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MEMORANDUM

FROM: Michael Gatti
Taylor McMahon
TO: Brian Hanson, Municipal Attorney
DATE: June 7, 2023
RE: Youth Advocates Services CUP Denial Appeal

I. Issue

We have been asked by the City and Borough of Sitka ("City") to provide a legal opinion on the pending appeal before the Board of Adjustment following the Planning Commission's denial of a Conditional Use Permit ("CUP") requested by Youth Advocates Services ("YAS") for a quasi-institutional home. Specifically, constitutional issues have been raised regarding whether the denial of the CUP was discriminatory or based on improper considerations, such as the "not in my backyard" ("NIMBY") style opposition testimony of the surrounding neighbors. There are further questions arising from the Planning Commission's Findings and Conclusions related to its denial of the CUP.

II. Statement of Facts

a. Factual History

On March 13, 2023, YAS applied for a CUP in order to purchase a duplex on 3411 Halibut Point Road ("Property") out of which it proposed to run a pilot program, Coastal Haven, that would provide housing to youth ages 16-21 who are homeless or at risk for experiencing homelessness. The Property is a duplex comprised of a main, five bedroom unit (Unit A) and a smaller two-bedroom unit (Unit B). The Units are separated by a four car garage. YAS proposes to put eight individuals in the larger Unit A and four in Unit B.

Coastal Haven will provide mental health services[1] to these youth, including wilderness therapy, and life skills training. Staff will be on-site 24 hours a day providing these services. Program participants must either go to school or have a job. They are not allowed to have vehicles or to host friends at the Property. YAS received a $2MM grant from Senator Murkowski for this project. Currently, three individuals have been identified for program participation and the plan is to "roll out" the program gradually. YAS operates other residential programs in Sitka.

[1] YAS does not provide drug and alcohol treatment and program participants are required to be drug and alcohol free.

Following receipt of the YAS application, a staff report was prepared as required by Sitka General Code ("SGC" or "Code") 22.30.160(A). The Staff Report recommended that the Planning Commission approve the CUP with the following conditions:

1. That Coastal Haven be operated consistently with YAS' application;
2. That Unit A may have eight residents and Unit B four;
3. That the Planning Commission could, upon receipt of a meritorious complaint, schedule further hearings to discuss mitigation and to terminate the CUP if a mitigation cannot be achieved; and
4. That YAS would complete a satisfactory fire/life/safety inspection prior to operation.[2]

On April 5, 2023, the Planning Commission heard YAS' application for a CUP. Public comment, both for and against, was heard. A motion to approve the CUP failed by a 2-3 voice vote. Thereafter, the minutes reflect that:

> M-Windsor/S-Mudry moved that the required findings for the conditional use permit could not be made because the proposal would adversely affect the established character of the surrounding vicinity due to the incompatible use with R-1 zoning, and the unified dissent of the neighborhood indicated high potential for neighborhood disharmony. This disharmony would also impact the ability of the proposal to meet its stated purpose.[3]

This motion passed 3-2.

Following this denial, YAS filed an appeal on April 19, 2023 asserting that: (1) the Coastal Haven proposal was consistent with the City's Comprehensive Plan; (2) that Coastal Haven was not incompatible with the neighborhood as the neighborhood was a mix of multi-family homes, duplexes, short term rentals, and a lodge, bar, and restaurant; (3) that there was not unified opposition to Coastal Haven, instead public comment was split 50/50 for and against; (4) that the reasons for denying the CUP were discriminatory and in violation of the Fair Housing Act; and (5) that YAS had provided a detailed operational plan that addressed the concerns raised by the public and the Planning Commission.

b. Procedural Overview

YAS' appeal will be heard by the Sitka Assembly, sitting as the Board of Adjustment ("BOA") pursuant to SGC 22.30.060(A), at its regular June 13, 2023 meeting. There has been some contention that the appeal was not timely filed due to the planning office incorrectly advising YAS on the time frame for filing the appeal. In such a scenario, as concluded by the Municipal Attorney, the appeal should be heard because the City is likely equitably estopped from dismissing

[2] CUP 23-07 Staff Report for April 5, 2023 at p. 5.
[3] April 5, 2023 Planning Commission Final Minutes at pp. 3-4.

the appeal as untimely under *Municipality of Anchorage v. Schneider*.[4] Additionally, not only would dismissing the appeal give rise to an equitable estoppel defense, YAS could simply file for a new CUP. Therefore, in the interest of fairness and administrative economy, the appeal should proceed.

At the upcoming appeal hearing, the BOA, will be acting in a quasi-judicial capacity. Past practice has been to conduct these appeals as open record appeals: meaning that the BOA may hear testimony and make findings.[5] Following the public hearing, the BOA may approve the CUP application, approve it with conditions, modify, deny, deny with prejudice, or remand the matter for further proceedings at the Planning Commission level.[6] The parties may seek reconsideration from the BOA[7] or appeals may be taken to the Alaska Superior Court within 30 days.[8]

III. Governing Code Provisions

a. Classification of Coastal Haven

All parties agree that the Coastal Haven will be a "quasi-institutional home," which is defined as:

> A residential facility located in a residence or living unit, the principal use being to serve as a place for no more than six persons in an R-1 zone and twenty persons in a R-2 or larger zone seeking rehabilitation, counseling, self-help and family environment. This definition shall not include dwellings intended for use as a family setting for handicapped persons as defined in the Fair Housing Act.[9]

The Property is zoned R1-MH. Under Code section 22.16.045:

> The R-1MH district is intended primarily for single-family, single-family manufactured homes or duplex dwellings, tiny houses or tiny houses on chassis at moderate densities, but structures and uses required to serve recreational and other public needs of residential areas are allowed as

[4] 685 P.2d 94, (Alaska 1984). The general elements of equitable estoppel are (1) assertion of a position by word or conduct, (2) reasonable reliance thereon, (3) resulting prejudice, and (4) that the estoppel will be enforced only to the extent that justice requires. *Id.* at 97.
[5] SCG 22.30.170; 22.30.180.
[6] SGC 22.30.170.
[7] SGC 22.30.190.
[8] SGC 22.30.240.
[9] SGC 22.08.710. The latter part of this definition appears to address the concept of a "group home" under the Fair Housing act.

conditional uses subject to restrictions intended to preserve the residential character[10] of the R-1 MH district.

Under SGC Table 22.16.015-1, a quasi-institutional use is a conditional use in the R-1 MH district.[11] A conditional use "is a use that may not be appropriate in a particular zoning district according to the character, intensity, or size of the lot or the surrounding uses."[12]

In this instance, YAS is asking both for a CUP to operate a quasi-institutional home in an R-1 MH district and also to exceed the number of persons allows in a quasi-institutional home in an R-1 district where it would otherwise be limited to six. The total program will serve twelve plus staff, although this will be divided between two units on the Property.

b. Guidelines for approving or denying a CUP

Per SGC 22.24.010, "the conditional use permit procedure is intended to afford the municipality the flexibility necessary to make determinations appropriate to individual sites. The commission may attach conditions necessary to mitigate external adverse impacts. If the municipality determines that these impacts cannot be satisfactorily overcome, the permit shall be denied." SGC 22.24.010(E) lists thirteen considerations for the Planning Commission to look at when determining the *impact* of a CUP. These were reviewed in the Staff Report. They are:

a. Amount of vehicular traffic
b. Amount of noise
c. Odors
d. Hours of operation
e. Location along a major or collector street
f. Potential for a "cut-through" traffic scenario
g. Effects on vehicular and pedestrian safety
h. Ability of police, fire, and EMS to respond to emergency calls on the site
i. Logic of the internal traffic layout
j. Effects of signage on nearby uses
k. Presence of existing buffers
l. Relationship of the CUP to the comprehensive plan
m. Other criteria that surface through public comments or planning commission review.

In addition to providing guidance on how to measure the impacts of the CUP, the Code also lists so-called "general approval criteria" for the Planning Commission to consider, such as

[10] A residential use means occupying the building for living, cooking, and sleeping purposes. SGC 22.08.720.
[11] A quasi-institutional home is a conditional use in all districts where allowed.
[12] SGC 22.24.010.

site topography, utility and service requirements, lot characteristics, use characteristics of the proposed use and community appearance.[13] The applicant bears the burden of proof. After all these considerations, in order to approve a CUP, certain findings must be made by the Planning Commission. These are that:

1. The conditional use will not:
    a. Be detrimental to the public health, safety, and general welfare;
    b. Adversely affect the established character of the surrounding vicinity; nor
    c. Be injurious to the uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located
2. The conditional use is consistent with the comprehensive plan
3. Conditions that are necessary to monitor the impacts of the CUP can be monitored and enforced;
4. The proposed use will not introduce hazardous conditions at the site that cannot be mitigated
5. The conditional use will be supported by adequate public facilities and services or conditions can be imposed to lessen their impact.[14]

In the present case, the Planning Commission did not make findings in these areas. Instead, it stated that these findings could not be made.

c. The decision of the Planning Commission

The Planning Commission's findings of fact are brief and at risk of being found inadequate or discriminatory. A best practice would be for the Planning Commission to consider the five factors in SGC 22.30.160(C) and indicate which were not met and why based upon evidence in the record. This is important in a case such as this where, in the absence of such findings, the decision is subject to challenge.

In Alaska, a planning commission's decision is presumed valid and judicial review is narrow.[15] The Planning Commission's decision will not be reversed so long as it is supported by substantial evidence.[16] Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion."[17] Additionally:

> Zoning board interpretations of zoning ordinances should be given great weight and should be accepted whenever there is a reasonable basis for the meaning given by the board. This deferential standard reflects the fact that

[13] SGC 22.30.160(C).
[14] SGC 22.30.160(C).
[15] *Griswold v. City of Homer*, 55 P.3d 64, 67 (Alaska 2002).
[16] *Id.*
[17] *Id.* (internal citations omitted).

> the Commission and the Board have expertise in administering zoning ordinances and they receive deference equal to that accorded to an administrative agency. With respect to questions of law that do not involve Commission or Board expertise, [the reviewing court will] substitute our independent judgment.[18]

Even with these liberal protections, the decision here is at-risk. The official minutes of the Planning Commission's meeting reflect two main bases for denial: (1) that the use is incompatible with R-1 zoning, and (2) the unified dissent of the neighborhood.

It is within the Planning Commission's purview to determine whether the proposed use is compatible with the rest of the R-1 neighborhood. However, the Code prescribes ways to measure the impact of a use, such as traffic, noise, odors, buffers, etc.[19] The Code also prescribes ways to look at how a conditional use will affect the neighbors. [20] The Planning Commission should have looked to the factors required for analysis under the Code.

The second reason for denial, "unified dissent of the neighborhood" and "high potential for neighborhood disharmony," is also problematic. To begin, as pointed out by YAS, public commentary was not uniformly against Coastal Haven: it was a mix of for and against. The potential for neighborhood disharmony is similarly not a factor for consideration under the SGC.[21] Many of the comments against Coastal Haven cite concerns about potential adverse effects: increased traffic, noise, and excessive use of the road and nearby public spaces. Some comments referenced the safety of young children. According to YAS, the public testimony was even more charged and based on the assumption that the program participants were criminals with unstable mental health problems. Each of these is an assumption based on stereotypes, not facts that were presented at the hearing, and it should not be the basis of the Planning Commission's decision. Additionally, denying zoning on the basis of subjective stereotyping may be challenged as discriminatory.

IV. The Fair Housing Act

The Fair Housing Act ("FHA") prohibits discrimination in housing on the basis of seven protected characteristics: race, color, national origin, sex, disability, family status, and religion.[22]

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[18] *Id.* at pp. 67-68 (internal citations omitted).
[19] SGC 22.30.160(C).
[20] *Id.* The Planning Commission may consider "use characteristics" that affect adjacent uses and districts such as "hours of operation, number of persons, traffic volumes, off-street parking and loading characteristics, trash and litter removal, exterior lighting, noise, vibration, dust, smoke, heat and humidity, recreation and open space requirements." *Id.* at (C)(4).
[21] SGC 22.30.160(C).
[22] The Fair Housing Act is codified at 42 USC §§3601-19. *See also* Title 24 of SGC, which prohibits discrimination on the basis of "race, color, age, religion, sex, familial status, disability, sexual orientation, gender identify, gender expression, or national origin." SGC 25.05.020.

While zoning matters are typically left up to local governments, they are preempted to the extent that they conflict with other federal laws, such as the FHA.[23] As noted by the United States Supreme Court, unlawful practices under the FHA "include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[24]

In 2016, the Department of Housing and Urban Development and the Department of Justice issued a joint statement regarding local land use laws and the FHA that addresses some of the issues raised in this appeal.[25] Notably, it cautioned that:

> [w]hen enacting or applying zoning or land use laws, state and local governments may not act because of the fears, prejudices, stereotypes, or unsubstantiated assumptions that community members may have about current or prospective residents because of the residents' protected characteristics. Doing so violates the Act, even if the officials themselves do not personally share such bias.[26]

For instance the Eleventh Circuit noted that an FHA violation can occur when the government acts in response to "significant community bias. Accordingly, a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision-makers personally have no strong views on the matter."[27]

At the outset, it should be assumed for the purpose of analysis that the residents of Coastal Haven are protected by the FHA. While they are selected for the program on the basis of their housing status (homeless, at risk for homelessness, etc.), not a protected status such as disability, YAS identifies that many of them will be of a protected race or disability status, or both. Additionally, Coastal Haven is likely a "group home" under the FHA.[28] While there is no precise definition, a group home is housing occupied by an unrelated group of persons with disabilities.

In addition to having a protected status under the FHA, by all appearances the Planning Commission took action in response to strong community bias against the residents of Coastal Haven. The record reflects a number of unsubstantiated assumptions and NIMBY style opposition to the development, at best. Instead of relying on the fears of the community, the Planning

[23] *E.g.* 42 USC §3615.
[24] *Texas Dep't. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.D. 519, 539,135 S.Ct. 2507, 2521-22 (2015).
[25] November 10, 2016 U.S Department of Housing and Department of Justice Joint Statement on State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, available here: https://www.justice.gov/opa/file/912366/download.
[26] Joint Statement at p. 5.
[27] *Cmty. Hous. Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F.Supp. 2d 208, 227 (11th Cir. 2003).
[28] The Code does not define "group home." SCG 22.08.

Commission should look to the factors identified in the Code and the evidence presented at the hearing that evaluates the Code CUP factors.[29]

V. Conclusion

Following the upcoming BOA public hearing, the BOA may either take action on the CUP or it may remand the matter back to the Planning Commission.[30] Regardless of which course of action is taken, findings based upon evidence in the record under SGC 22.30.160(C) should be made. As the matter stands now, due to the brief findings and the fact that the Planning Commission appeared to act primarily in response to community objections, the current denial of the CUP is subject to challenge under the FHA as discriminatory. But, this result can be avoided if the Code considerations for CUPs are addressed and appropriate findings made.

If the BOA determines that not enough evidence is presented at the upcoming hearing, it may continue the hearing and request briefing from the parties. Both YAS and its opponents provided unsupported testimony at the initial hearing. The opponents, for instance, cited concerns about future traffic, noise, and crime. On the other hand, YAS stated that it had policies on noise and disturbance but these policies are not in the record.

Because YAS operates other group homes in the Sitka area, it can be directed to present evidence on whether those properties have generated any complaints to YAS, the police, or other governmental authority. It could also be asked to provide its policies for review. The opponents, meanwhile, can be directed to provide its objective evidence, such as whether YAS' other group homes have affected property values in their vicinity. Upon such evidence, the BOA can issue a decision in accordance with the criteria set forth in the Code.

[29] *See Texas Dept. of Housing*, 576 U.S. at 541-42 (noting that while zoning officials would consider both objective and subjective factors, the subjective factors should be considered to a lesser extent).
[30] SGC 22.30.170(B)(1).