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August 7, 2009

VIA FACSIMILE

Mr. Tom Allen
Hearing Officer
City of Newport Beach

Re: ***Reasonable Accommodation***

Dear Mr. Allen:

The City of Newport Beach ("City") submits this supplemental letter brief pursuant to the Hearing Officer's Order dated August 2, 2009.

The City notes that the issues raised by the Newport Coast Recovery's ("NCR") supplemental brief far exceed those on which briefing was requested. The only issue the Hearing Officer asked NCR for briefing on involved NCR's allegations regarding the City's Housing Element. *See* Transcript of Proceedings (July 7, 2009) at page 122, line 25, page 123, lines 1-5.[1] The City offered to further brief the Hearing Officer on whether NCR had engaged in a "pattern or practice" of illegal operation. *See* TR (July 7, 2009) at page 123, lines 17-20. Conformably with the Hearing Officer's request, the City briefed these two issues on July 21, 2009.

NCR's supplemental briefing on the issues of "over-concentration," "equal opportunity," and "adopting discriminatory animus" were not requested. Nevertheless, the City has no objection with the Hearing Officer considering these issues since NCR claimed it did not have sufficient time to prepare and brief issues at the Use Permit and Reasonable Accommodation hearings.

[1] Any reference to a transcript of proceedings from one of the public hearings will be annotated "TR" followed by a page and line number.

And to the extent NCR requested permission to brief issues in its supplemental brief but did not, the City respectfully submits those matters be closed and the evidence confined that presented at the hearing.[2]

A. The Hearings Were Not About Licensing

NCR's supplemental brief states, "[a] request for a reasonable accommodation is not a licensure compliance hearing or an adjudication on compliance with state licensure standards." *See* Newport Coast Recovery's Supp. Brief at page 2.

The City agrees. The status of NCR's license and the implications of NCR's illegal activity on that license had nothing to do with the issues before the Hearing Officer. *See* RT (July 7, 2009) at page 25, lines 9-13 ("we can concede that this is not about questions of law with regard to licensure or whether or not this person is fit to hold a license from the state").

The reason this evidence about NCR's admission of minors to one its facilities is at issue is because Newport Beach's Municipal Code ("NBMC") section 20.91A.050 subdivision B requires that licensed facilities like NCR's "shall be operated in compliance with applicable State and local law . . .".[3] Staff believed this evidence showed NCR was not operating its facility in

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[2] At the Reasonable Accommodation hearing Counsel for NCR asked that the "record is left open" regarding its claim that NCR provides "a very different and narrow type of housing, and Newport Coast Recovery is the only one here on the West Peninsula -- and could be in the City – that is . . . [a] primary care all-male residential facility." *See* RT (July 7, 2009) at page 84, lines 19-24. NCR's supplemental brief provides no evidence or clarification on this particular point.

[3] NCR argues the evidence the City presented does not constitute a "pattern and practice" of violating state and local law. The NBMC section containing the "pattern and practice" language applies only to operators of "unlicensed residential care facilities" in or outside of Newport Beach, and the subsection is inapplicable here because NCR is a licensed facility. The City need not show NCR has a "pattern and practice" of operating its facilities illegally, the applicable code section states they must comply with state and local law – period.

compliance with this provision of the code, and once the evidence came to Staff's attention it could not simply be ignored or disregarded.[4] Staff was obliged to present the information for consideration by the City Council, and then the Hearing Officer. That is precisely what Staff did.

The NBMC makes no reference to licenses or the conditions for obtaining them from the State. Correspondingly, the City took no position on NCR's license during the July 7th hearing, and it was not considered a factor in the Staff's recommendation. The question of licensing arose because NCR's Counsel attempted to shift the focus of the hearing from compliance with the City's zoning ordinance, to licensing under the Department of Alcohol and Drug Programs ("ADP").[5]

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[4] In footnote 1 of its supplemental brief, NCR states the information presented at the July 7th hearing is unreliable and "not subject to cross examination . . .". Not so. Counsel for NCR chose not to cross-examine the parents who testified at the hearing. *See* RT (July 7, 2009) at page 29, line 19 ("We cannot and will not respond.") NCR asserts federal law prohibits it from responding to any of the evidence submitted at the hearing, and cites as authority 42 U.S.C. § 290DD-2, which generally prohibits disclosure of records of the identity or treatment of patients in a substance abuse program. In this case, however, the minor child who NCR illegally admitted to its facility *volunteered* his testimony about his experience as an NCR resident. Moreover, the parent consented to the minor's testimony. *See* RT (July 7, 2009) at page 117, line 21. The other minor's parent testified telephonically, revealed her son's identity, and was also available for cross-examination. Thus, any privilege held by the minors was explicitly waived. Additionally, 42 U.S.C. § 290DD-2 expressly applies only to treatment programs and facilities "conducted, regulated, or directly or indirectly assisted by" the federal government. NCR made no showing, nor is there evidence in the record to prove NCR received federal assistance. NCR also claims the City alluded to "other complaints it has received since the hearing which [sic] has not been shared with NCR of its attorneys." *See* Newport Coast Recovery's Supp. Brief at page 2. The City provided NCR's Counsel with all the correspondence it received regarding NCR in a letter dated July 30, 2009.

[5] NCR states there is nothing the City can do about the alleged illegal activity at NCR's facilities, even within the context of its municipal code. "The City's only legal recourse is to complain to DSS and ADP about what it perceives to be NCR's violation of its licensure." *See* Newport Coast Recovery's Supp. Brief at page 2. This claim completely overlooks the requirements of the NBMC, discussed above. The City also observes this defense is akin to a doctor who illegally prescribes drugs to his patients claiming he is exempt from criminal

Finally, the City questions whether any of the issues NCR raised surrounding the evidence presented at the July 7, 2009, hearing are relevant because the Hearing Officer did not base his decision on the after-acquired evidence. *See* RT (July 7, 2009) at pages 55-56; page 125, lines 20-22, page 126, lines 13-15 ("And the primary focus on my thinking remains the overconcentration issue that I think was founded in the first Resolution we did.")

B. The NBMC Requires the Hearing Officer Consider "Overconcentration" as a Factor in His Decision

NCR mistakenly argues that the Health and Safety Code preempts the City's consideration of whether its facility would result in an overconcentration of treatment facilities. NCR makes this assertion on the ground that ADP cannot consider "overconcentration" when reviewing license applications.

The City respectfully submits it is not within the Hearing Officer's discretion to ignore the issue of whether granting NCR's Reasonable Accommodation request would result in an overconcentration of facilities in Newport Beach. The NBMC explicitly requires this factor be taken into consideration. And contrary to NCR's contention, the reason the City Council included this factor for consideration in the ordinance was not to keep facilities like NCR's out of Newport Beach, but rather to avoid the "institutionalization" of the City's single-family residential neighborhoods that works to the detriment of both residents and persons in recovery. *See* NBMC §§ 20.91A.010(B); 20.91A.060(D).

NCR's preemption argument is completely misplaced. Aside from the fact that NCR fails to explain how state law preempts compliance with federal reasonable accommodation requirements, NCR misconstrues the nature of state law preemption.

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prosecution because his ability to prescribe drugs is a matter entirely within the purview of the state medical board, not the criminal justice system.

The threshold inquiry in any preemption analysis under California law is whether there is an actual conflict between local and state law. *See* ***Johnson v. Bradley***, 4 Cal. 4th 389, 399 (1992). The California Supreme Court found, "[a] conflict exists if the local legislation *duplicates, contradicts,* or *enters an area fully occupied* by general law, either expressly or by legislative implication. [Citations.]" ***O'Connell v. City of Stockton***, 41 Cal. 4th 1061, 1067 (2007), *quoting* ***Sherwin Williams Co. v. City of Los Angeles***, 4 Cal. 4th 893, 897 (1993) (emphasis in original).

The Hearing Officer's consideration of overconcentration as a factor in his decision does not duplicate or contradict any aspect of ADP's licensing scheme. As NCR points out in its supplemental brief, ADP has no authority to consider overconcentration when reviewing a license application. *See* Ops. Cal Atty. Gen. 109, *8-9 (2007). The Health and Safety Code is silent on the issue of overconcentration as to licensed alcoholism and drug abuse recovery and treatment facilities.

There is no conflict between the municipal code and state law because the City's guidelines do not duplicate, contradict, or enter into an area of regulation fully occupied by the relevant provisions of the Health & Safety Code.[6]

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[6] Health & Safety Code §§ 11834.01–11834.50 provide that ADP has sole authority to license the operation of adult alcoholism or drug abuse recovery or treatment facilities. *See* Health and Safety Code § 11834.01. ADP must grant a license to any treatment facility for which an applicant submits: (1) a completed written application; (2) a licensure fee; and (3) a fire clearance approved by the fire official having jurisdiction over the facility. *See* Health & Safety Code § 11834.03. Section 11834.09(c) requires ADP to deny an application if it determines the applicant is incapable of complying with the relevant statutory and regulatory requirements. Section 11834.36 also authorizes ADP to deny an application upon any of the following grounds:

"(1) Violation by the licensee of any provision of [the applicable statutes and ADP regulations].
(2) Repeated violation by the licensee of any of the provisions of [the applicable statutes and ADP regulations].

The overconcentration issue is exactly what the City says it is – *a zoning issue.* The only respect in which the Health and Safety code intrudes on this authority is to exempt residential treatment facilities that house six or fewer residents from any local zoning controls not also applicable to single family homes. *See* Health & Safety C. §§ 11834.20-11834.25. If anything, this limited and targeted intrusion into local zoning control is clear evidence that the legislature did not mean to preempt the entire field of zoning with respect to treatment facilities.

C. NCR's Reasonable Accommodation Request Would Fundamentally Alter the City's Zoning Scheme

An accommodation request is not reasonable if it would fundamentally alter the nature of the government program. In the land use context, this means an accommodation request is unreasonable if it fundamentally alters the character of the neighborhood and/or undermines the purpose of the City's zoning scheme. *See, e.g.*, ***Hovsons, Inc. v. Township of Brick,*** 89 F.3d 1096, 1105 (3rd Cir. 1996); *see also* ***Gamble v. City of Escondido***, 104 F.3d 300 (9th Cir. 1997) (operating a health care facility open to the general public in a residential area not required as a reasonable accommodation).

In ***United States v. City of Chicago Heights***, 161 F.Supp.2d 819 (N.D.Ill. 2001), the court held this principle allowed consideration of whether a group home would create an unreasonable overconcentration of such uses in a community. There, the city imposed a 1000-foot separation requirement between group homes, based on the belief that clusters of similar uses would

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(3) Aiding, abetting, or permitting the violation of, or any repeated violation of, any of the provisions described in paragraph (1) or (2).
(4) Conduct in the operation of an alcoholism or drug abuse recovery or treatment facility that is inimical to the health, morals, welfare, or safety of either an individual in, or receiving services from, the facility or to the people of the State of California.
(5) Misrepresentation of any material fact in obtaining the alcoholism or drug abuse recovery or treatment facility license.
(6) Failure to pay any civil penalties assessed by the department."

create an institutional environment. Based on the facts presented, the court held allowing a group home to operate within 1000 feet of a similar use would not result in a clustering of uses, would not "institutionalize" group home residents, and would not fundamentally alter the city's zoning scheme. But the court made the following observation, *apropos* of the situation presented here:

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

United States v. City of Chicago Heights, 161 F.Supp.2d 819, 837 (N.D.Ill. 2001).

It is for precisely the reason the court identified in ***City of Chicago Heights*** that Newport Beach requires the Hearing Officer to consider overconcentration when determining whether to grant a use permit or reasonable accommodation. One of the stated goals of the NBMC is:

> "[T]o protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery. In doing so, the City seeks to avoid the overconcentration of residential care facilities so that such facilities are reasonably dispersed throughout the community and are not congregated or over-concentrated in any particular area so as to institutionalize that area."

NBMC §20.91A.010.

Nor is this a case like ***Regional Econ. Cmty. Action Program, Inc. v. City of Middletown***, 294 F.3d 35 (2002) or ***Oxford House-C v. City of St. Louis***, 843 F.Supp. 1556 (E.D.Mo 1994), where the courts found the cities'

overconcentration concerns were pretexts for discriminatory animus. Newport Beach's concerns about "overconcentration" and the "institutionalization" of its neighborhoods are both real and documented. Moreover, NCR cites no authority, nor is the City aware of any, that holds overconcentration can never be considered when deciding whether an accommodation request is reasonable.

Finally, from a practical standpoint, NCR's claims regarding animus lose steam when considered against the number of reasonable accommodations and use permits the City has already granted to similar uses under its new regulatory scheme.

D. NCR Has Not Met Its Burden of Proof for Reasonable Accommodation

NCR complains that the City cannot require it to produce evidence that capacity for the requested number of beds is necessary for its financial viability, and that the City is applying the wrong burden of proof. These positions are flatly at odds with established case law.

Reasonable accommodations are required only if they are both "reasonable" and "necessary." "The 'necessary' element requires the demonstration of a direct linkage between the proposed accommodation and the 'equal opportunity' to be provided to the handicapped person." ***Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains***, 284 F.3d 442, 460 (3rd Cir. 2002). Case law demonstrates NCR bears the burden of showing the necessity of its requested accommodation.

Lapid-Laurel illustrates this point. In that case, the operator of a group home for the elderly requested a use variance to allow a 93-bed facility in a residential area. The operator failed to show that smaller facilities were unable to provide the range of care required, or that it would be economically infeasible to operate a smaller facility. The court found the "necessity" element satisfied as to disabled elderly residents' need to live in a single-family residential area, but not as to the number of residents requested by the facility operator. The court found the operator could satisfy the "necessity" element for the requested population by showing either: (1) the size was necessary for

the facility's financial viability; or (2) proving the size of the facility imparted some therapeutic benefit on the residents. The facility operator had not demonstrated a larger facility was necessary for either financial viability or therapeutic benefit. *See* ***Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains***, 284 F.3d 442, 460-61 (3 rd Cir 2002). The Ninth Circuit follows the same approach. *See e.g.*, ***City of Edmonds v. Washington State Building Council***, 18 F.3d 802, 803 (9th Cir. 1994) (sober living home made preliminary showing of necessity by showing it required six or more residents for financial self-sufficiency and to provide a supportive atmosphere for successful recovery).

NCR failed to provide evidence its preferred operating size is either therapeutically beneficial to its residents or necessary for the facility's financial viability. NCR failed to meet its burden on either count. If, as NCR's supplemental brief claims at page 4, that it is not seeking accommodation based on financial need, then it remains NCR's burden to prove that its desired accommodations are therapeutically necessary. In other words, NCR must show the requested number of beds provide a greater therapeutic benefit to its residents than some lesser number would. NCR made no such showing at the hearing, and there is no evidence to support its contention in the record.

E. Housing Element

NCR's supplemental brief mischaracterizes the correspondence between the Department of Housing and Community Development ("HCD") and the City's Planning Department. The letter attached to NCR's supplemental brief states, "HCD found that the City's group home ordinance constituted a 'constraint on persons with disabilities.'" This is not the case. The letter did not "find" anything, but rather asked the City for:

> "[A] detailed description of the City's recently adopted policies regarding group home development and analyze this policy for requirements that may constrain housing for persons with disabilities."

Letter from Cathy Cresswell to David Lepo (October 24, 2008). Similarly, the request for information about "transitional housing" was merely a request for information, not a finding of non-compliance.

It should also be made clear that the two comments NCR plucked from the seven-page, single spaced document were not prompted by the passage of Ordinance 2008-5, but were part of a much larger, annually required review of the City's Housing Element. *See* Declaration of Sharon Wood at ¶9 (attached to the City's supplemental brief).

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As always, if you have any questions or require clarification on any of the points contained herein, please let me know.

Sincerely,

Patrick K. Bobko

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bcc: Dave Kiff
Catherine Wolcott
Peter Pierce