

## RESOLUTION NO. 2009-81

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

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

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

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

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

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

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

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

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

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

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

**WHEREAS**, pursuant to Section 20.98.025 A of the NBMC, the standard of review on appeal shall not be de novo and the City Council shall determine whether the findings made by the Hearing Officer were supported by substantial evidence presented during the evidentiary hearing. The City Council may sustain, reverse or modify the decision of the Hearing Officer; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

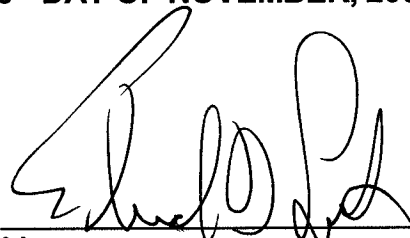
The City Council sustains the Hearing Officer's determination that this finding can be made. A request for reasonable accommodation may be denied if granting it would pose "a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others,"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

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

**NOW THEREFORE, BE IT RESOLVED:**

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

**PASSED, APPROVED AND ADOPTED THIS 10<sup>th</sup> DAY OF NOVEMBER, 2009.**

  
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Mayor

ATTEST:

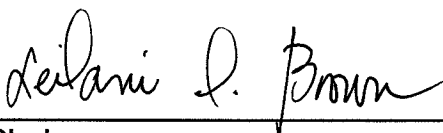
  
\_\_\_\_\_  
City Clerk



EXHIBIT "1"

**CONDITIONS OF APPROVAL**

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

**Project-specific Conditions:**

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

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

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

**Standard Conditions:**

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

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

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

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





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

# # #

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

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

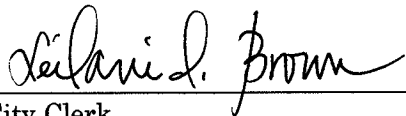
Ayes:        Henn, Rosansky, Curry, Webb, Gardner, Daigle, Mayor Selich

Noes:        None

Absent:      None

Abstain:     None

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

  
\_\_\_\_\_  
City Clerk  
Newport Beach, California

(Seal)

