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

NOTICE OF DECISION

I. Introduction

Tall Timbers Neighborhood Association (TTNA) and 28 individuals[1] filed a Notice of Appeal, challenging a March 18, 2014 letter of decision ("Decision") from the CDD Director to Haven House, Inc., concerning Haven House's proposed transitional housing project for women coming out of prison. The CBJ Planning Commission ("PC") considered the Notice of Appeal at its regular meeting May 13, 2014, and neither accepted nor rejected the appeal. Instead it ordered briefing on the preliminary issue of TTNA's standing to appeal the subject Decision.

On July 22, 2014 the PC heard oral argument from TTNA, Haven House and the CDD, by and through their respective counsel on:

> Whether the TTNA is an aggrieved person that may appeal the CDD Director's March 18, 2014 Decision.
>
> Whether TTNA has the legal standing to file the appeal.

II. Summary Statement of Decision

[1] TTNA and all 28 individuals are represented by the same attorney.

Having considered the parties' extensive briefing and oral argument, the PC concludes that TTNA does not have the right to appeal the Director's Decision, because it is not an "aggrieved person" and cannot be an "aggrieved person," unless and until a permit is actually issued or use authorized that would allow the Haven House project to proceed with its intended use. Because the only "aggrieved person" at this juncture is Haven House, the TTNA legal status/standing issue is moot and not relevant to the immediate proceeding. The PC notes that TTNA adopted its bylaws *after* it filed its Notice of Appeal, thereby raising a question as to its legal entity status at the time of filing, however, the parties appeared to concede at the hearing that TTNA now exists as a legal entity.[2]

III. Procedural History and the Director's March 18, 2014 Decision

The merits of the underlying land use matters are not before the PC at this time, however, a procedural overview is included as helpful framework to this Notice of Decision. In December of 2013, Haven House applied for a change of use from a single family to a transitional group home for its residential property on Malissa Drive. In a January 24, 2014 letter, the Director responded that Haven House's project did not qualify as a "group home" and that it "best fit the definition of a halfway house," which is not allowed where the property is located. [3] The letter did not indicate whether the Director's determination was appealable but invited questions or further discussion. Haven House filed a Notice of Appeal of the January 24 letter, and submitted additional information to the Director.[4]

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[2] TTNA's legal existence does not mean that it represents a majority, or any particular percentage, of the Tall Timbers neighborhood residents.

[3] See Regular PC Meeting Agenda for May 13, 2013, Staff Report for APL2014 0002 and APL2014 0004, Attachment 7.

[4] *Id.* at Attachment 6.

The March 18, 2014 Director letter that is the subject of TTNA's Notice of Appeal begins by thanking Haven House for "providing requested additional information . . . [t]hat . . . allowed [CDD] . . . to better understand how Haven House intends to operate."[5] The letter informs Haven House that based on legal guidance and the additional information received from Haven House, the Director has determined that the group home and halfway house provisions in CBJ Code are unenforceable against Haven House, and that its proposed use cannot be classified as either a halfway house or a group home. The Director then concludes the proposed use is a "use not listed," which will require an application and public hearing process as set out in CBJ 49.20.320.

In the March 18, 2014 letter, the Director concluded that the Haven House is not a single family residence and stated that the proposed use is or is most similar to a boarding house or rooming house. The letter indicates that "[t]he Director's Decision issued January 24, 2014, is rescinded . . . [and that the present decision] is appealable pursuant to CBJ 49.20.110.

Both Haven House and TTNA filed Notices of Appeal with respect to the Director's March 18, 2014 letter. Haven House also proceeded to apply for a permit as a use not listed under CBJ 49.20.320. The Haven House appeal was accepted by the PC, but subsequently stayed at the request of the Appellant. As indicated in the Introduction, no action was taken to accept or reject the TTNA appeal, pending this Notice of Decision.

IV. Pertinent CBJ Code Provisions

49.20.110 Appeals to the planning commission.

[5] *Id.* at Attachment 2 and 3 (duplicate copies).

(a) 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 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 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.
. . .

49.25.300 Determining uses.

(a) (1) Listed uses. There is adopted the table of permissible uses, table 49.25.300. The uses permitted in a zoning area shall be determined through the table of permissible uses by locating the intersection of a horizontal, or use axis and a vertical, or zone axis . . .

(2) Unlisted uses. The allowability of a use not listed shall be determined pursuant to section 49.20.320

49.20.320 Use not listed.

After public notice and a hearing, the board 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.

V. Findings and Conclusions

CBJ 49.20.110 does not expressly state who can file an appeal of a director's decision, but it provides that "any ***aggrieved person*** may appear and explain to the commission why it should hear the appeal." CBJ 49.20.110(a) (emphasis added.) The PC

believes it would be illogical to interpret this ordinance as requiring the higher threshold of "aggrieved person" status to appear to tell the PC why it should accept an appeal, while setting a lower threshold of mere "adversity" to file and prosecute an appeal.

The PC therefore concludes that one must be an "aggrieved person" to appeal a decision of the CDD Director, under CBJ 49.20.110(a). We further find TTNA's argument that suggests one could become "aggrieved" simply by such an initial appearance to testify before the PC, untenable. See TTNA Memorandum at p. 3.

Our reading of CBJ 49.20.110(a) gives meaning to the "aggrieved person" reference in the ordinance and is in keeping with general land use and zoning review practice.[6] We do not believe it was the intent of the Assembly to extend an indiscriminate, blanket right of appeal to everyone who disagrees with a determination of the Director in a land use matter. The "aggrieved person" standard strikes a proper balance that protects property rights and interests and prevents excessive litigation and undue delay. It requires analysis of both the interests at stake and the finality of determinations being adjudicated.

That a particular decision or determination is "appealable" does not mean that it is appealable by anyone, without regard to the person or entity's relation to or interest in the underlying determination, ie "aggrieved" status. For instance, when the Director, who has the jurisdictional authority to allow a requested use or issue a requested permit, denies the use or permit, the *applicant* is clearly an "aggrieved person." The applicant has a direct stake and interest in obtaining the permit or the authorization of the use and the Director's

[6] See discussion in *Earth Movers of Fairbanks v Fairbanks North Star Borough*, 865 P.2d 741, 743-45 (Alaska 1993).

determination is final, unless timely appealed. However, we do not agree that the denial of a permit or proposed use creates appeal rights in third parties who have no legal right or interest in the permit or use application. With respect to such third parties (TTNA, as well as individuals), the permit or use denial merely continues the status quo. One cannot be "adversely affected" or "aggrieved" by the denial of something they never asked for in the first place.

We find that the Director's determination that Haven House could not operate as a single family residence or group home were final determinations that only Haven House, as the aggrieved person, could appeal pursuant to CBJ 49.20.110. Unless and until Haven House receives authorization to proceed with a proposed use of its property, there can be no "aggrieved persons" other than Haven House, with respect to that proposed use.

This is in contrast to the Director's determination that Haven House could *apply* for a permit through the use not listed process provided in CBJ 49.20.320. Because with respect to that determination, there is truly *no* aggrieved person unless and until that public hearing process is followed and a Board of Adjustment decision, if not a PC decision on a potential conditional use permit application, is reached. Unless and until a permit is issued or denied there is no actual case or controversy with respect to anyone.

TTNA has urged the PC to give the Tall Timbers residents and neighbors the opportunity to tell their side of the story, by accepting its appeal. Haven House joins in urging the Commission to hear all of the arguments for and against Haven House's proposed use of its property--but doing so through the use not listed hearing process, under CBJ 49.20.320. Haven House argues that a piecemeal approach to the issues causes unnecessary

litigation and detrimental delay to Haven House that can be avoided and resolved through the use not listed process.

We agree that through the public hearing process, the PC sitting as the Board of Adjustment, can hear from all sides and can consider the constitutional challenges and competing arguments as to why or why not Haven House should be allowed to operate as a group home, a halfway house, a single family residence, or a boardinghouse or rooming house on the Malissa Drive property. In addition, the PC finds that the use not listed public hearing process provides the best opportunity and the proper forum for TTNA, Tall Timber residents and the public to be heard with respect to Haven House's proposed use of its property.

Moreover, no unfair prejudice will result from allowing Haven House to pursue the use not listed permit process since it will allow for a full public hearing on the proposed use and the issues raised in TTNA's appeal. Haven House will either obtain a permit or use authorization or it will not. Either way a final agency decision will be reached, which final decision in an actual case will be subject to challenge by any "aggrieved person."

The Notice of Appeal filed jointly by TTNA and its individual members, is hereby rejected and dismissed in its entirety. CDD is directed to complete the review and processing of Haven House's use not listed permit application as soon as possible, in order to schedule and hold the public hearing under CBJ 49.20.320, prior to August 25, 2014, if possible, as a courtesy to accommodate Mr. Spitzfaden's travel plans.

This Notice of Decision and the findings in it do not constitute a final agency decision in an actual case or controversy that is appealable under CBJ 49.20.120 and CBJ

01.50. However, this decision and its findings may be challenged in the context of a timely appeal of the final agency decision that will ultimately be issued, with respect to Haven House's proposed use of its Malissa Drive property.

Dated this 31 day of July, 2014.

Nicole Grewe

Presiding Officer Nicole Grewe

**Commissioner Satre, dissenting in part and concurring in part, disagrees with the PC's finding and conclusion regarding TTNA's status as an "aggrieved person," but concurs with the PC's conclusion and order that Haven House's use/permit application be reviewed through the use not listed process set out in CBJ 49.20.320.

Certificate of Service
I hereby certify that on July ____, 2014, a true and correct copy of the foregoing document was served on the following via Electronic Mail as follows:

Attorney for Haven House:	Mary Alice McKeen	ottokeen@gmail.com
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