

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
and UNL 2014 0001

DECISION ON APPEAL

Appellants Andrew Hughes and Tall Timbers Neighborhood Association filed an appeal of the Planning Commission's decision to grant a conditional use permit to Haven House¹, a transitional housing facility for women upon release from prison. The Appellants also object to the finding made by the Board of Adjustment that Haven House's transitional living facility was a land use not listed in the City and Borough's Table of Permissible Uses.² Haven House intervened in the appeal.

For the reasons stated below, both the unlisted use determination and conditional use permit decisions are upheld and the appeal denied.

¹ USE2014 0008.

² UNL2014 0001.

I. Procedural History and Issues on Appeal

On December 23, 2013, Haven House submitted a building permit application to the CBJ's Community Development Department ("CDD") to modify a single family home in the Tall Timbers neighborhood to a "transitional group home."³ On January 24, 2014, the Director of CDD sent Haven House a letter denying the permit, finding that Haven House was a "halfway house" and not a "group home" as defined by CBJ Code, which was not allowed in D-5 zones such as the Tall Timbers neighborhood.⁴

Haven House filed an appeal of the Director's decision on February 11, 2014.⁵ After receiving supplemental material and argument from Haven House on March 10, 2014,⁶ the CDD Director sent Haven House a second letter, dated March 18, 2014, stating that he'd concluded that CBJ code was "likely unenforceable" with respect to both "halfway houses" and "group homes."⁷ Based on that finding and the additional information provided by Haven House elaborating on its proposed project, the Director explained that Haven House's proposed use, a "transitional group home," was a "use not listed" under CBJ 49.20.320, which would need to be evaluated by the Board of Adjustment ("BOA").⁸ Haven House submitted its applications for an unlisted use determination⁹ and conditional use permit for an "entry home for women coming out of prison" to be located in the Tall Timbers neighborhood, on May 2, 2014.¹⁰

On April 1, 2014, a group of neighbors later identified as the Tall Timbers Neighborhood

³ R. 1450.

⁴ R. 1449.

⁵ R. 1445 – 1447. Haven House withdrew its appeal on April 4, 2014. R. 1379.

⁶ R. 1327 – 1356.

⁷ R. 69 – 70.

⁸ *Id.*

⁹ R. 30 - 31.

¹⁰ R. 381- 382.

Association filed an appeal of the CDD Director’s March 18, 2014, decision.¹¹ Haven House filed its appeal of the same decision on April 4, 2014.¹² On July 22, 2014, the Planning Commission dismissed the Tall Timbers appeal and stayed Haven House’s at its request.¹³

The BOA considered Haven House’s application for an unlisted use determination on August 21, 2014. As explained in its August 26, 2014, Notice of Decision, the BOA found that “transitional housing for people coming out of prison is of the same general character” as “miscellaneous rooms for rent,” category 1.610 of the Table of Permissible Uses (“TPU”)(CBJ 49.25.300).¹⁴ Because the TPU allows “miscellaneous rooms for rent” in D-5 zones with a conditional use permit, and because Haven House had applied to locate its facility in the Tall Timbers neighborhood – zoned D-5 – the BOA concluded that Haven House’s application for a conditional use permit should proceed.¹⁵

Tall Timbers appealed the BOA’s decision to the Assembly.¹⁶ At its regular meeting on September 29, 2014, the Assembly determined the appeal to be untimely and unripe, and dismissed it without prejudice.¹⁷ The Assembly notified Tall Timbers that the unlisted use determination made by the BOA would be appealable once a final decision was made by the Planning Commission on Haven House’s conditional use permit application.¹⁸

On October 14, 2014, the Planning Commission approved Haven House’s application for a conditional use permit, issuing its Notice of Decision on October 16, 2014.¹⁹

¹¹ R. 1369 – 1374.

¹² R. 1378 – 1382.

¹³ R. 1672 – 1679; R. 1599.

¹⁴ R. 353 – 354.

¹⁵ *Id.*

¹⁶ R. 1715 – 1718.

¹⁷ R. 1754 – 1755.

¹⁸ R. 1761.

¹⁹ R. 1315; 1296 – 1297.

This appeal followed the Planning Commission’s decision. As to the issues on appeal, the parties submitted a joint statement asking the Assembly to decide the following two questions:

1. Whether the Board of Adjustment’s unlisted use decision complied with CBJ 49.20.320.
2. Whether the Planning Commission’s conditional use decision complied with CBJ 49.15.330.

II. The Board of Adjustment’s Unlisted Use Decision Complied with CBJ 49.20.320.

Whether a proposed use is permitted in a particular zoning area is answered upon a review of the Table of Permissible Uses (CBJ 49.25.300). To determine whether a proposed use is allowed in any particular zoning district, a person would look through the Table to determine which category or “use description” their proposed project falls under, and then read the table to determine whether the use is allowed in a given zoning district (and if so, what approval process applies: department approval or conditional use permit.) When a proposed use does not squarely fall within any of the identified use descriptions, CBJ 49.20.320 applies:

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

After the CDD Director determined that Haven House’s proposed “transitional group home” was not a use identified in the Table of Permissible Uses, a hearing was scheduled in front of the BOA. In connection with the August 21, 2014, public hearing, the Board was provided a copy of CBJ Senior Planner Beth McKibben’s staff report, consisting of 7 pages of analysis and 224 pages of supporting documents.²⁰ The staff report analyzed Haven House’s

²⁰ R. 22 – 253.

proposal to provide “safe, sober, stable, structured and affordable housing...to help women ‘transition’ from prison to ordinary life outside of prison and to reduce recidivism.”²¹ Finding Haven House’s proposal to be providing “housing” of a sort, the Senior Planner determined that the use would properly be categorized as “Residential” under the Table of Permissible Uses.²² She then compared Haven House’s “proposed use of re-entry, or transitional housing for women coming out of prison” against the existing subcategories listed under the Residential category, concluding that Haven House “does not exactly fit.”²³ Given its similarities with some of the uses identified in category 1.600, though, she recommended the Board approve a use not listed determination for Haven House’s proposed “re-entry home for women coming out of prison.”²⁴ The staff report specifically recommended the BOA find Haven House’s proposed use to be of the same general category as the uses listed in category 1.610 of the Table of Permissible Uses, miscellaneous rooms for rent.²⁵

At the hearing, the BOA heard additional comments from the Senior Planner, and testimony from Haven House’s attorney, the attorney for Tall Timbers Neighborhood Association, and thirty-four members of the public.²⁶ At the close of the meeting, which lasted over four hours, the BOA deliberated, ultimately agreeing with the staff analysis and concluding that Haven House’s proposed use was of the same general character as the uses listed in category 1.610, miscellaneous rooms for rent.²⁷ In its final Notice of Decision, the BOA, specifically adopting the analysis outlined in the August 13, 2014, staff report, determined that:

²¹ R. 26.

²² *Id.*

²³ R. 26 – 27.

²⁴ R. 28.

²⁵ *Id.*

²⁶ R. 356 – 368.

²⁷ R. 366 – 367.

Transitional housing for people coming out of prison is of the same general character as those uses listed in category 1.610, miscellaneous rooms for rent of CBJ 49.35.200, the Table of Permissible Uses. The transitional housing use is deemed as listed in category 1.610 of the table of permissible uses for the purpose of determining whether a Conditional Use permit should be issued to Haven House.²⁸

Tall Timbers argues that the BOA's decision is not supported by substantial evidence. In its brief, Tall Timbers provides its own analysis of the "unlisted use determination," concluding that "Haven House is not 'of the same character' as 1.610."²⁹ While Tall Timbers clearly disagrees with the analysis conducted by the BOA, that is not enough to meet its burden on appeal.

The appeal code requires the Assembly to uphold the decision being appealed unless "the appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing." (CBJ 01.50.070) "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (CBJ 01.50.010.)

The Alaska Supreme Court has held that with respect to decisions made within its "sphere of expertise," a Planning Commission's decisions (in this case, sitting as the Board of Adjustment) are "entitled to considerable deference."³⁰ In reviewing a Commission's zoning decisions, a "presumption of validity" must be applied.³¹ This direction, in conjunction with the standard of appeal under CBJ 01.50, suggests that the role of the Assembly on appeal is limited. The Assembly does not re-weigh the evidence or second-guess the Commission's findings as long as there is evidence in the record to support those findings.

The Assembly finds that the BOA's decision is supported by substantial evidence. The BOA's finding that Haven House's proposed use was a "use not listed" was conceded by the

²⁸ R. 353 – 354.

²⁹ Appellants' Opening Brief at pp. 33 – 40.

³⁰ *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995).

³¹ *South Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993).

parties.³² As to its finding that the proposed use was most similar to “miscellaneous rooms for rent” under category 1.610 of the Table of Permissible Uses, the Assembly finds that the 231 page staff report and four hours of testimony from thirty-four members of the public contained substantial evidence that a “reasonable mind” might accept as adequate to support the BOA’s decision. The minutes from the August 21, 2014, meeting confirm that, in addition to the points raised in the staff report, the BOA differentiated Haven House’s proposed use from the use categories existing in the Table of Permissible Uses based on the fact that “transitional housing” was not currently listed in the Table and:

- A number of people would have bedrooms but share common space;
- There was a sense of “transient occupancy that was distinguishable from other living situations;” and
- Residents would not be serving a sentence.³³

Based on the record as a whole and the Notice of Decision dated August 26, 2014, the Assembly finds the Appellants have failed to meet their burden under CBJ 01.50.070 and the appeal is denied.

III. The Board of Adjustment’s Decision was supported by Adequate Written Findings.

The Assembly may set aside an agency decision “if the decision is not supported by adequate written findings or the findings fail to inform [the Assembly] of the basis upon which the decision appealed from was made.” As evidenced by the discussion above, the written decision, which adopted the staff report findings and analysis, and the discussion by the BOA as reflected in the minutes of the August 21, 2014 meeting, meets this standard.

Because we find the August 26, 2014, Notice of Decision and the record as a whole sufficient to provide us with a clear understanding of the basis of the BOA’s decision, we reject the Appellant’s argument that the findings are inadequate.

³² R. 258; 359.

³³ R. 367 -368.

IV. The Planning Commission's Decision to Grant Haven House's Conditional Use Permit is supported by Substantial Evidence.

After public hearing on October 14, 2014, the Planning Commission granted Haven House a conditional use permit for “the development of safe, sober and stable transitional housing in a home environment for up to nine women coming out of prison,” to be located in the Tall Timbers neighborhood. In its Notice of Decision dated October 16, 2014, the Commission adopted the analysis and findings contained in the CBJ Senior Planner’s September 30, 2014, memorandum and imposed six conditions.³⁴

As explained above, the Assembly may not substitute its judgment for that of the Commission as the Commission’s decisions are entitled to “considerable deference.”³⁵ If there is substantial evidence in light of the record as a whole, such that a reasonable mind might accept as adequate to support the Commission’s decision, the Assembly must uphold the decision.

Integral to the Commission’s consideration of a conditional use permit application is the staff report, which provides the Commission with an analysis of the proposed project. (CBJ 49.15.330(d)(3)). In analyzing a proposed project, staff considers whether a proposed conditional use is appropriate to a particular zoning district depending on the “character, intensity, or size” of the proposed use or the surrounding uses already in existence. (CBJ 49.15.330(a)). If the proposed use presents potential impacts on the neighborhood that can be mitigated with the use of conditions, the report recommends conditions. (CBJ 49.15.330(a)). Staff will recommend denial of an application if the proposed use will materially endanger public health or safety, will substantially decrease property values or be “out of harmony with property

³⁴ R. 1296 – 1297.

³⁵ *Lazy Mountain Land Club, surpa*, 904 at 386.

in the neighboring area,” or if the project fails to conform with the City and Borough’s Comprehensive Plan. (CBJ 49.15.330(d)(5)).

The Commission must adopt the staff report unless it finds by a preponderance of the evidence that staff’s determination was in error. (CBJ 49.15.330(e)(2)). Even if the Commission adopts the findings made in the staff report, the Commission can deny the permit for the same reasons staff must recommend denial: if the project will materially endanger public health or safety, if it will substantially decrease property values or be out of harmony with the neighboring area, or if it does not conform with the CBJ Comprehensive Plan. (CBJ 49.15.330(f)).

With respect to Haven House, the Planning Commission received a staff report from the Senior Planner consisting of 861 pages of analysis and back-up documentation.³⁶ The report specifically analyzed the following:

- The proposed project site.
- The proposed project design, including the number of residents being proposed, whether a resident house manager should be required to live on-site, and that the residents would be required to comply with the program’s “house rules.”
- Traffic impacts of the project on the surrounding neighborhood.
- Parking and circulation (specifically whether the project site could support the number of expected parking spaces needed.)
- Noise (noting that Haven House would be imposing a curfew on the residents.)
- Landscaping.
- Exterior lighting.
- Signage.
- Public Health and Safety issues (specifically discussing traffic impact and safety of children in the neighborhood and the neighbor’s concerns about the type of clients the proposed project would serve.)

³⁶ R. 369 – 1230.

- The effect of the project on property values in the neighborhood (appending a report from a local realtor and another from the CBJ Assessor, both finding no expected impact to property values, and noting that Haven House’s proposed project required its residents to keep up the exterior appearance of the home.)
- Conformity with the CBJ Comprehensive Plan.

Staff’s final recommendation was that the Commission approve the conditional use permit with five conditions: two related to parking; a requirement that the vegetative cover on the site be maintained; one requiring that if exterior lighting is installed, it be designed and located in such a way as to avoid offsite glare; and, lastly, that the permit require a house manager to live on-site.³⁷

The Commission held a public hearing on Haven House’s application on October 14, 2014. At that meeting, the Commission heard from, and asked questions of, the Senior Planner; attorneys for Haven House, Tall Timbers, and its own; and twenty-two members of the public (some opposed to the project and some in favor.)³⁸ The minutes reflect that over the course of the hearing, the Commission specifically considered parking, the impact of the proposal on property values, recidivism, signage, the issue of “house rules,” on-site supervision, traffic, and neighborhood harmony.³⁹ At the close of the meeting, the Commission voted to adopt the staff report and grant Haven House a permit with the five conditions recommended by staff plus one additional condition that Haven House establish “house rules,” which the Commission imposed “in order to preserve public health, safety and ensure neighborhood harmony.”⁴⁰

Based on this extensive record, the Assembly finds that the Commission’s decision was supported by substantial evidence. Tall Timbers disagrees with the Commission’s findings, arguing that allowing Haven House in the neighborhood fails to protect public health and safety,

³⁷ R. 379.

³⁸ R. 1300 - 1314.

³⁹ *Id.*

⁴⁰ R. 1296.

will decrease property values, impedes neighborhood harmony and lacks conformity with the Comprehensive Plan. But the fact that the Commission reached a different conclusion after hearing all the evidence than the conclusion reached by the Appellants is not relevant to the question on appeal. After reviewing the record as a whole – the staff report and back-up documentation, the testimony given at the October 14, 2014, public hearing, and comments and questions made by the Commissioners in response to that testimony – the Assembly cannot find that Tall Timbers has met its burden.

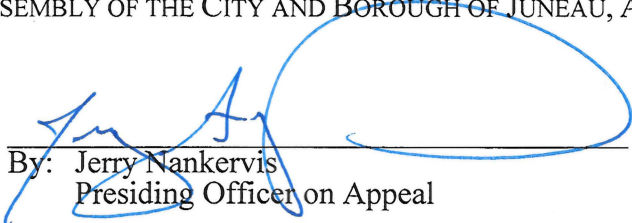
V. Conclusion

In light of the deferential standard of review the Assembly must afford to the Planning Commission’s zoning determinations (including Commission decisions when it sits as the Board of Adjustment), and the applicable standard of proof, the Appellants’ appeal must be denied. The Assembly finds that the record as a whole provided the Board of Adjustment with substantial evidence to make its unlisted use determination, and the Commission with substantial evidence to grant a conditional use permit to Haven House. We further find that both decisions – UNL2014 0001 and USE2014 0008 – are supported by adequate written findings.

The Planning Commission’s decision, and the underlying decision of the Board of Adjustment, are affirmed.

DATED this 19 day of May, 2015.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA


By: Jerry Nankervis
Presiding Officer on Appeal