

In re, Tall Timbers Neighborhood
Association Notice of Appeal
Planning Commission
City & Borough of Juneau

Tall Timbers Neighborhood Association

Vs.

CBJ Community Development Department
&
Haven House

Case No.: Appeal 2014 0002 – Planning Commission decision on whether to hear an appeal of the second Director’s Decision regarding the operation of Haven House, a not for profit organization who wants to use an existing house in a D5 zone for transitional housing for women coming out of prison.

Hearing Date: Tuesday, July 22, 2014
5:00pm, Assembly Chambers



In re, Tall Timbers Neighborhood
Association Notice of Appeal
Planning Commission
City & Borough of Juneau

Presiding Officer Order on Status of Appeal



BEFORE THE PLANNING COMMISSION OF THE CITY AND BOROUGH OF JUNEAU

HAVEN HOUSE, INC.,

Appellant,

v.

CBJ COMMUNITY DEVELOPMENT,

Appellee,

Appeal 2014 0004 of:
CDD Directors Decision in
BLD20130767

PRESIDING OFFICER ORDER ON STATUS OF APPEAL

The parties having met for a Prehearing Conference on May 28, 2014, the following shall be the order of the Planning Commission:

1. **Parties.** The Appellant is Haven House Inc. ("Haven House") and the Appellee is the CBJ Community Development.

2. **Representatives.** Appellant Haven House is represented by Mary Alice McKeen. Appellee CBJ Community Development is represented by Robert Palmer. All parties shall communicate through their respective representatives.

3. **Appellant's Request for Stay.** Appellant asked at the prehearing conference that this appeal be stayed, pending the briefing and disposition of certain legal issues raised in a related proceeding, *In re the Tall Timbers Neighborhood Association Notice of Appeal*. Appellant's request is granted. The appeal is stayed until further order of the Presiding Officer. Appellant may request by motion that the stay be lifted at any time, at which time another prehearing conference will be scheduled.

4. **Motions to Intervene.** Attorney Robert Spitzfaden filed separate, independent Motions to Intervene on behalf of Mr. Andrew Hughes and Tall Timbers Neighborhood Association, respectively, which motions were filed the day of the prehearing conference and will be considered and decided at such time as the Stay is lifted per this order.

5. **Form of Motions.** To be considered, any motion must be on a separate document, typed, double-spaced, and signed by the party submitting. Inquiries, comments, and informal motions may be disregarded. The sequence of documents for any motion shall be

Motion, Opposition, and, if allowed, Reply. Opposition and reply briefs shall meet the same requirements as motions.

6. **Filing.** All documents specified herein shall be filed electronically by e-mailing to CDD Administrative Officer, Brenwynne Jenkins, at Brenwynne_Jenkins@ci.juneau.ak.us a PDF document of the filing, unless a different format is specified by the CDD Administrative Officer. A party filing a document by electronic mail shall retain the original and produce it for inspection upon request of another party or as ordered by the prehearing officer. Documents filed by electronic mail received by 4:00 p.m. are deemed to have been filed on that business day; documents filed by electronic mail that are received by the Clerk after 4:00 p.m. are deemed to have been filed on the next day that is not a Saturday, Sunday, or holiday observed by the City and Borough of Juneau Administration Department.


7. **Service.** All documents filed with the CDD Administrative Officer by electronic mail will be distributed to the parties by the Clerk through electronic mail. As to any document filed by a method other than electronic mail, the party filing the document must submit with the filing an affidavit stating that all other parties and the Attorney Advisor (Jane Sebens) have been notified by electronic mail of the filing, as follows:

Mary Alice McKeen for Haven House, Inc:	ottokeen@gmail.com
Robert Palmer for CDD:	Robert_Palmer@ci.juneau.ak.us
Jane Sebens, Deputy Municipal Attorney:	Jane_Sebens@ci.juneau.ak.us

8. **Planning Commission Contact.** No party shall discuss the merits of this appeal with any member of the Planning Commission during the period of this stay.

IT IS SO ORDERED.

DATED this 29th day of May, 2014.



By: Presiding Officer Nicole Grewe

In re, Tall Timbers Neighborhood
Association Notice of Appeal
Planning Commission
City & Borough of Juneau

Presiding Officer Order on Scheduling



BEFORE THE PLANNING COMMISSION OF THE CITY AND BOROUGH OF JUNEAU

In re

TALL TIMBERS NEIGHBORHOOD
ASSOCIATION NOTICE OF APPEAL
Re: CDD Directors Decision in
BLD20130767

PRESIDING OFFICER'S SCHEDULING ORDER

Having met for a Scheduling Conference on May 28, 2014, the following shall be the order of the Planning Commission:

1. **Nature of Pending Proceeding.** The Notice of Appeal filed by the Tall Timbers Neighborhood Association ("TTNA"), with respect to the CDD Director's March 18, 2014 Decision, was neither accepted or rejected by the Planning Commission at its regular meeting on May 13, 2014. Rather the Planning Commission accepted CDD staff's recommendation and requested that all parties submit briefing on the issue of whether Tall Timbers has a right to appeal the CDD Director's March 18, 2014 decision. This proceeding is to decide that issue.

2. **Motion to Intervene.** On the day of the scheduling conference, a motion to intervene in this matter was filed by Attorney Robert Spitzfaden, on behalf of Andrew Hughes. Unless and until there is an accepted appeal, there is no appeal in which to intervene and the motion will not be considered or decided at this time. In the event the Planning Commission finds that TTNA has a right to appeal the subject decision, and the appeal is accepted, then Mr. Hughes's Motion to Intervene will be considered and decided at that time.

3. **Parties.** The parties to this proceeding are Tall Timbers Neighborhood Association, Haven House, Inc. and the CBJ Community Development Department.

4. **Representatives.** Tall Timbers Neighborhood Association shall be represented by Attorney Robert Spitzfaden. Haven House shall be represented by Mary Alice McKeen. CBJ Community Development shall be represented by Robert Palmer. All parties shall communicate through their respective representatives.

5. **Issues to be Briefed.** The Planning Commission has asked for briefing on whether TTNA has the right to appeal the CDD's Director March 18, 2014 Decision. The two subparts of the question which must be briefed are:

Whether the TTNA is an aggrieved person that may appeal the CDD Director's decision.
Whether TTNA has the legal standing to file the appeal.

6. **Briefing Schedule.** TTNA's Opening Brief shall be filed by 4:00 p.m. on Tuesday, June 24, 2014. Opposition briefs shall be filed by 4:00 p.m. on Monday, June 30, 2014. TTNA may file a Reply brief by 4:00 p.m. on Monday, July 14, 2014. No new issue may be raised in the reply brief.

7. **Form of Briefs or Motions.** To be considered, a brief or motion must be on a separate document, typed, double-spaced, and signed by the party submitting. Inquiries, comments, and informal motions may be disregarded. The sequence of documents for any motion shall be Motion, Opposition, and, if allowed, Reply. Opposition and reply briefs shall meet the same requirements as motions.

8. **Filing.** All documents specified herein shall be filed electronically by e-mailing to CDD Administrative Officer, Brenwynne Jenkins, at Brenwynne_Jenkins@ci.juneau.ak.us a PDF document of the filing, unless a different format is specified by the CDD Administrative Officer. A party filing a document by electronic mail shall retain the original and produce it for inspection upon request of another party or as ordered by the prehearing officer. Documents filed by electronic mail received by 4:00 p.m. are deemed to have been filed on that business day; documents filed by electronic mail that are received by the Clerk after 4:00 p.m. are deemed to have been filed on the next day that is not a Saturday, Sunday, or holiday observed by the City and Borough of Juneau Administration Department.

9. **Service.** All documents filed with the CDD Administrative Officer by electronic mail will be distributed to the parties by the Clerk through electronic mail. As to any document filed by a method other than electronic mail, the party filing the document must submit with the filing an affidavit stating that all other parties and the Attorney Advisor (Jane Sebens) have been notified by electronic mail of the filing, as follows:

Mary Alice McKeen for Haven House, Inc:	ottokeen@gmail.com
Robert Palmer for CDD:	Robert_Palmer@ci.juneau.ak.us
Robert Spitzfaden for TTNA:	spitz@gci.net
Jane Sebens, Deputy Municipal Attorney:	Jane_Sebens@ci.juneau.ak.us

10. **Oral Argument.** Oral argument on the issues briefed is set for 5 p.m. on July 22, 2014, in Assembly Chambers. TTHA shall have 30 minutes and Haven House and CDD will share 30 minutes to present argument, which time includes time used by the Planning Commission for questions. TTHA may reserve a portion of their time for rebuttal, but no new issue shall be raised during rebuttal.

11. **Planning Commission Contact.** No party shall discuss the merits of this proceeding with any member of the Planning Commission.

IT IS SO ORDERED.

DATED this 29th day of May, 2014.



By: Presiding Officer Nicole Grewe

In re, Tall Timbers Neighborhood
Association Notice of Appeal
Planning Commission
City & Borough of Juneau

Submission Brief

Tall Timbers Neighborhood Association



**BEFORE THE PLANNING COMMISSION OF
THE CITY AND BOROUGH OF JUNEAU**

In re,)
)
TALL TIMBERS NEIGHBORHOOD)
ASSOCIATION NOTICE OF APPEAL)
Re: CDD Directors Decision in)
BLD20130767)
_____)

**MEMORANDUM IN SUPPORT OF TALL TIMBERS
NEIGHBORHOOD ASSOCIATION RIGHT TO APPEAL**

Tall Timbers Neighborhood Association, a neighborhood association recognized by the City and Borough of Juneau, is entitled to appeal the decision of the Director because it is adverse to and aggrieved by the Director's decision.

Initially it should be noted that the appeal was filed not only by Tall Timbers but also by 28 individuals. The Notice Of Appeal provides in relevant part that the parties filing the appeal are Tall Timbers Neighborhood Association "and individuals on attached list". Attached were signatures of 28 people in their individual capacity. Thus, even if Tall Timbers is found not to have the right to appeal, the appeal of the 28 people still must be resolved, as no one to date has challenged the individuals' right to appeal, and the Planning Commission did not ask for briefing with respect to the individuals' appeal. The attached plat (exhibit 1) identifies where the individuals reside in the Tall Timbers neighborhood. All are in close proximity to the property Haven House is leasing. Haven House cannot be reached without passing by the individuals' properties. The individuals', like Tall Timbers, are adverse to the Director, in that they seek to overturn the

Memorandum in Support of Tall Timbers Neighborhood
Association Right to Appeal

Director's March 18, 2014 decision because they believe the use proposed by Haven House is deleterious to the neighborhood and not authorized by applicable zoning law.

Procedural History. Haven House applied for a change of use permit on December 23, 2013. The permit was denied by the Director's January 24, 2014 decision because a halfway house is not allowed in the D5 zone. Haven House appealed that decision. Without presenting the Haven House appeal to the Commission or holding any public process, the Director, apparently after private interaction with Haven House, then issued a March 18, 2014 decision determining that Haven House's proposed use was a use not listed, for which it could seek a conditional use permit. Following the Director's March 18, 2014 decision, Haven House withdrew its appeal of the Director's January 24, 2014 decision. Tall Timbers and the 28 individuals appealed the Director's March 18, 2014 decision. Tall Timbers appeared and explained at the scheduled meeting of the Commission at which the two appeals were being considered, why its appeal should be heard. The Planning Commission directed that briefing be had on Tall Timber's right to appeal and a presiding officer for both appeals was appointed. A prehearing conference in both appeals was held before the presiding officer.

The Code and its Legislative History. The Code 49.20.110(a) provides in relevant part that:

Review by the commission of a decision of the director, may be requested by filing a notice of appeal stating with particularity the grounds therefor . . . The notice shall be considered by the commission at a regular scheduled meeting. . .

[A]ny aggrieved person . . . may appear at that meeting and explain to the commission why it should hear the appeal. The appeal shall be heard unless it presents only minor or routine issues and is clear from the notice of appeal and any evidence offered at the consideration thereof, that the decision appealed was supported by substantial evidence and involved no policy error or abuse of discretion.

The Code does not contain a definition of an aggrieved person. None of the legislative history provided by the City on request by Tall Timbers, bears on the meaning of an “aggrieved person”.¹

Per the plain language of the ordinance, any aggrieved person may appear to explain why the appeal should be heard, but the appeal shall be heard unless it presents only minor or routine issues. This case presents major and extraordinary issues regarding what type of use Haven House is proposing and whether the Table of Permissible Uses authorizes that use. It raises the significant and troubling issue that the Director believes portions of Title 49 are unconstitutional. Accordingly, the appeal must be heard.

The Issue of Aggrieved Person is Moot. The Commission has already allowed Tall Timbers to appear and explain why the appeal should be heard, so whether Tall Timbers is an aggrieved person is moot. Once the Commission, at its May 13 meeting, allowed Tall Timbers to explain why the appeal should be heard, the issue before the Commission became whether the issues were more than minor or routine. Since no one disputes that this case presents more than minor or routine issues, the appeal must be heard. The fact that the Director issued two

¹ See attached exhibit 2 hereto on request for legislative history.

contradictory decisions, and believes portions of Title 49 are unconstitutional, alone establishes the issues here are not routine or minor.

Applicable standing law. The Alaska Supreme Court has determined that there must be adversity to have standing. *Earth Movers v. North Star Borough*, 865 P.2d 741, 742-743 (Ak. 1993).

In Alaska, “[t]he concept of standing has been interpreted broadly.” *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987). “The basic requirement for standing in Alaska is adversity.” *Id.* (citing *Moore v. State*, 553 P.2d 8, 24 n.25 (Alaska 1976)). Thus, we have held that “[s]tanding questions are limited to whether the litigant is a ‘proper party to request an adjudication of a particular issue.’” *Moore*, 553 P.2d at 24 n.25 (quoting *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968)).

The Staff Memorandum dated May 1, 2014 (at footnote 1) views AS 29.40.060, as interpreted in the cases of *Earth Movers v. North Star Borough*, 865 P.2d 741 (Ak. 743) and *Griswold v. City Of Homer*, 252 P.3d 1020 (Ak. 2011), as preventing Tall Timbers from being able to bring its appeal. AS 29.40.060 has no application to this matter because the statute does not apply to home rule municipalities such as the City and Borough of Juneau. AS 29.10.200. Accordingly, the Alaska Supreme Court’s determinations in *Earth Movers* and *Griswold* do not prevent Tall Timbers from bringing its appeal because those cases were decided under a statute not applicable to the City and Borough of Juneau. To the contrary, the reasoning of *Earth Movers* regarding aggrievement authorizes Tall Timber’s appeal.

As mentioned above, the Code does not define what an aggrieved person is nor does the legislative history shed any light on the meaning of the words.

Nothing in the Code or legislative history indicates that “aggrieved person” as used in the Code means the same as “person aggrieved” in AS 29.40.060 as interpreted by *Earth Movers* and *Griswold*. The Code was adopted in 1987 years prior to the decision of *Earth Movers* in 1993 and *Griswold* in 2011. Hence the Assembly had no reason to believe or understand at the time of adopting the Code that those cases would narrow standing in zoning cases in non-home rule municipalities.

By not making home rule municipalities subject to AS 29.40.060 (which narrowed standing), the Alaska Legislature left in place for the City and Borough of Juneau, due to its status as a home rule municipality, the broad standing requirement of adversity as described in *Earth Movers*. In fact, at the time the Code was adopted in 1987, the broad standing requirement of adversity was the applicable standing law. The Assembly in 1987 made no attempt to limit standing from the adversity standard as the law then stood, indicating the Assembly intended the adversity standard to apply.

Tall Timbers meets the standing requirement of adversity. There can be no question that there is adversity between the Director and Tall Timbers. Tall Timbers position is that the Director was correct in his first January 24, 2014 decision denying Haven House its permit because its use was not allowed in the D5 zone, and incorrect in his second decision of March 18, 2014 determining that Haven House could seek a conditional use permit as a use not listed. Tall Timbers asserts that the Haven House use is not permitted in the D5 zone. The Director

disagrees. The Director takes the opposite positions from Tall Timbers, thus creating adversity.

Tall Timbers² is a proper party because it is the neighborhood association publicly registered with the City and Borough of Juneau³ which was organized to: (i) identify neighborhood concerns and interests, and (ii) so the neighborhood would be safer and more peaceful because the residents would know each other.”

² Tall Timbers was organized when the neighborhood first developed in the 1970s. Statement of Andrew Hughes. An unincorporated association may be sued. Civil Rule 5(c)(6).

³ Tall Timbers is registered with the City and Borough of Juneau (exhibit 3) as a neighborhood association pursuant to Code chapter 11.35. In relevant part, Code 11.35.010 states the purpose of neighborhood associations:

“The purpose of this chapter is to provide a direct and continuing means of citizen participation in local government decisions about neighborhoods through the use of neighborhood associations recognized as advisory to the municipal government. These associations are intended to improve the ability of local government to elicit opinions and recommendations, to assess the priorities of residents, property owners, and businesses and to formulate its bases for decisions regarding community development programs, and crime prevention programs, including neighborhood watch programs, and other issues.”

In relevant part, Code 11.35.030(a) provides:

“The primary functions of a neighborhood association are to:

- (1) provide its membership with timely and effective notice of pending municipal, state, and federal meetings, hearings, decisions, and other actions of significance to the neighborhood;
- (2) notify the assembly, municipal boards and commissions, municipal officials, and state and federal agencies of matters affecting the neighborhood;
- (3) review and comment on applications for all rezonings, major developments as defined in CBJ 49.80.120, ordinances, plans, or other actions which may significantly effect the neighborhood;”

The City’s website encourages registration of neighborhood associations so that the associations may “provide a direct and continuing means of citizen participation in local government decisions about neighborhoods”. Exhibit 4 hereto.

Statement of Andrew Hughes. Tall Timbers' present bylaws (Exhibit 5) provide it is to address issues affecting the neighborhood, preserve harmony, protect public health and safety, and preserve property values, and allow the neighbors to impact the neighborhood's development and services. The Haven House property is located within Tall Timbers Subdivision. To access the Haven House property, one must pass by the other lots in the Tall Timbers neighborhood. The Haven House property is next door to and across the street from and on the same block as, lots within the Tall Timbers Subdivision. Given these facts and the City's recognition of Tall Timbers as a neighborhood association intended by the City to provide citizen participation in City decisions about the neighborhood, Tall Timbers is a proper party to appeal whether the Haven House use is permitted in the Tall Timbers neighborhood by the zoning laws of the City and Borough of Juneau.

Tall Timbers is an aggrieved person per Earth Movers. Even under the limited standing adopted in *Earth Movers* for non-home rule municipalities, Tall Timbers has standing because it seeks to protect the Tall Timbers neighborhood from deleterious uses.

Earth Movers(at pages 744-745) held that a business competitor did not have standing in a zoning case for two reasons:(1) competitors fall outside the zone of interest that zoning is meant to protect, namely uses deleterious to the neighborhood, and (2) no one has a vested right to engage in business without competition. Relevant to Tall Timber's standing in this case is the Supreme

Court's reasoning that zoning is meant to protect neighborhoods from deleterious uses. The Court found that the proper parties to challenge a zoning decision include (i) the neighbors directly affected by the use in their neighborhood and (ii) "others whose interests relate to the purpose of the zoning ordinance." Tall Timbers is organized to protect and preserve the neighborhood, and provide citizen participation on City decisions, so its interests relate to the purpose of the zoning ordinance-to preserve the neighborhood against deleterious uses. In this appeal it seeks to prevent the City from authorizing in the Tall Timbers neighborhood what Tall Timbers believes to be an unauthorized deleterious use contrary to the residential character of this D5 zone⁴. Since Tall Timbers falls within the zone of interest which zoning is meant to protect (prevention of deleterious uses), it has standing in this case to pursue this appeal.

Conclusion. The appeal must proceed with respect to the 28 individual appellants. Tall Timbers, as a neighborhood association registered with the City and Borough of Juneau, has standing to pursue its appeal because it is adverse to the Director, and is aggrieved because it seeks to protect the neighborhood from a deleterious use

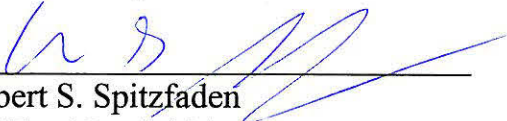
GRUENING & SPITZFADEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
217 SECOND STREET, SUITE 204
JUNEAU, ALASKA 99801
PHONE (907) 586-8110
FAX (907) 586-8059

⁴ "The D5 zone "is intended to accommodate primarily single-family and duplex residential development". Code 49.25.210(c).

DATED this June 24, 2014, at Juneau, Alaska.

GRUENING & SPITZFADEN, APC

Attorneys for Tall Timbers Neighborhood Association,
Andy Hughes, Sammy Legg, Tom Sullivan, Dan
Hubert, Paula Hubert, Rosena Salazar, Rino Salazar,
Toi Gile, Becky Nelson, Noah Lager, Shelly Lager,
Teri Maxwell, Guy Holt, Sam Bertoni, David Marvel,
Lynn Marvel, Bill Thornton and Darlene F. Thornton


Robert S. Spitzfaden
AK Bar No. 7710171

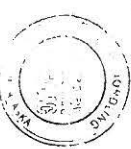
CERTIFICATION

I HEREBY CERTIFY that on June 24, 2014, a copy of the foregoing of
the foregoing was emailed to:

Brenwynne Grigg, CDD Administrative Officer
Brenwynne_Grigg@ci.juneau.ak.us

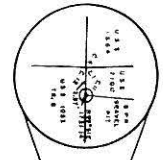
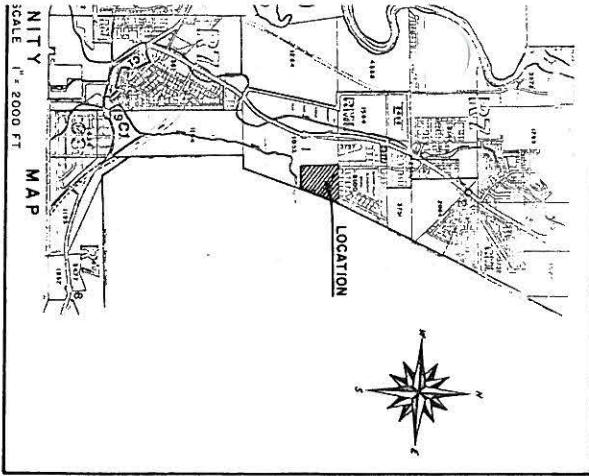

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IN THE City of Juneau, Alaska, 1973, before me, the undersigned, a Notary Public for the State of Alaska, residing at [Address], and duly qualified to perform the duties of a Notary Public for the State of Alaska, personally appeared [Name], known to me to be the person who executed the foregoing instrument, and he declared to me that he executed said instrument freely and voluntarily for the purposes and consideration therein stated, and he acknowledged to me that he executed said instrument in witness whereof, I have hereunto affixed my signature and official seal, and gave to him this certificate of filing above and therein set forth.

Notary Public for the State of Alaska
 [Signature]
 [Name]
 [Address]



CERTIFICATE OF SURVEY
 I hereby certify that I am a registered professional land surveyor and that the foregoing plat was prepared by me or under my direct supervision and that the plat was made by me and other details are correct to the best of my knowledge.

OFFICIAL RECORDS
 3159 TONGASS AVE
 JUNEAU, ALASKA



CERTIFICATE OF APPROVAL BY THE COMMISSION

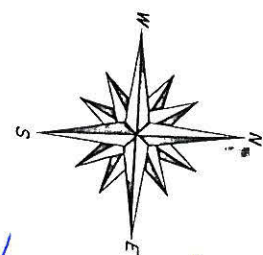
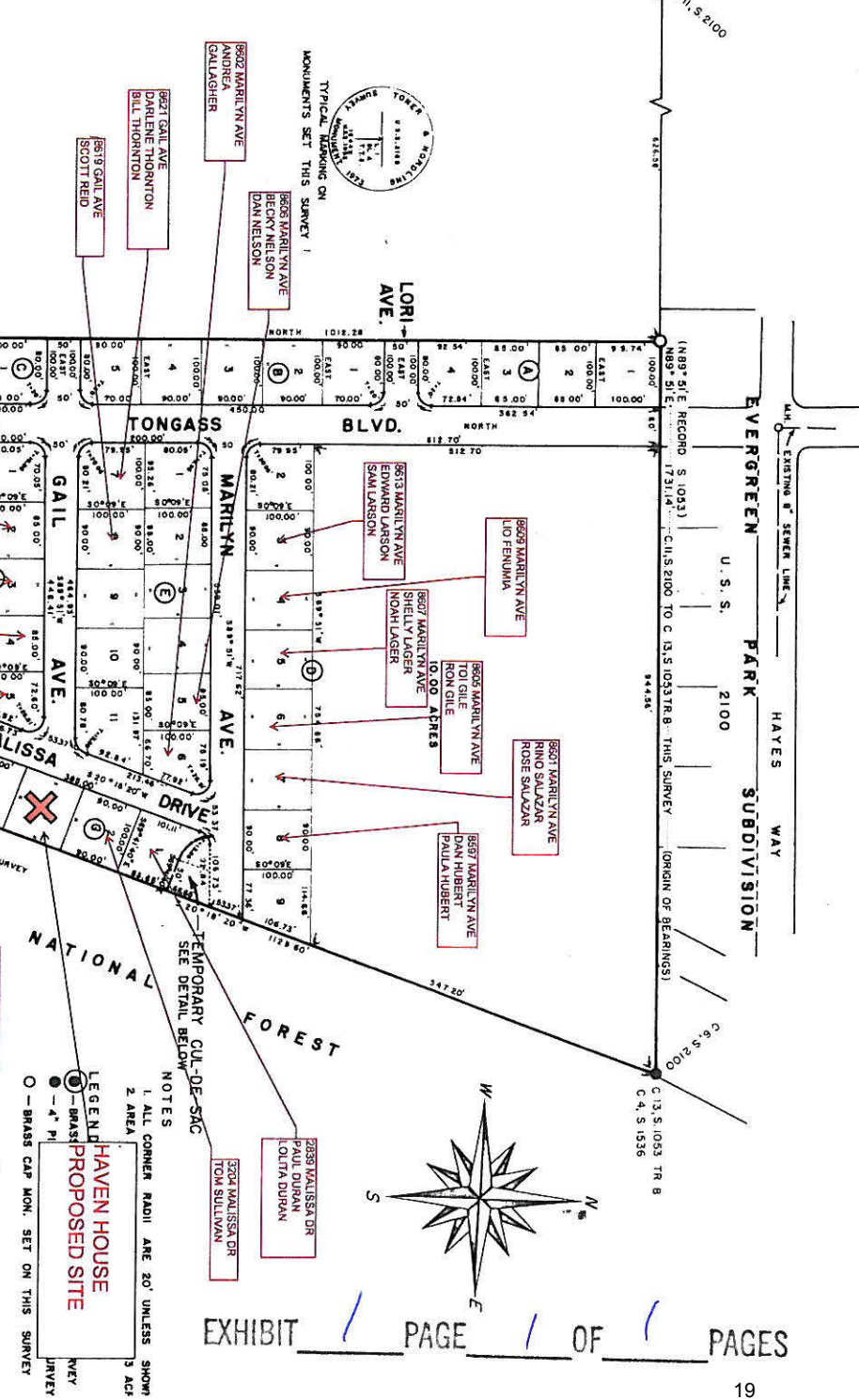
I, the undersigned, certify that the subdivision plat shown hereon has been found to conform to the provisions of the laws of the State of Alaska, and that the plat has been approved by the Planning Commission of the City and Borough of Juneau Planning Commission No. [Number], dated [Date], and that the plat shown hereon has been filed for recording in the office of the District Judge, Juneau, Alaska.

Attest:
 [Signature]
 [Name]
 District Judge

73-8

RECORD-D-FILED
 JUN 15 1973
 JUNEAU, ALASKA

PLAT OF TALLE TIMBE SUBDIVISION OF FR. U.S.S.I. JUNEAU MAY TONER & NORDLING REGISTER



Laurie Sica

From: Bob Spitzfaden <spitz@gci.net>
Sent: Wednesday, May 28, 2014 5:36 PM
To: Laurie Sica
Subject: Legislative History

Laurie

I spoke with Robert Palmer who tells me you are the person that can provide the legislative history for Code 49.20.110, enacted by the following: Serial No. 87-49, §2, 1987; Serial No. 92-10, § 3, 1992; Serial No. 95-35, §4, 1995; Serial No. 97-01, § 6, 1997.

The legislative history would include the Planning Commission and Assembly meeting minutes at which the ordinance was discussed, together with agendas of those meetings, staff memorandums regarding the ordinance, and any other documents bearing on the ordinance.

Robert S. Spitzfaden

EXHIBIT 2 PAGE 1 OF 1 PAGES