



CITY OF NEWPORT BEACH

MEMORANDUM

TO: Mayor and Members of the City Council

FROM: Catherine Wolcott, Deputy City Attorney
Janet Brown, Associate Planner

DATE: December 2, 2009

RE: **Yellowstone Women's First Step House, Inc. Appeal – Reasonable Accommodation**

1561 Indus Street: RA No. 2009-004 (PA2008-105)
1621 Indus Street: RA No. 2009-005 (PA2008-106)
1571 Pegasus Street: RA No. 2009-006 (PA2008-107)
20172 Redlands Drive: RA No. 2009-007 (PA2008-108)

Staff Analysis and Recommendation Regarding Hearing Officer's Decision

This memorandum is prepared to accompany the staff report submitted by the Office of the City Attorney for the appeal to City Council of a Hearing Officer's decision denying a requested reasonable accommodation to Yellowstone Women's First Step House, Inc. ("Yellowstone").

The staff report submitted by the Office of the City Attorney for this appeal sets forth the background of the application process, the public hearings, the Hearing Officer's actions, the filing of this appeal, and the applicant's stated grounds for appeal. The City Attorney's staff report also discusses the "substantial evidence" standard of review that Newport Beach Municipal Code (NBMC) Section 20.98.025 establishes for appeals of Hearing Officer actions granting or denying reasonable accommodation. Information on the procedural background of the appeal will not be repeated in this memorandum. However, some of the information on the substantial evidence standard is summarized below to refresh recollections prior to reviewing the highlighted evidence.

A separate staff memorandum discusses the evidence in the administrative record that supports the Hearing Officer's decision to deny the four use permits. This memorandum focuses on a discussion of evidence in the reasonable accommodation hearings' administrative record that supports the Hearing Officer's decision to deny Reasonable Accommodation Request No. 1 and, to the extent the City Council decides to consider it, Request No. 2.¹ Staff concludes that there is substantial evidence in the record to support the Hearing Officer's decision.

¹ As Request No. 2 (request to exceed the occupancy limits of two persons per bedroom plus one additional person) could be granted only in conjunction with a use permit or reasonable accommodation that allowed Yellowstone to remain in operation in these locations, and all use permit applications were denied, the Hearing Officer did not make a ruling on this request, and did not adopt any resolution

ISSUE:

- Did substantial evidence support the Hearing Officer's denial of Yellowstone's applications for reasonable accommodation to be treated as a single housekeeping unit?
- Had the Hearing Officer denied the second request for accommodation, to allow Yellowstone to exceed the occupancy limitations of NBMC Section 20.91A.050, was there substantial evidence in the administrative record to support that decision?

RECOMMENDATION:

Staff recommends the City Council:

1. Review the administrative record, including the analysis in the staff reports for the public hearings, and the transcripts of the hearings; and
2. Deny the appeals filed by Yellowstone, and uphold and affirm the Hearing Officer's decisions to deny Reasonable Accommodation No.'s 2009-004, 2009-005, 2009-006 and 2009-007; and
3. Direct staff to prepare resolutions denying the appeals, sustaining and affirming the Hearing Officer's decisions, and adopt the resolutions at the next City Council meeting.

DISCUSSION:

I. SUBSTANTIAL EVIDENCE TEST GIVES DEFERENCE TO HEARING OFFICER'S FINDINGS

On February 20, 2009, and March 12, 2009, the City held public hearings before Hearing Officer Thomas W. Allen to consider Appellant Yellowstone Women's First Step House, Inc.'s ("Yellowstone") application for four use permits and three reasonable accommodations. On April 14, 2009, Hearing Officer Allen adopted Resolutions of Denial for the four use permits and one of the reasonable accommodation requests. The question for the City Council today is whether there is sufficient evidence in the administrative record to support the decisions the Hearing Officer made.

Under the substantial evidence test, the Council must uphold the decision of the Hearing Officer if there is substantial evidence in the record to support the decision that the Hearing Officer made. If the City Council does not find substantial evidence in the record to support the Hearing Officer's decision, the City Council may reverse or modify the decision, or remand the matter for further consideration, which remand shall include specific issues to be considered or a direction for a *de novo* hearing. (NBMC §20.98.025(A))

denying the request. However, Yellowstone has appealed the denial of the use permit, and if the City Council reverses, modifies or remands the Hearing Officer's decision to deny the use permit(s), the applicant intends to preserve its ability to have Request No. 2 reversed, modified or remanded as well. Therefore, staff will also highlight evidence in the administrative record that would have supported a denial of Request No. 2, had a use permit been granted.

The City Council is limited on appeal to a review of the record from the proceedings below. It may neither substitute its views for those of the Hearing Officer, nor reweigh conflicting evidence presented to him. The decisions of the Hearing Officer are given substantial deference and are presumed correct. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

“Substantial evidence” means “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (121 Cal.App.4th at 1498.)

The party seeking review (in this case, the applicant) bears the burden of showing that the Hearing Officer's decisions are not supported by substantial evidence in the record and the City Council “must resolve reasonable doubts in favor of the administrative findings and determination.” (121 Cal.App.4th at 1497.)

Substantial evidence may include facts, and expert opinions supported by facts, but not argument, speculation, unsubstantiated opinion, or clearly erroneous evidence. (121 Cal.App.4th at 1498.) The testimony of a single witness can constitute substantial evidence. (*Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 99)

This memorandum highlights some of the evidence in the record that is consistent with the standards of substantial evidence established in the court's decisions quoted above. Some of the evidence was provided through the written or verbal testimony of members of the public who had personal experience with Yellowstone as a neighbor. The staff reports for the public hearing presented evidence as well as arguments to the Hearing Officer, and staff report excerpts containing relevant evidence may be included here as well.

II. SUBSTANTIAL EVIDENCE IN THE ADMINISTRATIVE RECORD SUPPORTS THE HEARING OFFICER'S DECISIONS

As the basis of its appeal, Yellowstone contends that the findings required for granting the requested accommodations could have been made. Therefore, Yellowstone states, the City improperly denied Yellowstone's request that each of its facilities be treated as a single housekeeping unit. (Attachment 3, Yellowstone Appeal Applications)

Even if there was evidence in the record that could be interpreted as supporting findings required to grant the request to be treated as a single housekeeping unit, the question before the City Council is *not* whether the evidence, interpreted differently, might lead a decisionmaker to an opposite or alternate conclusion. Although facts in the record might lead the City Council to a conclusion different from the Hearing Officer's, the City Council may not overturn the Hearing Officer's decision on the grounds that an alternative conclusion based on the same set of facts might have been equally reasonable. It may not weigh conflicting evidence and determine which side has the better argument. Instead, the City Council must resolve all reasonable doubts in favor of the administrative finding and decision reached by the Hearing Officer. (*Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners of the Port of Oakland* (2001) 91 Cal.App.4th 1344, 1356.)

In order for the Hearing Officer to approve or conditionally approve an application for reasonable accommodation, he or she must be able to make *each* of the five required findings following a

noticed public hearing. If even one of the five required findings identified in NBMC Section 20.98.025(B) cannot be made, the Hearing Officer must deny the request.

As shown in the Resolutions of Denial of Yellowstone's Request No. 1, the Hearing Officer determined that only three of the five findings required by NBMC Section 20.98.025(B) could be made. This memorandum discusses some of the evidence in the record that supports the Hearing Officer's decision that the other two required findings could not be made.

The examples of evidence below are in no way an exhaustive list of the substantial evidence in the record; they are intended solely as an illustration for the City Council of the type of evidence in the extensive administrative record that support the decisions of the Hearing Officer.

REQUEST NO. 1 – REQUEST THAT FACILITY RESIDENTS BE TREATED AS A SINGLE HOUSEKEEPING UNIT, AS DEFINED BY NBMC SECTION 20.03.030.

Yellowstone requested an exemption that would allow each of its facilities to be regulated under the same rules as a single housekeeping unit. However, at some point in the application process, Yellowstone also asserted that their residents *actually* reside as a single housekeeping unit.

When individuals reside together in a manner that complies with the NBMC definition of a single housekeeping unit, the City will treat that household as a single housekeeping unit, regardless of whether the residents are related or unrelated, disabled or non-disabled. No reasonable accommodation is required for a group of disabled individuals living as a single housekeeping unit to reside anywhere in Newport Beach. Therefore, as a threshold matter, the Hearing Officer had to consider whether residents of Yellowstone facilities actually reside as single housekeeping units.

NBMC Section 20.03.030 defines a Single Housekeeping Unit as:

The functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit, including the joint use of and responsibility for common areas, and *sharing household activities and responsibilities such as meals, chores, household maintenance, expenses, and where, if the unit is rented, all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a single written lease with joint use and responsibility for the premises, and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager.*

NBMC § 20.03.030 (Italics added.)

Over the course of the application process, Yellowstone's characterizations of the use of its facilities changed. Initially, Yellowstone did not characterize its residents as living as a single housekeeping unit. In its May 20, 2008 Application for Reasonable Accommodation for each facility, Yellowstone stated, "*The residents at the property reside separately at the property and interact within the property. There is individual use of common areas. The residents are responsible for their own meals, expenses and chores. Each individual resides at the property*

*subject to a separate contractual arrangement with the applicant.” (HR, YS 00071.) (Italics added.)*²³

This description is not consistent with that of a group residing as a single housekeeping unit under the NBMC definition. While there may be interaction between Yellowstone residents, Yellowstone admitted that resident responsibility for meals, expenses and chores is individual rather than joint. Rather than residents choosing the makeup of the household together, each individual enters a separate contract with Yellowstone management to reside in the facility.

In a follow-up conversation with Planning staff, Yellowstone CEO, Dr. Anna Thames stated that the facility has no written leases with any of the residents, and that rental agreements with residents are verbal. (HR, YS 00041.) Besides supporting a finding that residents of Yellowstone do not determine the household makeup, this admission also shows that residents of Yellowstone do not occupy the dwelling units under a single written lease, or any written leases.

On January 29, 2009, in response to a request for clarification of inconsistencies by City staff, Yellowstone again stated that residents of Yellowstone “reside separately at the property. There is a common area however each resident is responsible for their own meals, expenses, and chores.” (HY, YS 00180.)

In the same January 29, 2009 document, Yellowstone said that their request to be treated as a single housekeeping unit was necessary,

. . . because the Property is not transient or institutional in nature such that it fits the definition of a non-licensed residential care facility. Instead the Property more accurately fits the definition of a Single Housekeeping Unit as the term is defined in Section 20.03.030. Residents are the functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit. Like a Single Housekeeping Unit, there is a common area and *each resident is responsible for their own meals, expenses and chores . . . Also, the makeup of the Property is determined by the residents of the unit rather than the property manager.* (HR, YS 00181)(Italics added.)

In analyzing the request for reasonable accommodation, staff noted the conflicting information submitted by the applicant on who determined the household makeup, and conveyed its concern to Yellowstone. In response, Yellowstone stated on February 13, 2009 that,

. . . the materials submitted to the City in May 2008 reflect some inaccurate information . . . *Yellowstone does not have a contractual relationship with the residents of its properties.* With respect to the residents of the four Yellowstone homes in Santa Ana Heights, Yellowstone's position is correctly stated in a letter to the City dated January 29, 2009: “the makeup of the Property is determined by the residents of the unit rather than the property manager.” More specifically, Yellowstone's Board of Directors does not determine who

² All references to the administrative record are designated “HR, YS” followed by the page numbers. The designation means Hearing Record, Yellowstone.

³ Yellowstone submitted separate but substantially similar applications for each facility. Where information submitted for each facility is identical or substantially similar, this memo will cite to only one location of the information in the administrative record.

resides in each of the four homes. New residents are introduced and approved by the current residents during house meetings or they are not accepted. (HR, YS 00185 86) (*Italics added.*)

The February 20, 2009 staff reports stated:

Staff is troubled by the contradictory information submitted regarding whether the facility operator or the residents determine the household makeup. Given that both the May 20, 2008 reasonable accommodation application and the applicant's CEO stated that the applicant determines the household makeup, applicant's counsel's assertion in the January 29, 2009 letter that "the makeup of the Property is determined by the residents of the unit rather than the property manager" is difficult to accept. (HR, YS 00041 – 42)

At the March 12, 2009 public hearing, Yellowstone's counsel argued that Yellowstone would accurately be described as a single housekeeping unit. He read the NBMCs definition of a single housekeeping unit into the hearing record. He stated that the residents are the functional equivalent of a traditional family, and they were an interactive group. He noted there was a common area, and stated that each resident is responsible for their own meals, expenses and chores. However, Yellowstone's counsel did not assert at the hearing that Yellowstone was not in a direct contractual relationship with its residents, or that the residents occupied the dwelling units under a single written lease, or that Yellowstone management did not determine the household makeup. (HR, YS 01525 – 01528)

Near the end of the March 12 hearing the Hearing Officer stated that he was persuaded by staff's analysis with respect to the single housekeeping unit issue. (HR, YS 01556) The Hearing Officer's Resolution of Denial states, "Applicant's resident clients may be an interactive group of persons jointly occupying a single dwelling unit who share common areas, but the applicant's own submittals indicate there is no joint responsibility for meals or expenses, no single written lease (or any written lease at all), and the makeup of the household is determined by the applicant rather than the residents." (HR, YS 01636)

With this threshold issue resolved, the Hearing Officer determined that two of the five findings required by NBMC Section 29.98.025(B) could not be made. Some of the evidence in the administrative record that supports the Hearing Officer's decision is listed below:

- A. NBMC §20.98.025(B)(2) - Finding No. 2: The requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling. HEARING OFFICER'S DETERMINATION: This finding cannot be made.**

Discussion:

The Hearing Officer's Resolution of Denial of Request for Reasonable Accommodation No. 1 stated that the finding of necessity could not be made. (HY, YS 01635) The Hearing Officer appears to have based his decision on facts presented in the February 20, 2009 staff report's analysis, and from staff's testimony at the March 12, 2009 public hearing that the request to be treated as a single housekeeping unit was a request that was broader than necessary to afford disabled residents an equal opportunity to use and enjoy a dwelling. (HR, YS 01556)

Examples of evidence in the record that support the Hearing Officer's decision:

Request to be treated as a single housekeeping unit is a broader request than necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling.

- Staff report for February 20, 2009 use permit and reasonable accommodation hearing – “[A] request to be considered a Single Housekeeping Unit is essentially a request to be exempted from all of the provisions of Ordinance No. 2008-05 which place any sort of reasonable regulation on the operations of residential care facilities. This is not necessary, because there are many more narrowly tailored accommodations that could enable facility residents to enjoy the housing of their choice without depriving the surrounding neighborhood of reasonable conditions that mitigate the adverse secondary impacts that emanate from this facility.” (HR, YS 00040)
- Staff testimony at March 12, 2009 hearing (Wolcott) – “Would disabled individuals be unable to live in a dwelling without this specific accommodation? . . . This is an unnecessarily broad exemption, and we can find other ways to accommodate that don’t so severely undermine our Zoning Code. Alternative requests (that are more reasonable) can be formulated that could get to that result.” (HR, YS 01522)

B. NBMC §20.98.025(B)(4) - Finding No. 4: 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. HEARING OFFICER’S DETERMINATION: This finding cannot be made.

Discussion:

When a reasonable accommodation request is made, the City must grant the request if it is both *necessary* to afford a disabled individual an equal opportunity to use and enjoy a dwelling, and *reasonable*. A request may be considered *unreasonable* if granting the requested accommodation would result in an undue financial or administrative burden on the City, or a fundamental alteration in the nature of a City program. “Fundamental alteration” has also been described as “undermining the basic purpose the requirement was put in place to achieve.”

Examples of evidence supporting determination that granting the accommodation would alter the fundamental nature of the City’s zoning program (including evidence of secondary impacts that use permit or reasonable accommodation conditions would attempt to mitigate, as single housekeeping units are not subject to such conditions.):

- Staff report for February 20, 2009 hearing –

The purpose of the NBMC’s definition of Single Housekeeping Unit is to allow staff to determine whether groups of related or unrelated individuals are living together in a dwelling as a single housekeeping unit. This definition is necessary because of the persistent attempts by landlords to establish illegal boarding houses in dwellings within the City.

Groups living as a single housekeeping unit can live together in any residential zone in Newport Beach. Groups not living as a single housekeeping unit are

prohibited from establishing residences in any of the City's residential zones. There is, however, an important exception to the total prohibition of groups not living as a single housekeeping unit – groups not living as a single housekeeping unit in residential care facilities of any size.

Essentially, all residential care facilities have already received a reasonable accommodation from the NBMC's restrictions on groups not living as a single housekeeping unit. The NBMC provides many opportunities for new facilities to establish . . .

Although the residents of the residential care facilities receive preferential treatment because of their disabled status, the NBMC's Zoning Code also applies regulations . . . to ensure that the fundamental purposes of the Zoning Code can be achieved, and so that adverse secondary impacts higher density residential care facilities have on the surrounding neighborhood can be mitigated.

If the facility is treated as a Single Housekeeping Unit, it is entirely exempt from any of the reasonable controls the City might place on it. The City would be unable to make any reasonable effort to reduce the adverse secondary impacts such as noise, overcrowding, and unruly behavior by residents of applicant's facility to the detriment of neighbors, in addition to finding solutions to the applicant's disproportionate consumption of available on-street parking, and the overconcentration of facilities within a single block . . .

(HR, YS 00014)

- *Staff report for February 20, 2009 hearing – “. . . neighbors of the facilities . . . report increasing negative secondary impacts on the neighborhood as more of the applicant's facilities established there in recent years. The impacts reported include:*
 - *Litter in the neighborhood which complainants attribute to the applicant's facilities, including cigarette butts, soda cans and beer cans and bottles;*
 - *Family and other visitors to the facilities;*
 - *Facility residents traveling in groups between one facility and the others;*
 - *Meetings held regularly at one or more of the applicant's facilities, with outside attendees;*
 - *Excessive use of on-street parking by facility residents and their guests;*

(HR, YS 00045)
- *Correspondence from neighbor (J. Walker) for February 20, 2009 hearing – “In closing I would comment that I feel a change in the atmosphere of the neighborhood since Yellowstone Women's First Step House Inc. has purchased properties in our development. The feel of a residential neighborhood is diminished. Today there is a much stronger feel of an apartment complex or even a hotel/motel complex . . . I believe that facilities could be run in a residential neighborhood, but careful attention to detail is paramount. The facilities must be closely supervised 24/7. Policies and procedures to ensure the temporary residents exhibit a demeanor that is respectful of the permanent residence should be strongly considered . . . While much of what I would like to see put in place falls to (Yellowstone) . . . I also feel that it is the responsibility of the city to include provisions for review, monitoring and reporting, on a routine basis, those conditions and*

stipulations established and defined by any use permit that might be granted.” (HR, YS 01104 – 05)

Evidence concerning parking and traffic impacts:

- Staff report for February 20, 2009 hearing – *“The Institute of Transportation Engineers (ITE) establishes and publishes standards for trip generation rates based on the use classification of a site. In the case of a single family dwelling, the standard trip rate is based on 9.57 average daily trips per dwelling. Trip rates for residential care facilities are based on 2.74 average daily trips per each occupied bed. Based on these standards, a 12-bed residential care facility would generate approximately 32.88 average daily trips. The evidence shows this facility will generate average daily trips substantially in excess of surrounding single-family dwellings.” (HR, YS 00046)*

“ . . . a 17-bed residential care facility would generate approximately 47 average daily trips.” (HR, YS 00315)

“ . . . an 18-bed residential care facility is estimated to generate approximately 49.32 average daily trips substantially in excess of surrounding single family dwellings.” (HR, YS 00584)

- Applications for use permits submitted May 20, 2008 – In Section H (Transportation and Parking) of the application, the question “Will clients residing on-site be allowed to use personal vehicles and/or keep them on-site or nearby?” was answered “no.” The question “If No, describe other modes of transportation that clients will use (bus, other transit, bicycle, other)” was answered “Bus – Carpools, bikes.”) (HR, YS 00909)
- Applications for reasonable accommodation submitted May 20, 2008 (HR, YS 00886-87):
 - In answer to City’s Question 10, “Describe available on-site parking resources and the staff and visitor parking plans,” the applicant answered “The property has a two-car garage and driveway. This parking is ample for all of the property’s needs. The residents at the property do not have automobiles and rely upon public transportation and/or carpooling.”
 - In answer to City’s Question 11, “Describe client’s ability to drive and operate a vehicle while residing at the facility,” the applicant responded, “The tenants’ vehicles are not allowed to be parked and/or utilized at the property.”
 - In answer to City’s Question 12, “Does the facility provide transportation services (i.e. transportation to school, jobs, medical treatment, or other activities)?” the applicant answered, “No.”
- Correspondence from applicant’s counsel, January 29, 2009 – *“Parking on the Property is reserved for the manager and the assistant manager, thus the maximum number of cars on the Property at any one time will be two. Residents are not permitted to park on the Property. Visitors are not permitted on the Property therefore there are no visitor parking issues . . . The residents do not use cars. Instead, they rely on public transportation to and from the Property. . . Though the home generally does not provide*

transportation services, the home does provide some basic transportation to the nearby treatment facility and to St. John church. Both locations are within ten minutes of this home. There is a morning pickup at 8 a.m. and an evening drop off at 4 p.m. This is the only transportation provided. The vans that transport the residents are not parked on site. When not in use, the vans are kept in another city.” (HR, YS 01002)

- Correspondence from applicant's counsel, February 13, 2009 – “It has recently come to my attention there may be discrepancies between materials Yellowstone submitted with respect to its use permit application and requests for reasonable accommodation . . . The purpose of this correspondence is to clarify these inconsistencies . . . Parking In May 2008, when the original Yellowstone use permit and reasonable accommodation applications were submitted to the City, Yellowstone requested that four cars be permitted to park at the 1561 Indus property. There is adequate room for four cars to park at 1561 Indus, however, only the two resident managers for the home park on site. With respect to the three other Yellowstone properties, it has consistently been Yellowstone's position that only the two resident managers of the homes are allowed to park vehicles on site.” (HR, YS 01011)
- Correspondence from neighbor (J. Walker), submitted for February 20, 2009 hearing – “While Yellowstone Women's First Step House Inc. group may tell the city that ‘clients’ are not allowed to have vehicles during residency . . . [d]uring the months that the facility next to my home has been in operation I have had ‘clients’ park in front of my property rather than in the empty driveway of the Yellowstone Women's First Step House Inc. facility . . . There are vehicles coming and going, doing drop offs, or ‘visitor’ standing or parking, and the duration of this activity goes from very early in the morning (5 am) to very late at night (past 11pm and sometimes well past midnight.) And then there are the weekly evening meetings that are held at some of these facilities. While occasionally (other) residences of the neighborhood may have a gathering, party or club meeting, these are **not** routine. The parking impact to the surrounding street of the meeting house is significant.” (HR, YS 01102 – 03)
- Correspondence from neighbor (Groskreutz), submitted for February 20, 2009 hearing – “Although we have been told by Yellowstone officials at their own meetings that none of their residents are allowed to drive, we have evidence that the exact opposite is true, there are residents who are driving cars or trucks and parking them on our streets, many times loaded with personal possessions for extended periods of time.” (HR, YS 01039)
“On their meeting nites and during the day and on weekends, we cannot use any parking in front of our own homes because the spaces are full of attendees for these meetings. I have posted notes on vehicles on several occasions during their meetings in the past years, telling the owners that the next time they park illegally I am going to have their car towed because it was blocking my driveway.” (HR, YS 01039)
- Correspondence from neighbor (Robertson) submitted for February 20, 2008 hearing – “. . . my biggest concern are the assertions that (a) transportation is not provided; and (b) that residents are not allowed to have cars. My personnel observations are: (a) that Yellowstone operates two large capacity vans on a routine basis. Over the years I have seen these vans pick up and drop off residents at both the men's and women's residences, in particular 1561 Indus Street and 20172 Redlands Drive. These vans (one of which has ‘VANPOOL’ stenciled on the windows) have lately been parked each night in the neighborhood, typically alongside 20172 Redlands Drive near the intersection of

Redlands Drive and Pegasus Street. Additionally I have observed private vehicles pick-up and drop off multiple residents at 20172 Redlands. These facts on the ground seem to contradict statements made by the applicant.” (sic) (HR, YS 01090)

- Correspondence from neighbor (Harvey) for February 20, 2009 hearing – *“Contrary to Yellowstone’s past assertion that its residents do not park cars in our neighborhood, we have observed that many of their residents actually do park cars on our streets, especially along Pegasus Street adjacent to the 1571 Pegasus Street facility and on Redlands Drive adjacent to the 20172 Redlands Drive facility. In addition, a large passenger van associated with Yellowstone is often parked at night across the street from the 20172 Redlands Drive facility. We also observe numerous cars entering and leaving our neighborhood containing visitors to facility residents. These activities generate traffic out of proportion to the number of facilities.” (HR, YS 0111)*
- Testimony (B. Walker) at February 20, 2009 hearing – *“[W]e’ve had to go over and pound on the door ourselves to say, you know, ‘Get your stinking car out of our driveway.’ . . . there is a problem with the amount of concentration of the vehicles that we have associated with the various houses.” (HR, YS 01182)*
- Testimony (McDonough) at February 20, 2009 hearing – *“The vehicles that transport them in the morning, there’s one car after another picking people up. In the afternoons, there’s cars coming one after another. They say there’s no parking problem. I’ve had cars parked blocking my driveway. Several of the residents that have cars have blocked the driveway.” (HR, YS 01192 – 93)*

Evidence concerning visitors, interaction between residents of different facilities, and meetings held onsite:

- Correspondence from applicant’s counsel, January 29, 2009 – ***“Interaction Within the Property:** . . . [A]lthough Yellowstone owns four such homes in the Newport Beach area, there is no interaction between the homes. In other words, residents of the Property do not meet with the residents of other Yellowstone properties for dinners or other gatherings. Each home has its own residents and the residents of the home never interact with residents of a different home.” (HR, YS 01002)*
- Correspondence from applicant’s counsel, February 13, 2009 – *“It has recently come to my attention there may be discrepancies between materials Yellowstone submitted with respect to its use permit application and requests for reasonable accommodation . . . The purpose of this correspondence is to clarify these inconsistencies . .*

Group Meetings Neither group treatment meetings nor individual treatment meetings occur on any of the four Yellowstone properties. All treatment is performed off site in Costa Mesa. The only meetings that occur at each of the four homes are weekly house meetings with the residents to discuss potential new residents and other administrative matters. . .

Visitors Visitation with family and friends occurs on Sundays at Yellowstone’s Costa Mesa facility.” (HR, YS 01010 – 11)

- Correspondence from neighbor (Robertson) for the February 20, 2009 hearing – *“The report states that the applicant does not allow residents on any other Yellowstone property. However, this statement is negated by personal observations of residents from at least three of the four residences co-mingling at each other’s residences. I have seen women from the Pegasus house walk up to (the men’s facility at) Redlands, and on one occasion observed several women leave the Redlands house early in the morning before 7:00 a.m. . . I often see residences from the Redlands house walk up to the house at 1621 Indus. Additionally on at least two occasions I have seen large groups walk up to the house on 1621 Indus mid-week, mid-morning. The assumption being made is that there are large group functions . . . being held onsite.”* (sic) (HR, YS 01090)
- Correspondence from neighbor (Walker) for February 20, 2009 hearing– *“They did not have a meeting at the Redlands house last week and have not for about 3 weeks, but when they do, the meetings seem to start about 6:00 and breakup in about 90 mins. . . . [T]hey have held meetings there that seemed to draw about a dozen cars.”* (HR, YS 01091)
- Correspondence from neighbor (McDonough) submitted for February 20, 2009 hearing – *“Trash, bottles and cigarette butts on the street and parkways has increased, parking of vehicles for several days at a time is common, and groups from meetings mill about talking loudly. These issues cause a negative impact on the neighborhood.”* (HR, YS 01042)
- Correspondence from neighbor (Harvey) for February 20, 2009 hearing – *“On several occasions we have observed a line of men walk from the Yellowstone facility at 20172 Redlands Drive, enter the adjacent Yellowstone facility for women at 1621 Indus Street, and stay there for more than an hour. We believe that this indicates the facility is providing on-site services, for which a State license is required.”* (HR, YS 01111)
- Testimony (B. Walker) at February 20, 2009 hearing – *“This house . . . 1561 is the only one of the four that has a swimming pool. And during the summer, the men come from the men’s house, people come from the other houses, come over and have swimming parties . . . we were led to believe that only these people would be using that property, and that’s just not the truth . . . [A]t the 1621 house, for years, there have been what appeared to be orientation sessions . . . that have 20, 30, 40 people have been brought.”* (HR, YS 01181)

Evidence concerning impacts of increase in density of population:

- Correspondence from neighbor (B. Walker) for February 20, 2009 hearing – *“My primary objection to these use permit requests is the substantial increase in density that this represents for this neighborhood and the associated problems that come with a higher density usage than was originally planned for.*

“The use permits request permission to raise the density from the original design of a probable max of 6 per household to 18 (plus supervision?) per household. . .

“The increase in density has many environmental effects on the neighborhood. When these homes were planned, the target household was for a family unit of 5-6 with 5

bedrooms and 3 baths (the typical floor plan, encompassing about 2400 square feet) and a two car garage . . .

“Parking will become a worse problem with the addition of more cars since the houses only have 2 off-street parking spaces at most (the garages are filled with ‘stuff’ and not used for parking). When the house at 20172 has meetings (previously every Tuesday at about 6:00 p.m.) both sides of two streets were lined with cars, passage was more difficult.

“Waste generation per house is substantially increased with several of the houses putting out 4 overflowing 90 gallon trash cans per week . . .

“Late night/early morning traffic as group home residents who do not drive are picked up and dropped off or just sitting in the street as people talk – not a big deal with regular density, but with a doubling of the density, it just happens more often and becomes an irritant.” (HR, YS 01092)

- Correspondence from neighbor (J. Walker) for February 20, 2009 hearing – **“Infrastructure . . .specifically sewers and storm drains. The sewer and storm drain systems for this neighborhood were designed 40+ years ago. In my 20+ years of residency backups have been an issue. . . Increasing occupancy density 3x is a frightening proposal. What has/will the city do to help mitigate the impact for an occupancy rate well over the imagined occupancy level at time of systems design?”** (HR, YS 01102)

Evidence concerning change of character of neighborhood, and institutionalization:

- Correspondence from neighbor (Devine) for February 20, 2009 hearing – *“I have gathered the number of residents on each of the streets for comparison.*
 - *“On Pegasus Street, where there are 28 homes, **26.8% of the population** on those two blocks would be recovering alcoholics and addicts if the exception was permitted.*
 - *“On Indus Street, where there are 14 homes total, **47% of the population** on that street would be recovering alcoholics or addicts.*
 - *“On Redlands Street, **75 percent of the population** would be recovering addicts and alcoholics if the application was approved, and the exemption permitted.*

*“Considering those are three of the five streets in our neighborhood, that is a huge change in the demographics of our neighborhood. **Can you really say it’s a NIMBY issue if over half of our population is short-term recovering addicts and alcoholics?***

“Finally, I would like to remind everyone that the normal stay indicated on the Yellowstone Recovery website is 90 days. If each of these applications is granted, and the exemptions allowed, between these four homes that would mean 264 people coming into our neighborhood each year who are not long-term residents. On those same streets, there are 104 people who are permanent residents.

“How can you retain the residential character of a neighborhood if 71% of the people coming and going in the year are NOT residents for more than 90 days?” (HR, YS 01115)

REQUEST NO. 2 – REQUEST TO BE EXEMPTED FROM OCCUPANCY STANDARDS OF NBMC SECTION 20.91A.050

Discussion:

As mentioned in Footnote 1, above, the Hearing Officer did not rule on this request, because granting the request to permit more residents than use permit conditions could allow was related to Yellowstone's use permit conditions, and all use permits were denied. However, the following information and evidence before the Hearing Officer would have supported a denial of Request No. 2.

- A. NBMC §20.98.025(B)(2) - Finding No. 2: The requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling.**

Examples of evidence that would have supported a decision that the requested accommodation was not necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling:

(Note: Staff recommended granting the accommodation as to *current* residents of Yellowstone facilities, so that disabled individuals were not deprived of their current housing, and to allow them to complete their intended stay. Evidence that the accommodation is not necessary pertains to prospective facility residents.)

- Staff report for February 20, 2009 public hearing – *“As to prospective residents (at the facilities) applicant's counsel states that the accommodation is necessary because the prospective residents (of the facilities) have financial constraints caused by their disability, and would be unable to afford to rent a dwelling if the additional bed(s) (at the facilities) were unavailable to them because of the occupancy restrictions of NBMC Section 20.91A.050(C)(2) (HR, YS 00863 – 64) . . .*

“It is plausible that persons in early recovery from addiction tend to have lower incomes than they had before addiction temporarily reduced their employment opportunities. This will necessitate shared living arrangements in one form or another. Adding beds (at the facilities) could afford . . . additional disabled individual(s) the opportunity to use and enjoy a dwelling.

“The analysis does not stop at the financial needs of the potential residents, however. Were that the case, the City might be obligated to authorize an unlimited number of residents at the applicant's facilities at greatly reduced rents; the population of recovering alcoholics with financial limitations is vast. Even the Ninth Circuit has noted that mandating lower rents for disabled individuals would probably not be considered a reasonable request. (See Giebler v. M&B Associates, 343 F.3d 1143, 1154 (9th Cir. 2003))” (HR, YS 00864 – 65)

- Staff report for March 12, 2009 hearing – *“The applicant states that each facility requires 15 residents in order to be financially viable, and provides a general summary of average income and expenses for all four facilities. In some federal cases in which a sober living or other group home made a similar statement in support of its request for an accommodation allowing additional residents, courts found that the accommodation should be granted. However, the courts generally consider more detailed, verified financial information to reach that conclusion. (See Oxford House-Evergreen v. City of Plainfield, 769 F.Supp. 1329 (1991))*

“The applicant has not submitted financial information specific to each facility, but it has supplied an average cost analysis for its four facilities overall. The analysis was not signed under penalty of perjury, and although staff requested it repeatedly, the applicant did not submit specific evidence such as mortgage statements or utility bills by the date this report was prepared. Therefore, staff has performed a financial needs analysis based on the information supplied by the applicant, and other information publicly available on the applicant's website.

“The applicant states that in general, its weekly fees are based on a sliding scale from \$50 to \$160 per week, with an average rent of \$100 per resident per week. With 16 residents (the number of resident clients; facility managers do not appear to pay rent) the applicant reports the average monthly income from each house is \$6,400.

“The average monthly expense for each house is reported by the applicant to be around \$6,200, with an average mortgage of \$4,500/month, \$800/month for utilities . . . and \$900/month for food (the May 20, 2008 reasonable accommodation application states that residents are responsible for their own meals; the \$900 may represent basic supplies.) Applicant reports an average monthly expense of \$6,200, leaving only a \$200 monthly profit. Applicant has stated that it relies on contributions from the community to keep it from operating at a loss.

“ . . . Yellowstone's own website indicates that income and expense calculations may be inaccurate. The website's 'Our Fees' page (dated 2008) states that fees for sober living are \$160 - \$180 per week. Using the applicant's own reporting formula, this represents an average of \$170 per resident per week. With 16 paying residents (resident staff may not be paying rent), this would result in an average monthly income per house of \$10,880. If the reported average expense of \$6,200 is accurate, each facility housing 16 residents generates a monthly profit of \$4,680. (\$56,160 per year for each house of the three with 16 residents; or an estimated \$168,480 total for the three facilities located at 1621 Indus Street, 1571 Pegasus Street, and 20172 Redlands Drive.)

“For the facilities currently housing 16 paying residents, if the resident count were reduced to 11 paying residents (of the maximum 13 occupants permitted under the operating standards, two are Yellowstone staff), the monthly income would be \$7,480. Without knowledge of the actual mortgage and utility costs, staff cannot say whether this facility would actually operate at a monthly profit of approximately \$1,280, or approximately \$15,360 per year (\$46,080 total for three facilities currently housing 16 residents each), but this profit range seems sufficient for a non-profit that raises funds from the community to keep from operating at a loss. Therefore, staff does not agree with the applicant's contention that it needs 15 residents at each facility to be financially viable. ” (HR, YS 001359 - 60)

B. NBMC §20.98.025(B)(4) - Finding No. 4: 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.

- Staff report for February 20, 2009 hearing – *"Permanently allowing five additional beds (at one home) in excess of the highest number allowed under the operational standards of the NBMC could undermine the basic purpose which the requirement seeks to achieve. The basic purpose of the bed count limits is to draw a line at a reasonable density for a business providing residential recovery services within a residential neighborhood. Five additional beds (at one home) can undermine the fundamental purpose of the zoning program, unless Yellowstone's program impacts are eliminated or substantially reduced at other facilities.*

"Appellant may argue that five extra beds does not undermine the basic purpose the bed count restriction seeks to achieve, but the line must be drawn somewhere. The City Council found that line was two residents per bedroom plus one additional resident. These regulations are to ensure that the fundamental purposes of the Zoning Code can be achieved, and so that secondary impacts of the higher density residential care facilities on the surrounding neighborhood can be mitigated.

". . . [I]f the use permits are granted at each facility, and each facility receives the reasonable accommodation requested here, the extra 16 individuals could trigger an overconcentration that contributes even further to the change in the character of the neighborhood. The residents living in five (sic) recovery facilities located between 100 and 400 feet from each other are likely to create a quasi-institutional environment within the neighborhood.

"In a joint statement on the Fair Housing Act, the Department of Justice and the Department of Housing and Urban Development have recognized it would adversely affect persons with disabilities and would be inconsistent with the object of integrating persons with disabilities into the community if a neighborhood came to be composed largely of group homes. They agree that it is appropriate to be concerned about the setting for a residential care facility, and that a consideration of overconcentration may be considered in this context." (HR, YS 00867 – 68)

- Staff report for February 20, 2009 public hearing – *"The applicant's possible misstatements of easily verifiable facts (such as policies about no meetings, no visitors, and no inter-facility interaction), and early written and oral representations that two of the facilities held ADP licenses (which they never had), causes staff concern about the overall responsibility of the operator, and its ability to successfully manage both its residents and the negative impacts its facilities have on the surrounding neighborhood.*

"Allowing facilities that are not well run to operate with a high concentration of residents can lead to a further alteration in the character of the neighborhood. If a use permit in this location is granted, it may be necessary to scale back rather than expand the population of this facility, and increase supervision and enforcement of existing house rule to mitigate the impact of the facility on the surrounding neighborhood." (sic) (HR, YS 00869 – 70)

- Staff report for February 20, 2009 public hearing – *“The Institute of Transportation Engineers (ITE) establishes and publishes standards for trip generation rates based on the use classification of a site. . . Based on these standards, an 18-bed residential care facility would generate approximately 49.32 average daily trips. A 13-bed facility would generate 35.62 average daily trips, arguably an appreciable difference in traffic generation.”* (HR, YS 00871)

CONCLUSION:

Staff concludes that there is substantial evidence in the record to support the Hearing Officer's decisions to deny with prejudice Reasonable Accommodation No. 2009-004, Reasonable Accommodation No. 2009-005, Reasonable Accommodation No. 2009-006 and Reasonable Accommodation No. 2009-007.

Staff recommends that the City Council deny the appeals submitted by Yellowstone, sustaining and affirming the Hearing Officer's decisions, and direct staff to prepare resolutions for adoption at the next City Council meeting.

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CITY OF NEWPORT BEACH

MEMORANDUM

TO: Honorable Mayor and Members of the City Council

FROM: Janet Johnson Brown, Associate Planner
Catherine Wolcott, Deputy City Attorney

DATE: December 2, 2009

RE: **Yellowstone Women's First Step House, Inc. – Staff Analysis and Recommendation Regarding Hearing Officer's Decisions**

1561 Indus Street: Use Permit No. 2008-034 (PA2008-105)
1621 Indus Street: Use Permit No. 2008-035 (PA2008-106)
1571 Pegasus Street: Use Permit No. 2008-036 (PA2008-107)
20172 Redlands Drive: Use Permit No. 2008-037 (PA2008-108)

This memorandum has been prepared to accompany the staff report submitted by the Office of the City Attorney regarding the appeal of the Hearing Officer's decision to deny with prejudice the use permits submitted by Yellowstone Women's First Step House, Inc ("Yellowstone"). This memorandum is intended to highlight some of the evidence presented to the Hearing Officer in the administrative record and during public testimony that supports the Hearing Officer's decision.

The staff report submitted by the Office of the City Attorney provides the background of the application process, the public hearings, the Hearing Officer's actions, the filing of these appeals, and the applicant's stated grounds for the appeals. The City Attorney's staff report also discusses the "substantial evidence" standard of review that Newport Beach Municipal Code (NBMC) Section 20.98.025 establishes for appeals of Hearing Officer actions granting or denying reasonable accommodation.

ISSUE:

Did substantial evidence support the Hearing Officer's denial of Yellowstone's applications for use permits to allow the continued operation of existing unlicensed adult residential care facilities for each of its four Newport Beach locations?

RECOMMENDATION:

Staff recommends the City Council:

1. Review the administrative record, including the analysis in the staff reports for the public hearings, and the transcripts of the hearings; and

2. Deny the appeals filed by Yellowstone, and uphold and affirm the Hearing Officer's decisions to deny with prejudice Use Permit No. 2008-034, Use Permit No. 2008-035, Use Permit No. 2008-036 and Use Permit No. 2008-037; and
3. Direct staff to prepare resolutions denying the appeals, sustaining and affirming the Hearing Officer's decisions, and adopt the resolutions at the next City Council meeting.

BACKGROUND:

Yellowstone operates unlicensed residential care facilities providing a sober living environment at four locations in the West Santa Ana Heights area of Newport Beach. The facilities are located in four single-family homes in the Santa Ana Heights Specific Plan, in an area designated RSF (Residential Single Family). Yellowstone applied for four separate use permits that would allow them to continue to house 12 female residents at 1561 Indus Street, 17 female residents at 1621 Indus Street, 18 female residents at 1571 Pegasus Street, and 18 male residents at 20172 Redlands Drive, for a total of 65 resident clients. All four properties are located within approximately 320 feet or less of each other.

West Santa Ana Heights was an unincorporated area under the jurisdiction of the County of Orange at the time the four facilities were established. The City of Newport Beach completed the annexation of West Santa Ana Heights on January 1, 2008, prior to the adoption of Ordinance 2008-05. These uses were still in operation at the time the City enacted Ordinance No. 2008-05, and the effective date of the Ordinance on February 22, 2008.

NBMC Section 20.91A.020 requires nonconforming uses in residential districts that were rendered nonconforming by the adoption of Ordinance No. 2008-05 to apply for and receive a use permit to continue operation at their current locations. Yellowstone's facilities would be classified as a "Residential Care Facility, General-Unlicensed," and are located in a RSF (Residential Single Family) district where, under Ordinance No. 2008-05, such uses are not permitted or conditionally permitted. Yellowstone applied for a use permit for each of its Newport Beach facilities within the time period required by Ordinance No. 2008-05. Yellowstone also applied for a general reasonable accommodation, but did not initially request an exemption from any specific provision of the NBMC. (Further procedural history of Yellowstone's reasonable accommodation applications is detailed in the staff report submitted by the Office of the City Attorney for this matter.)

REASONS FOR APPEAL AND SUBSTANTIAL EVIDENCE TEST

Yellowstone filed applications to appeal the Hearing Officer's decision to deny the use permits to the City Council stating as the reason for appeal of the denial of each application that *"The home operates such that the required findings to grant a Conditional Use Permit can be made. Therefore, the City of Newport Beach improperly denied the request, with prejudice."*

Pursuant to NBMC Section 20.91A.040, an appeal of a Hearing Officer's decision on use permit applications for property located in residential districts is subject to the "substantial evidence" standard of review. On appeal, the City Council reviews the administrative record from the proceedings, and determines whether the Hearing Officer's decision was supported by substantial evidence in the record. Substantial evidence may include facts, and expert opinions supported by facts, but not argument, speculation, unsubstantiated opinion, or clearly erroneous evidence. If the Hearing Officer's decision is supported by substantial evidence, it must be

sustained by the City Council. If the Hearing Officer's decision is not supported by substantial evidence, the Council may reverse, modify and/or remand the matter to the Hearing Officer.

Even if there was evidence in the record that could be interpreted as supporting the findings required to grant the use permits, the question before the City Council is not whether the evidence, interpreted differently, might lead a decision-maker to an opposite or alternate conclusion. Although facts in the record might lead the City Council to a conclusion different from the Hearing Officer's, the City Council may not overturn the Hearing Officer's decision on the grounds that an alternative conclusion based on the same set of facts might have been equally reasonable. For a complete discussion of the kind of evidence that is considered "substantial evidence" please refer to the staff report submitted by the Office of the City Attorney.

This memorandum presents discussion and highlights of some of the evidence provided in the administrative record for the use permit hearings in support of the Hearing Officer's decision on March 12, 2009, to deny with prejudice Use Permit No. 2008-034, Use Permit No. 2008-035, Use Permit 2008-036 and Use Permit 2008-037.

USE PERMIT HEARINGS AND HEARING OFFICER'S DECISION:

Discussion:

A noticed public hearing was conducted by the Hearing Officer on February 20, 2009, taking testimony from staff, the applicant and members of the public. At the conclusion of the hearing, the Hearing Officer concurred with staff's recommendation to deny Use Permit No. 2008-034 for the facility located at 1561 Indus Street, and Use Permit No 2008-036 for the facility located at 1571 Pegasus Street, subject to the findings in the staff reports, and directed staff to prepare resolutions for denial with prejudice. The Hearing Officer also concurred with staff's recommendation to approve Use Permit No. 2008-035 for the facility located at 1621 Indus Street, and Use Permit No. 2008-037 for the facility located at 20172 Redlands Drive at a reduced bed count of 15 clients per facility. The hearing was continued to March 12, 2009, to adopt the resolutions and take action on the applications for requests for Reasonable Accommodation No.'s 2009-04, 2009-05, 2009-06 and 2009-07.

At the March 12, 2009 public hearing, staff recommended that the Hearing Officer reopen the public hearing to take testimony from the applicant, staff and the City's legal counsel, and the public.¹ (HR, YS 01475-81) Staff made the request to reopen the public hearing because of testimony provided by the applicant's legal counsel during the February 20, 2009 hearing in which Yellowstone cited a number of California cases, and appeared to assert they had vested rights as a nonconforming use that should excuse them from having to apply for a use permit. (HR, YS 01156-65) The Hearing Officer ruled that the hearing be reopened for the purpose of reviewing and considering the position taken by staff. (HR, YS 01481)

At the conclusion of the March 12, 2009 hearing, the Hearing Officer determined the Yellowstone facilities were not lawfully established uses when they were established within the County of Orange unincorporated territory known as West Santa Ana Heights, and were

¹ All references to the administrative record are designated "HR, YS" followed by the page numbers. The designation means Hearing Record, Yellowstone.

therefore not qualified to seek a use permit to continue the use in their current locations. (HR, YS 01511-12)

Establishment of Use:

As noted above, the Yellowstone properties are located in an area referred to as West Santa Ana Heights, which was annexed into the City effective January 1, 2008. Prior to annexation, West Santa Ana Heights was an unincorporated area under the jurisdiction of the County of Orange. When the use changed from that of a single family dwelling to a sober living facility, the use would have been subject to any land use regulations the County of Orange placed on such uses at that time.²

According to information submitted by the applicant to the City (HR, YS 00144), the use of the single family dwellings as sober living facilities were established as follows:

1561 Indus Street: 2007
1621 Indus Street: 2003
1571 Pegasus Street: 2005³
20172 Redlands Drive: 2005

The Santa Ana Heights Specific Plan was adopted by the County in October 1986 and was last revised by the County in 2001. When staff sought information from the County of Orange regarding these facilities relative to code regulations that would require a use permit or other discretionary permit for large group homes, staff was advised that the uses would have been classified as either a "Community Care Facility" or "Congregate Care Facility." Staff was also advised by County staff that both uses would be allowed without a use permit for up to six residents, and that a use permit issued by the Planning Commission was required to allow for seven to twelve residents. (HR, YS 01599-1602)

City staff contacted the County of Orange Planning Department to obtain all records they had on file for the four addresses after the February 20, 2009 public hearing. The only property with any type of use permit was 1621 Indus Street, which was granted a Temporary Use Permit in 2005 to hold meetings at the site, "issued for a period of time not to exceed 10 consecutive days and not happen more than four times within the calendar year. This will allow for a total of 40 meetings." (HR, YS 01353)

The March 12, 2009 staff reports stated that there is no record of any use permit issued by the County of Orange Planning Commission for a community care facility more than six residents and less than 12 residents operated by the applicant at any of the four facility locations. (HR, YS 01309, 01353, 01396 and 01428) However, there is documentation from the County from 2005 and 2006 that indicates that two Yellowstone facilities located at 20172 Redlands Drive and 1571 Pegasus Street were likely operating as community care facilities for more than 12 residents without the approval of a use permit granted by the County of Orange Planning Commission. (HR, YS 01415-17)

² A change of occupancy for purposes of the California Building Code (CBC) also occurred when the use changed, and to operate legally the structure was required to conform with any CBC requirements then in place for the occupancy type created.

³ County records indicate this facility may have been established by another operator in 2003 (HR, YS 01384)

Pursuant to NBMC Section 20.91A.020, persons whose use of their property in a residential district was rendered nonconforming by the adoption of Ordinance No. 2008-05 are qualified to seek a use permit to continue the use in its current location. The determination of nonconformity is established in Section 20.62.030 of the NBMC, which states a use that was lawfully established under the laws in place at the time, but that no longer conforms to the use regulations or required conditions for the district in which it was located because of annexation to the City, shall be deemed to be a nonconforming use. However, *"a use shall not be considered to have been "lawfully established and maintained" and is an illegal use if it was established or operated without required permits and licenses, including but not limited to permits and licenses required by any federal, state, or local government agency"* (italics added). (HR,YS 01310)

During the March 12, 2009 public hearing, the Hearing Officer stated *"it seems to me quite clear from what I read here that there were permit requirements for you, and that you didn't get them."* (HR, YS 01501). At the conclusion of the public hearing, the Hearing Officer established that the applicant had not applied for a use permit from the County of Orange, and that therefore, the use of the single family dwellings as sober living facilities were not lawfully established uses when they were annexed into the City. (HR, YS 01511-12) Based on that determination, the Hearing Officer adopted Resolutions No. HO-2009-003, HO-2009-004, HO-2009-005, and HO-2009-006 denying with prejudice the use permits submitted by Yellowstone because they were not qualified to seek a use permit to continue at their current location. (HR, YS 01593-1668)

Staff believes that the evidence provided during testimony and information in the administrative record is supportive of the Hearing Officer's determination.

Required Findings for a Use Permit:

The Hearing Officer is designated by Newport Beach Municipal Code ("NBMC") §20.91A.040 to approve, conditionally approve, or disapprove a use permit to allow an existing group residential care facility to remain in operation. In order to issue a use permit, he or she must be able to make each one of eleven (11) findings identified in NBMC §20.91.035 (A) and in §20.91A.060 following a noticed public hearing.

Although the March 12, 2009 staff reports focused on the fact that the Yellowstone facilities were not lawfully established uses, and therefore not qualified to apply for a use permit, staff also provided discussion relative to a required finding, as follows:

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.**
- 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.**
- 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.

- 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.**
- 5. If certification from an entity other than ADP's licensing program is available, applicants must get that certification.**
- 6. All individuals and entities involved in the facility's operation and ownership must be disclosed.**
- 7. No owner or manager shall have any demonstrated pattern of operating similar facilities in violation of the law.**

In the March 12, 2009 staff report, information was provided to the Hearing Officer that indicated the Yellowstone facilities were operating as community care facilities for 12 or more residents without the approval of a use permit granted by the County of Orange Planning Commission.

As stated in the March 12, 2009 staff report for the 1561 Indus Street facility:

All four Yellowstone facilities located in Newport Beach were established when the properties were within the jurisdiction of the County of Orange. County zoning regulations provided that community care facilities housing more than six residents and less than 12 residents were permitted subject to the approval of a use permit granted by the Planning Commission. Per documentation provided by the applicant, the Yellowstone facilities located at 20172 Redlands Drive and 1571 Pegasus Street were established in 2005 (although County records indicate that the Pegasus facility may have been established in 2003), and appeared to be operating community care facilities for more than 12 residents. There is no record of any use permit issued by the County for a community care facility operated by the applicant at any of the four facility locations. This demonstrates a pattern and practice by the applicant of operating community care facilities in violation of local laws in effect at the time the Yellowstone facilities were established. Therefore, this development and operational standard cannot be met and NBMC Section 20.91A.060 Finding A cannot be made. (HR, YS 01310)

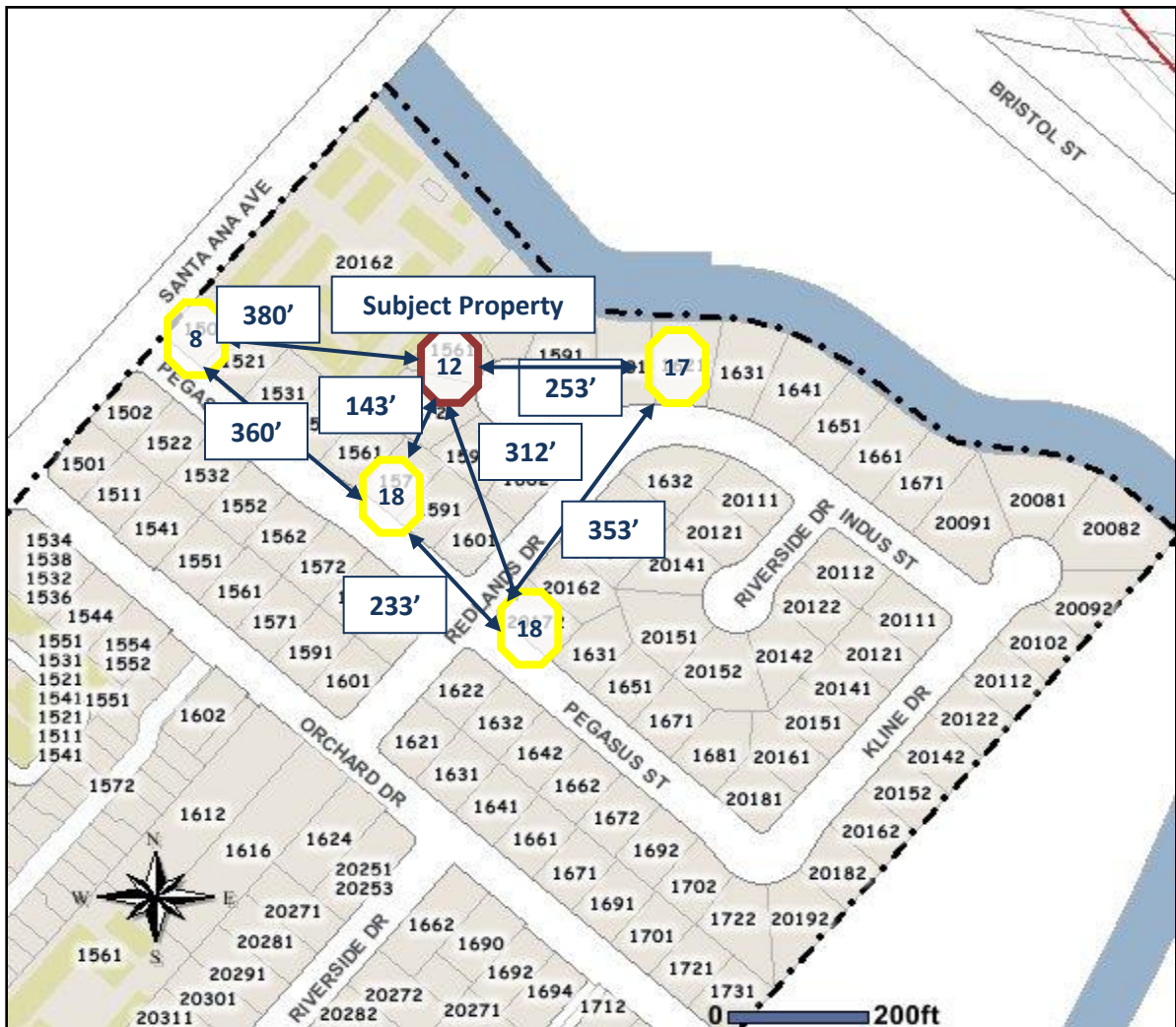
Staff believes the evidence in the administrative record supports the fact this finding cannot be made because the facilities were not in compliance with state and local law and the owner or manager has demonstrated a pattern of operating similar facilities in violation of the law. Therefore, even if the applicant were qualified to apply as a lawfully established nonconforming uses, a use permit cannot be granted for any of the Yellowstone facilities because not all of the required findings can be made.

Additional Evidence in Support of Denial of Use Permits:

In the March 12, 2009 staff report, staff recommended that the Hearing Officer deny the use permits for all four facilities. In addition to the inability to make all of the required findings, staff also recommended denial because the proposed uses were not consistent with the purposes of Section 20.91A.010 of the Municipal Code.

As stated in the February 20, 2009 staff report, 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. (HR, YS 00030)

As depicted in the map below identifying the 1561 Indus Street facility, there were approximately 73 group residential beds in this neighborhood at that time. (HR, YS 00027). During the February 20, 2009 public hearing, the Hearing Officer recognized the close proximity of each facility to the other, stating "It's clear that there is a cluster of uses in this one particular location." (HR, YS 01235)



- 1561 Indus Street (12 residents)
- 20172 Redlands Drive (18 residents),
- 1621 Indus Street (17 residents),
- 1571 Pegasus Street (18 residents),
- 1501 Pegasus (8 female residents, the Lynn House, now abated).

The February 20, 2009 staff report stated there were a number of concerns and allegations made by the neighbors of the facilities via letters and emails (HR, YS 00212-19) regarding the negative secondary impacts as a result of the density of such uses in the neighborhood. Some of the concerns and allegations include:

- A concentration of sober living homes in the neighborhood;
- On-site meetings which the operator states do not take place at the facility;
- Loud talking in the street and noise late at night following meetings;
- An apparent lack of adequate on-site supervision during the day and evenings;
- The influx of visitors and resident clients in the neighborhood and use of on-street parking, and resident clients' use of vehicles
- Litter in the neighborhood, including soda cans, cigarette butts, beer bottles and other trash in the streets, sidewalks and parkways;
- The facilities "generate massive amounts of trash;"
- Family and other guests visiting the facilities;
- Consumption of available on-street parking by facility residents and guests;
- Transport vans parked on the street, and "all over the neighborhood;"
- Facility residents traveling "around the neighborhood in groups as they go from home to home," "often in groups of 3 or 4, with no apparent business or destination;" (HR, YS 00025-26)

During both public hearings and in the staff reports, staff expressed concerns about the negative secondary impacts the facilities would have on the neighborhood, as well as inconsistencies and/or factual misrepresentation in the application documentation submitted by the applicant. Examples of evidence in the record regarding the adverse impacts on the neighborhood and inconsistencies and/or factual misrepresentation include:

Interaction and meetings:

- In the initial application submittal for all four properties dated May 20, 2008, a statement is included *"Residents from any one Yellowstone property are not allowed at any of the other Properties, and there are no functions that include all residents."* (HR, YS 00066)
- In correspondence from the applicant to the City dated January 29, 2009, *"Finally, although Yellowstone owns four such homes in the Newport Beach area, there is no interaction between the homes. In other words, residents of the Property (referring to 1621 Indus Street) do not meet with the residents of other Yellowstone properties for dinners or other gatherings. Each home has its own residents and the residents of one home never interact with residents of a different home."* (HR, YS 00445)
- Correspondence from the applicant dated February 13, 2009 states: *"Neither group meetings nor individual treatment meetings occur on any of the four Yellowstone properties."*

These statements are contradicted by the following:

- Correspondence from neighbor (Harvey) for February 20, 2009 hearing – *"On several occasions we have observed a line of men walk from the Yellowstone facility at 20172*

Redlands Drive, enter the adjacent Yellowstone facility for women at 1621 Indus Street, and stay there for more than an hour. We believe that this indicates the facility is providing on-site services, for which a State license is required.” (HR, YS 00283)

- Testimony (B. Walker) at February 20, 2009 hearing – *“This house . . . 1561 is the only one of the four that has a swimming pool. And during the summer, the men come from the men’s house, people come from the other houses, come over and have swimming parties . . . we were led to believe that only these people would be using that property, and that’s just not the truth . . . [A]t the 1621 house, for years, there have been what appeared to be orientation sessions . . . that have 20, 30, 40 people have been brought.”* (HR, YS 01181)
- Correspondence from neighbor (Robertson) for February 20, 2009 hearing – *“The report states that the applicant does not allow residents on any other Yellowstone property. However this statement is negated by personal observations of residents from at least three of the four residences co-mingling at each other’s residences. I have seen women from the Pegasus house walk up to Redlands, and on one occasion observed several women leave the Redlands house early in the morning before 7 a.m. . . . I often see residences from the Redlands house walk up to the house at 1621 Indus. Additionally on at least two occasions I have seen large groups walk up to the house on 1621 Indus mid-week, mid-morning. The assumption being made is that there are large group functions . . . being held onsite.”* (sic) (HR, YS 00261-62)
- Correspondence from neighbor (Walker) for February 20, 2009 hearing– *“They did not have a meeting at the Redlands house last week and have not for about 3 weeks, but when they do, the meetings seem to start about 6:00 and breakup in about 90 mins. . . . [T]hey have held meetings there that seemed to draw about a dozen cars.”* (HR, YS 00263)

Personal Vehicles and Parking:

- In the initial application submittal dated May 20, 2008 for all four properties, the reasonable accommodation application includes a statement *“The residents at the property do not have automobiles and rely upon public transportation and/or carpooling,”* and *“The tenant’s vehicles are not allowed to be parked and/or utilized at the property.”* (HR, YS 00070) Yet, within the same submittal package, the use permit application includes the following statement: *“Four resident have personal vehicles, which they park only in the garage and/or garage driveway.”* (HR, YS 00093)
- Correspondence from the applicant dated January 29, 2009 states *“The residents do not use cars. Instead, they rely on public transportation to and from the Property.”* (HR, YS 00180)
- Correspondence from the applicant dated January 29, 2009 also states: *“Though the home generally does not provide transportation services, the home does provide some basic transportation to the nearby treatment facility and to St. John church. There is a morning pickup at 8 a.m. and an evening drop off at 4 p.m. This is the only transportation provided, The vans that transport the residents are not parked on site. When not in use, the vans are kept in another city.”* (HR, YS 00180)

This information is contradicted by the following:

- Correspondence from neighbor (Groskreutz), submitted for February 20, 2009 hearing – *“Although we have been told by Yellowstone officials at their own meetings that none of their residents are allowed to drive, we have evidence that the exact opposite is true, there are residents who are driving cars or trucks and parking them on our streets, many times loaded with personal possessions for extended periods of time.”* (HR, YS 00214)
“On their meeting nites and during the day and on weekends, we cannot use any parking in front of our own homes because the spaces are full of attendees for these meetings. I have posted notes on vehicles on several occasions during their meetings in the past years, telling the owners that the next time they park illegally I am going to have their car towed because it was blocking my driveway.” (HR, YS 00214)
- Correspondence from neighbor (Robertson) submitted for February 20, 2008 hearing – *“. . . my biggest concern are the assertions that (a) transportation is not provided; and (b) that residents are not allowed to have cars. My personnel observations are: (a) that Yellowstone operates two large capacity vans on a routine basis. Over the years I have seen these vans pick up and drop off residents at both the men's and women's residences, in particular 1561 Indus Street and 20172 Redlands Drive. These vans (one of which has 'VANPOOL' stenciled on the windows) have lately been parked each night in the neighborhood, typically alongside 20172 Redlands Drive near the intersection of Redlands Drive and Pegasus Street. Additionally I have observed private vehicles pick-up and drop off multiple residents at 20172 Redlands. These facts on the ground seem to contradict statements made by the applicant.”* (sic) (HR, YS 00262)
- Correspondence from neighbor (J. Walker), submitted for February 20, 2009 hearing – *“While Yellowstone Women's First Step House Inc. group may tell the city that 'clients' are not allowed to have vehicles during residency . . . [d]uring the months that the facility next to my home has been in operation I have had 'clients' park in front of my property rather than in the empty driveway of the Yellowstone Women's First Step House Inc. facility . . . There are vehicles coming and going, doing drop offs, or 'visitor' standing or parking, and the duration of this activity goes from very early in the morning (5 am) to very late at night (past 11pm and sometimes well past midnight.) And then there are the weekly evening meetings that are held at some of these facilities. While occasionally (other) residences of the neighborhood may have a gathering, party or club meeting, these are **not** routine. The parking impact to the surrounding street of the meeting house is significant.”* (HR, YS 00274 – 75)
- Correspondence from neighbor (Harvey) for February 20, 2009 hearing – *“Contrary to Yellowstone's past assertion that its residents do not park cars in our neighborhood, we have observed that many of their residents actually do park cars on our streets, especially along Pegasus Street adjacent to the 1571 Pegasus Street facility and on Redlands Drive adjacent to the 20172 Redlands Drive facility. In addition, a large passenger van associated with Yellowstone is often parked at night across the street from the 20172 Redlands Drive facility. We also observe numerous cars entering and leaving our neighborhood containing visitors to facility residents. These activities generate traffic out of proportion to the number of facilities.”* (HR, YS 00283)
- Testimony (B. Walker) at February 20, 2009 hearing – *“[W]e've had to go over and pound on the door ourselves to say, you know, 'Get your stinking car out of our*

driveway.' . . . there is a problem with the amount of concentration of the vehicles that we have associated with the various houses." (HR, YS 01182)

- Testimony (McDonough) at February 20, 2009 hearing – *"The vehicles that transport them in the morning, there's one car after another picking people up. In the afternoons, there's cars coming one after another. They say there's no parking problem. I've had cars parked blocking my driveway. Several of the residents that have cars have blocked the driveway."* (HR, YS 01192 – 93)

Impacts to the neighborhood and change of character of the neighborhood:

- Correspondence from neighbor (Devine) for February 20, 2009 hearing – *"I have gathered the number of residents on each of the streets for comparison.*
 - *"On Pegasus Street, where there are 28 homes, **26.8% of the population** on those two blocks would be recovering alcoholics and addicts if the exception was permitted.*
 - *"On Indus Street, where there are 14 homes total, **47% of the population** on that street would be recovering alcoholics or addicts.*
 - *"On Redlands Street, **75 percent of the population** would be recovering addicts and alcoholics if the application was approved, and the exemption permitted.*

*"Considering those are three of the five streets in our neighborhood, that is a huge change in the demographics of our neighborhood. **Can you really say it's a NIMBY issue if over half of our population is short-term recovering addicts and alcoholics?***

"Finally, I would like to remind everyone that the normal stay indicated on the Yellowstone Recovery website is 90 days. If each of these applications is granted, and the exemptions allowed, between these four homes that would mean 264 people coming into our neighborhood each year who are not long-term residents. On those same streets, there are 104 people who are permanent residents.

*"How can you retain the residential character of a neighborhood if **71% of the people coming and going in the year are NOT residents for more than 90 days?**" (HR, YS 01115)*

- Correspondence from neighbor (J. Walker) for February 20, 2009 hearing – *"Since Yellow Women's First Stone House Inc. opened business in the property next to mine I now have more general debris in my yard; cellophane wrappers, plastic cup lids, cigarette butts. This is change since the change of ownership". (HR, YS 00275) And, "In closing I would comment that I feel a change in the atmosphere of the neighborhood since Yellowstone Women's First Step House Inc. has purchased properties in our development. The feel of a residential neighborhood is diminished. Today there is a much stronger feel of an apartment complex or even a hotel/motel complex." (HR, YS 00276)*
- Testimony (J. Walker) at February 20, 2009 hearing – *"Trash is an issue. While, yes, we have trash cans like everyone else, I would say if you're having three to four times the population in one building, is there enough curb space for the residents to put that*

number of cans out front. They are overflowing currently. They are being placed in front of fire hydrants, which means there's no neighborly feeling of what have concern for the people we're living with." (HR, YS 01199)

- Correspondence from neighbor (Robertson) for February 20, 2009 hearing – *"Additionally on at least two occasions I have seen large groups walk up to the house on 1621 Indus mid-week, mid-morning. The assumption being made is that there are large group functions . . . being held onsite."* (sic) (HR, YS 00262)

Operations and Supervision of Facilities:

- In the initial application submittal for all four properties dated May 20, 2008, the applicant provided information stating each facility would have on-site staffing of a house manager and assistant manager in each of the facilities.
- In correspondence from the applicant to the City dated August 22, 2008 in response to the City's requests for additional information, the applicant provided a statement signed by Dr. Anna Thames, Owner, that the residence located 1621 Indus Street is "currently licensed with the State of California." (HR, YS 00392) In this same correspondence, Dr. Thames is identified as the facility Director. (HR, YS 00391)
- In separate correspondence from the applicant to the City dated August 22, 2008 in response to the City's requests for additional information, the applicant provided a statement signed by Steven Thames, Owner, that the residence located 20172 Redlands Drive is "currently licensed with the State of California, Alcohol and Drug Programs." (sic) (HR, YS 00944) Dr. Thames is identified as the facility Director. (HR, YS 00940)
- Correspondence from the applicant dated December 23, 2008 – *"As we have discussed, none of the four homes is ADP licensed. To the extent that any prior representations regarding ADP licensing were made, we have learned that same were incorrect. If you have any questions regarding this item, or need any further explanation as to the reasons for our error, we are more than happy to provide same."* (HR, YS 00144)
- In correspondence from the applicant to the City dated January 29, 2009, the applicant stated *"All residents are prohibited from being in the house between 8:00 a.m. and 3:00 p.m. Additionally, all residents must return to the house by 4:00 p.m."*

Statements made by the applicant regarding supervision of the facilities are contradicted by the following:

- Correspondence from neighbor (McDonough) for February 20, 2009 hearing – *"On a daily basis we observe individuals wandering the neighborhood, often in group of 3 or 4, with to apparent business or destination."*
- Correspondence from neighbor (Robertson) for February 20, 2009 hearing – *"Additionally on at least two occasions I have seen large groups walk up to the house on 1621 Indus mid-week, mid-morning. The assumption being made is that there are large group functions . . . being held onsite."* (sic) (HR, YS 00262)

- Correspondence from neighbor (J. Walker) for February 20, 2009 hearing – *"I understand that the disabilities act provides protection from discrimination for these individuals. However as a property owner whose home this area is, I expect that the city will not transfer burden to me. I believe that facilities could be run in a residential neighborhood, but careful attention to detail is paramount. The facilities must be closely supervised 24/7. Policies and procedures to ensure the temporary residents exhibit a demeanor that is respectful of the permanent residence should be strongly considered."* (HR, YS 00276-77)

Staff believes these letters and testimony at the public hearings demonstrate the operator's inability to effectively manage the clients in the facilities in a manner that is respectful of the residential neighborhoods peace and quiet enjoyment, and that approval of the uses would be incompatible with the surrounding residential character of the neighborhood.

CONCLUSION:

Staff concludes that there is substantial evidence in the record to support the Hearing Officer's decisions to deny with prejudice Use Permit No. 2008-034, Use Permit No. 2008-035, Use Permit No. 2008-036 and Use Permit No. 2008-037.

Staff recommends that the City Council deny the appeals submitted by Yellowstone, sustaining and affirming the Hearing Officer's decisions, and direct staff to prepare resolutions for adoption at the next City Council meeting.