



CITY OF NEWPORT BEACH

MEMORANDUM

TO: Mayor and Members of the City Council

FROM: Catherine Wolcott, Deputy City Attorney *CW*
Kit Bobko, Special Counsel

DATE: December 2, 2009

RE: **Yellowstone Women's First Step House, Inc. Appeal – November 27, 2009**
Amendments to Reasonable Accommodation Requests

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

Preliminary Staff Analysis of Amended and New Requests and Related Procedural Matters

This memorandum is prepared in response to a letter sent to the Office of the City Attorney on November 27, 2009 ("the November 27 letter") by counsel for Yellowstone Women's First Step House, Inc. ("Yellowstone").

On February 20, 2009 and March 12, 2009, the Hearing Officer considered the following requests and applications made by Yellowstone:

- **Use Permits** – Yellowstone applied for use permits to continue operation at their current locations at their current capacities – 12 residents at 1561 Indus, 18 residents at 1621 Indus, 18 residents at 1571 Pegasus and 17 residents at 20172 Redlands (65 residents total). The Hearing Officer denied Yellowstone's use permit applications.
- **Reasonable Accommodation No. 1** – Yellowstone requested that each of its facilities be treated as a single housekeeping unit. In January 2009 correspondence and at March 12, 2009 public hearing, Yellowstone argued that they also operated as a single housekeeping unit.
- **Reasonable Accommodation No. 2** - Yellowstone asked for a waiver of the use permit occupancy limits of two residents per bedroom plus one additional resident.
- **Reasonable Accommodation No. 3** – Yellowstone asked for a waiver of use permit fees due to financial hardship.

The November 27 letter states that it amends Yellowstone's reasonable accommodation requests as follows:

- Yellowstone requests reasonable accommodation to continue to house 12 residents at each of its four facilities (48 residents total.) *(This request is generally related to Yellowstone's overall goal of continuing operation at its four facilities in some configuration, and is substantially similar to Yellowstone's requests for the granting of use permits. Staff does not consider this to be a new request.)*
- Yellowstone requests as a reasonable accommodation that the City treat each of its houses as a single housekeeping unit, by waiving the requirement that all of the residents be on a single written lease as required in the definition of single housekeeping unit in Newport Beach Municipal Code ("NBMC") section 20.03.030. *(Staff considers this a restatement of a previous request.)*
- Yellowstone requests the City grandfather the fire clearances it claims to have received from the Orange County Fire Authority prior to the City's annexation of Santa Ana Heights in January 2008. *(This is a new request, but will not be further analyzed in this memorandum. Staff has previously informed Yellowstone it will accept any fire clearances granted by the Orange County Fire Authority prior to January 1, 2008, but Yellowstone must provide evidence that such fire clearances were, in fact, granted. To date, Yellowstone has provided evidence of only one completed fire clearance.)*
- Yellowstone requests that the City apply all building, zoning, fire and life safety codes to each of its houses in the same manner as those code provisions are applied to single housekeeping units or single family uses. *(The request to apply zoning code provisions as if the Yellowstone facilities were a single housekeeping unit is a restatement of Yellowstone's previous request to be treated as a single housekeeping unit. The remainder of the request is a new request, which was not raised before the Hearing Officer.)*
- Yellowstone requests waiver of the occupancy limitation of two per bedroom plus one staff member to determine maximum occupancy per house.¹ *(Staff considers this a restatement of a previous request.)*

As noted above, some of the requests listed in the November 27 letter are new requests rather than amendments. Some are restatements of previous requests. Staff believes the issue of Yellowstone's fire clearances from the Orange County Fire Authority is properly characterized as a factual dispute rather than an accommodation request. The first request (to be granted an accommodation to remain in operation with 12 residents per facility), however, could arguably be considered an amendment of a previous request because it reflects Yellowstone's general intent to request an accommodation that would allow it to continue operation at its current locations.

¹ The NBMC operational standards for use permits set forth in Section 20.91A.050 require a maximum of two residents per bedroom plus one additional resident. Staff is not considered under the NBMC.

ISSUES:

- On appeal of a decision of a Hearing Officer, can the City Council hear and consider new or amended requests when the specific request was not submitted to the Hearing Officer, but evidence was presented at the evidentiary hearing that (1) raises the issue addressed in the request, and (2) would allow the City Council to determine whether findings could have been made to grant or deny the request?
- On appeal of a decision of a Hearing Officer, should the City Council hear and consider new or amended requests when the specific request was not submitted to the Hearing Officer, and there was no evidence presented at the evidentiary hearing that raised the issue addressed in the request?

RECOMMENDATIONS:

The NBMC states that on appeal from a reasonable accommodation request or use permit, the City Council "shall determine whether the findings made by the Hearing Officer are supported by substantial evidence presented during the evidentiary hearing," and may "sustain, reverse or modify the decision of the Hearing Officer," or remand the matter to the Hearing Officer for further consideration, which remand shall include specific issues to be considered or direction for a *de novo* hearing. See NBMC §§ 20.98.025A and 20.91A.040.

Staff recommends the City Council:

1. Review the administrative record, including material submitted by the applicant and the public, analysis in the staff reports for the public hearings, the Hearing Officer's resolutions, and the transcripts of the hearings in light of the new and amended requests; and
2. Consider whether substantial evidence presented during the evidentiary hearing before the Hearing Officer supports a determination that findings required to grant a reasonable accommodation for any or all of the Yellowstone facilities to continue operation at their current locations can be made;
3. Consider whether substantial evidence presented during the evidentiary hearing before the Hearing Officer supports a determination that findings required to grant a reasonable accommodation applying all building, zoning, fire and life safety codes in the same manner as the City would apply those codes to single housekeeping units can be made;
4. For restated prior requests on which the Hearing Officer has already made a determination, including the appellant's restated requests to treat Yellowstone facilities as single housekeeping units and to waive the use permit operational condition limiting residential care facilities to two residents per bedroom plus one additional resident, deny the appeals filed by Yellowstone, and uphold and affirm the Hearing Officer's decisions to deny Reasonable Accommodation No.'s 2009-004, 2009-005, 2009-006 and 2009-007.

DISCUSSION:

I. The City Council May Consider All Evidence Presented During the Evidentiary Hearing and Sustain, Reverse, or Modify the Hearing Officer's Decision.

The City Council does not have jurisdiction over the Hearing Officer's decision until he has rendered a final decision on either a use permit or reasonable accommodation request. In the context of an administrative hearing, a "final decision" is one that completely disposes of all issues between the parties, and the Hearing Officer contemplates no further action on the subject matter of his ruling. (See *e.g.*, *Griset v. FPPC* (2001) 25 Cal.4th 688, 700 (when court's ruling disposed of all causes of action framed by the pleadings, there remained no further substantive issues for future determination).)

On appeal, the City Council's review of the Hearing Officer's final decision is limited to evidence (i.e., facts) contained in the administrative record. The NBMC does not allow for the admission of extra-record evidence on appeal, nor may the City Council undertake a *de novo* review of the facts presented at that hearing. (See NBMC §§ 20.98.025A and 20.91A.040.) As a practical matter, if the evidence does not appear in the administrative record, it does not exist for purposes of the appeal. (See *e.g.*, *Eureka Citizens for Responsible Gov't v. City of Eureka*, (2007) 147 Cal.App.4th 357, 367 (finding extra-record evidence allowed only if unavailable at trial or improperly excluded).) Moreover, the Council may only "sustain, reverse or modify" the Hearing Officer's decisions; the Municipal Code does not permit the Council to decide issues for the first time on appeal.

The Council may neither substitute its views for those of the Hearing Officer, nor reweigh conflicting evidence presented to him. The Hearing Officer's decisions are given substantial deference on appeal. (See *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

Accordingly, to the extent the November 27 letter addresses claims or theories raised below that are based on evidence presented at the evidentiary hearing, the City Council may "sustain, reverse or modify" the Hearing Officer's decision regarding those claims or theories. (See *e.g.*, *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15 (noting on appeal a party may change the legal theory he relied upon at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record).)

Alternatively, to the extent the November 27 letter raises novel claims or theories based on facts not presented at the evidentiary hearing, the Municipal Code gives the Council no authority to admit the new facts, or to decide new claims. This follows the general rule that a party on appeal must stick with the case it tried. (See *e.g.*, *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350 n.8 ("The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.") (Internal citations omitted).)

It is however, within the Council's discretion to remand the matter to the Hearing Officer for further consideration or to obtain additional evidence on an issue. (See NBMC §§ 20.98.025A and 20.91A.040.)

II. There is Substantial Evidence in the Administrative Record that Supports the Hearing Officer's Decision to Deny the Reasonable Accommodation Request to Treat Yellowstone's Clients as a "Single Housekeeping Unit"

Under the substantial evidence test, the Council shall determine whether the Hearing Officer's findings are supported by substantial evidence, and may "sustain, reverse or modify" that decision.² The Council may also remand the matter for further consideration, which remand shall include specific issues to be considered or a direction for a *de novo* hearing. See NBMC §§20.98.025(A) and 20.91A.040.

The party seeking review (in this case, Yellowstone) bears the burden of showing that the Hearing Officer's decisions are not supported by substantial evidence in the record and the City Council "must resolve reasonable doubts in favor of the administrative findings and determination." (See *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

Yellowstone contends the findings required for granting the requested accommodations could have been made. The November 27 letter notes that two of the Yellowstone facilities hold Oxford House charters, and argues extensively about how Oxford Houses in general function as single housekeeping units.

The issue of whether Yellowstone residents actually resided as a single housekeeping unit was discussed in the February 20 and March 12 staff reports, and at the March 12, 2009 public hearing. Some of the arguments contained in the November 27 letter cite facts inconsistent with evidence in the administrative record, including Yellowstone's own written and verbal statements to staff. The Hearing Officer had an opportunity to review the applicant's sometimes-conflicting submissions and testimony, weigh the evidence, and make a determination of whether Yellowstone's residents actually resided as a single housekeeping unit. The evidence before the Hearing Officer included evidence that two of the Yellowstone facilities held Oxford House charters at the time of the hearing. (HR, YS 00170, 00666, 00715)³ The Hearing Officer also had an opportunity to review the evidence in the record and submitted upon direct testimony, and determine whether treating Yellowstone's residents as a single housekeeping unit was reasonable and necessary. As shown in the Resolutions of Denial of Yellowstone's Request No. 1, the Hearing Officer determined that it was not.

III. Substantial Evidence in the Administrative Record Supports a Determination to Deny a Reasonable Accommodation Granting an Exemption from the Use Permit Occupancy Limits of Two Residents per Bedroom Plus One Additional Resident

The Hearing Officer did not make a determination on this issue, because the occupancy limit was a use permit requirement. As Yellowstone's use permit applications were denied, the occupancy limit was considered a moot issue at the reasonable accommodation public hearing

² "Substantial evidence" means evidence of a "ponderable legal significance . . . reasonable in nature, credible, of solid value, and relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Young v. Gannon* (2002) 97 Cal.App.4th 209, 221.

³ Each page of the Hearing Record is numbered consecutively, beginning with HR, YS 00001. This means "Hearing Record, Yellowstone, Bates No. 00001."

on March 12, 2009, and the Hearing Officer did not make a determination or resolution in relation to it.

In relation to Yellowstone's November 27th request for an accommodation that allows it to continue operating its four facilities with 12 residents in each home, and an accommodation waiving application of the NBMC's use permit occupancy limit of two residents per bedroom plus one additional resident, a waiver of the use permit occupancy limit is not necessary for three of the facilities to operate at the population level requested. The November 27 letter requests a population of 12 residents at each facility. With the exception of the five-bedroom 1561 Indus, all Yellowstone facilities have six bedrooms. (HR, YS 00022, 00290, 00561, 00838) This allows three of the facilities to house more than the requested number of residents without exceeding the occupancy limits required for use permits issued under NBMC Section 20.91A.050.

IV. The Hearing Officer Effectively Considered the Issue of Whether Yellowstone Required a Reasonable Accommodation to Continue Operations at Its Current Facilities

Although Yellowstone did not specifically request a *reasonable accommodation* that allowed it to remain in operation at its current locations, it did request *use permits* to continue its current operations. Within the context of the evidentiary hearing on Yellowstone's use permit applications, the Hearing Officer considered evidence relevant to this request.

Staff recommends the City Council review staff's February 20 recommendations and findings in the four February 20, 2009 use permit staff reports. In the February 20, 2009 use permit staff reports, prepared prior to the City's discovery that the Yellowstone facilities were not legally established, staff stated findings could be made to grant use permits to two of Yellowstone's facilities, with a reduced population at each facility and operating conditions placed on each to mitigate negative secondary impacts on neighboring properties. In the February 20, 2009 staff report, staff recommended the use permits be granted to 1621 Indus and 20172 Redlands because those two facilities were the farthest apart of the four facilities, and therefore created the greatest dispersal.

IV. Yellowstone Raised the Fire Code and Life-safety Issues at the Evidentiary Hearing, but There Is No Evidence in the Record to Support a Finding That an Accommodation Can be Granted Allowing its Facilities to be Treated as Single Housekeeping Units for Building Code purposes

During the application process and at public hearings, Yellowstone addressed Building Code, fire, and life safety issues only in the context of asserting that they held valid fire clearances from the Orange County Fire Authority. At no time did Yellowstone assert in the administrative record that fire clearances should be waived, or that California Building Code requirements for single-family uses should be applied to its residential care uses.

Therefore, Yellowstone did raise issues regarding Building Code, and fire and life-safety at the evidentiary hearing, but failed to adduce sufficient evidence to support the new reasonable accommodation request. Regarding fire clearances, Yellowstone was unable to produce valid documentation from the Orange County Fire Authority for any of its facilities other than 1571

Pegasus. There is no evidence in the record that the City should apply Building Code requirements to Yellowstone as if its residents were a single housekeeping unit.

CONCLUSIONS:

Staff concludes that the City Council may properly review the evidence in the record and "sustain, reverse or modify" the Hearing Officer's decision regarding the question of whether a reasonable accommodation is both necessary and reasonable to allow all or any of the Yellowstone facilities to continue operation at their current location, with 12 resident clients per facility.

Staff concludes Yellowstone failed to adduce sufficient facts at the evidentiary hearing to support its claim on appeal that the City should grant a reasonable accommodation applying the California Building Code requirements for single-family occupancies to its facilities. Staff submits this issue was raised below, but there are no facts in the record that would support the Council's action to "sustain, reverse or modify" the Hearing Officer's decision on appeal.

Staff recommends that, as to the restated requests to treat Yellowstone facilities as single housekeeping units and to waive the use permit occupancy limit, the City Council deny the appeals submitted by Yellowstone, sustaining and affirming the Hearing Officer's decisions, and direct staff to prepare resolutions for adoption at the next City Council meeting.

If the City Council identifies evidence in the administrative record that allows it to make a finding in favor of an accommodation that permits Yellowstone to remain in operation at all or any of its facilities, staff recommends that the City Council direct staff to prepare resolutions reflecting its findings for adoption at the next City Council meeting.

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