BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

ANDREW HUGHES and TALL TIMBERS NEIGHBORHOOD ASSOCIATION, Appellants, vs. CBJ PLANNING COMMISSION, Appellee, and HAVEN HOUSE, Appellee-Intervenor.	)	Appeal of: Planning Commission Notice of Decision: USE 2014-0008 & UNL2014-0001

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The Planning Commission ("Commission") entered final judgment on October 16, 2014, disposing of all claims by all parties, and this Assembly has jurisdiction over this appeal pursuant to CBJ 49.20.120.

ISSUES PRESENTED FOR REVIEW

1. Whether adequate written findings and substantial evidence support the deviations of the Board of Adjustment ("Board") and the Commission from Title 49 as amended in 2010.

2. Whether adequate written findings and substantial evidence support the decisions of the Board and the Commission that Haven House is "of the same general character" as 1.610.

3. Whether substantial evidence supports the decisions of the Board and the Commission granting a permit to Haven House even if it is "of the same general character" as 1.610.

STATEMENT OF THE CASE

This case concerns what surely must be one of the most outrageous ideas which has ever come before this Assembly – relocating transient convicts, including recovering addicts, from other parts of Alaska into the Tall Timbers neighborhood in Juneau, a D-5 district, over the intense and valid opposition of the single families with children who live there. *See* pp. 2-9, *infra*.

The proposed halfway house would endanger the children of the neighborhood, particularly when they walk to and from school and when the convicts choose to leave their residence, escape or are expelled. *See* pp. 40-42, *infra*. The project would decrease the value of property in the area, *see* pp. 43-45, *infra*, with which it is out of harmony, *see* pp. 45-47, *infra*, and it lacks general conformity with the CBJ Comprehensive Plan and other officially adopted plans, *see* pp. 47-48, *infra*.

Almost as outrageous as this plan is the bizarre process by which the decisions below have purported to approve it. They have allowed the authority of the Alaska courts to be usurped by unauthorized constitutional judgments about this Assembly's legitimate

ordinances. *See* pp. 9-14, 19-33, *infra*. They have improperly severed, *see* pp. 27-33, *infra*, and effectively replaced these ordinances with an obscure publication called the *Latest Book*, *see* pp. 11-14, 33-40, *infra*. They have obfuscated what they have done by prejudging the issues, *see* pp. 11-16, *infra*, by failing to make discernible findings, *see ibid.*, and by allowing a series of word games which disguise unconstitutionality as something called "likely unenforceability," *see* pp. 10-14, 18-33, *infra*, and Haven House as something other than the halfway house which it obviously is, *see* pp. 5-6, 10-19, *infra*.

The length of this brief reflects the extent of the wild tangents on which the Board and the Commission have embarked in support of an indefensible proposition. It also reflects the large number of reasons why putting Haven House in the Tall Timbers neighborhood is a bad idea. But the issues in this appeal are remarkably simple. This Assembly has unambiguously prohibited halfway houses in D-5 districts. *See* pp. 16-19, *infra*. Haven House is a halfway house. *See* pp. 5-6, 10-19, *infra*. The decisions below must be reversed.

Facts of Case

The Tall Timbers Neighborhood

The Tall Timbers neighborhood is one of stable families with children, not transient convicts.

There are more than twenty children in the Tall Timbers neighborhood. [R. 606, 1032-1034]. There is an in-home day care for children just three homes away and Glacier Valley Elementary School is directly just 0.19 miles away. [R. 606][1]

The Tall Timbers neighborhood consists entirely of detached single-family dwellings, with no duplexes, apartments or other concentrated residential uses and no institutions, businesses or other commercial uses except for a day care; there is no through access to other streets or neighborhoods. [R. 606, 613, 1019-1034].

[1] CBJ 01.50.130 states in part that "[i]n reaching a decision, the appeal agency … may take official notice, either before or after submission of the case for decision, … of a fact which is judicially noticed by the courts of the state."

A description of the residents of the homes in the neighborhood is as follows:

1. One adult and one tenant.
2. One elderly woman.
3. Small family including two parents and one minor child.
4. Small family including two parents and two minor children.
5. Small family with two grandparents and four minor grandchildren who live with them part of the week.
6. Small family with two parents and one minor child.
7. Two brothers and two renters.
8. Married couple.
9. Small family with two minor children.
10. Small family with one minor child.
11. Small family with three adult children.
12. Small family with two minor children.
13. Small family with two parents and two minor children, and one renter. In-home daycare for minor children.
14. Small family with two parents and three minor children.
15. Small family with one parent and two children.
16. Small family with one parent and two adult children.
17. Small family with two parents, one minor child, and another family member.
18. Small family with two parents and one adult child.
19. Married couple.
20. One adult.
21. Small family including two grandparents, one adult child and her boyfriend, and two grandchildren.
22. Small family with two parents and one adult child.
23. Small family with two parents and two children.
24. Parent and one adult child.
25. Small family including two parents and one adult child.

[R. 613-614].

The neighborhood is "beautiful and perfect for raising children." [R. 363 (testimony of Malissa Drive resident Lolita Duran)].

The neighborhood is quiet. [R. 362 (testimony of area resident Darlene Thornton), 364 (testimony of area resident Dan Nelson) and 684]

The neighborhood is "close knit." [R. 363 (testimony of area resident Paula Hubert) and 365 (testimony of Malissa Drive resident Andy Hughes)].

According to Shelley Lager, a five-year resident of the neighborhood, she has three children, they "teach their children not to talk to strangers," "know who their neighbors are" and "recognize the cars in the neighborhood." [R. 361].

Sue Ann Randall notes that the present residents of the neighborhood also have made monetary and emotional investments in their homes. [R. 361].

Janice Lobaugh, broker/owner of Alaska Premier Real Estate, writes as follows:

> I previously owned and resided in a home on Marilyn Ave, within sight of 3202 Malissa Drive. I resided in Juneau for 33 years, including 4 years in the Marilyn home. In my experience, this is has [sic] always been an area with a great sense of community, where neighbors watch out for each other and many know each other by name. On sunny days, numerous children play in front yards and ride bikes in the street. Some people leave their homes unlocked. The neighborhood is comprised of single family homes, actually occupied by families. As the neighborhood does not offer through access to other streets, there is little traffic and noise but for the residents.

[R. 657-658].

Haven House

Haven House is, and has held itself out as, a halfway house. [R. 929-931].

Haven House is for women recently released from prison. [R. 25, 357 (comments of attorney McKeen), 678, 857, 933, 1196-1216].

At least seven of Haven House's nine spaces are reserved for women who are recovering from addiction. [R. 356 ("[m]ost of the residents of Haven House will be in recovery from alcohol or drugs") and 855]. Eight residents would share four bedrooms. [R. 1301 (comments of Planner McKibben)].

Some of these people would relocate to Juneau from other parts of the state such as Anchorage and Ketchikan. [R. 639, 650, 690-691]. Part of the reason convicts would relocate to Haven House from other parts of the state is that there might not be enough women to fill the rooms [R. 364, 375], even though Haven House would be the only housing in Southeast Alaska specifically for women leaving prison. [R. 691].

Two out of three prisoners in Alaska return to custody within three years of their release. [R. 655, 682, 1200]. This figure, of course, counts only the people who are caught. [R. 364 (comments of Pastor Susan Boegl)].

Halfway houses have *higher* rates of recidivism than among those paroled to the street [R. 984, 998-1001], recidivism is also higher among convicts with alcohol or drug problems [R. 925] and, unlike many halfway houses, Haven House will not provide substance abuse treatment, job training, mental health counseling or the like [R. 857]. Kara Nelson, director of Haven House, freely admits that she herself has probably committed "thousands of felonies." [R. 363].

Each convict would reside at Haven House for a period between one month and two years. [R. 691, 1202]. Therefore, Haven House would introduce as many as 1080 convicts into the neighborhood over a ten-year period. Based on the statistics above, more than 700 of these would become recidivists.

Haven House is a nonprofit institution [R. 362 (testimony of area resident Dan Hubert) and 678] and its Board "does not … believe that it can guarantee it will find a suitable person to be resident manager" [R. 689]. The resident manager will not be a counselor. [R. 1310 (comments of Ms. McKeen)]. There would be "lack of oversight. The program would not have a legal governing body to make sure the residents abided by its rules and the rules of the city and state …. Child care facilities, group homes and boarding homes all have the inspections …. This program would be self-policed." [R. 365 (testimony of area resident Noah Lager); *see also* R. 364 (testimony of Forest Lane resident Tanya Haight; not "enough structure") and 1298 (testimony of Ms. Lager; "lack of oversight"; day care centers require regular inspections)].

Safety and Other Concerns

The convicts will be able to leave Haven House on their own. [R. 686, 691]. Some of the convicts also may be expelled from the residence for rules violations. [R. 26, 359, 686-687, 690, 711]. The expulsion may be immediate. [R. 686-687]. Drug use and escapes are also common in halfway houses. [R. 1134-1154].

But most of the convicts at Haven House initially will not have cars. [R. 692]. The nearest bus stops are at least a half-mile walk away. [R. 851]. The route overlaps the "safe routes" to Glacier Valley Elementary School and Floyd Dryden Middle School in Juneau's Safe Routes to Schools Plan. [R. 653-654]. The streets are often dark. [R. 621]. There is no police station less than 4.5 miles away. [R. 606 n.19].

Haven House would threaten the safety of the children in the neighborhood. [R. 363 (testimony of Malissa Drive resident Paul Durand) and 364 (testimony of area resident Dan Nelson)]. The "entire neighborhood is scared." [R. 363 (testimony of William Judy, who lives directly across the street from Haven House)].

There also could be damage to property by the convicts and unsightliness if Haven House is reconfigured to allow for additional parking. [R. 1308].

Guy Holt, who lives across the street from the proposed Haven House property, and also Malissa Drive resident Sammy Legg and Ms. Thornton, are concerned about increased traffic. [R. 362, 364][2].

Mr. Holt notes that every car which would visit the facility would be in front of his home: the residents "would no longer know who belonged in the neighborhood …. It would destroy the sense of community and security" they now enjoy. [R. 362].

Ms. Lager "wouldn't mind if two felons happened to move next door who had purchased the house and moved in because that would be a long-term situation, because that is what the neighborhood is about," but she opposes "strangers moving into the neighborhood" and "the short term situation that was the Haven House proposal." [R. 361].

[2] During a small Haven House meeting in February 2014, one attendee blocked a mailbox on Malissa Drive, causing postal delivery personnel to forego delivering one household's mail on that day. [R. 1254].

Mr. Legg also objects to "the quick transition of residents" and "unknown faces in the neighborhood." [R. 364].

"[A] house with nine felons would change everything." [R. 363 (testimony of Malissa Drive resident Lolita Duran)]. Haven House "is completely inappropriate." [R. 364 (comments of Dan Nelson)].

Predictably, Haven House would substantially decrease the value of property in the neighboring area, as Ms. Lobaugh explains:

> By whatever name (boarding house, rooming house, halfway house), the proposed business of Haven House Inc. is completely out of harmony with the neighborhood.
>
> I can honestly say that I would not have purchased my Marilyn Drive home if, at that time, Haven House Inc. had been operating their transitional home at 3202 Malissa Dr.
>
> I have been employed in Alaska as a real estate professional since January 2000. During 5.4 of those years I practiced in Juneau. I am familiar with the infrastructure, businesses, facilities, and neighborhoods of Juneau. It is my professional opinion that the presence of a transitional home for felons as proposed by Haven House Inc. would substantially decrease property values in the neighborhood.
>
> As a real estate professional, I realize that law-abiding listing and selling agents would be required to advise potential buyers of issues such as the proximity of Haven House's proposed transitional home for felons. Over a period of years, a home with nine short-stay ex-felon residents could potentially bring hundreds of felons into the neighborhood, and this is a material fact that buyers would want to know. Common sense dictates that, faced, with a home near Haven House or a comparable home elsewhere in Juneau, if the homes were offered at the same price it would be patently obvious for buyers to select the "other" home. This effect will result in homes being slow to sell, and forcing owners to ultimately lower their offering price.
>
> I have learned that other real estate professionals are already raising concerns about a property for sale on Marilyn Drive due to the proximity to the proposed site of Haven House Inc.

[R. 657-658].

At least thirteen present residents – Daniel A. Nelson, Jerry Kennedy Sr., David Marvel, Darlene F. Thornton, Noah Lager, Shelly Lager, Sam Bertom, appellant Andrew

Hughes, Sam Larson, Paula Hubert, Tom Sullivan, Toi Gile and Teri J. Maxwell – also indicate that they *would not have purchased* property in the neighborhood if Haven House had been operating there. [R. 659, 661-663, 665-672, 675]. At least four other present residents – Kimberly Hearn, Ted Wilson, Paul Duran and Lolita Duran – indicate that they would not have purchased property in the neighborhood *without a substantial discount* in price. [R. 660, 664, 673-674].

A recent property appraisal of 8610 Gail Avenue states as follows:

> There is a proposed half way house "house facility" in a nearby property. At this point, the facility has not been approved by the city and is not felt to be an adverse effect on value or marketability. However, it [sic] the housing facility is approved, *this may change*.

[R. 1195 (emphasis added)].

At least twenty-nine residents have signed a petition opposing Haven House's application. [R. 1191-1194].

Chairman Satre recognizes that "[t]he neighborhood has almost unanimously indicated that Haven House will not be in harmony with the neighborhood." [R. 1314]. There have been only a few times during Chairman Satre's tenure on the Planning Commission when neighbors have come out this adamantly against a project. [R. 1314]. One participant called it "the worst experience in her career." [R. 1035].

Commissioner Miller acknowledges the concern: "When a group of felons is brought into a neighborhood that is a half mile distance from the home to the bus stop that is in a neighborhood with a lot of children and it is close to an elementary school, this is a concern." [R. 1313].

Commissioner Voelckers also concedes the "legitimate anxiety in the neighborhood." [R. 1313].

Proceedings Below

The Director's January 24, 2014, Decision rejects Haven House's proposal on the ground that "Haven House best fits the definition of a halfway house because it would be people, living together, who could be serving a sentence." [R. 933].

On March 18, 2014, the Director changed his mind and found Haven House a "use not listed" "based on … 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 [U]ses." [R. 710].

The only "additional information" and "reasoning provided above" in the March 18 Decision related to the arguments that Title 49 as amended in 2010 is "likely unenforceable" [R. 710-711], which is addressed below, *see* pp. 18-33, *infra*. *After* finding Haven House a "use not listed," the March 18 Decision *then* stated that Haven House is not a single family residence. [R. 711]. But the March 18 Decision did not state that Haven House is not within the definition of "halfway house" in CBJ 49.80.120. [R. 710-11].

The Community Development Department ("CDD") issued a Memorandum dated August 13, 2014. The August 13 Memorandum referenced the March 18 decision that Haven House is a "use not listed." [R. 24, 27]. The August 13 Memorandum then deviated from rationale of the March 18 Decision: The August 13 Memorandum asserted without discussion that "[t]he proposed use of re-entry, or transitional, housing for women coming out of prison does not exactly fit within any of our existing definitions or land use categories." [R. 27]. The August 13 Memorandum misstated that the reason that the March 18 Decision determined that Haven House was a "use not listed" was that it was not a single family residence. [R. 27 ("[g]iven this conclusion")]. The August 13 Memorandum specifically declined to address the alleged "likely unenforceability" of Title 49. [R. 25 ("[t]his staff report will not address that issue")].

Despite these deviations, the Recommendation section in the August 13 Memorandum suggested that the Board adopt "the Director's analysis and findings" [R. 28], an apparent reference to the March 18 Decision. The Background section of the August 13 Memorandum [R. 25] also indicated that it was attaching a legal memorandum from Assistant Municipal Attorney Palmer which actually was dated the following day, August 14, 2014. The August 14 Memorandum, like the March 18 Decision, addressed the "likely unenforceability" of Title 49 as amended. [R. 207-218]. However, neither the

Recommendation in the August 13 Memorandum nor its reference to the August 14 Memorandum appeared in the Findings or Analysis sections in the August 13 Memorandum. [R. 26-28].

The March 18 Decision also concluded that Haven House "is currently boardinghouse and rooming house or is currently most similar to a boardinghouse and rooming house." [R. 711].

The August 13 Memorandum acknowledges that Haven House may bring "impacts beyond those normally associated with uses permitted outright in the D-5 zoning district" but argues for treating it as a boarding house based on something called *The Latest Book of Development Definitions ("Latest Book")*[3] published by the Center for Urban Policy Research. [R. 26-27]. The August 13 Memorandum then finds without further explanation that Haven House is of the same general character as 1.610. [R. 28].

The Board met on August 21, 2014, and Haven House made clear through counsel that the building which it would occupy is a single-family dwelling [R. 358 ("In a D-5 district … a single family is allowed with no limit on the number of residents. In the home they wish to occupy, there were 13 people in the home previously …. It was a very large family")]; that it is for not more than nine persons [R. 358 ("Haven House is … for up to nine women")]; that there would be not more than two persons providing supervision and other services to such persons [R. 358 ("[o]ne to two caregivers must live on site")]; and that they all would live together as a single housekeeping unit [R. 365 ("it will be a single house-keeping unit")].

The Board's August 26 Decision adopted the Findings and Analysis sections in the August 13 Memorandum, purporting to determine that Haven House was deemed to be of the same general character as 1.610. [R. 572].

The 2010 amendment was addressed at the August 21 meeting. [R. 356]. However, the August 26 Decision failed to make any findings regarding the alleged "likely unenforceability" of Title 49 or otherwise supporting its deviation from it. The

[3] The actual title of the book appears to be *The Latest Illustrated Book of Development Definitions*.

August 26 Decision did not expressly adopt the March 18 Decision, the Background or Recommendation sections of the August 13 Memorandum or any part of the August 14 Memorandum. [R. 572-573].

Most of the Commissioners who commented on the use not listed determination for Haven House failed to provide any reasons supporting it. [R. 367 (Commissioner Voelckers felt that "this was an applicable Use Not Listed"; Commissioner Grewe said "the crux of her comment is that her support is for the Use Not Listed determination")]. However, Commissioner Miller said "the key for him is that the Haven House residents are not serving a sentence, so that therefore they are not within a halfway house situation." [R. 367].

Four of the eight Commissioners present also made comments implying that their support for the proposal itself had influenced their decision on the classification of Haven House. Commissioner Jackson noted that "when years ago a home for juvenile delinquents was established on his street, the whole neighborhood was very upset, but that nothing negative has ever happened as a result of that home, and that now the neighborhood has incorporated that home into the neighborhood." [R. 367]. Commissioner Jackson added that "the key to the success of these homes was being a good neighbor in [sic] the part of both sides." [R. 367]. Commissioner Peters asked witnesses opposing the proposed classification whether they would let their own child coming out of prison live with them and encouraged "those living in the Malissa Drive neighborhood to share their knowledge of the neighborhood, and to open their hearts and their homes." [R. 361, 367]. Vice Chairman Watson said that as an employer he "never experienced an individual out of prison violate their conditions when they were in a program" and believed that "Haven House presents the step the community has been missing" since he moved to Juneau. [R. 360, 368]. Although it "bother[ed]" Chairman Satre "to throw away original definitions, and the way that they should be applied, because they think that they are likely unenforceable," he supported the decision "because it gets the Commission to the point where it can conduct a Conditional Use permit hearing where … it should have gone in the first place." [R. 368].

Tall Timbers Neighborhood Association's ("TTNA") September 24, 2014, Memorandum and subsequent amendment proposes sixteen conditions if Haven House's permit is approved. [R. 630-633 and 1248-1255]

The CDD issued another Memorandum on September 30, 2014. The September 30 Memorandum again fails to specifically address the alleged "likely unenforceability" of Title 49 as amended in 2010. [R. 369-379]

In response to the public health and safety concerns, the September 30 Memorandum "recommends that Haven House be required to have a resident manager live on site as a condition of approval." [R. 375].

The CDD issued another Memorandum on October 10, 2014. [R. 1231-1234]. The October 10 Memorandum cites CBJ 49.15.330(g)(18), which authorizes "[s]uch other conditions as may be reasonably necessary pursuant to the standards listed in subsection (f) of this section." [R. 1234]. However, the October 10 Memorandum also indicated without explanation that the Commission lacked the authority to impose TTNA's proposed conditions relating to supervision, sunset provision, substance abuse, eviction, sex offenses and violence, transport of evicted residents, background checks, bus stop travel and courtesy. [R. 1232-1234].

The Commission met on October 14, 2014. Mr. Palmer advised that a condition would be enforceable under CBJ 49.15.330(f) if it relates to "health, safety or welfare" [R. 1312] but also that the Commission "can require house rules but not anything specific" [R. 1310]. However, the Commission recognized the difficulty of ongoing supervision of Haven House: Chairman Satre thought that "it would become very messy for the Commission to address the rules by which the house would operate" and pointed out that "most enforcement is complaint driven." [R. 1311]. Commissioner Miller wanted to "stay away from listing all of the specifics." [R. 1311]. Commissioner Peters worried that "the Commission is going to try and manage every degree of those expectations." [R. 1312]. Commissioner Voelckers agreed that "it is clearly not under their expertise to manage this." [R. 1312]. Vice Chairman Watson concurred that

"attempting to micromanage something like this created nothing but problems." [R. 1312].

The Commission's October 16 Decision adopted the analysis and findings in the September 30 Memorandum, purporting to approve a conditional use permit for Haven House in the Tall Timbers D-5 district, imposing some conditions but generally not the ones TTNA had proposed. [R. 1296-1297]. The Commission failed to make any findings regarding the alleged "likely unenforceability" of Title 49 as amended or otherwise supporting its deviation from it. [R. 1296-1297].

This appeal timely followed.

STANDARD OF REVIEW

CBJ 01.50.070(a) authorizes the Assembly to set aside the decisions below where they are not supported by substantial evidence in light of the whole record as supplemented at the hearing; or where they are not supported by adequate written findings or the findings fail to inform the appeal agency of the basis upon which the decisions were made; or where the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 254 (Alaska 2000) (citation omitted) (reversing lower decision). The sufficiency of factual findings is a legal question which may be decided by the exercise of independent judgment. *Horan v. Kenai Peninsula Borough Board of Equalization*, 247 P.3d 990, 997 (Alaska 2011) (holding findings insufficient).

ARGUMENT

As noted above, the Board and the Commission have reached an outrageous result through an almost equally outrageous process.

The Assembly should set aside both the August 26 and the October 16 Decisions on the grounds that they are not supported by substantial evidence or adequate written findings and that the findings fail to inform the appeal agency of the basis upon which the

decisions were made and that, in each such case, the hearing officer therefore failed to follow his own procedures and denied due process to the parties.

As a general point with respect to each of the arguments below, it should be remembered that although most of the Commissioners who commented on the use not listed determination at the August 21 meeting failed to present any reasons supporting it, four of the eight Commissioners present made comments implying that their support for Haven House itself had influenced their decision on its classification [R. 360-61, 367-68] – even though the ultimate merits of the proposal were not yet at issue on August 21.

To the extent that the Commissioners were supporting the deviations from Title 49, finding Haven House of the same general character as 1.610 and not denying and conditioning Haven House's application under CBJ 49.15.330(f), merely because they had decided in advance to support Haven House, this may explain the Board's and the Commission's erroneous rulings and their failure to make adequate written findings as discussed below.

Although CBJ 01.50.070(a) expressly requires adequate written findings as discussed above, "[i]n the usual case findings of fact are required even in the absence of a statutory duty." *Faulk v. Board of Equalization*, 934 P.2d 750, 751 (Alaska 1997) (citations omitted) (reversing assessment where "we can only guess how the Board resolved the conflicts between the Borough's and the Faulks' evidence" since "[t]he Board neither indicated whether it agreed with the appraiser's bulk discount theory nor how, if at all, it resolved the discrepancies between the appraiser's written report and testimony" and "[t]hus, we have an inadequate basis for determining whether the Board reasonably denied the Faulks' appeal"); *accord*, *Kenai Peninsula Borough v. Ryherd*, 628 P.2d 557, 562 (Alaska 1981) (requiring statement of reasons for Assembly's affirmance *even where no specific statute or ordinance required this*, and also holding Planning Commission's findings insufficient).

"Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the agency's action is supported by substantial evidence." *White v. Alaska Commercial Fisheries Entry Commission*, 678

P.2d 1319, 1322 (Alaska 1984) (citations omitted) (holding findings insufficient). Where a board fails to make findings which might provide a starting point for evaluating its decision-making process, one can only speculate about the board's reasons. *Faulk*, 934 P.2d at 752. But "we cannot fill the gap by making our own determination from the record." *Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270, 1275 (Alaska 1999) (holding findings insufficient).

The threshold question "is whether the record sufficiently reflects the basis for the agency's decision so as to enable meaningful judicial review. In answering that question, the test of sufficiency is a functional one: do the agency's findings facilitate this court's review, assist the parties and restrain the agency within proper bounds?" *Faulk*, 934 P.2d at 751 (citations omitted).

I. Adequate Written Findings And Substantial Evidence Fail To Support The Board's And The Commission's Deviations From Title 49 as Amended In 2010.

A. Adequate Written Findings and Substantial Evidence Fail to Support the Board's and the Commission's Decisions To the Extent That They Found Haven House Not a Halfway House and Not Prohibited Under CBJ 49.25.300 as Amended in 2010.

1. Adequate Written Findings Fail To Support The Decisions To The Extent That They Found That Haven House Is Not A Halfway House And Not Prohibited Under CBJ 49.25.300.

The Board's and the Commission's written findings, if any, regarding whether Haven House is a halfway house are not at all clear. For example, it is not clear whether the isolated statement in the Analysis section of the August 13 Memorandum that Haven House "does not exactly fit within any of our existing definitions or land use categories" [R. 27] meant that Haven House is outside the definition of "halfway house" in CBJ 49.80.120 or merely that the definition and the prohibition of 1.450 and 7.400, halfway houses, in the Table of Permissive Uses are unenforceable or "likely unenforceable." Because of this lack of clarity, the Board and the Commission failed to make adequate written findings and the

findings fail to inform the appeal agency of the basis upon which the decisions were made.[4]

2. Substantial Evidence Fails To Support The Decisions To The Extent That They Found That Haven House Is Not A Halfway House And Not Prohibited Under CBJ 49.25.300.

Under CBJ 49.80.120, "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.

Haven House is, and has held itself out as, a halfway house. [R. 929-31].

Haven House argued that it is not a halfway house and that its residents would not be serving sentences. [R. 365 and 1303-04 (under definition of "halfway house" which differs from CBJ 49.80.120)].

However, based in part on Haven House's own admissions at the August 21 meeting that the building Haven House would occupy is a single-family dwelling, that it is for not more than nine persons, that there would be not more than two persons providing supervision and other services to such persons [R. 358] and that they all would live together as a single housekeeping unit [R. 365], Haven House clearly satisfies this definition of "halfway house," as the Director originally found.[5]

Haven House also clearly satisfies other common definitions of a "halfway house." [R. 1308-09 ("[B]y anyone's account a halfway house would include a residence exclusively made up of felons with the only thing in common that they were hand-vetted by a parole officer, ejected if they are out of the house for longer than 48 hours; they are all undergoing rehabilitation of some sort, and are working in close cooperation with the

[4] Commissioner Miller's comment at the August 21 meeting that Haven House is not a halfway house because its residents "are not serving a sentence" [R. 367]. reveals an erroneous basis for at least his one vote. As indicated herein, CBJ 49.80.120 specifically states that "[r]esidents *may* be serving a sentence" (emphasis added). As the August 14 Memorandum correctly notes, persons on probation or parole *are* "serving a sentence." [R. 217-218]

[5] The nine residents of Haven House must be over the age of 12 since they will have been released from prison [R. 25, 357, 678, 857, 933 and 1196-1216]. rather than from a juvenile facility.

parole officer. It is not just a residence" (comments of Mr. Hubert)]; *see also Black's Law Dictionary* 10th ed. (Thomson Reuters 2014) ("halfway house" is "[a] transitional housing facility designed to rehabilitate people who have recently left a prison or medical-care facility, or who otherwise need help in adjusting to unsupervised living"); *Latest Book* p. xx ("[d]efinitions … should not run counter to the generally accepted meaning of words and phrases").

Even the Analysis in the August 13 Memorandum makes clear that Haven House is a halfway house. This Analysis urges treatment of Haven House as a boarding house based on the *Latest Book*'s comment to the definition of "transitional care home." [R. 27]. The fallacy in relying on this definition is discussed later in this brief. *See* pp. 33-40, *infra*. However, the *Latest Book*'s comment to the definition of "transitional care home" states in part that "[t]he transitional care home *is a form of halfway house*." *See Latest Book* p. 414 (emphasis added). Therefore, the authority which provides the very basis of the August 13 Memorandum itself confirms that Haven House is a halfway house.

The Table of Permissive Uses in CBJ 49.25.300 as amended in 2010 clearly lists 1.450 and 7.400, halfway houses, as a use not permitted in a D-5 district. Haven House is therefore a listed use not permitted. If the Board had applied this ordinance, then it never would have reached the issue of whether Haven House is of the same general character as 1.600, miscellaneous, rooms for rent. If the Commission had applied the ordinance, then it would have denied a permit to Haven House on the ground that it is a halfway house prohibited under 1.450 and 7.400. CBJ 49.15.330(e)(1)(A) requires that the Commission consider "[w]hether the proposed use is appropriate according to the table of permissible uses." The Commission should not have followed the Director's determination where it was in error. *See* CBJ 49.15.330(e)(2). Therefore, the August 26 and the October 16 Decisions clearly violate CBJ 49.15.330 and CBJ 49.25.300.

B. Adequate Written Findings and Substantial Evidence Fail to Support the Board's and the Commission's Decisions Deviating from Title 49 as Amended in 2010 Based on Its Alleged "Likely" or Actual Unenforceability.

1. Adequate Written Findings Fail To Support The Decisions To The Extent That They Rely On The Alleged "Likely" Or Actual Unenforceability Of Title 49.

Neither the Findings nor the Analysis in either the August 13 [R. 26-28] or the September 30 [R. 372-378]. Memoranda which were adopted by the August 26 [R. 572-573] and October 16 [R. 1296-1297]. Decisions, respectively, nor either of these Decisions themselves, addressed the alleged "likely unenforceability" of Title 49 as amended in 2010. Further, there has been no assertion or finding in this case, not even in the March 18 Decision [R. 710-711] or the August 14 Memorandum [R. 207-221], that Title 49 is *actually* unenforceable. Therefore, both the Board and the Commission failed to make written findings regarding this and the findings fail to inform the appeal agency of the basis upon which the decisions were made.[6]

Both the Board and the Commission also failed to make any other findings which would support their deviations from Title 49 as amended, including but not limited to findings regarding fair and substantial basis, legislative history and severability. [R. 572-573, 1296-1297].

2. Substantial Evidence Fails To Support The Decisions To The Extent That They Rely On The Alleged "Likely" Or Actual Unenforceability Of Title 49.

a. "Likely Unenforceability" is the Wrong Standard.

The March 18 Decision concluded that "Title 49 is *likely* unenforceable regarding Halfway Houses." [R. 710 (emphasis added)]. The August 14 Memorandum similarly purported to "provide[] the … legal basis for why the halfway house … provisions in

[6] One possible explanation for this failure to make adequate findings is that the Analysis section in the August 13 Memorandum which the August 26 Decision adopts misstated that the March 18 Decision had determined that Haven House was a "use not listed" *because* it was not a single family residence [R. 27], when in fact this is what the March 18 Decision concluded only *after* finding Haven House a "use not listed" [R. 711]. This confusion may have caused the Board and the Commission to erroneously believe that findings regarding the alleged "likely" or actual enforceability of Title 49 were not necessary.

Title 49 are *likely* unenforceable." [R. 207 (emphasis added)]. At the August 21 meeting, Ms. McKibben similarly stated that "*[i]t is not clear* whether this is founded upon a rational basis or not" but that "[b]ecause of the nebulous nature of the 2010 changes …, they are *likely* unenforceable" and "[b]ased upon this information, Title 49 provisions regarding halfway houses and group homes cannot be applied." [R. 356 (emphasis added)].

This language from the March 18 Decision, the August 14 Memorandum and Ms. McKibben, none of which specifically commits to the proposition that any part of Title 49 is *actually* unenforceable, makes clear that even they really were not sure that the ordinance as amended in 2010 is in fact invalid. The August 14 Memorandum even cautioned that "[t]his memorandum does not preclude the Planning Commission … from making a different conclusion." [R. 207]. Yet at the same time it also appeared to slam the door on further consideration of the issue: "[A]n analysis of other sources of authority was not warranted." [R. 213].

Neither the March 18 Decision [R. 710-711], the August 14 Memorandum [R. 207-221] nor Ms. McKibben's remarks [R. 356-357] provides any authority for their novel concept that an ordinance can simply be disregarded if it is "likely unenforceable."[7] Such a position, which expressly "bother[ed]" Chairman Satre [R. 368], appears not only unprecedented[8] but also in contravention of due process and also the Alaska statutes and rules providing for injunctive relief and procedures therefor, *see, e.g.*, AS 22.10.020(c) ("[t]he superior court and its judges may issue injunctions"); Rule 65, Alaska Rules of Civil Procedure (injunctions) – which is where the mere probability of success on the merits might have had some relevance, *see Alsworth v. Seybert*, 323 P.3d 47, 56 (Alaska 2014) (reversing injunction granted under wrong standard). Therefore, the Board's and

[7] It does not appear that this term is mentioned in any reported Alaska court decisions.

[8] Most of the authority which the August 14 memorandum cites *upholds* ordinances. *See Luper v. City of Wasilla*, 215 P.3d 342, 348 (Alaska 2009) (affirming enforcement); *Seward Chapel Inc. v. City of Seward*, 655 P.2d 1293, 1299 (Alaska 1982) (affirming enforceability). In *Griswold v. City of Homer*, 925 P.2d 1015, 1025 (Alaska 1996), the court affirms the substantive validity of an ordinance but, without enjoining its application, remands for further consideration of a lawsuit alleging a conflict of interest in its adoption. In *J.W. v. City of Tacoma, Washington*, 720 F.2d 1126, 1130 (9th Cir. 1983), the court states that "[n]ormally, the denial of a permit will be upheld unless arbitrary" (emphasis added).

the Commission's Decisions are erroneous to the extent that they rely on the "likely unenforceability" of Title 49.

b. Title 49 as Amended is Enforceable.

i. The Director, the Board, the Commission and Even This Assembly Must Apply Title 49 Because They Lack the Authority to Declare It "Unenforceable" or "Likely Unenforceable."

Title 49 as amended is enforceable unless it is unconstitutional. *See Ward v. State, Department of Public Safety*, 288 P.3d 94, 106 (Alaska 2012) ("[w]hen a statute unambiguously requires a certain result, policy arguments advocating for a different result are better addressed to the legislature") (upholding statute where appellants raised no constitutional challenge). But in this case "[t]he parties agree that the Assembly, acting in its quasi-judicial capacity under CBJ 01.50.020, does not have jurisdiction to decide whether a code provision or decision is constitutional." *See* 12/16/14 Joint Stipulation of Issues on Appeal ("Joint Stipulation"). Nor have the Director, the Board or the Commission had this authority. *See Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) ("[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law") (*cited in* Joint Stipulation). All of the entities below were therefore required to enforce Title 49 as amended, and this Assembly must do the same.

Lacking the authority to declare Title 49 as amended unconstitutional, the March 18 Decision, the August 14 Memorandum and Ms. McKibben at the August 21 meeting have invented the concept of unenforceability or "likely unenforceability," thereby disguising what is really a constitutional argument and purporting to avoid the very clear and simple mandate of the Table of Permissive Uses that Haven House is a listed use not permitted in a D-5 district. Since, as all parties agree, not even this Assembly in this proceeding has the authority to invalidate Title 49, the Assembly has no choice but to reverse the decisions below and allow the parties to make their constitutional arguments to the courts if they so choose.

ii. There is Fair and Substantial Basis for Title 49.

Appellants would argue to this Assembly if it had jurisdiction, and will argue to the courts if necessary, that Title 49 as amended is enforceable. Statutes neither infringing fundamental rights nor involving suspect classifications are entitled to a strong presumption of validity. *Vacco v. Quill*, 521 U.S. 793, 799-800 (1997) (reversing decision that prohibition on assisted suicide violated equal protection); *accord*, *Public Employees' Retirement System v. Gallant*, 153 P.3d 346, 349 (Alaska 2007) (reversing decision that residency requirement violated equal protection) ("[a] constitutional challenge to a statute must overcome a presumption of constitutionality" (citation omitted)). In particular, a zoning ordinance enjoys a presumption of validity when challenged on due process grounds. *See Seward Chapel Inc.*, 655 P.2d at 1298. "Fair and substantial" is "the minimum level of scrutiny," *see Luper*, 215 P.3d at 348, and an ordinance which satisfies equal protection also satisfies substantive due process, *see id.* at 348 n.30.

Equal protection does not require perfection in legislative classifications. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 592 n.39 (1979) (reversing decision invalidating distinctions in government employment). Nor does due process require standards which assure perfect, error-free determinations. *See Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (reversing decision invalidating statute mandating license suspensions); *accord*, *Seward Chapel Inc.*, 655 P.2d at 1298-1299 ("the distinctions drawn may be imperfect"). Not every minor difference in the application of laws to different groups violates the Constitution. *See Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 726 (1973) (affirming decision upholding apportionment of representation).

Although neither the Board nor the Commission made findings regarding the alleged unenforceability of Title 49, it appears from the March 18 Decision, the August 14 Memorandum and Ms. McKibben's comments at the August 21 meeting that there might have been a number of perceived grounds for such an argument.

First was the arguably harsher treatment of halfway houses than other uses in which people are not serving a sentence. The August 14 Memorandum stated:

> 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 …. [H]alfway 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.

[R. 215; *accord*, R. 356 (comments of Ms. McKibben)].

The March 18 Decision asserted that "neither Title 49 nor the legislative history provide justification for the change in prohibiting small Halfway Houses in residential areas" and that "neither Title 49 nor the legislative history provide justification for distinguishing Halfway Houses from other uses in which people are not serving a sentence." [R. 710]. Similarly, the August 14 Memorandum claimed that

> [t]he 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 ….
>
> This legislative history neglects to describe any facts or rationale to provide a justification for the more restrictive treatment of halfway houses. Thus, because … 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 ….
>
> 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 …. 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.

[R. 214-215].

However, the August 14 Memorandum also *provides* the rational and fair and substantial basis by explaining that the purpose of the 2010 amendment was to bring the

CBJ into compliance with federal anti-discrimination laws. [R. 209-210, 214-215 and 218-221]. "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." [R. 209]. The Memorandum cites authority that

> [p]eople 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.

[R. 210 (citation omitted)].

The August 14 Memorandum, citing *J.W.*, 720 F.2d at 1129 n.2 and 1131, correctly concedes that "formerly incarcerated persons – without more – are not a protected class" and that "criminal behavior can determine whether a proposed use could be restricted." [R. 219-220].

Since the residents of group homes are a federally protected class but the residents of halfway houses are not, it really is a quite unremarkable proposition that halfway houses may be distinguished from group homes when addressing the concerns about the latter, and it is difficult to see why the August 14 Memorandum would find this objectionable. Clearly there is fair and substantial basis for the arguably harsher treatment of halfway houses than other uses in which people are not serving a sentence.

Another possible reason for the perceived unenforceability of Title 49 might have been the allegedly harsher treatment of small halfway houses than correctional facilities and large halfway houses. The March 18 Decision alleged that "large halfway houses (10+ people) are allowed in residential zones but small Halfway House [sic] (less than 10) are not, and neither Title 49 nor the legislative history provide justification for the distinction." [R. 710]. The August 14 Memorandum similarly stated in part that

> the TPU is likely arbitrary because it allows halfway houses with more than nine people in twelve zones (including all residential). But the TPU prohibits halfway houses with nine or fewer residents to only four or five zones (no residential). 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 ….
>
> Additionally, no basis has been outlined for restricting halfway houses more than correctional facilities, where correctional facilities have higher traffic and greater zoning concerns …. 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 ….
>
> Therefore, because … the application of the TPU to [halfway houses was] not likely supported with a "fair and substantial" basis, [it] should not be relied upon until supporting justification is provided.

[R. 214-216 (emphasis added, citations omitted); *accord*, R. 356-357 (comments of Ms. McKibben and Mr. Palmer)].

The Board and the Commission appear to have overlooked the ample support for the distinction between small halfway houses and correctional facilities and large halfway houses in the 2010 amendment.

Correctional facilities presumably would have greater security than halfway houses and would not allow the convicts to leave the premises, thereby generating *fewer* zoning concerns – not more such concerns, as the August 14 Memorandum asserts without substantiation [R. 215].

Further, as discussed in the statement of the case above, halfway houses have *higher* rates of recidivism than those paroled to the street. This certainly provides fair and substantial basis for the arguably harsher treatment of halfway houses than correctional facilities.

In addition, although Haven House, unlike many halfway houses, would not be providing any therapy at all [R. 857], the argument is well known that therapy is more effective in larger groups. *See, e.g., Haven Chemical Health Systems LLC v. Castle Rock Township*, 2009 WL 67036 *3 (Minn. App. 2009), *review denied* (2009).[9] This certainly

[9] The unpublished 2-1 opinion in *Haven Chemical Health Systems LLC* rejected this argument on the ground that the evidence in that case did not satisfy the burden of proof under the Fair Housing Amendments Act, but this does not mean that it is insufficient to establish fair and substantial basis. Further, the minority opinion in *Haven Chemical*

provides fair and substantial basis for the arguably harsher treatment of small halfway houses than large halfway houses.

As indicated above, *see* p. 21, *supra*, the Assembly, like the Board and the Commission, lacks jurisdiction to decide these constitutional issues. But for the reasons stated, there is fair and substantial basis for Title 49 as amended and the courts would rule that the Board and the Commission, even if they had jurisdiction to rule otherwise, which they do not, erred by failing to apply Title 49 and the Table of Permissive Uses therein.[10]

iii. Any Absence of Legislative History is Irrelevant.

The August 14 Memorandum repeatedly focused on the absence of legislative history supporting the treatment of halfway houses in Title 49 as amended. [R. 209 ("[t]he Commission minutes regarding Ord. 2010-2022 do not provide any facts illuminating the reason to restrict halfway houses in the TPU"); 210 ("[a]t 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"); 214 ("[t]his legislative history neglects to describe any facts or rationale to provide a justification for the more restrictive treatment of halfway houses"); 215 ("[n]o … reasons have been provided"; "no basis has been outlined"; "no basis has been provided"); 216 ("[t]he record – in the form of committee minutes and memoranda – does not indicate any basis for the restrictive changes to halfway homes"); and 217 ("no justification has been presented to date")].

The August 14 Memorandum even appears to have claimed the right to hold the ordinance hostage "until supporting justification is provided." [R. 216].

But it is well established that "a legislature … need not actually articulate at any time the purpose or rationale supporting its classification." *See Heller v. Doe by Doe,*

Health Systems LLC finds "uncontroverted evidence In the record that there is a therapeutic advantage to having ten rather than six people for group therapy." *See* 2009 WL 67036 at *6 (Stoneburner, J., concurring and dissenting).

[10] The March 18 Decision also asserted that it is arbitrary under CBJ 49.25.300(a)(3) to list halfway houses under both 1.450 and 7.400 [R. 710], but there is nothing arbitrary in this case because halfway houses are prohibited under each section.

509 U.S. 312, 320 (1993) (citation omitted) (reversing decision that involuntary commitment procedure violated equal protection and due process). "[W]e *never* require a legislature to articulate its reasons for enacting a statute." *Federal Communications Commission v. Beach Communications Inc.*, 508 U.S. 307, 315 (1993) (emphasis added) (reversing decision invalidating a distinction in the Cable Communications Policy Act). Therefore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Ibid.* "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Ibid.*; *accord*, *SeaRiver Maritime Financial Holdings Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002) (affirming decision of U.S. District Court for Alaska that Oil Pollution Act does not violate equal protection) ("[a]lthough the legislative history … does not explicitly reveal Congress's motive in adding the provision, the government's proferred rationale suffices that Congress intended to protect Prince William Sound from the risk of another oil spill from the same vessel").

Again, the Assembly, like the Board and the Commission, lacks jurisdiction to decide these constitutional issues. But again for the reasons stated, the courts would rule, even if there was jurisdiction here or below to rule otherwise, which there is not, that any absence of legislative history does not affect the fair and substantial basis for Title 49 as amended.

iv. Fair and Substantial Basis for the Table of Permissive Uses is Not Required.

Regardless of whether there is fair and substantial basis for Title 49 as amended, no authority has been presented in this case, not even in the March 18 Decision [R. 710-711], the August 14 Memorandum [R. 207-21], or Ms. McKibben's comments [R. 356-357], that distinctions within Tables of Permissive Uses such as that in CBJ 49.25.300, as

opposed to distinctions in *the actual granting of permits*, must have fair and substantial or even rational basis.[11]

There is no indication in this case that any large halfway houses or correctional facilities actually exist which benefit from the arguably harsher treatment of small halfway houses in the 2010 amendment.[12] Further, even if these other entities do actually exist, the Table of Permissive Uses allows them only where the Commission approves a permit, and a Director and a Commission acting within their discretion almost certainly would reject the applications of these other entities under CBJ 49.15.330(d) and (f) for the same reasons set forth below that the Commission should have rejected Haven House's application. The cry that the Table of Permissive Uses is "arbitrary" therefore appears to be made only on behalf of entirely mythical creatures. Since the Table as written does not unfairly favor any existing entity in the actual granting of permits, it is not unenforceable. There cannot be discrimination in favor of green people when there are no green people.

It is well established that there is no denial of equal protection where there is no actual discrimination among persons in a similar situation at any given period. *See Koster v. Holz*, 148 N.E.2d 287, 293 (N.Y. 1958), *reargument denied*, 149 N.E.2d 540 (N.Y. 1958) (rejecting equal protection claim). Similarly, due process "is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (rejecting due process claim).[13]

Again, the Assembly, like the Board and the Commission, lacks the authority to decide these constitutional issues. But again for the reasons stated, the courts would rule,

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[11] The decision in *J.W.*, 720 F.2d at 1131-32, affirms a challenge to denial of *a permit*.

[12] Indeed, at least with respect to women, the evidence indicates that Haven House would be the only housing in Southeast Alaska for people leaving prison. [R. 691]. Further, the definition of "single-family dwelling" includes the requirement that it be "designed for … not more than one family." *See* CBJ 49.80.120. It is not clear that there would be a single-family dwelling designed for more than nine adult convicts and two supervisors.

[13] The August 26 Decision employs similar reasoning where it states that "[t]his Notice of Decision is not appealable until the Planning Decision makes a final decision on the Conditional Use permit." [R. 573].

even if there was jurisdiction here or below to rule otherwise, which there is not, that the Board and the Commission erred by deviating from Title 49 as amended.

c. The Board and the Commission Erred in Their Application of the Severability Doctrine.

CBJ 01.15.070 states as follows:

> Any ordinance heretofore or hereafter adopted by the assembly which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this ordinance, or the application thereof to any person or circumstances is held invalid, the remainder of this ordinance and the application to other persons or circumstances shall not be affected thereby."

Such a provision creates a presumption of severability. *See Alaskans for a Common Language Inc. v. State*, 170 P.3d 183, 211 (Alaska 2007) (reversing declaration that initiative was void by severing unconstitutional provision). Such a provision also indicates that the legislature intended the remainder of the act to stand if part of it was invalidated. *See id.* at 213. The burden is on the assailant of the legislation to show its inseverability. *See id.* at 211. This requires establishment of the clear probability that the legislature would not have been satisfied with what remains if the invalid part is eliminated. *See ibid.*

In this case, the Assembly was aware of CBJ 01.15.070 when it amended Title 49 in 2010 and therefore knew that it was severable, and the severability of Title 49 has not been disputed. The Board and the Commission, while purporting to acknowledge the remainder of Title 49 as amended, disregarded *all* of rows 1.450 and 7.400, halfway houses, thereby effectively severing them from the ordinance. Although neither the Board nor the Commission have made findings supporting these deviations, they appear to follow the rationale of the March 18 Decision, which expressly states that "*[e]xcept the provisions specifically addressed below* [dealing with halfway houses and group

homes], Title 49 is presumed valid and enforceable." [R. 710 (emphasis added)][14] This is an express concession of severability.

The severing of Title 49 by the Board and the Commission is premature under the express language of CBJ 01.15.070, since no court has declared any part of it invalid. Nor, for the reasons discussed above, *see* pp. 22-28, *supra*, is it expected that any part of Title 49 will be invalidated and, even if it is, nothing in CBJ 01.15.070 or other law confers jurisdiction on the Board or the Commission to decide how to sever it. However, even if severing is required, which it is not, and even if it is the Board or the Commission which has this authority, which it is not, deleting the provisions dealing with halfway houses from the ordinance altogether as the Board and the Commission have done is an incorrect application of the severability doctrine.

A statute is severable only if legal effect can be given to the severed statute *and if the legislature would have intended the provision to stand in the event other provisions were struck down*. *See Alaskans for a Common Language Inc.*, 170 P.3d at 209 (emphasis added). With respect to legislative intent, the key question is whether the portion remaining, once the offending portion of the statute is severed, is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part. *See id.* at 212.

The deletion of rows 1.450 and 7.400 disregards the obvious intent of the 2010 amendment to distinguish group homes from halfway houses and to prohibit halfway houses in D-5 districts. Further, the March 18 Decision and the August 14 Memorandum also conclude that the group home provisions in Title 49 as amended are "likely unenforceable." [R. 207, 216-218, 710]. This would eliminate the protection intended for group homes and reintroduce the distinction between group homes and single-family

[14] Although the August 14 Memorandum does not specifically address or even express cognizance of severability, it makes clear that it believes that it is only the halfway house and group home provisions which are "likely unenforceable." [R. 207 ("the halfway house and group home provisions in Title 49 are likely unenforceable"); 215 ("the TPU regarding small halfway houses is not likely enforceable"); 216 ("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"); 218 ("the group home definition is likely unenforceable")]

residences which the 2010 amendment specifically sought to abolish in order to comply with federal requirements.

The August 14 Memorandum even boasts that "[n]otably, 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." [R. 207]. In other words, the Memorandum would revert to the *status quo ante* which it was believed violated federal law.

Further, even if this approach is consistent with legislative intent, which it is not, a proper measure of respect for the lawmaking process requires that only those portions of laws which are unconstitutional should be struck down. *See Alaskans for a Common Language Inc. v. State,* 170 P.3d at 209 (reversing declaration that initiative was void by severing unconstitutional provision). "[W]e try not to nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (vacating injunction against enforcement of parental notification act). "Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course," so that "a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ibid.* (citation omitted).

In addition, "like the right to procedural due process, the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 744 (1984) (citation omitted) (reversing ruling that severability provision was unconstitutional by recognizing that it allows withdrawal of benefits). Therefore, "when the right involved is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740 (citation omitted); *accord, Levin v. Commerce Energy Inc.*, 560 U.S. 413, 426-427 (2010) ("[h]ow equality is accomplished – by extension or invalidation of the unequally distributed benefit or burden, or some other measure – is a matter on which the Constitution is

silent") (reversing dismissal of action based on comity where plaintiffs had sought increase in competitor's taxes but possible remedies for discriminatory provisions also included reduction of their own taxes).

Instead of invalidating the halfway house provisions and granting a permit to Haven House as the Board and the Commission have done, if anything they should have followed the prohibition against halfway houses in Title 49 as amended, severed a smaller portion of the ordinance and simply extended to correctional facilities and large halfway houses the same treatment which the 2010 amendment provides for small halfway houses.

In order to cure any invalidly disparate treatment of large halfway houses, the Board and the Commission, if anything, should have simply deleted the "not more than" clauses and the last sentence from the definition of "halfway house" in CBJ 49.80.120,[15] which would then read as follows:

> Halfway house means a single-family dwelling for persons over the age of 12, together with 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.

In order to cure any invalidly disparate treatment of correctional facilities, this alternative approach could have been taken easily by simply deleting "3" from the row for 7.500, correctional facilities, in the table of permissive uses in each column where no number appears for 1.450 or 7.400.

There is no question that legal effect could be given to Title 49 so severed. Whether legal effect can be given is "a relatively low threshold test." *See Alaskans for a Common Language Inc.*, 170 P.3d at 211. Correctional institutions and large halfway houses, if any ever exist, would simply be treated the same as small halfway houses.

It also appears that the Assembly would intend the enactment so severed to stand without its invalid parts, for it still would differentiate group homes from halfway houses

[15] This change would occur only with respect to the columns in the table which prohibit halfway houses. The change is not necessary where halfway houses are permitted.

and fulfill the purpose of the federal anti-discrimination laws, and it still would prohibit halfway houses in D-5 districts as the Assembly obviously intends.

The Board and the Commission clearly severed too much. Having gone as far as they did, what principled reason is there not to go all the way and invalidate *all* of the ordinance, leaving no basis to approve a permit for either Haven House or anyone else? Even if the Board and the Commission have had the authority which they claim, which they do not have, they clearly erred.

II. Adequate Written Findings and Substantial Evidence Fail to Support the Decisions of the Board and the Commission That Haven House is "Of the Same General Character" as 1.610.

A. Adequate Written Findings Fail to Support the Decisions.

The August 13 Memorandum leaps from the *Latest Book*'s alleged recommendation to treat halfway houses as boarding houses to a purported finding without further explanation that Haven House is of the same character as 1.610, without any indication that the *Latest Book*'s alleged recommendation is either based on or consistent with Alaska law. [R. 26-28]

The Board and the Commission also failed to make any other findings in support of their decisions that Haven House is of the same general character as 1.610. In particular, the Board and the Commission failed to make any findings specifically with respect to the five different use descriptions within 1.610. [R. 572-573, 1296-1297].

B. Substantial Evidence Fails to Support the Decisions.

As Dan Hubert comments, Haven House's insistence that it is not a halfway house itself indicates that it is not of the same character as the neighborhood:

> Ms. McKeen opposes the notion that Haven House is a halfway house … because placement of a halfway house in this neighborhood with children and a day care is inherently repugnant to … common sense.

[R. 1309]. This is true under any name.

CBJ 49.25.210(c) states in part that "[t]he D-5, residential district, is intended to accommodate primarily single-family and duplex residential development."

The use description for 1.610 in the Table of Permissive Uses in CBJ 49.25.300 states as follows: "Rooming, boarding houses, bed and breakfasts, single room occupancies with shared facilities, and temporary residences. Owner or manager must live on site."

CBJ 49.80.120 defines "Boardinghouse and rooming house" as "[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 'boardinghouse and rooming house' includes houses offering bed and breakfast." "Bed and breakfast" means "a dwelling in which more than two bedrooms are used for commercial lodging provided by the owner or operator who lives on site" and "includes boardinghouses and rooming houses." *See ibid.* "Commercial" means "having profit as a chief aim." *See ibid.*

Therefore, in the CBJ, rooming, boarding houses and bed and breakfasts must have profit as a chief aim and their owner or operator must live on site, and CBJ 49.25.300 independently requires that an owner or manager must live on site.

In addition, rooming, boarding houses and bed and breakfasts must measure their capacity by rooms. *See* CBJ 49.80.120 ("transient structures" means "all forms of short term residence, including hotels, motels, boardinghouses, bed and breakfasts, roominghouses, or any other residential use *where capacity is measured by rooms* rather than dwelling units" (emphasis added)).

"Single-room occupancy with shared facilities" means "living and sleeping space for the exclusive use of one occupant, with shared sanitary and/or food preparation facilities for all occupants of the development." *See* CBJ 49.80.120.

Both "single-room occupancy with shared facilities" and "temporary residences" must be "commercial" and otherwise like rooming, boardinghouses and bed and breakfasts under the rule of *ejusdem generis*, *see City of Kenai v. Friends of Recreation Center Inc.*, 129 P.3d 452, 459 (Alaska 2006), and also must have an owner or manager living on site pursuant to CBJ 49.25.300.

Haven House does not fit within these definitions, as the August 13 Memorandum itself expressly recognizes by conceding that it "does not exactly fit within any of our existing definitions or land use categories." [R. 27].

Since Haven House is nonprofit [R. 362 (testimony of Dan Hubert) and 678], it is not "commercial." Therefore, not only the convicts residing temporarily in Haven House, but also the Haven House ownership and management themselves, would lack the financial incentive to maintain it properly. This contrasts with the present residents of the neighborhood, who have made monetary as well as emotional investments in their homes. [R. 361 (testimony of Sue Ann Randall)].

Haven House also fails to satisfy the requirement that capacity be "measured by rooms" and the definition of "single room occupancies with shared facilities" for the additional reason that eight residents would share four bedrooms. [R. 1301 (comments of Ms. McKibben)].

Further, although the October 16 Decision stated that "[a] resident house manager will live on site" [R. 1296], Haven House's admissions that it may not be able to find a suitable manager [R. 689] and that the manager will not be a counselor [R. 1310 (comments of Ms. McKeen)] render this meaningless.

In addition, the defining characteristic of Haven House is that it is an institution, not a residence. *Cf. Culp v. City of Seattle*, 590 P.2d 1288, 1290 (Wash. App. 1979) (affirming vacation of permit for children's resident home) ("[T]he scheme of the code is to differentiate between a dwelling occupied by a family which takes in and cares for children and one which is occupied by children supervised by a staff. The former is compatible with the traditional notion of a family; the latter is compatible with the traditional notion of an institution").

Therefore, Haven House is not "of the same general character" as 1.610.[16]

Part of the reason that the Board and the Commission concluded otherwise is that the August 13 Memorandum, while citing the CBJ definitions, based its recommendation

[16] Commissioner Haight's assertion that all of the characteristics of Haven House fell within 1.610 except the transitional care element, [R. 367], finds no support in the record.

on a creative combination of other definitions proferred by the *Latest Book* which have not been adopted in the CBJ. [R. 27]; *cf. Vermont Division of State Buildings v. Town of Castleton Board of Adjustment*, 415 A.2d 188, 194 (Vt. 1980) (reversing order to issue permit) ("[t]he court's reliance upon a dictionary definition of 'residential' without reference to the zoning regulations in this case was clearly inappropriate").

This methodology directly conflicts with the *Latest Book* itself, the express purpose of which is not to resolve litigation but rather to assist an Assembly when it is writing an ordinance: "The original intent of the authors was to prepare a book of definitions that could be used … in any … ordinance." *Latest Book* p. x; *see also id.* at ix ("the definitions are designed to be used directly in ordinances"; "commentaries and annotations … explain how the definition may be used in an ordinance"). This is why "the reader is urged to consult with local counsel on … how state enabling acts or court decisions affect the application of specific definitions in a particular jurisdiction." *See id.* at xii. This also may be why most law libraries do not even carry the *Latest Book*, no reported decisions from Alaska have ever mentioned it, and many attorneys have never heard of it. In fact, it appears that the only published judicial decision in the whole country which has ever explicitly considered a proposed definition from the *Latest Book* rejected it. *See Grissler v. Zoning Board of Appeals of Town of Canaan*, 62 A.3d 539, 544 (Conn. App. 2013) (definition of "storage"); *see also McDowell v. Gahanna*, 2009 WL 4931886 *4 (Ohio App. 2009) (unpublished decision rejecting *Latest Book*'s proposed definition of "radio broadcast station").

The August 13 Memorandum misquotes the proposed definition of "boardinghouse" from the *Latest Book* as "[a] dwelling unit or part thereof in which, for compensation, lodging and meals are provided and personal or [sic] financial services may be offered." [R. 27][17] .

The August 13 Memorandum also relied on the *Latest Book*'s proposed definition of "Boarding home for sheltered care":

[17] The actual definition in the *Latest Book* states "personal *and* financial services" (emphasis added). *See Latest Book* p. 53.

> A *non-profit* or for-profit group home for the sheltered care of persons with special needs, which [sic] in addition to providing food and shelter, may also provide some combination of personal care, social or counseling services and [sic] transportation.

[R. 27 (emphasis added)].

The August 13 Memorandum also relied on the *Latest Book*'s proposed definition of "transitional care home," which is "[a] facility in which individuals live for a short period while receiving physical, social, or psychological therapy and counseling to assist them in overcoming physical or emotional problems." [R. 27]. The comment to this definition states in part that "[p]rofessional therapy and counseling are done on a more intensive basis than is permitted in an outpatient facility." *See Latest Book* p. 414.

The August 13 Memorandum attempted to link "transitional care home" in the *Latest Book* to "transient structures" in CBJ 49.80.120. [R. 26-27]. But there is no reason to believe that CBJ 49.80.120 intends its definition of "transient structures" either to include the "transitional care homes" in the *Latest Book* or to otherwise affect the scope of 1.610.

Each of the definitions proferred by the *Latest Book* differs significantly from the CBJ definitions. The *Latest Book*'s proposed definitions can include non-profit as well as for-profit homes, and in the case of a "boarding home for sheltered care" this is express. Further, none of these proposed definitions from the *Latest Book* expressly requires that the owner or operator must live on site, except with respect to boardinghouses in residential zones as discussed immediately below.

Further, Haven House does not even fit within the *Latest Book*'s proposed definitions. The *Latest Book* comments that where a boardinghouse is in a residential zone, "communities require the owners or operators to maintain their residence on-site and personally collect rents to ensure that the structure remains principally a private dwelling unit," *see Latest Book* p. 53, but Haven House admits that it may not be able to find a suitable manager [R. 689] and that the manager will not be a counselor [R. 1310 (comments of Ms. McKeen)].

The *Latest Book* also would require that "personal and financial services may be offered" in a boardinghouse, that a boarding home for sheltered care "may also provide some combination of personal care, social or counseling services and transportation," and that individuals in a "transitional care home" be "receiving physical, social, or psychological therapy," but Haven House would not provide these things [R. 857].

Also, the *Latest Book*'s proposed definition of "boarding home for sheltered care" includes only "group home[s]" [R. 27], but the definition of "group home" in CBJ 49.80.120 states in part that "[r]esidents must not be serving a sentence for a criminal act."

Therefore, Haven House would not be a "boardinghouse," a "boarding home for sheltered care" or a "transitional care home" even under the *Latest Book*'s proposed definitions.

The *Latest Book* specifically warns against applicants who "attempt to use uncommon or rare permutations of words in order to establish the legality of other uses." *See Latest Book* p. xxii. This is exactly what the Board and the Commission have done in this case.

In fact, the August 13 Memorandum expressly acknowledges the distinction between Haven House and 1.610 by conceding that "there may be impacts beyond those normally associated with uses permitted outright in the D-5 zoning district." [R. 27]. This is putting it mildly.

Houses for convicts are distinguishable in Alaska as a matter of law. AS 33.16.150(a)(10) prohibits parolees from even contacting or corresponding with felons without the permission of their parole officer. The Alaska Supreme Court has specifically found residence in a halfway house to be different than living independently in the community. *See Carl N. v. State, Department of Health & Social Services, Division of Family & Youth Services*, 102 P.3d 932, 933 (Alaska 2004) (affirming termination of father's rights where "he never lived independently in the community; he was in jail, *in a halfway house*, under house arrest, or in a residential treatment facility" (emphasis added)).

In *Bannum Inc. v. City of Fort Lauderdale, Florida,* 157 F.3d 819, 823-24 (11th Cir. 1998), *reh'g denied,* 166 F.3d 355 (11th Cir. 1988), *cert. denied,* 528 U.S. 822 (1999), the court affirmed a permit requirement for a halfway house which did not apply to multi-family residences, apartment houses, motels, hotels, foster homes, mobile home parks, convents or fraternity houses:

> Generally, the City's decision to require certain social service programs to obtain special approval was not arbitrary. Rather, this decision could have been premised upon differences in the ways in which such facilities would operate in comparison to other types of land uses that are not subject to the restriction. Enacting the ordinance enabled the City to control the placement of certain social service programs, thereby furthering the City's goals. Regarding the application of the ordinance to Bannum specifically, it was not irrational for the City to have concerns about whether the ex-offenders housed at the CTC would either pose some threat to the surrounding community or exacerbate the City's perceived burden in accommodating a disproportionate share of social service programs. Thus, the City could reasonably have believed that applying the "custodial facility" designation to Bannum's CTC would further its interests in conserving municipal resources and protecting the public ….
>
> Bannum presented some evidence that its CTC participants posed no actual threat to the Fort Lauderdale community. Unfortunately for Bannum, however, controlling precedent limits our inquiry to whether the City could rationally have believed that the CTC participants posed a threat to either public safety or municipal resources.

Bannum Inc. contradicts any notion that halfway houses are of the same character as boarding houses. *See also Vermont Division of State Buildings*, 415 A.2d at 194 (housing for juvenile delinquents not one family dwelling, professional residence-office, school, religious institution, public outdoor recreation, enclosed accessory building use, home occupation or community center); *Browndale International Ltd. v. Board of Adjustment for the County of Dane*, 208 N.W.2d 121, 133-34 (Wis. 1973), *cert. denied*, 416 U.S. 936 (1974) (reinstating prohibition of therapeutic homes in residential zone).

Except for the fact that Haven House would not be providing treatment for its residents who need it [R. 857] (for which it should not be rewarded in this application), it is actually closer to the character of other uses which CBJ 49.25.300 also prohibits in D-5

zones, *e.g.*, 7.100, hospitals, and 7.150, health care clinics, other medical treatment facilities providing outpatient care, etc. *See Palella v. Leyden Family Service & Mental Health Center*, 404 N.E.2d 228, 231-232 (Ill. 1980) (reinstating injunction against nonmedical detoxification center which was not nursing and convalescent home, where ordinance prohibited hospitals); *School Lane Hills Inc. v. East Hempfield Township Zoning Hearing Board*, 336 A.2d 901, 903 (Pa. Cmwlth. 1975) (affirming denial of permit for rehabilitation center in residential district where it amounted to a hospital).

It is ironic here that the August 13 Memorandum proffers Haven House as a "Boarding home for sheltered care" based on the *Latest Book* [R. 27], for the *Latest Book*'s comment to its definition of this term states in part that the facility provides "service, equipment and safety features" which may include supervision and assistance in dressing, bathing and hygiene; care in emergencies and during temporary illness; supervision in the taking of medications; and other services conducive to the residents' welfare. *See Latest Book* p. 52. If Haven House satisfied the *Latest Book*'s description of a "Boarding home for sheltered care," which it does not, then this would appear to put it squarely within yet the additional prohibitions in 7.100 and 7.150.

Haven House is not "of the same character" as 1.610. Even if it is, which it is not, CBJ 49.20.320 states merely that the use *may* be permitted and in this case the Board and the Commission erred by classifying Haven House as an allowed use in the Tall Timbers neighborhood.

For these reasons, and also based on all of the other arguments in this brief, the Board and the Commission erred by holding that Haven House is "of the same general character" as 1.610.

III. Substantial Evidence Fails to Support the Decisions of the Board and the Commission Granting a Permit to Haven House Even if It Is "Of the Same General Character" as 1.610.

CBJ 49.15.330(f) provides that

> [e]ven if the commission adopts the director's determinations pursuant to subsection (e) of this section, it may nonetheless deny or condition the permit if it concludes, based on its own independent review of the

information submitted at the hearing, that the development will more probably than not:

(1) Materially endanger the public health or safety;

(2) Substantially decrease the value of or be out of harmony with property in the neighboring area; or

(3) Lack general conformity with the comprehensive plan, thoroughfare plan, or other officially adopted plans.

In this case, the Commission should have denied and conditioned Haven House's application based on each of the subsections in CBJ 49.15.330(f).

A. Haven House Would Materially Endanger the Public Health and Safety.

Statistically, as many of 700 of the proposed residents of Haven House during the next ten years, including those from other parts of the state, would become recidivists. [R. 691, 1202]. These convicts would be able to leave Haven House on their own [R. 686, 691], walking the children's "safe routes" [R. 653-654, 692, 851] in the dark [R. 621], with no police nearby [R. 606, n. 19] and no suitable house manager [R. 689, 1310 (comments of Ms. McKeen)]. Some of them may escape [R. 1134-1154] or be expelled [R. 26, 359, 686-687, 690, 711] from Haven House while they are residing there. The danger to public health and safety is obvious. *Cf. Municipal Funding LLC v. Zoning Board of Appeals of City of Waterbury*, 853 A.2d 511, 517 (Conn. 2004) (reinstating denial of permit) ("[t]he plaintiff proposed to locate the facility in a residential neighborhood with a significant elderly population, a location where many residents walk late at night and early in the morning"); *Mile Square Service Corporation v. City of Chicago Zoning Board of Appeals*, 356 N.E.2d 971, 977-978 (Ill. App. 1976) (affirming denial of permit for halfway house in residence district) ("[T]he Zoning Board's denial of plaintiff's application bore a substantial relation to the public health, safety, morals or general welfare of the neighborhood. Several schools are located within close proximity to the subject premises …. [S]chool-age children are impressionable and could be adversely influenced by exposure to drug-related problems" (citation omitted)).

That the September 30 Memorandum (the analysis and findings in which the October 16 Decision adopted [R. 1296]), in response to the public health and safety concerns, recommends that Haven House be required to have a resident manager live on site as a condition of approval [R. 375], is tantamount to an admission that these concerns are valid. The comments by Commissioners Miller and Voelckers [R. 1313] also acknowledge the legitimacy of the concerns. Yet there is no way around Haven House's admissions that they may not be able to find a suitable manager [R. 689] and that the manager will not be a counselor [R. 1310 (comments of Ms. McKeen)]. So we are left with a finding of endangerment to public health and safety and no solution.

The September 30 Memorandum also made miscellaneous other points, *e.g.*, that convicts will have to be accepted into Haven House and agree to follow the rules, that Haven House will not accept sex offenders, that probation and parole officers will evaluate and monitor the convicts. [R. 375]. But there is no indication that this differs from the many other halfway houses where recidivism is higher than among those paroled to the street and where escapes are common.

The notion that the threats to public health and safety exist even without Haven House has been an ongoing misconception in this case. The September 30 Memorandum stated in part that "[c]urrently, women leaving prison, who would be eligible for residency at Haven House, are free to live anywhere in Juneau with approval from a probation/parole officer." [R. 375]. Commissioner Grewe stated at the October 14 meeting that "felons and people who have committed sex offenses and misdemeanors are all over this community" and that "these are risks that we all take living in a community and in a neighborhood." [R. 1313]. Haven House and numerous others expressed similar reasoning. [R. 358-359, 361-362, 364, 366, 689, 1304, 1308-1309]. The obvious fallacy in this is that Haven House would bring convicts to Juneau from other parts of Alaska and specifically channel them into the Tall Timbers neighborhood. [R. 639, 650, 690-691].

The Commission failed to make clear, through written findings or otherwise, why it rejected TTNA's proposed conditions and particularly whether it rejected the proposed

conditions relating to supervision, sunset provision, substance abuse, eviction, sex offenses and violence, transport of evicted residents, background checks, bus stop travel and courtesy because of the legal conclusions in the October 10 Memorandum [R. 1232-34], Mr. Palmer's contradictory advice [R. 1310, 1312] or some other reason. However, CBJ 49.15.330(g)(18) specifically authorizes "[s]uch other conditions as may be reasonably necessary pursuant to the standards listed in subsection (f) of this section." The standards listed in subsection (f) include "[m]aterially endanger the public health or safety," "[s]ubstantially decrease the value of or be out of harmony with property in the neighboring area" and "[l]ack general conformity with the comprehensive plan, thoroughfare plan or other officially adopted plans." Therefore, each of these proposed conditions, and also those relating to occupancy, fencing, parking and traffic mitigation, compliance with the Americans With Disabilities Act and insurance, should have been adopted.

For these reasons, and also based on all of the other arguments in this brief, the Board and the Commission erred by not denying and conditioning Haven House's application on the ground that it materially endangers the public health and safety.

B. Haven House Would Substantially Decrease the Value of the Property in the Neighboring Area.

Ms. Lobaugh's statement [R. 657-658] and the appraisal of 8610 Gail Avenue [R. 1195] leave no doubt that Haven House would and in fact already has begun to decrease the value of the property in the neighboring area. This is also the only conclusion which makes sense, particularly in view of the fact that at least seventeen of the present residents of the neighborhood either would not have purchased there at all, or would have purchased only at a substantially lower price, if Haven House had been operating there [R. 659-675]. *Cf. Mile Square Service Corporation*, 356 N.E.2d at 977 (proposed use would cause substantial injury to the value of other property in the neighborhood); *Arkansas Release Guidance Foundation v. Needler*, 477 S.W.2d 821, 822 (Ark. 1972) (affirming injunction against halfway house where it would decrease property values).

The September 30 Memorandum relied on an opinion from James R. Wakefield. [R. 377]. However, Mr. Wakefield's license expired on January 31, 2008. [R. 850]. His employing broker has not endorsed his opinion. And other than visiting the exterior of the Haven House property, there is no indication that Mr. Wakefield had any knowledge of or experience with the Tall Timbers neighborhood or of Haven House's proposed operation, other than that it is for up to nine women recently released from prison. [R. 610]

The September 30 Memorandum also indicated that

> [t]he CBJ Assessor has stated that she has researched reports of studies done to determine whether or not halfway houses or any other type of group/community service type housing impacts surrounding property values. She found no evidence to support this [sic] type of housing adversely affects surrounding property values (attachment I).

[R. 376].

However, according to Attachment I, on September 23, 2014, at 5:22 p.m. Ms. McKibben e-mailed Robin Potter as follows:

> This is a last minute request and I apologize for that. Your comments will be provided to the Planning Commission.
>
> I am working on the staff report for the conditional use permit for Haven House Inc. They propose to operate transitional housing for up to 9 women coming out of prison in an existing single family home at 3202 Malissa Drive, a D5 zoning district. The application is VERY large so I've only attached the parts I thought would be most helpful to you.
>
> There will no [sic] changes to the structure and the house is under going [sic] repairs.
>
> Do believe [sic] there will be an impact to property values?
>
> Thanks and please call me if you have questions.

[R. 596].

Ms. Potter replied on September 24 at 10:51 a.m. as follows:

> I reviewed the information you sent to me and did some extensive research online for reports of studies done to determine whether or not

> halfway houses or any other type of group/community service type housing impacts surrounding property values.
>
> I have found no evidence to support this [sic] type of housing adversely affects surrounding property values.
>
> If you need references to the studies, I can provide them for you.

[R. 596].

Reliance on this obviously cursory research, without reviewing the alleged studies, is obviously misplaced.

There was a vague reference in the September 30 Memorandum to "[p]hysical improvements" but no evidence in the record supporting its assertion that Haven House will have a positive impact on the neighborhood. [R. 376]. If anything, the spectre of unspecified "physical improvements" may give credence to the expressed concern about unsightliness if Haven House is reconfigured to allow for additional parking. [R. 1308].

For these reasons, and also based on all of the other arguments in this brief, the Board and the Commission erred by not denying and conditioning Haven House's application on the ground that it would substantially decrease the value of the property in the neighboring area.

C. Haven House is Out of Harmony With Property in the Neighboring Area.

The present neighborhood residents ask simply for the application of "common sense." [R. 364 (comments of Dan Nelson)]. The existing twenty-five homes generally contain single families with children. [R. 613-614]. The neighborhood is close knit and stable. [R. 361, 363 (testimony of Paula Hubert) and 365 (testimony of Andy Hughes)]. The residents leave their homes unlocked [R. 657], teach their children not to talk to strangers, know who their neighbors are and recognize the cars in the neighborhood [R. 361 (testimony of Shelley Lager)]. Haven House would change everything [R. 363 (testimony of Lolita Duran)] and public opposition has been almost unprecedented [R. 1035, 1314]. Particularly from the fact that so many of the residents would not have

purchased their homes if Haven House had been operating there [R. 659-675], it is clear that these people have relied on the proper application of the zoning laws.

A number of decisions have affirmed injunctions against halfway houses in residential neighborhoods altogether. *See, e.g., Smith v. Gill*, 310 So.2d 214, 219 (Ala. 1975) ("[t]he operation of a transitional facility in an exclusively residential district, and proof of the creation of an atmosphere detrimental to the use of and enjoyment of nearby residential property is subject to be enjoined if protested by owners of residences in the district"); *Arkansas Release Guidance Foundation*, 477 S.W.2d at 822 (where it would cause fear).

Halfway houses have been rejected even in *commercial* neighborhoods. *See, e.g., Philadelphia Suburban Development Corporation v. Scranton Zoning Hearing Board*, 41 A.3d 630, 631 (Pa. Cmwlth. 2012) (affirming decision that halfway house not customary and incidental to office use; neighboring business owners testified that they feared it would make the area unsafe); *State ex rel. Galloway Inc. v. City of Great Falls*, 684 P.2d 495, 497 (Mont. 1984) (affirming decision prohibiting prerelease center in business district).

Even if public opposition alone may not justify denial of a permit, in this case the opposition to Haven House is relevant as a matter of law. In *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1387 (11th Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994), the court, reversing a judgment against a city based on its disapproval of a development in a residential area, states as follows:

> There could be circumstances in which a city's residents wanted a development blocked for illegitimate reasons, such as racial prejudice. But that is not this case. Merely because citizen input may not be a sufficient basis for a rational government land use decision in every instance does not mean it can never be a sufficient basis for such a decision. *In most cases it will be.* Where, as here, citizens consistently come before their city council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid and that the proposed development should not be permitted.

(emphasis added, citation omitted). The public opposition to Haven House is well grounded. But even biases such as negative attitudes and fear are not necessarily invalid. *See Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (reversing decision that state treatment of disabled violated equal protection).

For these reasons, and also based on all of the other arguments in this brief, the Board and the Commission erred by not denying and conditioning Haven House's application on the ground that it is out of harmony with property in the neighboring area.

D. Haven House Lacks General Conformity With the Comprehensive Plan and Other Officially Adopted Plans.

All of the arguments above also demonstrate that Haven House lacks general conformity with the 2013 CBJ Comprehensive Plan ("Plan"), which provides in part for "safe neighborhoods," "public health, safety … and general welfare" and protection of "community form" and "from incompatible uses." *See* Plan pp. 1-2, 13 and 131.

By enabling convicts to travel on the "safe routes" to Glacier Valley Elementary School and Floyd Dryden Middle School, Haven House also would lack general conformity with the Safe Schools Plan. [R. 653-654].

The September 30 Memorandum stated in part that "[t]he 2013 CBJ Comprehensive Plan documents an on-going housing crisis." [R. 376]. The Memorandum then cited the Plan's policies with respect to "affordable housing" and "an adequate supply" of housing and "services … to ensure the safety, health, well-being and self-sufficiency of its residents." R. 376-377]. Commissioner Grewe commented that "[i]f this type of transitional home reduces the rate of recidivism for repeat offenses, then this is performing a benefit for the greater Juneau community." [R. 1313].

The fallacy in the September 30 Memorandum and in Commissioner Grewe's statements is that the convicts in Haven House would include those *relocated from other parts of Alaska* [R. 639, 650, 690-691], thereby increasing crime in Juneau and making housing here less available. It is already difficult for felons to find housing in Juneau. [R. 364 (comments of longtime resident Cindy Boesser)]. Recidivism is higher among convicts without housing. [R. 1303 (comments of Ms. McKeen)].

Even if Haven House benefits its own residents, these are not necessarily people who are here now. Further, some of the Plan's policies which the September 30 Memorandum cites [R. 376-377] specifically focus on the "homeless, rent overburdened, families, unaccompanied youth and the elderly" or the "indigent, youth, elderly, disabled persons and homeless," *see* Plan at 36 and 214. They do not focus specifically on convicts or recovering addicts.

For these reasons, and also based on all of the other arguments in this brief, the Board and the Commission erred by not denying and conditioning Haven House's application on the ground that it lacks general conformity with the Comprehensive Plan and the Safe Schools Plan.

CONCLUSION

As discussed in the statement of the case, the issues in this appeal are remarkably simple. This Assembly has unambiguously prohibited halfway houses like Haven House in D-5 districts. The Assembly should apply Title 49 as amended and reverse the decisions below, in the process protecting public health and safety; maintaining the value of the property, the harmony of the neighborhood and conformity with the CBJ Plans; and leaving constitutional issues to the courts. The evidence and findings below allow no other result.

DATED this 2nd day of March, 2015.

BAXTER BRUCE & SULLIVAN P.C.

By: Daniel Bruce
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Attorneys for Appellants Tall Timbers Neighborhood Association and Andrew Hughes

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2 day of March, 2014, a true and correct copy of the above was delivered to the following:

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By Gabrielle Keizer