

**City's Letter-Brief Regarding Reasonable
Accommodation No. 2009-009**

(July 21, 2009)

From: Wolcott, Cathy

Sent: Tuesday, July 21, 2009 5:03 PM

To: 'Tom/Pam Allen'

Cc: 'spolin2@earthlink.net'; 'cbrancart@brancart.com'; Kiff, Dave; Kit Bobko; Brown, Janet

Subject: Newport Coast Recovery - City of Newport Beach briefing

Dear Mr. Allen,

Attached please find the briefing and other information you requested from the City of Newport Beach at the July 7, 2009 administrative hearing on Newport Coast Recovery's applications for a use permit and reasonable accommodation. We are submitting the briefing contemporaneously to the applicant, and will be happy to provide further information if requested.

Catherine Wolcott

Deputy City Attorney

City of Newport Beach

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<<City_s Letter Brief.pdf>> <<Document.pdf>>



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Patrick K. Bobko
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July 21, 2009

VIA FACSIMILE

Mr. Tom Allen
Hearing Officer
City of Newport Beach

Re: *Reasonable Accommodation*

Dear Mr. Allen:

This letter-brief is submitted on behalf of the City of Newport Beach in connection with the hearing concerning an application for reasonable accommodation from Newport Coast Recovery ("Newport Coast"). This letter-brief responds to your request at the hearing on July 7, 2009, for further briefing regarding the meaning of "pattern and practice" as defined in the Newport Beach Municipal Code, as well as explanations of the documents presented by Newport Coast at the hearing.

Counsel for the City has provided the applicant with a copy of this letter.

"Pattern and Practice"

Newport Beach Municipal Code ("NBMC") section 20.91A.050 provides standards for the development and operation of residential care facilities in the City's residential zones. The Code requires these facilities operate in compliance with federal, state and local law.

NBMC section 20.91A.050 subdivision B applies to a *specific facility* in Newport Beach and states "[t]he property shall be operated in compliance with applicable State and local law...."

Subdivision C of the same section requires owners or operators of residential care facilities demonstrate that they do not have a "pattern or practice" of operating *similar facilities* in violation of state or local law:

"C. In order to ensure that unlicensed residential care facilities (small or general) are operating in a manner that is consistent with State and Federal law and established industry standards *and to ensure that operators do not*

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have a pattern or practice of operating similar facilities in violation of State or local law, the standards listed below shall apply:

4. The names of all persons and entities with an ownership or leasehold interest in the facility, or who will participate in operation of the facility, shall be disclosed in writing to the City, *and such persons and entities shall not have a demonstrated pattern or practice of operating similar facilities in or out of the City of Newport Beach in violation of State or local law.*"

(Emphasis added).

There are two separate standards at play here. Subdivision B applies to facilities operating in Newport Beach – and these facilities must comply with state law, period. It is unnecessary to show a “pattern or practice” of non-compliance with local, state or federal law.

Subdivision C applies to owners or operators of “unlicensed residential care facilities” in or outside of Newport Beach, and these facilities must not have a “pattern or practice” of violating state law.¹ And although Staff maintains the evidence adduced against Newport Coast at the July 7th hearing is enough to show a “pattern or practice” of violating state law, this subdivision is inapplicable because Newport Coast is a “licensed” recovery facility. Subdivision C applies only to “unlicensed” facilities.

As evidenced in the “Notice of Violation” attached to the Staff Report, Newport Coast’s admission of minors into its facility was a violation of state law.² Staff maintains this

¹ The NBMC does not define the phrase “pattern or practice.” Analogizing to other areas of the law, federal civil rights cases have held it “takes more than one unlawful practice to constitute a ‘pattern or practice’ of discrimination.” See *U.S. v. Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1096 n.5 (9th Cir. 1979). Within the context of civil rights, the Ninth Circuit held the words “pattern or practice” meant any situation where there were not “isolated, peculiar, or accidental events. The words were not intended to be words of art.” See *U.S. v. Ironworkers Local 86*, 43 F.2d 544, 551-53 (9th Cir. 1971). Within the context of criminal law, the phrase “pattern or practice” means “at least two acts.” For instance, the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) defines a “pattern” of racketeering as “at least two” acts of racketeering. See e.g., *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004).

² Undoubtedly due to the recent publicity the “group home” issues have gotten in the community, Staff has received additional phone calls and e-mails from individuals with similar experiences to those who testified at the hearing on July 7, 2009. If the Hearing Officer believes

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alone is sufficient to show that Newport Coast has not operated its facility "in compliance with applicable state and local law" as required by NBMC section 20.91A.050 B.

Housing Element and Consolidated Plans

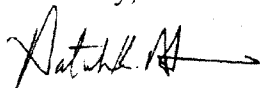
Counsel for Newport Coast has provided the Hearing Officer with a series of documents prepared by the City of Newport Beach and submitted pursuant to federal law to HUD that allegedly contradict the information Staff provided at the July 7th hearing. Counsel for Newport Coast also alleged there were "violation letters" issued by the State of California against the City regarding non-compliance with the State's housing elements requirements.

Counsel for Newport Coast gave these documents a very cursory treatment at the hearing, and according to the attached declaration of Assistant City Manager Sharon Wood, largely mischaracterized them. The lion's share of the documents concerned Community Development Block Grant ("CDBG") monies that must be used for low-income individuals, and have no bearing at all on Ordinance 2008-05.

Likewise, Counsel for Newport Coast suggested the City's Housing Element was out of compliance with state law, with the intimation that Ordinance 2008-05 was the culprit. Not so. First, the State has not issued "violation letters" to the City. In fact, the letter of October 24, 2008 is a "Review of the City of Newport Beach's Draft Housing Element." As the declaration of Assistant City Manager Wood explains, the comments from the State Department of Housing and Community Development were related to the City's required update of its Housing Element in 2008.

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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this information would help inform his decision on these issues, Staff recommends the hearing be re-opened for the limited purpose of presenting this newly acquired information.

1 these services. The City does not provide any outpatient or residential treatment
2 programs to persons in recovery.

3 4. The document Bates stamped NB25698 is the City's Five Year
4 Consolidated Plan for 2000-04 and One-Year Action Plan for 2000-01. The document
5 Bates stamped NB25717 appears to be either a page from the Action Plan or
6 Consolidated Plan. The portion of the document circled by Newport Coast's Counsel
7 simply identifies services persons with drug and alcohol addictions may require. The
8 City contracts with SPIN for the provision of these services. The document Bates
9 stamped NB25718 again appears to be either a page from the Action Plan or the
10 Consolidated Plan. The portion of the document Newport Coast's Counsel circled
11 acknowledges that there is limited funding and relatively few agencies to provide drug
12 and alcohol recovery services to the homeless and low-income individuals.

13 5. The document Bates stamped NB20709 is a page from the City's
14 Consolidated Plan for 2005-09. It identifies HUD's "Special Needs Populations," and
15 next to the category "Persons w/ Alcohol/Other Drug Addictions" is priority need
16 designation "HIGH." I am not sure if that is a designation assigned by HUD, or is a local
17 determination. The same is true for the document Bates stamped NB20725.

18 6. The document Bates stamped NB20773 is a page from the City's Five Year
19 Strategy for Special Needs Populations. The portion of the document circled by Newport
20 Coast's Counsel says it is one of the City's goals to "[i]ncrease supportive services for
21 persons suffering from substance abuse." The City was proposing to support this goal by
22 providing funding to SPIN. The document Bates stamped NB20554 is a page from the
23 City's Action Plan for 2006, and identifies that the City will continue to serve its special
24 needs populations *via* CDBG funding to SPIN.

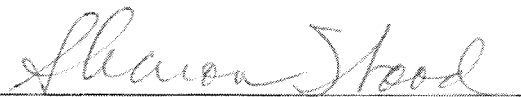
25 7. The document Bates stamped NB25505 is titled "County of Orange
26 Continuum of Care Gap Analysis." "Continuum of care" is a term that HUD uses to
27 address homeless problems. HUD realizes homeless problems are regional and cannot be
28 effectively addressed community by community. There is a City Staff member who

1 participates on the City's behalf in County meetings regarding homeless issues, and the
2 City uses the data collected on a county-wide basis to determine how the City will
3 allocate its CDBG funds.

4 8. The document Bates stamped NB25988 is a page from the City's Action
5 Plan for 2008. The portion of the document circled by Newport Coast's Counsel has to
6 do with the City's program objective of "increasing supportive services for persons
7 suffering from substance abuse" problems. Like many of the CDGB requirements, these
8 objectives are aimed at low- and moderate-income persons. The City achieves these
9 objectives primarily through its funding of SPIN.

10 9. I am aware that Counsel for Newport Coast said the State had notified the
11 City its Housing Element was not in compliance with California law. I assume Newport
12 Coast's Counsel is referring to the letter the City received on October 24, 2008, from
13 Cathy Creswell at the state department of Housing and Community Development
14 ("HCD"). The letter contained HCD's comments on the City's Housing Element, and
15 informed the City it believed revisions were necessary to bring the Housing Element into
16 compliance with state law. City Staff, like many cities in the Southern California
17 Association of Governments region, is responding to HCD's comments, and making the
18 necessary revisions to its Housing Element. I do not believe HCD's comments or the
19 City's revisions of its Housing Element have anything to do with Newport Coast
20 Recovery's Use Permit or application for Reasonable Accommodation. HCD's
21 comments in the subject letter were related to the City's required update of its Housing
22 Element in 2008.

23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct, and that this declaration was executed on July 20, 2009 at
25 Newport Beach, California.

26
27 

28 SHARON WOOD

**NCR's Letter-Brief Regarding Reasonable
Accommodation No. 2009-009**

(July 29, 2009)

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July 29, 2009

SENT VIA ELECTRONIC MEAN

Mr. Tom Allen
Hearing Office
City of Newport Beach
Newport Beach, CA

Re: Reasonable Accommodation Request
Newport Coast Recovery

Dear Mr. Allen:

Please consider this as additional supplemental to the record of the request of Newport Coast Recovery ("NCR") for a reasonable accommodation in the application of the City of Newport Beach's zoning code.

STATE LICENSING AND COMPLIANCE WITH STATE LICENSING

In 2007, the City of Newport Beach commenced a campaign to convince state officials that the Department of Alcohol and Drug Programs ("ADP") should take into consideration whether a city has more than its fair share of substance abuse treatment facilities and whether overconcentration of such facilities should be part of the licensing criteria for application for new and renewed licenses. (See Exhibits A and B) (Health & Safety Code §§ 11834.01-11834.50. The City's position was rejected by the California Attorney General in opinion number *90 Ops. Cal. Atty. Gen. 109*. (See Exhibit C) The Attorney General opined in the negative to the question of whether the Department of Alcohol and Drug Programs can deny an application for licensure or suspend or revoke the license of an alcoholism or drug abuse treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need. Specifically, the Attorney General stated "... each licensure applicant must complete an application form, obtain a fire clearance, and pay a fee to the Department. (See also § 11834.09, subd. (b).) Sections 11834.01 and 11834.03 provide no authority for the Department to deny a license because the community already has an overconcentration of such facilities." The City is pre-empted by Health & Safety Code § 11834.01-11934.50 from denying a use permit or reasonable accommodation request by a facility licensed by ADP on the basis of overconcentration.

In the same opinion, the Attorney General opined that only ADP has the authority to deny, suspend or revoke a license based on the standards set by the State Legislature. The City seeks to sidestep this requirement and use permit process as a vehicle to determine NCR's compliance with

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its licensure requirements. The City seeks to make a record and convince the Hearing Officer that NCR acted in violation of state law in the admission of two minors into its facility. Both the City and the parents of the minors have complained to both the Department of Social Services ("DSS") and ADP about this incident. 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.

A request for a reasonable accommodation is not a licensure compliance hearing or an adjudication on compliance with state licensure standards. The City alleges that NCR has engaged in a "pattern and practice" of violating state and local law. The City cannot deny a request for a reasonable accommodation on the basis of incident that may be a minor violation of its licensure requirements. One incident does not a "pattern and practice" make. *See, United States v. Parma*, 661 F.2d 562, 573 (6th Cir. Ohio 1981)(A pattern and practice suit necessarily involves a number of discriminatory acts.) The City erroneously asserts that an investigation by two state agencies involving the same incident constitutes a pattern and practice of violating state or local law. DSS closed out its investigation without taking any action. ADP allegedly has stated that it will investigate the incident.

Regardless of the outcome of the ADP investigation, this tribunal is without authority to use an alleged licensing violation as the basis for denying NCR's request of a reasonable accommodation. Matters relating to licensure are not proper matters for consideration in a zoning hearing. *See, Oconomowoc Residential Programs v. City of Greenfield*, 23 F. Supp. 2d 941, 958 (E.D. Wis. 1998); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 785 (7th Cir. Wis. 2002)(Complaints about mistreatment of patients which does not result in refusal, revocation or suspension of license by the State agency found not to have a causal connection to matters relating to zoning.) The crux of the dispute raised by the parents of the minors is contractual in nature. It's a business dispute. It may or may not be a violation of NCR's license, and if it is it may be considered a minor infraction. There are appropriate forums and means for addressing such a dispute. Unfortunately for NCR, the Hearing Officer accepts the complaints of the parents at face value and has included the complaints to the findings in denying NCR's request for a reasonable accommodation.¹ NCR has operated as NCR at this location since 2002. It is quite obvious that the City staff has expended a considerable number of man hours to secure the testimony of the two parents, emailing ADP, amending and appending the staff report to put before the Hearing Officer one incident, which occurred in March, 2009. Staff has alluded to other complaints it has received since the hearing which has not been shared with NCR or its attorneys. Notwithstanding the

¹Many of the allegations of one of the parents about her contact with NCR cannot be verified. For instance, one of the parent's claims a demand has been made to both Mr. Newman and the attorneys for NCR. There is no such record of such a demand being made. The City has muddied the waters by bringing the parents into the hearing and giving a statement that is not subject to cross examination to complain about NCR.

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immense expenditure of resources to convince by the City's Staff, it has failed to demonstrate a connection between issues of licensure and zoning.

The City intentionally placed NCR in a position of facing serious allegations in a public forum without the ability or the legal means to respond. It is error and a violation of federal law to find that "NCR refused to respond to the allegations." NCR is prohibited by federal law from disclosing much less discussing its clients and substance abuse treatment history. See 42 U.S.C. 290DD-2; 42 CFR 2.22, et seq.

REASONABLE ACCOMMODATION ANALYSIS

The staff recommendation is that a finding cannot be made as to future residents concerning the necessity of residing in NCR. The staff concluded that there exist other similar facilities in close proximity to NCR that future residents could choose. (Staff report, page 13) This conclusion is contrary to the law on reasonable accommodation. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1225-1226 (11th Cir. 2008) (The availability of another dwelling somewhere within the City's boundaries is irrelevant to whether local officials must accommodate recovering substance abusers in the halfway houses of their choice.) See *Howard v. City of Beavercreek*, 276 F.3d 802, 806-07 (10th Cir. 2002) (analyzing whether the requested accommodation was necessary to afford the plaintiff an "equal opportunity to enjoy the housing . . . of his choice"); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996) (rejecting argument that township reasonably accommodated plaintiff by allowing construction of a nursing home in another area of town).

42 U.S.C. 3604(f)(3)(B) contains three operative elements: "equal opportunity," "necessary," and "reasonable."

With respect to the phrase "equal opportunity," the House Report on the Fair Housing Act offers relevant context:

The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. House Comm. on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179 (footnote omitted) (hereinafter 1988 U.S.C.C.A.N.) (emphasis added).

A cogent analysis of "equal opportunity" can be found in *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 794-795 (6th Cir. 1996). The Court stated:

We find persuasive the analysis of courts that define equal opportunity under the FHAA as giving handicapped individuals the right to choose to live in single-family

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neighborhoods, for that right serves to end the exclusion of handicapped individuals from the American mainstream: The Act prohibits local governments from applying land use regulations in a manner that will exclude people with disabilities entirely from zoning neighborhoods, particularly residential neighborhoods, or that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities. *Bryant Woods Inn, Inc. v. Howard County*, 911 F. Supp. 918, 946 (D. Md. 1996) (citation omitted); see also *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994), *aff'd*, 115 S. Ct. 1776 (1995) ("Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community."). Moreover, the phrase "equal opportunity," at least as used in the FHAA, is concerned with achieving equal results, not just formal equality. See *City of Edmonds*, 18 F.3d at 806 ("The FHAA imposes an affirmative duty to reasonably accommodate handicapped people."); *Proviso Ass'n of Retarded Citizens v. Village of Westchester, Ill.*, 914 F. Supp. 1555, 1563 (N.D. Ill. 1996) (rejecting city's argument that "because Plaintiffs are subject to requirements imposed on all groups of unrelated non-disabled people, they have an 'equal opportunity' to live in the . . . dwelling").

The City Staff ignores the requirement that a future resident's "equal opportunity" is a choice that person gets to make, not a choice the City can make by making one less dwelling unavailable or asserting as long as there are other facilities of a similar nature, then a residents "choice" of housing will be preserved.

The Staff Report states that NCR failed to provide information as to what the optimum number of residents would make it financially viable. (Staff report, page 15). NCR is not required to put forward any information on financial viability unless it is seeking an accommodation in whole or in part on financial viability. The City has not put forward any case law that an applicant is required to demonstrate financial viability if it is not seeking an accommodation based on the same. The burden is on the City to show that the requested accommodation is unreasonable. The City has failed to do so. As was argued above, the City cannot claim that NCR committed "illegal acts" on issues involving licensing and refuse to grant an accommodation that involve land use and zoning.

The City has consistently applied the wrong standard in determining whether the applicant's requests are reasonable. The standard is whether the request seems reasonable on its face. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002). The burden then shifts to the City to demonstrate that the requested accommodation is an undue burden financially or administratively or will fundamentally alter its zoning scheme. The City concedes that it will not be burdened financially or administratively.

The City posits that granting the requested accommodation will cause a fundamental alteration to the City's general plan because it would allow more than one such facility per block and

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would cause overconcentration. All requests for a reasonable accommodation in the land use context require an alteration to a "rule, policy, practice or procedure." An alteration is not a fundamental alteration. Allowing NCR to continue at a location it operated at since 2002 is not a "fundamental alteration" of the City's zoning ordinances. This is supported by the fact that the City has approved use permits for similar facilities in the same vicinity. The City's erroneously believes that granting the requested accommodation would result in an overconcentration of residential care facilities. Overconcentration arguments have been rejected as violating the Fair Housing Act. *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 787 (7th Cir. 2002)(City's overconcentration argument resulting in disproportionate costs to emergency services for those facilities rejected); *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 50 (2d Cir.2002)(Argument that granting variance would cause an overconcentration of residential and social services facilities in the City found to be pretext for discrimination). *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1577 (E.D. Mo. 1994), *rev'd in part*, 77 F.3d 249 (8th Cir. 1996)(City's fear that it was being unduly singled out for an over-concentration of social service institutions has some basis in fact. These concerns, however, do not justify discrimination against the handicapped. Simply put, the complaint of "no more in my back yard" is just as unacceptable an excuse for discrimination against the handicapped as the discriminatory cry of "not in my back yard."), See also, *See Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 698 ("the FHAA rejects any notion that a Township can somehow avoid the anti-discrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities"), *aff'd* 995 F.2d 217 (3rd Cir. 1993).

Adopting the discriminatory animus of the community opposition to the granting of the request for a reasonable accommodation and to support the overconcentration argument in a violation of the Fair Housing Act. Adopting assertions put forward to those who oppose NCR on the basis that the presence of the recovering alcoholics and substance abusers diminishes the quality of life becomes actionable discrimination becomes discriminatory when it is adopted by a city official in decisions to deny land use permits or requests for reasonable accommodations.

The record is quite clear that the Hearing Officer is more than willing to accept without question each statement made by each member of the community concerning complaints about the conduct of what is thought to be residents of NCR. It should be noted that these same citizens appeared before the same Hearing Officer and presented the same complaints about the applications made by Ocean Recovery and Balboa Horizons. It is ironic that the complaints were not credited in those applications but were credited against NCR.

The law is quite clear that "even where individual members of government are found not to be biased themselves," a group home provider may demonstrate a violation of the FHAA if it can show that "discriminatory governmental actions are taken in response to significant community bias." *Tsombanidis v. City of West Haven*, 129 F. Supp. 2d 136, 152 (D. Conn. 2001), *rev'd on other grounds*, 352 F.3d 565 (2d Cir. 2003). Accordingly, "a decision made in the context of strong,

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discriminatory opposition becomes tainted with discriminatory intent even if the decision-makers personally have no strong views on the matter." *Innovative Health Sys, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997); see also *Samaritan Inns v. District of Columbia*, 1995 U.S. Dist. LEXIS 9294, rev'd on other grounds, 114 F.3d 1227 (D.C. Cir 1997) (finding a violation of the FHAA when government officials were influenced by political pressure exerted by the area residents); *McKinney Found. v. Town Plan & Zoning Comm'n*, 790 F. Supp. 1197, 1212 (D. Conn. 1992) (same); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 134 (N.D. N.Y. 1992) (finding that zoning officials violated the FHAA when they bowed to political pressure exerted by those hostile to persons with alcohol and drug-related disabilities); *United States v. Audubon*, 797 F. Supp. 353, 361 (D.N.J. 1991) (Discriminatory intent found where Audubon officials stated they agreed with or were responding directly to community opposition). See also *Cnty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 226 (D.D.C. 2003).

Unfortunately for all concerned, the unsupported discriminatory animus of the those opposed to NCR's applications have infected the proceedings and now forms the crux of the denial by the Hearing Officer.

HOUSING ELEMENTS AND CONSOLIDATED PLANS

The City misstates the actions of the Department of Housing and Community Development ("HCD") in its review of the City's Housing Element Plan. In a letter dated October 24, 2008 to David Lepo, Planning Director, City of Newport Beach, the Deputy Director of HCD which advised the City that revisions were required in the City's Housing Element Plan to bring it into compliance with State law. In particular HCD found that the City's group home ordinance constituted a "constraint on persons with disabilities." HCD is requiring the City to provide a detailed description of the City's group home ordinance and analyze it for requirements that may constrain housing for persons with disabilities. (See Attached Exhibit D, at HCD 6). The other deficiency HCD found that is relevant to this applicant is that when the City amended its zoning code to address the issue of group homes, it failed to identify zones where transitional housing will be permitted and conditionally permitted. State Law, specifically SB 2, requires the City to demonstrate that transitional and supportive housing are treated as residential uses subject only to those restrictions that apply to other residential uses of the same type in the same zone. (Exhibit D, at HCD 5).

Please contact me or my co-counsel, Christopher Brancart, if you need to discuss these issues further, or in need of additional information.

Tom Allen
Hearing Officer
July 29, 2009

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Sincerely yours,



Steven G. Polin

cc: Patrick Bobko
Catherine Wolcott
Christopher Brancart
Newport Coast Recovery
Dana Mulhauser
Paul E. Smith



1 of 1 DOCUMENT

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

No. 07-601

2007 Cal. AG LEXIS 17; 90 Ops. Cal. Atty. Gen. 109

December 18, 2007

QUESTION:

[*1]

THE HONORABLE TOM HARMAN, MEMBER OF THE STATE SENATE, has requested an opinion on the following questions:

1. May the Department of Alcohol and Drug Programs deny an application for licensure or suspend or revoke the license of an alcoholism or drug abuse treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need?

2. May a city limit the establishment of alcoholism or drug abuse treatment facilities serving six or fewer persons because the particular community already has more than a sufficient number of treatment facilities to meet the local need?

CONCLUSIONS

1. The Department of Alcohol and Drug Programs may not deny an application for licensure or suspend or revoke the license of an alcoholism or drug abuse treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

2. A city may not limit the establishment of alcoholism or drug abuse treatment facilities serving six or fewer persons because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

OPINIONBY:

EDMUND G. BROWN [*2] JR., Attorney General; GREGORY L. GONOT, Deputy Attorney General

OPINION:

ANALYSIS

The Department of Alcohol and Drug Programs (*Health & Saf. Code, § 11750*; "Department") n1 licenses residential facilities that provide nonmedical recovery, treatment, and detoxification services for users of alcohol and other drugs. (§§ 11834.01-11834.50; *Cal. Code Regs., tit. 9, §§ 10500-10631*; 76 Ops. Cal. Atty. Gen. 173, 175 (1993).) Such a treatment facility is defined as "any premises, place, or building that provides 24-hour residential nonmedical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug misuse or abuse, and who need alcohol, drug, or alcohol and drug recovery treatment or detoxification services." (§ 11834.02, subd. (a); see *Cal. Code Regs., tit. 9, § 10501*.)

n1 All further references to the Health and Safety Code are by section number only.

[*3]

These treatment facilities are different from residential care facilities that are subject to the California Community Care Facilities Act (§§ 1500-1567.8) and from facilities that simply provide a cooperative living arrangement for

persons recovering from alcohol and other drug problems. The latter "sober living environments" are not subject to licensing by the Department.

We are asked to determine whether the Department has the authority to deny an application for operating a treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need. Additionally, may a city limit the number of treatment facilities within its jurisdiction to prevent an overconcentration of such facilities?

I. Department's Authority to Deny Licenses

With respect to the scope of the Department's authority to limit the licensing of treatment facilities, we will assume that the extent of the local need is ascertainable through an appropriate fact-finding process, and the determination will be based upon the incidence of alcoholism and drug abuse and the percentage of substance abusers seeking treatment in the community. What authority [*4] does the Department have to prevent an overconcentration of treatment facilities in a particular locality?

Section 11834.01 states in part:

The department has the sole authority in state government to license adult alcoholism or drug abuse recovery or treatment facilities.

(a) In administering this chapter, the department shall issue new licenses for a period of two years to those programs that meet the criteria for licensure set forth in Section 11834.03.

Section 11834.03, in turn, provides:

Any person or entity applying for licensure shall file with the department, on forms provided by the department, all of the following:

- (a) A completed written application for licensure.
- (b) A fire clearance approved by the State Fire Marshal or local fire enforcement officer.
- (c) A licensure fee, established in accordance with Chapter 7.3 (commencing with Section 11833.01).

Accordingly, each licensure applicant must complete an application form, obtain a fire clearance, and pay a fee to the Department. (See also § 11834.09, subd. (b).) Sections 11834.01 and 11834.03 provide no authority for the Department to deny a license because the community already has an overconcentration of [*5] such facilities.

The Department is also authorized to determine "that the prospective licensee can comply with this chapter and regulations adopted pursuant to this chapter" before issuing a license. (§ 11834.09, subd. (a).) Subdivision (c) of section 11834.09 states:

Failure of the prospective licensee to demonstrate the ability to comply with this chapter or the regulations adopted pursuant to this chapter shall result in departmental denial of the prospective licensee's application for licensure.

Thus, a prospective licensee may be denied a license if he or she fails to demonstrate "the ability to comply" with sections 11834.01-11834.50 and the Department's regulations. However, neither the statutory scheme nor the implementing regulations make any reference to a community's current level of need for treatment facilities or to the sufficiency of existing facilities to meet the local need. No basis for the denial of an application is given in section 11834.09 other than the inability of the applicant to comply with the requirements for *operating* a facility.

Next, we examine the Department's authority to suspend, revoke, or deny a license contained in subdivision (a) of [*6] section 11834.36, which states:

The director may suspend or revoke any license issued under this chapter, or deny an application for licensure, for extension of the licensing period, or to modify the terms and conditions of a license, upon any of the following grounds and in the manner provided in this chapter:

- (1) Violation by the licensee of any provision of this chapter or regulations adopted pursuant to this chapter.
- (2) Repeated violation by the licensee of any of the provisions of this chapter or regulations adopted pursuant to this chapter.
- (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.

All of the grounds specified in section 11834.36 [*7] involve the *conduct* of the license holder or applicant. None focuses upon whether the community already has a sufficient number of facilities to meet the local need.

We recognize that a community's need for treatment facilities is mentioned in section 11834.20: "The Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." However, this reference is only an expression of legislative intent that cities should *encourage* development of treatment facilities, and cannot be reasonably read to impose a limit on such development. The affirmative policy articulated by the Legislature in section 11834.20 does not afford a basis for *denying* a license where the applicant meets all basic qualifications for the license.

As stated in *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104: "It is settled principle that administrative agencies have only such powers as have been conferred upon them, expressly or by implication, by constitution or statute. [*8] [Citations.] An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers." (See 76 Ops.Cal.Atty.Gen. 11, 15-16 (1993).) And, of course, we are not at liberty to add, in the guise of statutory interpretation, an additional licensing requirement. (See 89 Ops.Cal.Atty.Gen. 159, 165; 83 Ops.Cal.Atty.Gen. 111, 116 (2000); 82 Ops.Cal.Atty.Gen. 246, 248 (1999); 78 Ops.Cal.Atty.Gen. 137, 142 (1995).) Here, the Legislature has not given the Department any authority to consider the number of treatment facilities in a particular area when granting, suspending, or revoking a license to operate a treatment facility.

Finally, we note that the California Community Care Facilities Act, referenced above, requires the Department of Social Services to take "overconcentration" of residential care facilities into account when making its licensing decisions for such facilities. (§ 1520.5.) If the Legislature wishes to grant a similar authorization when the Department licenses the treatment facilities [*9] in question; it knows how to do so. (See *Safer v. Superior Court* (1975) 15 Cal.3d 230, 237-238; *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 927; 73 Ops.Cal.Atty.Gen. 13, 23 (1990).)

We conclude in answer to the first question that the Department may not deny an application for licensure or suspend or revoke the license of a treatment facility because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

2. City's Authority to Limit Treatment Facilities

The second question concerns whether a city may limit the number of treatment facilities serving six or fewer persons within its boundaries. For example, may a city enact an ordinance requiring that in addition to licensure by the Department, the prospective operator of a treatment facility must obtain the city's approval if the facility will be located within 500 feet of an existing treatment facility? We conclude that it may not.

The Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations [*10] not in conflict with general laws." (Cal. Const., art. XI, § 7.) The rules to be applied in determining whether a city's ordinances would conflict with general laws were recently summarized in *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 548:

The California Constitution reserves to a county or city the right to "make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." [Citation; footnote omitted.] "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." [Citations.] A prohibited conflict exists if the local ordinance duplicates or contradicts general law or "enters an area either expressly or impliedly fully occupied by general law." [Citations.]

"[I]t is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute.' [Citation.] '[L]ocal legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area [citation], [*11] or when it has impliedly done so in light of one of the following indicia of intent: "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the" locality [citations].' [Citation.]" [Citation.]

With these principles in mind, we return to the provisions of sections 11834.01-11834.50. Two statutes are relevant to our inquiry. First, section 11834.22 provides that treatment facilities serving six or fewer persons may not be made subject to any business taxes, local registration fees, use permit fees, or other fees to which ordinary single-family dwellings are not subject. Second, and even more in point, section 11834.23 states with respect to local zoning ordinances governing [*12] such facilities:

Whether or not unrelated persons are living together, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall be considered a residential use of property for the purposes of this article. In addition, the residents and operators of such a facility shall be considered a family for the purposes of any law or zoning ordinance which relates to the residential use of property pursuant to this article.

For the purpose of all local ordinances, an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons shall not be included within the definition of a boarding house, rooming house, institution or home for the care of minors, the aged, or the mentally infirm, foster care home, guest home, rest home, sanitarium, mental hygiene home, or other similar term which implies that the alcoholism or drug abuse recovery or treatment home is a business run for profit or differs in any other way from a single-family residence.

This section shall not be construed to forbid any city, county, or other local public entity from placing restrictions on building heights, setback, lot dimensions, or placement of signs [*13] of an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons as long as the restrictions are identical to those applied to other single-family residences.

This section shall not be construed to forbid the application to an alcoholism or drug abuse recovery or treatment facility of any local ordinance which deals with health and safety, building standards, environmental impact standards, or any other matter within the jurisdiction of a local public entity. However, the ordinance shall not distinguish alcoholism or drug abuse recovery or treatment facilities which serve six or fewer persons from other single-family dwellings or distinguish residents of alcoholism or drug abuse recovery or treatment facilities from persons who reside in other single-family dwellings.

No conditional use permit, zoning variance, or other zoning clearance shall be required of an alcoholism or drug abuse recovery or treatment facility which serves six or fewer persons that is not required of a single-family residence in the same zone.

Accordingly, a city may not make its land use decisions in a manner that will disadvantage treatment facilities serving six or fewer [*14] persons when compared to decisions applicable to ordinary single-family residences.

The hypothetical ordinance described above would allow the city to ban the operation of a new treatment facility within 500 feet of an existing facility. Such an ordinance would be in conflict with section 11834.23, and thus be

preempted by state law. (See, e.g., *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 [local law may not impose additional licensing requirements when state law specifically prohibits such requirements].)

Would our analysis and conclusion be different in the case of a charter city? A charter city, in contrast to a general law city, is not subject to state statutes involving "municipal affairs." (Cal. Const., art. XI, § 5, subd. (a); *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, fn.1; *California Veterinary Medical Assn. v. City of West Hollywood*, *supra*, 152 Cal.App.4th at p. 548, fn. 6.) "[T]his constitutional 'home rule' doctrine reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided [*15] the subject of the regulation is a 'municipal affair' rather than one of 'statewide concern.' [Citation.]" (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 45.)

Here, section 11834.23 has been made applicable to all cities, both general law and charter (§ 11834.20), and forbids the use of zoning or other regulatory powers to treat small treatment facilities differently from other residential dwellings (§§ 11834.22-11834.24). Section 11834.23 addresses a matter of "statewide concern" because it seeks to ensure that persons throughout the state who are recovering from problems related to alcohol or other drugs will have access to residential settings that provide treatment.

"[I]n articulating the test for preemption, the Supreme Court was concerned with ensuring that a state law does not infringe legitimate municipal interests *other than that which the state law purports to regulate as a statewide interest.*" (*City of Watsonville v. State Department of Health Services* (2005) 133 Cal.App.4th 875, 889 [state law requiring fluoridation of local water supplies narrowly tailored to state's interest in [*16] improving dental health], italics added.) Here, the state law in question has the precise aim of regulating local zoning requirements in pursuance of a statewide interest. The Legislature clearly intended to prevent local governments from applying any zoning clearances to small treatment facilities by mandating that they be treated the same as other single family residences for zoning purposes. The Legislature may properly look to the statewide need, rather than the local need, to overcome a charter city's municipal interests.

We conclude in answer to the second question that a city may not limit the establishment of alcoholism or drug abuse treatment facilities serving six or fewer persons because the particular community already has more than a sufficient number of treatment facilities to meet the local need.

Legal Topics:

For related research and practice materials, see the following legal topics:
 GovernmentsLegislationEffect & OperationGeneral OverviewGovernmentsLocal
 GovernmentsChartersGovernmentsLocal GovernmentsLicenses



CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY
Robin Clauson, City Attorney

August 3, 2007

Mr. Gregory Gonot
Deputy Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA, 94244-2550

VIA EMAIL Gregory.Gonot@doj.ca.gov
AND U.S. REGULAR MAIL

Dear Mr. Gonot:

The Newport Beach City Attorney's Office appreciates the opportunity to provide information relevant to Opinion No. 07-601. Our city has had extensive experience attempting to reasonably regulate alcoholism and drug abuse recovery and treatment facilities within the city while providing fair housing opportunities for persons in recovery. The Attorney General's Office's opinion on these questions will be helpful to many cities that are seeking resolution of divergent interpretations of existing state law.

Background

On March 8, 2007, our office sent notice that our city has more than met its local need for licensed alcohol and drug recovery and treatment facilities to the Licensing Division of the California Department of Alcohol and Drug Programs (hereinafter "ADP"), and requested that ADP curtail issuing more licenses in Newport Beach so long as local need remained met. (*Attachment A*) Our March, 2007 analysis of the numbers of licensed alcoholism and drug abuse recovery and treatment facilities produced the following statistics:

- In March 2007, with 2.63 licensed recovery beds per thousand residents, Newport Beach had the highest per capita ratio of recovery beds in Orange County. Newport Beach is home to only 2.7 - 2.8% of the total population of Orange County, but is host to approximately 14.6% of all licensed residential beds in the County. By contrast, in March, 2007, 18 of the 33 other cities in Orange County had no ADP-licensed residential beds at all, and six Orange County cities had only one or two licensed residential recovery facilities. Despite the inequitable distribution of licensed facilities, the number of licenses granted by ADP in Newport Beach more than doubled (from 10 to 22) in a two-month period in 2006, and more licenses are currently pending.
- In Newport Beach, all but one of the ADP-licensed facilities are located on or immediately adjacent to a narrow, 2.5 mile stretch of the city within West Newport and the Newport Peninsula. Over half of the licensed recovery facilities are concentrated within a mile of each other. One of our largest facility operators advertises that it has 30 homes (licensed and unlicensed) in a linear 1.3 mile area of West Newport.
- Publicly available information on several of the facilities' marketing practices, as well as reports by Newport Beach recovery facility residents,¹ indicate that a high percentage of the residents in these 22 facilities are not Newport Beach residents, and many are residents of other states

¹ Submitted either as complaints or during a series of City hearings in 2004.

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brought to California specifically to enter the Newport Beach recovery facilities. Furthermore, the operational characteristics of these commercial businesses is to offer transitory recovery programs from as little as 28 days in a residential setting.

This led the City to believe that Newport Beach had existing numbers of alcohol and drug recovery facilities that were commensurate with local need. "Webster's Third International Dictionary defines "commensurate" as "equal in measure or extent; corresponding in size, extent, amount or degree, proportionate." (Webster's Third International Dictionary, G&C Merriam Co, 1976) A subsequent analysis of Newport Beach's presumed local need indicated that Newport Beach currently has a significant excess of licensed residential recovery beds relative to the incidence of alcoholism and drug abuse in the general population, and the percentage of substance abusers seeking treatment. (**Attachment B**) The 2003-2004 National Survey on Drug Use and Health (NSDUH), sponsored by the Substance Abuse and Mental Health Services Administration (SAMHSA), a division of the Department of Health and Human Services, provides estimates of national and state substance abuse levels. The 2003-2004 NSDUH estimated that 10.10% of the population of California was dependent upon or abused alcohol or illicit drugs. The 2002 NSDUH indicated that, of all people abusing alcohol or illicit drugs, more than 94% do not believe they need treatment, leaving approximately 6% likely to be actively seeking treatment.

Applying these numbers to our city's population of 83,000, that would give Newport Beach approximately 8,300 residents dependent on alcohol or illicit drugs, with 498 of them actually likely to seek treatment. Attachment B details how this results in a significant surplus of beds in Newport Beach. (We believe these numbers are conservative, since we have not included in our analysis the fact that Newport Beach is home to only 63,800 adults.) With 219 licensed recovery beds for adults that offer recovery stays of varying lengths (28 days to five months are the length of stays reported by recovery facility operators in our city) and an additional estimated 25 dwelling units being used as sober living facilities, local recovery needs can easily be met on an annual basis with fewer than the currently existing licensed facilities.

It was these facts which made us determine that the local need for alcoholism and drug abuse recovery and treatment services has been met in Newport Beach, and that continued unfettered licensing would have an adverse impact on the welfare of our community. We asked ADP to deny further licenses in Newport Beach so long as this city bears more than its regional fair share and local need is met. Based, in part, on Section 11834.20 of the Health and Safety Code, which states that it is the policy of the state "that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." (Health & Safety Code § 11834.20) ADP licensing representatives agreed that some aspects of the situation created in Newport Beach were probably not what the Legislature intended. However, ADP appears to believe it lacks the statutory authority to deny licenses except under certain narrow circumstances. We believe the Legislature intended and the statute permits otherwise.

Questions Presented:

- 1) **Question One – May the Director of the State Department of Alcohol and Drug Programs suspend or revoke a license or deny an application for licensure of an alcoholism or drug abuse treatment facility where the current number of such facilities in the city is in excess of local need?**

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Yes. In our opinion, the Health and Safety Code provides authority for ADP to deny licenses when operation of a recovery and treatment facility creates a situation adverse to the best interests of the facility's residents or the public. Health and Safety Code section 11834.36 (Grounds for suspension, revocation, or denial; temporary suspension) sets forth criteria under which ADP may deny, revoke or suspend a license. These criteria include "[c]onduct 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." (Health & Safety Code § 11834.36(a)(4))

Pursuant to the rules of statutory construction. When interpreting or applying statutes, the interpretation or application should be consistent with the purpose of the statute and the statutory scheme as a whole. *Andersen v. Workers' Comp. Appeals Bd.*, 57 Cal.Rptr.3d 839 (2007) In attempting to determine legislative intent, when possible, effect should be given to the statute as a whole, and to every word and clause, leaving no part of the provision useless or deprived of meaning. *In re Estate of Rossi*, 42 Cal.Rptr.3d 244 (2006). Instead of following these rules of interpretation, the ADP has chosen to interpret this provision of the Health and Safety Code narrowly and not considered "local need" as provided for in Section 11834.20 when making determinations under Section 11834.36. The City contends that the Legislature would not have included a local needs analysis in Section 11834.20 if it did not want the ADP to consider this matter in making its determinations under 11834.36.

In addition, the Legislature would not have included "the people of the State of California" in the class of persons whose welfare is to be protected if it had intended a narrow interpretation of Section 11834.36.

Because a complex web of state and federal laws severely restricts cities authority to address land use impacts from excessive proliferation or clustering of licensed recovery facilities in residential neighborhoods, the Legislature gave ADP the authority to consider whether a city's local need has been met in making its determination whether or not to grant a license. Specifically, as ADP is the sole licensing authority (see Question 2, below), ADP has been legislatively directed to protect the general welfare of the people of the State of California and those persons receiving recovery treatment.

A. An excessive number of closely clustered recovery and treatment facilities create an environment that is inimical to the welfare of the people of the State of California and be considered by ADP under Section 11834.36.

The conduct of operating commercial recovery services whose operators' business models include economies of scale, national marketing and clustered facilities operating more as a boarding house than a single family home in residential neighborhoods can be detrimental to the welfare of recovery facility clients and the neighborhoods in which the facilities locate. Hence, in considering applications for licenses, it is appropriate for ADP to consider whether local need has been met and whether the issuance of additional licenses is appropriate under Section 11834.36.

For example, the welfare of the people of the State of California can be negatively impacted when a family's residence becomes, or is faced with being, surrounded on two or three sides by recovery facilities, or when 50% of a city census block's population is housed in licensed and unlicensed recovery facilities, as has occurred on 39th Street in Newport Beach. (Source: ADP website, Code Enforcement inspections, self-reporting, and 2000

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Census statistics) In 2000, this census block had a population of 79. In July 2006, four ADP licenses were granted on this block, with a total licensed capacity for all licenses of 24 residents. Conservatively assuming these four units housed only three persons in 2000 and are now known to house six residents in each, and that two sober living facilities also had a lower population in 2000 than their current population of approximately 28 combined, we estimate the 2007 population of this census block at 103. Fifty percent of that overall population is housed in a combination of licensed and unlicensed facilities; approximately 23% of the overall population is housed in the licensed facilities alone. Whether the City has met its "local need" and determining whether additional facilities should be licensed in this immediate area should be considered by ADP because additional facilities will contribute further to the change of the use character of this neighborhood from residential to semi-institutional boarding houses.

Furthermore, as stated above, California cities have no regulatory protection from licensed facilities that offer sober living as part of their residential treatment process. ADP representatives have told our office that most of the licensed facilities located Newport Beach also have sober living homes, whose resident numbers are not included in the licensing information and are acting as integral facilities. This pattern of operation further contributes to the process of institutionalizing a residential neighborhood, and multiplies the secondary effects because the licensed facilities and non-licensed facilities interact with and are dependent upon each other.

In a similar setting, the Legislature has acknowledged the disadvantageous secondary effects of having group residential facilities in communities that exceed the local need of the community. Specifically, it was the pattern of clustering and proliferation that caused the Legislature to declare a state policy against overconcentration of community care facilities. In fact, Health and Safety Code section 1520.5 provides that "The Legislature hereby declares it to be the policy of the state to prevent overconcentration of residential care facilities that impair the integrity of residential neighborhoods." (Health & Safety Code § 1520.5)

B. An excessive number of closely clustered recovery and treatment facilities create an environment that is inimical to the welfare of facility residents.

The loss of the residential characteristics of a neighborhood in which recovery facilities cluster also has an adverse effect on the welfare of the individuals receiving services from the facility and defeats the purpose of community-based recovery. The current ADP counsel interpretation of the Health and Safety Code, however, makes no provisions for this.

In *Corporation of the Episcopal Church v. West Valley City*, (D. Utah 2000) 119 F.Supp.2d 1215, the court said, "Those recovering from addiction have been shown to benefit from living with others in similar situations, and their presence in residential neighborhoods allows the recovering individuals to re-integrate into the community at large." 119 F.Supp.2d at 1222, citing *Oxford House v. Town of Babylon*, (E.D.N.Y. 1993) 819 F.Supp. 1179. Similarly, the court in *Oxford House, Inc. v. Township of Cherry Hill*, (D.N.J. 1992) 799 F.Supp. 450, noted, "Plaintiffs have presented evidence demonstrating that the ability of recovering alcoholics and drug addicts to live in a quiet residential area is critical to their recovery." 799 F.Supp. at 463.

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Even the American Planning Association's Policy Guide on Community Residences (*Attachment C*), which supports community residences, states:

"Community residences should be scattered throughout residential districts rather than concentrated in any single neighborhood or block.

For a group home to enable its residents to achieve normalization and integration into the community, it should be located in a normal residential neighborhood. If several group homes were to locate next to one another, or be placed on the same block, the ability of the group homes to advance their residents' normalization would be compromised. Such clustering would create a *de facto* social service district in which many facets of an institutional atmosphere would be recreated and would change the character of the neighborhood.

Normalization and community integration require that persons with disabilities be absorbed into the neighborhood's social structure. The existing social structure of a neighborhood can accommodate no more than one or two group homes on a single block. Neighborhoods seem to have a limited absorption capacity for service dependent people that should not be exceeded. Social scientists note that this level exists, but they can't quite determine a precise level. Writing about service dependent populations in general, Jennifer Wolch notes, At some level of concentration, a community may become saturated by services and populations and evolve into a service dependent ghetto.

According to one leading planning study, while it is difficult to precisely identify or explain, saturation is the point at which a community's existing social structure is unable to properly support additional residential care facilities [group homes]. Overconcentration is not a constant but varies according to a community's population density, socioeconomic level, quantity and quality of municipal services and other characteristics. There are no universally accepted criteria for determining how many group homes are appropriate for a given area.

Nobody knows the precise absorption levels of different neighborhoods. However, the research strongly suggests that as the density of a neighborhood increases, so does its capacity to absorb people with disabilities into its social structure. Higher density neighborhoods presumably have a higher absorption level that could permit group homes to locate closer to one another than in lower density neighborhoods that have a lower absorption level.

This research demonstrates there is a legitimate government interest to assure that group homes do not cluster. While the research on the impact of group homes makes it abundantly clear that group homes a block or more apart produce no negative impacts, there is concern that group homes located more closely together can generate adverse impacts on both the surrounding neighborhood and on the ability of the group homes to facilitate the normalization of their residents, which is, after all, their *raison d'être*." ²

² The City is in the process of obtaining the supporting studies cited in the footnotes of this section of the APA Policy Guide, and will be happy to forward them when available.

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Policy Guide on Community Residences, American Planning Association, September, 1997, Section 5 (footnotes omitted) (emphasis in original)

The policy stated by the American Planning Association is echoed by the Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act (**Attachment D**). On page 5 of the Joint Statement, the agencies give their opinion on when, if ever, a local government can limit the number of group homes that can locate in a certain area. While taking the position that strict separation requirements and density restrictions are generally inconsistent with the Fair Housing Act, the Departments of Justice and Housing and Urban Development stated their belief that "if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned with the setting for a group home." Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act. August 18, 1999.

As stated above, the current ADP interpretation of Health and Safety Code section 11834.36(a)(4) does not allow for any consideration of the welfare of potential recovery facility residents in this context in its decision to grant or deny a license, which is inconsistent with the express language of the Health and Safety Code and the foregoing authorities.

C. Statutory construction of Health and Safety Code Section 11834.20's "commensurate with local need" language indicates local need should be considered by ADP.

Our City has conducted a detailed review of the legislative history surrounding the adoption of Health and Safety Code Section 11834.20. There is no specific explanation for the inclusion of the words "commensurate with local need" in the legislative history. Therefore, the rules of statutory construction must be applied.

In attempting to ascertain the legislative intention, effect should be given, whenever possible, to the statute as a whole, and to every word and clause within, leaving no part of the provision useless or deprived of meaning. *In re Estate of Rossi*, 42 Cal.Rptr.3d 244 (2006). Legislative intent will be determined as far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. *California Department of Corrections v. California State Personnel Bd.*, 54 Cal.Rptr.3d 665 (2007)

The language "commensurate with local need" is not ambiguous. Nevertheless, in his May 24, 2007 letter to our office, ADP's legal counsel interpreted the language of Health and Safety Code section 11834.20 to be only a "precatory introduction to the more specific provisions that follow." If this interpretation is followed, it deprives an entire section of meaning and renders it useless as anything other than a verbal flourish.

Our city interprets section 11834.20 otherwise. The provisions of the Americans with Disabilities Act, the federal Fair Housing Act, the California Fair Employment and Housing Act, and the cases interpreting those statutes, combine to make city encouragement of the

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development of alcoholism and drug abuse recovery or treatment facilities unnecessary. We interpret Section 11834.20 to charge California cities, counties and ADP with ensuring that local recovery services are available for local needs. Our city's challenge has not been having enough residential recovery facilities to meet local needs; rather, it has been finding a legally defensible way of maintaining the character of the residential neighborhoods surrounding a proliferation of clustered facilities resulting from the unfettered granting of ADP licenses. Licensed and unlicensed facilities have located freely within our City because of existing state and federal fair housing laws; in one two-month period in 2006 the number of state-licensed alcoholism and drug abuse recovery or treatment facilities in Newport Beach more than doubled (from 10 to 22.)

The logical interpretation of the legislative intent behind Health and Safety Code section 11834.20 is that this section sets the standard that the State should encourage and cities are expected to help achieve - enough recovery facilities to meet the needs of each city's own residents. It is logical that the California State Legislature would wish every city and county in California to have enough local recovery facilities to serve its citizens. It is not logical that the State Legislature would encourage California cities to develop into recovery destinations for a national market, as Newport Beach and several other cities in coastal areas of Los Angeles and Orange County (Malibu, Laguna Beach, Costa Mesa) have become. National need for recovery services far exceeds the capacity of what these cities can absorb, and can overwhelm residential neighborhoods and change them forever. This result would not be consistent with the Legislature's stated concern for the welfare of the people of California. (Health & Safety Code §§ 11834.14, 11834.35(a)(4))

2) **Question Two - May a city prevent the licensure of an alcoholism or drug abuse treatment facility in the city where the current number of such facilities in the city is in excess of local needs?**

No, a city itself does not have the authority to prevent licensure. The Legislature has indicated its intent to occupy the field of licensing alcoholism and drug abuse recovery or treatment facilities, and has delegated licensing authority to ADP. Health and Safety Code section 11834.01 states, "The department has the sole authority in state government to license adult alcoholism or drug abuse recovery or treatment facilities." No provisions for licensing authority, or the corresponding authority to deny a license, is provided below the state level in the Health and Safety Code. The wording of Health and Safety Code section 11834.01 does not appear to leave cities any independent ability to prevent licensure, even when they can demonstrate that their local need has already been met.

However, ADP is authorized to consider information from cities relative to the welfare of facility clients and the general public as a factor in granting or denying a license, with a certain amount of deference. Health and Safety Code section 11834.14 says that the goal of licensure regulations is protecting the public while promoting the public welfare. This goal is broadly worded to encompass the welfare of the neighborhoods and community surrounding the licensed facilities as well as the welfare of potential residents of the facility seeking licensure.

Individual cities and counties are often in the best position to give the state-appointed licensing department information about the state of their community, and the actual impact of recovery facilities within that community. There is nothing in the Health and Safety Code that precludes ADP from considering information from cities about the impact granting an additional license will have on the health and welfare of the community or facility residents. This is particularly true

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when a city can demonstrate that it has fulfilled the statutory goals of Health and Safety Code section 11834.20, and its local need for recovery facilities has already been met.

Conclusion

Protection of the welfare of alcoholism and drug abuse recovery and treatment facility clients and the general public must be considered by *some* entity before a license is granted or renewed, and ADP is currently the only government entity with that authority. We hope that your opinion will help clarify these questions for us, for ADP, and for California cities in situations similar to ours.

Sincerely,



Robin Clauson,
City Attorney

- Enc. Attachment A – City's Notice dated March 8, 2007
- Attachment B – City's Alcohol and Drug Treatment Analysis
- Attachment C - American Planning Association's Policy Guide
- Attachment D - Joint Statement of the DOJ & the DHUD on Group Homes, Local Land Use, and the Fair Housing Act

ATTACHMENT - A

This fax was received by FAX-CNB on Line 2 from 6443139

NCR UP/RA 01029

1029



CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

Robin Clauson, City Attorney

March 8, 2007

Ms. Joan Robbins
Manager, Licensing and Certification
California Department of Alcohol and Drug Programs
1700 K Street
Sacramento, CA, 95814

VIA EMAIL AND
REGULAR U.S. MAIL

Dear Joan:

On behalf of the City, the residents of Newport Beach, and the residents of the licensed alcohol and drug abuse recovery and treatment facilities currently operating within the City, I request that ADP deny the license applications pending in Newport Beach. I also request that ADP deny future new license applications in Newport Beach for the following reasons:

1. Local need for recovery services in Newport Beach has been met, and probably exceeded. Newport Beach's fair share of regional need has been substantially exceeded.

ADP's charge for licensing alcohol and drug recovery and treatment facilities is based on the policy stated by the California State Legislature in Health and Safety Code § 11834.20:

"The Legislature hereby declares that it is the policy of this state that each county and city shall permit and encourage the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." Cal. Health & Safety Code § 11834.20 (emphasis added)

Currently available evidence indicates that the local need for alcohol and drug abuse recovery and treatment facilities in Newport Beach has been met, and possibly exceeded.

- Newport Beach already has 2.63 licensed recovery beds per thousand residents, the highest ratio of any city in Orange County.
- Newport Beach is home to only 2.7 – 2.8% of the total population of Orange County, but is host to approximately 14.6% of all licensed residential beds in the County.
- Based on the January 8, 2007 list of licensed facilities posted on the ADP's website, Newport Beach has at least 22 licensed residential alcohol and drug treatment and recovery facilities. Those facilities provide a total of 219 licensed residential beds, and are licensed for a total occupancy of 244 individuals.

We are in the process of researching other indicators of the City's local need for recovery services, and are seeking statistics on the number of persons per thousand in the population who actively seek or are placed in recovery during a given time period. Based on the disproportionately generous supply of licensed and unlicensed recovery beds available in Newport Beach, however, it is apparent that our residents already have ample opportunities for housing and treatment in their local area

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Joan Robbins
March 8, 2007
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during recovery. We believe that the City of Newport Beach has not only met its local need, but has also exceeded any fair share of regional need the City should bear. Of the 34 cities in Orange County, 18 have no ADP-licensed residential beds at all, and six cities have only one or two licensed residential recovery facilities.

In addition, there are a high number of unlicensed residential facilities and outpatient programs currently operating in Newport Beach. Newport Beach residents have gathered information that indicates there may be as many as 100 sober living facilities in addition to the licensed facilities, and Orange County Probation has confirmed that these numbers are probably not exaggerated. Guidelines provided by ADP officers indicate that many of these unlicensed facilities are providing services that make them subject to licensure by either ADP or Department of Social Services Community Care Licensing.

Federal fair housing laws require that cities and states make exceptions from their established laws when necessary to provide disabled residents with access to housing. The City of Newport Beach has always respected this protection, and has routinely accommodated the needs of the disabled. As a result, there are abundant housing opportunities for handicapped residents, including those in recovery from alcohol and drug dependencies, already in existence in Newport Beach. Unfettered grants of licenses for more facilities are unnecessary to meet existing need.

2. Granting currently pending license applications is not necessary to meet local need for recovery services, and can cause irreparable harm to specific residential neighborhoods.

a. Local overview – In Newport Beach, all but one of the ADP-licensed facilities are located on or immediately adjacent to a narrow, 2.5 mile stretch of the city within West Newport and the Newport Peninsula. Over half of the licensed recovery facilities are concentrated within a mile of each other. One of our largest facility operators advertises that it has 30 homes (licensed and unlicensed) in a linear 1.3 mile area of West Newport. Publicly available information on several of the facilities' marketing practices, as well as reports by Newport Beach recovery facility residents,¹ indicate that a high percentage of the residents in these 22 facilities are not Newport Beach residents, and many are residents of other states brought to California specifically to enter the Newport Beach recovery facilities. If true, Newport Beach's limited housing stock is being used by commercial organizations to provide accommodations and services in excess of our local need, and may be limiting available housing and services to address our local need. National need for recovery services far exceeds the capacity of what our city can absorb, and could overwhelm our residential neighborhoods and change them forever.

b. Morningside Recovery – 112 A and B 39th Street - Based on ADP licensing numbers and census data, we estimate that on the city block that begins across the street from the proposed Morningside Recovery facility (39th – 40th Street), 30% of the block's population is already housed in licensed recovery facilities. Between four and five sober living homes already present on the same block add to the concentration of recovery facilities and create an environment that is not consistent with the goals of community-based recovery. Adding an additional licensed facility at 112 39th Street would exacerbate this situation, and will not add a commensurate benefit to the residents in Newport Beach in need of recovery services.

¹ Submitted either as complaints or during a series of City hearings in 2004.

Joan Robbins
March 8, 2007
Page 3

In addition, Morningside Recovery has already displayed disregard for the zoning restrictions of the City of Newport Beach and the licensing restrictions of the ADP during its start-up phase. Although it was not yet in possession of a license from ADP, Morningside Recovery moved residents into the property at 112 39th Street in Fall, 2006. Fire clearance provided for Morningside's ADP license application was for six residents.

The Newport Beach Fire Marshall received a credible complaint that there were eight beds in the facility, and that two beds were temporarily removed from the facility in honor of an announced ADP inspection. In December 2006, Newport Beach Code Enforcement officers inspected 112 39th Street, confirmed that there were eight residents, and cited Morningside Recovery for exceeding six residents without the proper zoning clearance. Morningside Recovery is applying for a license for each unit in a duplex building. Integral facilities with over six residents tend to develop in duplexes with two licenses, and when this occurs Morningside will require a Federal Exception Permit (FEP) from the City of Newport Beach. (The FEP is our local permitting requirement for facilities with seven or more residents, which makes provision for accommodations specific to a disabled group's housing needs)

c. Ocean Recovery – 1217 and 1217 1/2 West Bay Avenue – This expansion of the existing Ocean Recovery women's program proposes to locate in an area in which approximately 17% of the population of a two-block cross-section of the Peninsula is already housed in three large licensed recovery facilities. The addition of an additional Ocean Recovery facility, in conjunction with the residents who have recently moved into the sober living expansion of the Newport Coast Recovery facility across the alley, would bring the population of residential recovery facilities in that area to 20%.

Unfortunately, Ocean Recovery does not appear to be following a pattern of openness and honesty with either its proposed neighbors or the City in its siting process. After Ocean Recovery purchased the property, neighbors report that they asked an Ocean Recovery representative present on the property what the property would be used for, and he replied that he and his family would be living there while their house was being remodeled. (This nullified the subsequent efforts of City representatives who encouraged neighbors to approach Ocean Recovery and work with them to protect the quiet residential character of Bay Avenue.)

Originally, Ocean Recovery indicated an intent to apply for a single license for the property at 1217 and 1217 ½ West Bay Avenue, with a licensed capacity of eight. When Ocean Recovery was informed by the City that this would require a FEP, facility operators told Planning Department representatives that they had made "a mistake in their application," and that they had intended to apply for two licenses, one for six residents, and one for two residents.² This does not

² To clarify the issue, the Planning Department asked Ocean Recovery to submit a written description of the operational patterns they anticipate following at 1217 and 1217 ½ West Bay, and the services to be provided in each unit. The document that Ocean Recovery provided described what is effectively an expansion of the Ocean Recovery women's program currently in operation at 1601 West Balboa, an existing nonconforming use. Because the additional facility will involve the expansion of an existing nonconforming use, the City intends to require a Federal Exception Permit in order to allow Ocean Recovery to operate its program as described at 1217 and 1217 ½ West Bay.

Joan Robbins
March 8, 2007
Page 4

change our determination that the application is for a facility with operations integral to other licensed facilities that will serve more than six residents, which therefore must have an FEP.

d. **Kramer Center Newport Beach** – The Kramer Center Newport Beach knowingly began supplying residential treatment services to adolescent girls without a license from either ADP or DSS in December, 2006. Although I cannot give details on an ongoing criminal investigation, before granting any license for the Kramer Center, ADP should be aware that the Newport Beach Police Department has received and is investigating complaints against this entity and some of its employees. ADP and DSS Community Care Licensing are also investigating the allegations.

I hope that the ADP will carefully consider our position before granting more licenses for residential alcohol and drug abuse recovery and treatment facilities in the City of Newport Beach. Changing the character of our neighborhoods from residential to institutional benefits neither our permanent residents, nor the clients of the existing facilities who are undergoing the difficult process of recovery. We appreciate any assistance you can give us in preventing the irreparable harm that could result from the unfettered expansion of the commercial operations in residential neighborhoods.

Sincerely,



Robin Clauson,
City Attorney

cc: Mayor and Members of Newport Beach City Council
City Manager

1800 Third Street, Suite 430
P. O. Box 952053
Sacramento, CA 94252-2053
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October 24, 2008

Mr. David Lepo, Planning Director
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92658

Dear Mr. Lepo:

RE: Review of the City of Newport Beach's Draft Housing Element

Thank you for submitting Newport Beach's draft housing element received for review on August 25, 2008. The Department is required to review draft housing elements and report the findings to the locality pursuant to Government Code Section 65585(b). A telephone conversation on October 20, 2008 with Mr. Gregg Ramirez, Senior Planner, and Ms. Linda Tatum and Ms. Jessie Barkley from PBS&J, the City's consultants, facilitated the review. In addition, the Department considered comments from Mr. Cesar Covarrubias, from the Kennedy Commission, Ms. Kathy Lewis, from the Newport Beach Housing Coalition, and Mr. Ezequiel Gutierrez, from the Public Law Center, pursuant to Government Code Section 65585(c).

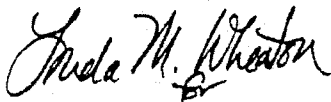
The draft element addresses many of the statutory requirements; however, revisions will be necessary to comply with State housing element law (Article 10.6 of the Government Code). In particular, the element should include analyses of the adequacy of identified sites to accommodate the regional housing need for lower-income households and revise programs to demonstrate the City's commitment to assist in the development of housing affordable to extremely low-income households. The enclosed Appendix describes these and other revisions needed to comply with State housing element law.

Furthermore, in September of 2007, the Department reviewed draft changes to the adopted housing element from the previous housing element planning period and determined revisions relating to the adequacy of sites would be necessary to comply with State housing element law. As the current draft contains much of the same site related information, many of the findings described in the September 10, 2007 review are still necessary to comply with State housing element law (Article 10.6 of the Government Code).

Mr. David Lepo, Planning Director
Page 2

The Department would be happy to arrange a meeting in either Newport Beach or Sacramento to provide any assistance needed to facilitate your efforts to bring the element into compliance. If you have any questions or would like assistance, please contact Melinda Coy, of our staff, at (916) 445-5307.

Sincerely,



Cathy E. Creswell
Deputy Director

Enclosure

cc: Gregg Ramirez, Senior Planner, City of Newport Beach
Kathy Lewis, Newport Beach Housing Coalition
Cesar Covarrubias, Kennedy Commission
Ezequiel Gutierrez, Public Law Center

APPENDIX
CITY OF NEWPORT BEACH

The following changes would bring Newport Beach's housing element into compliance with Article 10.6 of the Government Code. Accompanying each recommended change, we cite the supporting section of the Government Code.

Housing element technical assistance information is available on the Department's website at www.hcd.ca.gov/hpd. Refer to the Division of Housing Policy Development and the section pertaining to State Housing Planning. Among other resources, the Housing Element section contains the Department's latest technical assistance tool *Building Blocks for Effective Housing Elements (Building Blocks)* available at www.hcd.ca.gov/hpd/housing_element2/index.php, the Government Code addressing State housing element law and other resources.

A. Housing Needs, Resources, and Constraints

1. *Include an inventory of land suitable for residential development, including vacant sites and sites having the potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites (Section 65583(a)(3)). The inventory of land suitable for residential development shall be used to identify sites that can be developed for housing within the planning period (Section 65583.2).*

Newport Beach has a Regional Housing Need Allocation (RHNA) of 1,769 housing units, of which 708 units are for lower-income households. To address this need, the element relies primarily on underutilized and non-vacant sites within newly designated mixed-use areas. However, to demonstrate the adequacy of these sites and strategies to accommodate the City's share of the RHNA, the element must include more detailed analyses, as follows:

Addressing Unaccommodated Need from the Previous Planning Period: Pursuant to Chapter 614, Statutes of 2005 (AB 1233), as Newport Beach failed to adopt a housing element demonstrating sufficient sites to accommodate the City's RHNA for the 2000-2008 planning period, the element must include specific actions in its 2008-2014 update to address any unaccommodated need resulting from the previous planning period within the first year of the 2008-2014 planning period. To assist you in meeting this statutory requirement, including instructions on calculating the unaccommodated need, see the Department's AB 1233 memo at http://www.hcd.ca.gov/hpd/hrc/plan/he/ab_1233_final_dt.pdf. For additional assistance, please refer to the *Building Blocks*' website at http://www.hcd.ca.gov/hpd/housing_element2/GS_reviewandrevise.php.

Realistic Capacity: To calculate the potential residential capacity of sites in the inventory, the element assumes the sites will be built at either maximum allowed densities or to the maximum build out allowed under the general plan. The element must describe the methodology for determining capacity assumptions and demonstrate how the calculation accounts for land-use controls and site improvements, including height limits, and floor area ratios. The element could also describe the density yield of projects recently built or under construction. In addition, the element must provide a parcel specific estimate of the number of units that could be accommodated on all sites in the inventory including those within the John Wayne Airport Area.

Furthermore, as many of the sites are zoned for mixed-use, the residential capacity analysis must account for the potential development of non-residential uses and could consider any performance standards such as those mandating a specified portion of a mixed-use site be non-residential (i.e., first floor, front space as commercial) when estimating the potential residential capacity.

Sites to Accommodate the RHNA for Lower-Income Households: Given allowed densities, the John Wayne Airport Area appears to have the greatest potential to accommodate Newport Beach's share of the regional housing need for lower-income households. However, the element must demonstrate how existing uses, parcel sizes, land-use regulations, and General Plan Policy LU 6.14.6 impact the viability of this strategy to accommodate the RHNA for lower-income households within the planning period. For example:

- Non-Vacant Sites: As the element relies primarily on non-vacant and underutilized sites to accommodate the regional housing need (Appendix H-4), it must describe the existing uses of each of the identified sites within the parcel specific inventory and analyze the extent to which those uses may impede additional residential development. The element should also describe any existing or proposed regulatory incentives and standards to encourage and facilitate more intensive residential development on the identified underutilized sites. For further information, refer to the *Building Blocks*' website at http://www.hcd.ca.gov/hpd/housing_element2/SIA_zoning.php.
- Small Sites: Should the City need to rely on very small sites to accommodate a portion of the remaining regional housing need for lower-income households, the element must include an analysis demonstrating the development potential of smaller sites, including their capacity to facilitate the development of housing for lower-income households. The element could use development trends to facilitate this analysis. This is particularly important given the necessary economies of scale to facilitate the development of housing affordable to lower-income households. For example, most assisted housing developments utilizing State or federal financial resources typically include at least 50 to 80 units.
- Lot Consolidation: General Plan Policy LU 6.14.6 requires residential neighborhoods to include 10 continuous acres centered on a neighborhood park (page 5-44). The element should analyze the impacts of this policy on the availability of development opportunities within the Airport Area for a variety of housing types, including multifamily rental. While larger developers may have the ability to assemble the necessary sites to meet the 10 acre requirement, the analysis should consider the impact on smaller scale development proposals such as a low-income housing tax credit project and indicate the impact of LU 6.14.6 on such projects.

Sites with Zoning for a Variety of Housing Types: The housing element must demonstrate the availability of sites, with appropriate zoning, that will *encourage and facilitate* a variety of housing types, including supportive housing, single-room occupancy (SRO) units, emergency shelters, and transitional housing. An adequate analysis should, at a minimum, identify whether and how zoning districts explicitly allow

the uses, analyze whether zoning, development standards and permit procedures encourage and facilitate these housing types. If the analysis does not demonstrate adequate zoning for these housing types, the element must include implementation actions to provide appropriate zoning.

SROs: While the element indicates SROs are conditionally permitted in the RSC and APF zones, it must also demonstrate how the City's permit processing procedures, development standards, and standard conditions of approval encourage and facilitate the development of SROs.

Emergency Shelters: The element includes Program 5.1.6 committing the City to amend the zoning code to permit emergency shelters pursuant to Chapter 633, Statutes of 2007 (SB 2). In conjunction with the City's program strategy, the element must also identify the zone(s) being considered for emergency shelters and demonstrate sufficient capacity in the zone(s) to accommodate the need for emergency shelters, including sufficient capacity for at least one (year-round) emergency shelter. For further information, please see the Department's memo at http://www.hcd.ca.gov/hpd/sb2_memo050708.pdf.

Transitional and Supportive Housing: The element includes Program 5.1.6 to amend the zoning code to identify zones where transitional housing will be permitted and conditionally permitted. Pursuant to SB 2, the element must demonstrate transitional and supportive housing are treated as residential uses subject only to those restrictions that apply to other residential uses of the same type in the same zone. For example, if the transitional housing is a multifamily use proposed in a multifamily zone, then zoning and permit processing should treat transitional housing the same as other multifamily uses proposed in the zone.

2. *Analyze potential and actual governmental constraints upon the maintenance, improvement, and development of housing for all income levels, including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures. The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need in accordance with Section 65584 (Section 65583(a)(5)).*

Land-Use Controls: While the element includes Table H35 summarizing development standards for residential zoning districts and Table H34 describing FAR and density standards for the mixed-use areas, as stated in the Department's September 10, 2007 review, it must also analyze how implementation of these standards, particularly the Planned Community (PC) zone, will facilitate and encourage housing for all income groups. For example, the element must analyze how implementation of General Plan Policy LU 6.14.6 could impact the development of housing affordable to lower-income households. Should the requisite analysis determine the City's new land-use controls will impede residential development, the element must include a program to mitigate and/or remove any identified constraints.

Local Processing and Permit Procedures: As indicated in the element, City staff is currently working on a comprehensive zoning ordinance update to address inconsistencies between recently established general plan land-use designations and outdated zoning categories and the City Council adopted a resolution (as an interim measure) that allows projects to be "reviewed" in spite of this general plan/zoning inconsistency (page 5-77). However, as stated in the Department's September 10, 2007 review, the element must be expanded to demonstrate that in addition to "reviewing" residential projects, they can actually receive final approval during the time period which the zoning ordinance is being updated.

Affordable Housing Implementation Plan (AHIP): The draft element indicates the City requires an AHIP be prepared for projects with more than 50 residential units (page 5-51). While the element describes threshold requirements for the preparation of an AHIP and in-lieu options, the element should be expanded to include a more specific analysis of the program's proposed implementation framework and demonstrate the ordinance will not act as a constraint on development of market-rate units. For example, the element should include a more specific description and analysis of the types of incentives the City will adopt to encourage and facilitate compliance with inclusionary requirements, what options are available for developers to meet affordability requirements, how the ordinance interacts with density bonus laws, and the current amount of any in-lieu fee.

Constraints on Persons with Disabilities: The element must include 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.

3. *Analyze the opportunities for energy conservation with respect to residential development (Section 65583(a)(8)).*

The element states Newport Beach's updated natural resources element contains policies that promote energy efficient construction and encourage provision of energy alternatives (page 5-65), but does not provide a description of those policies. Given the importance of promoting strategies to address climate change and energy conservation, the City's analysis could facilitate adoption of housing and land-use policies and programs in the housing element that meet housing and conservation objectives. Planning to maximize energy efficiency and the incorporation of energy conservation and green building features can contribute to reduced housing costs for homeowners and renters. For example, the element could include incentives to encourage green building techniques and materials in new and resale homes, promote energy audits and participation in utility programs, and facilitate energy conserving retrofits upon resale of homes. Additional information on potential policies and programs to address energy conservation are available in the *Building Blocks'* website at http://www.hcd.ca.gov/hpd/housing_element2/SIA_conservation.php.

B. Quantified Objectives

Establish the number of housing units, by income level, that can be constructed, rehabilitated, and conserved over a five-year time frame (Section 65583(b)(1 & 2)).

The element does not address this requirement. It must quantify the number of housing units by income category that can be constructed, rehabilitated, and conserved over a five-year time period. This requirement could be addressed by utilizing a matrix like the one illustrated below:

	New Construction	Rehabilitation	Conservation
Extremely Low-Income			
Very Low-Income			
Low-Income			
Moderate-Income			
Above Moderate-Income			
TOTAL			

C. Housing Programs

1. *Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing, mobilehomes, and emergency shelters and transitional housing. Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, the program shall provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low- and low-income households (Section 65583(c)(1)).*

As noted in finding A1, the element does not include a complete site analysis and therefore, the adequacy of sites and zoning were not established. Based on the results of a complete sites inventory and analysis, the City may need to add or revise programs to address a shortfall of sites or zoning available to encourage a variety of housing types. For your information, where the inventory does not identify adequate sites pursuant to Government Code Sections 65583(a)(3) and 65583.2, the element must provide a program to identify sites in accordance with subdivision (h) of 65583.2 for 100 percent of the remaining lower-income housing need with sites zoned to permit owner-occupied and rental multifamily uses by-right during the planning period. These sites shall be zoned with minimum density and development standards that permit at least 16 units per site at a density of at least 20 units per acre. Also, at least 50 percent of the remaining need must be planned on sites that exclusively allow residential uses.

Furthermore, as noted in finding A1, pursuant to AB 1233, the element must identify the unaccommodated housing need by income level in the previous planning period and include programs to make sufficient capacity available by June 30, 2009. This demonstration is separate and in addition to adequate sites for the new planning period.

At a minimum, the element should be revised as follows:

- Programs 3.2.1 and 3.2.2 must be revised to include timeframes for the adoption of the proposed development standards and zoning districts that implement general plan land-use designations and policies.
 - As stated in the Department's September 10, 2007 review, given Newport Beach's reliance on a combination of mixed-use and redevelopment to accommodate its remaining housing need, Policy H.2.3 must be complemented with strong programs and implementation actions to facilitate such development (i.e., specific commitment to provide regulatory and/or financial incentives and promote the development of underutilized and/or mixed-use sites).
 - To comply with the provision of Chapter 633, Statutes of 2007 (SB 2), Program 5.1.6 must be modified to identify a zone(s) where emergency shelters will be permitted without a conditional use permit (CUP) or other discretionary action within one year of adoption of the housing element, and demonstrate sufficient capacity is available within this zone to accommodate at least one shelter. The zoning code must also permit transitional and supportive housing as a residential use and only subject to those restrictions that apply to other residential uses of the same type in the same zone.
2. *The housing element shall contain programs which "assist in the development of adequate housing to meet the needs of extremely low-, low- and moderate-income households (Section 65583(c)(2)).*

While the element includes some programs to assist the development of very low-, low-, and moderate-income households, programs should be expanded or added pursuant to Chapter 891, Statutes of 2006 (AB 2634), to specifically assist in the development of a variety of housing types to meet the housing needs of extremely low-income households.

3. *The housing element shall contain programs which "address, and where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing" (Section 65583(c)(3)).*

As noted in finding A2, the element requires a more detailed analysis of potential governmental constraints. Depending upon the results of that analysis, the City may need to strengthen or add programs and address and remove or mitigate any identified constraints.

4. *The housing program shall preserve for low-income household the assisted housing developments identified pursuant to paragraph (8) of subdivision (a). The program for preservation of the assisted housing developments shall utilize, to the extent necessary, all available federal, state, and local financing and subsidy programs identified in paragraph (8) of subdivision (a), except where a community has other urgent needs for which alternative funding sources are not available. The program may include strategies that involve local regulation and technical assistance (Section 65583(c)(6)).*

The element identifies 46 units as at-risk within the immediate planning period and another 87 units in the subsequent five years. Therefore, the element should strengthen Policy H.3, to include specific actions to address the potential loss of units. For example, the program should develop a strategy to quickly move forward in case units are noticed to convert to market-rate uses. In addition, Programs 4.1.1 through 4.1.3 should include specific timeframes for implementation.

D. Public Participation

Local governments shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the element shall describe this effort (Section 65583(c)(7)).

While the element provides a detailed listing of organizations and individuals notified regarding workshops for the housing element update, it should also describe the success of the outreach and how comments received as part of the public participation process were incorporated into the housing element. Newport Beach should continue to engage the community, including the parties commenting on the element, through any revisions and subsequent adoption of those revisions to the housing element.

City's Objection to NCR's Untimely Brief

(July 30, 2009)

Patrick K. Bobko
pbobko@rwglaw.com

July 30, 2009

VIA FACSIMILE

Mr. Tom Allen
Hearing Officer
City of Newport Beach

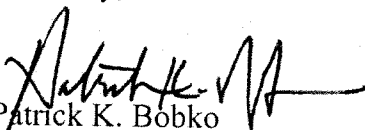
Re: *Objection to Newport Coast Recovery's Untimely Brief*

Dear Mr. Allen:

This letter is the City's formal objection to Newport Coast Recovery's untimely submission of the supplemental briefing the Hearing Officer requested at the Reasonable Accommodation/Use Permit hearing on July 7, 2009. It was Counsel for Newport Coast Recovery, not the City, who suggested the parties provide the requested supplemental briefing within 14 days - by July 21, 2009. (Transcript of Public Hearing on Newport Coast Recovery, LP, July 7, 2009, page 28, lines 12-13, and page 129, lines 14-15). The City complied with the Hearing Officer's order and timely submitted its briefing on Tuesday, July 21, 2009, and provided its brief to Counsel for Newport Coast Recovery at the same time. Newport Coast Recovery did not file its supplemental briefing until July 29, 2009 – *eight days after it was due*.

In addition to providing Newport Coast Recovery more than a week's time the City did not have, the extra eight days also allowed Newport Coast Recovery's Counsel time to review and rebut the arguments set forth in the City's submission. Unfairly, the City had no similar opportunity.

Sincerely,


Patrick K. Bobko

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Mr. Tom Allen
July 30, 2009
Page 2

bcc: Dave Kiff
Catherine Wolcott
Peter Pierce

Hearing Officer's Letter Authorizing Limited Supplemental Briefing

(August 2, 2009)

**Thomas W. Allen
Attorney at Law/Hearing Officer
3419 Via Lido #210
Newport Beach CA 92663
ptlaw@sbcglobal.net**

August 2, 2009

Sent by Email

Mr. Steve Polin
Spolin2@earthlink.net

Mr. Patrick Bobko
pbobko@rwg.com

Re: Newport Coast Recovery

Mr. Bobko is correct in his contention that the filing of the Newport Coast Recovery brief was untimely. The brief of Newport Coast Recovery is nevertheless accepted for filing. The City of Newport Beach is hereby granted the right to file a response to the Newport Coast Recovery brief, limited to the issues raised therein, which shall be filed at or before 5 pm, Friday August 7, 2009.

Filing shall be done by email.

/s/
Thomas W. Allen
Hearing Officer

cc: Mr. Kiff and Ms. Wolcott

**City's Supplemental Letter-Brief Regarding
Reasonable Accommodation No. 2009-009**

(August 7, 2009)

Patrick K. Bobko
pbobko@rwglaw.com

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.

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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

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.

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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

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

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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.

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

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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

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].

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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

-
- (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."

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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'

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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

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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 (3rd 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."

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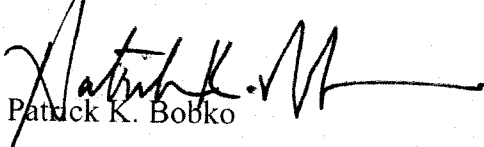
Letter from Cathy Cresswell to David Lepo (October 24, 2008). Similarly, the request for information about "transitional housing" was merely a request for information, not a finding of non-compliance.

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).

* * * *

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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August 7, 2009
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bcc: Dave Kiff
Catherine Wolcott
Peter Pierce

**City's Notice of Clarification Regarding the
City's Supplemental Letter-Brief Dated
August 7, 2009**

(August 11, 2009)



RICHARDS | WATSON | GERSHON

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Telephone 213.626.8484 Facsimile 213.626.0078

Patrick K. Bobko
pbobko@rwglaw.com

August 11, 2009

VIA FACSIMILE

Mr. Tom Allen
Hearing Officer
City of Newport Beach

Re: *Notice of Clarification*

Dear Mr. Allen:

I write this letter to clarify a statement made in the supplemental letter brief the City submitted to you on August 7, 2009.

The last page of that letter contains the following sentence:

“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).”

Letter from Patrick K. Bobko to Tom Allen (August 7, 2009) (emphasis added).

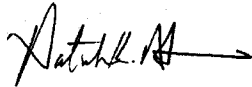
The italicized portion of this statement could be misleading. Although the Government Code says the City “shall review its housing element as frequently as appropriate” for certain of its elements, the Code requires the City conduct a formal review of its Housing Element not less than *every five to eight years*. See Gov’t C. §65588 (a) & (b). The correspondence between HCD and the City referenced above is related to the City’s 2008-14 Housing Element.¹

¹ The applicable Government Code provisions underwent a substantial revision in 2008. Prior to that, the generally applicable rule was that each city must review its Housing Element at least every 5-years.

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As always, if you have any questions or require further clarification on any of the other points contained in the City's supplemental brief, please let me know.

Sincerely,



Patrick K. Bobko

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cc: Steve Polin
Catherine Wolcott

**Order of Hearing Officer to Prepare
Resolution of Denial of Request for
Reasonable Accommodation**

(August 18, 2009)

1 THOMAS W. ALLEN
2 Attorney at Law
3 3419 Via Lido #210
4 Newport Beach Ca 92663

5 Hearing Officer

6
7 **CITY OF NEWPORT BEACH**
8 **GROUP HOME HEARINGS**
9

10 IN THE MATTER OF:)

11 THE REQUEST OF NEWPORT COAST)
12 RECOVERY LP FOR A REASONABLE)
13 ACCOMODATION TO OPERATE A)
14 RESIDENTIAL CARE FACILITY)

**ORDER OF HEARING OFFICER TO
PREPARE RESOLUTION OF DENIAL
OF REQUEST FOR REASONABLE
ACCOMMODATION**

15 REASONABLE ACCOMMODATION NO.)
16 RA 2009-009)

17 On July 7, 2009, a duly noticed public hearing was held before Thomas W. Allen,
18 Hearing Officer appointed by the City, to consider the Application for Reasonable
19 Accommodation of Newport Coast Recovery, a Limited Partnership (Applicant), to allow
20 it to operate a licensed adult alcohol and/or drug abuse recovery and treatment facility at
21 1216 West Balboa Boulevard, Newport Beach CA in the R-2 District, where such uses
22 are not permitted without a Use Permit. Testimony was presented by the Applicant, City
23 Staff and several members of the public in attendance. Counsel for the parties also
24 presented argument.

25 At the conclusion of the hearing, the Hearing Officer indicated he was inclined to
deny the request but was willing to establish a relatively short period of time for each

1-Decision of Hearing Officer

1 side to present additional information relevant to the Application. Accordingly, pursuant
2 to the proposal of Applicant's counsel, Mr. Brancart, the parties agreed to provide
3 further briefing to the Hearing Officer within two weeks after the July 7, 2009 hearing,
4 that is, by July 21, 2009. The City of Newport Beach submitted additional written
5 information to the Hearing Officer within the two-week period; however, Newport Coast
6 Recovery did not file its letter brief until July 29, 2009. In response to the City's
7 objection to the late filing, the Hearing Officer accepted the Applicant's late filing but
8 allowed the City an additional period of 5 days to file a response. The Hearing Officer
9 considered these filings in rendering this Order and concludes further conferences or
10 hearings are not necessary.

11 This Decision is made based upon the Application for Reasonable
12 Accommodation, the Staff Report and Attachments dated July 7, 2009, the testimony
13 and argument presented at the hearings, and the letter briefs and filings made
14 subsequent to the hearing.

15 16 **THE APPLICATION**

17 The Applicant made its request for reasonable accommodation under the Federal
18 Fair Housing Act, as amended, and the Newport Beach Municipal Code by using a
19 multi-faceted approach. Subsequent to the Applicant's initial filing, City Staff urged the
20 Applicant to present its request in a more defined manner for purposes of analysis but
21 the Applicant declined. Thus, Staff independently determined, correctly, to analyze the
22 request in two separate parts, each within the framework established in Chapter 20 of
23 the Newport Beach Municipal Code (NBMC) by Ordinance No. 2008-05.

24
25
2-Decision of Hearing Officer

1 The Applicant's first approach was to request a Use Permit, which the Hearing
2 Officer had previously denied in separate proceedings, this time as a reasonable
3 accommodation for persons with disabilities.

4 The Applicant's second approach to its reasonable accommodation request was
5 to seek an exemption from the restrictions of NBMC §20.10.020, which requires that
6 Residential Care facilities, such as the Applicant's, be located only in Multi-Family
7 Residential zones with a Use Permit. The Application also requests a waiver of certain
8 operational standards required to receive a Use Permit under 20.91A.050, as well as a
9 waiver of requirements it erroneously alleged were requirements under NBMC Sections
10 20.91A.

11 City Staff has correctly pointed out that under either approach, even if the
12 requests and exemptions were granted, the facility could not remain in operation unless
13 a Use Permit was either granted to the Applicant or waived altogether.

14 15 **REQUIRED FINDINGS**

16 The Hearing Officer determines that the following findings, required by
17 §20.98.025 B. of the NBMC, for reasonable accommodation requests *cannot* be made
18 with respect to the continuation of the operation beyond the time when the intended stay
19 of the current residents is complete:

20 1) Required Finding: *The requested accommodation is necessary to provide one*
21 *or more individuals with a disability an equal opportunity to use and enjoy a dwelling.*

22 A primary element of the necessity analysis is to determine whether there are
23 alternative housing opportunities available for a disabled person to receive the desired
24 therapeutic benefits.

25
3-Decision of Hearing Officer

1 City Staff testified that there are many State ADP licensed beds available in
2 duplex and apartment buildings along the Balboa Peninsula and one resident of the
3 area testified at the hearing that the same type of treatment facility is located "right
4 across the street" from Newport Coast Recovery. Specific operations were identified.

5 Applicant's counsel contended in the hearing that: "Newport Coast Recovery is
6 the only facility -- it is the only facility which is an all-male residential primary treatment
7 facility" and that it is a "unique service" in the community. When challenged to explain
8 how the facility's service was different than in other facilities, counsel requested the
9 record be left open to give the Applicant the opportunity to document its unique
10 services. The record was left open but this information was not provided, leading the
11 Hearing Officer to conclude that Newport Coast Recovery does not provide a unique or
12 specialized therapeutic value to the disabled in the community, not generally available
13 in other similar facilities in the Balboa Peninsula area.

14 For these reasons, together with the additional Staff Report analysis, the finding
15 of necessity cannot be made.

16 2) Required Finding: *The requested accommodation will not result in a*
17 *fundamental alteration in the nature of the City's zoning program, as "fundamental*
18 *alteration" is defined in Fair Housing Laws and interpretive case law.*

19 NBMC Section 20.91A.010 sets forth the purposes for requiring Use Permits in
20 residential districts. The City seeks to avoid the overconcentration of residential care
21 facilities so that such facilities are reasonably dispersed throughout the community and
22 are not congregated or over-concentrated in any particular area so as to institutionalize
23 that area. A primary therapeutic benefit for those in recovery is integration into
24 residential settings in the community. Such dispersal of facilities to avoid
25

4-Decision of Hearing Officer

1 institutionalization of residential areas is therefore a fundamental part of the Use Permit
2 process in the R-2 zone.

3 In adopting Ordinance No. 2008-05, the City Council developed flexible
4 standards for analysis and evaluation of the issue of overconcentration. These more
5 flexible standards are recommended by the American Planning Association to be
6 applied on a case by case basis to maintain the family setting and avoid
7 institutionalization in the residential neighborhoods while affording the disabled an equal
8 opportunity to reside there. In a January 12, 2009 Use Permit hearing, the Hearing
9 Officer determined that allowing more than one such facility within a calculable median
10 block length in a nonstandard subdivision area would create an overconcentration of
11 such uses in the neighborhood, to the detriment of the individuals in recovery at the
12 facility. The same analysis applies in the reasonable accommodation context and is
13 equally applicable as a basis for denial. Accordingly, the Resolution should contain the
14 finding that the Applicant's requested reasonable accommodation would result in an
15 overconcentration of recovery facilities in the area. An accommodation request is
16 unreasonable if it fundamentally alters the character of the neighborhood and/or
17 undermines the purpose of the City's zoning scheme. This accommodation would
18 fundamentally alter the City's purpose of avoiding clustering and preserving the
19 residential character of the mid-Balboa Peninsula neighborhood.

20 3) Required Finding: *The requested accommodation will not impose an undue*
21 *financial or administrative burden on the City as "undue financial or administrative*
22 *burden" is defined in Fair Housing Laws and interpretive case law.*

23 The finding cannot be made that the Applicant's request, if granted, will not
24 impose an undue administrative burden on the City. Numerous residents in the vicinity
25 of this use testified at the hearings regarding conduct of the Newport Coast Recovery

5-Decision of Hearing Officer

1 operation that has in the past and may in the future necessitate administrative and code
2 enforcement staff time. In particular, City representatives testified that administrative
3 staff and the Police Department were required to devote substantial time assisting
4 complainants about the operation and, in one case, locate a minor entrusted to Newport
5 Coast Recovery's care.

6 On April 1, 2009, California Department of Social Services Officer Michael
7 Valentine investigated allegations of minors being admitted to treatment at the facility
8 and confirmed that Newport Coast Recovery had provided unlicensed care and
9 supervision of minors at its 1216 West Balboa Boulevard facility. Officer Valentine
10 issued a Notice of Operation in Violation of Law to Newport Coast Recovery for housing
11 minors without a required license. Such a determination constitutes a basis for a finding
12 that the Applicant does not operate its facility in accordance with applicable law and
13 also establishes an undue administrative burden on the City.

14
15 **ORDER**

16 The reasonable accommodation application of Newport Coast Recovery is
17 hereby **DENIED**.

18 The City of Newport Beach is requested to prepare a Resolution of Denial for
19 review and adoption by the Hearing Officer. The Resolution shall implement this Order
20 and provide findings and analysis consistent with the Staff Report and the testimony
21 presented at the hearings conducted by the City involving the applications and requests
22 made by Newport Coast Recovery LP.

23 The Resolution shall include a condition permitting current residents residing in
24 the Newport Coast Recovery facility under a contract to receive treatment services to
25 remain until they choose to leave, or until their original intended stay is complete,

6-Decision of Hearing Officer

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whichever occurs first. This determination is made based upon the finding that the request is reasonable and necessary as to current residents.

The Resolution shall also contain a brief description of the efforts of the City Council of the City of Newport Beach in adopting Ordinance No. 2008-05 and confirm that this legislative effort, in itself, constitutes an unmistakable recognition by the City of its obligation to address and accommodate the rights of an individual with a disability to an equal opportunity to occupy and enjoy a dwelling in a residential setting in the City.

This purpose of this Decision is to direct the City to prepare a Resolution to be adopted by the Hearing Officer which shall constitute the Final Decision in this matter.

August 18, 2009 /s/ Thomas W. Allen, Hearing Officer

**Resolution No. HO-2009-022 Denying Use
Permit No. 2008-033**

(September 17, 2009)

RESOLUTION NO. HO-2009-022

A RESOLUTION OF A HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING WITH PREJUDICE USE PERMIT NO. 2008-033 TO ALLOW AN EXISTING GROUP RESIDENTIAL USE TO CONTINUE AT 1216 WEST BALBOA BOULEVARD, NEWPORT BEACH, CALIFORNIA (PA2008-104)

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.91A to the NBMC. Chapter 20.91A sets forth a process by which existing group residential care facilities, except for state-licensed drug or alcohol treatment homes serving six or fewer clients and not operating integrally with other uses, must apply for use permits to remain in operation beyond February 2009; and

WHEREAS, Newport Coast Recovery, LP, located at 1216 West Balboa Boulevard ("Use Location") in Newport Beach, California is today a residential care facility located in an apartment complex with seven dwelling units that is a state-licensed alcohol or drug residential treatment home for up to 29 persons (ADP License No. 300156AP); and

WHEREAS, Newport Coast Recovery, LP ("Use") applied for Use Permit No. 2008-033 to continue its operations as an 18 bed facility under Ordinance No. 2008-05 within the applicable time period, and a noticed public hearing was held on Monday, December 8, 2008, at the Newport Beach City Council Chambers where public testimony was taken, including testimony from the applicant, and this hearing was continued to Monday, January 12, 2009, also at the Newport Beach City Council Chambers where more public testimony was received including testimony from the applicant; and

WHEREAS, in order to allow an existing group residential care facility to remain in operation, a Hearing Officer must find, following a noticed public hearing, that all four of the findings identified in NBMC §20.91.035.A and all seven of the findings identified in NBMC §20.91A.060 can be met; and

WHEREAS, both hearings were presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach; who determined not all findings could be made and adopted Resolution HO-2009-001 on February 4, 2009, denying with prejudice Use Permit No. 2008-033; and

WHEREAS, on February 11, 2009, the applicant filed an appeal of the Hearing Officer's decision to deny Use Permit No. 2009-003, and

WHEREAS, on April 14, 2009, a public hearing conducted by City Council was held at the Newport Beach City Council Chambers, where testimony was taken, including testimony from city staff, the applicant, and the public; and

WHEREAS, at the April 14, 2009, hearing the City Council was informed that new evidence was acquired after the close of the public hearing conducted by the Hearing Officer on January 12, 2009, which was not admissible and could not be considered by City Council in making a determination on the appeal; and

WHEREAS, the City Council determined the new evidence was relevant to the substance of the application for a group residential use permit, and remanded the matter to the Hearing Officer for consideration of the newly acquired evidence only; and

WHEREAS, a noticed public hearing presided over by Hearing Officer Thomas W. Allen was held on Tuesday, July 7, 2009, at the Newport Beach City Council Chambers where testimony was taken, including testimony from city staff, the applicant, and the public; and

WHEREAS, after considering the newly acquired evidence the Hearing Officer determined that Finding 3 of NBMC §20.91.035.A cannot be made with respect to compliance with the provisions of the Code, and Finding A of NBMC §20.91A.060 cannot be made with respect to the development and operational standards specified in NBMC §20.91A.050, and directed staff to prepare a supplemental resolution of denial which shall supersede Resolution No. HO-2009-001; and

WHEREAS, the Use Location is within the Nonstandard Subdivision Area as defined by Ordinance No. 2008-05; and

WHEREAS, proximate to the Use Location are the following uses referred to in NBMC §20.91A.060 (D):

1. Within 300 feet: Balboa Horizons Recovery Services (11 bed licensed treatment facility located at 1132 West Balboa Boulevard, with an approved use permit) is one block east of the Use Location, on the same side of the street.
2. Within 300 feet and across the street: Newport Elementary School for students in grades Kindergarden through 5th grade located at 1327 West Balboa Boulevard.
3. Within 750 feet: Christ Church's large (44 children capacity) state-licensed day care center located at 1400 West Balboa Boulevard.

4. Within 1250 feet: Outlets for alcoholic beverages are the American Legion Hall located at 215 W. 15th Street and Fry's Market located at 115 E. 15th Street.

NOW THEREFORE BE IT RESOLVED:

Section 1. That Findings B and C and Findings E - G of NBMC §20.91A.060 can be made for the following reasons:

NBMC §20.91A.060 Finding B: The project includes sufficient on-site parking for the use, and traffic and transportation impacts have been mitigated to a level of insignificance.

The NBMC requires off-street parking and loading spaces for a residential care facility at a ratio of one space for every three beds. The facility provides a total of six off-street parking spaces; and therefore, would meet the NBMC requirements for off-street parking with the exception of weekend family counseling sessions as discussed below if a use permit were approved with conditions limiting the occupancy to 14 beds.

Newport Coast Recovery conducts regular family counseling sessions on weekends. Familial counseling for non-residents, while being an important part of the recovery of resident clients, can significantly impact on-street parking during busy weekends on the Balboa Peninsula. The use of on-street parking by the facility on weekends impacts the availability of on-street parking for use by residents of the neighborhood.

The Hearing Officer has determined this finding could be made if a use permit were approved with conditions of approval included that would limit the occupancy to 14 beds and require the applicant to: (1) purchase one master parking permit from the City to use for on-street parking by each client who is permitted to drive his personal vehicle to and from the facility; and (2) restrict to the maximum of three the number of clients who reside at 1216 West Balboa who are permitted to have personal vehicles; (3) require that all on-site spaces remain permanently clear and open for parking; (4) require all staff members to use the on-site parking for personal cars and transport vans; and (5) regulate family counseling activities on-site when on-street parking is utilized to Sundays between 9:00 a.m. and 12:00 noon. In the event family counseling occurs during other times of day, the applicant is required to provide on-site parking in a manner that that does not result in placement of resident cars on the street, or provide family members alternative transportation modes to and from the facility.

NBMC §20.91A.060 Finding C: The property and existing structures are physically suited to accommodate the use.

The building is similar to many other residential structures along West Balboa Boulevard constructed on a lot parcel that measures approximately 62 feet wide by 100 feet deep. The building was constructed in 1949 when the subject property was zoned R-3. The property was later rezoned to an R-2 District in 1989 along with other properties in the area. As a result, the structure is nonconforming structure permitted to continue subject to the provisions of Chapter 20.62, "Nonconforming Structures and Uses," of the NBMC.

The Hearing Officer acknowledges that the City of Newport Beach Fire Department is the responsible department for implementing fire protection of all group residential care facilities and residences. The subject property has an approved fire clearance from the City of Newport Beach Fire Department dated June 6, 2004, for a maximum occupancy of 29 residents, as well as staff. Separate from the use permit process, the applicant may be required to conduct an architectural code analysis of the facility to determine if the facility complies with existing current Building Codes for this occupancy type, or the Building Codes existing at the time the facility was initially issued a fire clearance.

NBMC §20.91A.060 Finding E: The operation of buses and vans to transport residents to and from off-site activities does not generate vehicular traffic substantially greater than that normally generated by residential activities in the surrounding area.

A facility van provides transportation for the residents on a weekly schedule dispersed within the day and among the days of the week so that van transportation is not concentrated during peak traffic times. Van loading and unloading occurs at the West Balboa Boulevard frontage that is less congested than the narrower alley access at the rear of the building. The Hearing Officer has determined that this finding could be made if a use permit were approved with a condition of approval included that would restrict the loading and unloading of transportation van passengers to occur within open parking spaces along West Balboa Boulevard and prohibiting van drivers from stopping or double-parking in a traffic lane.

NBMC §20.91A.060 Finding F: Arrangements for delivery of goods are made within the hours that are compatible with and will not adversely affect the peace and quiet of neighboring properties.

Business products and other packages and goods are delivered to the facility's business office located off-site. From this location, goods are delivered by staff members to the facility during weekdays between the hours of 9:00 a.m. to 5:00 p.m. The Hearing Officer finds that these days and hours for deliveries are

consistent with normal working hours and as such are compatible with and will not adversely affect the peace and quiet of neighboring properties.

NBMC §20.91A.060 Finding G: Arrangements for commercial trash collection in excess of usual residential collection are made within hours that are compatible with and will not adversely affect the peace and quiet of neighboring properties.

The applicant contracts with a commercial waste management company which collects trash twice a week on weekdays between the hours of 9:00 a.m. and 5:00 p.m. The Hearing Officer finds that the hours of trash collection are within hours that are compatible with and will not adversely affect the peace and quiet of neighboring properties.

Section 2. That Findings Nos. 1 - 4 of NBMC §20.91.035 (A) cannot be made for the following reasons:

NBMC §20.91.035 (A) Finding No. 1: That the proposed location of the use is in accord with the objectives of this code and the purposes of the district in which the site is located.

The Hearing Officer finds that the proposed project is only partially in accord with the objectives of this code and the purposes of the district in which the site is located. The subject property is located in an R-2 District, and the proposed use as a residential care facility is a nonconforming use. Nonconforming uses in a residential district are subject to the provisions of Chapter 20.91A of the NBMC. The Hearing Officer finds that the proposed application for Use Permit 2008-033 is in accord with the objectives and requirements of Chapter 20.91A with respect to the requirement for the submittal of an application for approval of a use permit to continue the use of the subject property as a residential care facility in the R-2 District.

The objectives of the code include provisions intended to reduce, through the use permit process, the potential for overconcentration of residential care facilities within a neighborhood and to protect public health, safety, peace, morals, comfort, or welfare of persons residing or working in or adjacent to the neighborhood of such use. The Hearing Officer finds that the intensity of the use, if limited to 14 residents housed in nine bedrooms within the seven dwelling units with two persons maximum per bedroom, would be consistent with a typical residential population factor of two persons per dwelling unit in the R-2 District and the surrounding properties within the R-2 District.

However, the Hearing Officer finds that the subject property's proximity to another residential care facility at 1132 West Balboa Boulevard, to a large state-

licensed day care facility at 1400 West Balboa Boulevard, to Newport Elementary School, and to facilities either selling or serving alcoholic beverages makes the proposed use incompatible with the surrounding residential character of the neighborhood. The discussion of incompatibility of the proposed use with the surrounding residential neighborhood is discussed in detail in Section 3, Finding D of NBMC §20.91A.060, of this resolution.

The Hearing Officer has determined that the proposed location of the use is not in accord with all of the objectives of this code and the purposes of the district in which the site is located due to the proximity of the proposed use to another residential care facility at 1132 West Balboa Boulevard, to Newport Elementary School, to the large state-licensed day care facility, and to alcoholic beverage sales and service facilities; and therefore, this finding cannot be made.

NBMC §20.91.035 (A) Finding No. 2: That the proposed location of the use permit and the proposed conditions under which it would be operated or maintained will be consistent with the General Plan and the purpose of the district in which the site is located; will not be detrimental to the public health, safety, peace, morals, comfort, or welfare of persons residing or working in or adjacent to the neighborhood of such use; and will not be detrimental to the properties or improvements in the vicinity or to the general welfare of the city.

General Plan policy LU 6.2.7 directs the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law so as to minimize impacts on residential neighborhoods. If a use permit were approved to allow the continued operations of the facility, conditions of approval would be imposed regulating the use and operational characteristics related to limits on the number of resident clients, curfew hours, smoking, transportation of clients off-site, trash collection, delivery of goods, and types of services provided. However, the Hearing Officer finds that the continued use of the subject property as a residential care facility in this location would be detrimental to the public health, safety, peace, morals, comfort, or welfare of persons residing or working in or adjacent to the facility.

Testimony by an adjacent neighbor and other area residents includes statements that residents of this facility have been disrespectful to others in the neighborhood, including playing music loudly despite frequent requests not to do so, littering, using profanity, and allowing excessive secondhand smoke to permeate adjacent residences. From this testimony, it does not appear to the Hearing Officer that the operator can adequately control the facility's caseload of clients in a manner that allows the neighbors to have quiet enjoyment of their properties.

The subject property is proximate (within 300 feet) to Newport Elementary School located at 1327 West Balboa Boulevard and proximate (within 750 feet) to Christ Church by the Sea's Children's Center, a large day care facility licensed by the State of California Department of Social Services located at 1400 West Balboa Boulevard with a capacity of 44 children. The Hearing Officer finds that these facilities could be affected by the use due to residents of Newport Coast Recovery using the open recreational area associated with Newport Elementary School and the potential for residents of Newport Coast Recovery to loiter, smoke, and engage in offensive and disruptive behaviors incompatible with nearby school and daycare uses.

NBMC §20.91.035 (A) Finding No. 3: That the proposed use will comply with the provisions of this code, including any specific condition required for the proposed use in the district in which it would be located.

The Hearing Officer finds that the facility would not comply with the operational standards specified in NBMC §20.91A.050, as outlined in Finding A of NBMC §20.91A.060 and as described in Section 3 below.

NBMC §20.91.035 (A) Finding No. 4: If the use is proposed within a Residential District (Chapter 20.10) or in an area where residential uses are provided for in Planned Community Districts or Specific Plan Districts, the use is consistent with the purposes specified in Chapter 20.91A and conforms to all requirements of that Chapter.

The Hearing Officer finds that this proposed project is only partially consistent with the purposes specified in Chapter 20.91A and does not conform to all the requirements of that Chapter. The subject property is located in an R-2 District, and the proposed use as a residential care facility is a nonconforming use. Nonconforming uses in a residential district are subject to the provisions of Chapter 20.91A of the NBMC. The proposed application for Use Permit No. 2008-033 is in accord with the purpose and requirements of Chapter 20.91A with respect to the requirement for the submittal of an application for approval of a use permit to continue the use of the subject property as a residential care facility in the R-2 District.

The intended purpose of the code is to maintain the residential character of the neighborhood within which a facility is located, to reduce the potential for overconcentration of residential care facilities within a neighborhood, and to protect public health, safety, peace, morals, comfort, or welfare of persons residing or working in or adjacent to the neighborhood of such use. The Hearing Officer finds that the placement of more than one residential care facility per median block length in the densely populated mid-Balboa Peninsula area creates a strong likelihood of change to the character of the residential neighborhood and

would result in an overconcentration of residential care facilities within the neighborhood.

The Hearing Officer has determined it is appropriate to apply the American Planning Association standard to this application. The use is located in the mid-Balboa Peninsula area which is a part of the Nonstandard Subdivision Area. Inasmuch as NBMC §20.91A.060 (D.3.) indicates median block lengths in different areas of Newport Beach widely range from 300 feet in the nonstandard subdivision areas to as much as 1,422 feet in standard subdivision areas, the Hearing Officer may establish a block length for the mid-Balboa Peninsula area where this use is located. The calculable median block length of 617 feet is hereby established for purposes of the mid-Balboa Peninsula area. The term "block" means an area bounded by streets, per Ordinance No. 2008-05 (per NBMC §20.03.030 "Definitions"). In this case, Balboa Boulevard is a major street that is a sufficient dividing line between each side of Balboa Boulevard. However, the Hearing Officer can extend beyond smaller streets like 12th and 11th Streets in an effort to "eliminate the differences in block lengths" per NBMC §20.91A.060 (D.3.) to achieve a 617-foot block standard.

Within the 617-foot block where the proposed use is located there is already one 11 bed residential care facility (Balboa Horizons). The proposed use located at 1216 West Balboa Boulevard, within the same block as Balboa Horizons, would result in an overconcentration of residential care facilities within the neighborhood.

The Hearing Officer has determined that the subject property's proximity to another residential care facility at 1132 West Balboa, to a large state-licensed day care facility at 1400 West Balboa, to Newport Elementary School, and to facilities either selling or serving alcoholic beverages makes the proposed use incompatible with the surrounding residential character of the neighborhood. The discussion of incompatibility of the proposed use with the surrounding residential neighborhood is discussed in detail in Section 3 of this Resolution. The proposed location of the use is only partially consistent with the purpose of the code and does not conform to all the requirements of NBMC §20.91A; and therefore, this finding cannot be made.

Section 3. That Findings A and D of NBMC §20.91A.060 cannot be made for the following reasons:

NBMC §20.91A.060 Finding A: The use conforms to all applicable provisions of NBMC §20.91A.050. These development and operational standards are summarized as follows:

1. No secondhand smoke can be detectable outside the property.

The facility's current operational regulations restrict smoking to designated areas within a courtyard area of the facility. The courtyard area is enclosed on all sides by walls but is open to the sky. Smoking outside of the limits of the enclosed courtyard area is prohibited. However, an adjacent neighbor and other area residents provided testimony indicating that excessive secondhand smoke has been detected outside the property. Therefore, the Hearing Officers finds this operational standard cannot be met.

- 2. Operations of the facility must comply with state and local law, and the submitted management plan, including any modifications required by this Use Permit. Each plan shall provide a contact name and number to the City.**

The Hearing Officer finds that the operations of this facility are not in compliance with state law because on two occasions the operator has admitted persons under the age of 18 years to the facility for treatment. These were violations of state law because Newport Coast Recovery does not hold a license from the California Department of Social Services to house minors. This also violates the facility's state ADP license terms because the operator did not hold an "adolescent waiver" that allows treatment of minors at the Newport Coast Recovery facility. This determination is based upon the evidence provided in the Newport Beach Police Department Employees Report dated March 31, 2009; the testimony of Mrs. Christina Willis on July 7, 2009; and the Notice of Operation in Violation of Law with attached material dated April 1, 2009 from the State of California Department of Social Services (DSS) issued to the applicant.

- 3. In order to ensure that unlicensed residential care facilities operate in a manner consistent with state and federal law and established industry standards and to ensure that operators do not have a pattern or practice of operating similar facilities in violation of state or local law, no services requiring a license can be provided if the facility does not have a license for those services.**

The residential care facility is licensed by the State of California Department of Drug and Alcohol Programs (ADP), and the operation plan for the facility provides that only those services permitted by the facility's ADP license are performed within the facility. According to information provided in the application documentation, the owners and managers of the facility do not own or operate any other similar facility in the City of Newport Beach or the State of California. Although neighbors of the facility submitted evidence that the same operator managed an unlicensed adult recovery maintenance

facility at 1219 West Balboa Boulevard for a period of time, the City is not aware that this facility was operated in violation of the law.

- 4. There shall be no more than two persons per bedroom plus one additional resident, unless a greater occupancy is requested and granted. Occupancy must also comply with State licensing if applicable.**

The facility is licensed for a maximum occupancy of 29 residents. The facility is comprised of seven dwelling units and contains nine bedrooms currently occupied by two persons per bedroom for a total of 18 residents. The Hearing Officer finds this occupancy is consistent with the residential occupancy design of the building and the occupancy standards of NBMC §20.91A.050.

- 5. If certification from an entity other than ADP's licensing program is available, applicants must get that certification.**

If a use permit had been approved for the facility to continue operations, a condition of approval would have been included requiring the applicant to consider the merits of additional certification available to it, including but not limited to an Orange County Adult Alcohol and Drug Sober Living certification.

- 6. All individuals and entities involved in the facility's operation and ownership must be disclosed.**

All employees and management personnel have been disclosed in the application documentation.

- 7. No owner or manager shall have any demonstrated pattern of operating similar facilities in violation of the law.**

According to information provided in the application documentation, the owners and managers of the facility do not own or operate any other similar facility in the City of Newport Beach or in the State of California. While residents submitted evidence that the same operator managed an unlicensed adult recovery maintenance facility at 1219 West Balboa Boulevard for a period of time, the City is not aware that this facility, which did not provide treatment onsite, was operated in violation of the law.

The facility's State of California ADP license is valid until January 31, 2010. Based on the newly acquired evidence, as described above in item 2, the Hearing Officer finds that the Newport Coast Recovery facility did not operate in compliance with the terms of the state ADP license issued to the applicant because the operator admitted minors to the facility for treatment without the

required adolescent waiver, and without a license from the Department of Social Services.

NBMC §20.91A.060 Finding D: The use will be compatible with the character of the surrounding neighborhood, and the addition or continued maintenance of the use will not contribute to changing the residential character of the neighborhood, such as creating an overconcentration of residential care uses in the vicinity of the proposed use. In making this finding or sustaining such a finding, the Hearing Officer shall consider, as appropriate, the following factors:

1. The proximity of the use location to schools, parks, other residential care facilities, outlets for alcoholic beverages and any other uses which could be affected by or affect the operation of the subject use;
2. The existence of substandard physical characteristics of the area in which the use is located such as lot widths, setbacks, narrow streets, limited available parking, short blocks, and other substandard characteristics which are pervasive in certain areas of the City of Newport Beach, including portions of West Newport, Lido Isle, Balboa Peninsula, Balboa Island, Corona del Mar and Newport Heights, which portions were depicted on a map referred to as the Nonstandard Subdivision Area presented to the Newport Beach Planning Commission on September 20, 2007 and on file with the Director of Planning; and
3. Whether, in light of the factors applied in subsection 20.91A.D.1 and D.2, it would be appropriate to apply the American Planning Association standard of permitting one or two such uses per block. Median block lengths in different areas of Newport Beach widely range from 300 feet in the Nonstandard Subdivision Areas to as much as 1,422 feet in standard subdivision areas. The average calculable block length in much of the standard subdivision areas is 711 feet and the calculable median block length is 617 feet. The Hearing Officer shall apply the American Planning Association standard in all areas of Newport Beach in a manner that eliminates the differences in block lengths. In making this determination, the hearing officer shall be guided by average or median block lengths in standard subdivisions of the City. The Hearing Officer shall retain the discretion to apply any degree of separation of uses, which he or she deems appropriate in any given case. A copy of the American Planning Association standard is on file with the Director of Planning.

The subject property is proximate (within 300 feet) to Newport Elementary School located at 1327 West Balboa Boulevard, and proximate (within 750 feet) to Christ Church by the Sea's Children's Center, a large day care facility licensed by the State of California Department of Social Services located at 1400 West Balboa Boulevard with a capacity of 44 children. The Hearing Officer finds that these facilities could be affected by the use due to residents of Newport Coast Recovery using the open recreational area associated with Newport Elementary School and the potential for residents of Newport Coast Recovery to loiter, smoke, and frequently engage in offensive and disruptive behaviors incompatible with nearby school and daycare uses.

The subject property is proximate (within 1250 feet) to two outlets for alcoholic beverages (American Legion Hall at 215 15th Street and Fry's Market at 115 15th Street) both within walking distance from the facility which allows residents of the use convenient access to alcohol sales and service which could affect the ability of the use to fully operate as an alcohol rehabilitation facility.

The subject property is within the Nonstandard Subdivision Area, an area which is characterized by narrow lot widths, small setbacks, narrow streets, limited available on-street and off-street parking, and short blocks. Noise associated with the operation of the use, including music and shouting, is audible to adjacent properties.

The Hearing Officer has determined it is appropriate to apply the American Planning Association standard to this application. The use is located in the mid-Balboa Peninsula area which is a part of the Nonstandard Subdivision Area. Inasmuch as NBCM §20.91A.060 (D.3.) indicates median block lengths in different areas of Newport Beach widely range from 300 feet in the nonstandard subdivision areas to as much as 1,422 feet in standard subdivision areas, the Hearing Officer has the authority to establish a block length for the mid-Balboa Peninsula area where this use is located, and has established the calculable median block length of 617 feet for the mid-Balboa Peninsula area. The term "block" means an area bounded by streets, per Ordinance No. 2008-05 (NBMC §20.03.030 "Definitions"). In this case, the Hearing Officer finds that Balboa Boulevard is a major street that is a sufficient dividing line between blocks on each side of Balboa Boulevard. However, the Hearing Officer can and has extended beyond smaller streets like 12th and 11th Streets in an effort to "eliminate the differences in block lengths" per NBMC §20.91A.060 (D.3) to achieve a 617-foot standard.

The Hearing Officer has determined that the placement of more than one residential care facility per median block length in the densely populated mid-Balboa Peninsula area creates a strong likelihood of change to the character of

the residential neighborhood. Within the 617-foot block where this use is located there is already one 11 bed residential care facility (Balboa Horizons).

Section 5. The Hearing Officer hereby denies with prejudice Use Permit No. 2008-033. This supplemental resolution shall supersede Resolution No. HO-2009-001.

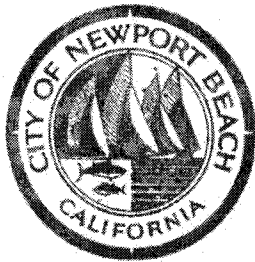
Section 6. The action shall become final and effective fourteen (14) days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20, Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED, AND ADOPTED this 17th DAY OF SEPTEMBER 2009.

By: Thomas W. Allen
Thomas W. Allen, Hearing Officer

ATTEST:

Keilani L. Brown
City Clerk



**Resolution No. HO-2009-023 Denying
Reasonable Accommodation No. 2009-009,
Request No. One**

(September 17, 2009)

RESOLUTION NO. HO-2009-023

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

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings; and

WHEREAS, the adoption of Ordinance No. 2008-05 amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

WHEREAS, Ordinance No. 2008-05 added Chapter 20.98 to the NBMC. Chapter 20.98 sets forth a process to provide reasonable accommodations in the City's zoning and land use regulations, policies, and practices when needed to provide an individual with a disability an equal opportunity to use and enjoy a dwelling; and

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

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

or, in the alternative,

2. Request No. Two - An exemption from the requirements specified in NBMC Section 20.91A.050 (Development and Operational Standards), including:
 - A waiver of the occupancy restriction of two persons per bedroom plus one staff member, and to allow a total occupancy of 18 residents;
 - An exemption from parking requirements specified in NBMC Section 20.66.030 and to impose parking requirements that treat the residents and the visitors of the residents in the same manner as any other resident or visitor to Newport Beach, particularly those requirements that pertain to weekend visitation;
 - Treat the use of the licensed residential care facility as a legal nonconforming use;

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

WHEREAS, a public hearing was held on July 7, 2009 in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting, both written and oral from the applicant, City staff and the public; and

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

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

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

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

WHEREAS, the Hearing Officer considered the written letter briefs in addition to the oral testimony presented at the July 7, 2009 public hearing; and

WHEREAS, pursuant to Section 20.98.025(B) of the NBMC, the written decision to approve, conditionally approve, or deny a request for reasonable accommodation shall be based on five findings, all of which are required for approval; and

WHEREAS, with respect to Request No. One (Request No. Two is analyzed separately in Resolution No. HO-2009-024), the Hearing Officer has determined that not all five of the required findings can be made pursuant to NBMC Section 20.98.025(B), based on the following facts:

1. **Finding: That the requested accommodation is requested by or on the behalf of one or more individuals with a disability protected under the Fair Housing Laws.**

Facts in support of finding: This finding can be made. The applicant submitted a statement that every resident of the facility is in recovery from alcohol and/or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

2. **Finding: That the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

The Hearing Officer has determined that a primary element of the necessity analysis is to determine whether there are alternative housing opportunities available for a disabled individual to receive the desired therapeutic benefits of a residential care facility.

The applicant has stated that individuals in recovery from alcohol or drug addiction need to maintain daily living skills closely related to those of individuals that are not addicted and that having a setting of family dwellings surrounding the facility will help maintain sober living and prevent relapse. The applicant asserted that Newport Coast Recovery is the only facility within the City that provides an all-male residential primary treatment facility, and therefore provides a unique service in the community that cannot be obtained elsewhere in the City. However, there are other all-male residential treatment facilities on the Balboa Peninsula cited by the City that provide State ADP-licensed residential treatment in duplex and apartment buildings of a similar nature. During the public hearing the applicant did not present any additional information documenting the unique services provided by their facility, but the Hearing Officer invited the applicant to submit further information on the unique program and therapeutic benefit in its letter brief. The applicant did not submit any information in its letter brief about whether it was licensed for primary treatment, or whether such primary treatment was either offered by the applicant, or offered by other facilities within the City.

The Hearing Officer finds that the applicant does not provide a unique or specialized therapeutic value to disabled individuals in the community that is not generally available in other similar facilities in the Balboa Peninsula area. Therefore, as to

prospective clients, the requested accommodation is not necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.

However, as to current residents, the Hearing Officer recognizes that the facility currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility. The Hearing Officer finds that an accommodation to allow only the current client residents residing in the Newport Coast Recovery facility under a contract to receive treatment services to remain until they choose to leave, or until their original intended stay is complete, whichever occurs first, is reasonable. Therefore:

As to current residents, this finding can be made. As the Hearing Officer has again denied Newport Coast Recovery's use permit application on remand, if the requested accommodation is not granted, the facility will be subject to abatement. The facility currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility. The Hearing Officer has determined that granting the requested accommodation is necessary to provide the current residents only with the opportunity to use and enjoy their current dwelling.

As to prospective residents, this finding cannot be made. The applicant seeks to provide housing for 14 to 18 residents in a seven-unit apartment building. The Hearing Officer finds that prospective residents seeking to live in a large licensed recovery environment have alternative available housing opportunities offering similar therapeutic benefit in a similar location and residential setting. All of these facilities are surrounded by family dwellings similar to those that surround Newport Coast Recovery, and can provide a similar example of and support for sobriety and daily living skills. The Hearing Officer finds that granting the requested accommodation is not necessary to provide prospective residents with an equal opportunity to use and enjoy the dwelling of their choice within the community.

NBMC Section 20.98.025(C) allows the City to consider the following factors in determining whether the requested accommodation is necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling:

- A. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability.*

Living with other individuals in recovery from addiction has been shown to prevent relapse in recovering clients, and if the requested accommodation were granted, the applicant's current and potential clients would be able to live in an apartment building in an R-2 District with other individuals in recovery. This situation could affirmatively enhance the quality of life of a person in recovery from addiction, unless overcrowding of the facility or institutionalization of the neighborhood interferes with the residents' re-integration into society.

At January 12, 2009 public hearing for Newport Coast Recovery's use permit application, the Hearing Officer determined that allowing more than one such facility within a 617-foot calculable median block length in a nonstandard subdivision area would create an overconcentration of such uses in the neighborhood, to the detriment of the individuals in recovery at the facility. Concern about overconcentration is consistent with the position taken by the Department of Housing and Urban Development (HUD) and Department of Justice (DOJ) in their "Joint Statement of Group Homes, Local Land Use and the Fair Housing Act," which was duly considered by the Hearing Officer in making such determination.

- B. *Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation.*

As to current residents: The applicant requested an exception from the requirements of NBMC Section 20.10.020, to allow the continued operation of an existing licensed residential care facility located in an R-2 District, where the NBMC permits such uses only in an MFR District with approval of use permit. As a prohibited use, the facility is subject to abatement. The applicant seeks to continue to house 14 to 18 disabled individuals in seven units of an apartment building. The facility currently houses residents who could be denied housing if abatement proceeds while they are still in residence at the facility. The Hearing Officer finds that if the requested accommodation is denied and abatement proceeds before current residents have completed their original intended stay, such residents will be denied an equal opportunity to enjoy the housing type of their choice.

As to prospective clients: The Hearing Officer finds that potential future residents seeking to recover from alcoholism and drug addiction by living in a large licensed recovery facility would not be deprived of an equal opportunity to live in a substantially similar dwelling situation of the same type (see discussion in item D below).

- C. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants.*

The applicant did not provide information or evidence demonstrating that the size or type of facility requested is necessary for the facility's financial viability. Instead, the applicant stated in its application that it objected to the application requirement to provide an explanation of why the requested accommodation is

necessary to make the facility economically viable in light of the relevant market and market participants.

In the case of Request No. One, the applicant did not request a population level that is higher than that which was recommended by staff in its January 12, 2009 use permit staff report. Therefore, staff did not recommend an alternate accommodation, and had no forum for analyzing the financial viability needs of the applicant. Absent this information from the applicant, the Hearing Officer was unable to consider this factor in determining whether the requested accommodation is necessary to provide a disabled individual an equal opportunity to use and enjoy a dwelling.

- D. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

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

The Municipal Code authorizes the Hearing Officer to consider whether the existing supply of facilities "of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting." Based on ADP's most recently published list of licensed facilities (list current as of December 12, 2008) and use permits granted by the Hearing Officer, City staff prepared a revised estimate of the number of licensed beds for alcohol and drug recovery in Newport Beach. Including the applicant's ADP license for 29 beds, staff estimates that there are currently approximately 236 ADP-licensed treatment beds in the City, many of which are located in duplex and apartment units on the Balboa Peninsula and in West Newport. Without the applicant's 29 beds, there are still 207 licensed recovery beds in Newport Beach. Like the applicant's facility, the majority of these facilities are located near the beach in residential districts zoned R-2. At the July 7, 2009 public hearing, Assistant City Manager Dave Kiff reported he was informed by residential care facility operators in the City of Newport Beach that there is a high vacancy of residential care facility beds. Based on this information, and given there was no controverting evidence presented, the Hearing Officer finds there is a sufficient supply of facilities of a similar nature and operation in the community and that denial of the reasonable accommodation would not deprive prospective residents of the opportunity of live in a similar residential setting in Newport Beach.

3. **Finding: That the requested accommodation will not impose an undue financial or administrative burden on the City as “undue financial or administrative burden” is defined in Fair Housing Laws and interpretive case law.**

With regard to current residents, this finding can be made. Allowing the facility to remain at its current location for a period of time that allows current client residents to complete their intended stay would not impose a financial or administrative burden on the City that is undue in relation to requiring disabled residents to leave their present housing. Therefore, the Hearing Officer has determined this finding can be made with regard to current client residents only.

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

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

4. **Finding: That the requested accommodation will not result in a fundamental alteration in the nature of the City’s zoning program, as “fundamental alteration” is defined in Fair Housing Laws and interpretive case law.**

As to current residents, this finding can be made. Most recovery facilities operating in the City of Newport Beach have reported an average length of resident stay of 30 to 90 days, which is temporary in nature. Because of potential hardship to current residents enrolled in Newport Coast Recovery’s treatment program, the Hearing Officer finds that allowing current residents in treatment to remain at the facility for the remainder of their original intended stay will not result in a fundamental alteration in the nature of the City’s zoning program.

As to prospective residents, this finding cannot be made. When an applicant requests an exemption from the requirements of NBMC Section 20.10.020, City staff analyzes whether granting the requested accommodation would undermine the basic purposes

the R-2 zoning district was put in place to achieve, and the purposes of requiring a use permit in a residential district. Accordingly, staff provided analysis and the Hearing Officer considered the intent of the Municipal Code in relation to Newport Coast Recovery's requests.

Ordinance No. 2008-05 places regulations on all groups not living as either a single housekeeping unit or a designated "Residential Care Facilities, Small Licensed" in residential districts. The basic purpose of these regulations is to ensure: (1) the fundamental purposes of the Zoning Code can be achieved; (2) that the adverse secondary impacts created by group residential uses not living as a single housekeeping unit can be mitigated, and; (3) that the adverse secondary impacts that "Residential Care Facilities, General" and "Residential Care Facilities, Small Unlicensed" may have on the surrounding neighborhood can be mitigated. To accommodate the needs of the disabled for housing opportunities, Ordinance No. 2008-05 provides that non-conforming residential care facilities located in residential districts may be allowed to continue operating subject to approval of either a use permit or a request for reasonable accommodation.

Zoning District Considerations: NBMC Section 20.10.010 sets forth the basic purposes for establishing zoning districts which include locating residential development in areas which are consistent with the General Plan and with standards of public health and safety established by the Municipal Code, ensuring adequate light, air and privacy for each dwelling, protecting residents from the harmful effects of excessive noise, population density, traffic congestion and other adverse environmental effects, and providing public services and facilities to accommodate planned population and densities. The specific purpose of Section 20.10.010 of the NBMC for the R-2 District is that the district "provides areas for single-family and two-family residential land uses."

Section 20.10.020 of the NBMC establishes those uses that are permitted, conditionally permitted, and prohibited within the R-2 District. In accordance with Section 20.10.020 of the NBMC, uses designated as "Residential Care Facilities, General" are not a permitted use in the R-2 District and are only permitted in the MFR District subject to approval of a use permit.

In the January 12, 2009 staff report, staff provided facts in support of analysis that limiting Newport Coast Recovery's capacity to 14 beds would result in a level of population density that was equivalent to a typical multi-family building occupancy of two persons per unit, and would be more consistent with the residential character of the neighborhood. The Hearing Officer concurred with the analysis in general that 14 residents in a seven-unit apartment building would not undermine the basic purposes the R-2 zoning districts were put in place to achieve.

Use Permit Considerations: The NBMC requires use permits for use classifications typically having operating characteristics that require special consideration, so that they may be located and operated compatibly with uses on adjoining properties and in the surrounding area. NBMC Section 20.91A.010 sets forth the purposes for requiring use permits in residential districts. The first stated purpose is:

...to promote the public health, safety, and welfare and to implement the goals and policies of the Newport Beach General Plan by ensuring that conditional uses in residential neighborhoods do not change the character of such neighborhoods as primarily residential communities.

The second stated purpose is:

...to 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.

The Hearing Officer finds that a primary therapeutic benefit for those in recovery from alcohol and drug addiction is integration into residential settings in the community, and that dispersal of recovery facilities to avoid institutionalization of such residential is therefore a fundamental part of the use permit process in the R-2 District.

In adopting Ordinance No. 2008-05, the City Council developed flexible standards for analysis and evaluation of the issue of overconcentration. These more flexible standards are recommended by the American Planning Association to be applied on a case by case basis to maintain the family setting and avoid institutionalization in residential neighborhoods while affording the disabled an equal opportunity to reside there. In the applicant's January 12, 2009 use permit hearing, the Hearing Officer determined that allowing more than one such facility within a 617-foot calculable median block length in a nonstandard subdivision area would create an overconcentration of such uses in the neighborhood, to the detriment of the individuals in recovery at the facility.

The Hearing Officer finds that the same analysis applies in the reasonable accommodation context and is equally applicable as a basis for denial. Because the Hearing Officer has already granted a use permit to another existing recovery facility within the 617-foot calculable median block length in which the Newport Coast Recovery facility is located, the Hearing Officer finds that granting the requested accommodation would result in an overconcentration of recovery facilities in the area. Therefore, the Hearing Officer finds that granting the accommodation would

fundamentally alter the City's purpose of avoiding clustering and preserving the residential character of the mid-Balboa Peninsula neighborhood.

The Hearing Office also finds that the use did not conform to all applicable provisions of Section 20.91A.050, (Development and Operational Standards), and in particular, Section 20.91A.050 (B), as discussed above. In March 2009, while its appeal of the Hearing Officer's denial of its use permit application was pending before the City Council, the applicant twice violated state law by accepting minor clients without a DSS license or the ADP adolescent waiver required to provide residential treatment, care and supervision to minors. NBMC Section 20.91A.050(B) requires that all facilities within the City be operated in compliance with applicable State and local laws. In order to grant a use permit, the Hearing Officer must make all findings required by NBMC Section 20.91A.060, and one of those required findings is that the facility operates in accordance with all operational standards of NBMC Section 20.91A.050. Because the facility has not operated in compliance with state law, the facility does not operate in accordance with all operational standards of NBMC Section 20.91A.050. The Hearing Officer finds that the results of the Department of Social Services officer's investigation constitute a basis for finding the applicant does not operate its facility in accordance with applicable law, as required by NBMC Section 20.91A.050(B), which requires that the facility be operated in compliance with state and local law. Ignoring these violations would undermine one of the basic purposes the use permit requirement was put in place to achieve: "to protect and implement the recovery and residential integration of the disabled, including those receiving treatment and counseling in connection with dependency recovery." Granting discretionary permits only to applicants that operate their facilities in compliance with state laws protecting their potential clients is necessary to protect and implement the recovery of the disabled.

Pursuant to Section 20.98.025(D) of the NBMC, the City may also consider the following factors in determining whether the requested accommodation would require a fundamental alteration in the nature of the City's zoning program:

- A. *Whether the requested accommodation would fundamentally alter the character of the neighborhood.*

At the applicant's January 12, 2009 use permit hearing, the Hearing Officer determined that more than one facility within a 617-foot calculable median block could result in an overconcentration of residential care facilities, and noted that such overconcentration, along with the operator's inability to adequately control and supervise the facility's residents in a manner that allows the neighbors to have quiet enjoyment of their properties, would fundamentally alter the character of the neighborhood.

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

Staff analyzed whether Newport Coast Recovery had sufficient on-site parking for the use and whether traffic and transportation impacts had been mitigated to a level of insignificance in its January 12, 2009 staff report. The Hearing Officer determined this finding could be made if conditions of approval were included that would limit the occupancy to 14 beds and require the applicant to: (1) purchase one master parking permit from the City to use for on-street parking by each client who is permitted to drive his personal vehicle to and from the facility; and (2) restrict to the maximum of three the number of clients who reside at 1216 West Balboa who are permitted to have personal vehicles; (3) require that all on-site spaces remain permanently clear and open for parking; (4) require all staff members to use the on-site parking for personal cars and transport vans; and (5) regulate family counseling activities on-site when on-street parking was utilized to Sundays between 9:00 a.m. and 12:00 noon. In the event family counseling occurs during other times of day, the applicant would have been required to provide on-site parking in a manner that that did not result in placement of resident cars on the street, or provide family members alternative transportation modes to and from the facility.

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

General Plan Policy LU 6.2.7 requires the City to regulate day care and residential care facilities to the maximum extent allowed by federal and state law to minimize impacts on residential neighborhoods. The City adopted Ordinance No. 2008-05 to implement General Plan Policy LU 6.2.7. Under the conditions described in the Finding 4 analysis above, the Hearing Officer believes granting the requested accommodation would substantially undermine an express purpose of the General Plan.

- D. *In the case of a residential care facility, whether the requested accommodation would create an institutionalized environment due to the number of and distance between facilities that are similar in nature or operation.*

As noted above, the Hearing Officer determined that granting use permits or reasonable accommodations that resulted in more than one such use within a 617-foot calculable median block length would create an institutionalized environment. As a use permit has already been granted to another existing facility located within 300 feet of Newport Coast Recovery and within the same median block length of the applicant's facility, the Hearing Officer determined

that granting the requested accommodation would create an institutionalized environment in the surrounding neighborhood.

5. **Finding: That the requested accommodation will not, under the specific facts of the case, result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.**

Facts in support of finding: A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others." See 42 U.S.C. § 3604(f)(9). This is a very limited exception and can only be used when, based on the specific facts of a situation, a requested accommodation results in a significant and particularized threat. Federal cases interpreting this exception in the FHAA indicate that requested accommodations cannot be denied due to generalized fears of the risks posed by disabled persons.

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

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

WHEREAS, the project qualifies for a Categorical Exemption pursuant to Section 15301 of the California Environmental Quality Act (CEQA) under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines). It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and it is not subject to CEQA; and


NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies with prejudice Request No. One of Reasonable Accommodation No. 2009-009, with respect to prospective residents.

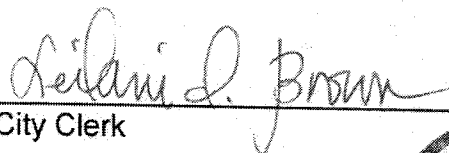
Section 2. The Hearing Officer finds that it is reasonable and necessary to grant the request as to the current client residents only residing in the Newport Coast Recovery facility under a contract to receive treatment services. It is condition of the denial of Request No. One of Reasonable Accommodation No. 2009-009 that during abatement proceedings current client residents only be allowed to remain at the facility until they choose to leave, or until their original intended stay is complete pursuant to the terms of their contract, whichever occurs first.

Section 3. This action shall become final and effective fourteen days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20 Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, APPROVED AND ADOPTED THIS 17th DAY OF SEPTEMBER, 2009.

By: 
Thomas W. Allen, Hearing Officer

ATTEST:


City Clerk

