To: HEARING OFFICER
Subject: FW: 101 Via undine....filed, please forward to Ed Johnson
Attachments: J3FCRwP4Taa6jM1SEHSrKA.jpg; 55xDA+tARwqjqSF3jgMpSQ.jpg; CTpu9OuSRcCSyE6AHjF18Q.jpg; jqVd45KGR3iYjz0gYyd03Q.jpg; Re_ 101 Via undine....filed, please forward to Ed Johnson.pdf

-----Original Message-----
From: Manal Bozarth <manal@manalre.com>
Sent: Thursday, August 1, 2019 4:16 PM
To: Whelan, Melinda <MWhelan@newportbeachca.gov>; 'Manal Bozarth' <manal@themcmonigleteam.com>
Cc: Murillo, Jaime <JMurillo@newportbeachca.gov>; Garciamay, Ruby <RGarciamay@newportbeachca.gov>; Lee, Amanda <ALee@newportbeachca.gov>
Subject: Re: 101 Via undine....filed, please forward to Ed Johnson

As promised, attached are the pictures I took 7/30/19 (Tuesday) regarding the corner hedge height (breaking the height limit).

I wanted to add a couple of closing points in the meeting in response to Mrs. Moore's closing statements that didn't add up in my head:

1) She states her son "is" disabled. If I had a disabled son, I would use all "alternative" areas (bedroom and courtyard) to accommodate his need. And...if he is ,truly disabled and cannot be around people then he would be very happy in a "secluded" courtyard with tall walls around him and a serene fountain (to drown the noise people, children, animals, gardeners, etc. make). I am assuming this type of disabled person would not feel "forced' (as her attorney said)...they would welcome the space.

2) She also stated she wanted to enclose that Strada so her son would not worry about a dogs jumping over the hedges...if this is the case, then the current 42"(safety triangle hedge) would "allow" a dog to jump in, so raising the hedge would not make this space "safer"'. Again, a statement that shows this case is not adding up.

3) Another fact that Mrs. Moore said, is her son likes to smoke outside. When I thought about this, it sounds like the owner (or current residents) of the property do "not" want smoke in the house, I am assuming if someone is smoking in the courtyard which opens into the living room, that would easily allow smoke in main living areas of home. To solve this problem; their son is "required " to smoke off the Strada area and they decided the hedge needs to be higher for smoking area. If we all could change the code because of our needs, then why do we have city codes?

In my opinion, the main question of this case:

1) Is their son disabled?

Even if their son "is" disabled, then he uses "alternative" areas and the Strada hedge is cut to 42" (city code). As traffic officers say, just because most cars are speeding, it doesn't mean you can break the law and not get a speeding ticket.

On 7/31/19, 1:10 PM, "Whelan, Melinda" <MWhelan@newportbeachca.gov> wrote:

Good Afternoon

Good Afternoon,

Due to staff scheduling on Friday, please make sure to submit any additional material for the Hearing Officer via email to myself and please copy the following staff who have also been copied on this email. Thank you.

Ruby Garciamay rgarciamay@newportbeachca.gov

Amanda Lee alee@newportbeachca.gov

Jaime Murillo jmurillo@newportbeachca.gov

MELINDA WHELAN
Assistant Planner
Community Development Department | Planning Division
mwhelan@newportbeachca.gov
949-644-3221

CITY OF NEWPORT BEACH
100 Civic Center Drive, Newport Beach, California 92660 | newportbeachca.gov

From: Whelan, Melinda
To: Garciamay, Ruby; Lee, Amanda
Cc: Murillo, Jaime
Subject: FW: PA2019-050: for Hearing Officer Johnson re appeal procedure
Date: Friday, August 2, 2019 11:13:22 AM

Please submit to the Hearing Officer as correspondence received after meeting.

From: Jim Mosher <jimmosher@yahoo.com>
Sent: Thursday, August 01, 2019 5:42 PM
To: Whelan, Melinda <MWhelan@newportbeachca.gov>
Subject: PA2019-050: for Hearing Officer Johnson re appeal procedure

Melinda,

Since I missed the first hour of the Moore Hedge Height Reasonable Accommodation No. RA2019-001 hearing (PA2019-050), I did not fully understand the context, but from Hearing Officer Johnson's final remarks **I gather there had been some question as to whether the next step for parties unhappy with his decision would be an appeal to the City Council or a request for review by the Superior Court**.

Mr. Johnson cited NBMC Sec 20.52.070.D.1.c: "*On review the **Council** may sustain, reverse, or modify the decision of the Hearing Officer or remand the matter for further consideration*, ..." as evidence that the City Council would be the proper reviewing body.

He could also have cited NBMC Sec. 20.52.070.D.7:

> "*Effective Date.*
>
> *a. A reasonable accommodation shall not become effective until the decision to grant the accommodation shall have become final by reason of the expiration of time to make an appeal.*
>
> *b. In the event an appeal is filed, the reasonable accommodation shall not become effective unless and until a decision is made by the **Council** on the appeal in compliance with Chapter 20.64 (Appeals)*."

Or Table 5-1 ("Review Authority") in NBMC Sec. 20.50.030, which clearly states the appeal body for all Hearing Officer decisions under Title 20 is the City **Council**, and includes footnote "*(2) The Council is the final review authority for all applications in the City.*"

This ***was*** the intent when Title 20 was adopted by Ordinance No. 2010-21. See pages 175, 199 and 236.

However, **since 2015, the appeal body for Title 20 Hearing Officer decisions has actually been intended to be the Planning Commission** (with possible additional appeal from them to the Council) per NBMC Sec. 20.64.020 : "*Decisions of a Hearing Officer may be appealed or called for review to the **Planning Commission***." And the appeal is to be heard "de novo" rather than being limited to verifying that the Hearing Officer based his decision on "substantial evidence" (which was the former standard on appeal).

At least, that is what the Council was told when they adopted Ordinance No. 2015-8 revising the procedure and allowing "calls for review."

See the "Chain of Review" showing "Hearing Officer --> Planning Commission --> City Council" and the written explanation on page 3 of the staff report when Ordinance No. 2015-8 was introduced as Item 20 on April 14, 2015, as well as Slide 3 in that night's presentation to the Council.

Unfortunately, the Council was not shown the totality of Table 5-1, so they did not notice that although the footnote about "substantial evidence" had been deleted, the Planning Commission had not been added to the body of the table as the new appeal authority. Nor were they shown the whole of Section 20.52.070, so they did not notice the continuing references to the Council in sub-parts D.1.c, D.7.b, and E.4.

The result is a confusing mess with Table 5-1 contradicting Sec. 20.64.020 and inexplicable references in Section 20.52.070 to the Council as the expected review authority. As Hearing Officer Johnson said, "it is what it is," but as the Council was told when these confusions were created, the current intent is for Sec. 20.64.020 to control, requiring Title 20 Hearing Officer decisions to be appealed (de novo) to the Planning Commission, and for the Planning Commission's decision to go on (de novo) to the City Council (as the final review authority before the Superior Court) only if the Planning Commission's handling of it was appealed.

Yours sincerely,

Jim Mosher

POST-HEARING DECLARATION OF DON FESLER

I, Don Fesler, declare:

1. The matters stated herein are within and based on my personal knowledge, are true and correct, and if called as a witness, I could and would competently testify thereto under oath.

2. As I testified, I estimated the size of that interior patio based upon comparing it to the gravel area which is surrounded by the hedge at issue. I know that setback area to be 10 feet wide, and it appears more narrow than even the narrowest part of the interior patio, and only about one-half as wide as the wider part of the patio. It also appears that the interior patio is about twice as long as the setback area is wide. Thus, it was and remains my estimate that, at its narrowest point, the interior patio is more than 10 feet wide and at least 15 feet long.

I.

NOW, THERE IS NO QUESTION THAT THE MOORES' APPLICATION IS A SHAM.

3. During my 44 years of jury trials, defending doctors in more than 150 cases, one thing stood out: One way or another, the truth most often surfaced. That happened during this hearing.

The testimony of Rhonda Moore demonstrated that the Moores latched onto the City's process for reasonable accommodation as a way to avoid complying with the zoning standards for hedge height that they have long intended to ignore. They are using any disability their son may have for only one reason: so they can grow their hedge as high as they'd like it to be.

As set out below in greater detail, Rhonda Moore did not dispute that her son engages in activities that put him in situations from which she and Dr. Bera had claimed he needs to be shielded. And, she offered nothing to dispute that there is a nice-sized interior patio available for his use that is open to both air and light, as well as an interior bedroom that provides total protection from exposure to the sights or sounds of either the street or the strada. In fact, she provided **no** evidence to counter **any** of the facts provided by my wife, Roberta Fesler, and me in our Declarations and our live testimony.

Also discussed below, as I suspected from the beginning, the idea for a 78-inch hedge originated with Rhonda Moore – not with Dr. Bera or any other medical professional. It was her idea, and all she did was ask him to write a letter supporting what she wanted.

Finally, as set forth below, Rhonda Moore's testimony inadvertently revealed the **real reason** she wants an outdoor area for her son: he smokes out there. It's obvious

that she does not want him to smoke in the house, or in the interior patio which opens into the house, because either she personally wants to keep cigarette smoke from the interior part of the house, or the owner of the home, Mrs. Leora Tilden, has forbidden anyone from smoking in the interior of the home.

4. **First,** Rhonda Moore **admitted** that her son did engage in the activities chronicled in the written and live testimony provided by both my wife, Roberta Fesler, and me.

After our live testimony, Hearing Officer Edward Johnson asked Mrs. Moore **2 times** to address the allegations that people have seen her son doing able-bodied activities. (City's Recording of Hearing at 1:42 and 1:44) The first time she is asked, the only responsive statement she made is at 1:44:06: "They may have seen my son. Absolutely. May have seen him walking. . .The whole idea is to get him out. . ." When asked again (at 1:44), her testimony did not even address the question.

So, the record before the Hearing Officer is undisputed: the disabled individual at the center of this Application frequently, routinely, and voluntarily places himself into situations that create opportunities for even greater exposure to the "triggers" for which he supposedly needs the protection of a hedge nearly twice as high as the law allows. Thus, he doesn't need whatever protection a 78-inch hedge might provide.

5. **Second**, even though Hearing Officer Johnson specifically provided the Applicants the opportunity to factually respond to ". . .any testimony that you have heard" (at 1:50), neither Rhonda Moore nor her attorney offered one word to dispute the evidence about the availability and features of the enclosed patio or the middle bedroom. So, the only evidence in the record before the hearing officer is that this home already provides the type of shelter from "triggers" that Dr. Bera claims the disabled son needs, meaning a lawful exemption from the 42-inch hedge height limit is not "necessary," as required by the law governing reasonable accommodations.

6. **Third**, starting around 1:46, Rhonda Moore begins explaining how this Application for Reasonable Accommodation <u>really</u> took flight.

She testified how, after she learned about the City's ordinance regarding reasonable accommodations, she hit upon 6 and ½ feet as a good height for the hedge. "And, you know what? At 6 feet, I think, 'Perfect! He's 6 feet.' But, then I remember that people who are taller than 6 feet walk around a lot, and I think, 'No, let's go 6-5.' So, I say to the doctor, Bera . . .He says, 'Perfect! Let's do it! Not an issue. What's the issue?' [I respond] 'I don't know.' I said, right when I got there, these were my intentions – to put in some hedging. . ."

As her own words prove, when confronted with the distinct possibility that the hedge would finally have to be trimmed to 42" and she and her husband could no longer escape complying with the same law that applies throughout the City, **she** decides how high she wants the hedge to be, and she presents her plan to Dr. Bera, who is more

than happy to oblige her by writing the letter which was submitted as the support for the need for the hedge.[1] His letter contains Rhonda Moore's opinion.

7. **Fourth,** Rhonda Moore accidentally revealed the real reason she wants her son to use the gravel area instead of the interior, enclosed patio: she doesn't want her son smoking inside Mrs. Tilden's house or on the interior patio, tarnishing the home.

She testified her son uses the gravel area surrounded by the hedge as a place to **smoke** (at 1:46 and 1:47). In fact, I have seen the Moores' son do exactly that, smoking in subject enclosure while he was on his cell phone, and dressed as I had always seen him, in a white T-shirt and a black baseball like cap.

. Thus, consistent with my jury trial career, **the truth finally won out. The evidence Rhonda Moore did and did not provide clearly shows that the Moores' Application is a sham, intended only to try to avoid cutting down their hedge to 42' required under the City's Municipal Code.**

III.

EVEN DR. BERA'S FARSICAL LETTER STATES THAT THE APPLICANTS' HEDGE NEED NOT BE 78-INCHES ALONG ITS ENTIRE PERIMETER.

8. Again reading Dr. Bera's farcical letter, he said a 78" hedge is needed **only in front** of the Applicants' son's bedroom and bathroom. Even if the letter represented his opinion, as opposed to Rhonda Moore's, and there was any reason to believe he had been advised that a 10' portion of the hedge could legally be no more than 36" (allowing direct exposure to and by the passing world), his letter cannot be said to support a claim that the entire length of the hedge must be 78".

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[1] Given Rhonda Moore's testimony, it is clear that the evidence surrounding the preparation of Dr. Bera's letter is not protected by the physician-patient privilege. She is not Dr. Bera's patient, at least not for these purposes. Any claim that her conversation with Dr. Bera is nonetheless privileged, because, for example, it was done in her capacity as a legal representative for her son, is unavailing to protect the records from release. Acting in that same capacity, her public testimony recounting the conversation between Dr. Bera and her **waives** the physician-patient privilege.

Either way, the medical records either never were or are not now legally privileged, and should be made a part of the record of this proceeding. There is no legal basis to deny my wife, me, nor anyone else adversely affected by an approval of the requested reasonable accommodation our due process rights to access those records.

Based on my tours of Mrs. Tilden's home, I recall that the bedroom and bathroom were, at most, no longer than 15 feet in total length. Thus, even if there were any basis to follow the so-called opinion in Dr. Bera's letter, which there is not, a stretch of only the 15' of the hedge directly outside of the bedroom and bathroom should be permitted to reach the 78" height.

9. Of course, if one followed Dr. Bera's unfounded, conclusory letter, that would indisputably create a blight at the Tilden home and the area of Lido Isle seen most frequently by the greatest number of people and guests – the area directly across from the beach, the clubhouse, and the bay. It would be the only hedge on Lido Isle with that configuration at a unique location like this.

IV.

RHONDA MOORE'S PHOTOGRAPHS ARE TOTALLY IRRELEVANT.

10. Rhonda Moore's three photographs are totally irrelevant. They show only that some hedges are more than 42"in height and that others are not. So what? There are not any other hedges on Lido Isle that are located at a unique location like this. Absolutely none.

V.

THE CITY HAS ESTABLISHED PRECEDENT THAT A REASONABLE ACCOMMODATION IS TO BE DENIED WHEN AN ALTERNATIVE MEETING THE NEEDS OF THE DISABLED PERSON IS AVAILABLE.

11. Attached is a copy of HO2013 –001 (Bakman), one of the two decisions denying an Application for Reasonable Accommodation made to the City because an alternative solution was available to meet the needs of the disabled person. (The other decision my wife mentioned was rendered by Hearing Officer Johnson, so he requested only a copy of this one be provided to him.)

12. The City's own interpretation of its Municipal Code section providing for reasonable accommodations mandates that this Application be denied, as the evidence in the record clearly proves there are existing alternatives available to meet the proferred needs of the Moores' disabled son.

VI.

THE REQUESTED REASONABLE ACCOMMODATION IS NOT AVAILABLE UNDER APPLICABLE LAW

13. Raising the height of a hedge to exceed the lawful limit is not within the provisions of the applicable law governing a local agency's responsibility to provide for reasonable accommodations. As stated at the hearing, 42 USC section 3602(b) defines "dwelling"

as "any building, structure, or portion thereof . . ." Neither the outdoor gravel area nor the hedge at issue fall within that definition. Thus, there is no legal authority to provide a reasonable accommodation which allows a hedge to grow higher than the 42 inches set out in the Municipal Code.

VII.

REQUESTED RESOLUTION AND ORDER

14. Considering all the evidence that has was admitted at this hearing:

A. The Moore's sham Application should be denied.

B. The Moore's should be required to do the what they were told to do by the City's Notice of Violation - cut their entire hedge down to 42 inches.

16. I declare under penalty that all the matters stated herein are true, and that this Declaration was signed on August 2, 2019, in Long Beach, CA.

DON FESLER

RESOLUTION NO. HO2013-001

A RESOLUTION OF THE HEARING OFFICER OF THE CITY OF NEWPORT BEACH DENYING REASONABLE ACCOMMODATION NO. RA2011-002 FOR ADDITIONS TO AN EXISTING TWO-UNIT RESIDENTIAL STRUCTURE TO ACCOMMODATE A DISABLED PERSON, LOCATED AT 219 DIAMOND AVENUE (PA2011-118)

THE HEARING OFFICER FOR THE CITY OF NEWPORT BEACH HEREBY FINDS AS FOLLOWS:

SECTION 1. STATEMENT OF FACTS.

1. Chapter 20.52 of the Newport Beach Municipal Code (NBMC) 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.

2. An application was filed by Jane Bakman, property owner, with respect to property located at 219 Diamond Avenue, and legally described as Lot 28, Block 10, Section Three, Balboa Island Tract, requesting accommodation from the requirements of Newport Beach Municipal Code (NBMC) Section 20.18.030, (Residential Zoning Districts Land Uses and Permit Requirements) to allow additions and alterations to an existing two-unit dwelling in excess of the floor area limit.

3. The subject property is located in the R-BI (Two-Unit Residential, Balboa Island) Zoning District.

4. A public hearing was held on May 30, 2013, in the Balboa Island Conference Room, 100 Civic Center Drive, Newport Beach, California. A notice of time, place and purpose of the meeting was given in accordance with the NBMC and other applicable laws. Evidence, both written and oral, was presented and considered at this meeting.

5. The hearing was presided over by Hon. John C. Woolley, retired Judge (California Superior Court, Orange County), Hearing Officer for the City of Newport Beach.

Facts in Support of Finding: The property is occupied by a duplex which is consistent with the zoning district in which it is located. The addition would be constructed in accordance with the required Building and Safety Code, therefore, the proposed project would not pose a threat to the health or safety of other individuals or substantial physical damage to the property of others.

As Finding No. 2 cannot be made, the reasonable accommodation must be denied.

SECTION 4. DECISION.

NOW, THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby denies Reasonable Accommodation No. RA2011-002.

Section 2. This action shall become final and effective fourteen (14) days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20, Planning and Zoning, of the Newport Beach Municipal Code.

PASSED, DENIED AND ADOPTED THIS 31st DAY OF MAY, 2013.

By: _____
Hon. John C. Woolley, retired Judge
(California Superior Court, Orange County)
Hearing Officer for the City of Newport Beach

ATTEST:

_____
City Clerk

CITY OF NEWPORT BEACH CALIFORNIA

SECTION 2. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION.

This project has been determined to be categorically exempt under the requirements of the California Environmental Quality Act (CEQA) under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

SECTION 3. FINDINGS.

In accordance with Section 20.52.070 (D.2) of the Newport Beach Municipal Code, all of the following findings must be made in order to approve a reasonable accommodation:

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

Fact in Support of Finding: The applicant submitted a statement signed under penalty of perjury that the property will be occupied by a person with a disability and requires accommodation. A letter from Dr. Kanwar T. Mahal was received and considered by the Hearing Officer. At the request of the applicant, Jane Bakman, the Hearing Officer ruled that the report from the doctor remain confidential. The Hearing Officer finds that there is no factual basis for the medical condition presented in the physician's letter for the conclusions regarding the Reasonable Accommodation.

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

Facts Do Not Support the Finding:

a. An accessible bathroom is currently provided by the existing ground floor bathroom. Any modifications necessary to make the existing bathroom accessible can be accommodated within the existing permitted floor area.

b. The proposed 189-square-foot breezeway addition proposed is in excess of that necessary to provide an accessible bathroom.

c. With consideration of the factors provided by NBMC Section 20.52.070 (D-3), the requested accommodation is not necessary to provide the disabled individual an equal opportunity to use and enjoy a dwelling. The justification presented does

not support the proposed size and location of the additions that are the subject of the accommodation request.

3. ***Required 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.***

Fact in Support of Finding: Allowing the construction of additions to the dwelling unit would not impose an undue financial or administrative burden on the City. The administrate costs of processing the building permit will be offset by normal building permit fees.

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

Facts in Support Finding:

a. The proposed floor area is consistent with surrounding residential properties with similar sized structures which may also exceed allowed floor area. The request to exceed the floor area is not related to the use of the property, which remains residential. The mass and bulk of the proposed structure will be within the perimeter of the existing building footprint and will not be discernibly abrupt in scale from the surrounding structures which may comply with the floor area limitations.

b. The proposed additional square footage would not intensify the existing two-unit residential use. Therefore, the increase in floor area would have no affect on traffic or parking in the vicinity; although the property is nonconforming with regard to parking since it only provides one parking space per dwelling unit.

c. The increase in floor area would not conflict with the existing residential uses on site or in the neighborhood.

d. There is no intention to operate the dwelling as a residential care facility. Thus, the granting of the reasonable accommodation request will not create an institutionalized environment.

5. ***Finding: 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.***