

CITY OF NEWPORT BEACH
HEARING OFFICER STAFF REPORT
December 16, 2009
Agenda Item 1

TO: Thomas W. Allen, Hearing Officer

SUBJECT: Pacific Shores Properties, LLC (PA2008-181)
492 Orange Avenue, and 492 ½ Orange Avenue

- Reasonable Accommodation No. 2008-001

APPLICANT: Pacific Shores Properties

CONTACT: Janet Johnson Brown, Associate Planner
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PROJECT SUMMARY

An application for Reasonable Accommodation Permit No. 2008-001 to allow the continued operation of an adult sober living facility in two dwelling units, subject to conditions that include a finding that accommodation is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling (finding No. 2 of NBMC Section 20.98.025(B)).

The City Council of the City of Newport Beach adopted Resolution No. 2009-81 on November 10, 2009, granting a modified reasonable accommodation request and remanded the issue of the required finding to the Hearing Officer to determine whether the requested accommodation is necessary for the facility to be financially viable.

RECOMMENDATION

Staff recommends the Hearing Officer conduct a public hearing, receive testimony from the applicant, the City of Newport Beach and its legal counsel, and members of the public. At the conclusion of the public hearing, staff recommends:

1. The Hearing Officer review the information submitted by the applicant under seal; and
2. Determine whether the applicant has met its burden to demonstrate the requested accommodation to allow up to 12 residents and a resident manager at each dwelling is necessary for the facility to be financially viable; and
3. If the Hearing Officer determines that the accommodation is necessary for the facility to be financially viable, staff recommends the Hearing Officer direct staff to report to the City Council that the finding can be made; or

4. If the Hearing Officer is unable to make the determination that the accommodation is necessary for the facility to be financially viable, staff recommends the Hearing Officer direct staff to submit a report to the City Council that the finding of necessity cannot be made.

BACKGROUND

Pacific Shores Properties, LLC ("Pacific Shores") operates a sober living home in three adjacent dwellings located at 492 Orange Avenue, 492 ½ Orange Avenue, and 3309 Clay Street. On March 25, 2009, the City held a public hearing to consider Pacific Shores' application requesting five separate accommodations from requirements of the Newport Beach Municipal Code ("NBMC") and the California Building Code ("CBC"). On July 2, 2009, the Hearing Officer adopted five resolutions related to Pacific Shores' requests; four Resolutions of Denial of Reasonable Accommodation and one Resolution of Approval of Reasonable Accommodation. The applicant filed an appeal of the Hearing Officer's decisions to deny the requests.

Appeals of Hearing Officer's decisions on reasonable accommodation requests are heard by the City Council. On appeal, the City Council reviews the administrative record, 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 City Council. If the Hearing Officer's decision is not supported by substantial evidence, the City Council may reverse, modify and/or remand the matter to the Hearing Officer.

On October 27, 2009, the City Council conducted a public hearing and considered an amended request for Reasonable Accommodation as submitted by the applicant/appellant. The City Council made a motion to grant the appeal, and to modify the Hearing Officer's decision to deny without prejudice Request No. 5 of Reasonable Accommodation No. 2009-001, subject to certain conditions.

The modification approved by the City Council was to conditionally grant a reasonable accommodation for up to 12 residents and a resident manager at each of the Orange Avenue addresses. The number of occupants, up to 12, entitled to reside at each address is based upon the CBC requirements for occupancies housing that number of resident clients and staff, and would be determined upon an inspection conducted by the Newport Beach Fire Marshal.

On November 10, 2009, the City Council adopted Resolution No. 2009-81 (**Attachment 1**), modifying the decision of the Hearing Officer, and conditionally granting a modified reasonable accommodation request. The granting of the accommodation was subject to conditions that include a finding that the accommodation is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling (finding No. 2 of NBMC Section 20.98.025(B)). The City Council remanded the matter to the Hearing Officer to consider only the specific issue of whether the requested accommodation is necessary for the facility to be financially viable.

DISCUSSION

The City Council has directed the Hearing Officer to consider the issue of necessity related to financial viability, which is the purpose of this public hearing.

In a reasonable accommodation setting, the applicant has the burden of demonstrating that a requested accommodation is necessary in order to afford a disabled individual or individuals an equal opportunity to use and enjoy a dwelling. "*Plaintiffs must show that but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice.*" (*U.S. v. City of Chicago Heights*, (N.D. Ill. 2001) 161 F.Supp.2d 819, 834 (internal quotes and citations omitted, italics added.)) As a condition of approval, the City Council directed that Pacific Shores meet their burden of demonstrating necessity by submitting sufficient evidence to demonstrate the applicant requires up to 12 residents in each of the Orange Avenue addresses to achieve financial viability. The City Council directed Pacific Shores to submit the information within 10 days following the adoption of the resolution granting the modified reasonable accommodation request for analysis by staff and submission to the Hearing Officer. The Hearing Officer shall determine whether Pacific Shores has demonstrated financial necessity on the basis on the information submitted by the applicant.

On November 2, 2009, staff communicated with the applicant's legal counsel informing them that financial information submitted by the applicant would be analyzed by the Administrative Services Director/Treasurer of the City of Newport Beach. In that same communication, staff requested that the applicant provide financial information such as profit and loss statements, rents collected, mortgages and tax expenditures, and other operating expenses, in addition to information necessary to interpret the financial information, such as a description of types of services provided, the number of employees and their functions, and any other information the applicant thought would enable the Hearing Officer to make a valid determination. In response, the applicant's legal counsel requested an explanation of the scope of information requested by staff. (**Attachment 2**) The City responded to the applicant's inquiry on November 9, 2009. (**Attachment 3**)

On November 20, 2009, the applicant's legal counsel submitted a statement of expenses for a specific period of time. On November 24, 2009, the applicant's legal counsel supplemented this submission with a statement of monthly rents received and number of residents residing in the dwelling units during each of those months for a different specific period of time. However, no supporting documentation was submitted to substantiate the submitted information for either income or expenses. After receiving the November 20th submissions, City staff spoke with Pacific Shores' counsel and verbally requested supporting documentation that could provide some verification of reported expenses. On December 4, 2009, the City sent a letter to the applicant's legal counsel requesting supporting documentation necessary in order for staff to provide a financial analysis of the applicant's operations and make a recommendation to the Hearing Officer. (**Attachment 4**) To date, no additional information or documentation supporting the financial summaries submitted to the City has been submitted.

The financial summaries submitted to the City were analyzed by the City's Administrative Services Director/Treasurer to the extent possible. Pursuant to City practices established in NBMC Chapter 5.04, and consistent with the City's policy of protecting the confidentiality of applicants' financial information, Pacific Shores' financial submissions and the City Treasurer's analysis of that information have been submitted under seal to the Hearing Officer.

Finding of Necessity

Cases interpreting the federal Fair Housing Amendments Act ("FHAA"), adopted in 1988, have held that a government agency has an affirmative duty to grant a requested reasonable accommodation if: (1) the request is made by or on behalf of a disabled individual or individuals, (2) the accommodation is necessary to afford the disabled applicant an equal opportunity to use and enjoy a dwelling, and (3) the request is reasonable. Whether a requested accommodation is necessary must be determined on a case-by-case basis.

Section 20.98.025.(C) of the NBMC allows the Hearing Officer to consider the following factors in determining the finding *that the requested accommodation is necessary to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling*:

1. *Whether the requested accommodation will affirmatively enhance the quality of life of one or more individuals with a disability;*
2. *Whether the individual or individuals with a disability will be denied an equal opportunity to enjoy the housing type of their choice absent the accommodation;*
3. *In the case of a residential care facility, whether the requested accommodation is necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants;*
4. *In the case of a residential care facility, whether the existing supply of facilities of a similar nature and operation in the community is sufficient to provide individuals with a disability an equal opportunity to live in a residential setting.*

The City's Administrative Services Director/Treasurer analyzed the information submitted by Pacific Shores, and stated that, if the income and expenses reported by the applicant were assumed to be true, then he could have found the number of residents requested by the applicant necessary for financial viability. This analysis included provisions for a vacancy rate similar to that Pacific Shores experienced during the reporting period, and a moderate profit margin. However, as the reported income and expenses were not supported by any verifying documentation, the City's Administrative Services Director/Treasurer was unable to draw a conclusion supported by facts, and therefore is unable to make a recommendation on this matter.

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

Lapid-Laurel illustrates this point. In that case, the operator of a group home for the elderly requested a use variance to allow a 93-bed facility in a residential area. The operator failed to show that smaller facilities were unable to provide the range of care required, or that it would be economically infeasible to operate a smaller facility. The court found the "necessity" element satisfied as to disabled elderly residents' need to live in a single-family residential area, but not as to the number of residents requested by the facility operator. The court found the operator could satisfy the "necessity" element for the requested population by showing either: (1) the size was necessary for the facility's financial viability; or (2) proving the size of the facility imparted some therapeutic benefit on the residents. The facility operator had not demonstrated a larger facility was necessary for either financial viability or therapeutic benefit. See *Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 460-61 (3rd Cir 2002).

The Ninth Circuit follows the same approach. (See e.g., *City of Edmonds v. Washington State Building Council* (9th Cir. 1994) 18 F.3d 802, 803) (sober living home made preliminary showing of necessity by showing it required six or more residents for financial self-sufficiency and to provide a supportive atmosphere for successful recovery.) "To make out a claim of discrimination based on failure to reasonably accommodate, a plaintiff must demonstrate that . . . (3) accommodation of the handicap 'may be necessary' to afford plaintiff an equal opportunity to use and enjoy the dwelling . . ." (*Giebeler v. M&B Associates* (2003) 343 F.3d 1143, 1147.)

Pacific Shores has provided the financial equivalent of an *argument* that it requires 12 residents in each unit for financial viability, but it has not provided any *evidence* to support this argument. Therefore, staff believes that Pacific Shores has not carried its burden of demonstrating that the requested accommodation is necessary to make the Pacific Shores facility financially viable.

Environmental Review

This activity 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. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3)) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

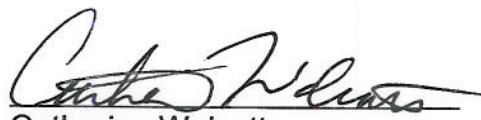
Public Notice

Notice of this hearing was published in the Daily Pilot and the Orange County Register, mailed to property owners and occupants within 300 feet of the property and posted at the site a minimum of 10 days in advance of this hearing consistent with the NBMC. Additionally, the item appeared upon the agenda for this meeting which was posted at City Hall and on the City website.

Prepared by:

Prepared by:


Janet Johnson Brown,
Associate Planner


Catherine Wolcott,
Deputy City Attorney

ATTACHMENTS

- Attachment 1: City Council Resolution No. 2009-81
- Attachment 2: Staff Communication and Applicant Response dated November 2, 2009
- Attachment 3: Correspondence to Applicant dated November 9, 2009
- Attachment 4: Correspondence to Applicant dated December 4, 2009

ATTACHMENT 1
City Council
Resolution No. 2009-81

FILE COPY

RESOLUTION NO. 2009-81

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWPORT BEACH APPROVING AN APPEAL, AND MODIFYING THE DECISION OF THE HEARING OFFICER'S TO DENY WITHOUT PREJUDICE REQUEST NO. 5 OF A REQUEST FOR REASONABLE ACCOMMODATION NO. 2008-001, AND CONDITIONALLY GRANTING A MODIFIED REASONABLE ACCOMMODATION REQUEST FOR AN EXISTING SOBER LIVING FACILITY LOCATED AT 492 ORANGE AVENUE, AND 492 ½ ORANGE AVENUE (PA 2008-181).

WHEREAS, Ordinance No. 2008-05 was adopted by the Newport Beach City Council on January 22, 2008, following noticed public hearings, and the ordinance amended the City of Newport Beach's Municipal Code (NBMC) relating to Group Residential Uses; and

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

WHEREAS, an application was filed by Pacific Shores Properties, with respect to properties located at 3309 Clay Street, 492 Orange Avenue, and 492 ½ Orange Avenue, and legally described as Lot 2 and Lot 1 in Block 6 of Tract No. 27 in the City of Newport Beach, County of Orange, State of California (APN 425-282-02 and 425-282-01), requesting approval of the following five requests for reasonable accommodation:

1. That residents of its facility at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue be treated as a single housekeeping unit as defined in Section 20.03.030 of the Newport Beach Municipal Code;
2. That the City no longer classify or treat the properties at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as "Residential Care Facilities," as defined by NBMC Section 20.05.010;
3. That the City classify the use of the dwellings at 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue as a legal nonconforming use;
4. That all code provisions applicable to the use of 3309 Clay Street, 492 Orange Avenue and 492 ½ Orange Avenue (including Zoning Code, Building Code, fire safety and any other applicable code) be applied to those properties in the same manner that those codes are applied and enforced to single family and two family residential uses located in residential districts zoned R-2; and
5. That the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit.

WHEREAS, a public hearing was held on March 25, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and purpose of the meeting was given in accordance with the Municipal Code. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Thomas W. Allen, Hearing Officer for the City of Newport Beach, who determined that, at the facility population level requested by the applicant, not all of the five findings required pursuant to Section 20.98.025 (B) of the NBMC could be made to grant Request No. 5 of Reasonable Accommodation No. 2008-001, that the City waive the requirement of NBMC Section 20.91A.020 that unlicensed residential care facilities may be located only in a residential district zoned MFR with a use permit; and

WHEREAS, the Hearing Officer stated that the applicant might, at some future date, present the City with a lower requested facility population level that would allow all five required findings to be made; and

WHEREAS, the Hearing Officer adopted Resolution No. HO-2009-021, denying Request No. 5 of Reasonable Accommodation No. 2008-001 without prejudice; and

WHEREAS, an appeal of the Hearing Officer's decision to deny without prejudice Request No. 5 of Reasonable Accommodation No. 2008-001 was filed by the applicant requesting that the City Council reconsider the denial; and

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

WHEREAS, pursuant to Section 20.98.025 A of the NBMC, 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 were supported by substantial evidence presented during the evidentiary hearing. The City Council may sustain, reverse or modify the decision of the Hearing Officer; and

WHEREAS, a public hearing on the appeal of the Hearing Officer's decision to deny without prejudice Request No. 5 of Reasonable Accommodation No. 2008-001 was held on October 27, 2009, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place, and purpose of the aforesaid meeting was given, and

WHEREAS, evidence in the administrative record, including the analysis in the staff report, the March 25, 2009 public hearing transcript, and documents submitted by the public was presented to the City Council; and

WHEREAS, on October 23, 2009, the applicant submitted an amended request for a reasonable accommodation, including a request to continue the present use with 12 residents (plus one resident manager, if needed) at each of the Orange Avenue addresses; and

WHEREAS, the City Council, after consideration of the administrative record and the amended request for reasonable accommodation submitted by the applicant, made a motion to approve the appeal, and to modify the Hearing Officer's decision to deny without prejudice Request No. 5 of Reasonable Accommodation No. 2009-001, and to conditionally grant a reasonable accommodation for up to 12 residents in each of the Orange Avenue addresses if each dwelling unit is able to comply with California Building Code requirements for occupancies housing that number of resident clients; and

WHEREAS, the City Council recognizes that granting the amended request for six residents in the Clay Street address is not necessary so long as the facility at 3309 Clay Street receives a license for six or fewer residents from the California Department of Alcohol and Drug Programs (ADP), and as such, treats the appeal as withdrawn with respect to the matter related to 3309 Clay Street; and

WHEREAS, the City Council granted the modified Reasonable Accommodation request as to 492 Orange Avenue and 492 ½ Orange Avenue conditioned upon the applicant providing sufficient evidence that the applicant requires the requested number of residents to achieve financial viability, which evidence shall be provided by Pacific Shores Properties, LLC within ten days of the Council's adoption of the decision. The matter of financial viability shall be heard by the Hearing Officer, who shall determine whether the requested number of residents are necessary to achieve financial viability. The City Council also conditioned the number of residents entitled to live on the premises based on compliance with the standards of the California Building Code, with no waiver of any California Building Code requirements; and

WHEREAS, the City Council conditionally grants the modified request for Reasonable Accommodation subject to the required findings of Section 20.98.025 (B) of the NBMC, and based on the facts in support of the findings, as follows:

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

The City Council sustains the Hearing Officer's determination that this finding can be made. The applicant submitted a statement signed by the facility manager that every resident of the facility is in recovery from alcohol or drug addiction. Federal regulations and case law have defined recovery from alcoholism and drug addiction as a disability, because it is a physical or mental condition that substantially impairs one or more major daily life activities.

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

The City Council grants the modified request for Reasonable Accommodation for up to 12 residents in each of the Orange Avenue addresses, subject to conditions. The applicant is directed to provide sufficient evidence to demonstrate that the requested number of residents is necessary to achieve financial viability.

The City Council remands the matter of financial viability to the Hearing Officer to determine whether this finding can be made. The number of residents entitled to reside on the premises shall be based on the occupancy standards of the California Building Code (CBC), with no waiver of any CBC requirements, and subject to an inspection of the premises by the Newport Beach Fire Marshal.

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

The City Council conditionally grants the modified request for Reasonable Accommodation for up to 12 residents in each of the Orange Avenue addresses, and modifies the Hearing Officer's determination that at the original population request of 50 residents, the facility would impose an undue financial or administrative burden on the City. With the modified Reasonable Accommodation granted by the City Council to allow up to 12 residents in each of the Orange Avenue address, the City Council finds the reduced population level would result in fewer negative secondary impacts on the neighborhood, and fewer resources expended by Code Enforcement, Building and Fire Departments to ensure the facility remains in compliance with state and local law.

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

The City Council conditionally grants the modified request for Reasonable Accommodation for up to 12 residents in each of the Orange Avenue addresses, and modifies the Hearing Officer's determination that at the original population request of 50 residents, the requested accommodation would result in a fundamental alteration of the nature of the City's zoning program.

The City Council finds that conditionally granting the modified Reasonable Accommodation with appropriate conditions limiting the population level in each of the Orange Avenue addresses would mitigate adverse secondary impacts such as noise, overcrowding, parking and traffic impacts, excessive secondhand smoke, and unruly behavior by residents, and would not undermine the basic purposes of the Zoning Code or result in a fundamental alteration of the City's zoning program. The number of residents entitled to reside on the premises shall be conditioned upon the occupancy standards of the California Building Code (CBC), with no waiver of any CBC requirements, and subject to an inspection of the premises by the Newport Beach Fire Marshal. Other appropriate conditions are stated in Exhibit 1, Conditions of Approval.

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

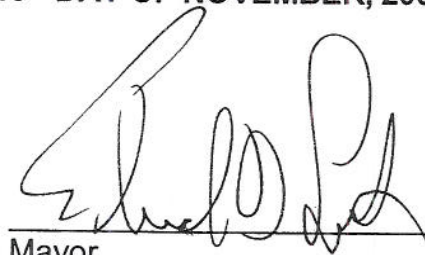
The City Council sustains the Hearing Officer's determination that this finding can be made. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others,"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

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

NOW THEREFORE, BE IT RESOLVED:

Section 1. The City Council of the City of Newport Beach hereby approves the appeal of the applicant, and conditionally approves a modified Request No. 5 of Reasonable Accommodation No. 2008-001 subject to the attached conditions.

PASSED, APPROVED AND ADOPTED THIS 10th DAY OF NOVEMBER, 2009.



Mayor

ATTEST:



City Clerk



EXHIBIT "1"

CONDITIONS OF APPROVAL

REASONABLE ACCOMMODATION NO. 2008-001
PACIFIC SHORES PROPERTIES, LLC
492 ORANGE AVENUE AND 492 ½ ORANGE AVENUE

Project-specific Conditions:

1. **Financial Viability/Finding of Necessity.** Pacific Shores Properties, LLC, shall submit sufficient evidence to demonstrate the applicant requires up to 12 residents in each of the Orange Avenue addresses and six residents in the 3309 Clay Street residence to achieve financial viability. Financial information shall be submitted to the Planning Department within 10 days of the date of adoption of this resolution. Staff, with the assistance of the Administrative Services Department designee, shall review and analyze the financial information and make a recommendation to the Hearing Officer.

The finding of necessity on the basis of financial viability shall be remanded to the Hearing Officer, who shall conduct a hearing to determine whether Pacific Shores has demonstrated financial necessity.

2. **Grant of Reasonable Accommodation.** Reasonable Accommodation No. 2009-001 is granted solely to Pacific Shores Properties, LLC to operate an adult sober living facility in the Orange Avenue addresses. All clients of the facility shall be classified as disabled, as that term is defined by federal and state fair housing laws. The Operator shall execute an affidavit declaring that all future clients receiving services from this facility are disabled persons.
3. **Occupancy Level.** The operator of Pacific Shores Properties, LLC, hereinafter referred to as "Operator," shall limit occupancy of this facility up to 12 residents and a resident manager in each of the Orange Avenue addresses. The number of residents entitled to reside on the premises shall be based on the standards of the California Building Code (CBC), with no waiver of any CBC requirements. The Newport Beach Fire Marshal shall inspect the premises to determine the maximum occupancy allowed under the standards of the CBC.

Standard Conditions:

4. **Staffing.** Operator shall have enough staff to appropriately and responsibly manage the facility; including at least one qualified manager on site at all times (24 hours a day, seven days a week).

5. **Governmental Referrals.** Operator shall not provide any services to any client or house any client who has been referred or caused to be referred to Pacific Shores' facility by any governmental agency, including but not limited to probationers or parolees.
6. **Assembly Uses.** Assembly uses are prohibited, except those that are limited solely to client residents of the facility and facility staff.
7. **Medical Waste.** Any and all medical waste generated through the operation of the facility shall be disposed of in accordance with the City of Newport Beach's Municipal Code, all other laws and best industry standards and practices.
8. **Trash & Trash Enclosures.** Operator shall comply with City code provisions pertaining to trash enclosures, and if directed by the Planning Director, shall secure and maintain commercial bin service at the subject properties. Operator shall provide a sufficient number of plastic trash cans with sealable covers to contain all of the refuse generated by the facility, which are to be used at all times. Trash cans shall be put out for pick up no earlier than 7:00 p.m. and before 8:00 p.m. on the evening before trash collection day, and shall be put back within the property by 6:00 p.m. on the day of collection.
9. **Smoking, Tobacco Products, and Cigarette Litter.** Per NBMC Section 2091A.050(A), no clients, guests, or any other users of the subject property may smoke in an area from which the secondhand smoke may be detected on any parcel other than the parcel upon which the use is located. Operator shall contain secondhand smoke generated by patients, clients, customers, and staff within the lot line of the subject property. Operator shall use its best efforts to:
 - a. Limit smoking to a designated smoking area located inside the facility and equipped with an air filter and smoke containment device or structure.
 - b. Prohibit smoking outside of the facility to prevent unreasonable annoyance to adjacent residences.
 - c. Rapidly address neighbor complaints of secondhand smoke, when it can be reasonably determined that the smoke comes from the facility.

In addition, Operator shall not allow clients, staff, or residents to litter cigarette butts on the ground, floor, deck, sidewalk, gutter, or street.

10. **Off-Street Parking and Garages.** Operator shall limit the number of residents permitted to have personal vehicles while residing at each of the facility's dwelling units to six (6) residents. Those residents permitted to have personal vehicles shall park in the garages spaces provided by the unit in which they live, or park on Old Newport Boulevard and commercial areas of Orange Avenue if on-site parking is unavailable.
11. **Transportation.** No transportation services are provided by the facility operator.
12. **Contact Information.** Operator shall provide area residents and the City with a 24/7 contact name, phone number and e-mail address to assist residents and the City with problems or concerns arising from the facility. E-mails or messages left for the Operator's designated contact shall be returned in a prompt manner within the next 24-hour period.
13. **Quiet Hours.** Operator shall enforce the Quiet Hours of 10:00 p.m. to 8:00 a.m. daily to its clients and customers occupying beds in its facility. During these Quiet Hours, all residents shall be inside except during emergencies. Quiet means noise, including music, television, and voices, is not audible beyond the perimeter of the facility except in a demonstrable emergency.
14. **Deliveries.** Any deliveries to the facility shall only be made between 8:00 a.m. and 5:00 p.m. on weekdays and prohibited on Saturdays or Sundays, unless urgently necessary.
15. **Persons per Bedroom.** Operator shall not allow more than two (2) clients in one bedroom.
16. **Building and Zoning Codes.** Operator recognizes that subject property has specific setbacks from the side yards, front yard, and/or back yard per the City's Building and Zoning Codes. Operator shall keep these setbacks clear of obstruction, including building obstruction. The orderly storage of trash cans is acceptable in setbacks.
17. **Facility Nuisances.** The subject property shall not be unsafe, unsightly or poorly maintained. If Operator receives a nuisance violation from the City in regards to any of these issues, Operator shall correct the violation within seven days or contact the City directly to implement a remediation plan in accordance with the City's municipal code.
18. **Profanity and Lewd Behavior.** Operator shall not tolerate lewd behavior, lewd speech, or profanity at the subject property, nor shall the operator tolerate profanity by staff or clients at levels audible to neighboring residents. The operator shall enforce the house rules against lewd speech, lewd behavior, or profanity. Profanity at a level audible to neighboring residents may result in an administrative citation issued by the City upon the property owner and operator.

19. **Noise.** Operator shall strictly adhere to the City's noise standards (NBMC §10.26.025; 10.26.030). Operator shall be responsible for minimizing clapping, stomping, or other noises at meetings or gatherings at the subject property, consistent with NBMC §10.26.030.
20. **Common Gathering Areas.** Operator's use of the common gathering areas for meetings, prayer, conversation, or other gatherings shall show due respect to non-resident visitors, and neighborhood residents, thus allowing them to take full enjoyment of the common gathering area.
21. **Services to Facility's Clients or Residents.** Operator shall use industry's best practices to ensure that the facility's clients or residents stay in recovery (including scheduled substance testing, random substance testing, and required counseling). Operator shall ensure that any client or resident removed from Operator's program or facility has the resources necessary to return home.
22. **Federal, State and Local Laws.** Operator shall comply with all federal, state, and local laws. The issuance of this reasonable accommodation shall not constitute a waiver of the requirements of any federal, state or local law, including the requirements of the California Building Code.
23. **Security and Safety.** The entrances and exits of each facility shall be secured and monitored. Fire exits shall be marked in accordance with the California Building Code. Smoke detectors and fire extinguishers shall be kept in operable condition. Exit passages shall be kept clear at all times.
24. **Additions or Modifications to Conditions of Approval, or Revocation of Reasonable Accommodation.** The Hearing Officer or City Council may add or modify conditions of approval to this Reasonable Accommodation, or revoke this Reasonable Accommodation upon a finding of failure to comply with the conditions set forth. The City Council may also revoke, modify, or amend this Reasonable Accommodation if it determines the conditions under which this facility is being operated or maintained are detrimental to the public health, safety, peace, morals, comfort, or general welfare of the community, or if the facility is materially injurious to property or improvements in the vicinity, or if the facility is operated or maintained so as to constitute a public nuisance. In any proceeding to revoke this Reasonable Accommodation, the cumulative effect of violation of two or more conditions shall be considered.
25. **Compliance with Conditions of Approval.** Per NBMC §20.98.035 (Amendments), a request for changes in conditions of approval shall be treated as a new application unless they are minor, do not involve a substantial alteration to the plan or conditions of approval, and are consistent with the intent of the original approval. Any changes in operational characteristics, including but not limited to the following, shall require amendment to this reasonable accommodation or can only take effect upon issuance of a new reasonable accommodation:

- a. Increase in number of client residents.
- b. Change in on-site staffing affecting the ability of the operator to adequately manage the facility and provide supervision of its residents.
- c. Increase in physical capacity of facility including number of beds, number of bedrooms, floor area of facility, etc.
- d. Request for amendment to any condition or conditions or approval.
- e. Change in property ownership in a manner that causes the majority of the property to be owned by a person or entity not identified in the Reasonable Accommodation or its application.
- f. Alteration and/or loss of approved on-site parking.
- g. Upon determination by the Planning Director, a change in facility management, a change in facility ownership, or a change in the population served by this facility. The term "change in facility management" shall include but not be limited to a change in the current management of Pacific Shores Properties, LLC and/or the conveyance, sale or assignment of Pacific Shores Properties, LLC's rights and obligations as to the facility at 492 and 492 ½ Orange Avenue or 3309 Clay Street to any successors in interest or assignees of Pacific Shores Properties, LLC.

#

STATE OF CALIFORNIA }
COUNTY OF ORANGE }
CITY OF NEWPORT BEACH } ss.

I, Leilani I. Brown, City Clerk of the City of Newport Beach, California, do hereby certify that the whole number of members of the City Council is seven; that the foregoing resolution, being Resolution No. 2009-81 was duly and regularly introduced before and adopted by the City Council of said City at a regular meeting of said Council, duly and regularly held on the 10th day of November, 2009, and that the same was so passed and adopted by the following vote, to wit:

Ayes: Henn, Rosansky, Curry, Webb, Gardner, Daigle, Mayor Selich

Noes: None

Absent: None

Abstain: None

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the official seal of said City this 11th day of November, 2009.

Leilani I. Brown

City Clerk
Newport Beach, California

(Seal)



ATTACHMENT 2

Staff Communication and Applicant
Response dated November 2, 2009

Brown, Janet

From: Chris Brancart [cbrancart@brancart.com]
Sent: Monday, November 02, 2009 12:15 PM
To: Brown, Janet; Chris Brancart; T. Peter Pierce
Cc: "Pierce, T. Peter" <>; Polin, Steve" <>; Wolcott, Cathy; Kit Bobko; Danner, Dennis
Subject: RE: Newport: Pacific Shore Financial Information

MS BROWN WROTE:

Per my communication with Dennis Danner, the Administrative Services Director/Treasurer of Newport Beach, regarding Pacific Shores' financial information, please provide a detailed profit and loss statement, and include such information as the client count during the reporting period, the types of services provided (i.e. meals, counseling), the number of employees and their functions, rents collected, mortgages and taxes expended, operating expenses, etc.

CERTAIN ITEMS HERE ARE BEYOND THE PROPER SCOPE OF THE INQUIRY. PLEASE PROVIDE ME WITH SOME BASIS FOR THE SCOPE OF THIS REQUEST IN THE EXISTENCE FHA LAW. THANK YOU.

In addition, please provide any other information you think would be of help to Mr. Danner in making a determination as to financial viability. Please also provide a telephone number in case Mr. Danenr needs to contact you or the person who prepared the information should he have any questions.

PLEASE PROVIDE ME WITH A BRIEF STATEMENT RE MR. DANENR'S QUALIFICATIONS TO MAKE THE FHA DETERMINATION, AND A SPECIFIC, WRITTEN EXPLANATION OF THE CRITERIA HE WILL APPLY IN MAKING HIS DETERMINATION. THIS REQUESTED DISCLOSURE IS FAIR, REASONABLE, AND, COMING FROM A GOVERNMENTAL AGENCY, REQUIRED.

This information must be submitted to my attention no later than Friday, November 20th.

PLEASE PROVIDE THE INFORMATION REQUESTED IN THIS EMAIL NO LATER THAN THIS FRIDAY, 11-6-09, SO THAT WE MAY TIMELY COMPLY WITH THE CITY'S DEADLINE. THANK YOU.

Christopher Brancart
Brancart & Brancart
(650) 879-0141 (voice)
(650) 879-1103 (fax)

CONFIDENTIALITY NOTICE: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended

recipient, please call me. Thank you.

----- Original Message -----

From: "Brown, Janet" <JBrown@newportbeachca.gov>

To: "Chris Brancart" <cbrancart@brancart.com>, "T. Peter Pierce" <ppierce@rwglaw.com>

Sent: Mon, 2 Nov 2009 11:38:20 -0800

Subject: RE: Newport: Pacific Shore Financial Information

> Mr. Brancart.

>

> Per my communication with Dennis Danner, the Administrative Services

> Director/Treasurer of Newport Beach, regarding Pacific Shores' financial

> information, please provide a detailed profit and loss statement, and

> include such information as the client count during the reporting

> period, the types of services provided (i.e. meals, counseling), the

> number of employees and their functions, rents collected, mortgages and

> taxes expended, operating expenses, etc.

>

> In addition, please provide any other information you think would be

> of help to Mr. Danner in making a determination as to financial viability.

> Please also provide a telephone number in case Mr. Danenr needs to

> contact you or the person who prepared the information should he have

> any questions.

>

> This information must be submitted to my attention no later than

> Friday, November 20th.

>

> Thank you in advance for your attention to this matter.

>

> Janet Johnson Brown

> Associate Planner

> City of Newport Beach

> (949) 644-3236

> jbrown@newportbeachca.gov

>

> -----Original Message-----

> From: Chris Brancart [mailto:cbrancart@brancart.com]

> Sent: Friday, October 30, 2009 1:15 PM

> To: T. Peter Pierce; Chris Brancart; Brown, Janet

> Cc: "Pierce, T. Peter" <; Polin, Steve" <

> Subject: RE: Newport: Pacific Shore Financial Information

>

> November 20. Will that work?

>

> THANK YOU. IT SHOULD WORK.

>

> Christopher Brancart

> Brancart & Brancart

> (650) 879-0141 (voice)

> (650) 879-1103 (fax)

>
> CONFIDENTIALITY NOTICE: This message is intended only for the use of
> the individual or entity to which it is addressed and may contain
> information that is privileged, confidential, and exempt from disclosure
> under applicable law. If the reader of this message is not the intended
> recipient, please call me. Thank you.

>
> ----- Original Message -----
> From: "T. Peter Pierce" <ppierce@rwglaw.com>
> To: "Chris Brancart" <cbrancart@brancart.com>, "Brown, Janet"
> <JBrown@newportbeachca.gov>
> Sent: Thu, 29 Oct 2009 13:50:39 -0700
> Subject: RE: Newport: Pacific Shore Financial Information

>
>> Chris --

>>
>> Anticipating your need for more time, I confirmed yesterday that the
>> 10 days will not begin to run until November 10 when the City
>> Council is scheduled to sign the resolution. That means the
>> financial information need not be provided until November 20. Will
>> that work?

>>
>> Peter

>>
>> -----Original Message-----
>> From: Chris Brancart [mailto:cbrancart@brancart.com]
>> Sent: Thursday, October 29, 2009 12:45 PM
>> To: Brown, Janet; 1Brancart, Chris
>> Cc: Pierce, T. Peter ; Polin, Steve" <
>> Subject: Newport: Pacific Shore Financial Information

>>
>> Ms. Brown,

>>
>> As we discussed following the Council meeting, Pacific Shores needs
>> 30 days from the date of the Council meeting, Tuesday, October 27,
>> within which to provide the City with the requested financial
>> information.

>>
>> 1. Please confirm by letter or email that this request is
>> acceptable.

>>
>> 2. Please forward this email to Ms. Wolcott and Mr. Bobko, whose
>> emails I do not have, so that they are advised.

>>
>> I'm cc'ing this to Mr. Pierce and Mr. Polin so that other counsel
>> are advise.

>>
>> Thank you.

>>
>> Christopher Brancart
>> Brancart & Brancart

> > (650) 879-0141 (voice)

> > (650) 879-1103 (fax)

> >

> > CONFIDENTIALITY NOTICE: This message is intended only for the use of

> > the individual or entity to which it is addressed and may contain

> > information that is privileged, confidential, and exempt from

> disclosure

> > under applicable law. If the reader of this message is not the

> intended

> > recipient, please call me. Thank you.

> >

> > ----- Original Message -----

> > From: "Brown, Janet" <JBrown@newportbeachca.gov>

> > To: "Chris Brancart" <cbrancart@brancart.com>

> > Sent: Thu, 29 Oct 2009 12:41:36 -0700

> > Subject: Site Inspection by Fire Marshal

> >

> > > Good afternoon, Chris.

> > >

> > > Fire Marshal Steve Bunting has indicated he is available to inspect

> the

> > > Pacific Shores' properties on Orange Avenue this Monday, November 2,

>

> > > in either the morning or afternoon.

> > >

> > > Would you please check with your client and let me know if this day

> > > works for them, and if so, what time would be acceptable. If it is

> not

> > > possible to schedule an inspection on Monday, please provide an

> > > alternative date and time.

> > >

> > > Thank you.

> > >

> > > Janet Johnson Brown

> > > Associate Planner

> > > City of Newport Beach

> > > (949) 644-3236

> > > jbrown@newportbeachca.gov

> > ----- End of Original Message -----

> > NOTICE: This communication may contain privileged or other

> > confidential information. If you are not the intended recipient of

> > this communication, or an employee or agent responsible for

> > delivering this communication to the intended recipient, please

> > advise the sender by reply email and immediately delete the message

> > and any attachments without copying or disclosing the contents.

> > Thank you.

> ----- End of Original Message -----

----- End of Original Message -----

ATTACHMENT 3

Correspondence to Applicant dated
November 9, 2009



CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

David R. Hunt, City Attorney

November 9, 2009

***Via Email cbrancart@brancart.com
& U.S. First Class Mail***

Christopher Brancart
Brancart & Brancart
Post Office Box 686
Pescadero, California 94060

**Re: *Pacific Shores Properties, LLC Reasonable Accommodation
A09-00583 – Financial Viability Review***

Dear Mr. Brancart:

This letter is in response to your November 2, 2009 email to Janet Brown of the Newport Beach Planning Department, in which you asked for an explanation of the scope of information the City requests in order to perform a review and recommendation on your client's October 23, 2009 amendment to its reasonable accommodation request.

As you are aware, in March, 2009 City staff reviewed your client's request for a number of accommodations, including an accommodation from the provisions of Newport Beach Municipal Code ("NBMC") section 20.10.020, which requires that unlicensed residential care facilities be located in residential districts zoned MFR, with a use permit. City staff analyzed the request in light of the findings required under NBMC chapter 20.98, and found that while it could not make the required findings for your client's request of 50 residents in three adjacent dwelling units, it could make the required findings to recommend granting the accommodation to Pacific Shores with a population of 12 resident clients in one of the Orange Avenue dwelling units. Your client did not raise the issue of financial viability at that time and in fact objected to providing any financial information. Therefore, staff was unable to analyze the number of clients necessary for your client to maintain financial viability at that time.

In his October 23, 2009 letter to our office, your co-counsel Mr. Polin amended the previous reasonable accommodation request from 50 to 30 residents, raised the issue of his client's financial viability for the first time, and asserted that an accommodation of 30 residents was necessary for the facility to maintain financial viability. At its hearing on this matter on October 27, 2009, the Newport Beach City Council agreed that the Pacific Shores facility's financial viability should be considered in relation to the necessity of granting the amended request. As Pacific Shores did not submit any information other than its own general assertion that it required this number of residents

Mr. Brancart
November 9, 2009
Page 2

for financial viability, the City Council conditionally granted the accommodation, but remanded the matter of financial viability to the Hearing Officer for consideration.¹

In order for the Hearing Officer to make a finding supported by facts on Pacific Shores' financial viability, he must consider more than just Pacific Shores' unsubstantiated assertion that it needs a certain number of residents in order to be financially viable. The applicant for a reasonable accommodation has the burden of demonstrating that granting its request is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling. (*City of Edmonds v. Washington State Building Council* (9th Cir. 1994) 18 F.3d 802, 803; *Lapid-Laurel, LLC v. Zoning Bd. Of Adjustment of the Township of Scotch Plains* (3rd Cir. 2002) 284 F.3d 442, 460.)

As you may recall, you specifically requested on October 27, 2009 that staff provide you with a list of the type of financial information Pacific Shores might submit. The list of information requested was staff's attempt to comply with your request. The City does not wish to dictate what sort of information your client must submit in order to establish financial necessity. Submitting the information requested may not be the only way to establish necessity. We leave the ultimate decision to you and your client as to what it wishes to submit. It will then be up to the Hearing Officer to determine whether the evidence submitted is sufficient. Thus, we encourage your client to submit as much information as it deems appropriate.

However, we believe the scope of staff's suggestions for financial information submissions is reasonable and directly related to the accommodation request your client made. As of this date, the requested information includes a profit and loss statement, Pacific Shores' client count during that reporting period, number and function of employees, types of services provided (such as meals and counseling), mortgage and tax expenses, and other operating expenses. Your client has asserted it requires a certain number of clients for financial viability, which includes generating sufficient revenue to pay operating expenses and generate a reasonable profit. The information specified is necessary to determine the average costs and income generated per client. If, however, your client can supply the necessary information in a verifiable form different from the forms requested, staff can consider it.

You have requested that we identify the basis for the scope of staff's request for information in existing fair housing law. Fair housing cases provide justification for the information staff has requested. The *Lapid-Laurel* case illustrates the scope of the applicant's burden to demonstrate financial necessity. In that case, the operator of a group home for disabled elderly residents requested a use variance for a 93-bed facility in a residential area. The court found the applicant had met its burden of demonstrating it was necessary for the elderly disabled to reside in single-family zones. However, the court found the operator failed to show that a smaller facility would not be financially viable. (*Lapid-Laurel, supra*. 238 F.3d at 460 – 461.)

¹ If Pacific Shores obtains a license for six or fewer residents from the California Department of Alcohol and Drug Programs ("ADP"), the 3309 Clay Street use will be considered a single-family use of property for Zoning Code purposes, per California Health and Safety Code section 11834.23. Therefore, the facility at 3309 Clay will not be included in the financial viability analysis.

Similarly, the Ninth Circuit also considers the number of residents necessary for financial viability in determining necessity, and that analysis cannot be accomplished without a statement of costs incurred by the facility and income provided by residents. (See *City of Edmonds v. Washington State Building Council*, 18 F.3d at 803, stating that the applicant had made a preliminary showing of necessity by showing that it needed six or more residents for financial self-sufficiency.)

Furthermore, fair housing law supports the City's requirement that the information be analyzed by staff and reviewed by a hearing officer. In *Keys Youth Services, Inc. V. City of Olathe* (D. Kan. 1999) 75 F.Supp.2d 1235, the court found that an applicant for reasonable accommodation asserting financial viability concerns must present evidence in support of this argument to the appropriate city body making the decision to grant or deny the accommodation. The *Keys Youth Services* court noted that *at trial*, the applicant had presented evidence supporting its argument that ten rather than eight residents were essential to the financial viability of the proposed home. This evidence indicated that the facility operator was paid on a daily per-capita basis, the incremental costs of housing two additional residents were minimal, and operating with ten residents would generate approximately \$60,492 per year. The operator also provided information on how the income generated would be spent. (75 F.Supp.2d at 1246.)

The *Keys Youth Services* court stated that,

Although the trial evidence might be sufficient on which to find that the accommodation of ten rather than eight residents is necessary, Keys failed to produce this evidence to the Planning Commission or to the City Council. The only evidence of a need for reasonable accommodation presented to these two bodies was that SRS reimburses Keys on a daily per capita rate, and that SRS has a waiting list for youth who need a Level V placement. Proof that Keys is paid on a per capita basis, and that this type of group home offers a needed service does not compel a finding, however, that ten rather than eight residents is a necessary accommodation.

Although Keys might find that it is economically advantageous to operate a home with ten rather than eight residents, the City Council had no evidence before it on which to find that the home could not operate with fewer than ten residents or that the requested accommodation is necessary to its financial viability. Under the FHAA, Keys had the burden of showing the City Council the need for a reasonable accommodation before seeking judicial relief . . . Keys has failed to show that it presented to the City evidence of the required linkage – that the proposed accommodation is necessary to provide potential residents an equal opportunity for housing in the community.

75 F.Supp.2d at 1246 – 1247 (Internal citations omitted)

The City recognizes that providers of disabled housing need not be non-profit organizations, and that some reasonable profit margin can be considered when analyzing financial viability and necessity. However, there is a difference between a for-profit housing provider making a reasonable profit that provides sufficient incentive to continue to provide housing for the disabled, and a profit margin that is beyond what is necessary for financial viability. If the population necessary to generate the larger profit requires a population level that is likely to inflict unreasonable secondary impacts on the

Mr. Brancart
November 9, 2009
Page 4

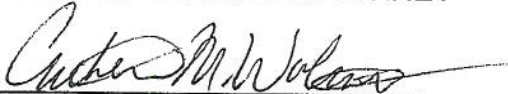
surrounding residential neighborhood and undermines the recovery of the resident clients, the City must consider those impacts as well.

Mr. Danner is the City's Administrative Services Director and Treasurer for the City of Newport Beach. He oversees the Accounting, Fiscal Services, Revenue and IT Divisions of the City, and is recognized throughout the state for his expertise in municipal finance. Mr. Danner or his designee is the City employee most qualified to review and interpret Pacific Shores' financial submissions and report his findings to the Hearing Officer.

If you have questions or need further information, feel free to contact our office at (949) 644-3131.

Sincerely,

OFFICE OF THE CITY ATTORNEY



Catherine M. Wolcott
Deputy City Attorney

cc: Kit Bobko, Richards, Watson & Gershon
Janet Brown, Planning Department
Dennis Danner, Administrative Services

Steven G. Polin
Law Offices of Steven G. Polin
3034 Tennyson Street, N.W.
Washington, D.C. 20015

ATTACHMENT 4

Correspondence to Applicant dated
December 4, 2009



CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

David R. Hunt, City Attorney

December 4, 2009

***Via Email cbrancart@brancart.com
& U.S. First Class Mail***

Christopher Brancart, Esq.
Brancart & Brancart
Post Office Box 686
Pescadero, California 94060

**Re: *Pacific Shores Properties, LLC Reasonable Accommodation
A09-00583 – Financial Viability Review***

Dear Mr. Brancart:

I am writing to remind you and your co-counsel that the City has requested some level of documentation of income and expenses reported by your client, Pacific Shores Properties, LLC. To date, our office has not received any documentation of the reported income and expenses which will be submitted next week under seal to the Hearing Officer.

City staff plans to release a staff report within the next seven days for your client's December 16, 2009 hearing before Hearing Officer Thomas W. Allen. This hearing will be held on the sole issue of whether the number of residents your client has requested are necessary for the facility's financial viability. If documentation of the reported expenses and income is not received by Tuesday, December 8 at the very latest, the City will be unable to include a recommendation to the Hearing Officer in the staff report on this matter.

As our office has stated before, in order for the Hearing Officer to make a finding supported by facts on Pacific Shores' financial viability, he must consider more than just Pacific Shores' unsubstantiated assertion that it needs a certain number of residents in order to be financially viable. The applicant for a reasonable accommodation has the burden of demonstrating that granting its request is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling. (*City of Edmonds v. Washington State Building Council* (9th Cir. 1994) 18 F.3d 802, 803; *Lapid-Laurel, LLC v. Zoning Bd. Of Adjustment of the Township of Scotch Plains* (3rd Cir. 2002) 284 F.3d 442, 460.)

Telephone: (949) 644-3131 • Fax: (949) 644-3139
City Hall • 3300 Newport Boulevard • Post Office Box 1768
Newport Beach California 92658-8915 • www.city.newport-beach.ca.us

Mr. Brancart
December 4, 2009
Page 2

If you have questions or need further information, feel free to contact our office at (949) 644-3131.

Sincerely,

OFFICE OF THE CITY ATTORNEY



Catherine M. Wolcott
Deputy City Attorney

cc: Kit Bobko, Richards, Watson & Gershon
Janet Brown, Planning Department
Dennis Danner, Administrative Services

Steven G. Polin
Law Offices of Steven G. Polin
3034 Tennyson Street, N.W.
Washington, D.C. 20015

[A09-00583] Brancart from CW 12.05.09 re Financial Viability Review