or less
8 persons was permitted in any district, planned community,
9 or specific plan areas zoned for residential uses. And
10 that a facility serving seven to twelve persons was
11 permitted in any district, planned community, or specific
12 plan area subject to the issuance of the use permit by
13 the Planning Commission."

14 Because very little information in the way of
15 permits or other records were turned over to the City by
16 the County following annexation of this area, City staff
17 contacted the County to request copies of all records
18 they had for the four addresses.

19 There are no records of a use permit being
20 issued for any of the four Yellowstone facilities, even
21 though County Planning staff thoroughly conducted a
22 search of their records at our request. We did find
23 records of a temporary use permit issued for 1621 Indus
24 that allowed meetings four times a year, ten days each,
25 allowing up to a total of 40 meetings. That permit was

1 issued in March of 2005.

2 We also found a letter sent by the Applicant to
3 the County in February of 2006 requesting to obtain Sober
4 Living Certification for an 18-bed sober living home at
5 the Pegasus property. Also at the Pegasus property, an
6 undated Code Enforcement Action stating "Sober living
7 home operating without a permit (over six people)."

8 We also found a record from 2005 that
9 Yellowstone attempted to obtain County Sober Living
10 Certification for the Redlands property with notes in the
11 County Activity Report dated September 2005, and an
12 actual fire inspection was performed, and the house was
13 set up for 15 beds.

14 Based on these records, it appears as if the
15 Redlands and Pegasus properties were being used as sober
16 living homes for more than 12 persons. We believe that
17 this demonstrates a pattern and a practice by the
18 Applicant of operating residential care facilities in
19 violation of local laws in effect at the time the
20 Yellowstone facilities were established.

21 And for this reason, we believe that Finding A
22 of Section 20.91A.060 cannot be made with regards to the
23 development and operational standard that no owner or
24 manager shall have demonstrated any pattern of operating
25 similar facilities in violation of the law.

1 Staff also questions whether the Yellowstone
2 facilities were even qualified to apply for and receive
3 use permits under Municipal Code Section 20.62.030,
4 Determination of Non-Conformity.

5 Section B of that section states that,

6 "A use that was lawfully established,"
7 excuse me, "under the laws in place at the time
8 that that no longer conforms to the use
9 regulations or required conditions for the
10 district in which it is located because of
11 annexation to the City shall be deemed to be an
12 non-conforming use.

13 "However," it continues, "a use shall not be
14 continued to have been lawfully established and
15 maintained and is an illegal use if it was
16 established or operated without required
17 permits and licenses, including, but not
18 limited to, permits and licenses required by
19 any Federal, state or local governmental
20 agency."

21 Pursuant to section 20.91A, "Persons whose use
22 of their property in a residential district was
23 rendered non-conforming by adoption of
24 Ordinance 2008-05 are qualified to seek a use
25 permit to continue the use in its current

1 location."

2 But there's no similar provision or illegal
3 uses. So, therefore, staff believes the Yellowstone
4 facilities might more accurately be characterized as an
5 illegal use rather than as a non-conforming use. And for
6 these reasons and as stated in greater detail in our
7 staff report, staff recommends denial of all four use
8 permits as requested by the Applicant.

9 If the Hearing Officer agrees with staff
10 recommendations, staff recommends the Hearing Officer
11 adopt the Draft Resolution of Denial with Prejudice for
12 Use Permit Number 2008-030, for the property located at
13 1561 Indus, and also to direct staff to prepared a
14 Resolution of Denial for the other three use permits.

15 And that concludes my presentation. I'm
16 available for any questions you might have.

17 MR. ALLEN: I don't have any questions at this
18 time. Does the staff have anything to add?

19 MR. KIFF: No.

20 MR. ALLEN: All right. What about the
21 Applicant? Would you like to respond, I presume?

22 MR. ZFATY: Yes. Thank you, Mr. Allen. Again,
23 Isaac Zfaty on behalf of Yellowstone.

24 I think as a preliminary matter we have to have
25 some ruling as to whether we are going to reopen the CUP

1 hearings as to these four properties. I say that because
2 my understanding is that those were completed at the
3 February 20th hearing.

4 And, of course, I have a presentation that I
5 would be happy to provide to you, Mr. Allen, in terms of
6 why it is that I think that the argument that's offered
7 by the staff at this point in favor of reopening these
8 hearings falls short.

9 MR. ALLEN: I've thought somewhat about that.
10 My thought is this. That staff has timely made the
11 request to reopen the hearings. I don't expect but would
12 be willing to listen that your client has incurred any
13 detrimental reliance or adverse effect as a result of
14 reopening the hearings.

15 In other words, I don't see that there would be
16 any changes that took place in that short period of time
17 that would constitute a vesting of some sort such that
18 the hearings couldn't be reopened.

19 So my ruling would be that the hearings can be
20 reopened for the purpose of considering the position now
21 taken by the staff.

22 MR. ZFATY: Well, we're not going to make an
23 argument that we have detrimentally relied at this point.
24 So with that, I would ask that I be allowed to give a
25 presentation on the CUP for each of the four properties

1 based on the new information, I think, is what we're
2 talking about here?

3 MR. ALLEN: Yes.

4 MR. ZFATY: Okay.

5 MR. ALLEN: Yes, you're welcome to proceed.

6 MR. ZFATY: Just to frame the issue, Mr. Allen,
7 the comment that Ms. Brown just made on the record was
8 that there's been new -- and I'm going to quote
9 this -- "information available to us at the time of the
10 hearing," referring to the February 20th hearing.

11 And the issue here is whether there was
12 actually something new that was presented at that
13 hearing. Ms. Brown just noted that it was testimony by,
14 I think, myself that for the very first time, we brought
15 to the City's attention that we were claiming that we
16 were an established non-conforming use.

17 I would submit to you that we have said from
18 the very beginning, going all the way back to our
19 original application in May of 2008, that we are an
20 established use, and, of course, I think that it goes
21 without saying that based on the implementation of the
22 ordinance that we are non-conforming.

23 So I don't agree that there's anything new
24 here. But the bigger picture is, what is it that we're
25 analyzing? The issue, in terms of what this new

1 information is -- assuming that it actually is new
2 information, just arguendo, is that Yellowstone was
3 operating facilities in Santa Ana Heights unlawfully.

4 And that requires an analysis of the County's
5 requirements by the City ex post facto, far after the
6 time, and we really have a mootness problem. It
7 stretches far beyond just a basic Constitutional analysis
8 of whether we've been afforded due process on the issue.

9 Because, as you can imagine, if the County had
10 decided that we were not in conformance with something
11 that -- some County Zoning Regulation, we would be
12 provided with, under the 5th and 14th Amendment of the
13 United States Constitution, notice and opportunity to be
14 heard, and we were provided with neither one of those.

15 And I think the City would agree with me that,
16 in fact, there was nothing that turned up that showed in
17 their subsequent search since February 20th that we were
18 cited or asked to be -- that we were held in abatement or
19 in violation of any zoning ordinance. So that's the big
20 picture analysis.

21 What would have to happen, though, Mr. Allen,
22 in order to get to the place that the staff is now
23 recommending, is that the City would have to make a
24 finding -- this is necessary -- the City would have to
25 make a finding that we had violated a County rule without

1 an opportunity to be noticed and without an opportunity
2 to be heard on that.

3 That is it a -- that is a Pandora's box that I
4 don't think the City wants to open. I don't think the
5 City wants to start going back and looking at potential
6 violations that were never cited, never noticed, and
7 never given an opportunity to be heard upon. That's the
8 big picture.

9 Specifically, the City requests to open the CUP
10 hearing -- I think that ship sailed -- and have you
11 analyze County requirements and, again, have you make an
12 actual judicial finding that Yellowstone violated some
13 law in the past.

14 Again, the City's indicated that "it conducted
15 a further investigation" -- this is based on the staff
16 report -- "into the laws applicable at the time the
17 facility was established while under the jurisdiction of
18 the County of Orange." And the reason provided again is
19 information obtained in the February 20th hearing.

20 Now, at the February 20th hearing, there was
21 factual information provided based upon the issues that
22 the City raised in terms of conflicts that were perceived
23 by the staff, and we provided those clarifications and
24 submitted to you, Mr. Allen, that there were no
25 discrepancies that were based upon -- that were

1 necessarily in contrast to each other.

2 There were explanations, for example, length of
3 stay, things like that, that we talked about that may
4 have varied during the time from our initial submission
5 and the February 20th hearing.

6 The staff recommendation for the rejection of
7 the CUP now is based upon section 20.91A.060, items (b)
8 and (h).

9 Subsection (b) provides that "A facility must
10 comply with state and local law, and the submitted
11 management plan, including any modifications, required by
12 this use permit."

13 (H) provides that "No owner or manager shall
14 have any demonstrated pattern of operating similar
15 facilities in violation of the law."

16 The 5th and 14th Amendments of the United
17 States Constitution provide that Yellowstone can't be
18 deprived of liberty or property without due process. And
19 this is a substantial due process issue. As I mentioned
20 earlier, it means we have to have been provided notice,
21 and we have to have been provided with an opportunity for
22 a hearing as to the purported County violation.

23 Article I of the California Constitution
24 actually provides a much broader scope. And the quoted
25 language here from Ryan versus California

1 Interscholastic -- Interscholastic Federation, San Diego
2 section, at 94 Cal. App. 4th, 1069, talks generally about
3 that standard.

4 The pertinent language is that "Procedural due
5 process under the California Constitution is much more
6 inclusive and protects a broader range of interest than
7 under the Federal Constitution."

8 Importantly, Mr. Allen, the staff report cites
9 to no violation of law. The staff reports infers a
10 violation based on a multiple-step process that was just
11 reported to you. And the conclusion is that there could
12 have been a notice by the County based upon the City's
13 assessment here today.

14 And I would submit that the staff report relies
15 upon a bunch of untested and speculative information that
16 had we been provided due process with the County, we
17 would have had an opportunity to be heard, and we would
18 have had our rights voiced.

19 One example -- and this is quoted from the
20 report -- that "The County of Orange Planning Department
21 and Code Enforcement Staff informed the City that a sober
22 living use would have been classified as either a
23 community care facility or a congregate care facility."
24 We don't even know which it is even today.

25 The staff report concludes that "Had the County

1 pursued the matter, a violation of law would have been
2 found." And the inference there -- and I think it's
3 pretty clear here -- that the County did not, in fact,
4 pursue the matter. No County evaluation occurred. No
5 notice was given. No hearing was held. And we had no
6 opportunity to be heard.

7 I provided here three pieces of evidence that
8 were included by the City, but -- purported evidence.
9 It's sort of -- again, it's hard to test this stuff. But
10 the first is that "Yellowstone Recovery attempted to
11 obtain County Sober Living Certification at 1571 Pegasus
12 Street." And the inference there is that we didn't
13 obtain it, or that we were rejected, but there's no
14 evidence of that.

15 The second is that there's also some evidence
16 that the County Code Enforcement was aware that the
17 facility was housing more than six residents without a
18 use permit.

19 Well, without getting into the Code
20 analysis -- the County Code analysis, for my money,
21 reading that quote from the staff report tells me that
22 somebody in the County at some point knew who we were,
23 knew what we were doing, and didn't do anything about it.

24 So -- and on that point, I would mention to
25 you, Mr. Allen, that last night, to my wife's chagrin, I

1 spent a couple of hours reviewing the Santa Ana Specific
2 Plan, which is about 150-some-odd pages. Then, I got to
3 the Zoning Code.

4 As you can see, this is approximately 2 inches
5 thick -- 2 inches of paper that we're now being called to
6 look at with a snapshot, without any due process, and
7 say, "Yellowstone violated this." Okay? That's
8 problematic.

9 The last point that I would raise directly from
10 the staff report is the staff notes that, "Had there been
11 an investigation, County Code Enforcement personnel would
12 conduct the SI." Didn't happen.

13 Staff report concludes that, "It," meaning
14 Yellowstone, "did not comply with the local law at that
15 time, because the operator had not obtained approval of a
16 use permit from the Orange County Planning Commission."
17 Again, no enforcement action. No opportunity to be
18 heard. No opportunity to appeal.

19 At this point, Mr. Allen, Yellowstone's not
20 able to and won't attempt to defend an action that the
21 County never initiated. It didn't happen.

22 The staff report provides that the Planning
23 Commission, per Zoning Code -- and this is this 2-inch
24 thick document that I was just referring to -- Section
25 7-1-950 allows for, to quote, "any other use which the

1 Planning Commission finds consistent with the purpose and
2 intent of this district."

3 That quote is important, because it's a
4 catchall. It basically says that had we been in front of
5 the County, had we had an opportunity to be heard, had we
6 been put on notice that perhaps we were violating some
7 County ordinance, we would have been able to apply for
8 something similar to the way that we here today. We
9 would have been able to apply for a use permit.

10 And the Code section that -- the Zoning Code
11 section that the staff cites specifically says "Any other
12 use," and so it's very broad. This is also set forth in
13 the Santa Ana Heights Specific Plan.

14 And, you know, I sound like a broken record.
15 No notice of a violation was issued. No opportunity to
16 be heard. No opportunity to apply for a permit. No
17 opportunity to cure it.

18 Based on my cursory review, I could find that
19 there was a County use permit procedure that was set
20 forth in 7-9-105.1C that's set forth a process. It
21 included a public hearing. It included that variances
22 could be applied for under subsection (e), and that
23 special use permits could be applied for under subsection
24 (f).

25 So, the next point that I'd like to make refers

1 to this discussion about the potential application for a
2 Sheriff's Certification process. I think that there's
3 some confusion there.

4 First off, the Sheriff's Certification Program
5 is -- the staff report notes that at one time, one of
6 Yellowstone's facilities was certified but dropped out of
7 the Certification Program. That is a purely optional
8 program. It's a program that some sober living homes are
9 a part of. Some are not.

10 It's not required by the County. And it's
11 something that we initially wanted to become a part of,
12 and, for reasons completely unrelated to zoning, we made
13 a decision that we would rather become a part of the
14 Sober Living Coalition. And again, there's another loose
15 affiliation of sober living homes.

16 It has nothing to do with the zoning. It has
17 nothing do with violations of zoning. It has nothing to
18 do with compliance of zoning.

19 The staff tries to cast Yellowstone in the
20 staff's judgment of how the County Zoning Code should be
21 interpreted here as a community care facility. We would
22 note that we don't provide care. If given the
23 opportunity to be heard, Yellowstone would argue that no
24 Yellowstone home fell into a category requiring a use
25 permit.

1 If that argument didn't rule today, then
2 Yellowstone would apply for a use permit with the County.
3 But how the County would have decided the issue is pure
4 speculation.

5 Currently, all four of the houses have County
6 Fire Clearances, and those include inspections. So we
7 can infer, if we're making inferences, that the County
8 has come through our property, and we know that they have
9 come through our properties, and still, there's been no
10 citation.

11 Staff report admits that there's also some
12 evidence that County Code Enforcement was aware that the
13 facility was housing more than six residents without a
14 use permit. Again, no enforcement action.

15 So the question is, how are we to know what the
16 County would have done? Well, we don't have any standing
17 to seek injunctive relief from a court of competent
18 jurisdiction, because it's moot. There's no court of
19 competent jurisdiction that would even listen to us.
20 We're not a part of the County any longer. So again, it
21 goes back to the due process issue.

22 And the City cannot be and may not be the
23 arbiter of some other jurisdictional rules now. The City
24 can't do what a court could not do now. There could be
25 no decision made, because of the Doctrine of Mootness.

1 The staff report concludes -- I think this is
2 also telling, Mr. Allen -- that "it's unlikely that the
3 County would have granted a use permit."

4 I've listed here -- and I won't go through all
5 of them on the record, but I've listed here just a few
6 questions that the City would have to answer, not just
7 ask, but answer, in order to reach the conclusion that
8 the staff has now proposing in order to get to the
9 conclusion that Yellowstone was in violation of some
10 County law without there actually being some citation,
11 some notice, and some opportunity to be heard.

12 First is, whether the County would have
13 required a use permit at any of the Yellowstone homes in
14 the first place?

15 The second is, what guidelines would have been
16 utilized in making the analysis?

17 What type of notice would have been provided?

18 You know, what reasonable accommodation
19 provisions the County would have analyzed? And that goes
20 back to what we talked about on February 20th, where
21 there are affirmative requirements that reasonable
22 accommodations be provided.

23 So the list goes on. But these are all
24 questions -- and they are just the ones that are off the
25 top of my head that we would have to answer, not just

1 ask, but answer, in order to go back and open up this
2 hearing, and reverse the original ruling based upon the
3 claim that Yellowstone did something unlawful in the
4 past.

5 There's some more -- on this slide, there's
6 some more discussions about what was included in the
7 Santa Ana Heights Specific Plan. In Section C, there's a
8 general provision that shows that the County contemplated
9 that it was even possible that portions of its Zoning
10 Code or, excuse me, it's Specific Plan could have been
11 adjudicated invalid.

12 The quote that I have up there is, "If any
13 portion of these regulations is, for any reason, declared
14 by a court of competent jurisdiction to be invalid or
15 ineffective in whole or in part, such decision shall not
16 effect the validity of the remaining portions thereof."

17 That's kind of boilerplate stuff. But it shows
18 that at least the County, itself, contemplated that there
19 could be a problem here. We could have gone back and
20 said, you know, we could have had a Constitutional
21 challenge to the County requirements. But again, we
22 don't even come close to getting that far.

23 And actually going back, the last point that I
24 make there is we can't have that adjudication because we
25 don't have standing. We don't have any standing to go

1 and challenge the County's Specific Plan, because we are
2 no longer part of that unincorporated part of that
3 County.

4 As to our legal conduct, at a minimum, what we
5 know is that Yellowstone has been lawfully operating in
6 the City of Newport Beach since January 1 of 2008. And,
7 of course, the response to that could be, "Well, it was
8 contemplated that Santa Ana Heights would become part of
9 the County and that this Ordinance was going into place."
10 That doesn't make any difference.

11 The bottom line is that at least until now, and
12 actually up through and including now, Yellowstone has
13 received no notice, no notice of abatement, and there's
14 been no requirement that Yellowstone do anything with
15 these properties, other than what they are currently
16 doing.

17 And that's the end of my presentation,
18 Mr. Allen, on the issue of the claim of some violation by
19 the City.

20 MR. ALLEN: Does the City wish to make any
21 response to that -- to those points raised by Mr. Zfaty?

22 MR. BOBKO: Just a few quick ones, Mr. Allen.

23 Patrick Bobko.

24 First thing is with regard to reopening the
25 hearing. Just as a matter of procedure, there hasn't

1 been a final decision yet in this hearing. Until there's
2 a final decision, I think it's perfectly acceptable for
3 the City to come forward with more information.

4 With regard to the second issue about this
5 being -- this hearing somehow being a post-hoc trial, it
6 is not. What's going on right now is the City is being
7 asked to accept, merely on the Applicant's word, that
8 they have a legal non-conforming use. And that's
9 different from being an illegal non-conforming use.

10 And the fact that the Applicant has come
11 forward and said that they were legal does not make it
12 so. And I don't think that there's any authority for the
13 City to have to be required to take that at the
14 Applicant's word.

15 In fact, if you were to come into the town and
16 say that you were buying a home, and that your home
17 was -- you were going to do some expansion to your home,
18 and it wasn't a non-conforming home, City would
19 immediately go to the records and check and see whether
20 or not it was.

21 So the City's really just doing its due
22 diligence here. There's no trial going on. There's no
23 conviction happening. It's simply verifying that the
24 Applicant's presentation as a legal non-conforming use is
25 true. And the City has now come with evidence to suggest

1 that perhaps that is not the case.

2 So we don't believe that there's any Latches
3 argument, which effectively is what the Applicant is
4 asserting now, that the City is estopped or foreclosed
5 from going back into the records to determine whether or
6 not it is a legal or illegal non-conforming use. Again,
7 it's simply a matter of due diligence for the City, and
8 it's actually no different than any other research the
9 City would do for a non-conforming use.

10 Finally, I want to put to rest this idea that
11 there's somehow been some terrible miscarriage of justice
12 with regard to due process here. You know, Counsel has
13 just put on another very lengthy presentation. He's been
14 presented with all of the evidence and all of the
15 information that the City has.

16 He's had an opportunity to basically examine
17 everything point by point, and challenge, refute,
18 discredit it. He's been heard. Evidence has been
19 presented. The Applicant had an opportunity to present
20 evidence. This is the hearing. This is it right here.
21 There's been no miscarriage of justice.

22 And the City -- again, if the Hearing Officer
23 thinks that perhaps more time would be reasonable, we'd
24 be willing to stipulate to a week's continuance so that
25 there would be further preparation. But we don't think

1 that's necessary. But let's be clear that there has been
2 no miscarriage of due process here at all.

3 Unless you have any other questions of me?

4 MR. ALLEN: No, not at the moment. Thank you.

5 MR. BOBKO: Okay.

6 MR. ZFATY: May I approach and respond?

7 MR. ALLEN: Sure. Does the City wish to say
8 something else first?

9 MS. WOLCOTT: I was going to augment his
10 statement.

11 MR. ALLEN: No. You go ahead, and then he can
12 respond to both of you.

13 MS. WOLCOTT: All right. Cathy Wolcott.

14 I wanted to address Mr. Zfaty's
15 characterization of his earlier correspondence with the
16 City in May of 2008 when they first submitted their
17 reasonable accommodation and use permit applications.
18 They did mention non-conforming, you know. They asked
19 for certification of non-conforming use.

20 The reason that we looked farther after the
21 February 20th presentation by the Applicant's Counsel is
22 that up to that point, they had not asserted that they
23 had vested rights as a non-conforming use that should
24 excuse them from having to be subject to a use permit in
25 the first place.

1 MR. ALLEN: I'm sorry. Would you say that
2 again, please?

3 MS. WOLCOTT: Sure. Up until the February 20th
4 hearing, the Applicant had never asserted that they had
5 vested rights as a legal non-conforming use that should
6 excuse them from having to be subject to a use permit
7 from the City in the first place.

8 At the February 20th hearing, the Applicant
9 presented a substantial amount of case law about specific
10 cases, which they were characterizing as law that
11 indicated that they shouldn't be subject to the use
12 permit process of the City because they had their rights
13 vested.

14 Because of the assertions made and the case law
15 cited, staff determined that it needed to review what
16 those vested rights, if any, actually were. And so at
17 that point, we needed to find out if the County had
18 already placed specific conditions on the facility
19 operations or if they had established a specific
20 occupancy load to which Yellowstone was already legally
21 entitled before annexation.

22 If those conditions were something that was in
23 the County records that we hadn't seen, we thought, out
24 of fairness, we needed to find out what they are. What
25 we found out in contrast was that actually nothing had

1 been applied for, nothing had been granted.

2 I would also say that I've never heard the
3 argument before that failure to apply for a required
4 permit from a government entity equaled lack of notice,
5 lack of right to be heard. It equals you failed to apply
6 for a permit that you needed.

7 And finally, the Applicant has asserted many
8 times over the nine months it took to get this
9 application to a complete form that every one of their
10 facilities had a fire clearance. In fact, only one, 1571
11 Pegasus, had a signed fire clearance from the Orange
12 County Fire Authority. There was nothing presented that
13 indicated final fire clearance for any of the other
14 facilities.

15 Thank you.

16 MR. KIFF: I have one comment before Mr. Zfaty
17 comes up, too, Mr. Allen.

18 MR. ALLEN: Sure.

19 MR. KIFF: Just a clarification for you,
20 Mr. Zfaty, the Orange County Fire Authority has nothing
21 to do with the County of Orange. They are separately
22 formed governments and have separate Boards of Directors.
23 So if I'm a County Fire Authority Inspector, I'm not
24 going to be checking to see that that home -- it complies
25 with Orange County land -- County of Orange land use

1 law.

2 MR. ZFATY: All right. I just want to
3 comment -- I want to respond to a couple of things.
4 First, we're not making a Latches claim. That's not what
5 we're saying at all. We're not saying that the City is
6 foreclosed from analyzing any particular issues.

7 As I said at the front end of this, if the City
8 thinks that it needs to make any more analyses of any of
9 the facts that has been presented with, that's fine. The
10 bottom line, though, is I don't want to get confused,
11 because we're talking over here, and this is really the
12 issue over here.

13 The issue is, is the City going to deny a use
14 permit to Yellowstone based on an affirmative finding
15 that prior to December 31 of 2007, when Yellowstone was
16 not a part -- when these four properties were not a part
17 of the City of Newport Beach, that Yellowstone violated
18 some County law? It has to be an affirmative finding.

19 I think the comment was that, "We've taken
20 Yellowstone's word that they were in compliance." Well,
21 the reality is that we were in compliance. You do have
22 to take our word for it, because we were there. We were
23 established.

24 If there's some interpretation of the Code that
25 any -- any entity, any person wants to make as to whether

1 Yellowstone is in compliance, then what happens is
2 Yellowstone gets due process on the issue. That's how
3 this works.

4 So going back to our initial discussion, had
5 Yellowstone violated something, some rule, some zoning
6 rule of the County of Orange, what would have happened is
7 there would have been a notice that we were in violation,
8 and we would have been given an opportunity to be heard,
9 and there could have been Appellate rights, and there
10 could have been another appeal, and we could have
11 attacked the ordinance, and it goes on and on and on.

12 MR. ALLEN: I don't get that entirely. You're
13 saying, I think, that because they didn't catch you, that
14 is, they didn't come out and find that you hadn't gotten
15 a use permit, you were somehow vested?

16 MR. ZFATY: No.

17 MR. ALLEN: You need to get that clarified.
18 Because it seems to me quite clear from what I read here
19 that there were permit requirements for you, and that you
20 didn't get them.

21 MR. ZFATY: What I'm saying is -- yeah, no. I
22 understand. And I think we were very clear. I actually
23 reread the transcript from the February 20th hearing. I
24 made it clear that we did not have a use permit.

25 The question was asked, I think, by Mr. Kiff.

1 We're not claiming that we had any use permit. What I'm
2 saying is, we're not even sure that we needed to have a
3 use permit.

4 And the problem is -- and I understand, with
5 all due respect, Mr. Allen, that you're looking at the
6 City's analysis and saying, "Well, that kind of make
7 sense to me. I can read. It's pretty clear. Based upon
8 my review of this, yes, Yellowstone should have had a use
9 permit with the County as of December 31 of 2007."

10 The problem with that analysis is that had that
11 been true, then somebody from the County would have had
12 to go through that analysis and provided Yellowstone with
13 some notice that it was in violation of some County
14 zoning regulation. And then we get into the due process
15 part of it.

16 MR. ALLEN: But you have to make the
17 application first, and you didn't. That belies the whole
18 analysis you're doing here, it seems to me.

19 MR. ZFATY: I would respectfully disagree.
20 Perhaps we would have had to make the application,
21 perhaps not. Perhaps we would have been given some sort
22 of, you know, reasonable accommodation. Who knows what
23 he would have happened. But that's the problem. We
24 don't know. There's no way to know.

25 And so for us to sit here now, as a part of the

1 City of Newport Beach, and look back and say, "We think
2 this could have been a violation, and we're going to
3 assume that Yellowstone operated unlawfully as a result
4 of this speculation that there was a violation, or that
5 they would have remained in violation of the Code had
6 they gone through all these processes that I just
7 described for you, we're going to go ahead now and revoke
8 the CUP," that's not proper. That's my point.

9 The City of Newport Beach has an affirmative
10 requirement that it find that Yellowstone operated in
11 violation of some Federal, state or local law.

12 MR. ALLEN: You just said the City would
13 revoke. The City's not revoking anything, right? I
14 mean, you just used the word "revoking."

15 MR. ZFATY: Yeah, and I misspoke. I think the
16 better way to put it is the City is going to deny
17 Yellowstone use permits based upon its inability to make
18 a critical finding.

19 And that inability to make a critical finding
20 is subject to the City's inability to say that
21 Yellowstone was somebody who was acting within the laws,
22 generally speaking. I mean, it's a pretty broad statute.
23 But that's the analysis.

24 And the problem is, again, tying this back in,
25 the problem is that we haven't had that hearing, and we

1 can't have that hearing. It's impossible. It's legally
2 impossible.

3 So I understand your point. What you're saying
4 is, well, you're just saying that you didn't get caught.
5 But the fact of the matter is, we're not saying that.
6 We're not saying that we didn't get caught. We're saying
7 that we weren't in violation, period. That's the end of
8 it. And there's no way that we can make that finding
9 now.

10 MR. ALLEN: All right. I'm sensitive to your
11 argument regarding denial of due process. And, you know,
12 the City should not be engaged in denying you the
13 opportunity to be heard. I recognize that we can't go
14 back and hold a County hearing to determine whether or
15 not you might get a County hearing. That's not going to
16 happen here.

17 But we can delay this matter for a week or two,
18 or whatever time is agreed upon, if you wish to conduct a
19 further hearing and make a presentation on -- further on
20 what you've already presented today, and I would be
21 receptive to that, if you wish to do that.

22 MR. ZFATY: I don't think that there's anything
23 I need to add, because -- and I think it's a good
24 question, though. And it goes to one of the main points
25 that I'm trying to make here, which is that between now

1 and a week from now and two weeks from now, there's
2 nothing that we can do to go back and get a judicial
3 declaration or a County approval of something. It won't
4 happen. It can't happen, right? We don't have standing.

5 If I went into court tomorrow and said, "We
6 need a judicial declaration immediately that we didn't
7 violate some zoning code for the County that happened,
8 you know, two years ago," I'm going to get laughed at in
9 the courtroom. It's not going to happen.

10 They are going to say, "You don't have
11 standing. Are you part of the County still?"

12 "No."

13 "Well, did you get cited for some violation?"

14 "No."

15 "Well, what are we here to talk about?"

16 "Well, there's some speculation that perhaps,
17 had we gone in to try to get a use permit" -- actually
18 that skips a step.

19 "That perhaps we were required to get a use
20 permit, and had we done in to the use permit, we would
21 have been found -- we would have been denied the use
22 permit with the County." We'll never get there. That
23 will never happen. It can't happen.

24 MR. ALLEN: I understand that. But what I'm
25 suggesting or asking is whether you need any more

1 opportunity to look at your position, given the fact that
2 you can't go back and get something that's no longer
3 obtainable?

4 But, nevertheless, if there's further analysis
5 of County law you'd like to do to make presentation on
6 why you didn't need -- I don't want to start speculating
7 on what you might find.

8 I'm just saying that at the outset of this
9 discussion, you made pretty serious allegations about
10 being denied due process of law. And I don't believe
11 it's appropriate for us to make a quick decision today
12 unless you're saying, "I've had all the due process I
13 need from the City for you to make a decision."

14 MR. ZFATY: Yeah. And there's actually two
15 responses to that. The first is that, as I mentioned,
16 there is nothing that will happen between now and two
17 weeks from now that will give me that due process.

18 And the second is that I am absolutely saying
19 that we're not being afforded due process to the extent
20 that the City's going to make a finding that we violated
21 some County rule, right?

22 In other words, I'm saying that we are not
23 being afforded due process on that issue, and we cannot
24 be afforded due process on that issue. It's mutually
25 exclusive at this point, right?

1 The problem is that whatever the County was
2 doing up until December 31 of 2007 in connection with the
3 Yellowstone, or any other facility in the Santa Ana
4 Heights area, if the County thought -- and we've
5 presented some particular comments that was in the staff
6 report that said that the County knew who we were, they
7 knew what we were doing, and there was no citation, if
8 the County believed that we would doing something wrong,
9 the County would have had to act on that. And had the
10 County acted on it, then we would have had an opportunity
11 to respond, right?

12 I mean, that's how due process works. We
13 notice somebody that, "You know what? We think you're
14 doing something wrong." And the person is given an
15 opportunity to be heard.

16 And perhaps what happens there is go in and we
17 convince the County, "No, we are not required to have to
18 use permit." Or what happens there is we go in and we
19 convince the County that, "You know, we shouldn't be
20 subject to this, but maybe we'll agree to some
21 conditions, or maybe we'll figure something out," and we
22 reach an agreement.

23 Or perhaps what happens is we go into the
24 County. County says, "No, you're required to have a use
25 permit." We disagree. We appeal. We lose. We appeal

1 again. We win or we appeal again, and we lose or win. I
2 mean, we don't know. That's the problem, but that's why
3 we have due process is because we don't -- it sounds
4 cliché, but you're innocent until proven guilty.

5 And I'm not trying to say that we snuck under
6 the radar here. I think there's evidence before us
7 today, without doing any further investigation, that the
8 County knew exactly who we were, and exactly what we were
9 doing, and we were not cited. But we cannot be afforded
10 due process, not today, not a week from today, not two
11 weeks from today. It won't happen.

12 MR. ALLEN: Okay. Anything further?

13 Does the City wish to respond any further to
14 the comments that were just made?

15 MR. ZFATY: Oh, one other comment -- I'm sorry.
16 We have County Fire Clearances. We brought copies with
17 us here today if the City wants to see them.

18 MR. ALLEN: Sure, yeah. Those should be
19 submitted.

20 MR. BOBKO: I'm actually going to look for an
21 assist here from staff, but I don't think that the idea
22 that -- and I think you hit it right on the head,
23 Mr. Allen -- that if you establish a use that's illegal
24 and simply don't get caught, and then you're annexed,
25 well, now you're beyond the reach of the law, because

1 you've existed for all that time, and clearly they took
2 no action against us, the former jurisdiction, so we must
3 be legal.

4 I don't think that that's the way things
5 typically work. And, in fact, I would ask staff for a
6 little clarification on that. But in a beach community
7 like this, I'm sure there are many homes that were built
8 probably before there were much of a Building Code, and
9 they remain non-conforming.

10 And the Codes have been upgraded, upgraded,
11 upgraded through the years. And today, you have houses
12 that are probably legally non-conforming. And the reason
13 that they are legally non-conforming is because at the
14 time that they were built, they conformed with the Codes
15 at that time.

16 This is really no different. You have a County
17 rule. We are shining a bright light now on whether or
18 not the Applicant complied with the requirements of the
19 rules at the time they were established.

20 The rules have now changed on them, admittedly,
21 when the City annexed the property. And now we're
22 asking, I think, a very reasonable question is, "Given
23 that you no longer -- you clearly don't comply with our
24 rules, did you comply with the rules when you initiated
25 your business?"

1 And if you did, you're non-conforming, and
2 we'll give you all of the protections that you're
3 afforded under the law. If you didn't, well, now you're
4 illegally non-conforming, and that's a whole different
5 matter entirely.

6 This is no different than the situation -- and,
7 again, I'll ask the planners to amplify this. But this
8 is no different than the situation that occurs whenever
9 you have little beach bungalows out here that try to
10 expand or put on an upper level.

11 And you say -- I'm sure the City tells them,
12 "You can't do that. You're an illegal non-conforming
13 use." And you go back and do all that research. Exact
14 same thing, a little bigger scale.

15 And again, if you would require more briefing,
16 then we would -- the City would be happy to provide more
17 briefing on the matter. So again, we want to make sure
18 that the Applicant has had all the due process they can
19 stand. So any extra time or anything like that, of
20 course, the City will stipulate to whatever the Applicant
21 thinks is necessary.

22 MR. ZFATY: The problem is -- and we keep
23 coming back to it is we are looking now at Yellowstone,
24 as Mr. Bobko said, as you aptly put it, Mr. Allen, we're
25 shining a bright light, and we're taking a look at what

1 Yellowstone did, and we're looking at the County
2 requirements now.

3 And we are -- what's inclusive in here is we
4 are deciding -- we are deciding that Yellowstone violated
5 some County zoning requirement. That is a critical,
6 critical decision here. Okay?

7 Because I think, as we will all admit, and I
8 still haven't heard it, the City has had a number of
9 opportunities to make this claim. And according to the
10 City, you know, the new information came out on February
11 20th. I got this information yesterday, all right? Or
12 maybe it was a day before yesterday. But it was -- it
13 was no sooner than two days ago, okay?

14 The City's had plenty of time to analyze this.
15 And I'm not asking for a continuance. What I'm telling
16 you is we're not going to get there. There wouldn't be
17 any due process, because we cannot be heard on that
18 critical issue upon which the entire house of cards falls
19 down, and that is whether Yellowstone was in violation of
20 a County requirement. We cannot make that finding here.
21 It's not possible.

22 MR. ALLEN: I understand.

23 Well, given those circumstances, I'm persuaded
24 that the Yellowstone facilities were not lawfully
25 established uses when they were annexed into the City.

1 They simply didn't have the County approvals that were
2 required of them.

3 And so, therefore, I think the staff's position
4 is well taken and correct. So therefore, we don't have
5 adequate language. In fact, I believe there are a few
6 more determinations that need to be made in this respect.

7 And before we adopt a Resolution that
8 establishes a denial of all four of the use permits, I
9 would just like to see that Resolution include a
10 determination that the likelihood is that -- at least the
11 likelihood, if not the certainty, that these uses were
12 impliedly approved or could have been approved by the
13 language -- and maybe I'm going out too far here and may
14 have to drop back.

15 But I'm only concerned about the concept that
16 other -- that the County could approve permits for other
17 similar uses. And that may be very, very difficult to
18 analyze.

19 In fact, if you have any observations on that
20 right now, I mean, I'd like to hear that. Here's the
21 situation, it seems to me. They defined the congregate
22 care facilities, and then they talked about six beds or
23 less. And then there was another section, as I recall,
24 that allowed 12 beds or less, yeah, 7 to 12.

25 So the implication would be that in that "other

1 uses" category, the County might have authorized, you
2 know, a use with 17 beds. And I think that's kind of
3 what Mr. Zfaty is saying is that we don't know whether
4 they might have done that. But we'll never know, because
5 they can't go back and get that.

6 All right. Going around in circles here. But
7 if there's analysis of that that should be done in that
8 Resolution, it should be done, in my estimation.

9 MR. KIFF: Mr. Allen, I think that's a good
10 point, and we're -- we can go through that analysis in
11 more detail in part because most -- obviously government
12 staff changes, but the folks who have been in County
13 Planning have not changed. And it's fairly straight
14 forward to work with them on an analysis of what they
15 interpreted their laws to have been and what it would
16 have been applicable at the time, and continuing on. So
17 we'll do that within the proposed Resolution of Denial.

18 I would offer, though, before you close the
19 public hearing, public testimony would -- is probably
20 still an opportunity at this time.

21 MR. ALLEN: True.

22 MR. KIFF: Okay.

23 MR. ALLEN: By the way, Mr. Zfaty, you did an
24 excellent job of analysis also in a very short period of
25 time. I'm surprised you didn't know about this before.

1 We do have public hearing provisions here for
2 these uses. And so, despite the fact the Hearing Officer
3 has pretty much announced the decision, if someone feels
4 the need to come forward and give us their wisdom, we'd
5 be happy to hear it.

6 Okay. Seeing none, hearing none, we'll close
7 the public hearing.

8 Thank you, Mr. Kiff.

9 MR. ZFATY: Can I make one more comment on the
10 record?

11 MR. ALLEN: Sure.

12 MR. ZFATY: My last comment would be that based
13 on what Mr. Kiff just said, I think it's interesting that
14 even the City even now is saying to us that, "Well, we
15 want to go and talk to the people at the County and get
16 their analysis, because they are the same people who have
17 been there for a long time, and they will be able to tell
18 us whether Yellowstone would have been in violation of
19 the zoning requirements."

20 I mean, to me, what that means is even now,
21 even now, at the end of this hearing, which Mr. Bobko
22 said, "The time is here and now," even now at the end of
23 the hearing, we still don't know if Yellowstone is in
24 violation of some zoning requirement from the County,
25 which we will never have standing to go and challenge.

1 And the second part of that is that if the City
2 is having some behind closed doors discussion with the
3 County folks in zoning, how are we afforded an
4 opportunity to be heard on that? How does that happen?

5 MR. KIFF: I have a couple of comments.

6 Mr. Zfaty, I was just being kind. I have no
7 doubt that Yellowstone Recovery, from my analysis of the
8 law, needed use permits for these four facilities.

9 You are also welcome to contact the County and
10 go through the same discussions that we would have in
11 preparing the Resolution of Denial. That's your
12 opportunity to work with them, too.

13 MR. MC DONOUGH: Can I make -- Mr. Allen, can I
14 make a public comment, just one?

15 MR. ALLEN: Sure.

16 MR. MC DONOUGH: Mike McDonough, 1562 Pegasus
17 Street, Santa Ana Heights.

18 Mr. Zfaty keeps saying that or has said that
19 they're not sure they actually needed a permit. I would
20 think Yellowstone's Counsel would have checked to see if
21 they needed it. The fact that they did not check to see
22 if they were required does not exempt them.

23 And to reply on the fact that the County did
24 not enforce the law does not mean the law didn't exist or
25 that there was a violation. Had they checked, they would

1 have been able to tell if they were required and if they
2 could get the permit.

3 To just say, "We didn't have an opportunity to
4 be heard," had they requested the use permit, the
5 residents would have had an opportunity to be heard and
6 could have objected to it. Thank you.

7 MR. ALLEN: Thank you.

8 MR. ZFATY: Can I respond?

9 MR. ALLEN: Well, we have until 6 o'clock, I
10 guess?

11 MR. ZFATY: I think Mr. Mc Donough's comment is
12 a wonderful one. Because had we checked -- he said, "Had
13 he checked, we would have found out. And had we found
14 out, the citizens would have had an opportunity to be
15 heard, and we would have been at a use permit hearing."

16 Exactly. Exactly. That's exactly my point.
17 Had all of these things happened, we would have been in
18 front of the County and asking for a use permit. But
19 none of those things happened. So we don't get our due
20 process. We never do. We never will. And here we are.

21 MR. MC DONOUGH: We didn't get due process
22 either.

23 MR. ALLEN: Okay. Thanks.

24 All right. Is there anything else that we
25 have?

1 MR. KIFF: No, sir.

2 I'm sorry. The reasonable accommodation
3 discussion could be next. We move right into that
4 section of the hearing, I apologize.

5 MR. ALLEN: That's right, we do. So let's --

6 MR. KIFF: So -- sorry.

7 MR. ALLEN: Does the reasonable accommodation
8 application apply if there's no permit? But doesn't that
9 have to be amended somehow to then find a reasonable
10 accommodation to grant the permit? Or am I -- I'm sorry.
11 I'm not following you as well.

12 MR. BOBKO: I suggest that we perhaps take a
13 five-minute break here, if, for nothing else, the Court
14 Reporter. And maybe we can all regroup and come up with
15 a plan of attack.

16 MR. ALLEN: So ordered.

17 (Pause in proceeding.)

18 MR. ALLEN: All right. We're ready to
19 reconvene, and we have the reasonable accommodation
20 hearings in front of us.

21 Staff? Can you start out by explaining why we
22 would be having these, given that the permits were being
23 denied?

24 MS. WOLCOTT: Yes. Two of the -- Applicant's
25 made three requests for reasonable accommodation.

1 First, I'll state my name for the record, Cathy
2 Wolcott, Deputy City Attorney.

3 There were three requests that the Applicant
4 made for each of their facilities, 12 requests in all.

5 Request number one was request to be treated as
6 a single housekeeping unit.

7 Request number two was a request for exemption
8 from the occupancy limitations of the operating standards
9 for use permit.

10 And request number three was a request for a
11 hardship waiver, a waiver of having to pay the usual use
12 permit fee.

13 Of those requests, one of the requests, number
14 two, is directly tied to the issuance of the use permit;
15 therefore, we will not address that particular request
16 today. We will, however, address request number one and
17 three.

18 MR. ALLEN: Okay.

19 MS. WOLCOTT: All right.

20 To give you little bit of background on
21 reasonable accommodation, the Unfair Housing Act
22 Amendment require government entities to make exceptions
23 from the usual rules, policies and practices when the
24 request is reasonable and the request is necessary to
25 afford the disabled person an equal opportunity to reside

1 in a dwelling.

2 This is a Federal requirement, and it poses an
3 affirmative duty on government entities to grant the
4 request if the request is reasonable and the request is
5 necessary. And it has to have both of those two
6 elements.

7 When you look at the reasonable prong of the
8 analysis, the request would be considered unreasonable if
9 granting the request would either impose an undue
10 financial administrative burden on the City, or result in
11 a fundamental change in the nature of the City zoning
12 program.

13 And fundamental alteration in the -- excuse
14 me -- not zoning program. It can -- zoning can be one of
15 the factors, but any City program.

16 Fundamental alteration would be defined as
17 undermining the basic purpose which the requirement seeks
18 to achieve.

19 When you get -- if you establish that the
20 request is not unreasonable, then you move to whether or
21 not the request is necessary. Will the accommodation
22 allow a disabled individual to live in the dwelling?
23 Would the disabled individual be unable to live in the
24 dwelling out the accommodation?

25 If the answer to the question would be "yes" to

1 question one but there might be something else that would
2 be more narrowly tailored and more reasonable for the
3 government entity, alternative accommodations can be
4 suggested and considered.

5 And in every situation, when you're doing your
6 reasonable accommodation analysis, it's going to be on a
7 case-by-case basis. So you may have a similar request
8 from a different entity and come up with a different
9 result, because there are different facts applicable in
10 that case.

11 Yellowstone has requested to be treated as a
12 single housekeeping unit and for a waiver of the usual
13 use permit fee.

14 To address the single housekeeping issue first,
15 Newport Beach -- the Newport Beach Zoning Code has a
16 definition of a single housekeeping unit, which is,

17 "The functional equivalent of a traditional
18 family, whose members are an interactive group
19 of persons jointly occupying a single dwelling
20 unit, including the joint use of and
21 responsibility for common areas, sharing
22 household activities and responsibilities, such
23 as meals, chores, household maintenance and
24 expenses, and where, if the unit is rented, all
25 adult residents have chosen to jointly occupy

1 the entire premises of the dwelling unit under
2 a single written lease, with joint use and
3 responsibilities for the premises, and the
4 makeup of the household occupying the unit is
5 determined by the residents of the unit, rather
6 than the landlord or property manager."

7 Every aspect of the definition is important in
8 the analysis of whether or not a group living in the
9 dwelling unit is considered a single housekeeping unit.

10 The restrictions on single housekeeping units
11 are different from other residential uses within the
12 City. Single housekeeping units live in any residential
13 district. There are no occupancy restrictions under
14 zoning code. However, there are California Building Code
15 restrictions on the number of people who can reside in
16 the dwelling.

17 So to return to our analysis, first, is the
18 request reasonable?

19 The request to be treated as a single
20 housekeeping unit is essentially a request to be exempt
21 from all the restrictions and conditions that the City
22 might impose to reduce adverse secondary impacts from
23 larger facilities.

24 The basic purpose of Ordinance 2008-05 was to
25 mitigate those adverse secondary impact. Therefore, it's

1 our opinion that exempting them from any kind of controls
2 the City could put to reduce those negative impacts
3 undermines the purpose.

4 All other groups not living in the single
5 housekeeping unit currently are prohibited in all
6 residential districts in the City of Newport Beach.
7 Boarding houses, fraternities, sororities, lodging
8 houses, no group that follows that operational pattern
9 can reside in any residential zone.

10 Essentially, the City has already made a
11 reasonable accommodation for residential care facilities.
12 They are the only non-single housekeeping group that can
13 reside in residential districts in the City of Newport.

14 The next step in the analysis is whether or not
15 the request is necessary.

16 Would the requested accommodation allow
17 disabled persons to live in a dwelling?

18 Yes.

19 Would disabled individuals be unable to live in
20 a dwelling without this specific accommodation?

21 No. This is an unnecessarily broad exemption,
22 and we can find other ways to accommodate that don't so
23 severely undermine our Zoning Code. Alternative request
24 for more reasonable could be formulated that could get to
25 that result.

1 We're going to skip request two.

2 Okay. Moving to request three, the fee waiver.

3 Because it's a nonprofit and raises money for
4 the community to support its program, Yellowstone's
5 requested a waiver of the standard \$2200 use permit fee
6 deposit.

7 The Ninth Circuit does allow or does require
8 that some financial constraints directly arising from the
9 disability of individuals may require reasonable
10 accommodation. However, Newport Beach also requires 100
11 percent cost recovery for use permits.

12 To make a recommendation on financial
13 accommodation, financial information must be reviewed by
14 the staff. We made many attempts to get specific
15 financial information from this Applicant, and we got a
16 very general statement of average expenses for each
17 house. They are saying approximately \$6200 expense per
18 house.

19 And they gave us an estimate of what fees they
20 would normally charge their clients, the residents. The
21 number that they gave us was \$50 to \$160, I believe, a
22 week. That was the fee that they said that they would
23 charge their facility residents.

24 When you go on the Yellowstone's Web site,
25 which I checked again this morning before we came up,

1 there Web site creates a different picture. The Web
2 sites says that the fees are \$160 to \$180 a week, which
3 is about \$170 average. So we used that to do what
4 analysis we could in the finances.

5 We estimate that the average cost per house,
6 based on the Applicant's assertions, is \$6200 a month.
7 Estimated monthly profit per house -- you can see on the
8 screen.

9 If every one of the houses is fully occupied at
10 the average rate which their Web site states that they
11 are charging their facility residents, and if the
12 expenses that they submitted to us without verification
13 or without supporting documentation are accurate, they
14 are making approximately \$400 month profit on 1561 Indus,
15 \$4,680 a month profit on 1621 Indus, \$4,680 at Pegasus,
16 and \$4,000 a month at the Redlands facility, which, by
17 our analysis, should make them able to afford to pay the
18 use permit fees.

19 And for that reason, we believe it does not
20 reach the necessity prong of the reasonable accommodation
21 analysis.

22 If you have any questions, I'll be happy to
23 answer them.

24 MR. ALLEN: So seeking a complete exemption
25 or -- from the -- or having them found to be a single

1 housekeeping unit completely would then allow a sober
2 living facility to occupy a residence in any of the
3 residential zones with no conditions imposed on them
4 insofar as their operation is concerned?

5 MS. WOLCOTT: Any residential district, any
6 amount of residents, up to the amount that the California
7 Building Code determines is not permitted for a
8 particular size of a structure, which is a fairly
9 permissive standard.

10 No restrictions, other than those imposed by,
11 say, our Nuisance Code, Penal Code on any other residence
12 in a single housekeeping unit within the City. That is
13 correct.

14 MR. ALLEN: Okay. Thanks. Any more, staff?

15 MR. KIFF: No, sir.

16 MR. ALLEN: Would the Applicant like to address
17 this?

18 MR. ZFATY: Sure. Thank you.

19 As Ms. Wolcott -- Isaac Zfaty again, Mr. Allen.

20 As Ms. Wolcott mentioned, we're asking for, I
21 think, our first and third request for reasonable
22 accommodation in light of the finding that I think you
23 will sign soon. Request number two becomes moot.

24 The first request is that we be treated as a
25 single housekeeping unit. The third is that we have our

1 application fees waived.

2 The "Single Housekeeping Unit" is defined in
3 section 20.03.030, of the Newport Beach Municipal Code.
4 And that's defined as,

5 "A functional equivalent of a traditional
6 family, whose members are an interactive group
7 of persons jointly occupying a single dwelling
8 unit, including the joint use of and
9 responsibility for common areas, sharing
10 household activities and responsibilities, such
11 as meals, chores, household maintenance and
12 expenses, and where, if the unit is rented, all
13 adult residents have chosen to jointly occupy
14 the entire premises of the dwelling unit under
15 a single written lease, with joint use and
16 responsibilities for the premises, and the
17 makeup of the household occupying the unit is
18 determined by the residents of the unit, rather
19 than the landlord or property manager."

20 And we would submit that we would accurately be
21 described as a single housekeeping unit.

22 First off, the residents are the functional
23 equivalent of a traditional family. They are supportive
24 of one another in the -- in their community in terms of
25 recovery from addiction. They are in an interactive

1 group.

2 They are in -- with respect to each of our four
3 homes that we're talking about here today, our single
4 dwelling units, each house stands alone. As we mentioned
5 in the February 20th hearing and in our submissions to
6 the City, there's no interaction between the homes.

7 And as to common areas, chores and activities,
8 the property provides the residents with a network of
9 support to encourage recovery from the systems -- from
10 the symptoms of alcoholism.

11 The residents reside separately at the
12 property. There is common area, however, where each
13 resident is responsible for their own meals, expenses,
14 chores, et cetera.

15 There is no individual treatment. There's no
16 group treatment or group therapy sessions that occur on
17 the property -- on any of the properties. And the sole
18 purpose for each resident living on the property is to
19 live in the house with other sober individuals with
20 similar disabilities and in a community.

21 There are no delivery vehicles going to and
22 from the property, and I guess this applies to request
23 number two, so we can skip that.

24 As to request number one, that we'd be deemed a
25 single housekeeping unit, again, I would submit that we

1 have provided the City with all of the information that
2 it needs to make that finding that we are a single
3 housekeeping unit, and to grant reasonable accommodations
4 as to each of the four properties.

5 The required findings are each of the following
6 five:

7 "First, that the requested accommodation is
8 requested on the behalf of one or more
9 individuals of a disability, protected under
10 the Fair Housing Laws."

11 This, by the way, is section 20.98.025B.

12 "The requested accommodation is necessary to
13 provide one or more individuals with a
14 disability an equal opportunity to use and
15 enjoy a dwelling.

16 "The requested accommodation will not impose
17 an undue financial or administrative burden on
18 the City, as 'undue financial or administrative
19 burden' is defined in the Fair Housing Laws and
20 also interpretative case law.

21 "And the requested accommodation will not
22 result in a fundamental alteration in the
23 nature of the City's Zoning Program, as
24 'fundamental alteration' is defined in Fair
25 Housing Laws and interpretative case law.

1 "And the requested accommodation will not,
2 under the specific facts of the case, result in
3 a direct threat to the health or safety of
4 other individuals or substantial physical
5 damage to the property of others."

6 As to findings one, three and five, Mr. Allen,
7 the City staff report notes that those findings can be
8 made.

9 "The requested accommodation is requested by or
10 on behalf of one or more individuals with a disability
11 protected under the Fair Housing Laws." We've
12 established that. Federal regulations and case law
13 define alcoholism as a disability.

14 As to the third prong, "the requested
15 accommodation will not impose an undue financial or
16 administrative burden on the City," the bed count that
17 we've proposed does not impose any financial or
18 administrative burden on the City. I think we're all in
19 agreement on that.

20 As to the fifth prong, "That the
21 reasonable -- the requested accommodation," excuse me,
22 "will not, under the specific facts of the case, result
23 in a direct threat to health or safety," I think we are
24 all in agreement that there's no threat there.

25 As to finding number two, which was one that

1 the staff felt that it could not make, "that the
2 requested accommodation is necessary to provide one or
3 more individuals with a disability an equal opportunity
4 to use and enjoy a dwelling," there are a number of
5 factors that are considered in connection with this
6 particular prong.

7 First is "whether the requested accommodation
8 will affirmatively enhance the quality of life of one or
9 more individuals with a disability."

10 Staff report says that "the facilities enhance
11 the quality of life of recovering addicts." And the
12 staff also agrees that rental rates for the Yellowstone
13 offer low cost sober living environment, and some of them
14 are actually free. This is a point that we will come
15 back to later when we talk about our request for number
16 three.

17 But one of the comments that Ms. Wolcott made
18 was that the Yellowstone Web site has a cost range that
19 differs from the submission. There's two pieces to that.

20 First off, Yellowstone has facilities
21 throughout the County and, in fact, outside of the County
22 as well. And so the rates that are quoted on there are
23 not necessarily the rates that we charge at these
24 facilities that we're talking about here today.

25 And as you can imagine, sometimes the rates

1 that are quoted on the Web site are not, in fact, the
2 rates that are actually charged to customers, so -- in
3 any kind of setting.

4 So you can only imagine that in a situation
5 like this, where Yellowstone, in some instances -- and
6 this is noted on the Web site -- provides absolutely free
7 accommodations for people, that there would be some
8 exceptions made when somebody wants to become a member of
9 one of these single housekeeping units.

10 The second factor is "whether the individual or
11 individuals with a disability will be denied an equal
12 opportunity to enjoy the housing type of their choice
13 absent the accommodation."

14 The staff report notes that "current future
15 residents will be denied affordable sober living." This
16 is, again, one of the key factors that we're talking
17 about here. We're analyzing this in terms of the City of
18 Newport Beach.

19 And as I think it is essentially undisputed,
20 Yellowstone provides some of the lower cost types of
21 sober living within this City. As compared to some of
22 the other facilities, it is far less expensive to reside
23 at one of these homes.

24 The only negative thing that's mentioned in the
25 staff report as to this piece is that there's

1 overcrowding of the facility or institutionalization of
2 the neighborhoods. Again, in the original application,
3 we provided information that evidenced the benefits and,
4 which I would comment, is undisputed.

5 The third prong is, in the case of a
6 residential care facility, "whether or not the requested
7 accommodation is necessary to make facilities of a
8 similar nature operation economically viable in light of
9 the particularities of the relevant market and the market
10 participants."

11 And the staff report notes that "maintaining
12 the current number of beds is not necessary for
13 Yellowstone to remain economically viable." Again, I
14 think this goes back to what I mentioned earlier, which
15 is that the staff is operating under some assumptions
16 that are not necessarily accurate as to what is charged
17 per resident per bed to stay in one of these homes.

18 The Yellowstone submission provided that it
19 needs to keep each house at its current occupancy to
20 remain open. The City's own calculations, based on the
21 information that we provided them, concludes the
22 opposite. And the City, I think, takes issue with the
23 fact that the Yellowstone's application was not supported
24 by bills, things of that nature.

25 I would say that we provided the information

1 that we felt was appropriate in light of privacy
2 concerns. We supported that with information. I
3 actually disagree. My recollection is that we provided
4 signed under penalty of perjury statements related to
5 what we submitted. That might not be right. I'll go
6 back to look at that. But if that's an issue, that's one
7 that can very easily be remedied.

8 Another issue that was raised in the staff
9 report was in the May 12, the one that pertains to this
10 hearing today, is that I think the City is under a
11 misconception that the CEO is eventually going to fully
12 own these properties, and that's not accurate.

13 As to at least two other properties that are
14 owned, they are now actually owned by Yellowstone. They
15 were donated to Yellowstone. And that is the plan as to
16 these properties as well, that they are not going to
17 be -- we're not talking about somebody who's one step
18 removed from the process who's going to be a profiteer,
19 just because they are able to rent out these properties
20 to Yellowstone, and then Yellowstone is able to, in turn,
21 collect rents from the tenants.

22 As to the issue of the whether Yellowstone, the
23 entity, operates at a profit, Yellowstone is a 501(c)(3).
24 So it is a nonprofit entity. That's an adjudication that
25 I don't think anyone here is looking to overturn.

1 Point four, Mr. Allen, is "in the case of a
2 residential care facility, whether the existing supply of
3 facilities of a similar nature and operation in the
4 community is sufficient to provide individuals with a
5 disability an equal opportunity to live in a residential
6 setting."

7 And we would submit that if these four homes
8 are removed, there absolutely would be a dirth of
9 availability for these people. These are individuals who
10 are at our homes, because these are the places they can
11 afford to go. These are oftentimes -- without getting
12 too far into details, they are oftentimes individuals who
13 have been subject to abuse themselves, who have -- who
14 are living with dependencies, and who, with the closure
15 of these four homes, will not be in a sober living home.

16 We don't know where they going to be, but I can
17 tell you right now that they are not going to be in a
18 sober living home. So the closure of these properties
19 will directly effect that result. There is no -- there
20 is no middle step in between that. If we close these
21 facilities, these people are out on their own.

22 In the staff report, there's mention of a
23 couple of other homes on Pegasus that -- I think they are
24 called the Lynn houses. These are houses that are
25 closing. So I don't think that that should have any part

1 of the calculation as to whether there's availability of
2 a similar nature and operation in the community of these
3 types of facilities.

4 On the issue of whether we are a single
5 housekeeping unit, the other factors that affect the
6 staff's suggested denial, City argues that Yellowstone's
7 request is too broad, that Yellowstone's requesting an
8 exception from all of the provisions of the Ordinance,
9 and that's not the case. We're asking that we be treated
10 as a single family -- a single dwelling -- single
11 housekeeping facility.

12 We are not asking for no regulation. We're not
13 asking for -- that we be -- that the sky's the limit as
14 to how we operate. We're simply asking that we be
15 treated as a single housekeeping unit, as any other
16 single housekeeping unit would be treated, subject to all
17 of the other rules and regulations of the City.

18 The City says that -- that the accommodation
19 requesting -- that's being requested is "broader than
20 necessary to afford the disabled individuals an
21 opportunity to reside in housing of their choice."

22 Yellowstone actually takes issue with that
23 statement in that we're not -- again, we're not asking
24 for any kind of reasonable regulation. We're simply
25 asking that we be given this one type of exemption.

1 As to -- specifically as to finding number
2 four, the staff said it "couldn't make the finding that
3 the requested accommodation will not result in the
4 fundamental alteration of the nature of the City's Zoning
5 Program."

6 The entire presentation that we provided on
7 February 20th of 2009 speaks to this issue. And it
8 actually parlays a little bit into what we were talking
9 about earlier in that we've established use at this
10 property -- at these four properties continuously. And
11 when we became part of the City of Newport Beach, for at
12 least 52 days we can say that we were operating lawfully.

13 Even if you're inclined to make a finding that
14 we operated unlawfully, okay -- we'll let that ship
15 sale -- if the City's inclined to make that finding,
16 which I strongly object to, it certainly can't make the
17 finding that for a minimum of those 52 days -- and I
18 think even broader. I think from January 1, 2008, even
19 until the present -- we've been operating lawfully.

20 There's nothing -- there's nothing that has
21 required to us do anything different than what we're
22 doing as we stand here today since we've been a part of
23 the City of Newport Beach.

24 So as to this specific issue, whether there
25 would be a fundamental alteration, there is no alteration

1 in the City's Zoning Program, inasmuch as the Zoning
2 Program allows for reasonable accommodation of uses such
3 as ours that are there, that have been there, that
4 continue to be there lawfully.

5 On the factors that the City's considering of
6 whether the requested accommodation would fundamentally
7 alter the character of neighborhood or whether the
8 accommodation would result in a substantial increase in
9 traffic or insufficient parking, the staff report notes
10 that "the requested accommodation will fundamentally
11 alter the neighborhood because of litter, meetings,
12 visitors and parking."

13 Dealing with those in order, as to the issue of
14 litter, we talked last time we met, on February 20th,
15 about the idea that -- that there is no evidence before
16 us, either then or now -- I've looked at the City's
17 attachments to the staff record, and I haven't seen any
18 evidence that there's been litter that has come from any
19 of our properties.

20 Since February 20th -- I made the statement at
21 the February 20th hearing that we don't have that
22 evidence. Since that time, it still hasn't appeared. So
23 I think that -- at least that piece is questionable at
24 best.

25 As to the issue of meetings, we talked last

1 time about how we have one meeting. And it is a meeting
2 that is restrictive to just the residents of the homes.
3 There are no other on-site meetings, and this is a
4 once-a-week thing.

5 As to the issue of visitors, the City, again,
6 mentioned in the staff report, as to the reasonable
7 accommodation request, that there was some commentary
8 provided by someone who e-mailed the City in support of
9 our either getting a continued use permit, excuse me, a
10 conditional use permit or a reasonable accommodation.

11 As I mentioned in the last hearing, that
12 pertained to a visitation, an alumni visitation, at one
13 of our Costa Mesa facilities. So that is not an issue
14 here.

15 And then as to the parking, we provided
16 photographs of parking the last time we came on February
17 20th. We talked about our parking practices. And again,
18 I don't see that those are issues here.

19 Other factors affecting, I think, the staff's
20 suggested denial were that the purpose of the bed count
21 limit would be undermined and overconcentration. The
22 City says "the basic purpose is to draw a line at a
23 reasonable density for business providing residential
24 recovery services within a residential neighborhood."

25 Given the size of these homes, the available

1 parking, the proposed densities, we think that we've
2 provided the City with ample information that this
3 request is reasonable and this continued use is
4 reasonable.

5 As I mention had earlier, two of the homes at
6 Pegasus are going to be closed or have closed already,
7 1501 and 1502. These are these Lynn houses. This
8 reduces the bed count by 24 collectively.

9 So that actually concludes our request
10 on -- for reasonable accommodation as to number one.

11 As to number three, on the fee waiver, I'll
12 just go through this quickly.

13 The applications for discretionary approvals,
14 including use permits, has to be accompanied by a fee as
15 established by the Resolution of the City Council, and
16 we're asking for a waiver of that fee.

17 The City cites to -- that it's had insufficient
18 data and talks about the Oxford House, Evergreen versus
19 City of Plainfield case, and says that that case stands
20 for the proposition that actual hard, solid information,
21 specific information, supported information, must be
22 provided.

23 As to that piece, we have attempted to provide
24 the City with a type of information that we think
25 is -- strikes a fair balance and an equitable balance

1 between our privacy concerns, excuse me, and the City's
2 need for information. I would note, again, that to the
3 extent that we haven't provided sufficient information
4 for this fee waiver, that we would be willing to discuss
5 that further.

6 And then lastly, Ms. Wolcott made the comment
7 that "we can find more reasonable ways to accommodate our
8 residents."

9 And I heard that, and I've still not seen how
10 that's supposed to happen. In light of what the City's
11 doing with this Ordinance in reducing the number of beds
12 in the City of Newport Beach, it strains the imagination
13 to think that there's going to be some other
14 accommodation that's going to satisfy the needs of these
15 disabled individuals.

16 There is a -- there's already a bed reduction
17 that's happened in the City of Newport Beach. Sounds as
18 if there's going to be a further reduction as time goes
19 by. And to blanketly say that there are other
20 accommodations, there's other possibilities, without any
21 further discussion on how that might occur and within the
22 confines of the City of Newport Beach, I think it's
23 difficult to analyze that.

24 Thank you.

25 MR. ALLEN: Staff wish to make response to any

1 of the comments?

2 MS. WOLCOTT: Yes, please.

3 I'll start with saying that Mr. Zfaty presented
4 his analysis of request number two, as well as request
5 number one and three.

6 I did not -- in the interest of due process and
7 fairness, we did not stop him and allowed him to present
8 that information. I will not give you all of my analysis
9 on number two. It is in the staff report in detail.

10 What I'm trying to give orally is kind of a
11 shorthand version of the analysis for purposes of
12 brevity. But if anybody wants more details on our
13 analysis and how we reached them, they can find it in the
14 staff reports from February 20th and today.

15 Okay. To be begin with, the last assertions
16 made first. As far as the fee waiver, the Hearing
17 Officer has seen other applications for financial
18 reasonable accommodation. Reasonable accommodation based
19 on financial limitations which arose directly from the
20 applicant's disability. And the Hearing Officer has seen
21 the rigor with which staff has had to pursue making sure
22 that it really is an accommodation that's necessary.

23 And to that end we have required individual
24 applications in the past to submit financial information
25 which they found somewhat intrusive. They were not at

1 all excited about producing it. But they produced their
2 financial information when requested, because they
3 recognize that if they were raising the financial issue,
4 their duty was to backup their financial request by
5 showing what the hardship was.

6 Individual applicants have submitted W-2's,
7 Social Security statements. They have given confidential
8 medical information. Where the information was
9 confidential, we have -- staff has reviewed it and has
10 made a recommendation, based on the review of that
11 information, but has not made the information public to
12 protect the privacy concerns. We are very sensitive to
13 privacy concerns of individuals.

14 Where a business is concerned, I'm not sure
15 they have the same privacy concerns to protect. As a
16 501(c)(3), that's not, you know, an open -- doesn't mean
17 that the analysis stops there.

18 The Hearing Officer also would have the
19 opportunity to review any information that was submitted
20 to the staff in camera, which would mean he could view it
21 himself, make his own determination without making the
22 information public if it was considered to be
23 confidential.

24 So while I would respectfully disagree with
25 Mr. Zfaty's characterization of our request as overly

1 intrusive and designed to violate any kind of privacy
2 concerns, we need to verify whether the hardship is there
3 or not.

4 As far as the single housekeeping unit, we are
5 not -- we are not refuting that it's an interactive
6 group. We are not refuting that there's no treatment
7 done on-site. We don't know it's done on-site, but we
8 have no evidence that treatment is performed there.
9 However, many of the other essential elements of our
10 single housekeeping unit definition are not present in
11 this instance.

12 Mr. Zfaty's office's characterization of what
13 the use looks like, what the characterization of the
14 residential occupancy pattern is, has changed over time.
15 On May 20th of '08, the original characterization on the
16 reasonable accommodation application was,

17 "The residents reside separate at the
18 property and interact within the property.
19 There's individual use common areas. The
20 residents are responsible for their own meals,
21 expenses and chores. And most significantly,
22 each individual resides at the property subject
23 to a separate contractual arrangement with the
24 applicant."

25 In January of '09, after being informed by the

1 City staff that their request for single housekeeping
2 unit was overbroad and that the reported pattern didn't
3 fit, they said,

4 "The residents are" -- in the letter from
5 Mr. Zfaty's office, they stated,

6 "The residents are functionally equivalent
7 to a traditional family, whose members are an
8 interactive group of persons jointly occupying
9 a single dwelling unit. Like a single
10 housekeeping unit, there's a common area, and
11 each resident is responsible for their own
12 meals, expenses and chores. Also, the makeup
13 of the property is determined by the residents
14 of the unit, rather than the property manager."

15 This directly mirrors the language of our Code,
16 and it majorly conflicts with their early assertions. It
17 began to appear that the Applicant was characterizing
18 their use according to the result they wanted, not the
19 actual character- --not the actual operating pattern.

20 But again, staff gave the Applicant a chance to
21 correct the inconsistencies. We did not want to do
22 unfair surprise. We did not want to do an ambush. Staff
23 informed them that there were inconsistencies between
24 their letter and May 20, 2008, application.

25 After being informed, the Counsel sent a letter

1 on February 13th of '09 saying,

2 "Material submitted to the City May 2008
3 reflects some inaccurate information.
4 Yellowstone does not have a contractual
5 relationship with the residents at its
6 properties. With respect to the residents of
7 the four Yellowstone homes in Santa Ana
8 Heights, Yellowstone's position is correctly
9 stated in a letter to the City dated January
10 29, 2009.

11 "The makeup of the property is determined by
12 the residents of the unit rather than the
13 property manager. More specifically,
14 Yellowstone's Board of Directors does not
15 determine who resides at each of the four
16 homes. New residents are introduced and
17 approved by the current residents during house
18 meetings, or they are not accepted."

19 That was the first time that characterization
20 was ever presented. And I believe if we had not
21 presented them with an opportunity, this would never have
22 been raised. The Hearing Officer can determine which
23 characterization he believes to be the true one.

24 The cost of the Web site differing from the
25 submission from the Applicant. It's the first time I've

1 ever heard the argument that the facilities are cheaper
2 in Newport Beach than elsewhere in the County. "The
3 rates quoted are not always the rates charged."

4 Sir, we used what we had to go with. We made
5 every attempt to get more financial information from the
6 Applicant. What we were able to get, we used.

7 My final comment is when Mr. Zfaty said that
8 when they are asking for an exemption from the single
9 housekeeping unit, they are not asking for a broad
10 exemption, they are asking for a very simple exemption,
11 what they are asking for is no conditional use permit
12 required, no conditions required, no reasonable
13 conditions the City could impose, such as reasonable bed
14 count, quiet hours, smoking areas, reasonable parking
15 controls, for extensive density. None of those would be
16 required, and, therefore, we do feel this is an overly
17 broad request.

18 Janet Brown was also going to address the issue
19 of whether or not the facility was ever legally occupied
20 for the 52 days between when Santa Ana Heights was
21 annexed and when our Zoning Code -- the changes to the
22 Zoning Code took effect in February of 2008.

23 MR. ALLEN: Let's just ask a question, here.

24 It's 10 minutes to 6. We're getting close to
25 probably being done, but we still have a public hearing

1 to conduct on the reasonable accommodations. Can we keep
2 going?

3 MR. KIFF: We don't have a conflict tonight
4 with this room. Sometimes we do on Thursdays. This time
5 we don't.

6 MR. ALLEN: Okay.

7 MS. BROWN: Thank you.

8 Yes. Starting in January 1, 2008, when the
9 properties were annexed to the City of Newport Beach, the
10 requirement at that time for sober living use would have
11 been the approval of a Federal Exemption Permit, which
12 the applicant did not have or did not make an application
13 for at any time.

14 So to say that they were conforming use or in
15 compliance with the City regulations at that time would
16 not be a correct statement.

17 MR. ALLEN: Would they have had to have that
18 permit as a County facility?

19 MS. BROWN: No. That was not a County
20 requirement. It's a City of Newport Beach requirement.

21 MR. ALLEN: So -- but they should have had one
22 as a City -- as soon as the annexation occurred?

23 MS. BROWN: Correct.

24 MR. ALLEN: All right. So anything else from
25 staff?

1 MR. KIFF: I'll make one comment.

2 Near the end of Mr. Zfaty's presentation, he
3 was noting that -- I apologize. I'm going to be
4 paraphrasing about how the City's enactment of this
5 Ordinance limits of the amount of -- what will
6 significantly decrease the amount of beds in the
7 community.

8 And as you're aware, Mr. Allen, you've approved
9 the use permit for 11 beds and 14 beds. The City
10 has -- City Council has approved a development for 204
11 beds with the largest operator of facilities in the City,
12 Sober Living by the Sea.

13 Your denial actions have only been, up until
14 this point, one, Newport Coast Recovery at 29 beds. And
15 then the facility at Narconon, Southern California,
16 voluntarily offered -- asked to be allowed to stay up
17 until February 2010, when its ADP license expires, and
18 then they had entered into an abatement agreement from
19 that date forward. That reflects 22 nighttime beds.

20 MR. ALLEN: Thank you.

21 So before -- Mr. Zfaty, do you need to make
22 some more comments before we see if any public needs to
23 talk?

24 MR. ZFATY: Yeah, I would like to have an
25 opportunity to respond to some of that, thank you.

1 First off, maybe I'll just go backwards. As to
2 the last comment about number of beds, though there may
3 have been some approved beds, and though there may have
4 been some beds that were -- there that was agreements
5 reached, the net effect, I think we can all agree, is
6 that the number of beds available have been decreased.
7 That much I think there's no dispute over.

8 We can talk about what we've approved and what
9 we've denied, but the bottom line is, there are less beds
10 available today of the nature that we're discussing here
11 than there were before February 22nd of 2008.

12 As to the issue of the Federal Exemption
13 Permit, I'm actually a little bit surprised by
14 Ms. Brown's comment. Because if you look at our initial
15 submission in May of 2008, we asked specifically -- we
16 noted that there was a provision in the Code for Federal
17 Exemption Permit.

18 And we asked, "We'd like to apply for a Federal
19 Exemption Permit." And the Code talked about how that
20 was supposed to -- how that process happened. We never
21 heard anything back from that or from the City on that
22 issue.

23 One of our representatives actually went down
24 to the City, and said, "I'd like to have the Federal
25 Exemption Permit document," and was denied, was told to

1 go anyway. "We don't have those." So unless I'm missing
2 something, and I may be, we have asked the City
3 specifically that we be available to a Federal Exemption
4 Permit.

5 MR. KIFF: While you're looking there,
6 Mr. Zfaty, you are missing something. The Federal
7 Exemption Permit went away on February 22nd, when the
8 Ordinance took effect. So it was a requirement for those
9 days up until the effective date of the Ordinance. We
10 could not issue any more from that date forward, because
11 the change stripped away the FEP process.

12 MR. ZFATY: Give me one second.

13 As to the issue of whether we were heard on our
14 request number two, notwithstanding that there may have
15 been some slides that talked about request number two, I
16 actually redacted my entire presentation on number two.

17 So we haven't argued our request for number
18 two. And I think it makes sense that we don't, because
19 request number two is that we be provided additional
20 beds. If at some point in time the City wants to hear
21 our argument on that, I'm more than happy to make it, but
22 it has not been made.

23 As to the production of financials, it kind of
24 gave me a little pause to hear that some of the
25 facilities may have provided medical information, because

1 it sounds like a HIPPA problem to me. But that
2 notwithstanding, we've never been asked to provide
3 anything in way of medical anything relating to our
4 residents.

5 And again, I don't think that's an issue here.
6 From my read of the staff report, there's no question
7 that we have a disabled class that we're talking about in
8 connection with these properties.

9 As to the information on the Web site, again, I
10 want to be real clear here, because I didn't say that the
11 bed -- the cost for staying in a bed in Newport Beach is
12 less than anything we do anywhere else. That's
13 interesting advocacy and argument, but that's not what I
14 said.

15 What I said was, as with anybody, you have
16 something on your Web site, that doesn't necessarily mean
17 that that's actually what is charged. So, we've provided
18 the City with information as to what we actually charge
19 or what we actually collect, is probably a better way to
20 put it, from the individuals who stay at these
21 properties.

22 If there's an issue regarding whether we have
23 properly signed them under penalty of perjury, because I
24 think that might have been the City's bigger problem or
25 larger concern, that can be provided.

1 Certainly if there's an issue as to whether
2 we're entitled to an exemption on that issue, whether the
3 City's inclined to grant us an exemption on that issue,
4 or whether that casts any aspersions on veracity of any
5 comments or statements we've made, that can be very
6 easily remedied.

7 Again, nobody has said at any point in time
8 that there's treatments at our facilities. It was
9 discussed that -- well, I'll leave that one alone. And I
10 think that's all I have.

11 MR. ALLEN: Okay. Thanks. Shall we -- let's
12 open the public hearing now.

13 Would anyone like to make comments on the
14 elements of the reasonable accommodation, either the
15 single housekeeping unit aspect or the fee waiver?

16 Mr. Mathena?

17 MR. MATHENA: Good to see you.

18 A couple of brief comments. I'm Larry Mathena,
19 M-a-t-h-e-n-a.

20 I just wanted to second Mr. Kiff's observations
21 in respect to making the observation that, yes, hopefully
22 actually bed counts are declining, considering that
23 there's still excessively disproportionate, even after
24 the decline, compared to anywhere else in the state. And
25 I just think that's worth having in the record.

1 And the second point I'd like to make, there's
2 an implied lack of cooperation relative to financial data
3 on the hardship point. I would observe that, as a
4 nonprofit entity, all you need to do is ask them for copy
5 of their 990, and they have to give it to.

6 And you will instantly be given the global
7 economic status, as least reported for tax purposes.
8 And, in fact, I would find it very disappointing that
9 they didn't choose to volunteer that for you. It's the
10 law that that is available.

11 Secondly, I believe, although I don't have the
12 expertise, that there's similar State filings that are
13 also absolutely publicly available.

14 And I have two observation there. One, I would
15 view that as a sign of a lack of cooperation in terms of
16 saying, "Here's the things we have to give to anybody."
17 It also troubles me that actually the City, in a
18 nonprofit examination, isn't aware enough to understand
19 that and go get that as additional evidence of what
20 charges are, frankly, what expenses are, and a variety of
21 other things that are useful.

22 And just an aside to that, the whole process, I
23 have to say of this, is as long as you tell us what
24 you're going to tell us, and if -- assuming you do it
25 subject to a penalty of perjury, it's like I don't see

1 the City independently verifying. I don't see the City
2 doing even a small amount of confirmation that it really
3 ought it.

4 And otherwise, you're kind of stuck with us
5 poor citizens, who really don't have the tools to do it
6 either. And you end up with this evolving mishmash, and
7 you also sort of end up -- because the City isn't, I
8 think, doing a great job of investigating, it sort of
9 says, "Well, but we can kind of see there's this
10 potential violation here, but for us to answer that, we
11 have to ask the question." And once of question is
12 asked, you have this evolution of what the answer is.

13 And the easy answer is, the way these things
14 are unfolded, from my perspective, if you're smart and
15 paying attention and you're the operator, you probably
16 ought to be able to get yourself into the box that you
17 qualify. And it's unfortunate that it isn't really
18 necessarily what the operations are and what the reality
19 is.

20 And one final brief point. A whole bunch of
21 testimony was presented at the February 20th hearing
22 about a whole bunch of different issues that do get to
23 parking, do get to, frankly, unlawful assembly, do get to
24 safety and health issues. And I -- I know you're aware
25 of that, but I just wanted to reiterate it in this

1 hearing. Thank you.

2 MS. WALKER: Good evening. Judy Walker, 1571
3 Indus.

4 We have heard repeatedly that there are no
5 parking problems, and that no evidence has been
6 presented. I bring with me this evening photographs. I
7 will leave the disk with -- I have the thumbprints as
8 well. It's hard for me to be able to say, "Here, plug in
9 a thumb drive."

10 These are documentation of parking issues that
11 we did explain in February. And we now are
12 substantiating those with visuals in addition, because
13 that was brought up, that there were no parking issues.
14 Also, that there are no safety issues.

15 Also, there are photographs of behavior with,
16 particular case, trash receptacles being placed and left
17 in front of the fire hydrants that, I believe, is a
18 safety issue to the neighborhood.

19 And hearing that the residents decide who's
20 going to be the next set of residents is most
21 disconcerting when you understand that these are the
22 people who are parking and are taking care of things like
23 trash and not paying attention to safety issues.

24 Thank you.

25 MR. ALLEN: Anyone else from the public?

1 Okay. Thank you. We'll close the public
2 hearing.

3 Anything else from staff?

4 MR. KIFF: No, sir.

5 MS. WOLCOTT: No, sir.

6 MR. ALLEN: I'm persuaded by staff's argument
7 with respect to the single housekeeping. I just don't
8 think that the reasonable accommodation requirements
9 extend that far, and the analysis that's been done is
10 solid. So I would rule to deny that portion.

11 Frankly, with the reasonable accommodation for
12 the fee, I can't get my head clearly around all of the
13 information and numbers here to be able to do it. And
14 I'm not sure how I can -- I don't see the need to
15 continue the hearing necessarily, but I'd like to be able
16 to take further time to analyze what's been presented and
17 what's been said to make a decision.

18 Does anybody have any suggestions?

19 MR. KIFF: Just a moment.

20 (Pause in proceeding.)

21 MR. ALLEN: I'm sorry. Can I intervene one
22 moment?

23 MR. KIFF: Sure.

24 MR. ALLEN: Mr. Mathena made the suggestion
25 about the 990, which I assume is some Federal tax return

1 or some such document that hasn't been provided. And
2 whether that would help at all, that should be considered
3 in my mind, if it's available and helpful.

4 MS. WOLCOTT: I would ask whether the Applicant
5 is willing to submit more, because we have always been
6 willing to review more up to the minute the staff report
7 was published, yes.

8 MR. ALLEN: Would the Applicant like to respond
9 to that at this point?

10 MR. ZFATY: As I mentioned in my presentation,
11 Mr. Allen, we're more than happy to continue our dialog
12 with the City on that issue.

13 MR. ALLEN: All right. Well then, again, the
14 procedure -- I hate to have to take up and spend City
15 money and time to conduct hearings here just on that
16 issue, because -- but if that's inappropriate, tell me,
17 you know. I wish we could do it without having to go
18 that far.

19 MR. ZFATY: I would actually defer to the staff
20 on that issue, but we are certainly willing to submit
21 that you can take the matter under submission, Mr. Allen,
22 subject to additional provision of information by us.

23 MS. WOLCOTT and I are in frequent
24 communication, so I'm more than happy to speak with her
25 next week about the provision of additional information.

1 She can forward it on to you whatever she needs.

2 I don't need about the public -- the
3 transparency issues. I will leave that to the staff,
4 but --

5 MR. ALLEN: Right.

6 MR. ZFATY: -- in terms of our requirements, we
7 will waive any kind of additional hearing on that
8 particular issue.

9 MR. ALLEN: All right. Thank you.

10 MR. BOBKO: Mr. Allen, what we suggest
11 is -- Kit Bobko -- is that the Applicant will submit to
12 staff whatever additional documentation that they'd like
13 to provide, and staff will submit it to you, and, you
14 know, two weeks from now or whatever, whatever is
15 convenient for you, you can issue your ruling.

16 But the City would be acceptable to letting you
17 take this under submission with that proviso.

18 MR. ALLEN: That's just fine with me.

19 MR. BOBKO: Okay.

20 MR. ALLEN: Let's proceed in that fashion,
21 then. Applicant will present whatever they wish to
22 present within, what, a week?

23 MR. ZFATY: That's fine. Actually, before you
24 do this, let me say one additional thing, because I
25 wanted to make sure we're clear.

1 Any such documentation that we provide that
2 relates to the broad Yellowstone, Yellowstone as a
3 facility, may not be specific enough. I think we're
4 talking about individual homes here. But with that
5 proviso, just so we're all clear --

6 MS. WOLCOTT: The kind of documentation we
7 requested before was mortgage statements, utility bills,
8 that kind of information, nothing confidential.

9 MR. ALLEN: Okay.

10 MR. BOBKO: The other thing is that to the
11 extent that any of this is sensitive information, we
12 would be more than happy, the City would, to submit it to
13 you under seal, or for review confidentially, of course,
14 and, of course, we return it back to them.

15 MR. ALLEN: If you'll identify that when you
16 submit it to me, then I would hold it confidentially.

17 MR. BOBKO: I'm sorry. I wasn't paying
18 attention. Could you say it again?

19 MR. ALLEN: I said that if you submitted it to
20 me under confidential -- in a confidential manner, then I
21 would hold it in that right and nevertheless consider.

22 MR. BOBKO: Okay. And the other thing is, of
23 course, just for clarity's sake, when staff provides this
24 information to you, there is no further communication
25 between the Hearing Officer and staff. I just want

1 everybody to be clear on that.

2 MR. ALLEN: Yes.

3 MR. BOBKO: Staff is providing you with
4 information in response, of course, to any additional
5 questions that you have. But staff does not work with
6 you in any regard. You are making these determinations
7 completely.

8 MR. ALLEN: Independently. So then also I
9 would prepare whatever finding needed to be made to
10 incorporate into a Resolution.

11 MR. BOBKO: Very well.

12 MR. ALLEN: Correct?

13 MR. BOBKO: Yes. I just want to make sure that
14 everyone who is listening or perhaps watching will know
15 that even though that this is going to occur under
16 submission, that, in fact, you will still be making this
17 independently.

18 MR. ALLEN: Correct.

19 MR. BOBKO: Okay.

20 MR. KIFF: I just had announcements, if you're
21 going to end the hearing, as to when the next hearings
22 are for the public's input, I'm sorry, for the public's
23 participation and information. I'm sorry. It's a long
24 day.

25 Notwithstanding the Yellowstone case, I was

1 going to -- for the folks in the audience who usually
2 attend these, just so they know when the next ones are,
3 if you're ready for that.

4 MR. ALLEN: I just wanted to clarify for us the
5 procedure we'll follow. Is it necessary to hold up the
6 entire Resolution on just -- for this fee, or can we do
7 that separately?

8 That is, we can adopt a Resolution with the
9 determinations that have been made today with respect to
10 all except the fee waiver request, and do that separately
11 or --

12 MR. KIFF: That would be my understanding.
13 After conferring with Counsel, we would -- we could maybe
14 do them in three different steps. The Resolution of
15 Denial for the use permit could be one. The Resolution
16 of the Denial on the single housekeeping unit reasonable
17 application. And then a third one could be the use
18 permit -- sorry -- the fee waiver, and that would be held
19 under your submission until you review additional
20 financial data.

21 MR. ALLEN: I think that's the way to do it.

22 MR. KIFF: Okay.

23 MR. ALLEN: All right. Then, there's nothing
24 further from me, except -- now, you wanted to make an
25 announcement about upcoming hearings?

1 MS. WOLCOTT: Mr. Zfaty also asked me to
2 interject. He'd like you to put on the record the
3 procedure of how the Resolution will be adopted so that
4 they don't lose any due process rights.

5 MR. ALLEN: The procedure of how the Resolution
6 will be adopted?

7 MS. WOLCOTT: Maybe you could ask Mr. Zfaty to
8 clarify.

9 MR. ZFATY: I'm not talking about due process
10 now. I'm just talking about notice. I just want to know
11 what the procedure is going to be.

12 In other words, will the staff provide you with
13 a proposed Resolution? Will you sign the Resolution?
14 Will we subsequently be -- will there be an announcement?
15 After the Resolution has been adopted, will we be
16 provided with some notice that that's occurred? Those
17 are my questions, just so we don't lose any appellate
18 rights.

19 MR. ALLEN: What we've been doing heretofore on
20 these is bringing the Resolutions back at a
21 subsequent -- like we did this afternoon with
22 that -- with the one that I signed. It was made public
23 by the staff several days ago.

24 MR. ZFATY: Perfect.

25 MR. ALLEN: So I would expect that we would do

1 the same procedure with this one, so that you get an
2 adequate opportunity to at least look at that before it's
3 signed.

4 MR. KIFF: And for, again, the Applicant's
5 information, the appeal timeline, which is deemed 14
6 days, takes effect -- begins, the clock starts, when
7 Mr. Allen signs the Resolution.

8 Let me go into, then, the next hearings. We
9 have a reasonable accommodation hearing for 900 West
10 Balboa. That's scheduled for March 19 at 4 o'clock.

11 We have another reasonable accommodation for
12 Pacific Shores Recovery. These are facilities at 3309
13 Clay, and 492 and 492 1/2 Orange. And that's scheduled
14 for March 25th, at 2 o'clock.

15 The Council has also hearing two appeal issues.
16 One is the Newport Coast Recovery denial. So the Council
17 will hear -- decide whether or not to uphold or overturn
18 that denial. That's March 24 at 7 p.m. here, starting at
19 7 p.m. That's a regular City Council meeting.

20 At the same night, the Council is expected to
21 weigh in on an Ocean Recovery application relating to
22 1115 West Balboa. And the action by the Hearing Officer
23 to continue that hearing to -- for six months. So the
24 Council has been asked to offer an opinion about that,
25 and potentially either declare it to be a decision or not

1 a decision, and then uphold it or return it to the
2 Hearing Officer for future action or further action.

3 Thank you.

4 MR. ALLEN: So that concludes our proceedings
5 for today, and we'll convene our hearings again on the
6 19th; is that correct?

7 MR. KIFF: Yep.

8 MR. ALLEN: Thank you.

9 (Ending time: 6:16 p.m.)

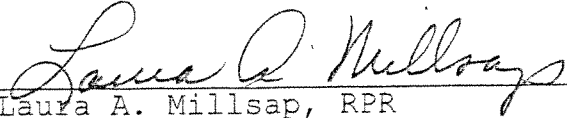
1
2
3 I, the undersigned, a Certified Shorthand
4 Reporter for the State of California, do hereby certify:

5 That prior foregoing proceedings were taken
6 before me at the time and place herein set forth; that
7 any witnesses in the foregoing proceedings, prior to
8 testifying, were placed under oath; that a verbatim
9 record of the proceedings was made by me using machine
10 shorthand which was thereafter transcribed under my
11 direction; further, that the foregoing is an accurate
12 transcription thereof.

13 I further certify that I am neither financially
14 interested in the action nor a relative or employee of
15 any attorney of any of the parties.

16 IN WITNESS WHEREOF, I have this date subscribed
17 my name.

18
19 Dated: MAR 25 2009

20
21 
22 Laura A. Millsap, RPR
23 CSR No. 9266
24
25

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