

**CITY OF NEWPORT BEACH
CITY COUNCIL STAFF REPORT**

Agenda Item No. 1
December 2, 2009

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: Office of the City Attorney
David R. Hunt, City Attorney
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SUBJECT: **Appeal of Hearing Officer's Denial of Use Permits and Reasonable Accommodations** – 1561 Indus, 1621 Indus, 1571 Pegasus, 20172 Redlands (Yellowstone Women's First Step House, Inc.)

- **1561 Indus Street: Use Permit No. 2008-034
(PA2008-105) Reasonable Accommodation No. 2009-004**
- **1621 Indus Street: Use Permit No. 2008-035
(PA2008-106) Reasonable Accommodation No. 2009-005**
- **1571 Pegasus Street: Use Permit No. 2008-036
(PA2008-107) Reasonable Accommodation No. 2009-006**
- **20172 Redland Drive: Use Permit No. 2008-037
(PA2008-108) Reasonable Accommodation No. 2009-007**

ISSUE:

Did substantial evidence support the Hearing Officer's denial of Yellowstone Women's First Step House, Inc.'s ("Yellowstone") application for use permits and for reasonable accommodations for each of its four Newport Beach facilities? If not, what action should the City Council take pursuant to Newport Beach Municipal Code ("NBMC") section 20.91A.040 and 20.98.025?

RECOMMENDATION:

Staff recommends the City Council determine whether substantial evidence in the record supports the Hearing Officer's decision to deny Yellowstone's applications for the use permits and reasonable accommodations.

If the City Council determines that substantial evidence supports the denials, the Council should sustain the decisions of the Hearing Officer.

If the City Council determines that substantial evidence in the record does not support any of the denials, the Council must then choose between one of three possible actions:

1. Reverse the Hearing Officer's decision and authorize the issuance of the requested use permit(s) or one or more of the requested reasonable accommodations to Yellowstone, under conditions the Council determines are appropriate based upon the evidence in the hearing record; or
2. Modify the Hearing Officer's decision denying the use permit and/or reasonable accommodation to Yellowstone based upon the evidence in the hearing record; or
3. Remand the matter to the Hearing Officer for further consideration, which remand shall include direction either to consider specific issues, or to conduct a *de novo* hearing on whether to grant, conditionally grant, or deny a use permit and/or reasonable accommodation to Yellowstone.

If the City Council determines the Hearing Officer's findings are not supported by substantial evidence and directs action be taken based upon choosing one of the three options above, we recommend that a resolution be prepared setting out the determination of the Council and the findings supporting that determination, and that the resolution be brought back to the Council for approval and adoption as the Council's final decision on the matter.

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 a residential district zoned 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 ("City") completed the annexation of West Santa Ana Heights on January 1, 2008, prior to the adoption of Ordinance 2008-05. These uses were in operation at the time the City enacted Ordinance No. 2008-05, and on the Ordinance's effective date of 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 are classified as a "Residential Care Facility, General-Unlicensed" use, and are located in a RSF (Residential-Single Family) district where, under Ordinance No. 2008-05, such uses are not permitted or conditionally permitted. On May 20, 2008, Yellowstone applied for a use permit for each of its four Newport Beach facilities within the time period required by Ordinance No. 2008-05.

In addition, Yellowstone applied for a general reasonable accommodation on May 20, 2008, but did not initially request an exemption from any specific City rule, policy or practice. On August 22,

2008, the applicant submitted an application for reasonable accommodation that requested an exemption "from single family to multi-family residence," and also discussed the need for an accommodation from the required use permit fee due to financial hardship.

In January 29, 2009, Yellowstone amended its reasonable accommodation request to request three specific accommodations. The requests were:

1. That the residents of each Yellowstone facility be treated as a single housekeeping unit, as the term is defined in NBMC Section 20.03.030;
2. An exemption from the occupancy restrictions of NBMC Section 20.91A.050, which requires that use permits granted to residential care facilities restrict facility occupancy to no more than two residents per bedroom plus one additional resident;
3. An exemption from the City's requirement that all use permit applicants pay a use permit application fee. (NBMC Chapter 3.36 and NBMC Section 20.90.030)

A. USE PERMIT HEARINGS AND HEARING OFFICER'S DECISION:

A noticed public hearing was conducted by the Hearing Officer on February 20, 2009, at which the Hearing Officer heard testimony from City staff and its counsel, 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, and directed staff to prepare resolutions for denial. 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, for a maximum of 15 residents each. The hearing was continued to March 12, 2009, to adopt the resolutions and take action on the application for requests for reasonable accommodation.¹

However, at the March 12, 2009, public hearing, staff recommended that the Hearing Officer reopen the public hearing on the use permit applications, and to take further testimony from the applicant, the staff and the City's legal counsel, and the public.

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. (HR, Y 01475, 01498) Applicant's counsel presented extensive information on the history of California courts' treatment of legal nonconforming uses, cited a number of California cases for the proposition that zoning restrictions should not be applied retroactively, and appeared to assert that Yellowstone had

¹ The full record of the proceedings at the Hearing Officer level is submitted to the City Council as the "Hearing Record" and is attached hereto as Attachment 2. Each page of the Hearing Record is numbered consecutively, beginning with HR, Y 00001. References to the Hearing Record are denoted at "HR", with the Bates stamp page number.

rights as a nonconforming use that should excuse it from the use permit requirement, or would render Ordinance No. 2008-05 unconstitutional. (HR, Y 01153 - 65)

Between the February 20 and March 12, 2009 hearings, staff conducted further investigation into the circumstances and laws applicable at the time the facilities were established under the jurisdiction of the County of Orange. (HR, Y 01475 – 76) In response to City inquiries, County staff provided information in emails to City staff that indicated large group homes would have been considered either a congregate care facility, or large community care facility, and that the County would have required use permits issued by the County Planning Commission for either use. (HR, Y 01629 – 32) Staff reported that based on information provided to staff by the County, it had reached the conclusion that under County jurisdiction and the Santa Ana Heights Specific Plan, each Yellowstone facility would have been considered either a congregate care facility, or a community care facility serving seven to 12 residents. (HR, Y 01476)

The Santa Ana Heights Specific Plan allowed community care facilities with seven to 12 residents in the RSF zone only with a use permit issued by the County Planning Commission. (HR, Y 01477, 01404 - 08, 01412) County records indicated that, with the exception of a temporary use permit for up to 40 meetings at 1621 Indus, no use permits had ever been issued by the County Planning Commission for any of the Yellowstone uses. (HR, Y 1477, 01629) Staff asserted this meant none of the Yellowstone facilities had ever been legally established under County jurisdiction. Because of this, staff determined it could no longer make required use permit findings that relied in part on a finding that the applicant had not operated other similar facilities in violation of state or local law. In addition, staff questioned whether Yellowstone, as an illegal use, had been qualified to apply for and receive a use permit. (HR, Y 01478 – 79)

The Hearing Officer agreed to reopen the public hearing on the issue of Yellowstone's use permit applications at the March 12, 2009 continued hearing. (HR, Y 01481) At the conclusion of the March 12, 2009 hearing, after consideration of the testimony submitted by the applicant, staff and the public, the Hearing Officer determined the Yellowstone facilities were not lawfully established when they were established within the County of Orange incorporated territory known as West Santa Ana Heights, and were therefore not qualified to seek a use permit to continue the use in their current locations. (HR, Y 01511 – 12) He directed staff to prepare Resolutions of Denial for all four use permits, and adopted the Resolutions on April 14, 2009.

B. REASONABLE ACCOMMODATION HEARINGS AND HEARING OFFICER'S DECISION:

A noticed public hearing on Yellowstone's use permit and reasonable accommodation applications was conducted by the Hearing Officer on February 20, 2009, taking testimony from staff, the applicant and members of the public. The February 20 hearing, which primarily dealt with use permit considerations, was continued to March 12, 2009, to adopt resolutions on the use permit applications and to hear and take action on the application for requests for Reasonable Accommodation No. 2009-06. (HR, Y 01240)

At the March 12, 2009, public hearing, the Hearing Officer heard testimony from City staff, its counsel, the applicant and members of the public regarding reasonable accommodation Requests

No. 1 and 3.² Therefore, the Hearing Officer was asked to consider only Request No. 1 (treatment as a single housekeeping unit) and Request No. 3 (waiver of the use permit fees) (HR, Y 01518).

At the conclusion of the March 12, 2009 hearing, and after consideration of information in the staff reports and testimony provided by the applicant, staff and its legal counsel, and the public, the Hearing Officer determined that he could not make required findings for Yellowstone's Request No. 1 (that residents of its facilities be treated as a single housekeeping unit.) (HR, Y 01556) He therefore directed staff to prepare Resolutions of Denial for Requests No. 1 and 2.

The Hearing Officer did not take action on Request No. 3. Staff had recommended denial of Request No. 3, based the limited, non-verified information submitted by Yellowstone on operational costs and fees charged, and had asserted that fees quoted on Yellowstone's website indicated that Yellowstone could afford to pay the use permit fees. However, staff also indicated it remained willing to consider additional financial information in support of the request, if the applicant was willing to provide it, and that Yellowstone could produce the information for in camera review by the Hearing Officer, rather than in a public setting. (HR, Y 01523 – 24, 01542, 01557) The applicant stated that fees quoted on its website did not necessarily reflect fees actually charged, and that it was willing to provide staff with additional financial information. (HR, Y 01551)

The Hearing Officer directed Yellowstone to submit any financial information it chose to staff within one week of the hearing. He further directed staff to forward the information to him. The Hearing Officer would then review the information and issue his ruling without further need for public hearings. (HR, Y -1558) However, despite staff's subsequent inquiries, Yellowstone did not submit further information. To date, Yellowstone has paid no use permit application fees, and no determination has been made on this issue.

On April 14, 2009, the Hearing Officer adopted Resolutions of Denial for reasonable accommodation Request No. 1.

C. APPEAL:

On April 27, 2009, Yellowstone filed timely appeals of the Hearing Officer's actions to the City Council with the City Clerk, attached hereto as Attachment 3.

- For each Yellowstone address, the applicant filed an appeal of the Hearing Officer's denial of the use permit application. In each use permit denial appeal, the stated grounds for appeal are "The home operates in such a manner that the required findings to grant a

² Staff had determined that without a use permit, Request No. 2 was not required, and the Hearing Officer did not disagree. (HR, Y 01518)

Conditional Use Permit can be made. Therefore, the City of Newport Beach improperly denied the request with prejudice."

- For each Yellowstone address, Yellowstone filed an appeal of the Hearing Officer's decision to deny the use permit, and therefore its related application for reasonable accommodation to receive an exemption from the occupancy restrictions of Section 20.91A.060 of the NBMC that restricts occupancy to two residents per bedroom plus one additional resident. The basis for the appeal is, "The City of Newport Beach denied the applicant's Conditional Use Permit application, therefore, the City's decision regarding the occupancy exemption was rendered moot. Although the City never specifically ruled on this particular reasonable accommodation request, Yellowstone hereby appeals because the . . . home operates such that the required findings to grant the requested reasonable accommodation can made."
- For each Yellowstone address, Yellowstone filed an appeal of the Hearing Officer's decision to deny the request that the facility be treated as a single housekeeping unit, as defined in the NBMC. The basis for the appeal is, "The home operates such that the required findings to grant the requested reasonable accommodation can be made. Therefore, the City of Newport Beach improperly denied the request, with prejudice."

In an attempt to accommodate conflicts with Yellowstone's counsel's schedule, the appeal hearing was scheduled before the City Council on September 22, 2009. The appeal was then continued to November 24 while staff and Yellowstone continued to attempt to reach an agreement on a mutually acceptable abatement agreement.

DISCUSSION:

Appeals of Hearing Officer's decisions on reasonable accommodation requests, as well as appeals on use permits in residential districts, are heard by the City Council. (NBMC sections 20.91A.040 and 20.98.025.) Appeals from a Hearing Officer's decisions on use permits in residential districts and reasonable accommodation applications are subject to the "substantial evidence" standard under the Municipal Code. On appeal, the Council reviews the administrative record from the proceedings below, and determines whether the Hearing Officer's decision was supported by substantial evidence in the record. If the Hearing Officer's decision is supported by substantial evidence, it must be sustained by the 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.³

1. Standard of Review – Use permits in districts zoned for non-residential uses.

³ Staff from the City's Planning Department and Deputy City Attorney Wolcott, who represented the City at the Administrative Hearing, have submitted memoranda highlighting some of the relevant evidence in the hearing record that they contend supports the Hearing Officer's decisions to deny use permits and reasonable accommodation applications. These memoranda are attached hereto as Attachment 1.

City Council review of land use decisions is typically conducted under the standard established by NBMC Chapter 20.95. The City Council is accustomed to reviewing decisions made by the Planning Commission, under the provisions of NBMC section 20.91.060. Section 20.91.060 provides that decisions made by the Planning Commission are reviewed by the City Council on appeal, and that the procedures for such appeals are codified in NBMC Chapter 20.95. Chapter 20.95 states:

The public hearing on an appeal shall be conducted "de novo" in that the decision that has been appealed has no force or effect as of the date on which the appeal was filed. The appellate body is not bound by the decision that has been appealed or limited to the issues raised on appeal. The appellate body shall hear testimony of the appellant, the applicant, and any other interested party.

(NBMC section 20.95.060(C).)

Therefore, the City Council has acted as both the appellate body and the finder of fact at hearings on appeals from decisions on use permits in areas zoned for commercial or industrial use. Public testimony and evidence not presented at the Planning Commission hearings has been properly presented to and considered by the City Council in these *de novo* hearings.

2. Standard of Review – Use permits in districts zoned for residential uses, and reasonable accommodations.

NBMC Chapters 20.91A and 20.98 establish different procedures for approval, conditional approval or disapproval of use permits in residential districts and requests for reasonable accommodation. These chapters of the Municipal Code do not give the City Council authority to address the issues "*de novo*."

When considering reasonable accommodations, and permits for uses conditionally permitted in *residential* districts such as this one, NBMC Chapters 20.98 and 20.91A establishes a different decision-making body and a distinctly different standard of appellate review by the City Council. Applications for reasonable accommodations and use permits in residential districts are reviewed and approved, conditionally approved or disapproved by a Hearing Officer rather than the Planning Commission, in accordance with the procedures set forth in Chapters 20.98 and 20.91A. Decisions of the Hearing Officers are appealed directly to the City Council. Unlike appeals for use permits approved, conditionally approved or disapproved by the Planning Commission, NBMC section 20.91A.040 states:

Decisions of the Hearing Officer may be appealed to the City Council. *Notwithstanding Section 20.95.060, the standard of review shall not be de novo and the City Council shall determine whether the findings made by the Hearing Officer are supported by substantial evidence presented during the evidentiary hearing.* The City Council acting as the appellate body may sustain, reverse or modify the decision of the Hearing Officer or remand the matter for further consideration, which remand shall include either specific issues to be considered or a direction for a *de novo* hearing.

(NBMC section 20.91A.040 [Italics added].)

Similarly, NBMC section 20.98.025(A) provides in part:

. . . notwithstanding Section 20.95.060, the standard of review on appeal shall not be de novo and the City Council shall determine whether the findings made by the Hearing Officer are supported by substantial evidence presented during the evidentiary hearing. The City Council, as the appellate body, may sustain, reverse or modify the decision of the Hearing Officer 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 section 20.98.025(A) [Italics added].)

a. The "substantial evidence" test and abuse of discretion.

When reviewing the decisions of a Hearing Officer on use permits and reasonable accommodation applications, the City Council is therefore required by NBMC sections 20.91A.040 and 20.98.025 to apply the "substantial evidence test." As discussed above, this means that the Council shall uphold the decision of the Hearing Officer if there is substantial evidence in the hearing record as a whole to support the decision the Hearing Officer made. Thus, the inquiry for the City Council is whether the Hearing Officer abused his discretion when he denied the applications for the use permit and the accommodations.

The concept of "abuse of discretion" is well defined in the law. In finding abuse of discretion, the City Council shall consider whether the Hearing Officer's action was arbitrary, capricious, in excess of his jurisdiction, entirely lacking in evidentiary support, or without reasonable or rational basis as a matter of law. A prejudicial abuse of discretion is established if the Hearing Officer did not proceed in a manner required by law, or if his findings are not supported by substantial evidence in the record. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

City staff, the applicant and members of the public may make comments regarding this issue at the City Council's hearing on the appeal. However, in making its determination the City Council is limited to a review of the hearing 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. (121 Cal.App.4th at 1497.) 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." (*Id.*)

"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.) Although facts in the hearing 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 alternate conclusion based on the same set of facts would have been equally reasonable or more reasonable. It also may not weigh conflicting evidence and determine which side has the better argument. Instead, it must resolve all reasonable doubts in favor of the administrative finding and

decision below. (*Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners of the Port of Oakland* (2001) 91 Cal.App.4th 1344, 1356.)

b. What sort of evidence constitutes "substantial evidence?"

In general, substantial evidence has been defined as "evidence of ponderable legal significance . . . reasonable in nature, credible and of solid value." (*TG Oceanside, LP v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1371.) It has also been defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (156 Cal.App.4th at 1371.) (citations and internal quotation marks omitted.) "If the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously, the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*DeMartino v. City of Orinda* (2000) 30 Cal.App.4th 329, 336) (internal quotation marks omitted.)

Substantial evidence may include facts, and expert opinions supported by facts, but not argument, speculation, unsubstantiated opinion, or clearly erroneous evidence. (*Sierra Club v. County of Napa*, 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.)

When reviewing an administrative decision under the substantial evidence test, the reviewing body considers all relevant evidence in the administrative record, beginning with the presumption that the record contains evidence to sustain the hearing officer's findings of fact. (156 Cal.App.4th at 1371.)

In summary, the City Council may overturn the Hearing Officer's decision only if it finds that there are insufficient facts, or expert opinions supported by facts, in the hearing record to support the Hearing Officer's decision.

c. Was the Hearing Officer's decision supported by substantial evidence?

Staff recommends that the City Council review the administrative record, including the analysis in staff reports, the transcripts of the hearings, documents submitted by the public and the appellant, and the resolutions adopted by the Hearing Officer. After review, the City Council should determine whether the Hearing Officer's decisions that certain required findings could not be made were supported by substantial evidence.

Appropriate Relief:

Per NBMC sections 20.91A.040 and 20.98.025, the City Council may sustain, reverse or modify the decision of the Hearing Officer if it concludes that decision is not supported by substantial evidence. It may also remand the matter to the Hearing Officer for further consideration. If the City Council remands the matter to the Hearing Officer, NBMC sections 20.91A.040 and

20.98.025 requires that the Council either identify specific issues to be considered or direct that the Hearing Officer conduct a *de novo* hearing on the matter.

Environmental Review:

This application has been determined to be categorically exempt under the requirements 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. The City Council's consideration of this agenda item does not require environmental review.

Public Notice:

This agenda item has been properly noticed as an appeal of a denial of an application for reasonable accommodation (published in the Daily Pilot and mailed to property owners and occupants within 300 feet of the subject property 10 days in advance of the hearing date) and in accordance with the Ralph M. Brown Act (72 hours in advance of the public meeting at which the City Council considers the item).

CONCLUSION:

Please determine whether the decisions of the Hearing Officer should be sustained or reversed, modified, or reversed with conditions, or remanded for further consideration. If the City Council reverses or modifies a Hearing Officer decision, staff recommends that a resolution be prepared setting out and memorializing the City Council's findings and conclusions, and will bring that resolution back for City Council review, comment, and adoption at the first available meeting.

Submitted by:

OFFICE OF THE CITY ATTORNEY

David R. Hunt, City Attorney

Attachment 1: Staff memoranda for December 2, 2009 Yellowstone Women's First Step House, Inc., appeal to City Council.

Attachment 2: Hearing Record: Proceedings regarding Yellowstone Women's First Step House, Inc., and related documents.

Attachment 3: Applications to Appeal Decision of the Hearing Officer