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BEFORE THE PLANNING COMMISSION
OF THE CITY AND BOROUGH OF JUNEAU

JUNEAU COOPERATIVE CHRISTIAN MINISTRY, dba THE GLORY HALL, Appellant, vs. CBJ COMMUNITY DEVELOPMENT, Appellee.	APL2021-06 Appeal of: BLD2021-0765 CDD Director's Decision dated December 1, 2021

TGH's Comments on Final Decision

Introduction and Summary

The Glory Hall (TGH) submits these comments in response to the Planning Commission's Final Decision in this appeal, distributed July 21, 2022.[1] At the outset, it is important to state what TGH is *not* doing. TGH is not objecting to the requirement in

[1] The Final Decision is dated June 29, 2022, the day after the Planning Commission's meeting, but the Final Decision was distributed on July 21, 2022. Five working days after July 21, 2022, is July 28, 2022.

the Final Decision that TGH obtain a conditional use permit. In fact, on July 5, 2022, four working days after the Planning Commission meeting on June 28, 2022, when the Commission orally announced its amended decision, TGH submitted an application for a conditional use permit. TGH received a response from CDD on its CUP application on July 22, 2022, when CDD asked for more information. TGH promptly provided it and was informed by CDD on July 27, 2022, that its application was complete.

TGH submits these comments within the deadline for comments on a proposed decision in CBJ 01.50.140(b)(4). Before issuing the Final Decision, the Planning Commission did not give TGH the opportunity to respond to CDD's arguments, did not issue a second proposed decision, and did not give TGH the opportunity to object to the amended decision as a proposed decision. In light of these facts, the Planning Commission should allow TGH to comment on the amended decision as long as TGH submits timely comments within the five-day window in CBJ 01.50.140(b)(4).

Although TGH is willing to apply for a conditional use permit, as required by the Final Decision, TGH wishes to make three points about the Decision: CDD concedes the project does not increase density; the process leading to the Final Decision was unfair in that TGH did not have the opportunity to respond to CDD's objections; and the Decision may have significant consequences, possibly unintended, for other development in mapped hazard areas, namely it appears to prevent any development in mapped hazard areas, except a single family home, without a conditional use permit.

Relevant Procedural History

The Planning Commission distributed a Proposed Decision in this appeal on June 1, 2022. CDD submitted timely objections on June 8, 2022. TGH had no objections to the proposed decision and therefore submitted none. The Planning Commission met on

June 28, 2022 and voted to issue an amended decision. The Planning Commission issued a new decision, a "Final Decision," dated June 29, 2022, and distributed July 21, 2022. The Planning Commission did this without giving TGH an opportunity to respond to CDD's objections and without issuing a new proposed decision.

TGH's only objective is, and always has been, to proceed as expeditiously as possible with this project. TGH began the process by Ms. Lovishchuk contacting a Senior CDD Planner to determine if a conditional use permit was needed or if only a building permit was needed. Ms. Lovishchuk was told a CUP was not needed. Ms. Lovishchuk emailed Edward Quinto with CDD on October 28, 2021. Ms. Lovishchuk identified the planner she had spoken with and stated that the planner had said a CUP was not needed. [R. 4] The record is not clear as to the exact date of TGH's application, but CDD denied the application for a building permit for this project on December 1, 2021 [R. 106 – 107].

CDD denied the application because on the unreasonable and arbitrary conclusion that the proposed conversion of a homeless shelter housing 43 – 53 persons a night to seven small apartments housing 7 – 14 persons would increase the density of the parcel and therefore was not allowed under CBJ 49.70.300(b)(1). CDD's conclusion centered around the definition of "dwelling units" in Title 49. A dwelling unit is defined in CBJ 49.80.120 as "a residential use consisting of a building or portion thereof, providing independent and complete cooking, living, sleeping and toilet facilities for one family." CDD's position was that TGH could not convert the homeless shelter to seven "dwelling units," where the residents would have "independent and complete cooking, living, sleeping and toilet facilities," because the prior residents of the homeless shelter had no "dwelling units," that is, they did not have their own "cooking, living, sleeping and toilet

facilities." The only way TGH was able to prevent CDD from frustrating what is supposed to be a City-wide response to the desperate need for affordable rental housing in Juneau was that the TGH Board maintained its commitment to serve persons in need of housing, TGH staff worked hard to provide information to support the appeal, and TGH found an attorney willing to prosecute the appeal pro bono.[2]

After oral argument on the appeal on May 24, 2022, held before many interested members of the public (in person and virtual), the Planning Commission issued a proposed decision on June 1, 2022, in TGH's favor and at page 4 made two findings:

> 1. CDD acted in error by not incorporating previous engineering work in their analysis under CBJ 49.70.300(a)(5). CBJ Engineering accepted the site specific 1989 R&M Geophysical Hazard Assessment. The assessment established that the Glory Hall was not in a severe hazard zone. The assessment amends the 1987 CBJ hazard maps for this property.
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> 2. The Planning Commission has determined the intent of CBJ 49.70.300 is to provide for the safety of occupants within a structure, regardless of use. As density is not specifically defined in Title 49, according to CBJ 49.20.300, the Planning Commission hereby provides the following interpretation: For the purposes of CBJ 49.70.300(b)(1), the phrase "shall not increase density" shall be interpreted to mean, "shall not increase the total quantity of people in a structure."

The R&M Engineering Report was the basis for the issuance of the conditional use permit that has allowed TGH to operate a shelter on that site for over 30 years.

On June 8, 2022, CDD filed objections to the findings. But in the last two sentences of CDD's Objections, CDD brought up something it had never mentioned in the entire appeal process, namely that the Planning Commission might want to require

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[2] On the housing crisis, see, for example, the recent article on the front page of the Juneau Empire, dated July 8, 2022, "Housing issues dominate city committee agenda," where the Assembly is concerned about the failure of the tax abatement ordinance to result in more housing in Downtown Juneau. This project is one way where the City could have had seven units of permanent affordable housing in Downtown Juneau by July 1, 2022, if renovation had been allowed to start in late November 2021.

TGH to obtain a conditional use permit.[3] Thus, on June 28, 2022, eight months to the day after TGH began the application process for a building permit on October 28, 2021, the Planning Commission told TGH to start all over and obtain a conditional use permit.[4] TGH started that process as soon as possible. TGH is cautiously optimistic that the process will proceed expeditiously and will result in seven new units of permanent affordable rental housing in Downtown Juneau. TGH does, however, comment on three points concerning the Final Decision.

1. CDD conceded that TGH's project does not increase density.

In CDD's Objections to the Proposed Decision, it is important to note that CDD conceded that TGH's project does not increase the density of this parcel,

> Thus, in this case, TGH's conversion will lead to fewer people living in a designated severe hazard area *even though* this same conversion will increase dwelling units. Thus, in this case, the Proposed Decision's definition for CBJ 49.70.300(b)(1)'s density supports TGH's conversion *and* the intent of CBJ 49.70.300(b)(1), which is to minimize risk to people and property.[5]

With that, CDD conceded what it had strenuously argued against since December 1, 2021, namely the project does not increase density. More importantly, CDD conceded that the Planning Commission's definition of "density" in the Proposed Decision "supports TGH's conversion *and* the intent of CBJ 49.70.300(b)(1)." CDD agrees the proposed definition of "density" works for this project.

CDD made other arguments against the Planning Commission's findings. TGH does not think it is necessary or helpful to respond to CDD's other arguments now

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[3] CDD's Objections to the Proposed Decision at page 7.
[4] After an applicant receives a conditional use permit, the applicant still must receive a building permit although presumably if the applicant meets the conditions, the issuance of a building permit is pro forma.
[5] CDD's Objections to the Proposed Decision at page 5 (italics in original)

because TGH is willing to apply for a conditional use permit and because TGH will respond to what CDD says concerning the CUP application.

2. The process was seriously flawed in that TGH did not receive an opportunity to respond to CDD's objections and should be corrected in future appeals.

CDD filed objections to the Planning Commission's Proposed Decision on June 8, 2022, under CBJ 01.50.140(a)(4): "The parties may file written objections to the proposed decision with the municipal clerk within five days after service of the proposed decision." CBJ 01.50.140(a)(4) does not allow for the other side to respond.

At the Planning Commission meeting on June 28, 2022, the appeal was on the agenda under "Unfinished Business," noting the issue was "[c]ontinued from the May 24, 2022, Planning Commission meeting." Before the participating Planning Commission members went into executive session to deliberate, the Planning Commission Chair, who was not participating in the appeal, did not allow TGH's counsel to ask Commissioner Arndt if TGH could respond orally to CDD's objections or if TGH could respond in writing. The Planning Commissioners went into executive session and voted to amend its proposed decision. The Commission issued a Final Decision. The Final Decision states at the top of page 2 that "the Commission considered the objections raised by CDD to the proposed decision on appeal and all other relevant information." What the Commission did not consider, and could not consider, was TGH's responses to CDD's objections. The Commission could not consider TGH's responses because TGH was not given an opportunity to respond.

TGH waives its rights, if any, to appeal the Commission's failure to provide TGH with any opportunity to respond to CDD's objections before the Commission changed its proposed decision. But TGH wishes to state its belief that this part of the appeal process

was unfair. It was unfair to TGH because the Planning Commission accepted CDD's arguments without giving TGH an opportunity to respond to them. Until this point, TGH had gone toe-to-toe with CDD on its legal arguments and had shown many of its arguments were fatally flawed including CDD's central argument that the proposed project increased density and therefore could not go forward at all. TGH put hours of research and effort into responding to CDD's successive positions with solid arguments. TGH would have done the same with CDD's objections if it had been given the opportunity. That would have been fair to TGH and would have given the Planning Commission information that could have enabled it to make a better decision.

It arguably denies due process that the CBJ appeal ordinance does not give an appellant a right to comment on objections to a proposed decision by the appeal agency before the appeal agency changes a proposed decision.[6] It is certainly bad policy. It is especially questionable in light of CBJ 01.50.140(c), which specifies a quite different procedure for appeals heard by a hearing officer. In that ordinance, the hearing officer prepares a proposed decision and serves copies on the city clerk who, in turn, serves them on the parties. And, as here, the parties have five days to object.

But, unlike here, if one party objects, the other side has the right to respond to objections. CBJ 01.50.140(c)(1) provides in relevant part:

> Within three days of the service on a party of objections, a party may file a written statement in support of the proposed decision. The hearing officer shall reconsider the proposed decision in light of timely filed objections and statements of support and shall promptly prepare any amendments to be made to the proposed decision or shall issue a statement that the objections to and the

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[6] The classic statement about due process is *Mullane v. Central Hanover Bank*, "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. 306, 313 (1950).

> statements in support of the proposed decision have been considered and that no change in the proposed decision should be made. The hearing officer shall set forth the reason for any amendment or for the rejection if timely filed objections.

This ordinance gives one side a short, specified time to respond to the other side's objections.

TGH sees no valid reason why one side gets to respond to arguments to change a proposed decision of a hearing officer but does not get to respond to arguments to change a decision of the appeal agency. Even if this disparate treatment would survive an equal protection challenge, as a matter of policy, why would the City want to treat these two applicants so very differently?

A different approach is taken by the Alaska Rules of Civil Procedure. There a court does not issue a proposed decision but issues a decision. A party has ten days to file a motion for reconsideration, which is limited to something the court has overlooked, misapplied or failed to consider.[7] After thirty days, if the court has done nothing, the motion is considered denied.[8] If the court wishes to reconsider its decision in light of the party's arguments, the court gives the other side the opportunity to respond to the other side's arguments.[9]

There are different ways to go about it but what is common is that if a decision-maker is going to change a proposed decision or reconsider a decision it has made, the decision-maker gives the affected party the opportunity to comment before the decision-maker changes the decision.

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[7] Alaska Rules of Civil Procedure 77(k)(1)(i) – (iii). A party can also seek reconsideration on the grounds that the law applied in the ruling has been changed by court decision or statute. Civil Rule 77(k)(1)(iv).
[8] Civil Rule 77(k)(4).
[9] Civil Rule 77(k)(3) provides: "No response shall be made to a motion for reconsideration unless requested by the court, but a motion for reconsideration will ordinarily not be granted in the absence of such a request."

TGH asks the Planning Commission to act to correct this problem in two ways. First, the Planning Commission can ask the City to correct this problem across-the-board through a change in the appeal ordinance (CBJ 01.50.140). Second, until that is done, in each appeal decided by the Planning Commission, if one side objects to a proposed decision, the Planning Commission would give the other side an opportunity to respond to the objections before the Planning Commission changes a proposed decision. It can be a relatively short period. That would treat *both* appellants fairly and would give the Planning Commission the benefit of arguments that could help it make a more informed decision.

3. The Final Decision may have significant consequences for development in any part of Downtown Juneau that is in a mapped hazard area.[10]

The Final Decision states that TGH's proposed project may proceed only with a conditional use permit because CBJ 49.70.300(a)(3) states: "Notwithstanding any other provision, all subdivision other than a boundary line relocation and *all development greater than a single-family dwelling within landslide or avalanche area shall require a conditional use permit*." (italics added)

A word about the Table of Permissible Uses or TPU is in order here. The TPU Uses lists the uses that a property owner may make of a property; the TPU specifies the approval procedure for each use in each zoning district; and the approval procedure differs whether the development is a "major development" or a "minor development."[11]

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[10] CBJ 49.70.300(a)(3) says in relevant part "all development greater than a single-family-dwelling within landslide or avalanche areas shall require a conditional use permit." The maps currently used by the City do not differentiate between landslide or avalanche areas. For purposes of CBJ. 49.70.300(a)(3), that does not matter because that ordinance applies to development in either a landslide or avalanche areas.

[11] The TPU is at CBJ 49.25.300. The rules for determining the uses are laid out in CBJ 49.25.300(a) – (c). Following that is the Table itself. The definition of minor development is at CBJ 49.25.300(c)(3). Major development means anything that is not a minor development. CBJ 49.25.300(c)(3)(D).

Under the current TPU, the approval procedure is either Category 1 or Category 3.[12] The approval for a "minor development" is Category 1, which means the property owner or developer must get a building permit issued by CDD. The approval category for a "major development" is Category 3, which means the property owner or developer must get a CUP issued by the Planning Commission and, after that, a building permit from CDD.

Under Category 1, the CDD Director may impose conditions on a building permit that are necessary to ensure compliance with Title 49, the Land Use Code.[13] But generally speaking it is accurate to think of Category 1 as uses that a property owner can make of its property. A property owner needs a building permit, but the property owner's neighbors do not receive notice of a minor development, there is no public hearing prior to the issuance of a building permit, and typically the special conditions that are imposed on a building permit are minimal to non-existent.

In Category 3, the procedure required for a "major development," the use "may or may not be allowed at a particular location, depending on a determination of its compatibility with surround or proposed land uses. The planning commission may attach any condition to ensure the compatibility of the proposed use."[14] CDD gives notice to the public as required by CBJ 49.15.230 and the Commission holds a public hearing on the CUP application. Members of the public may testify in favor or against the issuance of the CUP. The CUP process typically takes substantially longer than the building permit process. And the conditions attached to issuance of a *conditional* use permit under CBJ

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[12] Under the current TPU at CBJ 49.25.300, there is no use which is in Category 2. Category 2 is an "allowable use permit," which is still on the books as a category, CBJ 49.15.320, but there are no uses in the current TPU which are in Category 2.
[13] CBJ 49.15.310(d)(2).
[14] CBJ 49.25.300(b)(3).

49.15.330(g) need not be, but can be, wide ranging and extensive.

Putting aside the interpretation of CBJ 49.70.300(a)(3) in the Final Decision for a moment, this project is a "minor development" because the parcel is in the Mixed Use District and it is a residential development containing 12 or fewer dwelling units.[15] Under the TPU, TGH's project is in Category 1 and would be able to proceed with only a building permit. But the Final Decision states that it does not matter that the project is a minor development. The project requires a conditional use permit anyway. The Final Decision appears to eliminate Category 1 for "all development greater than a single-family dwelling"[16] in any parcel that is in a mapped hazard area. TGH does not know how many projects apart from single-family dwellings are currently approved as "minor development" in mapped hazard areas. But it appears that all those projects will now require the owner or developer to first get a conditional use permit from the Planning Commission. This may be a significant, unintended, consequence of the Decision.

Conclusion

TGH makes these comments on the Final Decision but is not asking the Planning Commission to take any action that would delay the processing of the conditional use permit. TGH's interest is, and always has been, simply adding seven units of permanent affordable rental housing to the housing stock of downtown Juneau as quickly as possible. Every unit matters.

Dated: July 28, 2022

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Christian Ministry dba The Glory Hall

[15] CBJ 49.25.300(c)(3)(D). This is one type of minor development in the Commercial and Mixed Use Districts. CBJ 49.25.300(c)(3)(A) to (E) lists development that is a minor development by zoning district.
[16] CBJ 49.70.300(a)(3).

I certify that on July 28, 2022, I served this document and on the following persons: Adam.Gottschalk@juneau.org; Sherri.Layne@juneau.org; Breckan.Hendricks@juneau.org; Chelsea.Wallace@juneau.org.

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