PUBLIC HEARING ON

PACIFIC SHORES PROPERTIES, LLC

BEFORE THOMAS W. ALLEN, ESQ., HEARING OFFICER

NEWPORT BEACH, CALIFORNIA

WEDNESDAY, MARCH 25, 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 4:00 p.m., and

10   ending at 6:05 p.m., on Wednesday, March 25, 2009, before

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

12   9266.

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LAWYER'S NOTES

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1   NEWPORT BEACH, CALIFORNIA; WEDNESDAY, MARCH 25, 2009

2   4:00 P.M. - 6:05 P.M.

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4   MR. ALLEN: All right. We'll open the hearing

5   on the reasonable accommodation request made by Pacific

6   Shores.

7   For starters, my name is Thomas Allen. I'm a

8   Hearing Examiner that has been appointed by the City to

9   conduct hearings on group recovery facilities.

10   This first item today is Pacific Shores at Clay

11   and Orange Avenue, up in the Heights, right off Newport

12   Boulevard.

13   Prior to going into that matter, we have a

14   quick item of housekeeping. There's been a request by

15   the staff to continue the Resolution of the approval of

16   the 900 West Balboa Boulevard item from last meeting.

17   And the request is to continue that until the next

18   hearing.

19   And is there any reason to be concerned that

20   we're impairing anybody's rights or considerations in

21   that respect by continuing this?

22   MS. BROWN: No, sir, there's not.

23   MR. ALLEN: Would it effect the time for an

24   appeal to be filed?

25   MS. BROWN: The time for appeal would begin

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1   upon adoption of the Resolution.

2   MR. ALLEN: When is our next hearing?

3   MR. KIFF: We're going to have to look at your

4   calendar, Mr. Allen, and discuss that with you. And the

5   next home -- next facility coming up is Balboa Recovery,

6   potentially, at Kramer Center. And we need to pull those

7   staff together. I don't think it's more than two weeks

8   away.

9   MR. ALLEN: Why don't we do this. If anybody

10 expresses any concerns about getting it done sooner, then

11 I would certainly be willing to come in and go through

12 it. There's no public hearing requirement or anything of

13 that sort to be concerned with, so if there is concern

14 over getting it done more quickly, let me know, and I'll

15 come in and go through it and approve it.

16   MR. KIFF: Yes, sir.

17   MR. ALLEN: And so with that commitment, we'll

18 continue that item.

19   And then back to the agenda, which is number

20 two, the reasonable accommodation request for Pacific

21 Shores.

22   Staff report?

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

24   As we did with the previous reasonable

25 accommodation hearings, this will be represented by three

                                                        5

1 of us. Myself, I'll do the quick background and speak

2 the most briefly. And then Janet Brown, from our

3 Planning Department, will speak more about the specific

4 application, and then Cathy Wolcott, our Deputy District

5 Attorney, will speak more about the reasonable

6 accommodation requests specifically.

7   So a reminder to the audience, this is a

8 hearing on reasonable accommodation requests. And for

9 the purpose of the hearing they are soon to be

10 consolidated. There are five that have been requested by

11 Pacific Shores Properties.

12   As I just stated, we'll do a brief background

13 on how the hearing works, then the application, then

14 Ms. Wolcott will speak about the reasonable accommodation

15 chapter in our Municipal Code, as well as presenting the

16 specific request of Pacific Shores.

17   Then the Applicant has an opportunity to stand

18 up and speak before the Hearing Officer, and the

19 applicant's time is not limited. The public hearing is

20 open then, and comments by the public are limited to

21 three minutes, unless the Hearing Officer determines

22 otherwise.

23   The Hearing Officer then can close the public

24 hearing, and the Applicant can return to clarify or rebut

25 comments made. And then a dialog could ensue between the

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1   Hearing Officer and the Applicant and City staff.

2   And then the Hearing Officer has an opportunity

3   to make a determination, the alternatives being approving

4   the request, denying the request, or continuing the

5   hearing to a date certain.

6   So for the public's understanding, here is

7   where the Pacific Shores Properties are, 492 1/2, 492

8   Orange, as well as 3309 Clay. They are proposing that

9   there be 50 recovery beds in this community divvied up

10   this way, 18 at 492 1/2 Orange, 20 at 492 Orange, 12 at

11   3309 Clay.

12   And with that, I may leave this up on the

13   board, but I'll let Ms. Brown speak more about the

14   specific application.

15   MS. BROWN: Thank you, Mr. Kiff.

16   Good afternoon, Mr. Allen. I'm Janet

17   Johnson-Brown, Associate Planner from the Planning

18   Department.

19   The Pacific Shores facilities are comprised of

20   three buildings located on two parcels on the southwest

21   corner of Orange Avenue and Clay Street in the Newport

22   Heights neighborhood. The properties are zoned R-2,

23   which allows for single-family and two-family residential

24   development.

25   The property located at 3309 Clay Street is

7

1   developed with a single-family dwelling, and the Orange

2   Avenue property is developed with two dwelling units.

3   The Applicant is requesting reasonable

4   accommodation for relief from the Municipal Code to

5   continue an unlicensed sober living facility to provide

6   housing for up to 50 individuals in the three buildings.

7   With regards to establishment of use, staff is

8   not certain when the use of the dwelling at 3309 Clay

9   Street was converted to a residential care or group

10 residential use. However, in response to complaints made

11 to the City in the Spring of 2007 about unpermitted

12 construction, City staff inspected the building and found

13 that the building was occupied and appeared to be in use

14 as either a residential care facility or a boarding house

15 use.

16   The property located on Orange Avenue, 492 1/2,

17 was constructed in 2005. And the final inspection by the

18 Building Department to allow occupancy of this building

19 occurred on September 21, 2005.

20   The 492 Orange Avenue building was inspected by

21 the Building Department to allow occupancy on April 26,

22 2007. I did want to make a note for the record that the

23 date of final inspection is incorrectly stated in the

24 staff report on page 5 as April 24, 2007. This date

25 should be April 25th.

8

1   After that final building inspection, the

2   facility manager was observed moving furniture and

3   tenants into the moving on May 8, 2007.

4   Since early 2007, there have been a variety of

5   code enforcement issues brought to the attention the City

6   regarding the Pacific Shores facility. These issues are

7   discussed in detail in the staff report and include, but

8   are not limited to, the unpermitted construction at 3309

9   Clay Street.

10   Following the inspection of the building in

11   Spring of 2007, the City issued a notice of violation for

12   unpermitted construction. In order to comply with City

13   and State building code requirements, the City requires

14   that violators remove unpermitted construction and/or

15   obtain approval of plans and permits for the unpermitted

16   work.

17   In response to the notice of violation and stop

18   work order, the property owner submitted plans to the

19   Building Department for plan check. It is the Building

20   Department's standard practice to delay further

21   enforcement action to allow the property owner an

22   opportunity to complete the plan check process and obtain

23   permits for the unpermitted work.

24   Over a year later, no attempts to complete the

25   plan check process were made by the property owner. And,

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1   therefore, following standard City practice, enforcement

2   efforts resumed and an administrative citation was

3   issued.

4   To date, this matter remains unresolved. In

5   the process of reviewing the plans, staff noted that the

6   building was incorrectly classified as an R-3 occupancy

7   for Building Code purposes rather than an R-4 occupancy.

8   An R-3 occupancy applies to single-family or

9   two-family structures, whereas an R-4 occupancy would

10   apply to structures for uses such as residential care

11   facilities for more than six residents.

12   The City's Fire Marshal is here at the hearing

13   today and can provide additional input as to the

14   significance of applying the correct occupancy rating to

15   the structures.

16   In February of 2007, Code Enforcement staff

17   requested information about the use of the Pacific Shores

18   facility. The manager of the facility at that time,

19   Mr. Mark Manderson, Sr., informed Code Enforcement staff

20   verbally and in writing that the facility leased rooms to

21   tenants.

22   In May of 2007, an ADP complaint investigator

23   looked into the allegation of unlicensed treatment being

24   provided at the Pacific Shores facility. The officer

25   reported to City staff that she was told by Mr. Manderson

10

1 that the Pacific Shores facility was not a recovery

2 facility, and that they just rented rooms to tenants. At

3 the investigator's request, Mr. Manderson provided copies

4 of sample leases with the tenants -- some of the tenants.

5   The ADP investigator determined that the

6 Pacific Shores facility was likely a sober living

7 facility, but the treatment services that would require

8 ADP licensing did not appear to be occurring on-site.

9   In July of 2007, the new facility manager, Mark

10 Manderson, Jr., told Code Enforcement staff that the

11 Pacific Shores facility was a sober living home.

12   In October 2007, the City filed a lawsuit in

13 State Court against Pacific Shores, LLC, for violations

14 of the Moratorium Ordinance for establishing a sober

15 living facility while the moratorium was in effect. The

16 City dismissed Pacific Shores from that suit earlier this

17 year.

18   As stated, the Applicant has requested

19 reasonable accommodation for relief from provisions of

20 the Municipal Code to continue operating an unlicensed

21 sober living facility. An application was initially

22 submitted September 24, 2008. And subsequent

23 amendments -- amended requests were submitted to the City

24 on March 10 and March 13, 2009.

25   The operational characteristics as described by

11

1   Pacific Shores are as follows. And this is based on the

2   information that's been provided by the Applicant.

3   The clients reside at the facility under a

4   separate written agreement with the operator and are

5   expected to abide by a set of house rules, a copy of

6   which is attached to the staff report as Exhibit 11.

7   The Applicant states that it does not have a

8   manager or an administrator, but that there are two

9   residents in each house designated to make sure that

10   tenants do not use drugs or alcohol and to ensure the

11   quiet enjoyment of the dwelling. The Applicant has also

12   stated that Mark Manderson, who assists in the

13   maintenance of the homes, is available on a 24-7 basis.

14   According to the Applicant, the curfew and

15   quiet the hours are 10 p.m. on weekdays and 11 p.m. on

16   weekends. And the Applicant states that curfew applies

17   only to new members of the household during the first 30

18   days of tenancy, and that quiet hours apply to all

19   residents.

20   The Applicant has stated that treatment

21   services are not provided on-site, and that clients are

22   expected to attend 12-Step meetings. There are no

23   transportation services provided by the facility

24   operator; however, the Applicant states that all

25   residents are permitted to have personal vehicles while

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1 residing at the facility, not all residents have

2 vehicles, and that some use public transportation.

3   The Applicant states that those residents who

4 do have personal vehicles park the vehicles along Old

5 Newport or along the commercial park area of Orange. And

6 that no residents park along Clay Street or on the

7 non-commercial parking area along Orange.

8   Each of the buildings do provide parking

9 on-site in the form of an attached enclosed two-car

10 garage.

11   And that concludes my portion of the

12 presentation. Catherine Wolcott, from our City

13 Attorney's Office, is here to discuss the specific

14 request as related to the reasonable accommodation and

15 the required findings that need to be made to grant the

16 request.

17   MS. WOLCOTT: Thank you, Mr. Allen.

18   To begin with some background on reasonable

19 accommodation in general, and anybody who's been to a

20 reasonable accommodation hearing before has heard this,

21 but we can go to the first slide.

22   Reasonable accommodation is something that is

23 required under the Federal Fair Housing Act Amendments.

24 Under Federal law, cities are required to -- Federal law

25 does define the failure to make reasonable accommodations

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1   in rules, policies and practices or services when such

2   accommodations are necessary to afford a handicapped

3   person an equal opportunity to use and enjoy a dwelling.

4   The Court has repeatedly interpreted this

5   language as imposing an affirmative duty on landlords and

6   public agencies to reasonably accommodate the needs of

7   disabled individuals. This is not a system that the City

8   invented. This is something that is required under

9   Federal law, which all cities and counties and other

10   agencies -- other governmental entities have to comply

11   with.

12   The Fair Housing Act Amendment requires cities

13   to make exceptions from their usual rules, policies and

14   practices when necessary conditions are met. Those

15   conditions are:

16   The request is made on behalf of a disabled

17   individual or group of individuals;

18   The request is reasonable;

19   The exception or accommodation is necessary to

20   afford disabled individuals equal opportunity to use and

21   enjoy a dwelling, and we've also listed the source code

22   in the U.S. Code Regulations.

23   The request is considered unreasonable if

24   granting the request would either impose an undue

25   financial or administrative burden on the City, or it

14

1   result in the fundamental change in the nature of the

2   City's zoning program.

3   So just because a disabled individual makes a

4   request does not mean that the City is obligated to grant

5   that specific request. There is limits on that, and

6   staff does the analysis on whether or not a request is

7   reasonable or necessary.

8   When an Applicant has given a request that is

9   clearly cannot be granted, the City engages in an

10   interactive process when possible to give them the option

11   of what other requests they might ask for.

12   When courts have reviewed whether or not a

13   fundamental alteration is being proposed in a request,

14   what they look at is whether or not the request would

15   undermine the basic purpose which the requirement seeks

16   to achieve.

17   So in this case, we're looking at a number of

18   requests that have to do with our Zoning Code and our

19   Building Code. So we're going to be analyzing whether or

20   not the basic purpose or the fundamental purpose of the

21   Zoning Code, or Ordinance number 2008-05, or the

22   California Building Code would be undermined by those

23   requests.

24   As in all reasonable accommodation requests,

25   they are analyzed on a case-by-case basis under the facts

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1   specific to that particular applicant, that particular

2   request, and the section they have asked to be exempted

3   from.

4   The first analysis that we would do when we are

5   looking at a reasonable accommodation is the -- actually,

6   first we look at is whether or not they are disabled. In

7   this case, the Applicant has submitted to us a signed

8   statement that everybody who would reside in this

9   property is a recovering alcoholic or addict.

10   And the Federal courts and the Code of Federal

11   Regulations has defined persons in recovery from alcohol

12   and drug addiction as disabled individuals. That's the

13   Federal definition.

14   Then we look at whether or not the

15   accommodation is necessary. Will the accommodation allow

16   the disabled individual to live in the dwelling? Will

17   the disabled individual be unable to live in the dwelling

18   without the accommodation?

19   And if there's a direct link between the

20   accommodation and the required equal opportunity -- I

21   should start with the fact that the way the U.S. Code

22   phrases it is important in the analysis of necessity.

23   You look at -- let's see. The language of the

24   Code, I believe, is we have to make the accommodation if

25   such accommodation is necessary to afford disabled

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1   individuals an equal opportunity to use and enjoy a

2   dwelling.

3   And the wording of that becomes important if

4   you're looking at how different circuits have interpreted

5   that particular phrase.

6   Pacific Shores Properties has requested to be

7   treated as a single -- can we back up one, Dave? I'm

8   sorry.

9   MR. KIFF: Yes.

10   MS. WOLCOTT: One of the things that Court

11   cases, in interpreting the necessity prong, have looked

12   at is whether or not there's a direct link between the

13   specific accommodation requested and the equal

14   opportunity which the Federal Government requires us to

15   provide.

16   And the courts have come up with two

17   requirements that would show that there's a necessity for

18   equal opportunity. One is whether the required

19   accommodation is necessary to make the facility

20   financially viable. And two, whether the required

21   accommodation provides therapeutic benefit.

22   And these are both very important factors to

23   look at when you're analyzing the request from a large

24   group facility. Do they need a facility the size they

25   asked for and are they financial viable, which the courts

17

1   have said affords disabled individuals an equal

2   opportunity to live and enjoy the dwelling? And does the

3   required size that they say they need provide a

4   therapeutic benefit for the individuals?

5   Pacific Shores Properties has made five

6   separate requests. The first request submitted back in

7   September of 2008 was to be treated as a single

8   housekeeping unit.

9   The second request was to be classified as a

10   residential care facility.

11   The third -- not -- excuse me. -- not to be

12   classified as a residential care facility. Not to be

13   treated as one in our analysis.

14   The third request is to be classified as a

15   legal non-conforming use.

16   The fourth request was that all Zoning,

17   Building, Fire and other applicable Code provisions be

18   applied to the facility dwellings as if they were a

19   single or two-family use, rather than the use that our

20   land use classifications or the California Building Code

21   considers them to be;

22   The fifth request, which you received on March

23   13th, since the date of this staff report, is to be

24   exempt from the requirements of Newport Beach Municipal

25   Code Section 20.10.020, which is the land use matrix in

                                                          18

1 which we say the Code says that residential care

2 facilities -- that all residential care facilities that

3 are not six and under licensed must be located in MFR

4 residential districts with a use permit. As you know,

5 all licensed six and under facilities can be located in a

6 residential zone.

7   Request number one and number two will be

8 treated together. We analyzed it at the same time,

9 because the request to be treated as a single

10 housekeeping unit and the request not to be classified as

11 a residential care facility were basically rewordings of

12 the same request.

13   If you look at the land use classifications

14 entitled "20 and Residential Zones," of the land use

15 classifications available, other than single housekeeping

16 unit, there was no other land use classification that

17 would have been particularly helpful to this Applicant.

18   The only other available classifications were

19 day care homes, which was not applicable here, group

20 residential, which is not helpful to the Applicant,

21 because group residential uses, which is all other uses

22 not residential care that are not living as a single

23 housekeeping unit, all of those uses are provided in all

24 other residential zones -- all residential zones, period.

25 Let me correct that.

19

1   Integral facilities? We would analyze them as

2   an integral facility. That's another form of residential

3   care use. And the only remaining land use classification

4   was parolee/probation homes, which are also prohibited

5   throughout the residential zones.

6   Therefore, if we don't classify them as a

7   residential care facility, the only other land use

8   classification that they would fit into would be

9   single-family, two-family and multi-family.

10   And it's a prerequisite for that use to be

11   classified as that use, that the people living there be

12   living as a single housekeeping unit. So that's the long

13   way of saying we will treat those two requests the same

14   as one.

15   Single housekeeping unit. I'm not going to

16   read you the entire definition, but you can look at it on

17   the screen. There are certain aspects of the definition

18   that the facility may meet, including, probably, being an

19   interactive group jointly occupying a single dwelling,

20   may have joint use of and responsibility for common

21   areas, they may share household activities, they may

22   share meals and chores, although I believe the Applicant

23   reported that they are responsible for their own meals.

24   And our single housekeeping unit definition

25   goes on, however. If the unit is rented, all adult

20

1   residents -- see what happens when you don't proofread

2   your work? -- residents have chosen to jointly occupy

3   the entire premises of the dwelling unit under a single

4   written lease with joint use and responsibility for the

5   premises, and the makeup of the household occupying the

6   unit is determined by the residents of the unit rather

7   than the landlord or the property manager.

8   And the evidence that was submitted both to ADP

9   and to us in the past is that they are each on individual

10   leases with the landlord, and the landlord determines the

11   makeup of the unit.

12   The characteristics of single housekeeping

13   unit, outside of the definition, are single housekeeping

14   units can live in any residential district. There are no

15   occupancy restrictions within the home for a single

16   housekeeping unit, other than those imposed by -- under

17   the Zoning Code. There are some occupancy restrictions

18   under the California Building Code as to how many

19   individuals can live in a structure of a certain size.

20   So our analysis starts with, is the single

21   housekeeping unit request reasonable? A request to be

22   treated as a single housekeeping unit is essentially a

23   request to be exempted from all of our restrictions and

24   all of the conditions the City might impose on a large

25   facility to reduce the negative secondary impacts.

21

1   One the basic purposes of the Ordinance was to

2 mitigate the adverse secondary impacts which a

3 residential care facilities might cause in surrounding

4 neighborhoods.

5   As we mentioned, all other groups not living as

6 a single housekeeping unit are entirely prohibited in

7 other residential districts; therefore, in the City's

8 view, the City has essentially already made a reasonable

9 accommodation for residential care facilities.

10   We have allowed them a process in which, rather

11 than just being told, "You are not a single housekeeping

12 unit. You cannot locate in the City," we've made an

13 exemption. And we said, "Because of the special needs of

14 your handicapped residents, we have created a process, a

15 lengthy -- you know, many, many options by which a

16 residential care facility with disabled individuals may

17 locate within the City."

18   However, if the request is granted, if this

19 facility a treated as a single housekeeping unit, the

20 basic purpose of Ordinance 2008-05 is nullified entirely,

21 and that does create a fundamental alteration of what the

22 Zoning Code intends and what the Zoning Code has adopted

23 to achieve.

24   The next prong of the application -- excuse

25 me -- of the analysis is whether or not treating it as a

22

1 single housekeeping unit is necessary to afford disabled

2 individuals the ability to live in and enjoy a dwelling.

3 The combination would allow disabled persons to live in a

4 dwelling.

5 However, then we next look at, would the

6 disabled individuals be unable to live in the dwelling

7 without the specific accommodation? And our answer is

8 no. The question is unnecessarily broad.

9 There are many options that the Zoning Code

10 allowed -- present, through which a residential care

11 facility can house its residence without being treated as

12 a single housekeeping unit.

13 Furthermore, the necessity for financial

14 viability or the therapeutic benefit of being treated as

15 a single housekeeping unit has not been shown by the

16 Applicant.

17 Alternative requests which are more reasonable

18 could afford the individuals an equal opportunity to

19 be -- to live within the City of Newport Beach.

20 If you review the staff report, all 39 page of

21 it, you'll see the full analysis of what findings we made

22 and did not make as to the single housekeeping unit

23 request and the request to not be treated as a

24 residential care facility.

25 If you want me to go into more details about

23

1   that, I'll happy to. But we do have a lot of requests to

2   cover.

3   Move to request number three, the request to be

4   treated as a non-conforming use. The staff recommended

5   granting this request because essentially the City's

6   already treated Pacific Shores as if it were a

7   non-conforming use.

8   There are questions about establishment dates.

9   There's a possibility that one was essentially

10 established during a certain period. But the way we've

11 been treating this facility is the same way that we treat

12 all non-conforming uses within residential districts.

13   And I should add that there's been some

14 confusion about legal non-conforming and non-conforming.

15 In our Planning Department's parlance, we don't use the

16 term "legal non-conforming." It's either non-conforming,

17 which is legal to be there under certain conditions, or

18 it's an illegal use.

19   Non-conforming uses in residential districts

20 after the passage of the Ordinance 2008-05, had the

21 opportunity to apply for a use permit within a certain

22 period of time. They had the opportunity to apply for a

23 reasonable accommodation. They had the opportunity to

24 apply for an extended period of abatement. They could do

25 any one of those options at the same time or in sequence.

24

1   And Pacific Shores has been give those same

2 options. They have been given the same opportunities as

3 non-conforming uses in residential zones.

4   Request number four, which is their request to

5 have these Zoning, Building and Fire Codes applied to

6 their dwellings as if they were single-family or a

7 two-family use.

8   Staff applied analysis used in requests number

9 one and two and recommended denial. Applying the Zoning

10 Code to a residential care facility as if it were a

11 residential use is essentially the same as treating it as

12 if with a single housekeeping unit.

13   As we've already discussed, single-family,

14 two-family and multi-family uses are single housekeeping

15 units essentially. And so we did the same analysis

16 there for Zoning and recommended denial.

17   As to the Building Code, California Building

18 Code is the State law. It is adopted at the State level

19 under the authority of the California State Legislature.

20 And it is adopted and enforced by the City of Newport

21 Beach. The Building Official and our Fire Marshal are

22 the individuals in the City staff that are responsible

23 for enforcing the State code.

24   Pacific Shores has requested to be treated as

25 an R-3 use, essentially. Switching gears a little, you

25

1   have not heard us talk before about Building Code

2   occupancy.

3   Essentially, when the Building Code use the

4   word "occupancy" in a way that is similar to the way the

5   Zoning Code uses the word "use." They are different

6   terms, but they apply to what's the use that's going on

7   inside the building.

8   State law establishes construction standards

9   and life safety requirements for the different occupancy

10   types, based on their operating characteristics and the

11   needs of the residents. So R-3 under the Building Code

12   are single and two-family occupancy. That would be a

13   single-family home or a duplex.

14   R-4 are recovery facility occupancies housing

15   seven or more in a building. And R-3.1 are recovery

16   facility occupancies housing six or less in a building.

17   Essentially, as the Applicant proposes to house

18   more than seven in each of its buildings, every one of

19   their occupancies are classified as an R-4. They would

20   like to be treated as an R-3 and have the standards for

21   those -- the lower standards of Safety Code of R-3

22   applied.

23   The life safety standards for residential care

24   facilities uses were established by the State Fire

25   Marshal, not our Fire Marshal. And the State Fire

                                                              26

1   Marshal adopted them under the authority of the State

2   Legislature, which expressly directed him, in Health and

3   Safety Code 13135, to adopt specific standards for

4   alcohol and drug recovery facilities.

5   The City has the authority to substitute

6   alternate materials and methods that will provide an

7   equivalent level of protection, but we do not have the

8   authority to waive the level of protection or change the

9   level of protection. And we do not feel it is

10   appropriate in any way to lower the standards of safety

11   for the residents of these facilities.

12   Those standards were adopted for a reason. And

13   they were adopted because, at the State level, the

14   determination was made that there were operational

15   characteristics for the special needs of the individuals

16   in the facility that required that extra protection. We

17   feel the Applicant should raise that extra protection.

18   It should be willing to provide it rather than seek to

19   lower it.

20   The City Fire Marshal enforces the State Fire

21   Marshal's regulations. He does not create them himself.

22   He does, however, have the authority to determine the

23   equivalent level of protection that might be there.

24   And I'm going to see rather quickly if

25   Mr. Bunting is here. He's not. If the Applicant has any

27

1   specific questions about why the Fire Marshal is

2   requiring what he is requiring, I can answer them to the

3   best of my ability when the time is appropriate.

4   But I can say that he has looked at some of the

5   facilities and has determined that they have the wrong

6   type of sprinkler in them. In a residential facility, a

7   residential type of sprinkler would be required.

8   In an R-4 occupancy -- I said "residential

9   facility." It's not a facility.

10   In an R-4 occupancy, a commercial sprinkler

11 systems are required. And the reason that's required is

12 that a residential sprinkler is in place to suppress the

13 fire long enough for the residents of that dwelling to

14 exit safely.

15   In a commercial facility, a commercial

16 sprinkler system is in place to prevent the spread of

17 fires and suppress the fires to prevent -- to protect

18 neighboring facilities, so the fire does not spread from

19 one dwelling to another, which is one of the reasons that

20 we could not make finding five in this analysis either.

21   We did feel that it would create a risk to

22 neighboring properties, as well as to -- the risk to the

23 residents of the facilities. Therefore, staff strongly

24 does not recommend granting request number four.

25   Number five, waiver of the requirement of

28

1   location in MFR with use permit.

2   At this level, we had a number of different

3   analyses that we did. We looked at whether the request

4   was necessary and reasonable for the current residents of

5   the facility. Because it is our feelings that if there

6   are current residents there, and they are staying for a

7   limited period of time, that's a different analysis as to

8   the necessity, you know.

9   First, someone who is already there who would

10   be deprived of housing if abatement proceeded. And two,

11   reasonableness, if it's a short period of time. The

12   facilities told us the average stay is, I think, 45 to

13   180 -- yeah. Approximately six months. So we didn't

14   feel that allowing current residents to remain for up to

15   six months maximum undermines the basic purpose of the

16   Zoning Code.

17   We also analyzed at the population level that

18   was requested specifically by the Applicant. The

19   Applicant would like to house 50 individuals, 12 of them

20   at 3309 Clay, 18 of them at 492 1/2 Orange, and 20 of

21   them at 492 Orange, based upon the number of bedrooms

22   that they represented are in these facilities.

23   Staff looked at this in detail, as you can see

24   in the staff report, and determined that -- I can go into

25   this a little bit more -- but determined that that level,

29

1   that number, was not necessary, and that number

2   fundamentally undermined the purpose of the Zoning Code.

3   Staff also analyzed what number and what

4   circumstances might be imposed that would enable this

5   particular facility to not being undermined the basic

6   purposes of the Zoning Code, and I'll talk about that

7   now.

8   So beginning with a necessity prong, is the

9   accommodation necessary to afford a disabled individual

10   an equal opportunity to use and enjoy a dwelling?

11   We looked there at whether or not -- and this

12   is from case law that we discussed earlier -- whether or

13   not the facility required the requested accommodation,

14   and whether the requested population level was required

15   to achieve financial viability and the therapeutic

16   benefit? Which is what a number of circuits have found

17   necessary to demonstrate the necessity prong.

18   We haven't seen any evidence of what the

19   financial needs are of the facility. We have requested

20   it, and the Applicant specifically objected to the

21   request and declined to present it in the past. Any time

22   the Applicant would like to present us with financial

23   information, we would will be more than happy to analyze

24   it and advise accordingly.

25   The Newport Beach Municipal Code allows the

30

1   City to consider four factors in determining necessity:

2   Whether the accommodation will affirmatively

3   enhance the quality of life of individuals with a

4   disability -- that's the therapeutic benefit analysis;

5   Whether the disabled individuals will be denied

6   an equal opportunity to enjoy the housing type of their

7   choice without the accommodation;

8   And whether the accommodation is necessary for

9   financial viability;

10   And whether the existing supply of facilities

11   of a similar nature and operation is sufficient to

12   provide individuals with an opportunity to use and enjoy

13   a dwelling in Newport Beach.

14   And that addresses the portion of the necessity

15   prong that I provided in the letter to you and to

16   opposing Counsel.

17   Staff analyzed the reasonableness and necessity

18   of this request with regard to the following categories:

19   Current residents of 492 and 492 1/2 Orange.

20   Because at this time, there is no one residing in 3309

21   Clay. That building has been red tagged pending

22   resolution of the Building Code issues.

23   And prospective residents at 50, and at staff's

24   recommended level 12 residents, one dwelling unit. As we

25   discussed in the staff report, without further input from

31

1   the public and from the Applicant, we didn't want to make

2   solid recommendation on which specific dwelling unit to

3   recommend for the one unit.

4   My analysis was that the most appropriate was

5   492 1/2 Orange, which is the back unit on the duplex at

6   the corner of Clay and Orange. And the reason for this

7   was that it's surrounded on two sides, one side by a

8   commercial office building, two sides by a Pacific

9   Shores' dwelling unit, and that would insulate the

10   neighbors from any secondary impacts.

11   And also that that was a use that was

12   established prior to the moratorium. That did not

13   violate the moratorium to the best of our knowledge, that

14   particular unit.

15   We move on to whether or not the accommodation

16   request is reasonable. The fact that we're allowed to

17   consider it is not the same as the findings. These are

18   factors that we can think about while we're making the

19   findings. These guide us in the analysis.

20   Whether the accommodation would fundamental

21   alter the nature of the neighborhood;

22   Whether the accommodation would result in

23   substantial increase in traffic or insufficient parking;

24   MR. ALLEN: Just quickly.

25   You're now going back and analyzing the request

32

1   as they made it, not how you're suggesting it would be

2   modified, right?

3   MS. WOLCOTT: In the staff report, we did both.

4   So if you go through the staff report, there's, you know,

5   category four as to prospective -- as to current

6   residents, and then we have two categories under

7   prospective residents, one of which is at the staff -- at

8   their requested level, and another is at the staff's

9   recommended level.

10   So as we went through it, we went through the

11   analysis, in a number of places we could not make the

12   required findings as to 50 individuals and three dwelling

13   units.

14   It didn't -- there were requirements about not

15   creating an overconcentration in the neighborhood, not

16   creating a clustering of facilities. And with three

17   dwelling units and 50 people, we could not make that

18   finding.

19   So then we analyzed with 12 people, one unit.

20   And specifically, we looked at the size of the unit. And

21   if, as staff recommended, that unit was taken back to the

22   way it was illustrated on plans that the City saw and

23   approved, that would give a recovery environment that is

24   much less compressed than any other we're aware of. It

25   would have 12 people with a facility that had only six

1   bedrooms and a bonus room and game room and offices. So

2   it would be spread out more, less density of the unit.

3   Other factors there, whether the accommodation

4   would create an institutional environment due to the

5   number and proximity of similar uses. Obviously, from

6   our perspective, 50 people looked like a sober living

7   institution. Eighteen people, 20 people in one dwelling

8   unit looked like a sober living dormitory, not like a

9   sober living home.

10   We are trying to make a recommendation that

11 allowed it to be a sober living home, if that's what

12 Federal law requires us to accommodate.

13   We went through the required findings. Would

14 granting the request impose an undue financial or

15 administrative burden? In most cases, no. At the

16 staff's recommended level, no.

17   However, at the level requested by the

18 Applicant, due to our history with this Applicant, due to

19 the past Code Enforcement issues that we have had and

20 continue to have, due to some of the misrepresentations

21 made by the Applicant about what exactly the facility was

22 early on back in Spring of 2007, because of those, we

23 could not make that finding as to a facility with 50

24 residents.

25   We felt that we could make it as to 12

34

1   residents, if the Applicant agrees to work carefully with

2   us, if inspection is allowed once a year. As you'll see,

3   that's one of the conditions that staff proposes, so that

4   we can monitor the -- or not monitor, to confirm every

5   year that the occupancy is what we've agreed to.

6   Then we look at whether granting the request

7   would result in a fundamental alteration in the nature of

8   the zoning program?

9   Would allowing the use to continue in an R-2

10   zone undermine the basic purpose R-2 zoning seeks to

11   achieve?

12   We also look at whether allowing the use to

13   continue without a use permit undermines the basic

14   purpose that the use permit requirement seeks to achieve?

15   The purposes of the R-2 and MFR zones. R-2 is

16   intended to provide areas for single- and two-family

17   residential uses. This is medium to high density,

18   depending on location. In the Santa Ana Heights area,

19   the Planning Department says this is medium density.

20   MFR is to provide single-, two- and

21   multi-family residential uses. Also at medium to high

22   density. At staff's proposed level of density, which

23   would be 12 residents in a six- to nine-bedroom facility,

24   felt the medium level of density would be achieved, given

25   the size of the lots in that area.

35

1   The use permit environment is also very

2   important. Use permits are required for uses that have

3   operating characteristics that require special conditions

4   to keep them from having an impact on the neighborhood

5   around them and changing the residential character of

6   that neighborhood.

7   Ordinance 2008-05 requires use permits for

8   non-conforming uses in residential areas. And the

9   purpose of that is to ensure that the purpose of the

10   Zoning Code is achieved, and adverse secondary impacts

11   from non-conforming uses can be mitigated.

12   The purpose of the permit -- I'm not sure if

13   it's on the next slide.

14   The purpose is to -- that's the general use

15   permit reason. And this is the special -- the use permit

16   that has -- the procedures of 20.91A.

17   The purpose is to promote public health and

18   safety and implement goals of general plan by ensuring

19   that conditional uses do not change the character of

20   residential neighborhoods.

21   And the second purpose is to protect and

22   implement the recovery and reintegration of the disabled,

23   in part by avoiding overconcentration that would lead to

24   institutionalization of an area.

25   And in the mind of staff, that second prong is

36

1   as important as the first. We don't feel that it is to

2   the benefit of recovering individuals to be in an

3   overcrowded or institutionalized condition.

4   From our conversations with recovery experts

5   and reading cases, one of the purposes of community-based

6   care is to allow the recovering individual to learn to

7   reintegrate into a neighborhood, to have interaction with

8   individuals who are not in the facility, so that they can

9   start relearning the standards and norms of a regular

10   neighborhood and learn how to enter the mainstream of

11   society again. The purpose is to learn how to live in a

12   neighborhood, not to learn how to live in an institution.

13   Is the use permit purpose undermined if the

14   accommodation is granted at the level staff recommended

15   and the level that the Applicant has requested?

16   One of the reasons we found that the use permit

17   might not be undermined by granting a similar

18   accommodation in the past is that reasonable controls,

19   which the Hearing Officer can impose through a use

20   permit, can also be imposed through a reasonable

21   accommodation. The Municipal Code allows the reasonable

22   accommodation process to have conditions attached to it.

23

24   The reasonable accommodation is not a land use

25   entitlement. It does not run with the land. It is

37

1 specific to a particular applicant at a particular

2 location under particular conditions.

3   Our analysis was that with the

4 conditions -- and I stress with the conditions -- all the

5 findings required to issue a use permit could be made for

6 this facility, with the exception of one item, which I

7 would like the Applicant to address.

8   One of the findings for a use permit,

9 operational standards, 20.91A.050, is that no individual

10 affiliated with the facility has a past pattern and

11 practice of operating similar facilities in violation of

12 state and local law.

13   You can parse out the word "similar facilities"

14 and whether or not it means the same facility. But

15 because some of the misrepresentations of the Applicant,

16 this specific Applicant, in the past, or one member of

17 the family that is affiliated with the facility, staff

18 would like reassurance from Counsel and the Applicant

19 that either that individual will not be involved in the

20 operation or present us with an explanation of why not

21 being able to make this finding does not undermine the

22 purpose of our Zoning Code.

23   This is not a use permit. We're not requiring

24 that you apply for a use permit. But we do have to

25 analyze, so we have some flexibility with the reasonable

38

1 accommodation standards. But we do have to analyze why

2 that prong is not undermined.

3   MR. ALLEN: Would you expect to do that on the

4 record in a hearing, or is that something that you

5 suggesting otherwise?

6   MS. WOLCOTT: I don't know that that needs to

7 be on the record at this hearing. I think it could be in

8 the public record. It would be part of the Resolution

9 that's adopted. Is that acceptable to you?

10   Proposed conditions. A bed count of no more

11 than 12 clients with one resident manager on-site to

12 control the activities and to enforce the rules of the

13 facility.

14   The facility will not occupy the second or

15 third dwelling unit for residential care purposes.

16   Weeknight curfew of 10 p.m.

17   Weekend curfew of 11 p.m.

18   Quiet hours of 10 p.m. to 8 a.m.

19   Staff report also has some other conditions

20 that may not be included in here, which include quiet

21 hours for television at a certain hour. I think it's

22 after 10 o'clock and before 8 a.m.

23   No secondhand smoke detectable off the

24 property.

25   Twenty-four-hour contact provided to address

39

1   the neighbor concerns. As in other accommodations and

2   permits that have been given, that would be a number that

3   residents could call and receive an answer within 24

4   hours from the facility operator that would address,

5   acknowledge the concerns, and give information on how

6   those concerns would be addressed.

7   Providing a list of similar facilities owned or

8   operated in the past five years, and certifying that no

9   person operating such facility has done so in violation

10   of law, or providing an explanation that was satisfactory

11   to staff and the Hearing Officer of why this would not

12   undermine the basic purpose of the Zoning Code.

13   No more than six residents with personal

14   vehicles. In the staff report, we address the parking

15   and the traffic issues. And if you'd like me to go into

16   that, I can. If you'd like me to spare you that, I will

17   summarize by saying that there are enough parking spaces

18   on-site to accommodate at either one of the units only

19   six residents under the parking standards required in the

20   Zoning Code.

21   Therefore, we, staff, would require that the

22   facility, which says that not all residents have cars,

23   limit the personal vehicles of the residents present to

24   no more than six, only six. And we would require that

25   the garage be open and accessible for vehicle parking,

40

1   and that those four residents who might have cars, if

2   they are not parking on-site, park only on Old Newport

3   Road or the commercial section of Clay Street -- excuse

4   me, Orange Street, and not park on Clay at all.

5   All other dwellings return to use single

6   housekeeping unit use. We would require, as we do with

7   all the use permits and accommodations, that we be given

8   the required compliance with all state and local laws,

9   including the California Building Code.

10   And if they are not in compliance at the time

11   that the Resolution -- any Resolution the Hearing Officer

12   would approve or not approve is executed, then they would

13   need to enter into a schedule with our Fire Marshal and

14   bring it into compliance to his satisfaction within a

15   certain period time. I believe we discussed six months.

16   We would also require an annual inspection to

17   confirm occupancy for a set period of years, and that is

18   because of the history that we have with this Applicant.

19   Okay. So we found that with conditions, the

20   use could conform to the operational standards of

21   20.9A.050, with the exception of that last one, which we

22   still are requiring an explanation for.

23   MR. KIFF: This may be where you're done.

24   MS. WOLCOTT: Okay. If you have any questions,

25   I'd be happy to answer it.

                                                        41

1   MR. ALLEN: All of this last information with

2 respect to request number five has been done virtually at

3 the last minute with no input from between you and the

4 Applicant, as I understand it. And so it's all being

5 presented today. And there are certainly a number of

6 questions about that from my standpoint of negotiating

7 permit in this setting.

8   So would you, staff, please think about that?

9 And you don't need to respond right at the moment, but

10 that's not -- this isn't the proper forum to negotiate a

11 resolution, in my estimation. So this needs to be worked

12 out.

13   MS. WOLCOTT: Can I address that?

14   MR. ALLEN: You sure can.

15   MS. WOLCOTT: We received this particular

16 request for accommodation on March 13th, when we were in

17 the middle of several other use permit and reasonable

18 accommodation applications. And so yes, that did push

19 back the time for the preparation of the staff report.

20   We also asked for more information that was not

21 provided until, I believe, the 18th of March, because

22 there were items that they had declined to give us,

23 information that they hadn't presented before that we

24 needed in order to do an analysis that's consistent with

25 a level of analysis we've done with other facilities.

42

1   So yes, staff came up with these

2   recommendations without further input from the Applicant.

3   And we did say in the staff report that we recognize that

4   this has just been presented to them, to the Hearing

5   Officer, and to the public.

6   And if the Applicant wanted to request a

7   continuance as to this particular -- or any member of the

8   public wanted to request a continuance as to this

9   particular prong of the analysis, this particular request

10   number five, we would not object.

11   MR. ALLEN: Okay. Okay. What's next from the

12   staff?

13   MR. KIFF: That's the end of the staff section,

14   Mr. Allen.

15   MR. ALLEN: Just a few quick questions.

16   Those occupancy R-4 standards have been applied

17   to all of the group facilities of seven or more in the

18   City, right? This wouldn't be the first time you're

19   suddenly applying R-4 standards?

20   MS. WOLCOTT: Our Fire Marshal has been sending

21   letters to all facilities of seven or more per building

22   for over a year requesting plan analysis, code analysis

23   of the particular building that they are in, so they can

24   assess whether or not they are in compliance either with

25   the 2007 Building Code, which was the new Code adopted in

43

1   2007, or with the standards which were applicable when

2   the use was established. That is an ongoing process, and

3   it is still a requirement.

4   MR. ALLEN: Just a question of physical

5   characteristics. I just went by this facility yesterday

6   a couple of times, and I really couldn't tell whether

7   492, I think it is, and 492 1/2 are actually attached

8   dwellings or whether there is a separation between the

9   two, your 18 and 20 there.

10   MS. WOLCOTT: They look like two separate

11   buildings. And Ms. Brown can probably address this

12   better than I can. They are classified as a duplex, and

13   Janet will tell you why.

14   MS. BROWN: The Zoning Code requires a

15   separation between detached structures, or they may be

16   attached by a solid roof 4 feet in width or more. And

17   when the buildings were constructed, they were attached

18   with a solid roof towards the rear of the property about

19   where Mr. Kiff is pointing right now. So there's just a

20   single solid roof attaching these two structures to each

21   other.

22   MR. ALLEN: So you can't go back and forth

23   between the two building --

24   MS. BROWN: No.

25   THE COURT: -- interiorly?

44

1   MS. BROWN: No, sir, you cannot.

2   MS. WOLCOTT: I would add that we looked at the

3   populations of this block. And we look at the 2000

4   Census to try to compare density. And I think our

5   analysis was that, one, they have turned

6   approximately -- with all three units in operation, they

7   would return approximately one-quarter of this block area

8   to -- that block that's there and that block that's over

9   there -- would be put to residential facility use.

10   Ms. Brown did an analysis from the 2000 Census

11   of how many parcels there were, and came up with an

12   analysis of -- let's see. I'll have Janet do this one.

13   MS. BROWN: On the side of the street with the

14   residential buildings facing along Clay Street, and then

15   it goes down -- the block goes down Broad Street, which

16   you can't see this in aerial photo, but along that block,

17   there were 20 lots or parcels. And the -- 20 blocks or

18   parcels that are residentially zones, there are 37 lots

19   or parcels on the other side, back-to-back properties,

20   that were commercially zoned.

21   So -- and the 2000 Census recognized that there

22   were 70 persons in that particular block. If I counted

23   just the number of residential parcels decided by 70

24   persons, that would be 3.5 individuals per lot or parcel.

25   Across the street from Clay, which you can see

45

1   a portion of it in this photo to the right here, that

2   block is a smaller block defined by the census, a total

3   of 12 lots or parcels. There were 43 persons in that

4   block. So based on that count, that would be 3.58

5   persons per block in the 2000 Census.

6   MS. WOLCOTT: So those were the numbers that we

7   were comparing the density for a proposal that housed 50

8   people in that portion.

9   MR. ALLEN: All right. From an

10   overconcentration point of view, there really -- there

11   wasn't much. There was a reference to overconcentration

12   in the staff report, but no real analysis. Just, why was

13   that the case?

14   MS. WOLCOTT: Maybe in my mind, it went without

15   saying that three units on a block housing 50 people

16   created an overconcentration. I'm sorry if I didn't make

17   that clear in the staff report.

18   MR. ALLEN: I mean, is that a finding that

19   would be included here independently? I understand you

20   made reference to institutionalization, which is

21   understandable, but --

22   MS. WOLCOTT: Let me another take another look

23   through the 39-page staff report and see if I can find

24   where I would have referenced that.

25   MR. ALLEN: Very good, thank you.

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1   Okay. Anything else from staff right now?

2   MR. KIFF: No, sir.

3   MR. ALLEN: Would the applicant like to make a

4   presentation at this time?

5   MR. POLIN: I would. I would also like to take

6   a five-minute recess before I begin.

7   MR. ALLEN: Let's take a five-minute recess.

8   MR. POLIN: Thank you.

9   (Pause in proceeding.)

10   MR. ALLEN: All right. We're going back on the

11   record.

12   Would conversations please continue outside?

13   Applicant ready to proceed?

14   MR. POLIN: Thank you, Mr. Allen. My name is

15   Steven Polin, and I'm one of the attorneys for Pacific

16   Shores.

17   As a preliminary matter, Pacific Shores is

18   currently in litigation with the City of Newport Beach in

19   Federal Court where we have challenged the requirements

20   of the use provisions and the reasonable accommodation

21   provisions as being violations of the Federal Fair

22   Housing Act.

23   Pacific Shores did not apply for a use permit,

24   and I strongly object to the interjection into this

25   reasonable accommodation proceeding by the City of any of

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1 the requirements of the elements of a use permit. And

2 you, Mr. Allen, if you're going to decide this and

3 consider the factors of a use permit and our request for

4 a reasonable accommodation, then it's basically -- this

5 hearing is tainted.

6   Reasonable accommodation. The Federal Fair

7 Housing Act states that handicapped people -- handicapped

8 persons can request a reasonable accommodation from any

9 rule, policy, practice or procedure from any entity.

10   Reasonable accommodation, put in layman's

11 terms, is either asking for a waiver of a condition or

12 requirement or a change in a condition or requirement or

13 doing something out of the ordinary.

14   Now, we have made five separate requests for

15 reasonable accommodation from the City.

16   One of them is to be treated as a single

17 housekeeping unit.

18   Another one is to not be -- is to ask the City

19 not to classify us as a residential care facility.

20   Another one would be to say that we're a legal

21 non-conforming use or the City recognizes us as a

22 non-conforming use that is not in violation of the City's

23 Zoning Ordinance.

24   The other is to treat Pacific Shores in the

25 provision of all Codes, Zoning, Building, Fire, Life

48

1   Safety, as if it were a single family use.

2   And finally, that we're not -- that the City

3   waive the requirement that unlicensed residential care

4   facilities may be located in only a residential

5   multi-family zone with a use permit.

6   Now, we have three houses with approximately 50

7   beds. What the City has come forward and told you is

8   we're willing to give them an accommodation, but only for

9   12 beds. That's not acceptable. That is not what our

10   request is. And to grant that, to give the City what the

11   City is recommending, is a denial of our request for

12   reasonable accommodation. Let me tell you why.

13   The City and yourself is required to take our

14   request as being reasonable. And reasonable is given a

15   very, very wide interpretation. As a matter of fact,

16   Justice Bryer, in the case of Barrett versus

17   United -- United -- U.S. Airways, said that you have to

18   look at the dictionary to see what reasonable is. And

19   it's given a great deal of leeway.

20   So to say that we're going to say that

21   you -- we're going to take 38 beds away from you is not

22   reasonable. And the City hasn't proffered any reason,

23   under the Fair Housing Act, as to why 38 people should be

24   evicted and lose their place to live and recover from

25   alcoholism and drug addiction. So first of all, you have

1   to take our request and each of our requests as being

2   reasonable.

3   Second of all, once it's found to be

4   reasonable, then it can only be found not to be

5   reasonable if it creates or causes an undue burden

6   financially, if it causes an undue burden

7   administratively, or if it fundamentally undermines or

8   alters the scheme.

9   Now, the City has arguing to you and putting

10   forth that there is no undue burden financially, there is

11   no undue burden administratively. However, three of our

12   five requests cause a fundamental alteration of the

13   zoning scheme.

14   And the reason the City says that is because

15   its zoning scheme is under attack. All right? It is

16   under attack for being in violation of the Fair Housing

17   Act. So if they grant an exception, if they say Pacific

18   Shores can operate as a single housekeeping unit, well,

19   what kind of signal is that going send to the people who

20   are opposed to Pacific Shores and to group residential

21   uses in general in the City?

22   And what kind of signal -- and the City, I

23   believe, their position is, what kind of signal is that

24   going to send to the other residential -- to the other

25   providers of housing? And they are going to say, "Well,

50

1   Pacific Shores can walk in there and get this, then we

2   can get this, too."

3   Well, the thing about reasonable accommodation,

4   Mr. Allen, is that it's a fact-intensive, basically

5   one-time deal only. It is to be considered by the

6   Applicant on the facts that are presented and

7   circumstances that are presented. It may have

8   precedential value in later proceedings if there are

9   similar situations.

10   But it doesn't lock the City into anything, all

11   right, other than, in this particular instance, a request

12   for reasonable accommodation was granted.

13   So to follow the City's logic that if you grant

14   our request to be treated as a single housekeeping unit

15   their whole Zoning Code is undermined is a fallacy.

16   Because other courts have said in similar

17   situations -- in similar situations -- and I'll give you

18   an example called Tsombanidis -- for the Court Reporter,

19   it's T-s-o-m-b-a-n-i-d-i-s -- versus City of West Haven,

20   which is an Oxford House case.

21   "Where the Court finds that the requested

22   accommodation was reasonable in light of the

23   fact that Oxford House Jones Hill operates in a

24   manner similar to a single family residence,

25   and the residents need to live in group homes

                                                          51

1   located in single family districts removed in

2   the areas where persons in recovery can readily

3   obtain drugs or alcohol.

4   "Moreover, the city's zoning regulations

5   already treat unrelated persons as a single

6   family so long as they are three or less in

7   number, and the regulations impose no numerical

8   limitations on the number of related persons

9   who can give live together a single

10   neighborhood."

11   So it's illegal in California to place

12   numerical limitations on what constitutes a family.

13   There's a case called Adamson versus City of Santa

14   Barbara, and that case involved 12 people living in a

15   house.

16   And the City has crafted an Ordinance for a new

17   definition of single housekeeping units that pretty much

18   tracks every other municipality in the State of

19   California that uses it, except they put in a provision

20   that says, "Unless they have a unitary lease, that they

21   can't be considered a single housekeeping unit."

22   Well, with group homes and with providers of

23   housing for people who have disabilities, particularly

24   with alcoholism and drug addiction, it is impossible to

25   have all the residents on one lease. They all come in at

1   different times. They leave at different times. They

2   get kicked out for violation of the rules.

3   So a reasonable accommodation in terms of the

4   single housekeeping unit would be to request a waiver of

5   this particular provision. And that doesn't undermine

6   anything. What it does is it is a recognition that group

7   homes and group home providers have special and unique

8   needs that need to be addressed.

9   Now -- and that is the reason why the City has

10   recommended that Pacific Shores not be granted a

11   reasonable accommodation to be a single housekeeping

12   unit. And that's the reason that the City proffers is

13   undermining its Zoning Code. And I submit to you,

14   Mr. Allen, that that those are insufficient reasons.

15   And unless the City can demonstrate how the

16   entire fabric of the Ordinance 2008-05 would be

17   undermined by the granting of that, then I think you are

18   compelled, sir, to grant our request for reasonable

19   accommodation in terms of that.

20   The City says that we should not be -- our

21   request not to be treated as a residential care facility

22   should also be denied, because the City has enacted a

23   zoning scheme that only classifies people with

24   disabilities as being a residential care facility.

25   It does not apply to families. It does not

53

1   apply to non-disabled people. It is only a

2   classification of those residences and those -- and that

3   type of housing that provide housing or housing or

4   services to people with disabilities.

5   This isn't the forum to litigate this,

6   or -- but I'm going to tell you that that is

7   discriminatory on its face. It's treating groups of

8   disabled people differently than group of non-disabled

9   people, and the Fair Housing Act prohibits that.

10   So when you have a classification as a group

11   residential facility and say that they can only set up as

12   a matter of right in certain zones, then that is denying

13   housing opportunities to those types of people.

14   And to say that Pacific Shores should not be

15   granted a reasonable accommodation, or at least a waiver

16   from that classification, merely because -- merely

17   because disabled people live there is not a reason to

18   deny the request for a reasonable accommodation, because

19   that is discriminatory.

20   The City has police powers to regulate rooming

21   houses, boarding houses, fraternities, sororities,

22   private clubs, in part because these types of uses do not

23   provide housing to persons with disabilities. And

24   persons with disabilities are specifically a protected

25   class under the Federal Fair Housing Act.

                                                          54

1   I often get asked about, well, what about the

2 students that live together? Don't they get the same

3 thing? And the answer is no, they don't, because they

4 are not protected under the Federal Fair Housing Act.

5   So when you start classifying uses based on

6 a -- based on the class of people that are living there,

7 and that those classes are specifically enumerated in the

8 Fair Housing Act, then you start running into problems.

9   If the concept is difficult to grasp, I often

10 say, "If you don't understand it, just substitute 'race'

11 for 'disability.'" So if you had -- if this was a matter

12 of race or national origin, people would be standing up

13 and saying, "This can't be." But because it's people

14 with disabilities, it's okay? No, it's not.

15   I don't think there's any question that the

16 population that Pacific Shores provides housing to is

17 disabled. I don't think that's in question in any of

18 these -- in any of these findings or any of the

19 discussion in the report.

20   The City admits that -- the City does not

21 question the need for sober housing, but the City also,

22 at the same time, says, "But we need to regulate it. We

23 need to put conditions on them. We need to keep them out

24 of sight, because people in our City don't like the fact

25 that they're present. But we can't kick them out, so

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1   what we're going to do is make it as difficult as

2   possible for these facilities to exist in Newport Beach,

3   and maybe they will get tired of having to come in and

4   ask for permission to live here."

5   Because basically this is what the City has

6   created is a zoning scheme that requires providers of

7   housing for people with disabilities to ask for

8   permission to come in and either stay where they are or

9   ask for permission to have a certain number of people

10   living there.

11   Now, this isn't asked of anybody else in the

12   City of Newport Beach, and I don't believe the Fair

13   Housing allows in these circumstances a provider of

14   housing to ask for permission.

15   Pacific Shores has been where it's been prior

16   to the enactment of this Ordinance. This is part of the

17   reason why we asked as an accommodation that it be

18   treated as a non-conforming use. If you grant our

19   request that it is a non-conforming use, then I think

20   what that means is we go back to what it was prior to the

21   enactment of this Ordinance and apply those standards as

22   if this were 2007 or 2006, and not 2009.

23   Let me just say this, Mr. Allen, in all group

24   home situations, parking is always problematic. It's the

25   type of problem that can always be -- in my experience,

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1 can always be remedied. It can always be worked out with

2 the housing provider, with the residents, in terms of

3 what's reasonable. And I don't think you need to be

4 acceding to the City's request to put parking

5 restrictions on us. I think that can be worked out

6 without the imposition of any kind of conditions.

7 The City says it has authority treating Pacific

8 Shores as a legal non-conforming use. I disagree with

9 that. If it was a non-conforming use, then we wouldn't

10 be here. If the City was treating it as being legal, we

11 wouldn't be here. We wouldn't have to be asking for a

12 reasonable accommodation. We wouldn't have to be asking

13 that the provisions of the Ordinance not be applied to

14 Pacific Shores.

15 Let me just say something about the Code

16 provisions that we're asking a waiver of. The Code

17 provisions -- and Ms. Wolcott spent a lot of time about

18 the Fire Code and about the fire classifications. I can

19 tell you this. These Codes are not tailored, narrowly

20 tailored to the specifics needs of this specific

21 population.

22 Courts have looked at across the board fire

23 restrictions. And there's a case called Marbrunic versus

24 City of Stowe. It's a Sixth Circuit case. And the Sixth

25 Circuit said, "When you look at the imposition of Life

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1   and Safety Codes, you have to take into consideration the

2   nature of the disability, and you have to narrowly tailor

3   those Life and Safety Code provisions to the ability of

4   the residents to respond to an emergency."

5   So basically what Ms. Wolcott is asking you to

6   do, Mr. Allen, is to impose commercial Fire Code

7   requirements because the State Code says so. I'm saying

8   that that is not so. Because reasonable accommodation

9   can be made to tailor those requirements.

10   And part of what we've asked -- and maybe this

11 is something that can be worked out -- is to treat -- is

12 the application of the Fire Codes as if it were a

13 single-family or two-family use, which was our request

14 was.

15   The City goes the other way and says, "It has

16 to be done as an R-3 or maybe an R-4," whichever one

17 deals with sober facilities of this size, which is

18 basically the imposition of a commercial Fire Code

19 requirements. This is not narrowly tailored. It's just,

20 "You look at the book. This is what it says. You apply

21 it."

22   That isn't what the courts say. That isn't how

23 the courts say that you have to deal -- that the -- how

24 these type of code requirements are applied to groups of

25 people with disabilities, that the nature of the

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1   disability has to be taken into account, and their

2   ability to respond to the particular emergency has to be

3   taken into account.

4   And I would submit that if the City, you know,

5   that if this were -- if the house is a -- one, is a legal

6   use in an R-2 -- R-2 zone, and it's got all the Life and

7   Safety requirements that is required of a use in an R-2,

8   that that should be sufficient, because that will take in

9   consideration what the City feels is protection for the

10   other dwellings in the neighborhood.

11   This is not an institution. And I take great

12   exception to Ms. Wolcott talking in terms of Pacific

13   Shores being an institutional use. This is not a campus,

14   all right? If we had the diagram back up there, this is

15   on the corner of Orange and Clay.

16   Directly across the street, which is cut off at

17   the top of the photo, are commercial uses. There's a

18   power plant across the street. There's multi-family

19   dwellings across the street. Orange Avenue is the

20   dividing line between either multi-family and commercial

21   use and R-2 uses. So right there on the corner is where

22   it changes. So when you look across the street, you've

23   got different uses.

24   Now, this is the zone that it's located in.

25   This is the zoning that the City is discussing. However,

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1   when the overall neighborhood is taken into

2   consideration, you need to take into consideration that

3   directly across the street is an office building, is a

4   power plant, and is a multi-family structure.

5   So -- and to say that those three houses are

6   somehow or another have an overconcentration of the

7   disabled people living there and that creates an

8   institutional use is truly affecting a disservice to

9   those people who live there.

10   Because they work. They get out in the

11   community. They take care of the houses. The houses are

12   absolutely immaculate. They are beautiful. The insides

13   of the houses are beautiful. And to say that somehow or

14   another this creates an institutional use is really

15   coming to the typical stereotyping of having groups of

16   disabled people living under the same roof.

17   Let me just say this. There is an

18   ongoing -- ongoing issue with this construction and what

19   the State Fire Marshal has done. I believe that if our

20   requested accommodation is resembling somewhat in the

21   form in the numbers that we're requesting, these issues

22   can be resolved and can be resolved peacefully.

23   There's ongoing controversy about this

24   unpermitted construction. As to when it started, we

25   believe that it was brought into play when the City cited

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1   Pacific Shores with violating the moratorium. The

2   moratorium is also -- and that conduct is also part of

3   our lawsuit.

4   So to a certain extent, yes, this is relevant

5   information for you to have; on the other hand, the

6   nature of the controversy and how the City has gone about

7   it is a matter that's being litigated, and we would hope

8   that if our request for accommodations are requested,

9   that those will easily be resolved.

10   MR. ALLEN: What is your understanding of where

11   this Code enforcement issue with that single-family

12   dwelling stands? And what is your client doing or not

13   doing to seek to gain approval of the work that was done,

14   if you know?

15   MR. POLIN: Well, to a certain extent, it's a

16   situation of the dog chasing the tail. We believe that

17   we have submitted what has been required. The City says

18   otherwise. So we're in this ongoing debate as to what

19   it's going to take to satisfy the City.

20   MR. ALLEN: Has been going on for well over a

21   year, it looks like.

22   MR. POLIN: Yes.

23   MR. ALLEN: It puzzled me as to why you would

24   be here making application and when you were at that

25   stage?

1   MR. POLIN: Actually, the thing with the Fire

2   Marshal is a recent event. That happened last fall.

3   Before that, it had to do with unpermitted construction.

4   We believe that we had the requisite permits to do the

5   construction. The City says that we didn't.

6   That we believe that the construction

7   started -- that we got permission to start the

8   construction in 2006. The City said that you've got the

9   permits, but you didn't do the construction. It's really

10   an issue that doesn't have a place here.

11   The Fire Marshal and the reclassification is a

12   recent event, which I don't want to -- to be honest with

13   you, Mr. Allen, I don't want to get into it, because

14   it -- there are legal issues involved in it that aren't

15   really necessary, other than the fact --

16   MR. ALLEN: I wasn't asking so much about the

17   Fire Marshal thing, as such I'm puzzled why it's taken so

18   long to get Code compliance with a use that you want to

19   take.

20   MR. POLIN: It's a situation where, at one

21   point, we thought it was resolved. City tells us

22   otherwise --

23   MR. ALLEN: Okay.

24   MR. POLIN: -- all right? We're trying to get

25   it resolved.

1   This brings us to the last issue to continue

2   operating in an R-2 zone when this is only a permitted

3   use in an MFR with a use permit.

4   If you go along with what the City is proposing

5   with the reasonable accommodation, that is a denial of

6   our reasonable accommodation request. We're not

7   requesting an accommodation from one house. We're not

8   requesting an accommodation from 12 beds. We're

9   requesting an accommodation for all three houses. The

10   City is proposing to you to basically close down the

11   other two houses. That's not an accommodation. It's

12   does not even come close to being an accommodation.

13   Let me say this. I know Ms. Wolcott told you

14   what was going on with our reasonable accommodation

15   request. I didn't get this report until late Monday

16   night. We made our request last September. Between

17   September and now, there have been intermittent requests

18   for additional information.

19   Some of the information we do not -- we did not

20   provide, because we do not believe the Fair Housing Act

21   requires us, as an Applicant or a request for a

22   reasonable accommodation, to provide such information.

23   MR. ALLEN: Do you believe you do not have to

24   supply that financial information in order to analyze the

25   issue about hardship, and that's part of this?

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1   MR. POLIN: It depends. The financing

2 information -- our thrust of the request for reasonable

3 accommodation had to do with -- our initial thrust had to

4 do with we wanted to be treated as a single housekeeping

5 unit.

6   We weren't claiming the financial necessity.

7 That's where that information -- that's where that

8 information would come into play, if we said it was

9 necessary to have X amount of people because it was

10 financially viable to have X amount of people in the

11 house.

12   What we wanted it treated as is a single house.

13 That's what our initial request was. There's been a lot

14 of back and forth between myself and Mr. Brancart, who is

15 my co-counsel, and the City about amending. And as you

16 can see, there have been subsequent amendments to our

17 request for reasonable accommodation, because we're

18 trying to work with the City on this. Now,

19 nowhere -- this notion of, "We're only going to recommend

20 12 beds," came out of the blue.

21   The other thing, Mr. Allen, is that the law is

22 pretty clear about request for reasonable accommodation

23 being acted on promptly. This zoning scheme -- this

24 Ordinance is the City's creation. It's not my creation,

25 all right?

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1   And so whatever issues that the City has in

2   terms of implementing the Code, in terms of processing

3   either use permits or request for reasonable

4   accommodation, is not my problem. Any undue delay in

5   acting on a reasonable accommodation request is

6   considered to be a denial of that request.

7   And I'll cite you to probably the seminal case

8   that's called Groome versus Jefferson Parish. It's a

9   Fifth Circuit case. Even if you were to grant the

10   request today as we requested it, our request is the

11   courts would still say it doesn't make any difference,

12   because your request was denied, because there's been an

13   eight-month delay or seven-month delay in acting on the

14   request. I don't want that to happen.

15   All I can tell you is that the way the City

16   loaded up the conditions and the information on this

17   fifth request isn't a reasonable accommodation. Bringing

18   in the use permit requirements to ask you to consider

19   those requirements as part of our reasonable

20   accommodation request is not a reasonable accommodation.

21   And basically, I believe it taints the hearing

22   and undermines the purposes, according to USC 3604BF3,

23   which is the reasonable accommodation provision. And I

24   don't believe the courts allow that type of interjection,

25   because it's not necessary to the analysis for reasonable

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1   accommodation requests.

2   To compare us -- to compare Pacific Shores to

3   those -- to those applicants that have applied for a use

4   permit and say, "Well, this is what -- the information

5   they have provided because it's required in the use

6   permit," when the Code -- when their own Code provision

7   says this is what you are to consider in terms of the

8   information, and me, being the Applicant, is required to

9   provide, sort of like stands the reasonable accommodation

10   provision and the reasonable accommodation process on its

11   head.

12   And the City can't come in here and say "Ignore

13   what Title 20" -- and I think it's .94, I may be wrong,

14   "says, because this is what we want you to consider.

15   This is how you should evaluate this." That's wrong, and

16   it's not -- they are the ones who wrote the Ordinance.

17   You, as a Hearing Officer, should hold their

18   feet to the fire as to what they wrote and what is

19   required, and not just bring in the dump truck and dump a

20   bunch of stuff that doesn't belong in here. Like I said,

21   we've applied for an accommodation for all three houses.

22   The City is saying that we'll only give you an

23   accommodation for one house with 12 beds.

24   Let me tell you something else, Mr. Allen,

25   because the City brought this up. This occupancy

                                                            66

1 requirement that the City has, two per bedroom, plus one

2 house manager, that's how they covered it, it's illegal.

3 Case called City of Edmonds versus Oxford House, 514 U.S.

4 something. It's a Supreme Court case.

5 It dealt with occupancy requirements. It says,

6 "It is illegal to treat -- to impose occupancy

7 requirements on unrelated people that are different from

8 related people. It has to be uniformly across the

9 board."

10 What the City is doing is saying that groups of

11 disabled people are being treated in terms of occupancy

12 differently than groups of either unrelated, non-disabled

13 people, or related people, or maybe even related disabled

14 people. It's illegal.

15 And for them to come in and say, "The number

16 that they are entitled to is 12 because they have six

17 bedrooms," is not only illegal but it's unreasonable, and

18 it cannot be sustained on a reasonable accommodation

19 analysis.

20 MR. ALLEN: Maybe the City will address that

21 when they get back up. I thought those standards applied

22 to all uses, not just to the --

23 MR. POLIN: No.

24 MR. ALLEN: -- disabled.

25 MR. POLIN: No, they don't.

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1   Okay. So what we're asking for, Mr. Allen, is

2 that our request for reasonable accommodation be granted.

3 And if it's going to be the City said that it should

4 be -- we should be recommended under our request number

5 three and number five, if it's under either of those

6 requests, then we want our accommodation for all three

7 houses.

8   If you think that we're entitled to a

9 reasonable accommodation to be treated as a single

10 housekeeping unit because what we're asking for is to be

11 treated like a family and to waive this unitary lease

12 requirement, then I would be very happy if you did that.

13   Nevertheless, we have five requests that we've

14 made. Two of them the City has said they don't oppose.

15 One of them, though, which they don't oppose they have

16 such a litany of conditions on it that if you granted

17 what the City is asking, that, in effect, denies our

18 request for reasonable accommodation.

19   And basically what the effect will be when we

20 talk about what may be necessary to afford a person an

21 equal opportunity to enjoy and use a dwelling will be

22 denying 38 people, potentially, maybe less than that, an

23 opportunity to use and enjoy the dwelling that they are

24 currently using mainly because they have to be evicted.

25   And I don't think the Fair Housing Act will

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1 allow the granting of an accommodation that results in

2 people being denied -- who are already living there

3 denied the opportunity to use and enjoy the dwelling of

4 their choice. Not just any dwelling, the dwelling of

5 their choice.

6   Thank you.

7   MR. ALLEN: One quick point. With respect to

8 non-conforming use, you said the City granted you number

9 three, non-conforming use, that you'd be perfectly happy.

10   As I hear the City describing that, they are

11 saying that if -- you are a non-conforming use according

12 to their standards, but that it would be required for you

13 to obtain one of the use permits if you were a

14 non-conforming use in that zone.

15   MR. POLIN: Well, I think what we're asking for

16 is that we be treated as a non-conforming use, and there

17 be a waiver of the use permit requirements. If you grant

18 that accommodation, I don't think we would be subject to

19 the use permit requirements. I think we'd go back to the

20 pre-2008, basically. That's what we're asking for.

21   We're asking to be granted -- actually, what

22 the request was, which they didn't put it in here, is so

23 that we be grandfathered in. We want to be grandfathered

24 in.

25   MR. ALLEN: I saw that your request said you

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1   wanted to be grandfathered in, and that artful legal term

2   caught me. But I do understand, and maybe the City can

3   respond to that when they respond to your comments.

4   MR. POLIN: Thank you.

5   MR. ALLEN: Thank you.

6   MR. BOBKO: Mr. Allen, would you like me to

7   respond now, or would you like to take public comment?

8   MR. ALLEN: I think that we have a lot of

9   people here. And if you can -- if you have your notes,

10   let's get started with the public hearing, with the

11   recognition that both you and the Applicant will, after

12   we close the public hearing, have the opportunity to

13   comment.

14   So, please state and spell your name for the

15   record.

16   MR. SOYLEMEZ: Sure. My name is Mustafa

17   Soylemez, S-o-y-l-e-m-e-z. I live at 407 Bolsa Avenue,

18   and I do have a written prepared statement for the record

19   that I'd like to read to you.

20   However, before I get there, Mr. Allen, I'd

21   like to make two points, actually counter-points, to the

22   Applicant's claims. And they are very, very specific,

23   but they are just fallacies as he described them.

24   First of all, he stated that Orange Avenue, the

25   top of that graphic or picture you see there, is mixed

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1   use and that is patently false. There are townhomes

2   located right across there.

3   What I believe the Applicant was trying to say

4   is that Old Newport Boulevard, which is actually on the

5   left side of the picture, is multi-use, and that is, in

6   fact, true. However, as you can see, the properties in

7   question are Orange and Clay, not Old Newport Boulevard.

8   So that's number one.

9   MR. ALLEN: Right.

10   MR. SOYLEMEZ: Number two, I challenge his

11   definition of what a complex or an institution is. One

12   thing he artfully neglected to mention to you is that the

13   back of all three properties are open, meaning it's an

14   adjoining property. This, by very definition, creates a

15   campus feeling. That is what a campus is, okay? It is

16   unrestricted access. That's, in fact, where most people

17   go to convene and smoke and talk and discuss, and things

18   like that. Those are the two points.

19   Okay. Now, I'll read my written statement.

20   As the City is aware, the owner is operating

21   without permits.

22   MR. ALLEN: I'm going to give you an extra ten

23   seconds, but I wanted to say -- because I forgot to say

24   it in the beginning -- each person has three minutes to

25   make their comments.

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1   MR. SOYLEMEZ: This is exactly three minutes,

2 so let's start right now, okay?

3   As the City's aware, this owner is operating

4 without the permits. Whether it's NBMC or others, there

5 are also many Building Code, Fire and Zoning violations.

6 This operator opened a facility during the moratorium,

7 and has been violating not only the letter but the spirit

8 of our law since Day One.

9   I know all this, because I have lived 25 yards

10 away at 407 Bolsa for the last four years, and I see what

11 goes on there daily. Today, I'm not going to speak about

12 those violations. The City will address those issues.

13   Rather, I'll focus on the direct negative

14 impact the situation has had on my home life and

15 community. Most importantly, it's altered the

16 composition of our neighborhood, which I believe is at

17 the very heart and crux of this hearing.

18   There are now approximately 40 living in a

19 footprint that was designed and zoned for two

20 single-family homes. This operator has illegally

21 transformed two dwellings originally designed for 12 or

22 less, six in each home, into an illegal complex that

23 houses 40.

24   What kind of impact does this thing

25 overcrowding have on me? Consider the metaphor. Think

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1   of a car on a side street joining traffic on a highway.

2   During non-peak times, there are generally no problems.

3   A car simply gets on the ramp and joins traffic

4   seamlessly.

5   But what happens, say, at 5 p.m., during rush

6   hour? The amount of cars wanting to get on the highway

7   doubles, quadruples. And pretty soon, cars are

8   completely backed up. Traffic stops. Noise increases.

9   Pollution increases, and the delays melt.

10   Why does this happen? Because the roads and

11   the area in general just aren't built to handle this.

12   It's inevitable. When you exceed something's design

13   specs, you'll get systematic failure. That's exactly

14   what's happening in Orange and Clay, and it pervades into

15   all parts of our essential life.

16   People coming up at all hours, foot traffic,

17   noise, smoking, trash, constant deliveries, cars

18   doubled-parked. It's incessant and it's completely

19   disrupted our neighborhood. Here's some specific

20   examples.

21   First of all, there's always lots of noise. At

22   least four times in '08, I've walked over there to ask

23   members to be quiet. Or on one occasion, when I asked

24   for the person's name, they refused. This happened in

25   late July of '08.

73

1   Second, there's always trash on the street on

2   the front. There's no one that can help over there.

3   There's no super. There's no manager. There's no

4   accountability.

5   Third, we have Bolsa Park where children are

6   very close by. It is 40 by 50 feet long. Group home

7   residents like to walk over there, smoke, and then

8   discard butts in the stand, even in front of kids. I

9   know these individuals --

10   MR. ALLEN: You need to wrap, and you're going

11   to submit your written comments?

12   MR. SOYLEMEZ: Yes, sir. I know these

13   individuals are from the complex, because I personally

14   have seen them walk from the homes to the park. Just

15   today, as I measured the dimensions of the park, I found

16   these. The pack was on the slide, and the butt was in

17   the sand. And this is very common. There are more

18   example, but others will share them.

19   To close, I ask the fancy, high-priced attorney

20   over there, how long did he spend at the property really

21   witnessing these things? Did he spend years? Months?

22   Weeks? Even days? Okay. Did he spend any time there at

23   all? Well, guess what? I have been there, and I live

24   there. And, therefore, I've been noticing these things

25   day and night for years.

74

1   As such, I believe any defense of the situation

2 by the attorneys and operator must be heavily discounted.

3 Whose testimony is more material? Who's in a better

4 position to account for the communities impact than me

5 and my other fellow residents? Attorneys who fly in from

6 D.C. on the day of hearing, or people who actually,

7 honestly and legally live there day in and day out?

8   As such, I hope you'll strongly consider my

9 request to not grant this operator the reasonable

10 accommodation.

11   Thank you.

12   MR. OBBAGE: Good afternoon. My name is David

13 Obbage. Last name is spelled O-b-b-a-g-e.

14   I would also like to respond to one of the

15 things that the Applicant's attorney had just mentioned,

16 but I'd like an extra 10 seconds, if I may.

17   I'd like to talk about that concept of loading

18 up. Well, the Applicant is accusing the City of loading

19 up on the conditions and requirements imposed on this

20 property. The loading up actually started when the

21 operator decided to load up the number of occupants on

22 this corner at Clay and Orange.

23   As I said, my name is David Obbage. I live at

24 3307 Clay Street, which is next door to the three

25 building sober living compound located at the corner of

75

1   Clay Street and Orange Avenue in Newport Heights.

2   Over the past two years, our community has

3   expressed its concerns about the operation of this

4   facility and the negative impacts that it has had on our

5   neighborhood. The primary reason that we are opposed to

6   this group home facility is based on facts and not

7   speculation.

8   For example, on the morning of November 6,

9   2007, an officer from the Orange County Sheriff's

10   Department came to my home at 7 o'clock in the morning

11   looking for information about a resident from 3309 Clay

12   Street, which is located directly next to me and is part

13   of the boarding house sober living facility that we are

14   viewing today.

15   The officer informed me that the individual

16   they were looking for was being sought by law enforcement

17   for misdemeanor and felony drug-related charges. The

18   officer also informed me that these type of suspects are

19   allusive and hard to find because they move from house to

20   house within the drug and alcohol group network in

21   Newport Beach.

22   What about the issue of overconcentration?

23   We're not sure how many recovering addicts are actually

24   living in this facility. And we're now estimating that

25   there are almost 40 people that are living in the three

                                                           76

1   houses at any one time.

2   This corner used to have two homes with two

3   families living on them when I bought my house. Now we

4   have three buildings, accommodating up to 40 people

5   living there. And is this what the City of Newport Beach

6   intended when they established the R-2 Zoning District

7   for this area and this neighborhood?

8   Another legitimate concern we have is that the

9   triplex of sober living homes is located one block from

10   our local nursery school. Who is conducting the

11   background checks on the individuals that are living in

12   the facility?

13   There have been several other instances of loud

14   profanity, secondhand smoke problems, and suspicious

15   activity that have occurred since this operator bought

16   the property and started operating a boarding house, and

17   now it's a sober living facility.

18   I urge to you deny this application and force

19   the Applicant to adhere to the zoning requirements and

20   Building Codes that are in place for our community. I

21   appreciate your giving me the opportunity to address you

22   today at the hearing.

23   Thank you very much.

24   MS. FABIAN: Good afternoon, Mr. Allen. My

25   name is Lisa Fabian, F-a-b-i-a-n, F, as in Frank. I

77

1   reside at 3301 Clay Street, which is right on the corner

2   closest here. And I want to share a couple of issues

3   that have impacted my neighborhood, myself, and my

4   family.

5   Number one, a couple of years ago, I observed a

6   young gentleman that was living in his car on the side of

7   my home on Bolsa and Clay. And for two weeks, I tried to

8   catch this individual, who, by the way, was doing drugs

9   in his car. I witnessed, from my second floor bedroom,

10 he was smoking. He had needles. I don't know all what

11 he was doing.

12   But I did report it to the Newport Beach Police

13 Department. And after two weeks, they finally found him

14 about 11 o'clock at night sleeping in his car. They

15 addressed this individual, and found in possession he had

16 some sort of an address stating that he was a resident at

17 3309 Clay Street.

18   They approached the residence, knocked on the

19 door. The gentlemen that were there would not open the

20 door, as they said they would be breaking the law or the

21 rule. So they were asked to come out through the back,

22 identify the individual. And sure enough, they had

23 identified that he was asked to leave the home, because

24 he was actually doing drugs, and he was kicked out. So

25 he started to live on the street next to my home.

78

1   Also, I did experience the 7 o'clock in the

2   morning knock on the door by the sheriff, you know,

3   interrupting our family lives. Also, smoking, trash. I

4   also I have two dogs that I walk two times a day. And I

5   also observe an individual leaving one of the residence

6   and hiding a bottle of liquor behind a plant at the park

7   where the children play on Bolsa Street. I did pull the

8   bottle out, and I don't have it as evidence right now,

9   but I can tell you that that did occur.

10   Also, there was an accident that occurred about

11   probably last year sometime, and my neighbor is not here,

12   but I'd like to read to you a statement that he gave to

13   me to represent on his behalf. His name is Tony Camacho,

14   and he resides at 3305 Clay Street. Camacho is

15   C-a-m-a-c-h-o.

16   Sometime in August of 2008, after an accident

17   of a drunk driver crashed into the home on -- it's 492

18   Orange Street, this is -- my neighbor spoke with the

19   owner, the senior and junior, regarding the crash.

20   And he smugly, as he was proceeding to clean

21   the damage, stated that he would not be surprised if the

22   City had sent or paid someone to crash in his property

23   with a drunk driver.

24   I'd like to submit this to you as evidence that

25   Mr. Camacho -- this was a conversation that he had with

79

1   this individual. And more importantly, this is the type

2   of person and type of individual that we're having to

3   deal with.

4   Thank you very much.

5   MR. RUSH: Bob Rush. Now that we've heard from

6   the residents local to the compound, I thought I'd come

7   up and just make a couple quick comments here.

8   As a 24-year resident of Newport Beach, I've

9   seen a lot of changes since 2000, the advent of

10   channeling drug and alcohol recovering addicts into our

11   neighborhoods. Some of this stuff -- some of the laws

12   are developing as we go forward.

13   I don't know that right out of the gate we're

14   going to be 100 percent, you know, fully developed in our

15   local Municipal Codes. So, you know, the expectation

16   that we have it perfect right out of the start is, I

17   think, unreasonable on the part of the Applicant's

18   attorney.

19   Regarding the Applicant's -- some of the

20   statements the Applicant's attorney mentioned, he wants a

21   broad qualification. He wants a broad approval to be

22   considered. He wants broad approval, excuse me, on

23   reasonable accommodation request, and he wants to be

24   considered a single-family residential unit.

25   But I don't know of any -- there's no structure

80

1 in the City, no single-family structure in the entire

2 City that houses 50 individuals. None. Yet, he wants

3 this accommodation now to be considered.

4   Even if you got this reasonable accommodation,

5 you still have basically -- you have basically two

6 buildings that were built more like dormitories or

7 boarding houses. And then you have a third -- you have a

8 single-family structure at 3309 Clay.

9   But when it comes to Building and Fire Code, he

10 wants to be specifically exempted because of some special

11 criteria that he wants to apply. So he wants broad

12 approving, but he wants specific exemption from the Fire

13 Code.

14   Now, Ms. Wolcott failed to mention that the

15 Fire Code -- State Fire Code and Building Code was

16 recently defended in Federal Court, May of 2008. I think

17 she probably had the specifics. But it was found to be

18 non-discriminatory in its state, and it is applicable to

19 all R-4's and all R-4.1's. That's Building Code and Fire

20 Code classification; not to be confused with Zoning Code

21 classification, which has this property as an R-2, which

22 two -- two units.

23   We are here today based on one individual's

24 word that he is treating drug and alcohol patients or

25 ex-patients in this facility, one individual by the name

81

1   of Mark Manderson, I believe. And without his testimony

2   or without his assertion that he's treating these

3   individuals, we wouldn't be here, because this might be

4   otherwise considered a boarding house or some other

5   structure.

6   So -- I mean, I think it's critical to the

7   hearing that we have some kind of attestation from the

8   Applicant that this is, in fact, one hundred percent of

9   these residents are truly drug and alcohol recovering

10 addicts, and that there's no admission of other

11 individuals that are not drug and alcohol.

12   And my last point that I'd like to make is

13 that -- and this is my one last point -- I don't believe

14 I've done a lot of -- I'm not an attorney. I've done a

15 lot of reading on reasonable accommodation. I don't

16 believe in all my readings of what reasonable

17 accommodation is trying to do, I don't believe reasonable

18 accommodation was designed to be an excuse for prolonged

19 and intentional violation of laws, and that's what we

20 have here.

21   We have a prolonged and intentional violation

22 of a number of laws for a number of years. And now at

23 the late stage, the Applicant is saying, "I'd like to now

24 qualify under reasonable accommodation, because I'm only

25 treating these addicts." And I don't think that

82

1   that's -- I think that's a misapplication of what the

2   intent of reasonable accommodation was designed for.

3   I'd like you to please consider that.

4   MR. ALLEN: Thank you. Let's see. It's 4

5   o'clock, and we're schedule to go until 4, but we

6   certainly have a ways to go with public hearings. Does

7   staff have any input on that?

8   MR. KIFF: We don't have our room conflict

9   today, Mr. Allen. So we can continue if you wish.

10   MR. ALLEN: Good. Should we take a

11   short -- let's let our ex-council member go, and then

12   we'll take a short break.

13   MR. NICHOLS: I'm Dick Nichols, and I'm from

14   Corona del Mar. I'm familiar with the property, but I

15   haven't reviewed everything in the last little bit.

16   I would like to first bring up the single

17   housekeeping unit. I believe that the Federal law says

18   that a single housekeeping unit of six or less is -- we

19   consider that as a special unit. When it's over six,

20   that dropped, okay?

21   He's talking about 50. Single housekeeping

22   unit of 50, all of a sudden, has -- so there's no upper

23   limit on this. This was decided also in the lawsuit by

24   the City just recently. I mean, that's how they rated

25   Sober Living By The Sea.

83

1   The second thing I would say is that this is

2 semi-ridiculous, because you've got two R-2 lots along

3 Clay, and that's 18 and 20, and a single-family on

4 Orange. And the point of the matter is, is that you

5 can't take lots in any city in existence and say, "Well,

6 I have these two, and they are altogether, so I just want

7 to have this considered an R-4." That has to go through

8 the City's zoning process.

9   And how in the hell is this guy has the

10 audacity to say, "Well, I can just combine these

11 altogether. And because I put sober living people in

12 this thing, I'll just say it's a single household"? Now,

13 there's no basis for any of those things to be done.

14 This shouldn't even have ever gotten this far.

15   Then the second -- then another aspect of it is

16 the two R-2 lots are joined. To my knowledge, that was

17 never rezoned in the City. I was on the Board at that

18 time, and that's not legal. And it wasn't enough room

19 between the lots.

20   Now, they did give a little bit of extra space

21 on Orange than I think that they needed to as a duplex

22 there, because that would a side yard. But nevertheless,

23 the space between the buildings is not 6 feet. And the

24 tying together of the two as R-2's -- individual R-2's is

25 illegal. I mean, that's not -- how that ever got through

84

1   this far is beyond me.

2   Now, when they did the R-1, then they wiped out

3   the property line in the back. Well, so now they made

4   this into a single lot, but it isn't zoned that way. I

5   mean, this is -- can I make an apartment building on any

6   three lots in the City?

7   Why don't I pick someone in Corona Del Mar?

8   That's good spot. Or somewhere else? And I'll just take

9   three lots, and I'll make an apartment building out of it

10   without rezoning or anything else. And I'll say, "Well,

11   gee. Depends on who I put in it." This doesn't make

12   sense at all is what I'm saying.

13   And the last thing I would say is as to Fire

14   Safety Codes. The Fire Safety Codes are designed to make

15   the people safe. These Codes are designed so that the

16   people living in these structures will not get burned to

17   death, that they will not have unreasonable lifestyle

18   because of the fact that they are not living in a safe

19   environment.

20   And so that's a State law, that the Fire Codes

21   come down from the Fed. They are known throughout, and

22   they apply to buildings depending on their usage. And

23   this is a usage of 50? This is a hotel environment.

24   This is not anything else.

25   Thank you.

85

1   MR. ALLEN: Thank you. Let's take five

2 minutes, and then get started again.

3   (Pause in proceeding.)

4   MR. ALLEN: All right. Back on the record.

5   MR. BROWNING: Good afternoon. My name is John

6 Browning. I live at 3256 Broad Street, which is just

7 around the corner from the compound.

8   And I would characterize this as -- it's not

9 really a request for a reasonable accommodation. It's a

10 request to allow a hotel or real a prison in our

11 residential neighborhood near a nursery school and down

12 the street, about three or four blocks, from Newport

13 Heights Elementary School.

14   The lack of parking around here, the street

15 parking, is something always filled. I've got a

16 6-year-old and an 8-year-old who are, you know, new bike

17 riders. Not very good bike riders. And this is an entry

18 to a residential neighborhood, so that's car traffic.

19   And when you have cars parked on both sides of

20 the skinny street, Clay Street, you try to cross over on

21 Bolsa, it's really dangerous. And it's because of these

22 cars, because there's 40 or 50 people living here parking

23 their cars out on the street.

24   The solution offered by the staff is to allow

25 them 12 units or 12 beds. But it's a solution that's

                                                      86

1 based on trust of people that have proven that they can't

2 be trusted. They have started these homes without

3 authorization by the City. They've violated Building

4 Codes. The staff report details many instances.

5 They've opened up a sober living home across

6 the street from my house that people walk from the Clay

7 Street address down Bolsa and left on Broad, back and

8 forth all the time. And that part -- that property is

9 not subject of today's hearing, but it's the same

10 property, the same people, and there's people going back

11 and forth all the time.

12 The concept of institutionalization is a

13 concept that's applicable to how these people are living.

14 The concept of a sober living home is to put people in a

15 residential neighborhood, in a residential setting, and

16 allow them to interact back into society, which is fine.

17 But when you put people in a hotel or a

18 dormitory with, you know, 40 people or 50 people in these

19 small houses -- these aren't 20,000 square foot hotels.

20 These are small. They swished them together. That's the

21 institutionalization aspect.

22 And then finally, I say that we need to stop

23 pretending that these are disabled people. They are

24 criminals. They are here on probation. The prisons are

25 crowded, and this is a slippery slope. Wait until the

87

1   Governor orders or the prison system orders the release

2   of drug offenders and felons.

3   Where are they going to put them? Out on

4   street? No. They are going to a sober living home

5   claiming that they have a drug addiction, when it's

6   really an addiction to money and an addiction to

7   committing crimes. And those are the people that are

8   going to be coming to our city. And it's just a matter

9   of time before one of these people commits a real serious

10   crime on a, you know, a kid from Newport Heights.

11   Thank you.

12   MS. MORRIS: Good afternoon. My name is Lori

13   Morris, M-o-r-r-i-s.

14   I just wanted to begin by saying that the

15   Applicant from the beginning has -- this has been many

16   years we've been watching this house, several years.

17   Longer than 2007. From the time they started building

18   this compound, you know, watching it as it's being built,

19   looking at the processes that it's going through, they

20   never followed City procedures as far as their

21   permitting.

22   I mean, I'm sure the City has brought forward,

23   you know, all -- and there's pages of these problems in

24   the permit with Clay. I was able to bring up -- this is

25   Clay, I think -- no, this is Orange and also Clay Street.

1   It's constant. And it was just like a

2 catch-me-if-you-can attitude. They would go about their

3 business. They would go into their offices until

4 somebody would report them. They would start building

5 without permits until somebody would report them.

6   So this Applicant from the beginning has been

7 untruthful in their putting forth what they want to have

8 happen at this facility, and it is a large group home

9 facility.

10   It began with "My parents are going to be

11 living there." Then it went to -- and this is said to

12 the City employees that asked, "Okay, what's going on

13 here?"

14   "My parents are going to be living here." Then

15 it's, "No, no. I'm going to turn it into a rental, but

16 I'm going to dictate what those renters are going to be

17 able to do. One of those is they can't drink."

18   I have a rental. I can't legally tell my

19 renter he can't drink. That's illegal. It's a rental.

20 He can do -- he's paying his rent.

21   Smoking, I think there's some issues with the

22 smoking back and forth. But each time he was caught and

23 said, "Well, you can't -- or you can't do that, or you

24 can't say this," he would then move on to what was the

25 next best beneficial answer there was for him.

89

1   We've got to this point -- I mean, by his own

2   admission, he's brought this up -- this informational

3   letter alone should be grounds for denial. Over and over

4   he has said, you know, "It's this one thing." You know,

5   "No alcohol. Most residents are using their bicycles or

6   will be using their bicycles."

7   How can he state that with conviction, say that

8   I've got this rental, and they are going to be using

9   their bicycles? You can't say that legally or put across

10 to the community, "I have 50 people, and they are all

11 going to be using a bicycle." That's not true. I mean,

12 that letter alone shows who the Applicant is. This is

13 what he put forth, and it's in the record.

14   Now, you know, you move forward with the

15 operating, and this is -- and he wants to operate it as a

16 family style. As Dick Nichols brought up, fifty people

17 is not family style. That's -- the definition by ADP and

18 everybody else, Federal and everybody else, six and

19 under. And that is agreeable.

20   No one here wants to discriminate against

21 people who want to get well, that have an addiction and

22 want to get well, and should and are allowed by Federal

23 law to do that an our neighborhoods.

24   What they have created with this is an

25 institutionalized medical facilities. Because these

90

1   people, even though they are after -- you know, they are

2   done being -- going through the process, they still have,

3   you know, issues that have to be accounted for.

4   So I would say that this Applicant has been

5   untruthful to the City. They cannot -- you cannot move

6   forward with what they are giving, even their attorney,

7   as truth. So I ask that you take that into

8   consideration, and I thank you for your time this

9   afternoon.

10   MS. KOHLER: Hi. It's Cynthia Kohler.

11   I've been doing this for quite a few years, and

12   that's just one thing, Mr. Allen, I wish you consider.

13   He wants to be considered a family. And there's 50

14   people in this home. And who knows who are in these

15   homes? How do we know who are in these homes? He

16   doesn't answer to anybody. He's not licensed. So how do

17   we know who is actually in these homes?

18   He's asking for special accommodation. Well,

19   he doesn't want to give up his information of who he is

20   housing. So why should we do this for him after he

21   hasn't followed the rules, and we have no idea who are in

22   these homes.

23   The other consideration is that every single

24   operator down here on the Web site advertises alternative

25   sentencing. That is my concern and has been my concern

91

1   all along. They get by probationary parolee because of

2   alternative sentencing. And not only do they have drug

3   and alcohol problems, they can have forgery, spousal

4   abuse. And they get that expunged if they go into these

5   homes. So I just wish you would consider all of that

6   when you take this in.

7   Thank you.

8   MS. OBERMAN: Denys Oberman. I'm a resident,

9   and I'm speaking on behalf of a citizens' group,

10   Concerned Citizen of Newport Beach.

11   The group became aware of this facility almost

12   three years ago, because the residents had contacted us

13   and told us that they had issues with this compound being

14   built, and that there were clearly issues of Code

15   violation, which they reported repeatedly to various

16   departments of the City in efforts try to get this

17   checked and get it under control before construction was

18   completed and was occupied, and there was no results that

19   were forthcoming.

20   During the Ordinance development process, the

21   attorney that we had gotten to help to work with the

22   City, which the City asked us to do and we did, to

23   develop ordinances also observed this facility and

24   reviewed the permits and physically reviewed the

25   facility, and -- along with the forensic architect, did,

                                                          92

1   in fact, confirm that the facility had numerous Code

2   violations.

3   You know, neither I, personally, or our group

4   are aware of all the things the City has done, but the

5   bottom line of it is, as a number of people have already

6   testified, this business operator has demonstrated

7   factually a disregard for the laws of the City. There is

8   nothing in the law anywhere, in Federal or State law,

9   that obligates the City to provide any sort of

10   accommodation to a business that deliberately thumbs its

11   nose at the laws of the City.

12   These laws are so far away from being

13   discriminatory to individuals, the City of Newport Beach,

14   and in particular in this impacted area where this

15   facility is located, is more overconcentrated than any

16   other city in California.

17   And furthermore, the City of Newport Beach for

18   the last nine or ten years has enforced no regulation

19   against group residential uses of this type, residential

20   care and treatment facilities, or non-state licensed

21   sober living homes.

22   The City endeavored to make a fair and

23   equitable Ordinance and also fulfill its duty to protect

24   the public when it enacted an Ordinance in 2007, actually

25   beginning of 2008. Unfortunately for us all, at that

                                                          93

1   point in time, there was already a condition of severe

2   overconcentration, which institutionalized the Balboa

3   Peninsula, West Newport, dense residential neighborhood.

4   And now we're confronted with trying to deal with that.

5   But the bottom line of it, Mr. Allen, is that

6   this operator, as a business -- has nothing to do with

7   the individuals in the facility -- the business has been

8   repeatedly in an illegal status.

9   And so we feel that the fair and reasonable

10   thing is to deny the reasonable accommodation, because

11   the business is there on an illegal basis and has been

12   since its inception.

13   Thank you, sir.

14   MS. HANNA: My name is Mary Hanna. I live at

15   511 Orange Avenue.

16   He addressed the complex across the street.

17   MR. ALLEN: Would you spell the last name,

18   please?

19   MS. HANNA: H-a-n-n-a.

20   MR. ALLEN: Thank you.

21   MS. HANNA: Just for the record, it's not a

22   complex. There are seven townhomes. There are 2.1

23   person per unit. So I don't think it's as dense as he

24   was talking about, the 50 people across the street.

25   I brought my property in 1998. At that time,

1 there was one single house on Clay. I, with all my other

2 neighbors, were concerned when they started building

3 these two huge homes. And you could tell from the

4 outside there was only one car garage. I mean, you can't

5 build a house like that in Newport Beach and not have but

6 a one car garage.

7   And I went to the City and said, "What is this

8 going on? We've got this huge home, supposedly, and no

9 parking for this home." And they said, "Oh, well, they

10 did this and they did that."

11   Well, unfortunately, I live across the street.

12 And my family and my visitors have no place to park,

13 because they're parking across the street. We have way

14 too much trash, way too much parking. It's impacted our

15 neighborhood.

16   It's terrorized our families, because these

17 kids and these young teenagers with tats, and everything

18 else that you see every place else, but they are nasty,

19 and they are very abusive, and have been to my family and

20 have been to friends of mine. And I just find it

21 almost -- I want to say terrifying to walk outside,

22 because you never know what you're going to see across

23 the street.

24   Anyway, I just I think you're doing a

25 disjustice to your citizen, to your people you pay taxes

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1 here, and to the people that bought in and have lived in

2 here and wanted to go along and be family and take care

3 of a family and do the right things, and then you let

4 these people walk in and just destroy our neighborhood.

5 I just think it's despicable.

6   MR. ALLEN: Is that for today? No one else

7 needs to speak?

8   Okay. Let's close the public hearing. And at

9 this point, let's let the Applicant respond to these

10 comments, if he wishes to do so. And then the City can

11 respond to both the public hearing comments and the

12 comments that the Applicant has made both before and

13 after the public hearings.

14   MR. POLIN: Thank you, Mr. Allen.

15   Who asked me earlier about -- comment that the

16 City attorney made that we did not provide financial

17 information? This is -- let me tell you.

18   This is the question on the reasonable

19 accommodation application.

20   "If the applicant is a developer/provider of

21   housing for individuals with disability -- with

22   a disability, please explain why the requested

23   accommodation is necessary to make your

24   facility economically viable in light of

25   relevant market and market participants.

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1   Please provide documentation, if any."

2   Our response was,

3   "Pacific Shores objects to this request, and

4   Applicant for reasonable accommodation is not

5   required to compare or make necessary in light

6   of" -- my printer went heywire here -- "in

7   light of relevant market and market

8   participants.

9   "Accordingly, it's not" --

10   Basically we said it's not our place. It's not

11   our job to provide data comparing the relevant market and

12   market comparisons in order to request this request to be

13   considered and be granted. Basically what it says is

14   they want to compare -- they want us to compare us to

15   other facilities.

16   First of all, it's not our job to go out and

17   compile this data. The relevant inquiry would be is, is

18   the accommodation -- are you requesting the accommodation

19   to make your facility financially viable? And leave it

20   at that.

21   If it was, we would have provided the

22   information, but that isn't what it requested. It wanted

23   a comparison of surrounding facilities, and do we -- and

24   for us to gather data. That is not the responsibility

25   nor -- of an Applicant or requested for reasonable

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1   accommodation, nor is it, I believe, required by the Fair

2   Housing Act to do so. This is something the City created

3   and made as a condition, and we objected to it. And it's

4   not necessary to provide.

5   So, it is misleading for the City to say that

6   we refuse to provide financial data when that is not what

7   the question was. And that is not what the requested

8   information was.

9   Mr. Allen, I've been doing this kind of work

10 for almost 20 years. I participated in numerous -- been

11 present at numerous hearings, either Zoning hearings or

12 hearings before City Council. I have heard citizens who

13 have a stake in their community come forward and say what

14 they believe should be done, expressed their fears,

15 expressed their concerns.

16   And to be honest with you, sir, it doesn't

17 change from community to community. I'm not saying that

18 what has been said here is right. I'm not saying what

19 has been said here is wrong. What we have here is the

20 essence of participatory democracy. Everybody gets an

21 opportunity to come up here and say their peace,

22 regardless of if I agree with their opinion or regardless

23 if I disagree with their opinion.

24   However, you have a different job as a

25 decision-maker. Because your job is to put aside the

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1 unsubstantiated fears and unsubstantiated stereotyping

2 that you hear, and deal with this issue on the facts that

3 are presented and the law as presented to you.

4   It puts you in a difficult position, because

5 you're not supposed to be swayed by emotion and not

6 supposed to be swayed by numbers, comparing the numbers

7 for or comparing the numbers against and the reasons for

8 it.

9   This is comes as no surprise to you that this

10 is a hot button issue in Newport Beach. It has generated

11 a lot of anger. It's generated a lot of animosity. It's

12 generated rooms and rooms and rooms and rooms and rooms

13 and rooms of paper, as I can attest to. I have to carry

14 what I -- the City provides me on a flash drive, because

15 the paper is too much.

16   It boils down to what the law requires and what

17 the facts are. And sometimes what the law requires and

18 what the facts are don't go along with what the public

19 sentiment is. And that's basically what we have here.

20   I don't think it's necessary for me to address

21 anything that the people have said here, because, as I

22 said before, they have a right to say it, whether I agree

23 with it or whether I don't agree with it. I think what

24 the City has compiled, what the City has brought forward,

25 what I have compiled, what I have brought forward, is

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1   what you need to consider.

2   I will say to you -- and at the sake -- at the

3   risk of repeating myself from what I said earlier, the

4   City's recommendation of granting a reasonable

5   accommodation that reduces -- that basically shuts down

6   two houses and reduces one house to 12 beds is not a

7   reasonable accommodation. I'm not saying, maybe, 50 beds

8   is a reasonable accommodation.

9   However, I think it's necessary that all three

10   houses remain in play; that they be available to provide

11   housing for the recovering addict and alcoholic. The

12   Fair Housing Act recognizes the commercial nature of

13   providing housing and providing -- group home

14   providers. It recognizes that -- recognizes not

15   everybody is doing this for strictly altruistic motives.

16   Not everybody who comes and applies for

17   reasonable accommodation is a nonprofit. And sometimes

18   the only choice is to go to a -- what some courts have

19   called a commercial facility. But commercial facilities

20   are entitled to a reasonable accommodation just as much

21   as a non-commercial facility is.

22   There are issues that have been raised by the

23   City. And to a certain extent, I think by the citizens

24   as to who is running this, is it how it's going to be

25   run, that, you know, can be sat down and discussed with

1   the City and worked out. We're not trying to say that,

2   you know, we're above the law. But I don't think the

3   City is above the law either.

4   Is there issues that, obviously, in terms of

5   condition that the City wants imposed, that I don't think

6   are necessarily, reasonable or legal in terms of what it

7   wants to do. But those are things that can be worked

8   out.

9   The bottom line is, Mr. Allen, is our request

10   reasonable? And I submit to you that it is. Regardless

11   of which way you go, Mr. Allen -- and it's not going to

12   cause an undue burden, financially or administratively.

13   I think that's already been conceded. And it's not going

14   to fundamentally alter the City's Zoning Code.

15   And it's necessary so that people who are

16   living there can continue to live there and know that

17   their sobriety and their recovery will not be interrupted

18   because of eviction.

19   What the City wants you to do is say, "We'll

20   give you 12 beds. Everybody else has to leave." Well,

21   that's causing a massive disruption in the continuity of

22   one's recovery. And the eviction is not because of being

23   forced to leave, and it's not because of anything these

24   individuals have done. It's because this is what the

25   City wants it to be done. It's forced loss of housing.

1   But one of the things that the courts always

2 analyzed is that, is the Applicant requesting the City to

3 provide them with housing, or they asking for an

4 accommodation? We're not asking the City to provide us

5 with housing. We're not asking the City to build us

6 housing. We're asking the City to let us remain. That's

7 what we're asking the City to do.

8   Thank you. I don't know if you have any

9 questions. All right.

10   MR. BOBKO: Good afternoon, your Honor. Just

11 going to make a couple of quick comments.

12   First one is, is Mr. Polin, with the rhetorical

13 flair, said, "We can just substitute 'race' any place

14 where we are talking about disabled people." And I'd

15 like to bring that back down a little bit and say let's

16 substitute single housekeeping unit, because that's

17 really what we're talking about here, and it has nothing

18 to do with anything else, really.

19   And to that more directly, the idea that

20 somehow folks are being denied the right to live in

21 specific zones is actually not true. The only people who

22 have the opportunity to have a group residential use in a

23 residential zone are folks who are able to seek a

24 reasonable accommodation or sober living homes. We don't

25 allow any of the other types of uses there.

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1   We don't allow boarding homes, sororities,

2   fraternities. None of those type of uses are allowed at

3   all. So this type of use has actually gotten a more

4   favorable treatment under our Ordinance than any other

5   type. In fact, no other type is permitted at all.

6   The idea that this is a one-time event, and,

7   well, if we let this go with the single housekeeping

8   unit, you know, it's just this one time. There's an

9   Ordinance that the City Council has agonized over where

10 the -- where the complete the call of the Ordinance, the

11 subject to which the Ordinance is directed, is this

12 specific situation.

13   So the City -- again, I don't think we need to

14 emphasize this too much, but our position is that if we

15 do toss the single housekeeping unit requirement

16 overboard, then, in fact, this is going to fundamental

17 alter the purpose of this Zoning Code.

18   The idea that someone is going to be put out on

19 the street tonight if your decision is not what the

20 Applicant asks for, I think is, again, somewhat inflated

21 rhetoric. In fact, that's not the case at all. No one

22 will be evicted.

23   The City has undergone this process over quite

24 a period of time, and there has been due notice given to

25 the Applicant, whereby the implementation -- and

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1   Mr. Kiff, I'm sure, can go through this in atomic detail.

2   But there's really three different things that can

3   happen.

4   The implementation of the Ordinance would not

5   take effect until the last contract with the business

6   expired, the lease expired, they could seek an

7   amortization period, which would extend the time period

8   so that no one was put out, or they could seek a

9   reasonable accommodation or use permit. And, of course,

10   as the Applicant has already stated, they did not seek a

11   use permit.

12   So that the idea that someone is in a bed

13   tonight or might not be in that bed tomorrow is a bit of

14   an exaggeration, I believe. There will be no immediate

15   impact on these folks. In fact, the Applicant has had

16   time to plan through that.

17   The last point I want to make is the Applicant

18   has suggested that the case of Oxford versus City of

19   Edmonds stands for the proposition that it is illegal for

20   the City to state how many folks can be in a particular

21   house or room and what not.

22   And although I claim -- I think I'm sure,

23   Mr. Polin might have been the one to actually argued that

24   case, and I don't claim to have the intimate knowledge of

25   it that he does, I do have the case here in front of me.

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1   And as I read through the Code that was actually

2   questioned there -- and this is from 514 U.S. 725,

3   Supreme Court case, 1995, the Code at issue there said,

4   and I'm quoting now:

5   "The Code provides that occupants of a

6   single-family -- of single-family dwelling

7   units must compose, quote, a family. And

8   defines family as, quote, persons without

9   regard to number related by genetics, adoption

10   or marriage, or a group of five or fewer

11   unrelated persons."

12   I don't think the City of Newport Beach is

13   anywhere close to that. We're talking about a single

14   housekeeping unit, where the only thing that has -- the

15   only relation has to be a common lease, really, when you

16   get down to it.

17   The other thing, if you look at our Code

18   Section 20.91A.050, the section where we talk

19   about -- and the exact -- I'm sorry. Let me go back,

20   20.91A.050(c)(2). And our Code states:

21   "There shall be no more than two residents

22   per bedroom, plus one additional resident.

23   Notwithstanding upon request by the Applicant

24   for additional occupancy, the Hearing Officer

25   has the discretion to set occupancy limits

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1   based on the evidence provided by the Applicant

2   that the additional occupancy is appropriate at

3   the site."

4   So there's no hard and fast rule. We're not

5   asking for blood tests. The Hearing Officer has the

6   discretion to find up or down from that.

7   Moreover, the whole title of that section is

8   Development and Operational Standards. This is simply a

9   planning guide. So it gives the planners an opportunity

10   or a chance or a baseline from which to make

11   determinations that otherwise would be, you know, almost

12   unmakeable.

13   So the idea that the City has gone and asked

14   these operators only to put so many people in each

15   bedroom and has somehow related that to the genetics,

16   adoption, marriage, or a group of five or fewer persons,

17   that question in the City of Edmonds case, is again

18   making a bit of a stretch.

19   So I will now lateral to staff, if they have

20   any of the particular building or staff-type related

21   questions that perhaps you'd like to have addressed. I

22   will relinquish it to them.

23   MR. ALLEN: Ms. Wolcott, are you going to talk

24   at all?

25   MR. BOBKO: She is, of course.

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1   MR. ALLEN: Will you allow that?

2   MS. WOLCOTT: Try to stop me.

3   MR. BOBKO: I won't.

4   MS. WOLCOTT: I wanted to clarify the

5 recommendation as to the current residents. If you look

6 at page 38 of the staff report and the summary of request

7 number five, it says,

8   "As to the current residents, all five

9   required findings can be made. The Applicant

10   did not report the average length of resident

11   stay. Staff recommends granting an

12   accommodation that permits all current

13   residents to reside in the facility for the

14   remaining duration of their stay, to a maximum

15   of six months. Staff recommends that as

16   current residents complete their stay and

17   clients move out, facility operation be

18   consolidated into a single dwelling unit with

19   12 resident clients and one resident manager.

20   Consolidation should occur as soon as possible,

21   within a maximum period of six months from the

22   day the Resolution of Approval if adopted by

23   the Hearing Officer."

24   So that was the staff recommendation. There

25 was no move to evict current residents.

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1   MR. ALLEN: What if it's not adopted by the

2 Hearing Officer?

3   MS. WOLCOTT: If it's not adopted by the

4 Hearing Officer, then that is something that would be

5 dealt with in an abatement setting and amortization

6 extension. There's a number of ways to deal with that in

7 the Municipal Code.

8   MR. ALLEN: Okay.

9   MS. WOLCOTT: I would also add one thing on the

10 necessity element. Mr. Polin has discussed the fact that

11 he feels that the reasonable accommodation, because it is

12 it has been asked, has to be granted. And I would remind

13 the Hearing Officer of the requirements of necessity and

14 of reasonableness.

15   What's reasonableness? A finding of

16 reasonableness requires, as we've discussed, that it not

17 fundamentally undermine the purpose the Zoning Code.

18   And necessity, if you look at the case of

19 Lapid-Laurel, LLC, v. Zoning Board of Adjustments of the

20 Township of Scotch Plains, 284 F.3d, page 442, 3rd

21 Circuit, the Third Circuit Court of Appeals held that

22 it's the plaintiff's burden to show necessity, and said,

23 "The necessity element requires the demonstration of the

24 direct linkage between the proposed accommodation and the

25 equal opportunity to be provided to the handicapped

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1   person."

2   They specifically, in the Lapid-Laurel case,

3   look at a 95-bed elder care facility. And they did find

4   that in this case, the elder -- the elderly disabled

5   people did require accommodation in order to live in a

6   residential zone. In that case, it's specifically a

7   single-family residential zone.

8   However, the Court specifically said that as to

9   the size of the facility, they had not demonstrated

10   necessity as to the size. They had said that in order to

11   show that, the applicant would have to show that the size

12   would serve a therapeutic purpose and would, therefore,

13   ameliorated an effect to the hardship of the handicapped.

14   And second, that the facility's size was

15   necessary for the facility's financial viability. And

16   the Court equated financial viability with giving the

17   disabled equal opportunity to live in a residential

18   neighborhood.

19   And I agree with Mr. Polin that the question on

20   the reasonable accommodation application is perhaps not

21   stated as clearly as it could be. But the information we

22   were looking for is, what do you need to be financially

23   viable? Because that is what the Federal cases require

24   us to look at.

25   Thank you.

1   MR. ALLEN: One question. You're recommending

2   the Hearing Officer grant the non-conforming use

3   determination; is that true?

4   MS. WOLCOTT: As we interpret it to be.

5   MR. ALLEN: Well, that's what we need to

6   address. Because it's clear that Mr. Polin has quite a

7   different interpretation of that than you do.

8   MS. WOLCOTT: After hearing Mr. Polin's

9   interpretation, it sounds like he would like to have the

10   laws that were in place prior to January 22, 2008,

11   applied to his client's facility --

12   MR. ALLEN: Right.

13   MS. WOLCOTT: -- which he was welcome to try to

14   comply with any time prior to January 22, 2008.

15   And I don't believe that the way the Code is

16   written is that non-conforming uses in residential

17   districts, any of them, go through this process. That's

18   what our Code allows. And we have not analyzed an

19   accommodation from that and treating them as they would

20   have been treated in 2007-2006, because it was not clear

21   that that was what the request was.

22   MR. KIFF: Clarification, Mr. Allen,

23   Ms. Wolcott?

24   It's my understanding that if they were granted

25   the right to be a non-conforming use, they would go back

                                                         110

1   to the point at which many of the folks who have gone

2   through the use permit process would, in other words, be

3   required to go through that use permit process. Because

4   that ordinance is non-conforming uses in residential

5   districts, and it sets forth the use permit process.

6   Is that your understanding, too?

7   MS. WOLCOTT: Yes. We went through the

8   on-the-spot analysis of how we would treat this facility

9   if it was 2007. Every facility that had more than seven

10 residents and was reported by the Applicant, and that

11 appears to be all of them, would have been required to

12 apply for a Federal Exception Permit from the City.

13   The Federal Exemption Permit had some different

14 standards. We still, you know, have those standards

15 around. But it was very similar to a combination -- the

16 FEP was very similar to a combination between a use

17 permit and a reasonable accommodation. And it did have

18 some elements in it that could be considered -- they

19 weren't required to be considered.

20   But an element -- one element that could be

21 considered is whether a campus was created. Under the

22 definition in place at that time, this would have created

23 a campus, because it was three or more buildings that

24 were using one building for a common purpose for all the

25 rest of the residents. As I understand, they were all

                                                        111

1   using the pool and patio area.

2   MR. ALLEN: Okay. All right. Thank you.

3   MR. KIFF: I have just one question of the

4   Applicant. I'm confused as to how many people reside

5   there today. Mr. Polin spoke about -- he had a couple

6   different statements where he said 38 people would be

7   evicted. I just want to understand how many people

8   reside there today, and if 3309 is not occupied, but 492

9   Orange and 492 1/2 Orange are occupied?

10   MR. POLIN: We don't have that information

11   today. As to the exact numbers, we think it's somewhere

12   in the neighborhood of between 30 and 40.

13   MR. KIFF: Thank you.

14   MR. POLIN: And there's I want to correct the

15   record on something. And I'm always doing this about the

16   City of Edmonds case.

17   City of Edmonds case was about an

18   occupancy -- it was about an exemption in the Fair

19   Housing Act that had to do with occupancy standards. It

20   didn't have to do with the definition of family that

21   Mr. Bobko read. The City of Edmonds tried to state that

22   their definition of family and their cap of unrelated

23   persons in there constituted an occupancy requirement

24   which would exempt it from the Fair Housing Act.

25   Supreme Court said no. An occupancy

1   requirement is basically a square-footage-type

2   requirement as applied equally to related and unrelated

3   persons alike. It has nothing to do with the definition

4   of family. So I just wanted to correct that.

5   Thanks.

6   Oh, one other thing in terms of what

7   Ms. Wolcott said. This notion of we're not kicking

8   anybody out today is somewhat of a misnomer. Basically

9   they are saying you've got six months to leave. It has

10   nothing to do with the preparation of what's going on.

11   We have applied for a reasonable accommodation.

12   We expect to get a reasonable accommodation. So, what

13   has occurred and what are -- what is required of Pacific

14   Shores and the people who live there has nothing to do

15   with, "Well, you know, they didn't apply for a use

16   permit, so they are out of luck." You know, the Code

17   provides another mechanism for dealing with this, and

18   that's with a reasonable accommodation process.

19   So why should the residents be penalized

20   because they opted to go for reasonable accommodation as

21   opposed to a use permit? And why should the residents be

22   penalized and be able to go to sleep tonight knowing

23   that, "Well, at least I'm going to be here tonight," but

24   knowing that at in six months they are out of there?

25   That's an unreasonable condition, and that's still an

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1   eviction.

2   MR. KIFF: A couple more brief comments,

3   Mr. Allen.

4   Mr. Polin mentioned one statement about that

5   the City's Ordinance is designed to, quote, keep them out

6   of sight, meaning people in recovery. And I wanted to

7   remind, at least, the public this process and this

8   Ordinance is approved to date 233 beds with more in the

9   pipeline. And they're beds all throughout our community,

10   especially on the Balboa Peninsula, where the

11   overconcentration exists.

12   And then there was a gentleman, Mr. Browning,

13   who had stood up and said that these are pretend disabled

14   people. And I wanted to reject that comment officially.

15   The City recognizes that folks in recovery are disabled

16   and entitled to the housing protections under the Fair

17   Housing Act.

18   With that, I think staff has concluded its

19   comments.

20   MR. ALLEN: All right. Thank you all for

21   participating and presenting your thoughts and ideas and

22   all the legal analysis. And now, it's my turn to decide

23   what to do here.

24   And I believe this facility, as it's been

25   analyzed by the staff, is basically not entitled to the

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1 reasonable accommodations that are being sought.

2   As we've learned repeatedly here, the law

3 requires government agencies to grant reasonable

4 accommodations to disabled persons, and it's clear that,

5 in all of these situations, the staff has not questioned

6 whether the occupants of these units are now not

7 disabled. So there's no question before this Hearing

8 Officer about whether we're dealing with disabled

9 individuals or not. We're accepting that they are.

10   So in each of the findings that need to be

11 made, the finding will be made that disabilities are

12 present.

13   The real questions have to do with the

14 necessity for the reasonable accommodations and whether

15 the requests are reasonable in each instance. The staff

16 took the first two together, request one and two, because

17 the definitions so intertwine as between the single

18 housekeeping unit and the request to be classified or

19 treated -- or not to be treated, I should say, as a

20 residential care facility.

21   And I think that it's very clear that the

22 definition of the single housekeeping unit is simply not

23 met by these uses. Mr. Polin objected to the notion that

24 one of the requirements of the City is that the occupants

25 all be subject to one lease. But that is the definition

                                                      115

1   that the City has adopted. And so far as I know, it's

2   not illegal. Whether it's being litigated is not my area

3   to be concerned with. I haven't been told that it's

4   illegal, and, therefore, I accept that it is.

5   I think the most compelling part of the request

6   number one and two is that there is -- it is a fact, in

7   my estimation, that there would be a fundamental

8   alteration to the City's zoning scheme if the single

9   housekeeping unit definition and the reasonable

10   accommodation or, excuse me, the classification as a

11   residential care facility was disregarded.

12   Because it appears to me that the residential

13   zones are pretty much based upon, in substantial part,

14   those definitions and requirements. And the staff report

15   does a good job of setting that out. So that's really a

16   fundamental part of my determination.

17   All the usual issues, as Mr. Polin pointed out,

18   are present in this one, like they are probably in most

19   cities everywhere. But they are still issues, and they

20   are significant. The public discussed the parking

21   issues, which are present, as well as some conduct that

22   was unacceptable. But in any event, that denial of the

23   request one and two is made.

24   Going on to reasonable accommodation request

25   number three, which is the determination about legal

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1   non-conforming use, I think I understand.

2   And the Resolution that is ultimately adopted

3   needs to articulate the City's position in that respect,

4   and not somehow constitute a basis for the Applicant to

5   argue that by granting this accommodation, which is

6   recommended by the City, is granted with that proviso

7   that it not go back to become a use that was prior to the

8   recent zoning Ordinance amendment, and, therefore, it

9   becomes a legal conforming use now and could, thereby,

10   continue to operate as such.

11   If they wanted to be a non-conforming use, then

12   they should have applied for the permit required by the

13   Ordinance, in my estimation.

14   The reasonable accommodation request number

15   four with regard to the application of Codes of the

16   Zoning Code, clearly, once again, the analysis that's

17   done on the definitions in one and two equally applies

18   there.

19   The Building Codes, the same issue applies with

20   respect to the City can't grant a waiver of the

21   California Building Code. And so to the extent that

22   those requirements are applicable, they have to be

23   applied to all uses and clearly to the care facility uses

24   as well. So that would be denied.

25   Number -- let's see. We're at number five.

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1 And this is a little bit more difficult from my

2 perspective because it came in at the last minute and

3 recognized by all, for a variety of reasons, nobody's at

4 fault. It just came in very late, and so staff has not

5 done a complete or as complete an analysis of this

6 request as might have been done.

7   But I believe that Resolution findings can be

8 crafted, based upon the findings in -- certainly in one

9 and two and the request by the Applicant to be exempt

10 from the Zoning Code residential requirements entirely,

11 that a support can be made for not grant requesting

12 number five as made.

13   So with that, I have not certainly articulated

14 everything that needs to be in this Resolution to make

15 the proper findings. But the staff report speaks well to

16 all of those issues, and I would expect that a Resolution

17 be prepared that contains the findings set forth in the

18 staff report, which I believe are adequate to support a

19 denial of all five of these.

20   Any comments or concerns from staff?

21   MR. KIFF: Clarification, Mr. Allen. On number

22 five, your direction is to not grant or to deny

23 reasonable accommodation. Does that include the City's

24 alternate recommendation as 12, or does it

25 include -- it's of the entirety of it?

1   MR. ALLEN: I believe it has to, Mr. Kiff, and

2 I'd love to see if the parties can get together and work

3 this out, but that's not my job.

4   MR. KIFF: I see.

5   MR. ALLEN: And the City has made an effort to

6 make a proposal, but the Applicant has, out of hand,

7 rejected that proposal. And so I don't have the ability

8 to unilaterally impose the City's suggestions on him. I

9 think it would be an excellent compromise if that could

10 be done. And if it can be done, I'd be happy to revisit

11 as the Hearing Officer.

12   But I gained the very distinct impression that,

13 at this level, decisions need to be made on these

14 applications, and that's what I'm doing.

15   MR. KIFF: Understood.

16   MR. ALLEN: All right. Any other comments or

17 concerns?

18   UNIDENTIFIED SPEAKER: Can the public make a

19 statement?

20   MR. ALLEN: No, I don't think that's

21 appropriate now, because we'd just end up get back into a

22 legal discussion and debate. So thank you very much, all

23 of you, for your respectful time and attention.

24   The hearing is now closed.

25   (Ending time: 6:05 p.m.)

119

1

2
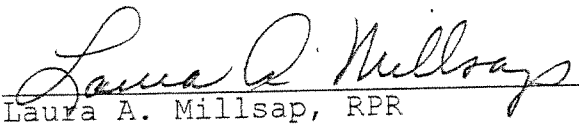
3   I, the undersigned, a Certified Shorthand

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: ___APR 0 6 2009_____

20

21 _____
    Laura A. Millsap, RPR

22 CSR No. 9266

23

24

25

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