PUBLIC HEARING ON

NEWPORT COAST RECOVERY, LP

BEFORE THOMAS W. ALLEN, ESQ., HEARING OFFICER

NEWPORT BEACH, CALIFORNIA

TUESDAY, JULY 7, 2009

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7   Public hearing was taken on behalf of

8   the City of Newport Beach at 3300 Newport Boulevard,

9   Newport Beach, California, beginning at 3:00 p.m., and

10 ending at 6:07 p.m., on Tuesday, July 7, 2009, before

11 LAURA A. MILLSAP, RPR, Certified Shorthand Reporter No.

12 9266.

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1   NEWPORT BEACH, CALIFORNIA; TUESDAY, JULY 7, 2009

2   3:00 P.M. - 5:50 P.M.

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4   MR. ALLEN: All right. We'll commence the

5 hearings on Newport Coast Recovery. We have two today,

6 as you noticed on the agenda. The first hearing that is

7 scheduled -- and incidentally, I'm Thomas W. Allen, the

8 Hearing Officer designated by the City for purposes of

9 hearing the group home applications.

10   The first hearing we have today is a remand

11 from the City Council to this Hearing Officer after the

12 Hearing Officer denied the Use Permit application of

13 Newport Coast Recovery. And then subsequent evidence was

14 discovered that the City Council wanted the Hearing

15 Officer to review.

16   And so we're going to have a very limited

17 public hearing with respect to that particular remand and

18 then move on to the second hearing, which is a reasonable

19 accommodation hearing at the request of Newport Coast

20 Recovery to continue the operation they presently have.

21   So my suggestion here is we have until 5:45 to

22 conclude these hearings. The first hearing is a very

23 limited one solely on the issue of some after-acquired

24 evidence. And so I think Mr. Kiff will probably comment

25 similarly, but the idea is to restrict the amount of

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1   testimony that we give solely and exclusively to the

2   narrow issue on the after-acquired evidence so that we

3   can move that hearing through as rapidly as possible, and

4   then move forward with the more comprehensive matter of

5   the reasonable accommodation request for today.

6   So with that, I'm going to turn it over to

7   Mr. Kiff to commence the presentation.

8   MR. KIFF: Thank you, Mr. Allen.

9   As background for you, Mr. Allen, and for the

10   audience, on January 12th of this year, you denied this

11   Applicant, Newport Coast Recovery's request for a use

12   permit at 1216 West Balboa. The operator, Newport Coast,

13   appealed that decision to the City Council. On April

14   14th of 2009, the City Council acted to return the issue

15   to you to consider evidence acquired after the January

16   12th hearing.

17   As you noted, part one of today's agenda is a

18   reopen the Use Permit hearing to consider that evidence.

19   Part two is the reasonable accommodation hearing. That's

20   a new hearing by the same Applicant at the same location.

21   For the Use Permit hearing, I'm going to make

22   are very brief presentation about the after-acquired

23   evidence. Then, as has been your past practice, the

24   Applicant is welcomed to make comments. Then the public

25   hearing would be open. As you stated, the testimony is

5

1 limited to facts or knowledge about the after-acquired

2 evidence.

3   The comments are limited to 3 minutes, unless

4 you determine otherwise. You can close the public

5 hearing at that point. The Applicant can return to rebut

6 or clarify comments made. And then an opportunity for

7 questions and answers from you to the Applicant or to

8 City staff, and then you can make a determination. At

9 that point, after the determination, we move to the

10 reasonable accommodation hearing.

11   So with that, I want to make staff's

12 presentation about the after-acquired evidence. There is

13 a finding that the Municipal Code requires the Hearing

14 Officer to make at the -- in order to grant a Use Permit.

15   And one is that the use conforms to all

16 applicable provisions of a certain section of the Code.

17 But that one of these conditions -- and it's within

18 Newport Beach Municipal Code Section 20.91A.060 -- and

19 this is condition eight, it says, "That no owner or

20 manager shall have any demonstrated pattern of operating

21 similar facilities in violation of the law."

22   So this is a finding that we believe we could

23 make in January, as a staff. And making that

24 recommendation is a finding that we believe we cannot

25 make right now.

6

1   So -- and this comes about as a result of a

2 discussion of a call that was made to me on or about

3 April 1, March 30th of 2009, where a mother claimed to

4 have had a 17-year-old child in treatment at Newport

5 Coast Recovery for substance abuse.

6   Among the troubling issues that she raised with

7 me were that apparently Newport Coast Recovery knowingly

8 accepted at least up to two minor boys for treatment at

9 Newport Coast Recovery in apparent violation of their

10 license from ADP. Newport Coast, to my knowledge, has a

11 license to treat adult men, not minors.

12   The mother alleged that, sorry, a subsequent

13 investigation by the Department of Social Security

14 services which governs youth and youth facilities brought

15 forth a claim by a Newport Coast staff member that they

16 held an adolescent waiver that allows treatment of minors

17 for the Newport Coast facility.

18   Adolescent waiver is granted by ADP on a

19 condition basis, but my follow-up call with ADP resulted

20 in them telling me that there's no record of Newport

21 Coast ever having an adolescent waiver authorizing

22 Newport Coast to treat adolescents.

23   The mother alleged that one of the minors was

24 instructed by Newport Coast staff to lie about his age if

25 asked. And that one of the minor boys was taken off-site

1   in another resident's personal vehicle where the minor

2   relapsed. The minor boy was removed from Newport Coast's

3   facility is taken to a sober living facility in Costa

4   Mesa without notifying the minor's parents.

5   At this point, the Newport Beach and Costa Mesa

6   police were involved. Found the child. And Newport

7   Coast told our police department that they would not take

8   the child back to the Newport Coast Recovery facility

9   because he was a minor, in effect, abandoning the minor

10   away from his parents, who were both -- the father in

11   Central Valley, and the mother in Nevada. So that's a

12   case that -- case one that was brought to my attention.

13   The second one involves another family from

14   Bend, Oregon, About the son's time with Newport Coast

15   Recovery. I'll summarize that. The son had come out of

16   a detoxification facility known as the Pat Moore

17   Foundation in Costa Mesa after a 72 hour stay.

18   The son was encouraged by the director at

19   Newport Coast to come to Newport Coast Recovery. The

20   father paid a $10,000 deposit in advance of the son's

21   stay. The son left Newport Coast Recovery shortly

22   thereafter, about five days, because he claimed there was

23   no effective treatment there, and that he was basically

24   unsupervised.

25   The son's friends were able to check him in and

8

1   out. The son left one evening, and the staff at Newport

2   Coast didn't know he was gone until the next day. The

3   father has had issues attempting to get his money back.

4   The Newport Coast Web site pledges a certain

5   level of care, involving, for instance, meals and quality

6   home cooked meals. But basically, the son was given $55

7   a week Albertson's card with meals prepared on his own.

8   The son and the father assert that when the son

9   came back to get his papers that he had signed, he wasn't

10   given all those papers back.

11   Newport Coast Recovery, they also alleged, lost

12   the son's passport and a car title, despite it being in

13   the safe.

14   The father in this case also walked in

15   attempting to find the operator, Mr. Newman, and walked

16   through the building through an open door with no

17   controls over the facility.

18   The father also spoke of researching Newport

19   Coast further on the Internet, and noting that a number

20   of things on the Web site exaggerates the qualities and

21   qualifications. A case in point stating that Newport

22   Coast has a different, higher, rating from the Better

23   Business Bureau than Newport Coast actually has. Staff

24   attempted to verify this and found up to four instances

25   where they this may be true. I'm not going to summarize

9

1 those four. Those are in the staff report.

2   These are also potential violations of the ADP

3 license. Exaggerating the claims of your qualifications,

4 if that's what's going on, is something that ADP is now

5 investigating with Newport Coast Recovery.

6   We don't have an investigation report back on

7 that, nor do we have an investigation report back from

8 ADP on the instance of the minor being held there. I

9 need to make the record clear on. That we do, however,

10 have a violation issued by the Department of Social

11 Services for housing minors on-site without that license.

12   So with that, that concludes the information I

13 have as after-acquired evidence.

14   MR. ALLEN: And this was all evidence that was

15 submitted to the City Council at the time they considered

16 their the appeal and then remanded it; correct?

17   MR. KIFF: No, Mr. Allen. The evidence

18 submitted to the -- the evidence considered by the City

19 Council in their remand involves the two minors only.

20 The second family coming for the happened later.

21   MR. ALLEN: Okay. Anything else from staff?

22   MR. KIFF: No, sir.

23   MR. ALLEN: Then the Applicant would have the

24 opportunity to make a presentation on this issue?

25   MR. BRANCART: Thank you very much. I name is

1   a Chris Brancart. I represent the Applicant in this

2   case, Newport Coast Recovery.

3   Let me begin with a general objection, if I

4   may, to the Hearing Officer. The information that's been

5   provided to you by City staff came in a multi-volume

6   staff report comprising hundreds of pages. In

7   anticipation of this report being both lengthy and also

8   having a lot of new information in it, Counsel for the

9   Applicant requested of City staff that they be provided

10   with 10 days, 10 days before this hearing, in order to

11   examine the material that's presented to you upon which

12   you're asked to based your opinion, and we're asked to

13   respond to.

14   The response from the City is no, they would

15   not give us 10 days to prepare for this hearing and, in

16   addition, provided the report to my Counsel, who you've

17   met before, Mr. Polin, at 5 o'clock his time on

18   Wednesday, the day, of course, before the 4th of July

19   holiday.

20   I think it's important that you, as a Hearing

21   Officer, understand that not only are you being asked to

22   make determinations based on what can be described only

23   as rank hearsay, but you're also being asked to make

24   determinations upon a voluminous staff report in a

25   procedural posture that's substantially and highly

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1   prejudices the Applicant.

2   Let me make a second set of observations and

3   express concerns. You are being asked now, contrary to

4   what City Council instructed, to reopen the record here

5   and have new evidence presented before you. City Council

6   was very specific in the remand here to the Hearing

7   Officer that it was to deal with one allegation and one

8   allegation only, and that was the housing of minors.

9   That evidence comes to you as both solicited by

10   the City and also through other means and is presented to

11   us as late as 15 minutes ago. So we're not only being

12   asked to respond to a report consisting of hundreds of

13   pages without adequate time to prepare, in spite of, I

14   think, a very reasonable request to have 10 days to

15   prepare for this report, but we're being asked now to

16   accept the City's position that they should be allowed to

17   reopen the record, a record that was clearly set before

18   the City Council and, contrary to City Council's

19   instructions, now undertake additional inquiries about

20   after-acquired evidence.

21   But that's not my biggest problem of what's

22   happening here. My biggest problem with what's happening

23   here is the City has been on notice that Newport Coast

24   Recovery cannot respond to these types of allegations

25   that allege violations of licensure, because this process

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1   does not adequately protect or safeguard the

2   confidentiality and the integrity of the confidential

3   issues concerning both these individuals receiving

4   treatment.

5   We cannot respond. And there is, one would

6   say, a certain bullying quality to this, because the City

7   has been told repeatedly we cannot respond to issues that

8   concern treatment of individuals, because we do not have

9   in place here in this process the types of safeguards

10   which are inherent in any DSS and ADP hearing concerning

11   licensure or the violations of licensure.

12   We cannot respond to that, because to do so

13   would violate not only our ethical obligations to these

14   individuals but also to the regulatory restrictions. So

15   we will not and cannot respond.

16   But let me say there's something that's more

17   fundamentally wrong with what's happening here with the

18   after-acquired evidence, sir. You are Hearing Officer

19   asked to adjudicate and make findings in connection with

20   a zoning decision.

21   What you've been presented with is information

22   based strictly on hearsay reports that has been hardily

23   provided to us by the City that there have been, perhaps,

24   some violations of licensure law. That is not a zoning

25   issue. That is a licensure issue.

13

1   And that is what's fundamentally wrong about

2   what's occurring here today is that this body, despite

3   your knowledge of the Ordinance, despite good efforts by

4   good people, this body is not qualified to protect both

5   the safeguards of the individuals involved in protecting

6   their confidentiality, nor is it competent to render the

7   decisions to quote the Ordinance, whether or not, indeed,

8   there was a violation of law.

9   Sir, there is only two entities that are

10   qualified do that, and that is ADP and DSS, those

11   agencies of the State of California. Mr. Kiff made

12   reference to that, that we don't know what the outcome of

13   those determinations are. We don't know what the outcome

14   of those determinations are.

15   And the City presented hearsay information that

16   we cannot respond to because of inadequate

17   confidentiality provisions. And this body, as a Hearing

18   Officer sitting to adjudicate a zoning matter, is not in

19   a position to render those determinations. There are

20   only two people who are competent to do that, ADP and

21   DSS.

22   Nor is this an empty gesture. A moot point.

23   Because as Mr. Kiff has told you, ADP and DSS is

24   investigating these matters right now and can do it

25   confidently, can do it with the expertise required, and

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1   is the only two agencies that are charged to render this

2   decision.

3   The last point I would make is this. Let me

4   make two more. There is a certain quality of retaliation

5   that goes on, and the vigor with which the City has

6   undertaken to solicit these complaints from individuals

7   that touch upon confidential information, that bear on

8   licensing, that the City knows Newport Coast Recovery

9   cannot and will not respond to consistent with its

10   ethical and legal and licensing obligations. Most of

11   these solicitations occur after Newport Coast Recovery

12   challenges the City, whether it be through the HUD

13   process or seeks a permit.

14   There was one substantive piece of evidence

15   that was presented by Mr. Kiff, and that is that there

16   was a notice of violation that was issued by DSS. What

17   Mr. Kiff did not tell you in connection with that Notice

18   of Violation is that after it was issued, DSS conducted a

19   top-to-bottom inspection of the operation at Newport

20   Coast Recovery, and they cleared that violation.

21   If you have questions.

22   MR. ALLEN: Maybe let me just -- this was

23   a -- I have not seen any of this information. Nobody's

24   made any -- there's nothing in writing alleging any of

25   this. This is all brand new from you to me. And so, I

15

1   would like to just review it quickly.

2   You say ADP and DSS are, in fact, investigating

3   this now. Do you know that for a fact?

4   MR. BRANCART: Mr. Kiff said that as well, is

5   that if -- when there are allegations or complaints of

6   any kind that come to a licensed -- about a licensed

7   facility, they are referred to the Complaint Intake Unit.

8   The Complaint Intake Unit then will assign an

9   investigator. And after gathering information, there's

10   an administrative procedure by which the administrative

11   agencies, referring to their supervisors, sometimes legal

12   Counsel, will then make a determination of whether or not

13   there's warrant to be a hearing, at which time the proper

14   confidentiality, the safeguards are in place. We're not

15   here talking about minors, and what the circumstances

16   dealing with person's treatment, or the nature of their

17   treatment. And that's the process by which these types

18   of determinations are made.

19   So that's the administrative procedure, and my

20   point is this. We -- strike that.

21   This is not the forum that we can nor will we

22   defend ourselves consistent with our ethical and

23   licensure obligations. We can't do it. The City knows

24   that, and the City been told that.

25   And so they can come and say whatever

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1   allegations, based upon hearsay statements, that the City

2   wants to summarize to you as inflammatory as they are,

3   and they know we cannot respond consistent with both the

4   ethical and licensure obligations.

5   The second thing that I find so problematic

6   about this process is -- and the City Council discussed

7   this in the presence of all the City staff that you see

8   here today. And the City Council asked time and again,

9   "But is the Hearing Officer the right person to make this

10 determination?" referring to the two minors' issue.

11 Twice it was asked by City Council.

12   I think the mayor asked it and one of the City

13 Council members asked it. The point being is that

14 there's a recognition that -- there's the recognition

15 that this is not the body that is either

16 qualified -- without disparaging you -- competent, given

17 the nature of the allegations, nor is the body that has

18 the procedural safeguards in place that those types of

19 determinations can be made.

20   Nor is this a, "Okay. Well, then no one will

21 ever know," right? I mean, ADP and DSS is in the process

22 of following their ordinary administrative processes to

23 make these types of determinations. That's one point.

24   The second point I want to just emphasize again

25 is, if you read the City Council record, it's clear that

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1   we've been remanded here for a very specific purpose.

2   There was an after-acquired evidence presentation to the

3   City Council made by City staff at the time of the City

4   Council vote. The vote of the City Council was to remand

5   on a determination about that.

6   What we now have here today is -- and received

7   as recently as 15 minutes ago, is some additional

8   material that's being presented. There was no motion or

9   request that you reopen the record on this issue, nor is

10   there any fair and adequate opportunity to respond to

11   this.

12   I mean, for example, issues are talked

13   about the Web site. If there was a fair opportunity to

14   respond, one would say, for example, when the Web site

15   was up, it was accurate. It may not be accurate today.

16   And there are other things that could be said.

17   But, you know, how does one organize a response

18   when you're given this material this way, and it's told

19   explicitly by City Council, "This is not the issue that

20   you're to take up here."

21   Thank you.

22   MR. ALLEN: Okay. Thank you.

23   City response?

24   MS. WOLCUTT: Thank you. Katherine Wolcutt,

25   Deputy City Attorney.

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 1              I'm going to respond to some of what the

 2    Applicant's Counsel has said, and outside Counsel,

 3    Mr. Bobko, will respond to some of the other issues.

 4              The Applicant's Counsel has discussed the fact

 5    that we are presenting after-acquired information here,

 6    some of which was presented to the City Council, and some

 7    of which came up after the City Council

 8    remanded -- directed that this be remanded to you for a

 9    rehearing.

10              The after-acquired evidence that came up after

11    the remand order was given by the Council is relevant to

12    the reasonable accommodation consideration.  It's

13    efficient to remand it all at the same time, given the

14    lack of time considered.

15              The Applicant has also stated that there was a

16    retaliatory tone to this, that we had solicited these

17    unsolicited complaints.  Mr. Kiff received these calls

18    unsolicited, entirely unsolicited, from members of the

19    public who were looking for the proper person to make

20    their complaint.  And I believe that the mother of the

21    minors found Mr. Kiff by doing a Web search and finding

22    his name attached to a staff report, which was related to

23    the Newport Coast Recovery.

24              Mr. Kiff can say himself how the adult former

25    resident of Newport Coast Recovery located him and how
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1   they came to make contact. But it was not through some

2   kind of retaliatory search for that information.

3   Mr. Brancart agrees that one of the substantive

4   pieces of the evidence that we have is that Social

5   Services did an inspection and issued an NOV. The

6   request for -- when you're considering whether or not all

7   this information is hearsay, I made the request directly

8   to the Social Services Inspector that I've dealt with in

9   the past. I requested that he inspect Newport Coast

10   Recovery and confirm whether or not the allegations that

11   minors had been housed there was true.

12   The Social Services Operator was named Michael

13   Valentine. You've seen correspondence from him in the

14   staff report. He confirmed that minor had been housed at

15   Newport Coast Recovery. He confirmed that there was no

16   Social Services license to house minors at that facility.

17   And he also confirmed, after inspecting the facility,

18   that no minors were there at that time.

19   I believe that's what Mr. Brancart is referring

20   to when he says that they have done a top-to-bottom

21   inspection, and the facility has been cleared. I think

22   the statement "the facility has been cleared" is a little

23   misleading in this context. There may not have been

24   minors there then, but there were minors there before.

25   Social Services confirmed it. That is a violation of

20

1   state law.

2   Mr. Brancart has said that this is not a zoning

3   matter. However, our Municipal Code section

4   20.91A.050.C4 states that it's a requirement as an

5   operating standard for a Use Permit that no person that's

6   affiliated with the operation of the facility has a past

7   pattern or practice of running the facilities in

8   violation of state or local law. It doesn't have to be a

9   zoning issue.

10   There is a reason that that requirement is in

11   the Code, and that is so that we do not have situations

12   such as this. It's to protect and prevent this sort of

13   situation from occurring. Therefore, we feel that it is

14   within the Hearing Officer's jurisdiction to hear what

15   violations of state law the Applicant has performed in

16   the past.

17   Confidentiality issues. The facility does have

18   a duty to protect the confidentiality -- the identity of

19   individuals who are in recovery at their facility at the

20   time. I don't believe that protecting an identity of the

21   facility residents prevents the Applicant from defending

22   itself if it is able to do so from the allegations we've

23   made.

24   And I believe -- oh, was to the 10-day request,

25   there was no precedent for the Applicant requesting to

                                                          21

1   receive the staff report 10 days in advance. We did make

2   every effort to provide it far enough in advance to give

3   them a reasonable amount of time. We recognize it is a

4   lot of material to wade through and to absorb.

5   However, the Applicant received it prior to 5

6   p.m. Eastern Standard Time. That would be 1:30 -- I

7   believe it was 2 o'clock our time here. So it was around

8   5 o'clock Eastern Standard Time, and it was six days

9   before the hearing.

10   That is the almost the exact equivalent of the

11   time that our Planning Commission, our City Council, all

12   applicants who are other applicants for discretionary

13   permits with the City, and all applicants for

14   discretionary permits Counsel generally receive staff

15   reports. It is City's established pattern and practice,

16   and we stuck to it.

17   That's all I have to add right now. Thank

18   you.

19   MR. BOBKO: If I may, Kitt Bobko, outside

20   Counsel for the City.

21   I just want to add one thing to what

22   Ms. WOLCUTT just said, and that's with regard to the

23   confidentiality and Counsel's suggestion that it is

24   completely impossible to defend against these

25   allegations.

22

1   There are two things with that. The first is

2 in is that no one, the City -- as between the City and

3 defendant -- or the Applicant, I'm sorry, the Applicant

4 has the best knowledge of what happened. The City is

5 dealing with knowledge that it's gained by these people

6 coming forward and giving stories.

7   But there's certainly no dearth of evidence or

8 information on the Applicant's behalf. All of the

9 alleged incidents occurred at the Applicant's facility.

10 And if anyone knows the in's and out's when people came,

11 when they left, what was alleged and what actually

12 happened, it's the Applicant. So this idea that the

13 Applicant is completely in the fog about what has

14 occurred I think is a little bit misleading.

15   Secondly, with regard to the confidentiality,

16 certainly if the Applicant wishes to come forward with

17 exculpatory statements and whatnot, it could submit those

18 to the Hearing Officer under seal. It could redact

19 names. There are a number of ways that we could protect

20 anyone who needs to be protected. And, in fact, the City

21 has gone to great length to do so in communicating with

22 the Applicant.

23   So this idea that they have been dragged up

24 here kicking and screaming completely defenseless to

25 these allegations I think is a bit of an overstatement.

23

1 And certainly the Applicant has experienced enough to

2 know that there are ways, if they wanted to, that they

3 could rebut some of the allegations.

4   With regard to your competence, your Honor, we

5 are not asking you to pass judgment over any of these

6 matters as a question of law. What we are asking you to

7 do, is within the context of the City's Municipal Code,

8 decide whether these allegations amount to a violation of

9 law.

10   We are -- the City has not, as, again, Counsel

11 for the Applicant has suggested, done this out of a fit

12 of retribution. Quite to the contrary. When Staff first

13 recommended this Applicant or when staff first made its

14 report for this Applicant, the application was

15 recommended to be approved. And then it was only after

16 this information came to Staff that it had to go back and

17 suggest to the Council.

18   And again, I'd like to make one minor

19 correction as well. The Council didn't see this

20 evidence. The Council was presented with a proffer of

21 evidence, which I believe was about five or six bullet

22 points. So the Council actually has not seen this

23 evidence. You will be the first person to see this

24 evidence.

25   But we're not asking you to draw conclusions of

24

 1   law about that evidence. What we're asking you to do is,

 2   within the bounds of Municipal Code, decide whether this

 3   is something that bears upon this Applicant's ability to

 4   use the land as it is -- as he's asking to use it. And

 5   from the weight of evidence and from the testimony I

 6   believe you're going to here in a few moments, I don't

 7   think there's any way that you can conclude that it

 8   doesn't bear upon that land use.

 9   But again, we can concede that this is not

10   about questions of law with regard to licensure or

11   whether or not this person is fit to hold a license from

12   the state. In fact, you are not competent to make that

13   decision.

14   The only thing we're asking you to decide is

15   whether or not there is enough evidence, given the

16   parameters of our Municipal Code, to decide whether this

17   person can use the land as he is asking to use it.

18   Thank you.

19   MR. ALLEN: Mr. Bobko, what the finding that we

20   were, as the City, was required to make was that no one

21   manager shall have demonstrated a pattern of operating

22   facilities in violation of the law. And it's being

23   suggested that now we have a pattern of operating a

24   facility in violation of the law.

25   Doesn't that require that I make a finding

                                                        25

1   that, in fact, there was a violation of the law by the

2   way they operated this facility, vis-a-vis, these minors?

3   MR. BOBKO: I think that ADP has probably

4   already done that work for you.

5   Go ahead, Mr. Kiff.

6   MR. KIFF: Do you mean DSS, Mr. Bobko?

7   MR. BOBKO: I'm sorry. Thank you. That's good

8   staff. I think DSS has already done that for you.

9   I think that the evidence, though, again, in

10   order to give the Applicant his due process and to allow

11   him to -- again, we heard the word "hearsay" come up.

12   And of course, you know, that's a problem when you have

13   administrative hearings of people who are scattered all

14   about, but this is the opportunity to question that.

15   And if you, in your wisdom, believe that the

16   evidence does not amount or does not show that there has

17   been a violation of law, in addition to what DSS has

18   already decided, then certainly it's within your purview

19   to find that there isn't a pattern and practice of

20   violating the law.

21   But this hearing, again, is about a land use.

22   And the Applicant is here. All of the people who are

23   going to speak and give testimony are here. And you will

24   have an opportunity to hear that testimony first hand, as

25   will you, and be able to rebut it at the end. So the

26

1 idea that this is all hearsay and this is, again, smoke

2 and mirrors and retribution I think is a bit of an

3 overstatement.

4   MR. ALLEN: I see. Are there people here that

5 are going to testify further about this -- one or more of

6 these matters?

7   MR. KIFF: It's my understanding, yes,

8 Mr. Allen.

9   MR. ALLEN: Okay. Because the hearsay issue

10 itself concerns me. Generally speaking, making a finding

11 such as we're required to make or not make here solely on

12 hearsay is generally not acceptable practice. And so, I

13 would really like to hear about that.

14   MR. BOBKO: Your Honor, unlike a court

15 proceeding, in an administrative hearing, the rules of

16 evidence do not apply. So although we are doing our

17 level best to make sure that everyone is afforded their

18 due process -- and again, to echo some of the things that

19 Ms. WOLCUTT said, you know, the staff report was not

20 shoveled out in the darkness in order to give it to

21 opposing Counsel on the weekend of the 4th of July.

22   To the contrary, staff worked to their fingers

23 to the bones to try to compile all of the evidence and

24 get everything done and get it out as quickly as they

25 could. And the July 7th date was not selected by the

27

1   City. The City has been trying to have this hearing

2   since May. The July 7th date was selected by opposing

3   Counsel.

4   So the idea that the City is, you know, doing

5   anything that is going to curtail the ability of the

6   Applicant to respond is, again, I think an overstatement.

7   But getting back to your original question

8   about the rules of evidence, they simply don't apply in

9   an administrative hearing. And we have presented

10 e-mails.

11   If the Applicant, now that he has seen -- the

12 Applicant has seen the names, has any specific

13 information that they would like to include about those

14 e-mails, which were provided ahead of time, they may do

15 that. They can question the facts included in those

16 e-mails. They can even question anyone who gets up and

17 speaks now. But a strict hearsay rule, in fact, does not

18 apply today.

19   MR. ALLEN: Thank you.

20   MR. BOBKO: And I'm sure opposing Counsel will

21 disagree.

22   MR. BRANCART: May I be very, very brief?

23   MR. ALLEN: Yes, very brief. And then let me

24 understand what we're planning to do from here with

25 regard to this work.

28

1   MR. BRANCART: I believe that after this,

2   you're going to solicit comments from members of the

3   public on this narrow issue of after-acquired evidence

4   and then return to reasonable accommodation.

5   MR. ALLEN: I understand, but are there people

6   here set to testify with respect to violations that

7   occurred with respect to these two separate instances

8   that we have?

9   MR. BRANCART: I am unaware of them.

10   MR. ALLEN: I'm not asking you, frankly. I'm

11   asking Staff.

12   MR. KIFF: Mr. Allen, Ms. Christina Willis is

13   here, the parent of one of the minors, as is the minor.

14   MR. BRANCART: Now the plot thickens. Do we

15   take testimony in connection with a licensure matter

16   dealing with confidentiality? Obviously, they are free

17   to speak and say whatever they want in a public forum.

18   Newport Coast Recovery's process and obligations remain

19   the same. We cannot and will not respond. Obviously,

20   there's safeguards where it could be.

21   Can I turn back to what's at hand here, though?

22   As I recall, the City, when we actually focus on what

23   you're asked to do here, it's to make a finding whether

24   or not there is a demonstration of a pattern, a pattern,

25   a pattern of a violation of the law.

29

1   The only thing that's been represented to you

2   is, one, no finding of violation of the law. There could

3   potentially be licensure violations by not obtaining a

4   waiver prior to the housing the minor. Could be. ADP

5   and DSS will let us know.

6   Second, there was a Notice of Violation, which

7   does not constitute a violation of law. It can

8   constitute a violation of a certain regulatory provision

9   within licensure and an allegation that that occurred,

10   but then there is a follow-up inspection, and then a

11   Notice of Violation is cured.

12   Third point, we're looking here for you to make

13   this finding of a pattern of violation. The only thing

14   that you've received is Notice of Violation of a

15   potential failure to comply with a regulatory requirement

16   of pre-obtaining a waiver for a temporary housing of

17   minors, which is not, quote, law as it's generally

18   understood, about rather arises out of whatever narrow

19   particular licensure requirements that has happened here.

20   I'm going say this. I'm going to set

21   aside -- I'm going to set aside my objection that we

22   can't respond. I'm going to set aside for just a moment,

23   for the sake of argument, that this is not the place

24   where these determinations are made.

25   And I'm going to suggest that, as it's been

30

1   presented to you as a Hearing Officer to determine, have

2   you had -- can you make a finding that there is a

3   demonstrated pattern, pattern of violating the law based

4   upon the hearsay statements that you've been presented?

5   And I'm going to suggest to you no, that there is not.

6   Now, at the end of the day, when the competent

7   officials make these determinations, and they can handle

8   the issues dealing with hearsay and presentation of

9   documents, and experts can look at these things who knows

10   these licensure and waiver requirements, what have you,

11   then we will know. But at this point, we are not there

12   and this is not the forum here to go ahead and make those

13   determinations.

14   Last thing I want to say about -- last thing I

15   want to say about this -- and I don't think this should

16   be lost on us, because I think it goes to the apparent

17   unfairness that runs throughout this process, and that

18   is, this is not what we're here for. I go back and urge

19   you, as a Hearing Officer, to take a look at the remand

20   order from the City Council, and it's quite narrowly

21   drawn, and it's not what we're doing here right now.

22   MR. ALLEN: How does the Staff respond to that

23   last point? The City Council said to remand the matter

24   back to the Hearing Officer to only consider the newly

25   acquired evidence. Is that the newly acquired evidence

31

1   that was presented to them, or is that other evidence

2   that you've obtained since?

3   MR. BOBKO: Your Honor, we submit that Council

4   didn't know what the evidence was. So when they said

5   "newly acquired evidence," that's exactly what we told

6   them, that there had been people that had come forward.

7   But again, we didn't present them this evidence. We

8   presented them with a proffer of evidence. And they

9   looked at it, and they said, "Yeah, that sounds like

10 something that you should consider as the Hearing

11 Officer."

12   So I disagree with Mr. Brancart in that the

13 Council had this -- such clarity in what they were asking

14 you to review. What they told them was, in order to

15 prevent them from being bias or tainted when this comes

16 back up to them on Appeal, as I'm sure it will if we get

17 that far, was not to tell them precisely what it was that

18 we had discovered, but to only give them, again, a

19 proffer of what we had learned, and suggested to them

20 that it was important, and that you should consider it.

21   So to suggest that they knew precisely the

22 boundaries of the evidence that we collected and that

23 they meant to curtail that, I think, again, is a bit of

24 an overstatement.

25   MR. ALLEN: All right. Thank you.

                                                        32

1   Anything further that we intend to present or

2   review on this?

3   MR. KIFF: No, sir, not beyond the public

4   testimony.

5   MR. ALLEN: Pardon?

6   MR. KIFF: No.

7   MR. ALLEN: I'm not in a position to render a

8   decision on this today. There's been a lot of issues

9   that have been presented that I did not know about, that

10   I just am hearing today for the very first time.

11   And so, it's appropriate to do a complete and

12   final job to make a presentation back to the City Council

13   and not make a decision based upon what I've been

14   presented with here today, because I think there are some

15   significant issues that need to be considered.

16   Can we select a date fairly shortly but,

17   nevertheless, to give sufficient time to the Applicants,

18   so that they don't have concern over their lack of

19   information within the 10-day period and get back before

20   us and make a more complete presentation on this?

21   MR. BOBKO: We appreciate there's a lot of

22   issues here. One concern that the City has is that the

23   continuance would prejudice -- is that there are people

24   who have come today, as this has been a noticed hearing

25   for quite a while, and are willing to give testimony.

33

1   We think that it would prejudice the City by

2 not allowing those people to speak today. Because then,

3 of course, my learned opponent will say that, "Why,

4 that's all hearsay. Those people have just sent us

5 e-mails, and we had no chance to respond."

6   So I think that it would be fairest for all

7 involved if those persons, if they wish, be allowed to

8 come speak. And then the Applicant will have first-hand

9 knowledge of what testimony was given. There will be no

10 hearsay objection later on. And you will have the

11 benefit of actually hearing these people and being able

12 to question them today, something that might not happen

13 if we continue this to another date.

14   MR. ALLEN: I completely agree with that. I

15 didn't want to curtail the public hearing aspect of it.

16 I just wanted to indicate that I wasn't ready to make a

17 decision based upon what we're hearing right now. But I

18 agree with you. We should open it up and let these

19 people testify.

20   MR. BOBKO: Okay. Very good.

21   MR. ALLEN: Does anyone else have anything else

22 to say before we open the public hearing?

23   Okay. The public hearing is open. And as

24 Mr. Kiff indicated a few minutes ago, each person has

25 three minutes to speak. And so be sure to identify

34

1 yourself, spell your last name for the record, when you

2 come to the podium.

3   MS. WILLIS: My name is Christina Willis,

4 W-i-l-l-i-s, and I'm the parent of -- one of the parents

5 of the children that were put into the facility.

6   Unaware of the fact that they were not suppose

7 to take minors at the time, I was in a very bad position.

8 Wanted help for my son. And Mr. Newman spoke to me at

9 least five times just on the drive down to get me down

10 there.

11   Since we took my son out after everything bad

12 that had gone and happened during the time that they were

13 there, I had actually checked in two children, one of

14 which was not mine, with his parents' consent, anyway.

15   This is the letter from Barbara Alms which

16 shows that it is being investigated through ADP. This is

17 the Web site, which has been falsely -- I mean, it's not

18 what they say at all. And my son can testify to that as

19 well. He lived it.

20   I think Mike Newman, quite frankly, the Newport

21 Coast Recovery is -- they are crooks. They have taken

22 money from several of those parents. On my account is

23 $35,000. They refuse to pay the $10,000 back, which I

24 have here letters from my attorney. I've tried

25 everything, every avenue. That's why I'm here today.

35

1   I don't think he should be allowed to be in

2 business and take people's money when their children are

3 hurting and they are not giving them any help. He went

4 home and since got a felony charge for drugs, which I can

5 show you as well, because they don't help you. And I

6 don't believe they belong in business.

7   I've tried every avenue that I can, from

8 attorneys to whatever. They won't respond. They don't

9 answer calls. So the other parent that's dealing with

10 the same thing, same response. Nothing. He'll even

11 called Mr. Newman in the middle of the night. "Why were

12 you calling me? Why are you holding my money hostage?"

13   We've had to deal with this, and we have

14 families. As you can see, I'm getting ready to have baby

15 number four or five -- number five, sorry. So you lose

16 count after a while. No.

17   My son went from a straight A student. He was

18 a great kid. He had a downfall in his life. I went to

19 them for help. Did not receive that help. Took the

20 other child hoping -- because they are partners in crime,

21 they are best friends, they do everything together,

22 hoping that the two of them would come back sober

23 together and move on with their lives.

24   That child has since had to go to another

25 program. I can't afford to send my child to another

36

1   program. They have taken my money and they've run.

2   Plain and simple. Nobody returns calls. Nobody cares

3   whether or not -- but they have got my money.

4   And I'm not the only parent. There's two

5   others that I know of one of, which is a good friend of

6   mine, which is the other child's parent, who also -- is

7   waiting for $10,000. He was sent two separate checks,

8   which I'm assuming Mr. Newman knows how to go around the

9   law, two separate checks for $5,000. Neither of them are

10   any good. He goes to the bank every day trying to cash

11   those checks. Nothing.

12   So I feel personally duped. My son has

13   suffered because of it. His friend has suffered because

14   of it. And it's an ongoing battle for us, because I

15   could never get the help that was needed for him. You

16   know, my family had to take time off, had to drag my

17   other children, find them sitters, all that stuff to be

18   here every weekend. On the weekend I came up, there was

19   supposed to be a family meeting. Family meeting never

20   happened.

21   So everything I was promised and within their

22   brochure online -- I mean, that's the best way that I

23   could do it. It sounded amazing to me, which would make

24   you want to go and take your child and think, "Wow, this

25   is it. This is our answer." Mr. Newman called me five

37

1   times, and I have phone records to prove it, on the drive

2   down. Just on the drive down, in the short time, trying

3   to make sure that we're going to get there.

4   We got there. Everything -- it was late at

5   night. They sat with us. They assured us for, I would

6   say, a good 2 1/2 hours. They saw the reluctance on my

7   face, because it looked like a shady, scuzzy place. The

8   people looked like convicts that work there. Not all of

9   them. There's two very -- three very nice people in

10   there.

11   I later heard a lot of things through my son

12   and through his friend, things that shouldn't have been

13   going on there. My son was getting in cars with people.

14   Didn't know anything about it. No one ever told me. He

15   was supposed to be the facility 24/7 as far as I knew.

16   Getting in the car, going and driving. And

17   they don't even drug test them when they come back. They

18   could have been doing anything they wanted. That is not

19   the way it was supposed to be. That was not what we were

20   told. That was not what we were promised. It's not

21   hearsay. He's right here. He'll answer any question you

22   have.

23   We just don't want to see other people going

24   through what we have been through. At the worse time in

25   their life when they're down and out, and their children

38

1 are suffering, I don't want to see someone else have to

2 go through this, ever. It's not fair, and it's not fair

3 that they took my money and they ran and they gave me

4 nothing in return. Nothing.

5   It was lost money. It was my life's savings,

6 and they know it. They knew that. And they were okay

7 taking it. And I was okay with giving it as long as my

8 kid got the help. I later find out he was not even

9 supposed to be there. The other child was diabetic, I

10 tried making sure for the life I of me that that child

11 was going to get his shots. They assured us, "Everything

12 was going to be okay."

13   The reason I ran into Mr. Kiff online was

14 looking up incidents with Newport to try to find out, am

15 I the only one this is happening to? That's when I read

16 that there were other people that had diabetes that had

17 not gotten their shots, or whatever needed to be done,

18 and suffered. The ambulance had been called two or three

19 times because of that. Their neglectful. It's plain and

20 simple as that.

21   MR. ALLEN: Do they still have your $10,000?

22   MS. WILLIS: Yes, they do. And

23 nobody -- nobody will contact me now, but, boy, they sure

24 wanted to get me down there. I mean, when I pulled

25 up -- to be honest with you, it was Mike Newman waiting

39

1 outside for me, even. "How are you?" He was the

2 sweetest guy in the world. I thought this is amazing.

3 Didn't last. Apparently, he never even visits the

4 facility once a month, and that's for donuts when the

5 parents come to visit.

6 MR. ALLEN: Okay. Thanks.

7 Where are we with time here?

8 MS. OBORNY: It was about five or six

9 minutes.

10 MR. ALLEN: Okay.

11 MS. WILLIS: Can we get Chris' mother on the

12 phone?

13 MR. KIFF: We could, yes.

14 MS. WILLIS: I think that that's very

15 important. And you're welcome to take those.

16 MR. KIFF: Okay.

17 MS. WILLIS: I do need them back, though.

18 MR. KIFF: Okay.

19 MR. ALLEN: Thank you.

20 Anyone else wish to speak?

21 MS. OBERMAN: Good afternoon, your Honor, and

22 Counsel and staff. Denys Oberman speaking on behalf of

23 the group of residents located in the Central Balboa

24 Peninsula.

25 We've listened to this and the allegations with

40

1   regard to the hearsay illegal operation, et cetera.

2   There is definitely a pattern of illegal operations in a

3   variety of respects. There was an illegal operation in

4   the form of an illegal facility that operated for several

5   years across the Street at 1219 West Balboa and was

6   reported by the citizens. The City is aware of it.

7   And actually, in one of these prior Use Permit

8   hearings, the operator actually admitted that he had run

9   this type of facility, and that he had, quote, ended up

10 closing it down. So that is one element of operation

11 that was illegal.

12   Secondly, there have been a number of other

13 code violations that impact health and safely. There

14 have been fire code violations. There have been fires,

15 and the City staff can certainly speak to all these

16 issues. There are a number of other -- so the bottom

17 line of it is, these are not isolated incidents or series

18 of incidents. They are representative of violations that

19 have occurred over the past five or more years on the

20 part of this operator.

21   There are many families, both within this

22 community and families who had young adults and maybe

23 children that were in the program, that are afraid to

24 come forward. There they afraid for a number of reasons.

25 We've previously expressed fear for retaliation. That's

41

1   been pooh-poohed. There has been -- there have been

2   continued confrontations on the part of the operator, his

3   management, and the residents in the facility whenever

4   complaints have been submitted. So that fear is real.

5   There are incidents -- why is it when we talk

6   about fairness and equity, that when residents come

7   forward or others, parents of patients or clients that

8   make testimony, that that testimony is characterized as

9   hearsay, when that testimony is based on direct

10   experience and direct observation?

11   If this degree of evidence is insufficient to

12   demonstrate a pattern, there are a number of other people

13   that will come forward within this community and parents

14   sending young adults here from outside the community who

15   will testify if they are afforded the same types of

16   protections that this business operator that is operating

17   illegally is, at least a similar level of protection.

18   And lastly, I want to say that it's my

19   understanding that this City does have a duty to uphold

20   state law. Is that correct or incorrect? I'd like to

21   inquire. We've reviewed the state law. We reviewed it

22   with a far variety of lawyers for the City, for various

23   residents, and residents groups, et cetera.

24   The City does have a duty to uphold the state

25   law, and also the City has a duty -- it has a duty to

42

1 protect the health and safety of the residents. And that

2 is within the purview of this hearing protocol and we

3 believe within your purview.

4   And that we hope and recommend that you act,

5 and we'd like to see you act today so there's no undue

6 continued burden on the City and its residents, and act

7 to abate this use and also deny the request for

8 reasonable accommodation.

9   Thank you.

10   MR. MATHENA: Good afternoon. Larry Mathena.

11   Just a couple points, hopefully, that will be

12 helpful. As someone in the public who's attended most of

13 these hearings, I just want to go on record -- and I

14 would be happy to testify as a member of the public

15 somewhat knowledgeable -- that from my perspective, in no

16 know way, shape or form has the City or the City staff

17 done anything in a retaliatory manner or in a manner

18 designed to undermine the position of group home

19 operators.

20   In fact, if anything, I could probably, with a

21 little preparation, testify for an extremely long period

22 of time about how the City, in fact, has tied itself into

23 a knot to do exactly the opposite. So any claim of

24 retaliation on behalf of the City, I believe, is utterly

25 fallacious.

43

1   Number two, you know, I do accept that there's

2 a need to find a potential additional grounds for denial.

3 And let's back up and keep in mind you, in your wisdom,

4 did deny this operator a Use Permit way back when. And

5 the only issue before us is, in light of additional

6 evidence, whether or not, frankly, there's additional

7 grounds to deny that operator its Use Permit. One of the

8 grounds is, evidently, patterns of law violations.

9   Two different points. The law as quoted does

10 not make a difference between regulatory or

11 administrative law versus some grander law. You clearly

12 have in front of you sufficient evidence to indicate a

13 violation of that, whether or not the state and the

14 regulatory authorities involved in enforcing that law

15 deem it meaningful enough to apply penalties or sanctions

16 against this particular operator.

17   Finally, I would observe that in terms of both

18 this particular caseload and everything else and the many

19 times I've been involved in the City's activities

20 associated with group homes, that no way, shape or form

21 has the City violated its normal operating processes in

22 any shape or manner. In some ways, I could object to

23 that personally, but I will choose not to.

24   MR. ALLEN: Does anyone have any more testimony

25 bearing directly on the point of what the City Council

44

1   remanded for the Hearing Officer to hear?

2   MR. BRANCART: Yes, sir. I believe that the

3   Applicant speaks again before you close.

4   MR. ALLEN: Yes, you can speak again after we

5   conclude the public hearing.

6   Anyone else need to speak?

7   Okay. Thank you. Then we'll close the public

8   hearing, and Mr. Kiff, we just completed the public

9   hearing. And our normal course from here is to allow

10   rebuttal by both the Applicant and the City; correct?

11   MR. KIFF: Well, Mr. Allen, with all due

12   respect, I'd make a request to reopen the public hearing

13   and allow the other parent to speak. She is not with us

14   today. She did offer to call in. I typically would have

15   put her on the speaker phone here, but Mr. Polin is using

16   our speaker phone, respectfully. So this is -- that's

17   why I ran out was to get her contact information. I just

18   spoke with her. She's prepared to speak.

19   MR. ALLEN: So how would we do that then?

20   Handle that one and have Mr. Polin to go on hold?

21   MR. KIFF: No. I'm going to put her on my cell

22   phone, if you're willing to.

23   MR. ALLEN: That's fine, as long as we can hear

24   her for the record.

25   MR. KIFF: Hello? Ms. Golden, this is Dave

45

1   Kiff. I have you on speaker phone in our hearing room

2   before Mr. Thomas Allen, who is our Hearing Officer.

3   We're now in the public comment period of the discussion

4   about Newport Coast Recovery. I'm not going to ask you

5   any questions. You're invited now, though, to make any

6   comments you believe the Hearing Officer should hear.

7   MS. GOLDEN: Okay. Thank you so much for

8   giving me an opportunity to.

9   MR. ALLEN: I appreciate it.

10   MR. KIFF: I'm sorry. You'll want to identify

11   yourself for the record first.

12   MS. GOLDEN: Oh, sure. Judy Lynn Golden,

13   Christopher Van Dan's (phonetic) mother.

14   MR. KIFF: Go ahead, then, please.

15   MS. GOLDEN: First of all, I would like to say

16   that I think it's just unbelievable that Tina and my

17   husband have not been reimbursed all of the money that

18   they paid for a fraudulent contract.

19   They did -- I will say that he did put,

20   yesterday -- asked him to put $1500 into an account for

21   my husband. And this was after, I would say, probably at

22   least 200 phone calls. I think that the way they -- I'm

23   sure you've already heard, and everybody's said what they

24   had to pay, but I had to pay $5,000 (unintelligible).

25   When he took off and left at about 12 o'clock

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1   on the 29th, no one ever even contacted my ex-husband.

2   No one had contacted my ex-husband or let him know our

3   child was missing, that he got back at about 9:30, 10

4   o'clock the next morning. And one of the workers there

5   had actually contacted my daughter and told her.

6   And when I called, my roommate -- when I

7   called, it was Judd Wheatfield (phonetic). And my

8   roommate calls me back. And this was a long time ago.

9   She's no longer with me. He called me back and said,

10 "The reason why I missed your call is because I was on

11 the phone on the other line with your ex-husband. If you

12 want to know about your son, call him," and he then hung

13 up on me.

14   Keep in mind, okay, he's into drugs, no form of

15 ID, takes shots of insulin every day. And I felt like we

16 got no idea where our child was. When we finally

17 got -- we had weekends, not even actual weekdays, and had

18 no idea we could reach him. And when both my husband and

19 I contacted them, "We put him on four-month no

20 visitation." They also said, "Quit calling here."

21   That's when I got in contact with Kathy

22 Wolcutt, and everybody was really starting to -- we -- we

23 had no idea for 2 1/2 days where our son was.

24   Then we only found out that he was at Reckers

25 (phonetic), which was another place that he is not

47

1   allowed to have trips. And when I got over there, when I

2   go back down there to pick up my son, it was like walking

3   into a terrible prison movie.

4   When I got there, I got there and

5   (unintelligible) after I got my son's things -- Al

6   Pacino. He had clothes with him, colognes with him. He

7   had all sorts of things that they didn't pack. And then

8   they take him back, so I find my kid in Costa Mesa.

9   And when I got there, it was the most scary

10 situation that I ever walked into. And that's

11 what (unintelligible.) And so I guess I think it was a

12 very scary situation. They took advantage of everyone

13 concerned, especially these two kids.

14   I mean, they really did number on the

15 financial. I pray to God that he got himself help and

16 got (unintellible), because to take that kind of

17 money -- $45,000. And they say on their Web site where,

18 "Oh, weekend special $15,000." And when we were in

19 there, some people were in there for $12,000, $15,000,

20 (unintelligible). They said to us for forty-five. It

21 was just a travesty.

22   And the people that we had explained their

23 prision -- prison sentences too, I mean, it was

24 just -- it was not a good situation. I would just -- we

25 put my son into better rehab called --

                                                        48

1   MR. ALLEN: Okay.

2   MS. GOLDEN: -- in Northern California to get

3   him help.

4   MR. KIFF: Jody, our time limit is up.   I'm

5   going to --

6   MS. GOLDEN: I appreciate it.

7   MR. KIFF: Hold on one moment, please.

8   MR. ALLEN: Can you hear me?

9   Would you please ask her how old her son was

10   when he entered the facility?

11   MR. KIFF: Jody, will you tell the Hearing

12   Officer how old your son was when he entered the

13   facility?

14   MS. GOLDEN: Yes, he was 17 years old.

15   MR. ALLEN: Thank you.

16   MS. GOLDEN: And he was told, "If anyone asks,

17   tell them you're 18."

18   MR. KIFF: Okay.   Any other questions of her?

19   MR. ALLEN: No more questions for me.

20   MR. KIFF: That would conclude our testimony.

21   MS GOLDEN: Okay.   Thank you very much,

22   Mr. Kiff.   I appreciate it.

23   MR. KIFF: Hold on here.

24   MR. BRANCART: So that it's stated on the

25   record, and I want to be plain, Newport Coast Recovery

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1   will not violate its ethical obligations or

2   confidentiality provisions to cross-examine an individual

3   or their parents regarding any treatment they have. I

4   want to add a rebuttal comment, and I want on that plain

5   and on the record. That's not the way it's done.

6   MR. ALLEN: Let's see. We've closed the public

7   hearing now. Although we reopened it temporarily for the

8   purposes that important to call.

9   Which parents were and child were the ones that

10   the evidence was present at the time the City Council

11   made its order to remand?

12   MR. KIFF: Mr. Allen, both parents spoke. Both

13   parents provided the information at roughly the same

14   time. This involved two minors so you heard from.

15   MR. ALLEN: These two?

16   MR. KIFF: That's correct. You heard from the

17   second minor here on the phone with Ms. Jody Golden, and

18   the first minor with Ms. Willis.

19   MR. ALLEN: Okay. All right. Let's see. I've

20   forgotten our practice, whether we have the Applicant

21   speak first in response to public hearing comments or

22   whether we have the City. Whichever, please, go forward.

23   MR. KIFF: It's the Applicant.

24   MR. BRANCART: The finding you're asked to make

25   is that there has been a demonstration or pattern of

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1   violation of the law. In connection with that, I believe

2   it's incumbent on the Hearing Officer to make the

3   following subsidiary findings.

4   One, that this has been a fair process by which

5   you have received a fair -- fair presentation of the

6   evidence; in other words, that you determine that there

7   are no confidentiality or ethical obligations that would

8   in any way preclude someone in Newport Coast Recovery

9   from responding to this information and all of this

10   information.

11   And that is a determination that will have to

12   be made, obviously, in light of not only municipal codes

13   that apply here, as well as zoning codes -- I'm sorry, as

14   well the licensing codes, and other confidentiality

15   provisions.

16   Second, that it has been demonstrated here by

17   the City that there was a violation. What we've heard

18   is, of course, information that's been provided. But

19   none of it necessarily rises to a violation of law.

20   That's the second -- that is the second subsidiary

21   finding you, as a Hearing Officer, have to make.

22   "As a Hearing Officer, I hereby determine that

23   these state provisions were violated. I determined that

24   adequate evidence existed for the violation of these, and

25   that I'm competent to render these decisions and hear the

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1 evidence that supports it, and this was a fair

2 presentation of the evidence, despite the fact that the

3 Applicant could not comment on what the evidence was

4 presented."

5   As part of that, I would add this. We've heard

6 two things -- without breaching confidentiality, but I do

7 believe I heard two people that expressed a concern that

8 they had not received monies back from them. It is -- if

9 that is true, and the very best light of the -- presented

10 to the individuals, we may have a breach of contract.

11 And that may be something that's occurring in dozens,

12 perhaps hundreds, of businesses here in the City of

13 Newport Beach within this week.

14   But a breach of contract, if, indeed, that is

15 what occurred here, and Newport Coast Recovery vehemently

16 disputes it, is not a violation of law.

17   I'm going to end on this note. Thank you.

18   MR. ALLEN: City's response?

19   MR. KIFF: Mr. Allen, respectfully, it's Staff

20 assertion -- obviously we have Counsel here for Staff, as

21 well as for the operator.

22   We brought these two cases towards you in good

23 faith, as they were brought to us by both parents. We

24 also brought forth to you in attachment one of your staff

25 report that says -- that includes the document on

52

1 Department of Social Services letterhead that says,

2 "Subject: Notice of operation in violation of law."

3   It's a pretty clear document that's in front of

4 you. I very much respect your thought that this

5 could -- it would be arguably fair to allow the Applicant

6 additional time to respond to that, but -- and we're

7 amenable to your wishes there.

8   But it's clear to us, as Staff, that the

9 document in front of you is -- makes us unable to make

10 the finding whereby this operator to, quote section

11 20.91A.050, that "the property shall be operated in

12 compliance with applicable state and local law."

13   This is an example where the property is not in

14 operated in compliance with applicable law and state law

15 specifically. I think that's concludes

16 Staff -- Mr. Bobko has a remark.

17   MR. BOBKO: I want to get back to the due

18 process issue for just a moment.

19   MR. ALLEN: Due process?

20   MR. BOBKO: Yes.

21   MR. ALLEN: Okay.

22   MR. BOBKO: Your Honor, again, my opponent says

23 that this is not a fair presentation, and that they will

24 not answer the evidence. And frankly, were I in his

25 shoes, I would make the same claim. I don't know how you

                                                        53

1 could possibly respond to that evidence.

2   I, again, reiterate that if they wanted to

3 present evidence to you under seal, redacted from all of

4 the names, that would be perfectly acceptable to the

5 City. And we think that that would ameliorate any

6 questions about confidentiality that prevent them from

7 exerting any type of defense here.

8   We've done that in the past. It is not

9 uncommon to do in situations, for example, in cases

10 where, for example, police officer files are turned over

11 from the City. That information is confidential by the

12 Penal Code, and those files are always turned over under

13 seal. We would -- if that's the question, the City would

14 be happy to stipulate to that procedure, so that you had

15 the ability to look at any of evidence that they would

16 like to put on.

17   But again, this suggestion that there is simply

18 no defense to this evidence, and not only is there no

19 defense to this evidence, but they are legally prohibited

20 from defending ourselves against that evidence, is, I

21 think, an overstatement.

22   MR. ALLEN: All right. Here's what I think,

23 and I'm going to do this as quickly as possible.

24   Number one, Mr. Mathena said what we all are

25 recognizing all the way along here, that whatever we do

54

1 today does not have any effect on the Resolution

2 previously adopted making the findings, among other

3 things, that there's an overconcentration, and that this

4 use was denied for that reason.

5   So this use is still denied, and the City

6 Council did not seek further input with respect to that.

7 They simply remanded the additional evidence concern to

8 the Hearing Officer to make a finding there. The City

9 Staff has come up with a notion that possibly this

10 constitutes the basis for demonstrating a pattern of

11 violation of the law.

12   I don't think that one or two instances

13 constitutes a pattern of violation of the law. But it is

14 clear to me, without having to conduct any further

15 hearings, that at least two 17-year-old individuals were

16 admitted into this facility, and that they were present

17 their for awhile, and they entered into what -- or their

18 parents entered into contracts to have Newport Coast

19 provide services for them. And that's pretty simple and

20 straight forward. I did not hear even denial of that

21 from the Applicant.

22   So I don't need to go forward in my mind and

23 conduct a full-blown evidentiary hearings to determine

24 whether technical violations occurred with respect to the

25 nature of the treatment that was given. The fact is,

55

1   there were two 17-year-olds admitted into the facilities,

2   and they were weren't licensed.

3   And so I'm going ask the City Staff to prepare

4   a Resolution that would be a Resolution supplemental to

5   the 2002-09, I believe it is, or -- I'm sorry, no.

6   2009-002 Resolution. It would be supplemental to that,

7   not the same Resolution, because the City Council

8   remanded this for a determination to them as to this

9   newly acquired evidence.

10   And so while I don't believe a pattern or

11   practice of violating the law just based on what the City

12   Council remanded back, which I think is a separate issue,

13   I can't go back and make a determination here now that,

14   for instance, they're using the garage in violation of

15   law, and a lot of other things that have been contended

16   here, because that's not what the City Council sent back.

17   The City Council sent back this one issue of

18   whether this newly acquired evidence should be considered

19   by the Hearing Officer, and that's what I'm going to do

20   by this Resolution. And I believe I'll have to work with

21   Staff to construct it. But there's no need to further

22   continue this. I will draft that Resolution in

23   connection with staff, and we'll end that at this point.

24   Any comments or needs to make further --

25   MR. BRANCART: Yes. Obviously, so that the

                                                          56

1   record is clear, all the objections stand. We object to

2   the finding. This is not the competent forum. Please to

3   do not, by my lack of advocacy on this issue, say that

4   we're conceding any of these points.

5   What I've said before, and I'll say it again,

6   is that this is a matter that's going to be fully

7   adjudicated by ADP and DSS. It's not going to be

8   adjudicated here.

9   But you've rendered your finding and -- based

10   upon the information that you have before you, and you've

11   made a determination that you believe you're in a

12   position to make that finding on the record that's been

13   presented, that that is what has occurred.

14   But please do not accept our presentation as

15   being acceptance of the finding or not presenting a

16   denial, okay?

17   MR. ALLEN: I won't do that, but on the other

18   hand, I think you had a duty to at least make some

19   presentation here. And if you're legally prevented from

20   doing that, I find it that surprising, that you could not

21   at least deny that these, in fact, occurred.

22   MR. BRANCART: Right. And I appreciate that,

23   and that's the determination you've made as the Hearing

24   Officer, that you believe, based upon the expertise that

25   you bring here, is that that would have been something

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1 that the Applicant could and should do.

2   Regarding the application of licensure, we

3 respectfully disagree, but that is a subsidiary finding.

4 And I would like that reflected in your findings,

5 please.

6   MR. ALLEN: Okay.

7   MR. BRANCART: Would you do that? Thank you.

8   MR. BOBKO: I'll take five minutes.

9   MR. ALLEN: Mr. Bobko?

10   MR. BOBKO: I'm simply going to ask that we

11 take a five-minute break, before the reasonable

12 accommodation hearing.

13   MR. ALLEN: I think it's an excellent idea. Is

14 this one concluded?

15   MR. BOBKO: Staff has nothing.

16   Mr. Kiff?

17   MR. KIFF: Nope.

18   MR. ALLEN: It's concluded then, subject to

19 adoption of a Resolution.

20   (Pause in proceeding.)

21   MR. ALLEN: All right. Let's commence number

22 two on this agenda, which is the same Applicant, Newport

23 Coast Recovery, seeking a reasonable accommodation from

24 several of the Newport Beach Code standards.

25   So let's commence with a Staff report by the

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1   City.

2   MR. KIFF: Ms. WOLCUTT will be making the

3   reasonable accommodation presentation. As a reminder,

4   the pattern is similar to what we do with the Use Permit

5   hearing. There's a Staff presentation. The Applicant

6   has an opportunity to make comments. Public hearing is

7   opened; public hearing is closed. Applicant can return.

8   You can ask further questions, and then either make one

9   of three different determinations, approve, deny or

10 continue.

11   And just as a reminder to the folks in the

12 audience, our obligation is to be out of the room by

13 5:45.

14   MS. WOLCUTT: Katherine Wolcutt, Deputy City

15 Attorney. That probably applies to me as well to get

16 through the Powerpoint with all due speed.

17   As you see in the Staff report, the Staff

18 report is approximately 39 pages long. The Applicant

19 made two different reasonable accommodation requests, and

20 they were both very exhaustively analyzed.

21   And we will be hitting the high points in the

22 verbal presentation today, because of the number of the

23 requests and the length of the Staff report and the need

24 to get through the material so that people still have

25 time to speak. For anybody who's been to these

                                                        59

1 presentations before, this will look very familiar.

2   The background in reasonable accommodation,

3 under the Federal Fair Housing Act, "unlawful

4 discrimination includes refusal to make reasonable

5 accommodations in rules, policies, practices, or

6 services, when such accommodations may be necessary to

7 afford a handicapped person equal opportunity to use and

8 enjoy a dwelling." That's a quote from the McGary v.

9 City of Portland, 9th Circuit case.

10   The duty for a city or a housing provider to

11 make reasonable accommodations is well established.

12 Federal Fair Housing Act Amendments are the source of the

13 duty. They require cities to make exceptions from their

14 usual rules, policies, and practices when:

15   The request is made on behalf of the disabled

16 individual;

17   When the request is reasonable;

18   And when the request for the accommodation or

19 exemption is necessary, and that that necessity is tied

20 to whether it is necessary to afford a disabled

21 individual an equal opportunity to use and enjoy a

22 dwelling. Source of that is 42 U.S. Code, Section

23 3604(f)(3)(B).

24   First, we look at whether or not a request is

25 reasonable. And requests are considered unreasonable if

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1 granting it would either:

2   Impose an undue financial or administrative

3 burden on the City;

4   Or if it would result in fundamental alteration

5 in the nature of the City program.

6   Fundamental alteration is also described as

7 "undermining the basic purpose which the requirement was

8 adopted to achieve."

9   We also look at whether the request is

10 necessary. Will the accommodation -- on a general level,

11 will the accommodation allow the disabled individual to

12 live in the dwelling if the accommodation is granted?

13   Would the disabled individual be unable to live

14 in the dwelling without the accommodation?

15   And then we look at whether or not there's a

16 direct link between the accommodation requested and the

17 required equal opportunity?

18   And court cases looking into this issue and

19 analyzing it have found -- have come to define it as

20 whether the required accommodation is necessary to either

21 make the facility financially viable, and thus, provide

22 an equal opportunity to live there;

23   Or does the required accommodation provide a

24 therapeutic benefit to the disabled resident? Is there a

25 direct connection between the accommodation requested and

61

1   the benefit to be received?

2   Applicant has requested two alternative

3   exemptions. Each request would require an

4   exemption -- if granted, it would require an exemption

5   from the restriction of Newport Beach Municipal Code

6   section 20.10.020, which requires that residential care

7   facilities generally be located only in MFR zones and

8   with a Use Permit.

9   An exemption for the Newport Beach Municipal

10   Code section 20.10.020, with continued operation under

11   the terms recommended by the January 12th Staff report

12   was the first of Applicant's request. They made two

13   separate ones, which complicated the analysis a little

14   bit, hence the length.

15   That recommendation that they have asked you to

16   adopt is that the use be continued in the current

17   location with 14 residents, maximum occupancy. And some

18   of the other conditions that that would have required,

19   recommended by staff:

20   Quiet hours;

21   All the on-site parking spaces, all six of

22   them, be kept clearing for parking, not used for any

23   other use;

24   Three master parking permits be purchased from

25   the City, and that staff and residents and visitors who

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1   would -- staff and residents will use those master

2   parking permits when parking off-site.

3   And for the family counseling that's apparently

4   provided to the residents' families, Staff had made a

5   suggestion that either the counseling sessions for people

6   who do not reside on-site be conducted from 9 to 12 in

7   the morning, on Sunday mornings, to mitigate impact on

8   beach parking.

9   Or that the family -- when family counseling is

10   provided, that the family members park elsewhere and be

11   transported from off the Peninsula with a shuttle system.

12   It also required compliance with all Federal,

13   state and local laws, as all of our conditions can do.

14   Applicant also made a second request. As the

15   Applicant phrased it, if we did not -- if the Hearing

16   Officer did not grant the first request, which was

17   essentially continue the operation with 14 and

18   conditions, including conditions on parking, then they

19   required -- asked for a waiver of continued operation of

20   18 residents, and a waiver of certain Newport Beach

21   Municipal Code requirements, and also waiver of selected

22   standards that were required in order to receive a Use

23   Permit.

24   Those specific standards that they asked to be

25   waived were asked for 18 residents as maximum occupancy;

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1   They asked for a waiver of the Use Permit

2   occupancy requirements. There's a limit of two per

3   bedroom, plus one additional resident in the entire

4   facility in order to receive a Use Permit;

5   Exceptions from the parking requirements. The

6   parking requirements are in another section of the Code,

7   20.66.030. Those parking requirements were in place

8   before the current Ordinance was adopted.

9   They asked that residents and visitors be

10 subject to the same parking requirements as all

11 residential uses;

12   They ask that the City -- the Hearing Officer

13 determine that the City should treat the Newport Coast

14 Recovery as a legal non-conforming use;

15   They asked that the City apply the California

16 Building Code requirements that were in place at the time

17 the facility was established. The first change of this

18 facility from a residential use to a recovery facility

19 use was in 1997.

20   A waiver of the overconcentration

21 considerations, particularly those involving APA standard

22 of one or two residential care facilities per block;

23   And a waiver of consideration of proximity of

24 the facilities to schools, playgrounds, day care centers,

25 and alcoholic beverage outlets.

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1   The Staff recommendations are to deny request

2   number one, but to permit current facility residents to

3   complete the stay that they intended, so that we're not

4   depriving any current residents of their housing;

5   And request number two, to deny the

6   accommodation since we have already dealt with the

7   current residents into request number one.

8   Turning to analysis at the individual requests,

9   request number one. First, we look at whether request

10   number one is necessary and necessary to afford a

11   disabled individual an equal opportunity to use and enjoy

12   a dwelling.

13   We look at, does this facility require the

14   requested accommodation at the requested population they

15   have asked for to achieve financial viability or a

16   supportive recovery environment? And our 9th Circuit

17   source for that is City of Edmonds v. Washington State.

18   The factors of the Newport Beach Municipal Code

19   allows the City to consider, and a Hearing Officer,

20   whether the accommodation will affirmatively enhance the

21   quality of life of individuals with a disability. That's

22   tied to the therapeutic benefit issue;

23   Whether the disabled individuals will be denied

24   an equal opportunity to enjoy the housing type of their

25   choice without the accommodation;

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1   Whether the accommodation is necessary for the

2   facility's financial viability;

3   And whether the existing supply of facilities

4   of a similar nature and operation is sufficient to

5   provide disabled individuals with an equal opportunity to

6   live in a residential setting.

7   As usual, Staff analyzed the reasonableness and

8   the necessity of these requests with regard to current

9   residents and prospective residents, since they are

10   individuals that are situated differently.

11   As to the current residents, Staff found that

12   the request was necessary and reasonable. The City is

13   not in the practice of attempting to abate current

14   residents who were there at the time that this issue was

15   heard.

16   As to protective residents, the analysis showed

17   that the request number one was not necessary and was not

18   reasonable.

19   And the necessity issue, Applicant did not

20   submit evidence that it required the requested

21   accommodation in order to be financially viable, and did

22   not present evidence that required accommodation for

23   therapeutic benefit.

24   It did submit a statement that living together

25   while in recovery with others who were also in recovery

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1   was a therapeutic benefit, and the City does not dispute

2   that. What the City disputes is whether this specific

3   accommodation is necessary to provide the therapeutic

4   benefit to individuals living with others in a licensed

5   residential care facility that enhances their recovery.

6   To continue that issue, we look at the

7   alternate housing opportunities. Because the Newport

8   Beach Municipal Code authorizes a consideration of other

9   available facilities that are of a similar type and

10   nature.

11   As of July 6th, we had 200 -- of the approved

12   facilities, that means the ones that are not subject to

13   abatement and that are licensed within the City, there

14   are 207 ADP licensed beds within the City. Many of those

15   are in duplex and apartment buildings on the Balboa

16   Peninsula and West Newport.

17   If someone's looking to recover and live with

18   other persons in recovery in a licensed environment and

19   to be near the beach, there's a number of other similar

20   alternatives they can choose from.

21   As to current residents, as we've discussed,

22   the use is subject to abatement with the Use Permit

23   denial and if the reasonable accommodation is denied,

24   and, therefore, current residents would lose their

25   housing.

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1   Prospective residents. The future residents

2   would lose their ability to live in this duplex, but not

3   in other similar facilities, as we've discussed.

4   Then we moved to the issue with request number

5   one of whether request number one is reasonable with the

6   combination of factors that the Municipal Code tells to

7   us consider:

8   Would the accommodation fundamentally alter the

9   character of neighborhood;

10   Whether it results in a substantial increase in

11   traffic or parking issues;

12   Whether granting the accommodation would

13   substantially undermine any express purpose under General

14   Plan or Specific Plan;

15   And whether the accommodation would create

16   institutionalized environment due to the number and

17   proximity of other similar uses.

18   We also look at other required findings:

19   Would granting the request impose an undue

20   financial administrative burden;

21   Would granting the request result in a

22   fundamental alteration in the nature of the City's zoning

23   program.

24   Generally, when we're looking at an exemption

25   from this particular section of the Municipal Code, we

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1   look at the purposes of, especially for our purposes,

2   both the R2 zone versus the MFR zone, or the zone we're

3   trying to establish.

4   And we did less analysis on this this time

5   because there was more analysis required in other areas.

6   And because of the determinations in those areas, this

7   issue really didn't need to be dealt with in depth. But

8   there are the purposes of our R2 and MFR zones.

9   Under other conditions, this finding could be

10   made that with 14 residents in seven apartment units, the

11   density was similar to that which would be common in R2

12   residential zone for a non-conforming building.

13   Then we look at what the purpose of the Use

14   Permit is, whether we undermine the purposes the Use

15   Permit was supposed to achieve by allowing it to be in

16   operation without the Use Permit.

17   Use Permits are required for uses with

18   operating characteristics that require special conditions

19   to enable them to not have an adverse impact on other

20   uses in the area.

21   And Ordinance 2008-05 requires the Use Permit

22   for non-conforming uses in residential areas. This is to

23   ensure the purposes of the Zoning Code are achieved, and

24   to mitigate adverse secondary impacts.

25   Purposes that are specifically enumerated in

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1   the Code are to promote the public health, safety and

2   welfare, and implement goals of the General Plan by

3   ensuring that conditional uses don't change the character

4   of residential neighborhoods.

5   And equally important, to protect and implement

6   the recovery and reintegration of the disabled, in part

7   by avoiding the overconcentration that would lead to an

8   institutionaliation of the area.

9   And would the Use Permit purpose be undermined?

10   Our analysis was that because of the Applicant's conduct

11   that we have found out since January of this year, that

12   the findings required to issue a Use Permit could not be

13   made for this facility. If you were looking de novo at

14   the factors that you have to find -- that you were

15   allowed to look at and the findings that you have to

16   make, we believe that the finding to issue a Use Permit

17   could not be made today.

18   We talked about current.

19   Prospective residents. All required findings

20   cannot be made. One of the basic purposes of the zoning

21   program would be undermined if the Use Permit were

22   granted, or if the reasonable accommodation waiving the

23   Use Permit were granted.

24   That purpose, as we've discussed, is discussed

25   earlier in the Use Permit hearing. There was a

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1   requirement put into the Municipal Code that no one who

2   is operating a facility operated a similar facility with

3   a pattern or demonstrated pattern or practice of

4   violating state or local law.

5   We also admit that we can anticipate the

6   administrative burden of monitoring facility and

7   prosecuting substantiated complaints.

8   With conditions, could the use conform to the

9   operational standards of 20.91A.050? Because that's one

10   of the first requirements for a Use Permit to be given.

11   Was it operated in compliance with state and

12   local law, with management plan of a 24-hour contact?

13   Staff continues to assert that it is not

14   operating in compliance with state law. I believe the

15   Department of Social services letter that was dated April

16   1, 2009, the Notice of Violation which was sent, says,

17   "You are here" -- was it in this -- I believe, the

18   exhibit that you'd find this in is Council's packet that

19   was given to the City Council. That was where it was

20   last located.

21   "You are hereby notified the above-referenced

22   facility is operating without a license, which is a

23   violation of California Health and Safety Code section

24   1508." Social Services determined and confirmed that

25   this facility violated state law. And it violated it

71

1   twice, once with each minor. So that's two instances

2   that we can confirm.

3   I cannot give you instances over a year. I

4   can't show you 10 or 12 instances. Our Code does not

5   define "pattern." It doesn't define "practice." I don't

6   know of a clear bright line test for what's a pattern and

7   what's a random incident.

8   But I think you've seen since April, we've

9   had -- since late March, we've seen a number of instances

10   arise that cause Staff deep concern. And we believe that

11   it does show that there's a pattern of violation of state

12   law and, therefore, that finding cannot be made.

13   Whether the property is physically suited to

14   accommodate use;

15   Whether there's sufficient parking;

16   Whether the use will change the character of

17   the surrounding residential neighborhood.

18   Generally, Staff looked at this issue when it

19   made its recommendation back in January and determined

20   that it would not be an issue, that, with conditions, the

21   facility could meet those required findings.

22   However, with the violations of state law that

23   we have documented and which ADP is in the -- ADP is in

24   the process of investigating. The Social Services'

25   investigation is complete, and Social Services confirmed

72

1   what we know.

2   Moving to request number two, start with a

3   threshold issue. None of the requested -- separately

4   requested accommodations, if they were granted, would

5   allow the Applicant to continue their operation just on

6   their own.

7   As a reminder, those are 18 residents, maximum

8   occupancy;

9   The waiver of the Use Permit occupancy

10   requirements;

11   Exemptions from parking;

12   Treating them as legal non-conforming use.

13   We'll go through those, but as a reminder,

14   those are some of the specific elements they are asking

15   for exemptions from.

16   There are four factors required to show

17   necessity, as we've discussed. This is just a reminder

18   slide, because it was seen earlier in the presentation.

19   This is what they asked for exception from.

20   And Staff determined that the individual

21   requests made by the Applicant were not necessary for

22   disabled individuals to enjoy equal opportunities to

23   housing, and they were not reasonable.

24   We discussed the financial viability aspect a

25   little bit when they were asking for 14 residents. At 18

73

1   residents, that's more than 14. In the past, we've done

2   an analysis. But we've asked for Applicant to

3   show -- evidence to show why they need a larger size

4   facility than recommended by Staff. And the Staff -- the

5   Applicant expressly objected to that request.

6   They have also not submitted evidence that they

7   required accommodations, any of the exempted, you know,

8   the waiver of the parking, treating them as a legal

9   non-conforming use, overconcentration, they have haven't

10   asked for those as a therapeutic benefit.

11   We've seen the slide about the Bryant Woods Inn

12   about the size -- increasing the size of the facility to

13   a size requested by an applicant. It might provide

14   financial benefit to the operator, but did not provide

15   any particular benefit to the residents that the laws are

16   concerned with.

17   That's a summary of some of the factors the

18   Court looked at in regards to the Bryant Woods case. The

19   similarity of other facilities with vacancy rates in the

20   area, failure to present -- Plaintiff's failure to

21   present evidence, and failure to show that a larger size

22   will be therapeutically beneficial.

23   And the Court noted that "If Bryant Woods Inn's

24   position were taken to its limit, it would be entitled to

25   construct a 10-story building housing 75 residents, just

74

1   because the residents had handicaps."

2   So moving to the specific factors, the 18

3   residents, there's no evidence of viability or

4   therapeutic benefit to having 18 residents. Alternate

5   housing exists. There is a licensed male facility for

6   males with 18 residents that has been granted a Use

7   Permit that's a block away.

8   Waiver of occupancy restrictions. We were very

9   confused by this request, because there are nine -- even

10   if you take out the one apartment unit that's being used

11   as an office, there's still nine bedrooms left in the

12   facility.

13   And under the occupancy restrictions, that

14   would allow them 19 residents, not the 18 they requested.

15   So we can dismiss the request for the waiver of the

16   occupancy restriction, because they don't need it to get

17   the number they've asked for.

18   Very similar in the parking. The facility has

19   six on-site parking spaces. The Newport Beach Code

20   requires three -- one parking space onsite for every

21   three residential care facility beds. They already have

22   the parking spaces they need for 18 residents. It is not

23   necessary.

24   Visitor parking. There was no evidence that

25   visitor parking conditions had any impact or prevented

75

1   therapeutic benefit or financial viability.

2   As far as whether it's necessary to treat

3   people at Newport Coast Recovery as a non-conforming use,

4   no. The City has always treated Newport Coast Recovery

5   like a non-conforming use.

6   The Newport Beach -- we've seen other

7   situations where it wasn't necessarily legally

8   established, so that an accommodation was made during the

9   period where they weren't involved in the administrative

10   system. But in this case, there's never been any

11   question how they have been treated.

12   California Building Code requires that the

13   application -- that the Code sections that were in place

14   when the occupant-type changes are the appropriate ones

15   to apply.

16   And our Fire Marshal made the accommodation, if

17   you will, to apply the 2008 Codes, because there were

18   some restrictions in prior versions of the Building Code

19   that Applicant would have found it very, very difficult,

20   if not impossible, achieve.

21   And, therefore, he had made the offer of

22   applying 2008, but if the Applicant wants to apply the

23   1997 Building Codes, I'm sure the Fire Marshal will be

24   happy to advance the Building Code requirement. That we

25   can do.

76

1   Waiver of other factors. Proximity of parks

2   schools, other facilities. I'd like you to know that

3   there's nothing in our Municipal Code that requires you

4   to consider proximity to churches or playgrounds. It's

5   schools, parks and facilities. We determined that that

6   waiver was not necessary, because there were no

7   playgrounds -- we'll get to that one later. There's

8   another slide.

9   These factors would be considered. The

10 proximity to other uses. Those factors would be

11 considered when determining whether the use would be

12 compatible with the character of the neighborhood,

13 whether it would contribute to changing of the

14 neighborhood. It is not a flat finding that you have to

15 make that there is no proximity of other uses like that.

16   Would waiving the factors be necessary to

17 afford a disable individual an equal opportunity to enjoy

18 a dwelling? We decided no. Because of the other issues

19 that we're going to address, there were reports of lack

20 of supervision and violations of state law by the

21 Applicant.

22   Supervision of the individuals who reside

23 within the facilities has been important in the past in

24 order to reduce the impact on the neighbors, and that is

25 why we have the lengthy list of conditions when a Use

77

1   Permit is granted. They are non-rebuttable

2   considerations. Violations of the state law are very

3   important to us for the reasons that we've stated

4   already.

5   Therefore, Staff determined that the required

6   finding in 20.91A.060 can't be made, and that's because

7   one of the crucial operating standards required that

8   20.91A.050(c)(4) cannot be met.

9   Waiving the requested factors that they

10   enumerated, the proximity issues, overconcentration,

11   consideration, that was not necessary, because it

12   wouldn't result in continued facility operation, because

13   we couldn't make another crucial finding.

14   Would there be an undue financial or

15   administrative burden? Well, I will tell you 8 o'clock

16   at night when Mr. Kiff and I were still at our desks

17   trying to help the two moms who were trying to find

18   their -- the one child who, from Newport Coast Recovery,

19   had moved to an unlicensed facility in Costa Mesa, the

20   thought of administrative burden did cross my mind. I

21   believe that there would continue to be an administrative

22   burden.

23   Would granting the requested accommodation

24   result in a fundamental alteration in City's Zoning

25   program?

78

1   If we waive the overconcentration factors as

2   requested, yes, we would be undermining a very important

3   factor and a very important purpose that the Ordinance

4   was adopted to achieve. Preventing overconcentration was

5   a fundamental program. And part of that program is not

6   just to protect the residents but to protect the

7   residents of the facility.

8   The purpose of community-based care, as we

9   understand it, as ADP has explained it to us, is to allow

10   individuals in recovery to begin to reintegrate into the

11   surrounding neighborhood and to learn the skills of

12   living in a neighborhood surrounding by others who are

13   not, you know, essentially using alcohol and drugs.

14   Overconcentration, which transforms a

15   neighborhood into a quasi institutional area, defeats

16   that purpose. This was stated better by the Court in

17   U.S. v City of Chicago Heights, where they stated,

18   "There may be situations in which the distance

19   between homes was so little, that it could fundamentally

20   alter the City's purpose of avoiding clustering and

21   preserving the residential character of certain

22   neighborhoods."

23   Other areas. When we look at fundamental

24   alterations of the Zoning Codes, the parking requirement

25   that the Applicant -- the waiver that the Applicant

79

1   requested. The purposes of having an off-site parking

2   requirement are stated in other areas of the Municipal

3   Code.

4   To ensure the off-street parking and loading

5   facilities are provided for new land uses and alterations

6   of existing uses;

7   To establish the parking standards that are

8   consistent with the needs and uses of -- the needs of the

9   use and feasibility;

10   And to ensure that off-street parking and

11   loading facilities are designed to ensure efficiency,

12   protect public safety, and to insulate surrounding land

13   uses from adverse impacts.

14   Anybody in this room is very likely to know

15   what the impacts of excessive use of a facility in the

16   summertime parking could be, especially when they are

17   doing treatment of individuals who do not reside on-site.

18   The Applicant also has a history of parking

19   violation, particularly behind the facility when they

20   were not using the garage for parking purposes. They

21   provide counseling to visitors who do not reside on-site.

22   Granting the waiver would undermine the purposes that

23   that requirement was put in place to achieve.

24   And I would also encourage you to see the Staff

25   report, where we do a comparison of what the -- what

                                                              80

1 restrictions, if any, were placed on another home

2 occupation on, say, an individual living next door to

3 Newport Coast Recovery who was running a business, a

4 counseling business, and having clients visit his

5 home -- his or her home to provide the counseling.

6   There are requirements in the Municipal Code

7 that limit the impacts on neighbors there. And there's

8 also requirements that all on-site parking be retained,

9 not reduced. And that there no substantial increase in

10 the pedestrians or automobile parking. We do not put

11 similar -- called it out restrictions on pedestrian

12 activity for these facilities.

13   Waiver of the considerations of proximity to

14 schools, parks and alcoholic beverage outlets. There

15 could be situations in which it would determine

16 that -- which you could determine that a basic purpose of

17 the Zoning Code would not be undermined by waiving

18 consideration of the factors. But these are factors

19 only, and they are considered by you on a case-by-case

20 basis.

21   And that is the end. Unless you have any

22 questions for me, I think that concludes the Staff

23 presentation.

24   Thank you.

25   MR. ALLEN: One question. And I just was not

81

1   previously aware that the Bryant Woods case talked about

2   a vacancy factor. And I don't think we get that far into

3   an analysis in the reports that I've seen about vacancies

4   in the units that are available; correct?

5   MS. WOLCUTT: We have not reported on the

6   specifics on that. I believe Mr. Kiff might be in a

7   better position than I am to know what the vacancy rates

8   are. Sometimes facility operators tell him, you know,

9   what their vacancy is.

10   Do you have information on that, Dave?

11   MR. KIFF: The information is anecdotal, and

12   the vacancy rates are running anywhere from half the beds

13   open and vacant to 40 percent.

14   MR. ALLEN: Okay. Thanks.

15   Does that complete the Staff presentation, City

16   staff?

17   MR. KIFF: Yes.

18   MR. ALLEN: All right. Applicant ready to go

19   forward?

20   MR. BRANCART: Thank you very much.

21   Let me begin with a few observations that much

22   of the presentation that was just presented to you, based

23   upon the analysis of fundamental alternation, was

24   boot-strapped from information that you heard at the

25   first part of this hearing.

1   It was boot-strapped from information based

2 upon a claim by the City that they had demonstrated a

3 pattern of violation of law, a finding that you expressly

4 stated less than an hour ago could not be made. And that

5 runs through this entire presentation.

6   In fact, City staff is so direct as to say that

7 the only thing that keeps us from standing before you as

8 a Hearing Officer and re-endorsing our original Staff

9 report is this after-acquired evidence, of which you have

10 found, one, that the Applicant could, without violating

11 ethical and confidentiality rules, could present evidence

12 in that forum about that, and two, that was a Notice of

13 Violation that was issued. That's it.

14   And therefore, I think you need to take what

15 you've just saw on these slides, and put it in the

16 context of the findings that you rendered earlier this

17 afternoon.

18   It is striking also in the Staff presentation

19 how little there is to contest in some respects. Staff

20 concedes that there would be no need to request an

21 accommodation regarding the existing parking regulation;

22   There would be no need to request accommodation

23 or exception to the existing occupancy restriction;

24   That the Fire Marshal -- there's no need to do

25 that, because we can apply Code either in '97 or 2008.

83

1   So what it then comes down to, fundamentally,

2   is this question of overconcentration and necessity. Let

3   me begin with the question first of necessity.

4   Staff concedes that there is a necessity as to

5   those individuals who presently reside at Newport Coast

6   Recovery. Staff claims that there is no such necessity,

7   even though the same services would be provided to the

8   same disabled individuals in the same state of need, the

9   same -- because there are other institutions who could

10   provide those same services.

11   That is false. Newport Coast Recovery is the

12   only facility -- it is the only facility which is an

13   all-male residential primary treatment facility. Let me

14   repeat that. It is the only facility that is an all-male

15   residential primary care facility. Please, as the

16   Hearing Officer, press the Staff to be very clear when

17   they put out broad and unsubstantiated claims that there

18   is comparable treatment beds available.

19   Because each of these facilities provides a

20   very different and narrow type of housing, and Newport

21   Coast Recovery is the only one here on the West

22   Peninsula -- and could be in the City -- that is a

23   primary -- that is, after somebody comes out of detox,

24   primary care all-male residential facility.

25   Yes, there are all-male facilities, but this is

84

1   the only one that fits that. So this is a unique service

2   that Staff has not addressed. So let's put in context,

3   then, that there is actually no necessities claimed by

4   Staff, because people could have, according to them, go

5   across the street and obtain the same services, which, in

6   fact, is patently, patently false.

7   The second thing that's claimed by Staff,

8   anecdotally right now by Mr. Kiff, is the claim that

9   there are substantial numbers of treatment beds available

10   and, therefore, there is no need. In fact, the City of

11   Newport Beach has repeatedly told the federal government

12   in reports certified by the City Council just the

13   opposite. I'd like to share with you an exhibit.

14   What I'm presenting to you, as the Hearing

15   Officer, are exerts of documents that were prepared by

16   the City of Newport Beach and submitted pursuant to

17   Federal law to United States Department of Housing and

18   Urban Development.

19   These reports are mandated by Federal law and

20   are required to be presented to HUD both on an annual and

21   also on a periodic basis. Pursuant to submitting these

22   reports, the City obtains Federal monies, and obtains

23   monies based upon the truth of the reports that are

24   submitted here by the City to the Federal government.

25   If you, as Hearing Officer would please turn to

85

1   page 1 of this, you can see this is the Consolidated

2   Plan, one version, that was presented by the City of

3   Newport Beach to the United States Department of Housing

4   and Urban Development for the time period that we have

5   before you.

6   If you turn to the second page, part of this

7   presentation requires the City to state what its priority

8   needs are for its special populations. And as you see

9   there, the City has specifically told HUD that "persons

10 with alcohol and other drug addictions is a high priority

11 need." That certainly contradicts what you've been told

12 here today.

13   Please turn to page 3. Also in that same

14 report, you will see that, as indicated, substance abuse

15 services, again, is a high priority need that has been

16 submitted by the City to the Federal government in order

17 for the City to obtain Federal money with the promise

18 that these reports are accurate.

19   Please turn to page 4. The City has to tell

20 HUD what its enumerated goals are to do with the Federal

21 money. And one of them, as you can see here, is goal

22 number three on page 4, "to increase the supportive

23 services for persons suffering from substance abuse."

24   Please turn to page 5. This is not only

25 something that's been submitted in consolidated plan for

86

1   period of 0509 by the City, but in the previous

2   consolidated plan, the City has repeatedly stated to the

3   Federal government that the types of services that they

4   now claim are not necessary to you, as a Hearing Officer,

5   are absolutely one of the highest priorities of the City

6   of Newport Beach.

7   Specifically, if you turn to page number 6, as

8   reported by the City to the Federal government, it

9   indicates that "persons with alcohol and drug addictions

10   were one of the activities that needed to be assisted."

11   And if you turn to the top of page 7, it tells

12   what you the obstacle is, "the ability of any funding and

13   social service agencies that can provide those services."

14   Obviously, individuals who are operating therapeutic

15   homes are providing, indeed, those services.

16   If you would turn to page number 8, page number

17   8 is a report from earlier. And it repeats, as you can

18   see at the bottom of page number 9, that, in fact, one of

19   the crying needs, according to the City, was the "need

20   for programs that included room and board and counseling

21   for improved supportive services of those in substance

22   addiction."

23   Please turn to page number 10. And while we're

24   going through this, I want you, as the Hearing Officer,

25   to please understand that pursuant to Federal statute,

1   the City Council has adopted and approved these reports.

2   Pursuant to Federal statute, the City has prepared these

3   reports to be submitted to HUD in order to obtain

4   funding.

5   So unlike coming here and not testifying under

6   oath and the informality of this procedure, these are

7   documents that are not only vetted through City staff,

8   but then adopted by the City, and then submitted with

9   certification to the Federal government saying, "This is

10   true. This is the problem we need to fix in the City of

11   Newport Beach. Give me money." And the Federal

12   government has given the City, in fact, relying on those

13   reports, hundreds of thousands, millions of dollars.

14   Page 11, I think you're being deceived. Page

15   11, this is the Strategic Plan for City of Newport Beach.

16   Of course, item number three under "Strategic Plan, we

17   must improve services to those with substance

18   addictions."

19   Page number 12, the Con Plan. Part of this Con

20   Plan, you see on page 13, was an indication of, how did

21   the services and needs of people with substance abuse

22   housing services fit within the continuum of care that's

23   available generally in the county?

24   Putting us in a larger context of county, which

25   was part of -- this, by the way, was submitted by the

88

1   City, but it looks at the broader County issue in order

2   to assess need. You can see under "substance abuse

3   treatment beds," that they talk about the substantial

4   gap.

5   And in terms, again, of priority, as

6   consistently has been reported by the City to the Federal

7   government to obtain funding, it is always the highest

8   priority that we obtain -- that we address the substance

9   abuse issues.

10   There's a repeat of that, of course, on page

11 14, and it goes on. That's a sampling of what's been

12 told to you that I think contradicts certainly, if not

13 the very word that you've been told here, the spirit of

14 what's been said to you.

15   I want to make a second point, because the time

16 period that we had to respond to this is so short. I

17 would urge you to consider and demand from Staff that

18 they provide to you the reports that have been issued

19 finding the City in violation of the housing elements

20 provisions of the General Plan requirements, as

21 administered by the State Department of Housing and

22 Community Development.

23   And would I would please ask you them to

24 provide you with the violation letters that have been

25 issued by the State of California against the City

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1 regarding non-compliance with housing elements. And

2 specifically ask them about the, quote, disability

3 issues.

4   Because that, again, you'll see, as reflected

5 here, that in terms of compliance with State law

6 regarding these very issues, the State would beg to

7 differ with what you have just been told.

8   So what, then, have we been told? One, that

9 people can go across the street and get the very same

10 services. That is patently untrue. There are unique

11 services that are offered here by Newport Coast Recovery.

12   Second, we are told that we have a super

13 abundance of those. Mr. Kiff will say here that it's

14 merely anecdotal. In fact, that contradicts what's been

15 repeated told by the City to the Federal government, as

16 approved by City Council, in order to get Federal monies.

17   And last, I would urge you to take a look at

18 the violation letters issued by HCD, Housing and

19 Community Development. Housing and Community

20 Development, in connection with the noncompliances of the

21 housing provisions. Those are available on the Web site.

22 You'll be able to find this on the Web site if you'd like

23 to find them yourselves.

24   Let me talk to you a minute about this issue of

25 cost. In substantial consultation with Mr. Kiff, Newport

90

1   Coast Recovery arrived at these numbers of 14 and 18.

2   These were the break point numbers that they needed to go

3   ahead and operate in economic viability. And these were

4   discussions that were done between Mr. Newman and

5   Mr. Kiff at length.

6   At the end of the day, they were prepared to

7   make their financial break with 14 beds, and that's why

8   the first accommodation they submitted was the 14 bed

9   request, which was essentially adopt the Staff report

10 that had previously been submitted to you. So let's

11 not -- so let's not say there's been no economic or

12 economic determination here. They have made the

13 compromise.

14   Keeping in mind, just so we put this in

15 context, they are licensed to have 29 beds. They are

16 willing to make the accommodation in order to maintain

17 financial viability down to 14 beds. That's why they say

18 "Adopt the Staff report," and that's something that came

19 out of lengthy discussions between Mr. Newman and

20 Mr. Kiff about, where's the break point to keep the

21 facility viable? And, therefore, I think it is

22 disingenuous for Staff to say that there has been no

23 discussion or analysis regarding that.

24   Let me focus on this overconcentration issue.

25 The issue of overcontration is perhaps the most ill

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1   defined and misused concept in this entire process. I

2   say that because it has literally no meaningful standards

3   by which you do apply, both in determining similarities

4   of facilities, densities of population, natures of use,

5   and any other meaningful criteria.

6   Merely having you take a yard stick and measure

7   from one housing dwelling to another of persons who

8   happen to be of a certain disability class tells you

9   actually nothing about whether or not there's

10   overconcentration.

11   I want to emphasize a second important point.

12   You are basically asked -- and you did in your last set

13   of findings. You took a yard stick and you said, "These

14   people are 300, 400 whatever," with absolutely no

15   meaningful finding as to what the law requires, but also

16   nor has Staff given you this information.

17   And I think it would be unfair for them to give

18   it to you now, nor have you been given for what the City

19   would like to consider and what's driving this larger

20   agenda. And what I mean by that is, one, merely the

21   proximity between these facilities, there is not

22   admissible meaningful measurable concrete evidence of

23   adverse impact upon the communities.

24   Nor is there any analysis provided to you by

25   Staff that if we add these individuals at this distance,

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1   that's going to create this set of adverse impacts. It

2   is all complete speculation that they provided to you

3   glossed over with the words "overconcentration."

4   Nowhere is that made more painfully obvious

5   than the presentation that was just presented to you by

6   City Staff in which they talk about overconcentration

7   being for the benefit of people -- avoiding

8   overconcentration for the benefit of people who are

9   disabled.

10   And, in fact, I think Staff did get it right

11   here, and it's been wrong the way they have been

12   presented it to you, and I think that it's wrong in the

13   Ordinance, is that the only time you should appropriately

14   consider overconcentration is when it's to establish that

15   there is a benefit to people with disability, i.e., we're

16   not going to give you housing. We're going to deprive

17   you of the ability to get housing, which we have

18   repeatedly told the Federal government you need here in

19   town, because that would put you in an overconcentration.

20   So by doing you a favor, we're denying you the

21   opportunity to housing.

22   But I think it's most important here for

23   purposes of your termination is that nowhere in these

24   volumes of papers that we get before the 4th of July

25   holiday is there any evidence to show that this is

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1   intended to benefit the disabled. None. Whatsoever.

2   What you are given, essentially, is, at the end

3   of day when you parse it all the way, is the yard stick.

4   This facility is here at 70 feet. That facility is here.

5   There's no evidence, meaningful competent evidence, to

6   say that because of this proximity, because Newport Coast

7   Recovery happens to be where it's located, people in

8   other facilities who are disabled are being detrimentally

9   affected in terms of their -- and there's just -- it's

10   just not there.

11   We're stating the standard, we're misapplying

12   it, and we're not providing you with any evidence. If

13   you would like, as the Hearing Officer, to say, "Look.

14   I'm determining overconcentration just based upon the

15   relationship of proximity of these places," you certainly

16   are entitled to do that and make that finding.

17   I mean, they are facts on the ground. But that

18   in not a competent legal finding. The competent legal

19   finding is because of this overconcentration, there has

20   been detriment to specific disabled individuals. And I

21   would argue, strenuously, depriving them of the

22   opportunity of housing that we've repeatedly told the

23   Federal government that we need is not of their benefit.

24   It is a very pernicious standard that the City

25   is applying here. And I won't be -- well, if you

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1   substituted any other protective class in for disabled,

2   any other class for disabled, and you said, you know, "We

3   can't have people living in this kind of proximity

4   because of overconcentration of any other particular

5   class of persons," we would all find it naturally quite

6   offensive. And that's what's going on here, because

7   there's no underlying analysis of it.

8   Let me end on this issue about burden. Staff

9   had to work late one night responding to telephone calls,

10   and I do appreciate their diligence in doing that. But

11   what is strikingly missing from your report here is any

12   real competent evidence of the impact that this facility

13   has on City services.

14   I have been told, and it's not here. I don't

15   see Police Department run sheets. I've been told that

16   the number of runs that were made to this dwelling is

17   comparable or fewer than would be made to a comparable

18   multi-family housing unit in this part of the City.

19   I've also been told that the relatively few of

20   the run sheets I've looked at in 2008, that some of them

21   had to do with parking. They were unrelated, because in

22   Balboa, people park, and there were police called out,

23   and they cited people.

24   In other words, you're told that, why is this a

25   burden? And we're told, one, because we worked late one

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1   night. And second, because as a part of working late, we

2   have found this evidence, that you have determined you

3   can't make a finding on, is something that's going to

4   keep us active. And that's just not competent evidence.

5   That's not competent evidence.

6   And where are the run sheets? And not just

7   saying, "Okay, we can produce some run sheets that show

8   that there were eight or ten police calls to this area."

9   But let's go ahead and analyze those sheets, and show

10   that they are truly connected to this dwelling, and that

11   they are meaningful in the context of run sheets to

12   understand how the police were responding to calls.

13   Let's look at how the run sheets for comparable,

14   comparable multi-family dwellings.

15   I mean, you know, as what happens so often in

16   this case with these applicants is we bring them in here

17   and we focus on that, and we say how bad they are. But

18   we put them in the context of the fact that there are

19   people in the community, businesses that are operating

20   that don't update their Web sites, other businesses that

21   have contract dispute with customers, other people who do

22   get the police called.

23   We focus on one, and we think in isolation.

24   Well, this is just not right, and I think that that's

25   ultimately unfair. But what I think is most

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1   important -- well, I think that's ultimately unfair. Let

2   me end on this point.

3   You've been presented with information that, I

4   think at this point, you should grant the reasonable

5   accommodation based upon the information you have here.

6   But if you are inclined to deny this reasonable

7   accommodation -- and I'd urge to you grant it right now,

8   it ought to be granted -- and it ought to be granted, and

9   let me be specific.

10   And this is it -- ought to be granted, but it

11   ought to be granted in the context of Staff's original

12   report of 14 beds, okay? Because that was what Staff

13   originally agreed with.

14   And also I think that it's -- for consistency

15   sake, we should get off 18, and let's go back down to 14,

16   so that we say that we're looking at comparable numbers.

17   Staff report is at 14, or waive all these specific

18   requirements, put it down to 14. I think you ought to

19   grant it, and I think that that's as well for all the

20   reasons I've stated.

21   But if you are inclined to deny it, I do think

22   it's incumbent upon the process, in fairness to the

23   process, that we have an opportunity to respond to what

24   was written here.

25   You know, just putting Bryant Woods, which is a

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1   4th Circuit case, and pulling snippets out of it, but

2   which is not a mainline case in terms of where the

3   reasonable accommodation law is in terms of its

4   application, to my mind, just by putting in Bryant Woods

5   is not telling you a lot about what the law is, and why

6   we believe fundamentally we're making an erroneous turn

7   here.

8   So I'd ask that you give the Applicant an

9   opportunity to supply you with appropriate briefing to

10   respond to what the City Staff has presented, if you're

11   inclined to deny. But I'd urge you, there is ample

12   evidence that's been presented here that you should grant

13   this accommodation, 14 beds, original staff

14   recommendation.

15   I appreciate your time.

16   MR. ALLEN: Does anyone else from the Applicant

17   here or that would want to speak or --

18   MR. BRANCART: No. We presented what we need

19   to say.

20   MR. ALLEN: Okay. Does Staff want to make any

21   responses to that? Should we wait until public --

22   MR. KIFF: I'm sure Mr. Bobko has some notes,

23   too, and I will not address the legal ones.

24   But Mr. Brancart, I wanted to some help

25   answering a question that I actually asked back on April

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1   18th, and you asserted that it again, as did Mr. Newman,

2   in his request to have Mr. Allen's original denial

3   appealed.

4   And it was that, indeed, Newport Coast provides

5   a unique service in the community, that being the only

6   men's only primary care facility in the Newport Beach.

7   Quote, other facilities require 30 days of primary care

8   prior to entrance.

9   And as I stated to Mr. Newman back in April, I

10   said, "To me, that implies that Newport Coast offers Day

11   One non-medical detoxification services, something that

12   ADP does, indeed, license." But I don't see on ADP's

13   records where Newport Coast is authorized to provide

14   non-medical detox. The classification on ADP's list for

15   Newport Coast is, quote, RES versus RES-Detox.

16   And all that said, I might misunderstand how

17   that works in the continuum of care. So I was hoping

18   either you or Mr. Newman could inform me as to why and

19   how -- whether or not you are, indeed, licensed by the

20   ADP to provide non-medical detox, because that's not

21   listed that way.

22   MR. BRANCART: As I understand the continuum

23   care issue, what makes this facility unique is because

24   it's for individuals that come out of that initial -- and

25   you heard reference to it earlier, 24-, 72-hour detox,

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1   and they can go directly into that primary

2   care -- primary care facility.

3   And I can illuminate it further, because --

4   MR. ALLEN: Can you define what primary care

5   is? Because you've used that term repeatedly. I didn't

6   hear -- I hadn't heard that term before in this context.

7   MR. BRANCART: It is that facility that

8   individuals can go directly to, and this is a social

9   model, not a medical model.

10   MR. ALLEN: Who is establishing those

11   definitions, and so forth?

12   MR. BRANCART: It is my understanding that

13   those are definitions that are used in both describing it

14   from a governmental context, but also these are used in

15   the industry terms of how we route people through a

16   system to lead them to care.

17   I do think that -- because I don't want to

18   speak beyond my area of expertise, that I can go ahead

19   and provide you with supplementation regarding this, if

20   the record is left open.

21   If you're inclined to deny this application,

22   then I'd urge to you leave the record open, let us

23   provide you with that, so that we're not here relying

24   upon my inadequate ability to explain what is unique

25   about this housing, quite to the contrary of what you've

                                                          100

1 been told by the City. And I will do that. We'll just

2 need time or my Co-Counsel can do that.

3   MR. ALLEN: Okay.

4   MR. KIFF: I think arguably, Mr. Allen, that's

5 a fair thing for us to continue to look into, because it

6 would be my assertion, based on what Mr. Brancart said,

7 that there are, again, a number of care facilities in

8 Newport that provide that identical model. But neither

9 of us are experts on what ADP does and -- in part on the

10 continuum care, which is why I asked the question.

11   MR. BOBKO: Thank you, Mr. Allen. I will try

12 to move quickly. I know there are people who would like

13 to speak, so I won't consume the remaining time.

14   I think, first and foremost, that we can put

15 any questions about the Applicant's due process concerns

16 to rest. There was clearly time to produce documents and

17 refer to things on the Web site. This suggestion that

18 there was not adequate time to prepare I think has now

19 been laid to rest finally.

20   Having said that, being that the City does not

21 have to or that the Applicant does not share the City's

22 obligation to produce everything that it intends to

23 provide at that hearing, I have not had a chance to

24 review the documents that Mr. Brancart has given to me

25 for the first time about 8 minutes ago or 9 minutes ago.

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1   But I have had a chance to look at it just

2   briefly, and I note, and I would direct the Hearing

3   Officer's attention to the top of page 2, where it says

4   "Homeless needs."

5   So when we have the circle with the arrow,

6   "persons with alcohol and other drug addictions," and

7   then I don't know what the top of the box says. It only

8   says "high," we don't know what the "high" refers to.

9   But I'm willing to suggest that that document has to do

10   with homeless people. And unless I'm misinformed, I

11   don't believe that homeless people inhabit Newport Coast

12   Recovery, because certainly they are unable to pay.

13   I think if you flip through the document,

14   you'll find other places where things have been provided

15   to you, and they were given a rather rough going over. I

16   also note on page 9, it suggests that the program that is

17   circled, the first sentence says "This program provided

18   access to recovery programs to homeless and low income

19   individuals."

20   Again, harkening back to testimony that we

21   heard at the beginning of the hearing from the woman who

22   had a child there, the homeless and lower income

23   individuals, I don't think, are the ones who are pulling

24   up $35,000 for a stay. So I don't think that these

25   documents are necessarily relevant at all. And certainly

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1   I don't believe that giving them such a short shrift here

2   proves much of anything.

3   The overconcentration, again, I don't want to

4   get into too much of this, because I know there are

5   people who want to speak. The City vehemently,

6   vehemently disagrees that we are applying a simple yard

7   stick, as Mr. Brancart suggests. And we also take issue

8   with the idea that there's no hard evidence in the record

9   about impacts on the community.

10   If we get in our time machine and harken back

11   in December 8, 2008, there are a number of people who

12   gave testimony about very direct impact that they've

13   sustained because of this place.

14   Mr. Myers, Jeff Myers, said, and I quote, "I've

15   lost tenants in my rental unit because of the proximity

16   to noise and profanity coming from this place. So I've

17   had a financial burden."

18   Mr. Schoonover came forward and told us, "They

19   use profanity all the day long. My truck has been stolen

20   from in front of my house. There's been graffiti on it.

21   It's been broken into three or four times. My stereo's

22   been stolen."

23   If we go, then, fast forward a little bit to

24   January, January 12th, in front of you again, Mr. Bacich

25   came forward, and you asked him who he was and if he was

                                                        103

1   the duplex owner that was the subject of the discussion.

2   And he said, and I'm quoting now, "I own -- I

3   own the duplex directly behind it. And one of the

4   owners' comments was that there had not been any police

5   reports. Yes, we never filed any police reports in our

6   complaints, and we had many of them. We went directly to

7   the manager of the facility and tried to deal with them

8   that way."

9   So all of this pointing to a simple yard stick

10   belies the fact that, on at least two different occasions

11   in front of you, people have come forward and given

12   concrete evidence with direct impacts. It's certainly

13   not hearsay about things that they have suffered because

14   of the management and operation of the facility.

15   Now, that is, of course, one facility of many.

16   But I don't think it takes much extrapolation to say that

17   if you have a number of facilities operating in a very

18   close proximity in type of environment, it's not only bad

19   for the people who are trying to regain their health, but

20   it's also bad for the people who live next door.

21   And I will make one last comment about the

22   pattern and practice. My colleague, Ms. Wolcutt, touched

23   on it briefly, but I'd like to suggest and I am aware

24   that you have recently made a finding on this.

25   But we have brought you not one incident. We

                                                        104

1   didn't come in here and say with an e-mail or something

2   that was clearly speculative a position suggesting that

3   the way that this place is operating is outside of the

4   law.

5   We brought you two people, and she's sitting

6   right here. You got to hear her speak. Mr. Kiff found

7   other woman who wanted to speak over the phone. Now, I

8   can't provide with you data points over time. I

9   certainly can't provide you with a line of people that

10 would prove a pattern and practice.

11   But given that this is the only evidence that's

12 in the record, and that evidence was direct testimony

13 from people who have direct experience with this

14 operator, given that you have heard that, the only

15 evidence that you, I think, can consider -- and again, I

16 think that it is -- the City would suggest that it is

17 within your purview to draw inferences from the evidence

18 that's before you, that it is not unreasonable to believe

19 that Newport Coast Recovery operates this way as a matter

20 of course.

21   The only evidence in front of you is that they

22 do. Mr. Brancart has very -- assured -- strongly refused

23 to provide any evidence to the contrary. You, yourself,

24 noted in your last finding that you thought that he was

25 under an obligation to do so.

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1   So in most courts -- and again, I understand

2   that the strict rules of evidence don't apply here. But

3   in most courts, when you have evidence, and you are able

4   to draw reasonable inferences from that evidence, and

5   that evidence is uncontroverted, we think the conclusion

6   is that there is a pattern and practice here. And, in

7   fact, there's no evidence to the contrary.

8   Thank you.

9   MR. ALLEN: All right. Unless there's

10 something compelling, we need to get going with the

11 public hearings, so okay.

12   Let's open the public hearing, and, please,

13 we've use a lot of time here, unfortunately, in all these

14 presentations by the lawyers, but we need to hear from

15 you, too. So come in and make it concise, and let's go.

16   MS. FUNDENBERG: Good afternoon. My name is

17 Louise Fundenberg, F-u-n-d-e-n-b-e-r-g. I'm president of

18 the Central Newport Beach Community Association.

19   And it's been brought to my attention by many

20 members that there's some people in our group that would

21 like to speak but they have withheld, because they were

22 afraid of -- let's put it out flat -- retaliation.

23   And wonder if these people then could speak

24 under the seal that was suggested, a seal of evidence,

25 that would give them a chance to bring evidence to the

1   Hearing Officer. And that's my question. - --

2   Thank you.

3   MR. ALLEN: Just generally speaking, that just

4   does not -- is not done in the public hearing context for

5   land use matters, I'm certain. And I really don't think

6   it would apply in this hearing context either.

7   They're certainly more than welcome to present

8   whatever they wish to by writing, and this Staff is very

9   good about getting that written material out there, and

10   that's every bit as important in our analysis as the

11   voice communications here.

12   MR. WOOD: My name is Douglas Wood. I live at

13   1214 East Balboa Boulevard. My family owns rental

14   property at 1119 West Bay Avenue.

15   In the midst of the overconcentration of

16   commercial rehab for-profit businesses, directly across

17   the alley from our property is 1132 West Balboa, a

18   for-profit commercial rehab business. Nearby, at 1120

19   West Balboa Boulevard, is a non-licensed for-profit

20   commercial or rehab business.

21   Across the street, at 1115 West Balboa

22   Boulevard, is another profit commercial rehab business.

23   In the block -- in the next block north, at 1217 West Bay

24   Avenue, is another for-profit commercial rehab business.

25   Behind 1217 West Bay Avenue, at 1216 West Balboa

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1   Boulevard, is subject for-profit commercial rehab

2   business.

3   In this residential zone within the 1100 and

4   1200 blocks, there are five for-profit commercial rehab

5   businesses. This is clearly overconcentration. This

6   overconcentration results in fundamental alteration in

7   the nature of the City's zoning program.

8   Additionally, these rehab homes have resulted

9   in an exorbitant waste of City time and resources, and

10 that's a real expense. I urge to you deny the reasonable

11 accommodation as recommended by the Staff.

12   MR. ALLEN: Thank you.

13   MS. OBERMAN: Denys Oberman speaking on behalf

14 of Saul Benbothway (phonetic) and broker by the residence

15 at 12th Street.

16   With regard to the reasonable accommodation,

17 first of all, I'm tired of being the mouth piece. There

18 are a lot of people, the residence have suggested, that

19 are afraid of retaliation. So I'd like to have that

20 entered yet again in the record, and their reasons for

21 fear are well founded.

22   First of all, we wondered about this whole

23 process of reasonable accommodation. So in addition to

24 talking with the City Staff and others, we did directly

25 contact an official HUD to obtain some clarification on

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1   this issue.   And what we were advised is the following:

2   One, obligations with respect to illegal

3   operations.   There is no obligation to consider or grant

4   reasonable accommodation if either an individual with a

5   disability or provider of housing to the so-called

6   disabled does, in fact, demonstrate illegal behavior.

7   So, that's our illegal practices that would be counter to

8   the intent and the letter of the law, so --

9   MR. ALLEN: Did they give you something in

10   writing?

11   MS. OBERMAN: Actually, there was something on

12   the Web site, which we followed up with HUD.   And we have

13   requested a written confirmation.

14   Secondly, with regard to overconcentration, HUD

15   did, again, affirm that overconcentration is not in the

16   best interests of the disabled, and it is something that

17   they look on with disfavor.

18   Having said that, this is an emerging and

19   non-maturing area of law.   And the only place that there

20   are any matrix of overconcentration that we've been able

21   to find and that they were able to cite was in the

22   courts.

23   And there's specifically a case called

24   Minneapolis-St. Paul, that was several years ago, where

25   there was already existing overconcentration that was

                                                      109

1   less concentrated -- and I'm getting rather long winded,

2   and I apologize -- that was less concentrated that these

3   five facilities within between 300 and 50 feet that

4   Mr. Wood previously described.

5   And furthermore, less concentrated than the

6   number of the total number of facilities that we

7   currently have even after this Ordinance has been

8   implemented on the Balboa Peninsula/West Newport/Lido

9   area. So they did affirm that overconcentration is a

10   concern, and that they look on it with disfavor.

11   So that's what we got directly from HUD

12   relative to the issue of overconcentration. I believe

13   the City got a similar indication based on the Staff

14   report that I read.

15   And lastly, why -- there is also an opportunity

16   to look at reasonable accommodation, HUD says, on a

17   case-by-case basis. So the taking into account various

18   element of the situation and the facts and various

19   factors that pertain to any specific case is something

20   that's appropriate and acceptable to do, according to

21   HUD. So I did just want to clarify those things. I

22   think Staff did already cover them.

23   And I want to lastly say that, why on earth

24   should you grant a reasonable accommodation in the

25   instance of the overconcentration and, probably more

                                                      110

1   importantly, to an operator that's proven to operate

2   repeatedly illegally in practice, and also irresponsibly

3   with public health and safely risk?

4   Thank you.

5   MR. LOPEZ: Paul Lopez, 1125 1/2 Balboa.

6   First of all, just in observing the process, I

7   haven't been to all these hearings, is that we're in the

8   midst of a reasonable accommodation hearing, and the

9   Staff and the Applicant are still not very clear in

10   regards to what primary care is, the differentiation of

11   why this particular facility or operation provides

12   something that unique here on the Peninsula.

13   I would that this burden would fall on the

14   shoulders of the Applicant. I heard that Dave asked the

15   Applicant back in April. I think it's July 7th today.

16   Why that hasn't been responded to. So if that becomes a

17   key component of their argument, I'm quite surprised that

18   they didn't come up with that definition.

19   I think the impacts to the community, we talked

20   about this Applicant as an operator. I think that is

21   part of the use hearings that the management supervision

22   of this facility has been very well documented by the

23   community. So all the public feedback that we received

24   as part of the use hearing I think would be applicable

25   here.

                                                      111

1   And I would just say that I think the record

2   speaks that this operator has not -- has not managed this

3   facility in the way that is not detrimental to the

4   community.

5   Thank you.

6   MR. ALLEN: A number of people spoke -- and

7   come, please come on up -- at the hearings previously on

8   this, and I would certainly be interested in hearing from

9   anyone from the public who has observed a different level

10 of conduct, improvement or lack thereof, since that time.

11   MR. MATHENA: Larry Mathena, I'm going to go

12 directly to that point. I just want to hit a couple of

13 issues that were raised by the Applicant.

14   Specifically -- and I think Mr. Bobko did a

15 good job discussing this, the statistical evidence

16 presented. I just want to point out a few things.

17   Even accepting the explanations given for those

18 a statistics, the point of comparison here is not the

19 City of Newport Beach as a whole, it's the Peninsula.

20 The Peninsula generally is terribly overconcentrated,

21 does have a disproportionate number of units and is,

22 frankly, overburdened by them. It's number one.

23   Number two, the characterization of the

24 licensing on the ADP side for Newport Coast Recovery is

25 identical to the recovery facility at Ocean Recovery a

                                                    112

1 block away that this gentleman has disputed saying it

2 provides something different.

3   I don't understand how it can provide something

4 different if they have exactly the same license. Above

5 and beyond that, if you look at their Web sites, if

6 anything, the implication is that Ocean Recovery provides

7 more services, not less.

8   So when you add that to the fact that Mr. Kiff

9 is actually pushed for an explanation, I think the

10 certainty until pressed on the point that the Applicant

11 presents that, "Oh, they are unique," with no explanation

12 why, whatsoever, and challenging some of the points that

13 the City's made without support, there is no support that

14 they have given for their unique status regarding primary

15 care. Period. Not in the record and not in what's been

16 said.

17   And if that's such an important thing, by the

18 way, for them to achieve, gee, that they are presenting

19 something nobody else is, with such a lynch pinpoint for

20 reasonable accommodation, I would think they would be

21 packed for bear to deal with the point, and they are not.

22   So I don't see that they presented any evidence

23 to justify reasonable accommodation because they present

24 something that anybody else does or doesn't.

25   Secondly, to go back to the point that of high

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1 priority, I do accept that the City, as a whole, does

2 view taking care of disabilities -- including drug issues

3 as a high priority. But that does not mean that at this

4 particular location that it's not inappropriate to say

5 that there are enough facilities, and that you don't have

6 enough data to decide that reasonable accommodation is

7 not granted.

8   Specifically, based on the evidence in front of

9 you, I question whether or not you can find that their

10 facility enhances quality of life. We do have a high

11 risk of an undue burden.

12   And last but not least, overconcentration is

13 here. You found it in the Use Permit, and there's no

14 reason not to find it in this hearing either.

15   Thank you.

16   MR. ALLEN: We're moving rapidly toward our

17 departure time. Who else would like to speak? And

18 whoever wants to speak next, hop up and getting right up

19 here ready to go.

20   MS. MC BRIDE: Hi. I'm Julie McBride. I live

21 at 1200.

22   And I just wanted to speak a little bit as to

23 the change of the characteristics of the neighborhood.

24 Our neighborhood is a great neighborhood. I have a

25 3-year-old son, but I don't take my son down the alley

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1   past this home, nor do I take him down the boulevard in

2   front of this home.

3   And the reason being is I don't want my son to

4   hear that kind of language that I hear consistently

5   coming from this house, or to inhale the second-hand

6   smoking that I hear or smell in the alley when I'm

7   walking past. So it has changed the character of our

8   neighborhood, and I just wanted to let you know that, at

9   least in my household, we feel it.

10   Thank you.

11   MS. WILLIS: Hi. Christina Willis again.

12   I did want to thank you very much on what he

13   was talking about, you know. They talk about the Fire

14   Codes, and whatnot. When you have 15 or 14 residents,

15   plus all of these staff, that's out there smoking and

16   flicking cigarette butts, I guarantee there's a Fire Code

17   hazard.

18   And my boys weren't allowed to lock their doors

19   at night. I thought that was pretty interesting. These

20   are young kids that can't lock a door, and you've got

21   grown men coming in and out who are convicts that have

22   told the boys, "Well, I was in prison for 15 years, and

23   this is what I did," and giving them an explanation of

24   that type of thing, which was unnecessary. They didn't

25   know who these people are that they are supposed to be

1   looking up to to change their life.

2   As far as the specialty, when we got there, we

3   were promised detox with these boys. In the contract, it

4   states they have to be detoxed for 72 hours beforehand.

5   They specifically asked the boys, and they did drug test

6   and they come up positive. But they never sent them

7   anywhere. They argued whether or not to send them to

8   Hoag or to just let them sleep it off.

9   Of course, being that Christopher had diabetes,

10   he could have died. It was very risky to his life.

11   There was nothing special about that. The kids were

12   suffering. They begged and begged to get some kind of

13   specialty help, going to the doctor to detox, to get some

14   kind of a pill, anything to help them, which I know now

15   that Ativan could have helped.

16   We were told by a woman on Mike's staff point

17   blank, "There's no detox for cocaine. There's nothing."

18   And I'm offering this up because, again, I would never

19   want to see anybody put children through that or even

20   grown men.

21   I mean, a drug habit is a bad thing. We all

22   know that. But it can cause death. It can cause death

23   if it's not handled properly. And it wasn't. There was

24   nothing special about that.

25   And last but not least, I read all of these

                                                          116

1 cover to cover back before all of this. And I realized

2 that in the public hearings, Mr. Newman had mentioned

3 several times that nobody had cars on the premises. That

4 was actually a resident there. That's untrue as well.

5   Like I said before in my statement, my child

6 was getting in the car with another resident that lived

7 there, because his car was parked right out front. So,

8 getting in there, driving, going to places at night, I

9 was completely unaware that they were even leaving the

10 premises. And we were promised that he would be well

11 watched over, flashlights in the room the whole night,

12 all that. Never, there was nothing special about that.

13   So I would hope they deny it.

14   MR. ALLEN: Anyone else?

15   MR. WILLIS: Hi. My name is Joseph Willis,

16 W-i-l-l-i-s.

17   MR. BOBKO: Do you have any questions?

18   MR. WILLIS: Do I have any questions? Do you

19 have any questions?

20   MR. ALLEN: How old are you?

21   MR. WILLIS: 17 years old. I give permission.

22   MR. ALLEN: I don't have any other questions.

23 Thank you.

24   MR. WILLIS: Thank you.

25   MR. ALLEN: Anyone else wish to speak?

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1   Okay. We're already out of time. But, okay,

2 Mr. Brancart?

3   MR. BRANCART: Just to rebut. We end with the

4 Applicant being able to speak to the issues.

5   MR. ALLEN: All right. What can we do

6 time-wise here? Because I don't want to deny anybody the

7 opportunity to say what they'd like to say. The public

8 hearing is closed, incidentally. And if we can -- I

9 don't know. What do you suggest?

10   MR. KIFF: My intent, Mr. Allen, was to allow

11 the Park, Beaches and Recreation Commission to meet as

12 scheduled on -- at 6. I am seeing, though, that they may

13 have canceled their meeting at this time due to a lack of

14 a quorum from an e-mail. So I suppose we could stay

15 longer if we need to.

16   MR. ALLEN: It would be highly desirable to put

17 a wrap on this tonight, I would think.

18   MR. KIFF: Understood.

19   MR. ALLEN: Can we do that? I mean, is there

20 anyone that's compelled to leave that's instrumental to

21 the decision-making process?

22   All right. Then, Mr. Brancart, would you like

23 to go ahead and make a presentation here to put a wrap on

24 it?

25   MR. BRANCART: I will, and I will be brief.

                                                      118

1   MR. ALLEN: I wouldn't feel the need -- don't

2 feel the need to be brief as long as we have the time.

3   MR. BRANCART: It's self-inflicted. Let me

4 make three observations.

5   First, as indicated at the initiation of this

6 rather lengthy afternoon, I indicated to you that we

7 would provide you with a substantial amount of material.

8 Counsel concedes that it was before the 4th of July

9 holiday.

10   If you are inclined to deny the reasonable

11 accommodation, I ask that we be permitted to submit a

12 written submission that we were unable to do that

13 because, essentially, we had six days with a holiday,

14 and, of course, there may have been additional time taken

15 off as well. And I think it's worth doing.

16   Second of all, I would urge that -- well,

17 second of all, speaking about the issues that were

18 discussed in the first use hearing and also reiterated

19 here, it is extremely problematic for any person, in this

20 case, the Applicant, to come before you and rebut

21 allegations of misconduct that occurred two or three,

22 five or six times more than a year ago.

23   As I read through the transcript, what I was

24 struck by was individuals who felt genuinely hurt by

25 these quality-of-life infractions, smoking, cussing, and

1   sometimes people parked their van in the wrong place.

2   Another van breaking. Someone put trash in someone

3   else's trash can.

4   It is impossible for the Applicant to rebut

5   those types of allegations. And what I have said

6   before -- and I know it is true of Newport Coast Recovery

7   now -- is that if, in fact, there are these complaints of

8   quality-of-life infractions, the proper and responsible

9   course is to contact the police, because only the police,

10   not this hearing, months and sometimes years after the

11   fact of individuals, only the police can determine was

12   there, indeed, an infraction, and what is the source of

13   the infraction?

14   The gentleman claims his car was vandalized and

15   a truck stolen. We will never know who that person was

16   who actually did the vandalizing or stealing the truck.

17   The other gentleman claimed that, in fact, trash was put

18   into someone's trash can. We'll never know who put the

19   trash there.

20   There was a claim that there was wiring that

21   was done that perhaps was done improperly. We'll never

22   know that the wiring was that was not done. This is why

23   we have code enforcement and police officers who can, at

24   the time of the alleged infraction is occurring, go to

25   the scene, observe the infraction, and determine the

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1   source of it.

2   Because what we have right now is just, well,

3   in many cases, we have speculation. In other

4   cases -- and it puts the Applicant in an impossible

5   position to respond to those, quote, quality-of-life

6   infractions, unquote. And these are serious, and I don't

7   mean to minimize it, and I'm not. But it does put us in

8   an untenable position, and there's certainly no way to

9   make a determination to know who did what and who was

10   responsible for what happened.

11   The second thing I would say is, to go back and

12   reiterate what I said before, is that there are some

13   objective standards, but they have to be measured in the

14   context with other similar facilities, like similar

15   apartment building, or things like that, run sheets and

16   thing like that, which, you know, we're not presented

17   with.

18   These are objective. And it's not just saying

19   "Here's the run sheet." But what were these offenses

20   they are running? Were these offenses, not just by tag,

21   by address, but were they actually truly people in the

22   housing that we're claiming about?

23   The last observation I would make is this,

24   because of the shortness of time. There was a question

25   that was raised by the City. I've asked you if would you

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1 please take a look at the State's Housing and Community

2 Development Web site concerning licensing. I reiterated

3 we would like an opportunity to file a written response

4 to you in response to the City's Staff report, and I

5 think, frankly, that's fair.

6   I mean, you know, just amongst lawyers here,

7 you don't get hundreds of pages of document the day

8 before a three-day holiday, and then be expected to come

9 to a hearing and respond to it. That's just generally

10 not the way these types of determinations are handled.

11   And this is not -- and I want to be clear on

12 this. This is not to say that the City was not working

13 hard and diligently. I'm sure they were working hard.

14 But the fact of the matter is, it is patently difficult

15 and in some ways was unfair to ask an applicant to

16 respond to that notice on a Tuesday afternoon, when we

17 have one day before the 4th of July holiday. That's the

18 long and the short of it.

19   I really appreciate your time, and thank you.

20   MR. ALLEN: Does the City want to do a response

21 or --

22   MR. BOBKO: I only say, if it's your

23 inclination to go, we'd stipulate to a brief, if you

24 think it would help.

25   MR. ALLEN: That's fine. One thing I'm not

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1 going do is go find the City's Web site, and then housing

2 element and try to ferret out what might be going on in

3 the housing element, and so forth, with this. So if you

4 have something that -- please present it, because I won't

5 do that.

6 MR. BRANCART: Understood.

7 MR. ALLEN: And correspondedly, if the City has

8 any issues that it believes can support or otherwise

9 controvert Mr. Brancart's claim of the housing element,

10 let's go ahead and submit that.

11 Okay. Anyone else need to say anything or --

12 MR. KIFF: Mr. Allen, I would ask that if,

13 indeed, you're leaning towards some additional

14 information being provided to you, I think it is

15 important for the Applicant to address a couple of things

16 that we've raised.

17 We -- I think the City has an obligation to

18 discuss the pattern or practice, and I believe we have

19 shown, but can show in a more concise method, how there's

20 a pattern and practice of breaking the law. We've seen

21 just today about Ms. Golden's testimony, Ms. Willis'

22 testimony, Mr. Hamilton's e-mail.

23 I would also like the Applicant to come back

24 and answer a couple of questions for me that I raised in

25 the Staff report. And I think Mr. Brancart's point is

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1   well taken that, "Gosh, Web sites get outdated."

2   But there are a couple of key things. One,

3   especially, is that their medical advisor, who is

4   Dr. Michael Rudolf, who may be a terrific guy, but the

5   Web site says that he is board certified in addiction

6   medicine.

7   And if I'm Ms. Willis at home in Henderson,

8   Nevada, I think I might look to that and say, "Gosh, this

9   is a place where I want to be." Well, it turned out, at

10   least from what I -- my limited research, and it involves

11   calling his office, he's not board certified in addiction

12   medicine.

13   And this is something that gets to the heart of

14   a thing that we've discussed a little bit here today is

15   that Newport Beach, as a City, is not in a position to

16   directly decide licensing issues for ADP. But we're

17   certainly in a position to say, for people like

18   Mrs. Willis coming from out of state, that we have a

19   regulatory device that allows us -- if a business is

20   here, that it's a credible business, and especially the

21   way -- as important as recovery is to people, that it's a

22   good recovery business. And we have allowed now, what,

23   upwards of 280 beds from what I think are good, reputable

24   companies.

25   And when I see things like that, that there may

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1   be overstating the qualifications of their own medical

2   director, I think that's a business that the community

3   here doesn't want to be associated with. And I guess

4   that's where maybe my lay person's understanding of this

5   as a Staff member is that I don't want to look Ms. Willis

6   in the face and say "That's a business that is here and

7   is operating, apparently, in violation of the things that

8   our Ordinance was meant to protect her and her child

9   from."

10   So with that, I'd make that one request, after

11   that long-winded comment about verifying Dr. Rudolph's

12   board certification, and the couple of other things are

13   always helpful to understand what truly is correct on

14   that Web site with the four issues that I raised.

15   Thank you.

16   MR. ALLEN: Okay. From my perspective, as the

17   Hearing Officer, I am strongly inclined -- I'll wait

18   until you gentlemen complete your conference.

19   I am strongly inclined to deny this reasonable

20   accommodation application. And the primary focus of my

21   thinking remains the overconcentration issue that I think

22   was founded in the first Resolution we did.

23   I fully understand Mr. Brancart's comments with

24   respect to a lack of specificity, that all we have is a

25   yard stick. But there's a lot more to it than that that

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1   is subjective and judgmental. But that yard stick really

2   helps out there on the ground, on the street, as to how

3   many there are per block or unit, and I realize this

4   doesn't take into account density.

5   But my feeling, personally, and what I plan to

6   do in future ones, if they came forward, where there was,

7   in fact, another overconcentration issue, was to look

8   very carefully not just at whether a facility existed,

9   but whether -- how many beds there were and what the

10   nature of the intensity and density of the use was. And

11   Mr. Wood made a good point in describing how many there

12   are right here in this immediate location.

13   So in any event, my inclination, strongly, is

14   to deny the reasonable accommodation on that basis and

15   also on the basis of the lack of necessity. I think

16   there's a much stronger burden that should be carried

17   here to demonstrate the need for the facility. And that,

18   in turn, does tie in to Mr. Brancart's contention about

19   primary care and comments by the public or two that the

20   same kind of care can be obtained, quote, unquote, right

21   across the street.

22   So here's an additional point I see. As the

23   Hearing Officer at this level, I would like to get as

24   much input as I could on behalf of the City, because it

25   turns out that, in this process that the City has

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1 adopted, the City Council really can't ask for additional

2 information on appeal, and it makes it for difficult for

3 them.

4   So I think that we should take a relatively

5 short period of time, and you're working on a date, by

6 which both sides can present that additional information.

7 And then that can become a part of the record as the

8 final decision is made and provide a more complete record

9 for the City Council.

10   So once again, I have that strong inclination,

11 which conceivably can be overturned if there was a

12 compelling, unique service provided by this that was not

13 elsewhere available along the mid Peninsula. That would

14 make a significant difference. I accept that.

15   So with that in mind, is there a date to which

16 we can continue this?

17   And incidentally, we don't need any more public

18 hearing, in my estimation. I don't want to diminish the

19 importance of that, but we've really heard a lot from the

20 public, and they have said the same things again. And I

21 really do understand what their position is with regard

22 to these, and I take that strongly into account in

23 looking at this. But I don't think we need any

24 additional public hearing presentation. If someone needs

25 to make a presentation, they can send something in

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1   writing within the period of time.

2   MR. BRANCART: Thank you. I agree with that

3   analysis, except for the part that you're strongly

4   inclined to deny the application. I agree with the

5   analysis that there are issues that do call for further

6   information. What I would propose is this:

7   To gather -- this information be gathered

8   largely by my Co-Counsel, Steve Polin, and Mr. Polin

9   is the one we've discussed that handles the

10   administrative City side of things.

11   I would estimate that to pull that together, we

12   should have 10 days. And then after 10 days -- two weeks

13   from today. And then after that, what I would

14   like -- because I agree with you. We have had ample

15   public comment -- because he is located out of state,

16   that what we could do is convene a telephone conference,

17   we convene here. He could appear telephonically, and

18   largely it's a discussion of what is the information

19   that's now presented addressing these specific issues, if

20   there's a need to present any.

21   Well, that would be my proposal. Would that be

22   acceptable to you?

23   MR. ALLEN: I think that works. We can convene

24   here is what you were suggesting, and then Mr. Polin

25   could be conferenced in and make his whatever additional

                                                      128

1   presentation he would like to make.

2   MR. BOBKO: I don't see any need to conference

3   anyone in. I think this can be done on paper. I think

4   we can merely brief this completely. I'm a little

5   reticent to start going through, you know, Mr. Polin.

6   But he won't present any testimony. Mr. Polin can't

7   present testimony. So I don't see any need to reconvene

8   by tele-conference or otherwise. We can just do this on

9   paper.

10   MR. ALLEN: That's fine.

11   MR. BRANCART: I don't entirely disagree with

12   Mr. Bobko. But what I have found is that once you review

13   the submissions, you may have questions. So I would

14   propose that, why don't we set that within two weeks,

15   we'll submit our responses.

16   If that's submitted directly to you and copied

17   to the other side, we can do that, or we'll submit it

18   directly to the City attorney, and they will provide a

19   copy to you, whatever procedure we're directed to do.

20   And then after you've had an opportunity to

21   review them, if you have questions, then you, as a

22   Hearing Officer, have the authority to convene any kind

23   of conference you want. And we can do it in a three-way

24   conference call from your office and the City attorney's

25   office and Mr. Polin in Washington D.C.

1   MR. ALLEN: I think that works. So

2   let's -- each side -- I'm fine with two weeks to make the

3   submissions. I think Mr. Bobko's point is well taken.

4   And if it does necessitate a conference, we'll

5   do it. But there wouldn't be one scheduled at this

6   point. And I would base it upon the written material,

7   then render a determination, either recorded at City

8   offices or simply in writing, and probably the latter.

9   MR. BRANCART: Thank you.

10   MR. ALLEN: All right. I think that

11   concludes -- unless there's anything?

12   That concludes our hearing, then. Thank you

13   very much.

14   (Ending time: 6:07 p.m.)

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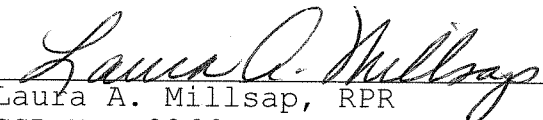
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2

3   I, the undersigned, a Certified Shorthand

4   Reporter for the State of California, do hereby certify:

5   That prior foregoing proceedings were taken

6   before me at the time and place herein set forth; that

7   any witnesses in the foregoing proceedings, prior to

8   testifying, were placed under oath; that a verbatim

9   record of the proceedings was made by me using machine

10   shorthand which was thereafter transcribed under my

11   direction; further, that the foregoing is an accurate

12   transcription thereof.

13   I further certify that I am neither financially

14   interested in the action nor a relative or employee of

15   any attorney of any of the parties.

16   IN WITNESS WHEREOF, I have this date subscribed

17   my name.

18

19   Dated: __**JUL 1 5 2009**_____

20

21   _____
      Laura A. Millsap, RPR

22   CSR No. 9266

23

24

25

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