CITY/BOROUGH OF JUNEAU
ALASKA'S CAPITAL CITY

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

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 say 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

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

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[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
Attorney for Tall Timbers:	Robert Spitzfaden	spitz@gci.net
Attorney for CDD:	Robert Palmer	Robert_Palmer@ci.juneau.ak.us
Attorney for Planning Commission:	Jane Sebens	Jane_Sebens@ci.juneau.ak.us

Courtesy Copy to CDD Personnel:
Holly Kveum Holly_Kveum@ci.juneau.ak.us
Brenwynne Jenkins Brenwynne_Jenkins@ci.juneau.ak.us

Litigation and Civil Support Assistant

CITY/BOROUGH OF JUNEAU
ALASKA'S CAPITAL CITY

Law Department

MEMORANDUM

DATE: August 14, 2014
TO: Planning Commission
FROM: Robert H. Palmer, III
Assistant Municipal Attorney
SUBJECT: Enforceability of Halfway House and Group Home provisions

This memorandum provides the legislative history and legal basis for why the halfway house and group home provisions in Title 49 are likely unenforceable. This memorandum does not preclude the Planning Commission ("Commission") from making a different conclusion. This memorandum also includes supplemental points of authority that show how courts have approached similar cases.

The source of the enforceability concerns are based on the current definitions of halfway house and group home as applied through the table of permissible uses ("TPU"). Those definitions and the TPU changed in 2010. Notably, if Haven House had applied prior to 2010, it would have likely qualified for an allowable use permit to operate as intended at 3202 Malissa Drive because a halfway house or group home was a permitted use in a D-5 zone from at least 1987 until 2010.[1]

I. LEGISLATIVE HISTORY

A. 1987 to 2010: Regulation of group homes and halfway houses

In 1987, Title 49 was completely repealed and reenacted.[2] Since 1987 and until 2010, the following definitions and TPU applied to group homes and halfway houses.

[1] Assembly Meeting No. 2010-10, Minutes at 5 (April 12, 2010) (describing that the Commission only reviewed an allowable use permit to impose conditions, but the Commission could not deny the permit).

[2] Ord. 87-49 § 2.

1987-1993 Group Home Definition: "A residential use such as a rooming house or dwelling for persons seeking rehabilitation or recovery from any physical, mental, emotional, or legal disability, or any combination thereof, in a family setting including a child care home, halfway house, handicapped or infirm home, intermediate care home and nursing care home."[3]

1993-2010 Group Home Definition: "'Group home means a residential use such as a rooming house or dwelling for persons seeking rehabilitation or recovery from any physical, mental, emotional, or legal disability, or any combination thereof, in a family setting including a child care ~~home~~ residence, halfway house, ~~handicapped or infirm~~ home for persons with disabilities, intermediate care home and nursing care home.[4]

1987-2010 Halfway House Definition: "'Halfway House' means a single-family dwelling for not more than nine persons who have demonstrated a tendency toward alcoholism, drug abuse, mental illness, or antisocial or criminal conduct, together with not more than two persons providing supervision and other services to such persons, all of whom live together as a single housekeeping unit."[5]

Figure 1: 1987-2010 Table of Permissible Uses[6]

Code	Use description	RR	D1	D3	D5	D10	D15	D18	LC	GC	MU	WC	WCO	WCR	I
1.400	Group Homes [D]		2	2	2	2	2	2	2	2					
1.450	[not used]														
7.400	Institutions (other than halfway houses) where mentally ill persons are confined								2	2	2,3				
7.500	Penal or correctional facilities	3	3	3	3	3	3	3	3	3	3				3

Approval Type 2: "Allowable Use Permit – Requires Planning Commission Approval"[7]

[3] Ord. 87-49 at 235; Ord. 93-46 at 2.

[4] Ord. 93-46 at 2; Ord. 2010-22 Line Item Changes at 8.

[5] Ord. 87-49 at 236; Ord. 2010-22 Line Item Changes at 8.

[6] Ord. 87-49 at 66 and 69; Ord. 95-09 (same); Ord. 2010-22 Line Item Changes Ex. A at 1 and 6.

[7] Ord. 87-49 at 66.

> Approval Type 2,3: "Allowable Use Permit required if Minor Development, Conditional Use permit required if Major Development"[8]
>
> Note D: "**This category includes** homes for the handicapped or infirm nursing care, **halfway houses**, and child care homes."[9] (emphasis added)

Importantly, from 1987 to 2010, group homes and halfway houses were treated identically and were allowed in every residential zone except RR. In 2010, the definitions and the TPU changed.

B. 2010 to present: Regulation of group homes and halfway houses

Relevant to group homes and halfway houses, Title 49 was revised in 2010 to remedy concerns how the group homes definition and TPU restrictions discriminated against federally protected individuals seeking group housing.[10]

In 2010, the legislative history describes that the Commission and the Assembly were focused on remedying group home discrimination concerns. The Commission minutes regarding Ord. 2010-22 do not provide any facts illuminating the reason to restrict halfway houses in the TPU.[11] On April 7, 2010, before the Assembly and Planning Commission, the Planning Manager provided a memorandum addressing the changes to group homes and halfway houses within the code.[12] As to these changes, Mr. Chaney wrote:

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[8] *Id.*

[9] Ord. 87-49 at 73; Ord. 93-46 (changing child care homes to child care residences); Ord. 2010-22 Line Item Changes Ex. A at 13 (deleting note D and changing to Reserved).

[10] *E.g.*, Memo from Greg Chaney, Planning Manager, to the Planning Commission, January 26, 2010 ("Further research has revealed that people who require the services of a Group Home as proposed in the definition above are a federally protected class and may not be subject to any greater restriction than is imposed on single-family residences. Therefore, staff proposes to list Group Homes with the same restrictions as single-family residences. The advantage to keeping a distinct definition for Group Homes is that these facilities will be clearly distinguished from Halfway Houses and will have a defined maximum number of clients.")

[11] Planning Commission Minutes at 21 (February 23, 2010); Ord. 2010-22.

[12] Memo from Greg Chaney, Planning Manager, to the Assembly and Planning Commission Committee of the Whole, Re: TXT2009-00004 (April 7, 2010).

> The definition of *Group Homes* is proposed to be modified by removing *Halfway Houses* from the definition of *Group Homes*. Now *Halfway Houses* for people serving a sentence for a criminal act would be regulated separately from living situations for people with disabilities in a family setting with caregivers who live on site.
>
> People who require the services of a *Group Home* as proposed in the revised definition above are a federally protected class and may not be subject to any greater restriction than is imposed on single-family residences. Therefore, staff proposes to list *Group Homes* with the same restrictions as single-family residences. The advantage of keeping a distinct definition for *Group Homes* is that these facilities will be clearly distinguished from *Halfway Houses* and will have a defined maximum number of clients.
>
> On line 1.400 superscript note [D] appears to be superfluous since the term "*Group Homes*" is more clearly addressed in the Definitions section of the Land Use Code. Therefore Note [D] is to be removed from the Table of Permissible Uses.[13]

Mr. Chaney's memorandum focused on changing the definitions because of concerns about discriminating against those with disabilities.[14] At hearings on February 23, 2010, before the Planning Commission and April 12, 2010, before the Assembly, the reason and effect of restricting halfway houses to only four or five zones was not discussed. The changes to halfway houses and group homes were only passingly discussed.[15] Regardless, Ord. 2010-22 passed.

Ordinance 2010-22 created the definitions and TPU that are currently found in Title 49:

> **2010-present Group Home Definition: "***Group home* means a residential use such as a roominghouse or dwelling for at least six but not more than nine persons of any age seeking extended healthcare, rehabilitation or recovery from any physical, mental, or emotional~~, or legal~~ disability, or any combination thereof, in a family setting~~, including a child care residence, halfway house, home for persons with disabilities, intermediate~~

[13] *Id.*

[14] *Supra* at note 10. Mr. Chaney's concerns appropriately reflected how the law had changed regarding zoning of suspect and quasi suspect classes of people, like housing former mental patients. *E.g., J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983) (reversing a denial of a special use permit for a group home for former mental patients in a residential zone).

[15] *Supra* n. 1 at 5 (Assembly Minutes); Planning Commission Minutes at 21 (February 23, 2010).

~~care home and nursing care home~~. Residents must not be serving a sentence for a criminal act. One to two supervisors/caregivers must live on site. Residents and supervisors/caregivers live together as a single housekeeping unit. Additional non-residential support may be provided but shall not constitute the primary method of supervision or care supplied. Similar uses with five residents or less shall be regulated as single-family residences. Uses with ten or more residents shall be regulated as institutional residential or healthcare facilities. *"*[16]

2010-present Halfway House Definition: "*Halfway house* means a single-family dwelling for not more than nine persons over the age of 12, together with not more than two persons providing supervision and other services to such persons, all of whom live together as a single housekeeping unit. Residents may be serving a sentence for a criminal act. Uses with ten or more residents shall be regulated as institutional correction facilities."[17]

Figure 2: 2010-Present Table of Permissible Uses[18]

Code	Use description	RR	D1	D3	D5	D10 SF	D10	D15	D18	LC	GC	MU	MU2	WC	WI	I
1.400	Group Homes	1	1	1	1	1	1	1	1	1	1					
1.450	Halfway Houses	3								3	3	3	3			
1.610	Rooming, boarding…	3	3	3	3	3	1,3	1,3	1,3	1,3	1,3	1	1	3^N		
7.400	Halfway Houses									3	3	3	3			
7.500	Correctional Facilities	3	3	3	3	3	3	3	3	3	3	3	3			3

Approval Type 1: Indicates the use requires Department approval.[19]

Approval Type 1,3: Indicates uses with minor developments require Department approval and uses with major developments require a conditional use permit from the Commission.[20]

Approval Type 3: Indicates the use requires a conditional use permit from the Commission.[21]

[16] CBJ 49.80.120; Ord. 2010-22; Ord. 2010-22 Line Item Changes at 8.

[17] CBJ 49.80.120; Ord. 2010-22; Ord. 2010-22 Line Item Changes at 8.

[18] CBJ 49.25.300 TPU; Ord. 2010-22; Ord. 2010-22 Line Item Changes Ex. A at 1 and 6.

[19] CBJ 49.25.300(b)(1).

[20] CBJ 49.25.300(c).

[21] CBJ 49.25.300(b)(3).

Importantly Ord. 2010-22 caused small halfway houses—having up to nine residents and two supervisors—to be treated differently than large halfway houses. Specifically, small halfway houses were designated in two places, 1.450 and 7.400, which restricted them to five zoning districts. However, large halfway houses—having ten or more residents—were treated like 7.500 Correctional Facilities and allowed in nearly every zoning district with a conditional use permit. Also neither Ord. 2010-22 nor existing code defines "serving a sentence for a criminal act" or "institutional correction facilities."

Thus, multiple inconsistencies and vagueness resulted from Ord. 2010-22 that led the Director to conclude on March 18, 2014, as follows:

> 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 [Permissible] 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. [22]

[22] Letter from Hal Hart, Director of Community Development, to Pamela Finley, Attorney for Haven House Inc., March 18, 2014. ("March 18 Decision")

II. DISCUSSION

Zoning, especially regarding group homes and halfway houses, is regulated and limited by numerous laws.[23] While specific sources of authority may have different standards of review or require a different analysis, every zoning restriction in Alaska must at least pass the "fair and substantial" standard, which is the lowest standard for a substantive due process or equal protection claim.[24] Because the Director concluded the halfway house and group home definitions as applied through the TPU did not likely meet the "fair and substantial" standard, an analysis of other sources of authority was not warranted with the March 18 Decision.[25]

A. Fair and Substantial Standard of Review

The City and Borough of Juneau ("CBJ") may impose zoning restrictions so long as the restrictions are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[26] While zoning restrictions are presumed to be enforceable, the zoning restriction must have a fair and substantial relationship to a legitimate government purpose.[27] Thus, without a fair and substantial basis between the zoning restriction and any legitimate government purpose, the zoning restriction is arbitrary and unenforceable.[28]

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[23] *E.g.*, CBJ Title 49; 42 U.S.C. 12101 *et seq.* (Americans with Disability Act); 42 U.S.C. 3602 *et seq.* (Fair Housing Act).

[24] *Luper v. City of Wasilla*, 215 P.3d 342, 349 (Alaska 2009) (describing that "Alaska's standard is more protective than the federal standard because it requires that the relationship be 'fair and substantial' rather than merely 'rational.").

[25] *Supra* at 22.

[26] *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1297-98 (Alaska 1982).

[27] *Luper v. City of Wasilla*, 215 P.3d 342, 348 (Alaska 2009) ("When a zoning ordinance infringes on property rights we apply the minimum level of scrutiny, under which the provision must bear a "fair and substantial" relationship to a "legitimate" government purpose."); *Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996).

[28] *Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996) (describing that "a legislative body's zoning decision violates substantive due process if it has no reasonable relationship to a legitimate government purpose.");

1. The current halfway house and group home definitions as applied through the TPU are likely unenforceable.

The CBJ would likely have a difficult time explaining that a rational basis, let alone a fair and substantial basis, exists to prohibit halfway houses in all residential zones.

The TPU was changed in 2010 to conform to legal requirements to regulate homes for federally protected people just like single family residences are regulated. In the process, the definition and TPU for halfway houses changed. The legislative history of group homes and halfway houses indicates both were allowed in all residential zones (D1 – D18) and both commercial zones (LC & GC).

In the 2010 amendments, the changes focused on resolving discrimination concerns for group homes, but the amendments did not consider the ramifications to halfway houses. The 2010 amendments restricted small halfway houses to five zones (RR, LC, GC, MU, MU2).[29] This legislative history neglects to describe any facts or rationale to provide a justification for the more restrictive treatment of halfway houses. Thus, because halfway houses were allowed in more zones and no justification has been articulated for the restrictive 2010 amendments, there is not likely a fair and substantial basis for the 2010 amendments restricting small halfway houses to only five zones.

Furthermore, the TPU is likely arbitrary because it allows halfway houses with more than nine people in twelve zones (including all residential).[30] But the TPU prohibits halfway houses

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e.g., *J.W. v. City of Tacoma*, 720 F.2d 1126, 1130 (1983) (concluding a zoning ordinance was applied unconstitutionally because it discriminated against former mental patients).

[29] 1.450 Halfway House is allowed in RR, LC, GC, MU, and MU2; 7.400 Halfway House is allowed in LC, GC, MU, and MU2. CBJ 49.25.300 TPU.

[30] 7.500 Correctional Facilities (larger halfway houses per halfway house definition CBJ 49.80.120) are allowed in RR, D-1, D-3, D-5, D-10SF, D-10, D-15, D-18, LC, GC, MU, MU2, and I. CBJ 49.25.300 TPU.

with nine or fewer residents to only four or five zones (no residential).[31] Because the TPU allows for more intensive halfway houses in residential zones but prohibits less intensive uses—without describing the standards or justifications—there is likely no "fair and substantial" basis to restrict halfway houses as applied by the TPU.

Given this record, a "fair and substantial" basis may not exist for the disparate treatment of halfway houses in the TPU and the restricted number of zones as compared to the pre-2010 TPU. No traditional zoning basis, like traffic impacts or other reasons have been provided to restrict halfway houses to four or five zones. Additionally, no basis has been outlined for restricting halfway houses more than correctional facilities, where correctional facilities have higher traffic and greater zoning concerns. Lastly, no basis has been provided to restrict the number of zones allowing a halfway house from what had been permitted under the pre-2010 TPU. Without a "fair and substantial" basis for the disparate treatment, especially for small halfway houses, the TPU regarding small halfway houses is not likely enforceable.

To summarize, prior to 2010, group homes and halfway houses were treated the same. In 2010 the definitions of group homes and halfway houses changed. Group homes became more narrowly defined and focused on avoiding discrimination concerns of federally protected people. In the TPU, group homes were then allowed in most zones. With this change, the definition for halfway houses became broader. In the TPU, halfway houses were added in two places: 1.450 and 7.400. Furthermore, halfway houses were allowed in only four or five zones with a conditional use permit; even though prior to the 2010 change halfway houses were allowed in eight zones. Lastly, if the halfway house at issue has ten or more residents, then it would be

[31] 1.450 Halfway House is allowed in RR, LC, GC, MU, and MU2; 7.400 Halfway House is allowed in LC, GC, MU, and MU2. CBJ 49.25.300 TPU.

classified as a correctional facility and be permitted in almost all zones with a conditional use permit. Therefore, the question becomes—post Ord. 2010-22—whether there is a fair and substantial basis to restrict halfway houses, with less than ten residents, to fewer zones than a correctional facility or a group home.

The inconsistencies and concerns as to halfway houses within the code and TPU can be summarized as follows:

1. Halfway houses, prior to 2010, were allowed in eight zoning districts, including D-5, because halfway houses were subsumed in the group home definition.

2. In 2010, small halfway houses were given their own designation in the TPU in two places: 1.450 and 7.400; Large halfway houses were designated in the TPU as 7.500.

3. When halfway houses were added to the TPU in 2010 at 7.400, halfway houses replaced mental institutions without analysis of whether the impacts are different.

4. In 2010, halfway houses were changed from an allowable use permit requirement to a conditional use permit requirement.

5. With the changes in the TPU, halfway houses were allowed in only five zones, when prior to 2010 they had been allowed in eight zones.

6. If the halfway house has more than ten residents under the 2010 amendments, it will be regulated as a correctional facility, and correctional facilities are allowed in twelve zones. TPU at 7.500.

7. Therefore, a halfway house with fewer than ten residents is not permitted in a residential zone but a large halfway house is allowed in a residential zone.

8. The record—in the form of committee minutes and memoranda—does not indicate any basis for the restrictive changes to halfway homes.

Therefore, because the definitions of group home and halfway house and the application of the TPU to those two categories were not likely supported with a "fair and substantial" basis, the two terms should not be relied upon until supporting justification is provided.

2. People on probation or parole are serving a sentence

Similarly, the 2010 amendments did not describe why a sentence prohibition was included in the group home definition. While a justification may be possible to distinguish people on probation or parole from other federally protected people, no justification has been presented to date.[32]

Although the phrase "serving a sentence for a criminal act" is included in both the group home and halfway house definitions, the CBJ code does not define it.[33]

The legislative history describes that a person on parole would be "serving a sentence for a criminal act":

> it is clear that 'parole' may be part of a criminal 'sentence.' The proposed phrase 'Clients must not be serving a sentence **or be on parole** for a criminal act" (emphasis added) is therefore redundant.[34]

In light of that legislative history, the following describes why somebody on parole or probation would be "serving a sentence for a criminal act."

Alaska case law has described a person on probation is still serving a sentence.

> By its very nature and definition probation means and signifies liberty under certain imposed conditions. Its basic purpose is to provide a program which offers an offender the opportunity to rehabilitate himself without confinement. This is to be accomplished under the tutelage of a probation officer and under the continuing power of the court to impose a sentence for his original offense in the event he abuses his opportunity and violates the conditions of probation.[35]

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[32] 2 Rathkopf's The Law of Zoning and Planning § 23:27 (4th Ed.) ("even though a group home may function as an integrated single-housekeeping unit, it is unlikely to be held to constitute a 'functional family' where the purpose of the living arrangement is to provide a transitional or halfway house for rehabilitation of adult convicts, alcoholics, or drug users.")

[33] CBJ 49.80.120 (definitions).

[34] *Supra* at n 10.

[35] *Beckman v. State*, 689 P.2d 500, 503 (Alaska App. 1984).

Parole is quite similar, except parole means the defendant received a sentence greater than two years. If the defendant complies with the correctional facility rules, the parole board can make an individualized determination, conclude the defendant qualifies for good time credit, and release the defendant with conditions of parole.[36] However, like a defendant on probation, a parolee is still serving a sentence because the parolee must comply with the parole conditions.

In summary, a person on probation or parole is still serving a sentence because the person must comply with the conditions imposed for release. Importantly, a defendant who violates conditions while on probation or parole can be further sentenced. Thus, as *Beckman* outlines, probation and parole serve to rehabilitate without confinement, but these defendants are still fundamentally serving criminal sentences. Therefore, the group home definition is likely unenforceable as applied to people who are serving a sentence.

B. Other Considerations for the Planning Commission

1. Federal Statutes

In addition to the fair and substantial standard, zoning restrictions can be preempted by federal law. For example, the Americans with Disability Act prohibits discrimination based on recognized disabilities and local governments must provide reasonable accommodations, which has been interpreted to prohibit zoning restrictions that treat people with a recognized disability differently.[37] Similarly, the Fair Housing Act prohibits discrimination based upon a handicap or familial status.[38] Specific to the context of zoning, the following qualifies as a handicap or disability:

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[36] AS 33.16.010 – 33.16.900.

[37] 42 U.S.C. 12102 *et seq.; e.g., Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999).

[38] 42 U.S.C. 3601-3631; *e.g., Oxford House-C v. City of St. Louis*, 77 F.3d 249, (8th Cir. 1996) (concluding that an eight person limit per group home does not violate the Fair Housing Act).

- Recovering alcoholics and recovering drug addicts[39]
- Past resident of mental institution[40]
- Physical or mental impairment, but current illegal use of a controlled substance is not an impairment[41]

Thus, the Fair Housing Act and the Americans with Disability Act can preempt some local government zoning restrictions.

Although those federal statutes preempt some zoning restrictions, local governments can still impose zoning restrictions that pass the fair and substantial standard and do not discriminate against protected persons.[42] As described below, formerly incarcerated persons—without more—are not a protected class of persons.[43]

2. Neighborhood opposition regarding people on probation or parole.

The law is not clear on what type of zoning restrictions a local government can impose on people on probation or parole. However, a Ninth Circuit Court of Appeals decision, *J.W. v. City of Tacoma*, implies that violent criminal behavior could form the basis for a zoning decision, but speculative neighborhood fear cannot.[44]

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[39] *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 803 (9th Cir. 1994) *aff'd sub nom. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *United States v. S. Mgmt. Corp.*, 955 F.2d 914, 923 (4th Cir. 1992) (former drug addicts and recovering drug addicts are protected under the Fair Housing Act).

[40] *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983).

[41] 42 U.S.C. 3602(h)(3).

[42] *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) ("the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."); *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008) (non-discriminatory zoning regulations can prohibit people protected by the Fair Housing Act on the basis that the tenancy is too short for a single family residential district); 2 Rathkopf's The Law of Zoning and Planning § 23:26 (4th Ed.) (describing that the placement of group homes in residential districts present complex issues and court typically balance the interests of the neighbors, the benefits from locating group homes in residential areas, and any government interests).

[43] *See J.W. v. City of Tacoma*, 720 F.2d 1126, 1129 n. 2 (9th Cir. 1983).

[44] *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983).

In *J.W.*, the court held a zoning ordinance unconstitutional as applied because the denial of a special use permit for a nine-person group home was arbitrary.[45] Specifically, the court evaluated traditional zoning concerns:

> The city's decision to deny Blount the requested permit fails to withstand such analysis. The ordinance prerequisites for issuance of a permit are conceded by the city to be satisfied. The State of Washington has officially concluded that there is a special need for more small, family-like group homes for the mentally ill in residential neighborhoods. It was stipulated below that the Blount house,
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> > both by its external and internal physical characteristics, has the appearance of a single family dwelling. It is a split-level ranch-style house, and its exterior appearance is both similar to and compatible with the surrounding neighborhood. It was originally a single family dwelling and was converted to a group home by adding some bedrooms. The physical alterations necessary for this conversion were done by Mrs. Blount's ex-husband and are in full compliance with the building code of the City of Tacoma.
>
> The city further admits that "[t]he existence of the home does not create any parking problems within the neighborhood, nor has it led to any undue burden on existing utilities, transportation systems, education, police or fire facilities."[46]

The *J.W.* court also addressed whether the former mental institution residents had a history of violent or criminal behavior, which implies that criminal behavior can determine whether a proposed use could be restricted.[47] The *J.W.* court stated that the special use permit was denied "principally because of the heavy opposition of neighbors at the public hearing…"[48] Importantly, the *J.W.* court noted that the City of Tacoma failed to produce any "evidence to

[45] *Id*. at 1131-32 (describing that judicial review was heightened because the decision may have rested on inaccurate and stereotypic fears about former residents of a mental institution).

[46] *Id*. at 1131.

[47] *Id*.

[48] *Id*.

support a blanket assertion that former mental patients as a class are particularly dangerous, disruptive, or otherwise undesirable neighbors. [FN] 2"[49] In footnote 2, the *J.W.* court described that if community fears are substantiated, that could provide a rational basis to restrict people on parole from living in a group home in a residential area:

> Other groups of persons burdened by the Tacoma ordinance, such as parolees, may be situated significantly differently. Although the record before us in this case does not address the issue, it is conceivable that community fears concerning such groups may rest on a sound factual basis. *But see Nicholson v. Connecticut Half-Way House, Inc.*, 153 Conn. 507, 218 A.2d 383, 385-86 (1976) (halfway house for parolees would not be enjoined as nuisance where fears of community residents, although genuinely felt, rested completely on supposition). Each group must, of course, be considered in light of its own peculiar circumstances.[50]

Therefore, speculative neighborhood fear cannot be a basis to impose a zoning restriction, but neighborhood fear based on a sound factual basis may satisfy rational basis review.[51]

[49] *Id*. at 1130.

[50] *Id.* at 1120 at n. 2.

[51] *S. Anchorage Concerned Coal., Inc. v. Coffey*, 862 P.2d 168, 172 (Alaska 1993) ("The recognized rule is that a planning board may always take evidence and testimony from community members into account in making its permitting decisions, but that it may not rely on neighborhood opposition alone as a reason to deny a permit."); *Application of Volunteers of America, Inc.*, 749 P.2d 549, 552 (Oklahoma1988) (perceptions of a pre-release prison halfway house cannot be used to deny a use permit).