

1 absence of contradictory authority, CBJ 01.50 describes appellate procedures.⁸ In particular, CBJ
2 01.50.020(b) precludes appeals of non-final decisions:

3 An appeal shall be filed only from a final agency decision. Decisions which
4 are not appealable include, but are not limited to, decisions to recommend,
5 advise or request an action, even if the recommendation, advice or request is
6 procedurally required as a prerequisite to some other decision, which latter
7 decision is dispositive of the matter.

8 Because only the Board of Adjustment has authority to make final decisions on use not listed
9 applications, Decision #2 is only a recommendation and statement of how the Director intends to
10 advocate at a use not listed hearing.

11 This is an unusual case because Tall Timbers filed an appeal before the Haven House had
12 its use not listed hearing and before the Board of Adjustment/Commission determines whether
13 Haven House is authorized to operate as intended. Therefore, Tall Timbers has jumped the gun,
14 and the Commission should dismiss this appeal and proceed with the use not listed hearing.

15 **B. Tall Timbers jumped the gun by filing an appeal before Tall Timbers legally existed
16 or could file an appeal.**

17 The Commission should also dismiss Tall Timber's appeal because Tall Timbers, as an
18 entity, could not and cannot file an appeal. Specifically, Tall Timbers did not have the legal
19 capacity to file this appeal. Additionally, Tall Timbers did not derive standing by registering as a
20 neighborhood association. Tall Timbers should not be rewarded by being allowed to proceed with
21 this appeal.

22 First, Tall Timbers cannot file an appeal because it does not have the legal capacity to file
23 an appeal. An association of people must have corporate status or possess the right to sue in order
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⁸ E.g., CBJ 49.20.120 states that CBJ 01.50 applies to appeals from the Commission except as provided in Title 49.

1 to have standing.⁹ In the leading Alaska Supreme Court decision, the Court considered whether an
2 “association of individuals who are residents of the City of Seward, and who oppose [a street
3 vacation]” had standing.¹⁰ The Court held the association, “Washington’s Army” did not have
4 standing because it was not a corporation or possessed the right to be sued:
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6 An entity must have corporate status or possess the right to sue in order to
7 have standing. The ability to sue or be sued has traditionally centered on the
8 ability of a party to be accountable for the process and results of legal
9 proceedings. Washington’s Army, as an entity, lacks standing because it
10 does not have a person or a legal entity that may be held responsible for the
11 process and results of the legal proceeding and thus does not have the ability
12 to sue or be sued.

13 Here, Tall Timbers has not produced any evidence that it is a corporation.¹¹ Additionally,
14 Tall Timbers has not produced any evidence that it has the ability to sue or be sued, especially as of
15 the date the appeal was filed.¹²

16 Further, even if Tall Timbers perfects standing during the pendency of this appeal, the
17 Commission should still dismiss this appeal and proceed with the use not listed hearing because
18 Tall Timbers would not be prejudiced by participating in the use not listed process.¹³ Also, the

19 ⁹ *Washington’s Army v. City of Seward*, 181 P.3d 1102, 1105 (Alaska 2008). Interestingly, Tall Timbers neglected
20 to confront this case despite it being specifically cited to in the May 1, 2014, Staff Report.

21 ¹⁰ *Id.* at 1104.

22 ¹¹ The only evidence that indicates that Tall Timber might become a corporation is Article 15 of its bylaws, which
23 were adopted after it filed this appeal. Tall Timbers Opening Brief Ex. 5 page 5 of 5: “Upon a majority vote of the
24 members present at a membership meeting, the Association may elect to become a nonprofit corporation.” Tall
25 Timbers has not provided any evidence that it is actually recognized by the State as a corporation.

26 ¹² Tall Timbers cites to Civil Rule 5(c)(6) for authority that an unincorporated association can be sued, Tall
27 Timbers Opening Brief at 6 of 9. Civil Rule 5(c)(6) does not exist. Additionally, Civil Rule 5(c) does not support Tall
28 Timber’s assertion. That rule provides a means for a court to simplify the service of pleadings when a large number of
29 defendants are involved. There is nothing to suggest that an unincorporated association can be sued or has the capacity
30 to sue.

31 ¹³ Tall Timbers would not suffer a procedural due process harm because until the Haven House is authorized to
32 operate as intended, Tall Timbers—assuming *arguendo* that it has capacity and a personal interest—it cannot show any
33 deprivation of an interest or prejudice. *E.g.*, *D.M. v. State of Alaska*, 995 P.2d 205, 212-14 (Alaska 2000) (describing
34 CDD Opposition Brief *In Re Tall Timbers Neighborhood Association*

1 Commission should dismiss the Tall Timbers appeal because Tall Timbers did not and has not
2 provided evidence that it has the legal capacity to file an appeal. Thus, Tall Timbers jumped the
3 gun by filing an appeal before it had standing, and the Commission should not reward Tall Timbers
4 by hearing this appeal.

5
6 Second, Tall Timbers did not acquire standing by registering as a neighborhood association.
7 Exactly a month after Haven House submitted its application for the change of use permit, Tall
8 Timbers submitted a neighborhood association registration form.¹⁴ The purpose of neighborhood
9 associations is for the CBJ to efficiently disseminate and received information, which facilitate
10 citizen participation.¹⁵ However, despite Tall Timber’s assertions, the submission of a
11 neighborhood association registration does not create any rights for the association to file an
12 appeal.¹⁶ CBJ 11.35 governs neighborhood associations and specifically states that no rights are
13 created by registering,¹⁷ and registration does not grant any special rights to petition.¹⁸ Thus, Tall
14 Timbers does not have standing as a result of registering as a neighborhood association.
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16

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18 that due process is not violated when a person is given the opportunity to be heard). The use not listed process provides
Tall Timbers the opportunity to be heard.

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20 ¹⁴ When Tall Timbers submitted its neighborhood association registration form on January 23, 2014, it
intentionally attempted to avoid the Alaska Public Records Act when it stated in the special notes section “Please keep
21 membership records private.” Tall Timber’s Opening Brief, Ex. 3 at 2 of 5. As described by Deputy Clerk Beth
McEwen on the following page, the registration form and the attachments are considered public documents and would
be provided to the public upon request. *Id.*, Ex. 3 at 3 of 5.

22 ¹⁵ CBJ 11.35.010.

23 ¹⁶ “Tall Timbers is a proper party because it is the neighborhood association publicly registered with the City and
Borough of Juneau...” Tall Timbers Opening Brief at 6 of 9.

24 ¹⁷ CBJ 11.35.060 “**No rights created.** Nothing contained in this chapter creates a substantive or procedural right in
any person. The failure of the City and Borough, any neighborhood association or any other person to give or receive
25 notice or to invite or make comment under this chapter does not affect the validity of an action by a neighborhood
association or the City and Borough.”

¹⁸ CBJ 11.35.050 “**Right to petition.** Nothing in this chapter is intended to deny or limit the right of individuals or
groups, whether or not a member of a neighborhood association, to petition the assembly or otherwise participate in
City and Borough government through methods or procedures not involving a neighborhood association.”

1 Therefore, because Tall Timbers does not have the capacity to file an appeal and does not
2 derive any standing by registering as a neighborhood association, the Commission can dismiss the
3 Tall Timbers’ appeal. Tall Timbers jumped the gun by appealing before it had the capacity to file
4 an appeal.

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6 **C. Tall Timbers jumped the gun by filing an appeal because Tall Timbers is not an
aggrieved person.**

7 By including the term “aggrieved person” in CBJ 49.20.110, canons of ordinance
8 construction require adjudicative bodies to give meaning to the term. *City & Borough of Juneau v.*
9 *Thibodeau*, 595 P.2d 626, 634 (Alaska 1979) (stating that “a court should not presume that a
10 legislative body has used superfluous words”).

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12 The CBJ, like the State, restricts standing in land use cases to an “aggrieved person.” The
13 aggrieved person standing requirement is more restrictive than the traditional standing doctrine in
14 Alaska. The aggrieved party standing doctrine is designed to prevent undue delay of final
15 dispositions and to reduce litigation originating from land use decisions.¹⁹ Tall Timbers jumped the
16 gun because it, nor any property owners in the Tall Timber subdivision, could be an “aggrieved
17 person” right now. Haven House has not even had the public hearing to determine whether it is
18 allowed to operate as intended.

19
20 CBJ 49.20.110(a) restricts appeals from the Director to the Commission only from CDD or
21 an “aggrieved person.”²⁰ The purpose of CBJ 49.20.110(a) is to describe the procedural
22 requirements of how to file an appeal of a land use decision and specifically states “The department
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24 ¹⁹ *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 743 n. 6 (Alaska 1993).

25 ²⁰ CBJ 49.80.120 defines a person as “Person means an individual, partnership, firm, company corporation.” That
definition does not provide that an unincorporated neighborhood association is a person. *E.g., Izaak Walton League of
Am. v. Monroe Cnty.*, 448 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1984) (concluding that a representative association
was not an aggrieved person and did not have standing to challenge a zoning decision).

1 and any aggrieved person, including the developer, may appear at that meeting and explain to the
2 commission why it should hear the appeal.” The term “aggrieved person” is not defined in Title 49.
3 However, the term has been used extensively since 1926 and is defined in Alaska land use law,
4 which restricts standing to a person personally aggrieved in a manner different than the community
5 as a whole.
6

7 The legislative history of CBJ 49.20.110 demonstrates that the Assembly, like the
8 Legislature, removed the more liberal taxpayer standing option in land use appeals.²¹ Taxpayer
9 standing is a doctrine that allows a member of the community, who has no particular personalized
10 injury, to appeal a governmental action.²² In contrast, aggrieved party standing requires a particular
11 personalized injury to appeal a governmental action.²³ CBJ, like the State, follows the majority
12 position that only aggrieved persons—not merely taxpayers—have standing to appeal a land use
13 decision.²⁴
14

15 CBJ 49.20.110(a) resulted from a massive re-write of the CBJ land use code, which limited
16 appeals to aggrieved persons. In 1987, the Assembly repealed and reenacted the CBJ land use code.
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18 ²¹ Mr. Spitzfaden has made a number of public records act requests since May 28, 2014. The public records act,
19 AS 40.25.122, requires a party to litigation to comply with the administrative procedures to obtain records regarding
20 litigation. Mr. Spitzfaden may be required to invoke the jurisdiction of the Commission to issue a subpoena *duces*
21 *tecum*, if he or any of his clients attempt to obtain records subject to this or other litigation. CBJ 01.50.080(a).

22 ²² *E.g.*, *Griswold v. City of Homer*, 252 P.3d 1020 (Alaska 2011) (describing that the Legislature eliminated
23 taxpayer standing in land use cases when it limited appeals to only aggrieved persons); *Hoblit v. Comm'r of Natural*
24 *Res.*, 678 P.2d 1337, 1341 (Alaska 1984) (describing that the plaintiff had “not demonstrated a sufficient ‘personal
25 stake’ in the outcome of this controversy to give him standing.”). Tall Timbers concedes that “there must be adversity
to have standing.” Tall Timbers Opening Brief at 4 of 9.

²³ *Griswold v. City of Homer*, 252 P.3d 1020 (Alaska 2011); some jurisdictions have concluded that people that
live five blocks away do not meet the aggrieved party standing requirement. *Crowder v. Zoning Bd. of Adjustment*, 406
So. 2d 917, 919 (Ala. Civ. App. 1981) *writ denied sub nom. Ex parte Crowder*, 406 So. 2d 919 (Ala. 1981).

²⁴ 4 Am. Law Zoning § 42:7 (5th ed.):

“It is well established that not every resident of the municipality is a person aggrieved by a decision of the board of
adjustment. It is not enough that a person be a property owner in the municipality, or, absent a specific statute, a
taxpayer with a general interest in efficient planning and zoning administration. To be a person aggrieved by
administrative conduct, it is necessary to have a more specific interest in the decision of which review is sought.”

1 ²⁵ One of the changes resulted in who could file land use appeals. The pre-1987 version of Title 49,
2 like the current version, appears to have followed the 1926 Model Standard State Zoning Enabling
3 Act (“1926 Model Act”), except the current version of CBJ 49.20.110 eliminated the taxpayer
4 standing option and restricted appeals to aggrieved persons.²⁶
5

6 The 1926 Model Act suggested that governments establish a board of adjustment to hear
7 appeals from the planning department and established appeal procedures from the board of
8 adjustment.²⁷ “Appeals to the board of adjustment may be taken by any **person aggrieved** or by
9 any officer, department, board, or bureau of the municipality affected by any decision of the
10 administrative officer.”²⁸ The 1926 Model Act then provided

11 Any **person or persons**, jointly or severally, **aggrieved** by any decision of
12 the board of adjustment, or any taxpayer, or any officer, department, board,
13 or bureau of the municipality, may present to a court of record a petition,
14 duly verified, setting forth that such decision is illegal, in whole or in part,
 specifying the grounds of the illegality.²⁹

15 Although appeals from the board of adjustment includes the word “taxpayer,” jurisdictions—like
16 Alaska—have concluded that appellate procedures without the term limit appeals only to aggrieved
17 parties.³⁰ Regardless, 1926 Model Act provided (1) that a person had to be aggrieved to appeal a
18 planning department decision and (2) that jurisdictions should provide for appeals from the board
19 of adjustment.
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22 ²⁵ Ord. 89-49 § 2 Repeal and Reenacted CBJ Title 49.

23 ²⁶ United States Department of Commerce, A Standard State Zoning Enabling Act (1926), available at
24 <https://www.planning.org/growingsmart/enablingacts.htm>.

25 ²⁷ 1926 Model Act at 10-11.

²⁸ *Id.* at 10.

²⁹ *Id.* at 11.

³⁰ 4 Am. Law Zoning § 42:7 (5th ed.); e.g., AS 29.40.050-060; *Griswold v. City of Homer*, 252 P.3d 1020 (Alaska
2011); *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 743 (Alaska 1993).

1 The CBJ, like the State, eliminated the taxpayer standing option and followed the two-step
2 appellate procedure for land use appeals. Prior to 1987, CBJ Title 49 used language similar to the
3 1926 Model Act for appeals. For example,

4
5 An appeal from an action, decision, ruling, judgment or order of the board of
6 adjustment may be taken by **any persons, jointly or severally aggrieved,**
7 **or any taxpayer or any officer, department, board or bureau** within the
8 city and borough to the city and borough assembly as provided by Charter
9 and ordinance.³¹

10 The same type of appeal language was sprinkled throughout Title 49, which was modeled after the
11 two-step process suggested in the 1926 Model Act.³² Importantly, when Title 49 was amended in
12 1987, the Assembly removed the term “taxpayer” and retained the term “aggrieved person” for
13 appeals of the Director.³³ Importantly, the changes in 1987 to Title 49 reflect the Assembly’s intent
14 to remove taxpayer standing and to limit land use appeals to aggrieved persons, which is what the
15 Legislature did two years earlier.³⁴

16 Despite the concept of standing being interpreted broadly in Alaska, the Legislature limited
17 standing in land use appeals only to aggrieved persons for non-home rule municipalities. “In
18 general, standing in zoning cases has been more restrictive than general standing principles,
19 primarily in order to prevent excessive litigation and undue delay of final dispositions.”³⁵ When the
20 Legislature enacted AS 29.40.050-060, it limited standing in land use appeals to aggrieved

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22 ³¹ CBJ 49.25.806 (1974); Ord. No. 74-05 (creating the Board of Adjustment and providing for appeals of Board of
23 Adjustment decisions).

24 ³² Appeals from the Board of Adjustment were provided for “A municipal employee, a person aggrieved by the
25 decision of the board of adjustment or any taxpayer, may appeal a board of adjustment decision, including a variance
26 decision, to the assembly as provided in CBJ 01.50.” CBJ 49.26.100 (1981); Ord. No. 81.19 (providing for
27 comprehensive land use regulations regarding flood hazards).

28 ³³ CBJ 49.20.110 (appeals from the Director); CBJ 49.20.120 (appeals to the Assembly).

29 ³⁴ The Legislature removed taxpayer standing when it enacted AS 29.40.050-060 in 1985. *Griswold v. City of
30 Homer*, 252 P.3d 1020, 1029 (Alaska 2011).

31 ³⁵ *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 743 n. 6 (Alaska 1993).

1 persons.³⁶ The Alaska Supreme Court has even concluded that the aggrieved party phrase also
2 eliminates taxpayer-citizen standing in land use appeals.³⁷ For example, a business competitor
3 who's only alleged injury was potential increased business competition does not have standing to
4 challenge a land use determination.³⁸ Thus, to appeal a land use determination in Alaska, a person
5 must show a personalized legal interest, as distinguished from the general interest of the
6 community, that has been specifically and injuriously affected by the land use decision.
7

8 To allow a non-aggrieved person to appeal of a Director's decision would violate the
9 canons of ordinance construction and contradict the context of CBJ 49.20.110. CBJ 49.20.110(a)
10 clearly restricts standing in the initial appearance before the Commission to CDD and to any
11 "aggrieved person."³⁹ Because CBJ 49.20.110(a) specifically uses the term "aggrieved person,"
12 canons of ordinance construction require adjudicative bodies to give meaning to the term.⁴⁰ If only
13 an aggrieved person can initially appear to explain why an appeal should be heard, then only
14 aggrieved person can file an appeal to be given the opportunity to appear.⁴¹ The Alaska Supreme
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18 ³⁶ Those statutes explicitly apply to non-home rule municipalities, AS 29.10.200, and provide guidance to home
19 rule municipalities. Although the extent of the aggrieved party requirement has not been extensively defined, some
20 courts have provided guidance. *Griswold*, at 1031-1032 (personalized damage to the use or enjoyment of a landowner's
21 property would give the landowner standing); *Earth Movers*, at 744 (stating that neighbors directly affected by the
22 change of use would likely have standing); *State v. Weidner*, 684 P.2d 103, 110 (Alaska 1984) ("Where the question
23 concerns subdivision planning approval or zoning change, various courts have held that property owners adjacent to
24 the land have the necessary interest required for standing."); *Crowder v. Zoning Bd. of Adjustment*, 406 So. 2d 917, 919
25 (Ala. Civ. App. 1981) *writ denied sub nom. Ex parte Crowder*, 406 So. 2d 919 (Ala. 1981) (concluding a person five
blocks away was not aggrieved by a land use decision).

³⁷ *Griswold v. City of Homer*, 252 P.3d 1020, 1029 (Alaska 2011).

³⁸ *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741 (Alaska 1993).

³⁹ This is not a case about whether CDD can appear or appeal.

⁴⁰ *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 634 (Alaska 1979) (stating that "a court should not presume that a legislative body has used superfluous words").

⁴¹ CBJ 49.20.110; *e.g., Chabau v. Dade Cnty.*, 385 So. 2d 129, 130 (Fla. Dist. Ct. App. 1980) (concluding that an association of property owners lacked standing because it could not sue in state court then logically it could not appeal an administrative zoning decision).

1 Court has concluded that in the context of when a party may appeal a land use decision, even the
2 phrase “adversely affected’ as used in a land use ordinance means the same as the word
3 “aggrieved” used in AS 29.40.050-060.⁴² In CBJ 49.20.110(a), the term “aggrieved person” means
4 just that: only an aggrieved person can appeal a Director’s decision.⁴³
5

6 Here, Tall Timbers never appeared to explain why the Commission should hear this appeal.
7 Mr. Dan Hubert appeared in his personal capacity, but he explicitly stated that he was not
8 appearing on behalf of Tall Timbers. Tall Timbers has misstated the procedural history.⁴⁴ Thus,
9 because Tall Timbers never appeared, the aggrieved person requirement cannot have been waived
10 and is not moot.⁴⁵
11

12 More importantly, neither Tall Timbers nor its purported 28 individual members⁴⁶ can show
13 they are aggrieved persons. Haven House does not have a permit authorizing it to use the house on
14 Malissa Drive as intended. Further, Haven House has not even had the hearing in which the Board
15 of Adjustment/Commission would hear public concerns and conduct its detailed inquiry to whether
16 Haven Houses’ intended use is an unlisted use. Without a permit authorizing Haven House to
17

18 ⁴² *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 743 (Alaska 1993).

19 ⁴³ This is not the first time the aggrieved person standard has been used to explain who can appeal a land use
20 determination. *E.g.*, November 22, 2005, Lands Committee Agenda at 19 of 120 (pdf version) (“The applicant, or any
21 aggrieved person, may appeal the CBJ’s consistency determination to the CBJ Planning Commission or Assembly, in
22 accordance with the procedures established for the appeal of the underlying zoning permit or approval in CBJ Title
23 49.”); April 20, 1987, Assembly Minutes at 6 of 45 (pdf version)(stating that “Any aggrieved party has 20 days to
24 appeal [the issuance of a conditional use permit to the Assembly].”); August 18, 1976 Special Assembly Meeting at 2
25 and 10 of 10 (pdf version)(summarizing that an applicant challenged whether an appellant was an aggrieved party and
stating that the appeal was not granted).

⁴⁴ “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.” Tall Timbers Opening Brief at 2 of 9.

⁴⁵ “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.” Tall Timbers Opening Brief at 3 of 9.

⁴⁶ Tall Timbers Opening Brief at 8 of 9.

1 operate, especially even before the Board of Adjustment conducts the use not listed hearing, neither
2 Tall Timbers nor its purported 28 members can be aggrieved.

3 **D. Tall Timbers jumped the gun by filing an appeal when Decision #2 did not create**
4 **sufficient adversity to even satisfy the more liberal taxpayer standing doctrine.**

5 Even if the CBJ used the more liberal standing doctrine for land use appeals, Tall Timbers
6 cannot satisfy that standard for the same reasons as stated above, namely: Tall Timbers cannot
7 appeal unless the Board of Adjustment/Commission determines Haven House’s intended use is a
8 use not listed and then authorizes Haven House to operate as intended.

9
10 Under even the liberal standing rule, which is the taxpayer standing doctrine, a party only
11 has standing when the person “has a sufficient personal stake in the outcome of the controversy to
12 ensure the requisite adversity.”⁴⁷ Here, the use not listed hearing has not occurred and Haven
13 House is not authorized to operate as intended. There is no adversity until those two perquisites
14 occur. Importantly, if the Board of Adjustment/Commission determines Haven House is not
15 allowed to operate as intended, then Tall Timbers has not suffered any adversity to even satisfy the
16 more lenient standing doctrine. Thus, Tall Timbers jumped the gun and this appeal should be
17 dismissed.
18

19 Therefore, Tall Timbers has jumped the gun and needs to wait for the Board of Adjustment
20 to conduct and render a decision from the use not listed hearing before Tall Timbers can claim it
21 satisfies either the liberal or “aggrieved person” standing doctrines.
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⁴⁷ *Hoblit v. Comm'r of Natural Res.*, 678 P.2d 1337, 1341 (Alaska 1984) (describing that the plaintiff had “not demonstrated a sufficient ‘personal stake’ in the outcome of this controversy to give him standing.”).


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III. CONCLUSION

Tall Timbers jumped the gun and the Commission should dismiss this appeal. The proper forum for adjudicating whether Haven House is a use not listed is the use not listed process as described by the Director in Decision #2. Because the Director does not have authority to make the final decision whether a use is listed or not, Tall Timbers cannot appeal Decision #2. Tall Timbers, or more appropriately the potentially aggrieved people to Haven House's intended use of Malissa Drive, can make all of the substantive arguments identified in its notice of appeal as to why Haven House is not an unlisted use at the use not listed hearing. Thus, neither Tall Timber nor the potentially aggrieved persons will be prejudiced by the Commission dismissing this appeal and proceeding with the use not listed hearing. Tall Timbers jumped the gun and this appeal should be dismissed.

Dated this 30 day of June, 2014.



Robert H. Palmer, III
ABA No.: 1405032

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Certificate of Service

I hereby certify that on June 30th, 2014, a true and correct copy of the foregoing document was filed electronically via electronic mail to:

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Litigation and Civil Support Assistant

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

Opposition Brief
Haven House



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 /
_____ /

**Response to Memorandum by Tall Timbers Neighborhood Association to
Appeal CDD's Director Decision of March 18, 2014**

CBJ Land Use Code provides in section CBJ 49.29.110(a) that an aggrieved person may appeal a decision of the Director of the Community Development Department (CDD) to the Planning Commission. Tall Timbers Neighborhood Association (Tall Timbers) wishes to appeal to the Planning Commission the Decision of the CDD Director dated March 18, 2014, attached as Exhibit 1. To resolve whether Tall Timbers may appeal that decision to the Planning Commission and what steps the Planning Commission should take to resolve the issues raised by CDD Director's Decision BLD20130767, the Planning Commission needs to decide three questions:

1. Whether an unincorporated association is a person within CBJ Land Use Code 49.29.110 and 49.80.120. CBJ Land Use Code 49.29.110(a) provides that an aggrieved "person" may appeal a decision of the CDD Director. CBJ Land Use Code 49.80.120 defines "person" as "an individual, partnership, firm, [or] company corporation." Tall Timbers Neighborhood Association is not an individual, partnership, firm or corporation. Is Tall Timbers Neighborhood Association a person within CBJ Land Use Code 49.29.110 and 49.80.120?

2. Whether Tall Timbers or any residents of Tall Timbers Subdivision are aggrieved by CDD's decision of March 18, 2014. CDD has not granted Haven House a permit to operate. On March 18, 2014, CDD rescinded a decision that Haven House was a halfway house and issued a new decision that CDD believes the Planning Commission, after a public process, may grant Haven House a permit. Can a person that opposes the granting of a permit be aggrieved when CBJ has not issued a permit?

3. Whether the Planning Commission should schedule a public hearing as soon as possible on Haven House's appeal and Haven House's application for a use not listed permit. In a public hearing on Haven House's appeal and on Haven House's application for a use not listed permit, Tall Timbers and any person opposed to this project can make every single argument they could make in an appeal of the CDD Director's Decision of March 18, 2014, and the Planning Commission could hear all the evidence and arguments on whether Haven House should receive a permit. Should the Planning Commission schedule such a consolidated public hearing?

Chronology

This is a chronology of the key events that are relevant for the Planning Commission to decide whether Tall Timbers may appeal the CDD Decision of March 18, 2014, and to schedule the next steps on Haven Haven's application for a permit to operate.

- 12-23-13 Haven House applies for an allowable use permit for a group home at 3202 Malissa Drive.
- 1-24-14 CDD denies Haven House a permit on the grounds that [1] Haven House's use is not a group home because the residents will not have a disability and [2] Haven House is a halfway house.
- 2-14-14 Haven House files a notice of appeal.
- 3-6-14 CDD asks Haven House for additional information.
- 3-10-14 Haven House provides additional information and files a legal brief that [1] Haven House's intended use is as a single family residence, as family is defined by CBJ 49.80.120; [2] in the alternative, Haven House's intended use is as a group home; [3] Haven House's use is not a halfway house as defined by CBJ 49.80.120.
- 3-18-14 CDD rescinds its decision of 1-24-14 and issues a new decision that [1] CBJ Title 49 regarding halfway houses is likely unenforceable because it is irrational and arbitrary; [2] CBJ Title 49 regarding group homes is likely unenforceable and denies Haven House's application for a group home permit; [3] Haven House is not a single family residence and denies Haven House's application to operate as a single family residence; [4] CDD believes that Haven House is a "use not listed and of the same general character" as listed uses in the D-5 district; CDD believes that Haven House's intended use is most similar to a boardinghouse/rooming house, a use that may occur only if the Planning Commission grants a conditional use permit; **CDD did not grant Haven House a permit to operate; CDD does not have authority to grant a permit under CBJ 49.20.320, the use not listed provision; only the Planning Commission may issue a permit under the "use not listed" ordinance.**
- 4-1-14 Tall Timbers files a notice of appeal on the grounds that [1] CBJ Title 49 regarding halfway houses and group homes is enforceable; [2] Haven House is a halfway house; [3] Haven House is not a boardinghouse/rooming house within CBJ Title 49; [4] Haven House is not a use not listed pursuant to CBJ 49.20.320.
- 4-4-14 Haven House files a notice of appeal of CDD's denial to Haven House of a permit to operate as a single family residence or as a group home.
- 5-2-14 Haven House applies for a permit as "a use not listed and of the same general character as listed uses" in the D-5 district.
- 5-13-14 At a meeting, the Planning Commission [1] accepts Haven House's appeal [Appeal 2014 -0004]; [2] directs briefing on whether Tall Timbers has the right to appeal the CDD decision of March 18, 2014,

- [3] designates Commissioner Nicole Grewe as Presiding Officer for both appeals.
- 5-28-14 Tall Timbers files a motion to intervene in Haven House’s appeal; Andrew Hughes, owner of the lot adjacent to 3202 Malissa Drive, files a motion to intervene in Haven House’s appeal and in Tall Timbers’ appeal.
- 5-28-14 Commissioner Grewe holds a scheduling conference.
- 5-29-14 In Haven House’s appeal, Commissioner Grewe issues an order staying proceedings in Haven House’s appeal based on request of Haven House. In Tall Timbers’ appeal, Commissioner Grewe issues an order scheduling legal briefs on whether Tall Timbers may appeal the CDD decision of March 18, 2014 and setting oral argument on this question before the Commission for July 22, 2014.
- 6-24-14 Tall Timbers files a memorandum; eighteen individuals who signed Tall Timber’s Notice of Appeal dated 4-1-14 file a motion to intervene in Haven House’s appeal.

Haven House notes that Tall Timbers asserts that the CDD Director rescinded the January 24, 2014 decision “apparently after private interaction with Haven House.”¹

Haven House is not exactly sure what Tall Timbers is suggesting but Haven House invites the Commissioners to review the twenty-five page legal memorandum that Haven House submitted, and is part of the public record, which thoroughly lays out Haven House’s argument as to why the January 24, 2014 decision was in error.²

At the informational meeting with residents of Tall Timbers that Haven House held on February 21, 2014, several residents made statements that suggested they had talked in detail with the CDD Director before he issued the January 24, 2014 decision that Haven House was a halfway house. Haven House has not pursued this with a records request and understands that CBJ staff have contact with members of the public as part of their job.

Ordinances Primarily Involved

The primary ordinances involved in deciding the issues in this memorandum are as follows:

CBJ 49.20.110(a) Review by the commission of a decision of the director [of the Community Development Department] may be requested by filing a notice of appeal stating with particularity the grounds therefore with the department within 20 days of the date of the decision appealed. The notice shall be considered by the commission at a regular scheduled meeting. **The department and any aggrieved person, including the developer, may appear at that meeting and explain to the commission why it should**

¹ Tall Timbers Memorandum at 2.

² Haven House’s Memorandum in Support of a Zoning Permit (March 10, 2014).

hear the appeal. The appeal shall be heard unless it presents only minor or routine issues, and it is clear from the notice of appeal and any evidence offered as consideration thereof, that the decision appealed was supported by substantial evidence and involved no policy error or abuse of discretion. [emphasis added]

CBJ 01.50.020(b) An appeal shall be filed only from a final agency decision. Decisions which are not appealable include, but are not limited to, decisions to recommend, advise or request an action, even if the recommendation, advice or request is procedurally required as a prerequisite to some other decision, which latter decision is dispositive of the matter. [emphasis added]

CBJ 49.20.320 Use not listed. After public notice and a hearing, the board [of adjustment] may permit in any district any use which is not specifically listed in the table of permissible uses but which is determined to be of the same general character as those which are listed as permitted in such district. Once such determination is made, the use will be deemed as listed in the table of permissible uses.

Argument

1. Tall Timbers Neighborhood Association may not appeal the CDD Director's Decision of March 18, 2014, because the Association is not a person as defined by CBJ Land Use Code.

To appeal a CDD decision, the appellant must be an "aggrieved person." Haven House examines whether Tall Timbers is "aggrieved" in the next section of this memorandum but Tall Timbers must also be a person. The CBJ Land Use Code has a definition section: CBJ 49.80.120. CBJ 49.80.120 states: "Person means an individual, partnership, firm, [or] company corporation."³ CBJ 49.80.120 states that the words used in CBJ Title 49 "shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning."⁴

Tall Timbers Neighborhood Association is an unincorporated association. Tall Timbers is clearly not an individual, a partnership, or a corporation, and is not a for profit corporation. It is also not a non-profit corporation. The bylaws of the association provide that its members may elect to become a non-profit corporation,⁵ but the association has not been formed as a non-profit corporation.

The context of CBJ 49.20.110 -- that an appeal of a CDD Director decision may only be brought by an "aggrieved person" -- does not suggest that "person" in that context should be defined differently from the definition of person in CBJ 49.80.120.

³ CBJ Land Use Code 49.80.120 (Definitions).

⁴ CBJ Land Use Code 49.80.120 (first sentence).

⁵ Article 15, TTNA Bylaws, Exhibit 5 to Tall Timbers Memorandum.

An unincorporated association does not have standing to bring a legal action in court to stop a project.⁶ The Alaska Supreme Court held that an entity called “Washington’s Army” that consisted of a group of individuals who opposed the construction of a facility in Seward did not have standing to bring suit to stop construction of the facility.⁷ The Court explained:

An entity must have corporate status or possess the right to sue in order to have standing. The ability to sue or be sued has traditionally centered on the ability of a party to be accountable for the process and results of legal proceedings. Washington’s Army, as an entity, lacks standing because it does not have a person or a legal entity that may be held responsible for the process and results of the legal proceeding and thus does not have the ability to sue or be sued.⁸

The same principle should apply when an unincorporated association wants to bring an administrative appeal to stop a project. In an administrative appeal, a party must also be held accountable. For example, the Assembly may allocate costs as a result of an appeal.⁹ How would the Assembly allocate costs against an unincorporated association? If the association did not pay the costs, how would the Assembly enforce the judgment against the association? Even though Haven House does not anticipate this appeal will result in an order allocating costs against any party, the provision allowing for allocation of costs suggests that an appellant must be an entity against whom an order for payment of costs could be entered.

Tall Timbers Neighborhood Association can become a non-profit corporation. It would then be a person within the meaning of CBJ 49.29.110 and could appeal as an association, as distinct from individuals who are members of the association. Five neighborhood associations in Juneau have formed as non-profit corporations.¹⁰

Tall Timbers cites Civil Rule 5(c)(6) for the proposition that an unincorporated association may be sued.¹¹ Haven House found Civil Rule 5(c), no Civil Rule (5)(c)(6). Civil Rule 5(c) simply addresses the service of “numerous defendants.” Haven House agrees that numerous persons may file an appeal in the same appeal and that numerous persons may sue or be sued in the same action. That is not relevant to whether an association may take action as a separate legal entity.

⁶ *Washington’s Army v. City of Seward*, 181 P. 3d 1102 (Alaska 2008).

⁷ *Id.*

⁸ 181 P. 3d at 1105 (footnotes omitted).

⁹ CBJ 01.50.150(a).

¹⁰ State of Alaska, Division of Corporations, Business and Professional Licensing, Corporations Database, <http://commerce.alaska.gov/CBP>. The Thane Neighborhood Association is the only neighborhood association that has actively maintained its nonprofit corporation status. The others were administratively dissolved as nonprofit corporations.

¹¹ Tall Timbers Memorandum at 6 note 2.

Tall Timbers notes that it is a neighborhood association that has formed and registered with CBJ under CBJ 11.35.020.¹² As an association, it may give input to the CBJ Assembly, the Planning Commission and CBJ staff on actions that the City may take. But the ordinance allowing for neighborhood associations specifically states it does not create any substantive or procedural rights:

11.35.060 NO RIGHT CREATED. Nothing contained in this chapter creates a substantive or procedural right in any person.

The right to appeal a CDD decision to the Planning Commission is certainly a procedural right. Therefore, the neighborhood association ordinance is not, and cannot be, the basis for asserting that Tall Timbers Neighborhood Association has the right to appeal a CDD decision to the Planning Commission.

Haven House urges that the Planning Commission combine Haven House's appeal with Haven House's application for a use not listed permit. As a neighborhood association, Tall Timbers can participate fully in those proceedings and raise all its objections to the proposed location of Haven House.

2. Tall Timbers Neighborhood Association is not an aggrieved person and does not have the right to appeal the CDD decision of March 18, 2014, because the Decision does not grant Haven House a permit.

CBJ 49.20.110(a) Review by the commission of a decision of the director [of the Community Development Department] may be requested by filing a notice of appeal stating with particularity the grounds therefor with the department within 20 days of the date of the decision appeals. The notice shall be considered by the commission at a regular scheduled meeting. **The department and any aggrieved person, including the developer, 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. [emphasis added]

Tall Timbers is not aggrieved by the CDD Decision of March 18, 2014, because the CDD Decision of March 18, 2014, did not grant Haven House a permit to operate. Haven House does not have a permit to operate. Tall Timbers does not want CBJ to issue Haven House a permit to operate. But no officer or agency of CBJ has issued Haven House a permit to operate.

¹² Tall Timbers Memorandum at 6.

Further, the first sentence of CBJ 49.20.110(a) provides for review by the commission of “a decision of the director.” The CDD Director made a decision that denied Haven House a permit as a single family residence and a group home. That is why Haven House clearly is aggrieved and can appeal. That is why the Planning Commission without a moment’s hesitation accepted for decision Haven House’s appeal.

But the CDD Director did not make any decision granting Haven House a permit in his March 18 decision. The CDD Director rescinded his prior decision that Haven House was a halfway house and therefore could not operate in the D-5 District. The CDD Director stated that he thought that Haven House could operate under a use not listed permit but this was only if the Planning Commission granted a permit after a public hearing.

Tall Timbers thus wishes to appeal the rescinding of a decision when that decision did not lead to the action that Tall Timbers opposes, namely the grant of a permit to Haven House. Tall Timbers wants to appeal a decision that the CDD Director entered in the middle of the administrative process. This violates CBJ 01.50.020(b), which provides:

An appeal shall be filed only from a final agency decision.

Decisions which are not appealable include, but are not limited to, decisions to recommend, advise or request an action, even if the recommendation, advice or request is procedurally required as a prerequisite to some other decision, which latter decision is dispositive of the matter. [emphasis added]

The rescinding of the CDD Director’s prior decision that Haven House was a halfway house was not “a final agency decision” by the CDD Director to grant Haven House a permit. Haven House is not certain whether this ordinance [CBJ 01.50.020(b)] directly governs the appeal of the CDD Director’s decision to the Planning Commission. But the ordinance states a generally valid principle that a person must get a final adverse decision from one level before appealing for a different result to the next level.

Tall Timbers states that the issue of whether Tall Timbers is aggrieved is moot since the Planning Commission allowed a member of Tall Timbers to speak at the meeting on May 13, 2014.¹³ That is a nonsensical reading of CBJ 49.20.110(a). The Planning Commission allows anyone to speak who wishes to speak on the subject at hand. The Planning Commission does not have CDD staff quiz a member of the public beforehand as to what they are going to say. Obviously, the requirement that a person be aggrieved is not a requirement as to who can testify but who can appeal.

Tall Timbers states that it is “adverse” to the CDD Director because it disagrees with the CDD Director’s action in his March 18, 2014, rescinding his prior January 24, 2014 decision. Tall Timbers agreed with the prior decision and still believes that Haven House is a halfway house and should be denied a permit on that basis. This logic does not support Tall Timbers right to appeal the CDD Director’s decision of March 18, 2014,

¹³ Tall Timbers Memorandum at 3.

for two reasons: adversity is not the standard for standing in zoning appeals and adversity does not eliminate the requirement for a final decision.

In zoning cases, adversity is not sufficient to confer standing. The Alaska Supreme Court in *Earth Movers of Fairbanks v. Fairbanks North Star Borough* clearly explained the concept of standing as it applies to zoning decisions:

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)). Both parties vigorously argue whether Earth Movers is a property party to challenge the Department’s decision.

General Alaska standing law is not applicable in this case. In the area of land use law, the legislature has chosen to limit standing by statute. Therefore, we must look to the applicable statutes and ordinance for guidance in determining whether Earth Movers has standing.¹⁴

Tall Timbers memorandum quotes the first paragraph but not the second.¹⁵ The Court explains in *Earth Movers* why standing in zoning cases is more restrictive than general standing principles:

In general, standing in zoning cases has been more restrictive than general standing principles, primarily in order to prevent excessive litigation and undue delay of final dispositions. 83 Am. Jur. 2d Zoning and Planning 1026 (1992)¹⁶

Tall Timbers must be aggrieved by the CDD Decision of March 18, 2014, not merely adverse to it. The fact that Haven House *might* receive a permit as a result of the CDD Decision of March 18, 2014, does not mean that Tall Timbers or any resident of Tall Timbers Subdivision is aggrieved by that decision. Tall Timbers and any neighbor will be aggrieved only if and when Haven House is issued a permit to operate.

Tall Timbers states that it has the right to file an appeal because the ordinance states, “The appeal shall be heard unless it presents only minor or routine issues.” It is undeniable that this situation presents extremely important issues. But if that were the only requirement to file an appeal, any person in Juneau could file an appeal: any taxpayer, any resident, even any non-resident who was interested in the issue. Even if the

¹⁴ 865 P.2d at 742-43 (emphasis added).

¹⁵ Tall Timbers Memorandum at 4.

¹⁶ 856 P.2d at 743 note 6.

decision involves important issues, the person who wants to appeal the decision must be aggrieved, or adversely affected, by the decision.¹⁷

Haven House may not get a permit to operate. Haven House hopes that is not the case and believes that will not be the case. But until Haven House receives a permit, it is not even clear what “the issues” exactly are. If the Planning Commission concludes Haven House is most similar to a single family residence, it will receive an allowable use permit. That would create different issues than if the Planning Commission concluded that Haven House was similar to a boardinghouse/rooming house and could operate under a conditional use permit.

Finally, Tall Timbers’ standard to appeal a CDD decision to the Planning Commission would allow any person to appeal any CDD Decision to the Planning Commission [1] midway through the development process [2] merely because they were “adverse” to it. If Tall Timbers or the neighbors have standing to appeal the CDD’s decision that the halfway house ordinance is unenforceable even though Haven House has not been granted a permit, any decision by CDD midway through a project is appealable by anyone who doesn’t like the decision.

If the CDD Director initially required an applicant to submit two engineering studies, and then concluded that one study was sufficient, a person who disagreed with the CDD Director’s decision could appeal the CDD Director’s decision to the Planning Commission. If CDD initially decided that a traffic study was necessary, and then decided that a traffic study was not necessary, any person who disagreed with the CDD decision could appeal the CDD’s decision to the Planning Commission. In the life of a project, especially a big one, CDD makes many decisions as the project goes along. If neighbors could appeal to the Planning Commission every decision that they did not like that CDD made during the application process, that standard would virtually give the neighbors the right to stop any complex, controversial project, or at the very least, delay it for a very long time.

3. The Planning Commission should expeditiously schedule and hold a public hearing on Haven House’s appeal and Haven House’s application for a use not listed permit.

Haven House filed an appeal of the parts of the CDD Decision of March 18, 2014, that denied Haven House a permit to operate as a single family resident and as a group home. Haven House claimed that it did fit within the existing Table of Permissible Uses for the D-5 district. Haven House, however, also pursued the alternative described in the CDD Decision and filed an application to receive a use not listed/similar use permit.

Haven House asks the Planning Commission to combine Haven House’s appeal with Haven House’s application for a use not listed permit. Haven House urges the Commission in the strongest possible terms to schedule a hearing on all matters relating

¹⁷ The Court in *Earth Movers* interpreted the term “aggrieved” in an appeal statute to mean the same as “adversely affected” in another appeal statute. 856 P.2d at 743 – 744.

to Haven House's application on August 26, 2014 or, if that is not feasible, September 9, 2014. Haven House bases this request on three reasons.

First, it is fair to Tall Timbers and any residents that oppose the project. At the hearing on the use not listed permit, all Timbers and any residents of the neighborhood can make every single argument they would make in an appeal of the CDD's decision of March 18, 2014: every single argument. Tall Timbers can argue that Haven House is a halfway house; that the halfway house ordinance is enforceable; that Haven House is most similar to a halfway house; that it is not a group home; that the group home ordinance is enforceable; that if the project is allowed, it should require a conditional use permit and have certain conditions.

Second, it is the most efficient use of public and private resources. It avoids two hearings on virtually the same issues. If the Planning Commission does not consolidate the two hearings, and rejects Tall Timbers' argument that Haven House is a halfway house, the Planning Commission would have to have another whole proceeding to decide whether Haven House should receive a permit under the use not listed provision in CBJ 49.20.320.

And how could Haven House, CDD, Tall Timbers and interested individuals argue whether Haven House is a halfway house without going into the same facts and evidence about whether it can operate as a single family residence, a group home, or a use similar to other listed uses? And why would the Commission want to have two hearings when it could hear all the issues in one hearing?

Third, a combined hearing scheduled as soon as possible avoids further intolerable delay. Haven House has been paying substantial rent on the residence since January 2014. This is a very significant expense for a small non-profit corporation such as Haven House. Haven House has staff that it does not want to lose.

It would be especially wrong to delay a decision on Haven House's application for a permit so that the Planning Commission could decide, as a lone issue, whether Haven House should be denied a permit because it is a halfway house. That would be especially wrong because CDD, the agency charged with implementing the Land Use Code, has concluded that the halfway house ordinance is unenforceable because it is arbitrary. The CDD Director, reluctantly I am sure, concluded:

I conclude Title 49 is likely unenforceable regarding Halfway Houses because of the following: (1) large halfway houses (10+ people) are allowed in residential zones but small Halfway Houses (less than 10) are not, and neither title 49 nor the legislative history provide justification for the distinction; (2) neither Title 49 nor the legislative history provide justification for the change in prohibiting small Halfway Houses in residential areas; (3) neither Title 49 nor the legislative history provide justification for distinguishing Halfway houses from other uses in which people are not serving a sentence; and (4) the Table of Permissive [sic]

uses lists Halfway houses in two different sections (1.450 and 7.400), table CBJ 49.25.30, which creates an arbitrary effect if CBJ 49.25.300(a)(3) is applied. [Decision of March 18, 2014]

The CDD Director does not use the word “unconstitutional” but the only reason the executive branch can find a law “unenforceable” is because it is so arbitrary or otherwise irrational that it would be unconstitutional to enforce it.¹⁸ Tall Timbers recognized that the CDD Decision meant that CDD found the halfway ordinance was likely unconstitutional.¹⁹

Most importantly, delay is harmful because Haven House wishes to provide a needed that is needed in Juneau: specialized housing for women coming out of prison. In support of its application for a use not listed permit, Haven House submitted careful documentation on the need for housing for formerly incarcerated. It is a nationwide problem, a statewide problem an a local problem. Haven House submitted forty-four exhibits in supports of its application. These exhibits included detailed statements from many people in our community on the need for this type of housing: probation officers, counselors, persons who work in the recovery field, persons who work to improve housing for low-income people in our community, former offenders, some residents of the Tall Timbers Subdivision.

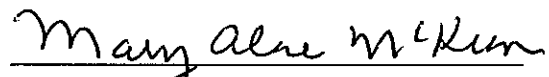
Haven House simply wants the Planning Commission to promptly review Haven House’s application and supporting material and determine if Haven House has met the requirements for a permit under the use not listed statute in CBJ 49.20.320.

CONCLUSION

The administrative appeal process of the City “shall be construed to secure the reasonable, speedy and inexpensive determination of every appeal.” CBJ 01.50.260.

To achieve that goal to the extent possible in this appeal, the Planning Commission should promptly schedule a public hearing on all issues related to Haven House’s applications to operate in Juneau – either as a use allowed in the current Table of Permissible Uses or a use not listed but similar to allowed uses under CBJ 49.20.320.

Dated: June 30, 2014

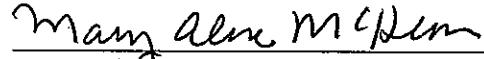

Mary Alice McKeen AK BAR # 8106035
Attorney for Haven House, Inc.

¹⁸ Haven House has not fully researched whether exhaustion of administrative remedies under an ordinance is required if the ordinance is unconstitutional. Cf *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)(exhaustion of state remedies it not a prerequisite to bringing suit under 42 USC 1983).

¹⁹ Tall Timbers Memorandum at 3.

CERTIFICATION

I hereby certify that on June 30, 2014, a copy of the foregoing was emailed to Brenwynne Grigg, CDD Administrative Officer, Brenwynne_Grigg@ci.juneau.ak.us.



Mary Alice McKeen

Attorney for Haven House, Inc.

March 18, 2014

Pamela Finley, Attorney for
Haven House, Inc.
P.O. Box 22977
Juneau, AK 99802

RE: Haven House Transitional Housing located at 3202 Malissa Drive

Dear Ms. Finley:

Thank you for providing the requested additional information. That additional information allowed the Community Development Department ("CDD") to fully review the Haven House proposal and better understand how Haven House intends to operate at 3202 Malissa Drive. I have reached the following decision.

Upon reviewing the additional information provided by Haven House and upon legal guidance, I conclude the Title 49 provisions regarding Halfway Houses and Group Homes are likely unenforceable as applied to Haven House. Except the provisions specifically addressed below, Title 49 is presumed valid and enforceable.

I conclude Title 49 is likely unenforceable regarding Halfway Houses because of the following: (1) large halfway houses (10+ people) are allowed in residential zones but small Halfway House (less than 10) are not, and neither Title 49 nor the legislative history provide justification for the distinction; (2) neither Title 49 nor the legislative history provide justification for the change in prohibiting small Halfway Houses in residential areas; (3) neither Title 49 nor the legislative history provide justification for distinguishing Halfway Houses from other uses in which people are not serving a sentence; and (4) the Table of Permissive uses lists Halfway Houses in two different sections (1.450 and 7.400), table CBJ 49.25.300, which creates an arbitrary effect if CBJ 49.25.300(a)(3) is applied.

Similarly, I conclude Title 49 is likely unenforceable regarding Group Homes as applied to Haven House because of the following: (1) neither Title 49 nor the legislative history provide justification for distinguishing Group Homes from other uses in which people are not serving a sentence; and (2) neither Title 49 nor the legislative history provide justification for differentiating Group Homes with more than six residents and those with less than six residents.

For those reasons, I conclude that I cannot apply the Title 49 provisions regarding Group Homes and Halfway Houses to Haven House. Thus, I conclude Haven House cannot be classified as a Group Home or Halfway House.

Previously, I concluded that Haven House best fit the definition of a halfway house because the proposed use involved people, living together, who would be serving a sentence. However, based on the additional information, the reasoning provided above, and considering the proposed use does not now fit within one of the uses specifically listed in the Table of Permissive uses, I conclude the proposed use of

155 So. Seward Street, Juneau, Alaska 99801-1397

EXHIBIT 1, PAGE 1 of 1

Haven House is a "use not listed." CBJ 49.20.320. In order to be considered for a "use not listed," Haven House will need to make an application to the CDD consistent with CBJ 49.20.320. This request would be evaluated by the Planning Commission sitting as the Board of Adjustment. This "use not listed" process requires public hearing and the associated public notice.

I conclude the proposed use of Haven House is currently boardinghouse and rooming house or is currently most similar to a boardinghouse and rooming house. CBJ 49.80.120 defines boardinghouse and rooming house as follows:

Boarding and rooming house mean a dwelling in which more than two bedrooms are used for commercial lodging provided by the owner or operator who lives on site. The term "boarding house and rooming house" includes houses offering bed and breakfast.

I conclude that Haven House is not a single family residence per CBJ 49.80.120 because the use is a boardinghouse and rooming house or is more characteristic of a boardinghouse and rooming house. I find the following factors distinguish Haven House from a single family residence: (1) a house manager lives onsite and provides services in exchange for rent; (2) two part-time co-directors live offsite and come onsite daily to provide services in the home; (3) all nine of the clients pay rent of \$550/month; (4) the clients will be recently released from prison and most will be on probation or parole; (5) most, if not all, of the clients will be under the supervision of probation or parole officers; and (6) despite allowing the clients to stay up to two years, Haven House may actually be a transient structure because there are no minimum stay requirements and clients will be evicted for violating the client agreement. At no point has CDD adversely distinguished Haven House based on the actual or potential likelihood of any of its clients having a disability or handicap as protected by 42 U.S.C. 3602 (Fair Housing Act) or by 42 U.S.C. 12101 (Americans with Disability Act).

If the Board of Adjustment decides Haven House is similar to a boardinghouse and rooming house, an application for a conditional use permit can then be applied for and processed. The conditional use permit will be considered by the Planning Commission, after a public hearing. Alternatively, if the Board of Adjustment decides Haven House is more similar to a use that does not require a conditional use permit, then the underlying building permit application could be processed accordingly.

The CDD often hosts neighborhood meetings early in the conditional use permit process so that interested neighbors and other members of the public have an opportunity to learn about the project and the conditional use permit process. Both the "use not listed" and the conditional use decisions are appealable decisions.

The Director's Decision issued January 24, 2014, is rescinded. This Director's Decision is appealable pursuant to CBJ 49.20.110.

Please contact me at 586-0757 if you have any questions or would like to discuss this further.

Sincerely,

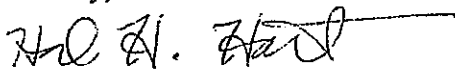

Hal Hart, AICP
Director

EXHIBIT 1, PAGE 2 of 2

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

Reply 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)
_____)

**REPLY REGARDING TALL TIMBERS NEIGHBORHOOD
ASSOCIATION RIGHT TO APPEAL**

The Community Development Department (CDD) and Haven House oppositions to Tall Timbers Neighborhood Association’s right to appeal fail for the following reasons.

1. Finality is not at issue. Whether the Director’s March 18, 2014 decision is a final decision that may be appealed to the Planning Commission is not at issue. First, the Director determined in his March 18, 2014 decision (herein Decision) that the Decision was appealable: “The Director’s Decision is appealable pursuant to CBJ 49.20.110”. The CDD did not appeal the Director’s determination that the decision was appealable so whether the Decision was appealable is not at issue here. Second, the Planning Commission and the Presiding Officer directed that the issues to be resolved before the Tall Timbers appeal could be accepted were whether Tall Timbers was aggrieved and had legal standing to file the appeal. Those issues do not involve whether the Director’s Decision was final for purposes of appeal, hence they are not at issue. Third, Code

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49.20.110 does not require finality. Instead, it states that “review by the commission of a decision of the director, may be requested by filing a notice of appeal . . .” Nothing in Code 49.20.110 states that a Decision by the Director must be final to be appealable, nor does it state that Code 01.50 (which requires finality for appeals to the Assembly) applies to appeals from the Director to the Planning Commission. Code 01.50.020 does not apply to appeals from the director to the Planning Commission because that Code 01.50.020 only applies to appeals to the Assembly or appeals which the Code, Charter or Assembly resolution provide Code 01.50 applies. Neither is the case in this appeal from the Director’s Decision to the Planning Commission. Fourth, even if Code 01.50.020 applied, it provides finality does not include recommendations, advise or requests for action. Here the Director reached final conclusions about Haven House use and permit request, hence his Decision was final. See Section 3 below.

2. Tall Timbers is an unincorporated association with the right to sue and be sued. As a long standing unincorporated association, Tall Timbers has the right to sue and be sued. Civil Rule 17(c). As a person defined by City Charter and Code, Tall Timbers may appeal the Director’s Decision. Charter section 15.14(i) (“person” extends and applies to associations); Code 01.15.010; AS 01.10.060(8). As a neighborhood association recognized by the City with the right to sue and be sued, it has the right to participate in this appeal.¹

¹ The purpose, in relevant part, of the neighborhood association ordinance is to provide a means of citizen participation in local government decisions. The functions of

3. **Tall Timbers is both aggrieved by and adverse to the Director's Decision.** As set out in Tall Timbers' opening memorandum, it has the right to appeal because it is a proper party to address the faults of a the Director's Decision. As set out in Tall Timber's opening Memorandum (pages 4-5), the Alaska Supreme Court required adversity for standing, meaning Tall Timbers should be a proper party to challenge the decision. Tall Timbers is a proper party as it is organized to make the neighborhood safer and address neighborhood concerns.

It is plain on the face of Code 49.20.110(a) that aggrieved person applies to determine who may appear before the Commission to assert that the appeal does not involve minor or routine issues and so must be heard, and that the Code section does not specify that only a person aggrieved may prosecute the appeal, once the appeal is accepted. There is no legislative history that contradicts the plain meaning of the ordinance. Tall Timbers appeared thru Mr. Hubert to specify its position. Mr. Hubert, a lawyer, specified he was not the legal representative of Tall Timbers, but that did not mean he was not presenting Tall Timber's views.²

neighborhood associations include to review and comments on actions which may significantly affect the neighborhood, and propose action upon issues affecting the livability of the neighborhood. Code Section 11.35.030(a) 3 and 7.

² Minutes of May 13, 2014 Planning Commission meeting page 17: "Dan Hubert said that he is a member of the Tall Timbers Neighborhood Association, but that he is not the legal representative. . . . He said that Tall Timbers disagrees with the staff recommendation that the parties submit briefings on their reasons for appeal."

CDD claims that adversity is not the standard for determining if Tall Timbers may appeal because AS 29.40.050 and AS 29.040.060, as interpreted by *Earth Movers v. North Star Borough*, 865 P.2d 74 (Ak 1993), and *Griswold v. City of Homer*, 252 P.2d 1020(Ak 2011), requires that Tall Timbers be an aggrieved person as defined in those cases; and CDD and Haven House claim Tall Timbers is not aggrieved. Because the legislature chose not to impose the requirements of AS 29.40.050 and AS 29.040.060 on home rule municipalities such as the City and Borough of Juneau, the City was free to and did create its own system of appeals unrestricted by said statutes³, so the City's appeal system and whether Tall Timbers may appeal are not defined by AS 29.40.050 and AS 29.040.060 as interpreted by *Earth Movers* and *Griswold*.⁴

³ For decisions of the Director, the Code creates three levels of appeal, from the Director to the Commission, from the Commission to the Assembly, and from the Assembly to the Superior Court. Only the appeal from the Director to the Commission indicates an aggrieved person may appear and explain why the Commission should hear the appeal. The appeal from the Commission to the Assembly is of right. Code 49.20.120. The appeal from the Assembly to the Superior Court "may be had by filing a notice of appeal in accordance with the applicable rules of court." Code 01.50.190. The Rules Of Appellate Procedure, Rules 204(b) and 601, addressing notices of appeal, do not limit appeals to a person aggrieved. Accordingly, the City has chosen to exercise the authority granted to it by the legislature when the legislature did not make home rule municipalities subject to AS 29.40.050 and.060. With that unrestricted authority, the City chose to create its own system of appeals independent from and unrestricted by AS 29.40.050 and AS 29.40.060. Nothing in the Code or its legislative history indicates that the Assembly in enacting its own system of appeals determined that an "aggrieved person", for purposes of appeals from the Director to the Commission, would be governed by the AS 29.40.050 and AS 29.40.060 and the Alaska Supreme Court's interpretation thereof.

⁴ *Earth Movers* and *Griswold* did not involve home rule municipalities, instead involving municipalities to which AS 29.40.050 and AS 29.40.060 applied.

The repealed section of Title 49 referenced by the CDD (Code 49.25.806) (specifying appeals be by aggrieved persons and tax payers) applied only to appeals from the board of adjustments to the Assembly. It did not apply to appeals from the Director to the Planning Commission. Because repealed AS 49.25.806 relates to a different matter (appeals from the Board of Adjustment to the Assembly), it has no bearing in determining whether Tall Timbers is aggrieved for purposes of appealing the Director's Decision. That repealed AS 49.25.806 specified that appeals to the Assembly may be taken by aggrieved persons, tax payers, etc. does not mean that appeals to the Planning Commission from the Director pursuant to present Code 49.20.110(a) may only be taken by persons aggrieved as defined in AS 29.40.050 and AS 29.40.060 and interpreted by *Griswold* and *Earth Movers*, nor does the repealed 49.25.806 mean appeals under present 49.20.110(a) cannot be taken by persons adverse to the Decision.

Simply because no permit has been issued or denied, does not mean that Tall Timbers is not aggrieved or this appeal is premature or that the Director's Decision is not final.⁵ Without the Director's Decision, Haven House was denied

⁵ Code 49.20.110(a) does not require that the Director's Decision be final to be appealable. Code 01.50.020 provides appeals to the Assembly must be final, but does not address appeals from the Director to the Commission. Further, even if Code 01.50.020 applied to impose finality, the Director's Decision is final because it does not recommend, advise or request an action, but instead finally resolves the various issues addressed in the Decision specifically that the Director's January Decision refusing a permit to Haven House is reversed, and specifying that given its proposed use, Haven House may proceed to secure a permit.

a permit for its proposed use. With the Director's Decision, it now can secure the permit. The Director's Decision made the following definitive determinations. First, Title 49 is unenforceable for Half Way Houses and Group Homes, so those provisions do not apply to Haven House. Second, the proposed use for Haven House is a "use not listed" as defined by CBJ 49.20.320 so to determine if Haven House's use is permitted in the D5 zone, it must apply to CDD pursuant to Code 49.20.320. Third, the Director concluded the Haven House proposed use was a boardinghouse and rooming house or is currently most similar to those uses. Fourth, the Director determined that Haven House's use is not a single family residence. Fifth, if Haven House's use is determined by the board of adjustments to be a use similar to boardinghouse and rooming house, it can apply for a conditional use permit, otherwise the underlying building permit will be processed accordingly, so apparently either way, Haven House gets a permit. The Director has interpreted the ordinance in a manner that directly contradicts his prior January, 2014 Decision. The effect of the Decision is to allow Haven House to proceed to secure a permit. Had the Director not reversed his January, 2014 Decision, this matter would be over and Haven House could not proceed to secure a permit. In effect, the Director has created a process by which haven House can get a permit, while the January Decision denied the permit outright. Without the Decision, Haven House would be unable to proceed with its use, thus protecting

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the neighborhood from a deleterious use. The appeal here is not premature given the conclusions reached in the Decision.

Even if AS 29.40.050 and AS 29.40.060 and Griswold and Earth Movers applied, Tall Timbers is aggrieved because its purpose falls within the zone of interest that zoning is meant to protect, to preserve neighborhoods from deleterious uses. As Earth Movers recognized, not only neighbors, but “others” whose interests relate to the purpose of the zoning ordinance have standing. One of those “others” is a neighborhood association such as Tall Timbers seeking to protect and preserve the neighborhood from deleterious uses.

Given the situation created by the Decision, and Tall Timber’s and the individual appellants’ purpose to prevent a use deleterious to the neighborhood, Tall Timbers and its members are aggrieved persons and adverse to the decision of the Director.

4. Haven House and the CDD have caused the delay in resolving this situation. The Planning Commission and the Presiding Officer have already resolved the process to be used in this case. First, resolve the Tall Timber’s right to appeal, and only then address the merits of the Director’s Decision. The Presiding Officer has directed briefing only on whether Tall Timbers is an aggrieved person with a right to appeal. Hence Haven House’s briefing seeking to change the process to combine the use not listed process with this appeal is

immaterial because it does not address the issues that the Presiding Officer directed be addressed.

Haven House brought about its rent predicament itself by entering into the lease before it got the permit. It knew or should have known it needed a permit. Ignorance of the law is no excuse. The Commission has no duty to resolve a problem created by Haven House's own actions.

CDD and Haven House have brought about the very delay about which they complain. But for their challenge of Tall Timber's right to appeal, the merits of this appeal could have been well on the way to resolution.

Given the challenge to Tall Timber's appeal, the Commission must honor its own order and requirements of the City Code which provides for resolution of Tall Timber's right to appeal followed by appeals to the Assembly and Superior Court if there is dissatisfaction with the Commission's decision. Regardless of the resolution of the challenge to Tall Timber's right to appeal, the Commission has to resolve the merits of the individual appellants' appeal of the Director's Decision. Of course, that resolution may also be appealed to the Assembly and Superior Court.

Because resolution of the merits of the Director's Decision may well lead to the conclusion that Haven House has no right to have its use occur in the D5 zone, it is a waste of the time, money, resources and efforts of the Commission,

Assembly, Tall Timbers, and individual appellants to move forward with the use not listed or conditional use permit processes, until the Tall Timbers involvement is resolved as well as the merits of the appeal of the Director's Decision.


In any event, the dates suggested by Haven House for combined proceedings (August 26 or September 9) cannot be met because Tall Timber's counsel has a long standing commitment to be out of the office and country from August 25 to October 1.

If CDD and Haven House want to expedite matters, they can simply drop their objections to Tall Timber's right to appeal the Director's Decision, so that the merits may be addressed.

DATED this July _____ § _____, 2014, at Juneau, Alaska.

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CERTIFICATION

I HEREBY CERTIFY that on July 9, 2014, a copy of the foregoing of the foregoing was emailed to:

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