



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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August 9, 2022

CBCA 7350-FEMA

In the Matter of WILSHIRE BOULEVARD TEMPLE

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Before the Arbitration Panel consisting of Board Judges **BEARDSLEY** (Chair), **ZISCHKAU**, and **O'ROURKE**.

Applicant, Wilshire Boulevard Temple (Wilshire), requested arbitration of the determination by the Federal Emergency Management Agency (FEMA) that Wilshire is ineligible to receive public assistance (PA) funding for facilities damaged by wildfire. FEMA determined that Wilshire is not a qualifying private nonprofit (PNP) facility that provides essential social services to the general public. Instead, FEMA found that Wilshire is primarily a recreational camp and rental facility and, therefore, is ineligible for PA funding. We disagree and return the matter to FEMA for a mixed-use analysis.

Background

In November of 2018, multiple wildfires spread through Butte, Los Angeles, and Ventura counties in Southern California. One of these fires, the Woolsey Fire, destroyed nearly 100,000 acres of land in Los Angeles and Ventura counties, including much of Malibu, California. The President issued a major disaster declaration related to the wildfires, with a recognized incident period of November 8–25, 2018.

Wilshire has operated as a nonprofit organization since 1942. The property at issue is located between the Pacific Ocean and the Santa Monica Mountains in Malibu and consists of two distinct facilities: the Hess Kramer facility, which opened in 1952, and the adjoining Gindling Hilltop facility, which opened in 1968. At the time of the fire, each facility contained multiple buildings and structures, including dining halls, an infirmary, indoor and outdoor meeting space, office space, residences, a ropes course, sports facilities, an arts-and-crafts pavilion, and amphitheaters. The facilities were used for a variety of purposes: outdoor educational programs, social events, recovery and rehabilitation services, group meetings and gatherings, summer camps, and private leadership events. Wilshire also owned and operated the associated water, power, and wastewater treatment utilities.

The Wilshire property was directly in the path of the Woolsey Fire. Wilshire estimated that sixty-nine of its eighty-five buildings or structures were either damaged or completely destroyed in the fire. Damaged or destroyed structures included a meeting hall, library, dance platform, residences, cabins, and infrastructure such as bridges, fields, retaining walls, and roads. Wilshire subsequently applied to FEMA for PA funding under section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5189a (2018). The application was denied on June 24, 2019, on the grounds that Wilshire was not an eligible PNP providing essential governmental type services to the general public but was instead an ineligible recreational summer camp. On August 27, 2019, Wilshire appealed the decision to FEMA, arguing that it qualified as a community center under 44 CFR 206.221(e)(7) (2018). While at times its facilities did operate an ineligible recreational summer camp, Wilshire contended that the facilities were used for eligible community center activities more than fifty percent of the time, and it was therefore eligible for PA funding. FEMA requested additional support for Wilshire's claims regarding the use of its facility, which Wilshire provided on March 6, 2020.

Nearly two years later, FEMA denied Wilshire's appeal, concluding that the facilities were primarily used for recreational purposes or as a rental property. Consistent with the requirements of the Stafford Act, Wilshire timely sought arbitration of FEMA's denial on March 15, 2022. 42 U.S.C. § 5189a(d).

### Discussion

Regulations promulgated pursuant to the Stafford Act provide that “[p]rivate nonprofit organizations or institutions which own or operate a private nonprofit facility” are eligible for PA funding. 44 CFR 206.222(b). FEMA does not dispute Wilshire's status as a PNP organization. Nor does FEMA dispute that Wilshire owns and operates the facilities at issue in this arbitration. FEMA does take issue with a number of aspects of Wilshire's application that resulted in the denial of funding. These include the requirements that: (1) a community center be open to the general public (including that any fees charged for use of the facility be nominal), and (2) the primary use of the facilities be for eligible purposes. We review each of FEMA's contentions below.

### Whether Wilshire is Open to the General Public

Eligible PNP facilities are those that provide “essential [social<sup>1</sup>] services to the general public.” 44 CFR 206.221(e). Such facilities include community centers, among other types of facilities, provided they are “open to the general public.” *Id.* at 206.221(e)(7). Although the regulations do not define what it means to be “open to the general public,” FEMA guidance states that PNP facilities generally meet the requirement of serving the general public if ALL of the following conditions are met:

- Facility use is not limited to any of the following:
  - A certain number of individuals;
  - A defined group of individuals who have a financial interest in the facility, such as a condominium association;
  - Certain classes of individuals; or
  - An unreasonably restrictive geographical area, such as a neighborhood within a community;
- Facility access is not prohibited with gates or other security systems; and
- Any membership fees meet all of the following criteria:
  - Are nominal;
  - Are waived when an individual can show inability to pay the fee;
  - Are not of such magnitude to preclude use by a significant portion of the community; and
  - Do not exceed what is appropriate based on other facilities used for similar services.

FEMA Public Assistance Program and Policy Guide (PAPPG) (Apr. 2018) at 11.

FEMA argues that Wilshire’s facilities are not “open to the general public.” We disagree based on the conditions identified in FEMA’s own guidance and the detailed evidence in the record addressing these conditions. The Wilshire facilities do not unduly restrict access in any of the ways highlighted in FEMA’s guidance. Use of the facilities is not limited to a certain number of individuals or to a defined group of individuals with a financial interest in the facilities. Documentation identifies a wide variety of people and

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<sup>1</sup> Section 20604 of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, enacted on February 9, 2018, amended the Stafford Act’s definition of “private nonprofit facility” to refer to “social services” rather than “governmental type services.” 132 Stat. at 85 (to be codified at 42 U.S.C. § 5122(11)(B)). The change is retroactively applicable to any disaster or emergency declared on or after August 23, 2017. *See* 132 Stat. at 86. Because the wildfires at issue here occurred in November of 2018, the change is applicable to Wilshire’s application, even though FEMA has not yet modified its regulations to comport with the statutory change.

organizations from the community that used the facilities for various purposes in the years prior to the fire, such as veterans, cultural organizations, at-risk youth, community groups, drug and alcohol recovery programs, music groups, homeless children, religious groups, students, families, and leadership organizations. Furthermore, access is not restricted to certain classes of individuals or an unreasonable geographic area, such as a particular neighborhood or school district. Presumably, many of Wilshire's visitors come from Southern California, but we do not find this region to be unreasonably restrictive, and Wilshire itself has not restricted access based on residency or other geographic criteria. Finally, while the facilities do have gates and a security system, the Wilshire property is open and unlocked during the day and only locked at night for safety purposes. This arrangement is no different from other eligible facilities that lock their doors after hours. Wilshire's security system provides reasonable access controls that are meant to ensure the safety of the staff, facility users, and the facility itself. The gates and security system do not contradict a finding that Wilshire is open to the general public.

In reviewing the documentation and considering the testimony of witnesses, we also find that Wilshire's fees meet the criteria set forth in FEMA's guidance. Fees to use Wilshire's facilities are nominal when considered on a per-day, per-person basis, as FEMA's guidance requires. Fees are quite low considering what the user receives, such as meals, facility use, and lodging (if requested). Testimony from Wilshire's executive director revealed that fees charged to hosting organizations are negotiated based on what the organization can afford and what Wilshire needs to cover its operating costs for the visit. As evidenced by testimony and information in the record, Wilshire strives to make sure that no organization is denied access due to inability to pay, and it waived or reduced its fees accordingly. A few examples of such groups include the Ventura County Fire Department, the Ventura Police Department, the Cancer Hope Foundation, the San Francisco AIDS Foundation, and the Children's Lifesaving Foundation. We also find that the fees do not exceed what is appropriate based on similar facilities in the area. Wilshire included a comparison table of fees charged by other facilities used for similar purposes. This table demonstrates that Wilshire's fees are significantly lower than similar facilities in Southern California.

FEMA argues that Wilshire's fees do not meet all criteria because they are high enough to preclude use by a significant portion of the community when considered on a *per-contract* basis. Indeed, many of the *total contract* prices are higher than what the average individual user of the services could afford on their own. While an individual usually accesses Wilshire's facilities through a third-party organization for a nominal per-person fee, there is no evidence that such fees prevent individual users from accessing the programs offered on the Wilshire property by the organization. Even if the host organization were to pass Wilshire's costs along to the individual user, the individual cost would still be nominal and much less than fees charged by similar facilities. Many nonprofit organizations rely on high membership volume or minimum participation to charge low fees to individual users, and Wilshire's arrangement is no different. For these reasons, we find that Wilshire's fee

structure meets the criteria set out in FEMA guidance and that its facilities are open to the general public as required by regulation.

### Whether Wilshire Provides Eligible Services

The regulations do not define “community center,” but FEMA guidance lists a number of eligible and ineligible community center services. Eligible activities include art services; educational enrichment activities that are not vocational, academic, or professional training; senior citizen projects and group meetings; services and activities intended to serve a certain group of individuals (such as women or teenagers); social activities of mutual interest to the community; youth groups; and other “activities of community centers that serve the general public.” Ineligible services include vocational, academic, or professional training; training intended to prepare an individual for a full-time paying career; and one-time or irregular meetings.

The regulations further provide that if a facility provides a mix of both eligible and ineligible services and uses the same physical space for both, the facility will be an eligible applicant if more than fifty percent of its operating time is dedicated to eligible services. Funding will then be prorated based on the time the applicant dedicates to eligible services. If the applicant owns the entire facility but at times leases to another entity, the facility will still be an eligible applicant if more than fifty percent of the total space is dedicated to eligible services.

FEMA rejected Wilshire’s application for PA funding on the grounds that its facilities are not eligible nonprofit facilities. The record shows that Wilshire provided a variety of eligible services on its property before the fire, including educational enrichment activities through Los Angeles County Outdoor Science School (LACOSS), and activities intended to serve specific groups. To name a few, Wilshire serves veterans through Save a Warrior and at-risk and underprivileged youth through the Sal Castro Foundation and Camp Harmony. The record also makes clear that Wilshire was used for a number of ineligible services. For example, Wilshire operated its own ineligible recreational summer camps for approximately sixty-five days per year before the fire. Its facilities were also used for a number of other recreational camps and ineligible events such as weddings and corporate leadership retreats.

FEMA guidance requires an applicant to provide eligible services for at least fifty percent of its operating time to be eligible for PA funding. Because FEMA determined that Wilshire primarily operated a recreational summer camp and rental facility, it declined to perform this calculation during the application process. (“It is unnecessary to calculate the percentage of time or space devoted to community activities versus athletic and recreational activities, because the two facilities claimed . . . are overwhelmingly athletic and recreational.”). We disagree with FEMA’s characterization of the Wilshire facilities. Live testimony made clear that the recreational or athletic aspects of services provided at the Wilshire property were incidental to the social services users received. Because Wilshire

only makes its facilities available to organizations that further its mission to serve the community, it cannot be said that Wilshire is merely a rental facility which “offers its property to whatever groups will pay [its] rental fees.” *Union for Reform Judaism*, CBCA 6457-FEMA, 19-1 BCA ¶ 37,452, at 181,984.

FEMA further argues that the vast majority of services offered on the Wilshire property are not eligible because they are operated by another entity. It is true that many, if not most, of the social services offered at Wilshire are operated by third-party social service organizations. However, this Board has previously held that the distinction FEMA seeks to make is not supported by regulation. See *First Presbyterian Church, Panama City, Florida*, CBCA 7282-FEMA, 22-1 BCA ¶ 38,084. The regulations require only that the entity own more than fifty percent of the facility and that the services provided are eligible social services, not that the owner provide the services themselves. 44 CFR 206.221(e), .222(b). Further, FEMA guidance specifically contemplates this, stating that if another entity leases space from the applicant, the applicant may nonetheless be eligible, provided the services themselves are eligible. PAPPG at 16. It is undisputed that Wilshire owns the entire facility, and we find that many of the services offered are plainly eligible social services. That a separate entity operates the program does not render the service itself ineligible.

Relevant to this analysis is that FEMA seeks to categorize the educational enrichment activities provided on the Wilshire property by LACOSS as an ineligible academic training activity. Operating since 1960, LACOSS describes its program’s purpose as providing science enrichment experiences to fifth and sixth grade students. The classification of this activity is essential to the mixed-use analysis because this program was operated on Wilshire’s property for a substantial number of days each year before the fire. In reviewing the materials presented regarding the program, as well as testimony about use of the Wilshire Property by LACOSS, we find that the services fall into the category of educational enrichment, not academic training. The activities are not led by licensed teachers; attendance is not compulsory; there are no standardized testing requirements; and the activities supplement a core science curriculum rather than replace it. That the program is supervised by a school district does not change the result. Nor may the program be fairly classified as ineligible training for a full-time paying career. The program is taught to fifth and sixth graders; does not end with a certificate, degree, or diploma; and includes no practical job training.

Included as evidence in Wilshire’s application were three activity logs that contained information about how the facilities were used for the years 2016, 2017, and 2018 (up until the time of the fire).<sup>2</sup> This included the dates of use, the names of the group or entity using

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<sup>2</sup> For each listed use, Wilshire offered to provide FEMA with all of the supporting information, including contracts, invoices, and internal communications about the events and activities. Although the record does not show that FEMA requested or reviewed the information, FEMA focused its analysis of eligibility on the LACOSS program, without

the facilities, how many participants were served, and the specific services performed. The information shows that in 2016, Wilshire was used for eligible community center-type activities for approximately 263 days, or 80.2% of its operating time. For 2017, the information shows that Wilshire was used for eligible services for 268 days, which translates to 81% of its operating time. It also shows that only sixty-three days were dedicated to summer camp activities that summer. In 2018, prior to destruction by the Woolsey Fire, the data shows that the facilities were used for eligible community-center services for 222 days out of the 257 days dedicated to and available for community-center type services, representing 77.6% of Wilshire's operating time. Wilshire added that the property was booked for an additional twenty-six days throughout November and December of 2018, which were cancelled due to the fire. Assuming those days were booked for eligible services, 248 days, or almost 80% of Wilshire Property's operating time in 2018, would have been dedicated to eligible use. Based on this information, we conclude that prior to the fire, the Wilshire property was used primarily as a community center that offered eligible non-critical social services on a year-round basis.<sup>3</sup>

### Decision

For the reasons stated above, we return this matter to FEMA to conduct a mixed-use analysis consistent with this opinion.

*Kathleen J. O'Rourke*  
KATHLEEN J. O'ROURKE  
Board Judge

*Erica S. Beardsley*  
ERICA S. BEARDSLEY  
Board Judge

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which Wilshire could not reach the fifty percent threshold.

<sup>3</sup> Wilshire offered evidence of strikingly similar entities that suffered damage yet were approved for PA funding, including the Don Lee Camp and Retreat Center operated by the Methodist Church, the Saint Joseph Abbey Retreat Center, and the Bayou Civic Club. After reviewing the record, the panel determined that an analysis of these entities was not necessary since we find that the evidence offered in support of Wilshire is sufficient for a mixed-use analysis.

*Jonathan D. Zischkau*  
JONATHAN D. ZISCHKAU  
Board Judge