Health & Human Services and Public Safety Committee

Tuesday, September 8, 2020, 5:30 PM
Remote Meeting

Councilor Belinda Ray, District 1, Chair
Councilor Tae Chong, District 3
Councilor Pious Ali, At-Large

1. Announcements

   a. Potential Executive Session, pursuant to 1 M.R.S. section 405(6)(E), to consult with the City's attorney regarding the City's rights and duties with respect to safe injection sites and related State and Federal laws.

   b. Please click the link below to join the webinar:
   https://zoom.us/j/93507868471
   Or iPhone one-tap :
   US: +19292056099,,93507868471# or +13017158592,,93507868471#
   Or Telephone:
   Dial(for higher quality, dial a number based on your current location):
   US: +1 929 205 6099 or +1 301 715 8592 or +1 312 626 6799 or +1 669 900 6833 or +1 253 215 8782 or +1 346 248 7799
   Webinar ID: 935 0786 8471
   International numbers available: https://zoom.us/u/adTzdwINVQ

2. Review and Approval of Minutes from August 11, 2020

   a. Draft meeting minutes from August 11, 2020.

3. Updates

   a. Overdose Prevention Sites

i. Update on Safehouse case.

Attachments:

1. The October 2, 2019 Memorandum issued by the Federal District Court for the Eastern District of Pennsylvania in support its order denying the Government's motion for a judgment on the pleadings. Although this memo and its denial of the government's motion was not dispositive and did constitute final action by the court, this memorandum outlines most of the substantive issues and bases for the court's ultimate decision, issued on February 25, 2020 in favor of Safehouse and against the Government.

2. The Court's February Memorandum entering a declaratory judgment in favor of Safehouse and against the Government.

3. Court's Memorandum supporting its grant of the Government's request to stay the effect of the February 25 order while the Government's appeal of the Court's February 25 order is being appealed.

ii. Possible Executive Session

4. Smaller Shelter Zoning

a. Staff Presentation
b. Committee Questions and Discussion
c. Public Hearing
d. Possible Vote

5. Committee Work Plan

a. HHS & PS 2020 Workplan

6. Next Meeting: October 13, 2020

NOTE: Public comment will be taken at this meeting. If the committee votes to forward this proposal to the full City Council there will be further opportunities for public comment. Please feel free to send comments to members of the committee on any issue at any time via email. Councilors email addresses are available on the city website: www.portlandmaine.gov.

The meeting can be watched online via livestream: www.portlandmaine.gov/livestream

Keep up to date with the new shelter design and planning process at the City's website

www.portlandmaine.gov/shelterplanning

Health & Human Services and Public Safety Committee Minutes

Tuesday, August 11, 2020, 5:30pm, Remote Meeting

Committee Attendance:

Belinda Ray, Chair (District 1), Tae Chong (District 3), Pious Ali (At-Large).

Councilors in Attendance:

City Staff:

Kristen Dow, Director of Health and Human Services; Bridget Rauscher, Chronic Disease Prevention Program Manager; Keith Gautreau, Fire Chief; Jason Grant, Life Safety Plan Reviewer; Anne Torregrossa, Associate Corporation Counsel; Adam Harr, Executive Assistant for Social Services.

Meeting called to order at 5:35 PM.

AGENDA ITEM 1 – Announcements

- Racial Equity Landing Page:
  - https://www.portlandmaine.gov/2644/Racial-Equity-Work

AGENDA ITEM 2 – Approval of Minutes

- Councilor Chong moved to approve the minutes, Councilor Ali seconded and the minutes were approved unanimously.

AGENDA ITEM 3 – Updates

- Group of service providers continues to meet to discuss unsheltered individuals in Deering Oaks Park.
  - Out reach staff noted 15 individuals this morning at 6:00 AM
    - This number climbs to 50 during the day; not everyone seen during the day needs shelter at night.
  - Outreach reminders that services are available.
  - Discussion on ordinances.
    - Not for providers to enforce.
    - Reminder that they exist and there may be a time when enforcement ramps up.
  - Pandemic Reminders
    - Mask distribution.
    - Where people experiencing homelessness can be tested.
    - PUI and Respite shelter still available as well as a hotel shelter.
  - Water and masks are available at for outreach teams at Expo.
  - Portapotties are up in Lincoln Park and one other location without mush usage.

- Trash collection continues to be an issue.
    - DPW looking to do a daily pick-up.
- Constant need for day space.
    - Looking for places outside where people would not stay at night or an existing space that can be used during the day.
    - Staffing not expected to be an issue.
- Councilor Chong asked about day space and if the teen center closed as well as the resource center, noting the youths he saw at demonstrations.
    - To Kristen's knowledge the teen shelter has not closed and that youth are involved in organizing efforts.
    - The operates two shelters that offer say space to individuals staying at the shelter.
- Councilor Chong asked about the other services, specifically mailboxes and if mail distribution is continuing?
    - She does not know the details of their operation but individuals at this time appear to still be receiving mail at Preble Street.
    - At this point in time Preble Street is not able to open their space.
- Councilor Chong asked if it possible to use the library.
    - The library is doing a phased reopening and is not able to offer space yet, but recognizes the community need.
- Councilor Ali asked if it is known the age demographics of the youth participating in demonstrations.
    - Unknown, Kristen spoke to one of the organizers.
    - We do not shelter youth under 20 at OSS; they would go to the teen shelter.
- Councilor Ray asked what Preble Street is currently using their space for.
    - They are preparing meals they distribute throughout the community and say they are preparing the space to be a 40-bed shelter.
        - It is a long process to make a shelter and Councilor Ray asked why over the next 2 months it is not available.
- The group of social services providers are meeting every other day.
- Councilor Ray asked that data on why people are not accessing services
    - Identifying barriers as we plan for the next shelter.
- Councilor Chong said the Portland Portland Press Herald said a large number (over 60,000) of people could be facing eviction. Are we planning for contingencies base on the economy?
    - Yes:
        - Housing retention specialists at OSS are working with housed individuals talking to tenants about how they can keep their housing.
        - More housing units may become available due to evictions and seasonal housing.
        - GA is preparing for such an economic shift.
    - Are housing councilors able to meet with landlords?
        - Housing councilors do reach out to landlords.

            - We were piloting a diversion program before the pandemic. How to work with landlords and family members to avoid staying in the shelter.
        - Is there any specific outreach to landlords to teach how they can help renters access rental assistance?
            - Chair Ray said that this is veering towards the housing committee.
            - Councilor Ali said when people who are not able to pay their mortgages, the CARES ACT money will not allow us to pay for mortgages. Mary Davis can confirm.
            - Councilors Chong emphasized with the onus being on renters, are we doing outreach to landlords to assist their renters and acknowledged this is a housing issue, not shelter.
            - Councilor Ali said that the program is administered through the Opportunity Alliance with a simplified an application.

<u>AGENDA ITEM 5 – Sprinklers</u>

- Chief Gautreau summarized the process to date on updating sprinkler requirements, specifically of Additional Dwelling Units (ADU).
    - A general discussion took place February 11, 2020.
    - The Chief and Corporation Council Anne Torregrossa prepared some options for the committee.
- One of the main Council goals to provide affordable housing.
- The Committee asked what authority do we have to do versus what is required by the State?
    - 3 family dwellings must be sprinkled.
    - 1 and 2 family dwellings are not required to be sprinkled at the state level.
    - South Portland has adopted our code.
    - New buildings are sprinkled and that is non-controversial.
- This meeting will discuss existing buildings built before 2010 that is looking to add housing.
- Because the state amended Chapter 24, The City of Portland has more flexibility.
    - Allow the addition to a single-family home without the requirement to sprinkle the existing home or the addition if the dwelling isn't over 50% changed by the renovation
        - If most of the building needs to be gutted, why would you not do the life safety during the construction?
    - Allow the conversion of existing detached unit without requiring sprinklers, such as a detached garage.
        - If the entire house was renovated, a sprinkling requirement would be triggered.
- Legalizing illegal dwelling units draft policy
    - Common scenario: two family building that has an attic people are seeking to create a third unit in the attic.
        - Makes a three unit but will look at a case by case basis.
        - May not need sprinklers if all the other life and safety requirements are met such as means of egress and fire alarms.

- Not requiring to sprinkler when going from a one to two unit.
- Detached buildings that have existed for 5 years.
    - 5 years is changeable and exists so people do not build a new structure with the intention of creating a dwelling without sprinkling.
- This would clear guidance on ADUs being treated the same.
- This ordinance amendment is offered for the committee's consideration.
- Zoning code drives some life safety requirements.
    - Some may change in recode process.
    - ADU attached almost always has to be sprinkled.

Committee Questions and Discussion

- Councilor Chong asked about life safety requirements for illegal dwelling units going from one to two, could it be more cost-effective just to sprinkle illegal dwelling units added to a second floor? Are fire barriers part of life safety code too?
    - Each case is individual so Life Safety sits down with each landlord/owner to discuss options. Sometimes sprinkling is much cheaper than building an egress; this all depends on each unique situation (such as second egress requirements, fire doors etc).
- Councilor Ray confirmed that:
    - All new single-family homes must be sprinkled.
    - Adding a dwelling unit by converting part of an existing single-family home into a new unit without making major renovations to the entire building and that all the other life safety requirements are meant, are exempt from adding sprinklers.
    - Anything unit going from two to three or more will need to be sprinkled.
    - An existing detached building that has existed for at least five years can be converted without sprinkling.
        - 5 years is a good number to avoid people attempting to bypass the ordinance.
- Councilor Ray said that the communities adopting stricter ordinances and that the State of Maine does not requiring the sprinkling of one and two family homes but we do as much more dense community as does Gorham and South Portland; other communities that require it do so for subdivisions.

Public hearing opened and closed at 6:24 PM; there were no public comments.

- Chief Gautreau asked if it is a given that ADUs must meet the other life safety requirements.
    - Correct; this does not change the other requirements.

Councilor Chong moved to recommend the ordinance amendment presented. Councilor Ali seconded.

- Councilor Chong asked about an ADU not meeting a different requirement; does that trigger the entire house needing to be sprinkled or other things in life safety then?
    - Sub inspections get triggered and everything must be done for the final approval of the building permit.

    - This is true for existing illegal dwelling units with no actual construction is planned.
    - Anything that presents a danger to the entire property would need to be upgraded.
        - Common example: an owner lives in one unit and rents out the rest of the property; the entire building must be upgraded to meet life safety standards.
        - Life safety standards are less for two units versus 3 and above but the while building needs to be safe.

The Committee voted unanimously to recommend to the City Council for passage.

<u>AGENDA ITEM 5 – Public Health Equity Note</u>

- Bridget Rauscher reviewed the concept; akin to a fiscal note.
- Health impact assessment by the public health director or designated staff would use the most recent assessment to analyze potential impact.
- The process can be streamlined.

Committee questions and discussion

- Chair Ray is not sure we would need a big ordinance.
    - The fiscal note requirement was created by adding it to Council rules.
        - Corporation Council made an example and form that is required to be completed whenever something comes before the Council that costs more than $50,000.
    - How much specificity is needed?
- What would trigger a health equity note?
    - Not needed for every tiny decision
    - What would the threshold be?
    - Larger items such as language changes to ordinance.
- Would this be health equity or impact?
    - Health impact is more broad and can be more environmental.
    - Health impact assessment would already include health equity by including social determinants of health.
- Can this be accomplished with existing staff in the department?
    - It depends what the Council is looking for; it would be challenging if it were for everything the Council sees but is definitely possible for the public health director for a higher threshold such as ordinance language changes.
- Councilor Chong said he is digesting the information and wants to be able to consider health and disparate impacts but is still processing.
    - Are there local examples?
    - There weren't huge racial disparities in the city health assessment presented to the committee in Winter.
        - There is a separate minority health report.
- Kristen sad as a whole during COVID-19, public health is woven into everything we do. There is not a department Public Health hasn't worked with.
- Councilor Ali spoke about the issue of addiction and stigma where people may not be able to seek treatment as a result; if we are providing mobile support for addiction, is it

    - He is looking for internal guidance that identifies impacts and that people are serve equitably.
    - He does not want to rush this.
- Chair Ray is interested in equity and the health impacts of Council decisions.
    - Like fiscal impacts, when making zoning changes, deciding particular types of housing, we consider both the health and the equity piece and this may be doable as the health assessment includes social determinants of health.
    - Char Ray is unclear what form the change to make is: in ordinance?
    - Heath in all policies so considering health in government decisions becomes the normal way of doing business.
- How to move forward?
    - Additional examples of ordnance or policy.
        - Bridget to pull more.
    - Examples of thresholds
        - Does American Public Health Association have a tool for this?

<u>AGENDA ITEM 5 – Next Steps</u>

- The next meeting is September 8, 2020.
    - Smaller Shelter Zoning
        - Public Hearing.
        - TBD if ready to vote.
    - Discuss work plan for remainder of the year.
        - Overdose Prevention Sites back on.
            - Safehouse won initially their federal case in Philadelphia and is being appealed.
            - Jen Thompson to Update.
- October have Bob Fowler, Public Health direction present on mental health.
- Councilor Chong asked if we are working with schools given the anxiety around hybrid models.
    - Family Health program is able to reach out to schools.
    - Schools are working with Maine DOE and CDC.
    - Councilor Ali said the school district is still trying to figure out their plan.
        - Outreach is being done for people who do not speak English.
        - They are surveying parents for model feedback.
    - Councilors Chong is interested in community health outreach worker involvement throughout covid.
        - They are being trained on mental health first aid as it pertains to covid.
    - Chair Ray wants to respect the decisions of the school board with who they work with while making sure they know our public health division is a resource available to them.

- The meeting adjourned unanimously at approximately 7:07 PM.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **SAFEHOUSE, a Pennsylvania nonprofit Corporation; JOSE BENITEZ, as President and Treasurer of Safehouse,** **Defendants.**	:	**CIVIL ACTION** **No. 19-519**
SAFEHOUSE, a Pennsylvania nonprofit Corporation, **Counterclaim Plaintiff,** **v.** **UNITED STATES OF AMERICA,** **Counterclaim Defendant,** **and** **U.S. DEPARTMENT OF JUSTICE; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; and WILLIAM M. McSWAIN, in his official capacity as U.S. Attorney for the Eastern District of Pennsylvania,** **Third-Party Defendants.**	:	

McHUGH, J. **June 24, 2020**

MEMORANDUM OPINION

I. Introduction

This is a declaratory judgment action in which I previously concluded that 21 U.S.C. § 856(a) cannot be read to bar supervised injection sites whose ultimate purpose is to reduce fatalities caused by opioid addiction. In accordance with the request of the parties I proceeded to enter a final appealable Order on February 25, 2020. ECF 142. Plaintiff Safehouse then promptly announced its intention to begin operation in South Philadelphia, leading the Government to file an emergency motion for a stay of the Court's February Order.

Any urgency to address the motion quickly dissipated. Safehouse's attempt to open without meaningful dialogue with the surrounding neighborhood was met with organized opposition supported by various elected officials, and the COVID-19 pandemic came to overshadow the opioid epidemic, understandably becoming the almost singular focus of local authorities. In view of those events, the Government's motion to stay might almost be viewed as moot. But as Philadelphia begins to reopen, and with 963 opioid overdose deaths in Philadelphia in 2019, it is conceivable that Safehouse might yet seek to open before review by the Court of Appeals.

In issuing a declaratory judgment, I consistently rebuffed the parties' attempts to transform an issue of statutory construction into a public policy debate. Ironically, the standard for evaluating a stay is grounded in equitable considerations, such as harm to the parties and "where the public interest lies," so a broader discussion is necessarily now required. Under the traditional test, especially as to the issue of irreparable harm, the Government's case for a stay is marginal. But these are not ordinary times. The combination of the pandemic and the momentous protests following the killing of Mr. George Floyd make this the wrong moment for another change in the status quo. Accordingly, the Government's request for a stay will be granted.

II. The Legal Standards Governing Requests to Stay Final Judicial Orders

Safehouse raises a threshold issue—whether a declaratory judgment is properly the subject of a request for a stay. Federal Rule of Civil Procedure 62, titled generally, "Stay of

Proceedings to Enforce a Judgment," addresses money judgments and injunctions, but is silent as to declaratory judgments. Safehouse appears to argue that because my February 25 Order does not mandate any specific action, there is no execution of the Order that can be stayed. ECF 149, at 3-4.

There is little precedent addressing this issue. The Government invokes the All Writs Act, 28 U.S.C. § 1651, but without citation to any decisions that rely upon it as authority to stay a declaratory judgment. The Government also cites precedent holding that a court has inherent authority to stay orders apart from the Civil Rules. ECF 145, at 4-5 (citing *United States v. Denver & Rio Grande W. R.R. Co.*, 223 F.2d 126, 127 (10th Cir. 1955)). The argument advanced by Safehouse is highly abstract. It appears that Safehouse seeks to draw a distinction between the enforcement consequences of a declaratory judgment and its preclusive effect.

Intuitively, aside from the gap in Rule 62, it is not clear why a court cannot stay its own declaratory judgment. The late Judge O'Neill of this Court sensibly held that where a declaratory judgment is requested to be stayed, the court should look to its practical effect. *Robertshaw v. Pudles*, 2014 WL 1976890, at *2 (E.D. Pa. May 15, 2014). Here, the effect of my ruling was that Safehouse was cleared to open, without fear of prosecution, a facility that the Government insists is illegal. In practical terms, the February 25 Order has significant consequences. I am persuaded that I retain the power to stay the judgment and will apply the traditional standard for considering a stay.

The grant or denial of a stay focuses on four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). In deciding whether to grant the stay, courts balance all factors, with the first and second the "most critical." *Id.* "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Id.* at 433-34.

In the Third Circuit, *In re Revel AC, Inc.*, 802 F.3d 558 (3d Cir. 2015), is the lead case that addresses application of the *Nken* factors. According to *Revel*, courts first assess whether the movant has satisfied the first and second *Nken* factors: Is the movant likely to succeed on the merits and will the movant suffer irreparable injury absent a stay? *Id.* at 571. To show a sufficient likelihood of success on the merits, the movant must demonstrate that it has "a reasonable chance, or probability, of winning." *Id.* (quoting *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). A "reasonable chance of winning," in the Court of Appeals' prescription, "need not be more likely than not," *id.* at 569, but it must be "significantly better than negligible," *id.* at 571. To demonstrate irreparable injury, the movant must evidence "harm that cannot be prevented or fully rectified by a successful appeal." *Id.* at 568 (quoting *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984) (Posner, J.)). Further, the movant's alleged injury absent a stay must be "*likely*, not merely possible." *Id.* at 569 (cleaned up).

It is important to note the different burden the moving party must carry as to each factor. While reference to "likelihood" under the first factor (likelihood of success on the merits) has been interpreted by our Court of Appeals as a standard less onerous than more likely than not, the use of "likely" for irreparable harm means "more apt to occur than not." *Id.* Thus, the showing required as to likelihood of success on the merits is significantly less than what is required for establishing irreparable harm.

Once beyond the first two factors, the court must balance the harm of the movant with the harm of the other parties interested in the litigation should a stay be issued. In doing so, courts in this Circuit "weigh the likely harm to the movant (absent a stay) (factor two) against the likely irreparable harm to the stay opponent(s) if the stay is granted (factor three)." *Id.* Courts must also assess "where the public interest lies (factor four)—in effect, how a stay decision has consequences beyond the immediate parties." *Id.* (internal quotation marks omitted).[1]

In balancing each of the four factors, "[k]eeping in mind that the first two factors are the most critical," *id.* at 570, the Court of Appeals counsels that likelihood of success on the merits is "arguably the more important," *id.* at 568. Accordingly, "even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the stay opponent if a stay is granted, it is still required to show, at a minimum, serious questions going to the merits." *Id.* (cleaned up). Correlatively, "depending on how strong a case the stay movant has on the merits,

[1] The Government contends that it may "merge" its irreparable harm with the harm it believes the public will suffer absent a stay. ECF 145, at 10 (citing *Nken*, 556 U.S. at 435). According to the Government, this is so because "the government's interest *is* the public interest." ECF 145, at 10 (citing *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016)). However, in arguing for merger, the Government misreads the case law. In *Nken*, the Supreme Court concluded that the traditional stay factors, not a more demanding statutory standard, governed a court's authority to stay an alien's removal pending judicial review, and that, in applying the traditional factors, "[t]he first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. The *Nken* Court also suggested that courts should in particular circumstances merge the public's interest with harms alleged by the Government. *Id.* at 435. But the *Nken* Court made clear that merger was appropriate only "when the Government is the *opposing* party" and after "an *applicant* satisfies the first two [stay] factors." *Id.* (emphasis added); *see also Pursuing America's Greatness*, 831 F.3d at 511 (citing *Nken* for the proposition "that, in the context of a stay, assessing the harm to the opposing party and weighing the public interest merge when the Government is the opposing party"). Here, unlike in *Nken*, the Government is not the party opposing a stay but the party applying for it, and it is the Government's burden to "satisf[y] the first two factors," not Safehouse's. *See Nken*, 556 U.S. at 435. The status of the Government as the party requesting the stay may seem trivial, but permitting the Government to merge the public's harms with its own only when opposing an application for a stay makes eminent sense. Generally, when the Government opposes a stay request, it has already secured a court judgment finding a violation of some federal law, and the applicant for the stay is the party found to have violated it. In such situations, granting the stay would prevent the Government from enforcing a law a court has found it has legal authority to enforce. Here, because my conclusion was that the Government lacks legal authority to apply Section 856(a) in the way that it seeks, the position it is advancing is not presumptively in the public interest.

a stay is permissible even if the balance of harms and public interest weigh against holding a ruling in abeyance pending appeal." *Id.* at 571.

Revel could be read to imply that the movant must satisfy factors one and two before a court can balance the relative harms or consider the public's interest. *See id.* (noting that stay factors one and two "both" are "necessary"). But *Nken* never imposed such a requirement, and *Revel*'s prescription is cast as a recommendation rather than a dictate. *Revel* observes that the stay analysis is fundamentally equitable, and that "all four stay factors are interconnected." *Id.* Indeed, a district court's granting of equitable relief is the paradigmatic "exercise of judicial discretion." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). Thus, while *Revel*'s step-by-step approach greatly assists in resolving the majority of stay requests, I understand *Revel* to nonetheless allow consideration of all four factors where circumstances, either particular to the parties, or forced upon them by world events, require it.

With that background in mind, I turn to the specifics of the Government's motion.

III. The Preliminary Burdens

A. The Government has made the requisite showing of a more than negligible likelihood of success on the merits

To carry its burden to show that it is likely to succeed on the merits, the Government need only demonstrate that it has "a reasonable chance, or probability, of winning." *Revel*, 802 F.3d at 571. Those chances of prevailing on appeal must be "significantly better than negligible," *id.*, but "need not be more likely than not," *id.* at 569.

The Government has met that modest threshold here. The very nature of this case leaves room for reasonable minds to differ. I have previously observed that the question of whether Section 856(a) applies to the conduct planned by Safehouse is "complex," "difficult," and altogether "novel." *See, e.g.*, Transcript of Oral Argument, at 4:19-5:13 (noting that "the questions [asked at oral argument] are questions that are important to [the Court] in grappling with the complicated issues" presented by the case), ECF 131; Memorandum Opinion on Government's Motion for Judgment on the Pleadings, at 7 (noting that the Court was tasked with "address[ing] a novel question of statutory construction"), ECF 133; *id.* at 56 (acknowledging that "[b]oth sides skillfully argue that Congress's meaning in [Section] 856 is consistent with their own"); Memorandum Opinion on Safehouse's Motion for Final Declaratory Relief, at 4 (noting that the reach of the statute was "a difficult and complex matter of first impression"), ECF 141.

To illustrate, the Government will undoubtedly urge the Court of Appeals not to break from the other circuits that have concluded that the "purpose" requirement of Section 856(a)(2) can be satisfied by those using the premises rather than those making the place "available." *See* ECF 133, at 24-26. Maintaining uniformity among circuits is an important consideration for appellate courts, and though the Third Circuit is willing to chart its own path even where there is substantial precedent to the contrary, *e.g.*, *Cirko v. Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020), it could choose to align with those circuits.

My conclusion that the Government has met its burden on this factor also depends on how I read the language of Section 856. Other courts saw a need to remedy a perceived redundancy between subparagraphs (a) and (b), whereas I did not. As noted in my previous opinion, ECF 133, at 8-9, even at the level of the Supreme Court, jurists ostensibly engaging in a "plain meaning" analysis can look at the same language and reach opposite results. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81 (2007).

Furthermore, the standard of review on appeal is broad. The parties have stipulated to all material facts, and I have not made any independent factual findings. ECF 137, Ex. A. Whether Safehouse runs afoul of Section 856(a) is a pure question of law that the Court of Appeals will resolve *de novo*, with my opinion owed no more deference than any persuasive power it may contain.

I stand by my analysis. I particularly stand by the proposition that words are tools and not talismans, and courts should hesitate to endow them with a meaning they could not possibly have, particularly in the context of criminal liability.[2] But I have no hesitancy in concluding that reasonable minds may differ as to the correct result. That suffices to meet the Government's burden under *Nken*'s first prong.

[2] The parties agree that when a statutory provision is clear on its face, the text alone reveals what Congress meant by the words it employed. *See* ECF 47, at 5; ECF 48, at 20. But the Government is wrong to suppose that application of this principle inexorably leads to the conclusion it seeks. That is in part because the word "purpose," which lies at the heart of the statute, operates on several levels. In enacting Section 856(a)(2), Congress generally prohibited any person who manages or controls any place from knowingly and intentionally making that place available for the purpose of unlawful drug use. In choosing those words, at one level, the drafters of the legislation had linguistic objectives. In my previous opinion, for instance, I observed that dictionaries (past and present) routinely define "purpose" as one's *ultimate* objective. ECF 133, at 37-38. I also observed that common principles of grammar require that both Section 856(a)(1) and Section 856(a)(2) "have the same subject, identified in [Section] 856(b) as 'any person,'" and that "the purpose requirement" in Section 856(a)(2) "applies to the person who acts knowingly." ECF 133, at 20. But in enacting Section 856(a)(2), the drafters also had legal objectives, that is, objectives about what the "law" would be in light of their adopted text. In addition to generally prohibiting any person who manages or controls any place from knowingly and intentionally making that place available for the purpose of unlawful drug use, Congress certainly had a variety of more concrete convictions not only about the correct application of the statute to particular circumstances, but also convictions as to where it would not apply. The available legislative evidence supports the conclusion that Congress desired Section 856(a)(2) to outlaw "crack houses" but not to punish business owners who "knew" drug use occurred on their property but did not operate their property for that "purpose." *See, e.g.*, ECF 133, at 20-21, 29, 31. And various courts of appeals have concluded that Section 856(a)(2) does not automatically apply simply because there is some drug use on the premises, *see* ECF 133, at 39, even if the words of the statute could fit those facts. As noted in my prior opinion, the Government itself retreats both from its literalism and from its core reading of the statute when faced with challenging facts such as parents struggling to save an addicted child. ECF 133, at 41-42. The task for a court when interpreting a statute is to discern the objective Congress sought to achieve in the specific case before it. When language can be understood to mean different things, particularly when it comes to criminal liability, and it is indisputable that the drafters' concrete convictions could not have encompassed the circumstances of a particular case, judges who do not test their conclusions by a variety of interpretive tools do so at their peril. And it is the combination of those tools that led me to the conclusion reached in my October decision.

B. The Government will not be irreparably injured by the denial of its request for a stay

While the Government easily makes the requisite showing that it is likely to succeed on the merits, it does not carry its more onerous burden to show that it will be irreparably harmed absent a stay. To demonstrate irreparable injury, the Government must demonstrate "harm that cannot be prevented or fully rectified by a successful appeal." *Revel*, 802 F.3d at 568 (internal citations omitted). Further, the possibility that "corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id*. The injury must be "neither remote nor speculative, but actual and imminent." *Id.* at 571 (citations omitted). And the Government must demonstrate that such injury "is *likely*," that is, "more apt to occur than not." *Id.* The Government makes several arguments to support its claim of irreparable harm. Except for its argument as to possible community impact, the harms it asserts are highly abstract and, even in the case of community impact, highly speculative.

1. ***The Government has not shown that the opening of Safehouse would frustrate any congressional determination concerning drug use.*** I take the Government's first argument to be that allowing Safehouse to operate "threatens to overturn Congress's determination that there is no legal use" for certain unlawful drugs. ECF 145, at 11. That contention lacks merit both legally and factually. The Government seizes upon a statement from a Safehouse witness at an evidentiary hearing to the effect that a ruling in Safehouse's favor would "decriminalize" drug use on its premises. *See* ECF 145, at 11-12 (citing ECF 127, at 237:2-12). My ruling did not reach such a conclusion. To the contrary, my opinion expressly noted that "opioid . . . possession is undisputedly criminal," and that, "[b]y definition, a person cannot lawfully use or consume a substance that the person cannot even lawfully possess." ECF 133, at 18, 40. At that evidentiary hearing, I noted that "it's self-evident that [users of unlawful drugs at Safehouse's proposed supervised injection site would] be violating the law," and that Jose Benitez, president and treasurer of Safehouse, "at one point . . . conceded as much." ECF 127, at 167:6-169:3. Mr. Benitez went on to concede that his staff would have no power to stop "the police or DEA [if they] tried to make an arrest at the site of a user," even if staff might try to negotiate with the relevant authorities so that an arrest did not threaten any other constituency. ECF 127, at 167:24-168:20. The Government remains free to arrest and charge users of narcotics if it chooses to exercise its prosecutorial discretion and employ law enforcement resources in that way.

Nor does the fact that Safehouse provides a site where users of unlawful narcotics can inject under medical supervision as part of a public health initiative in any way deny the judgment reached by Congress. To the contrary, the need to inject under observation underscores the deadly potential of the banned substances. And though the Government scores a semantic point when it observes that "safe injection" is an oxymoron when it comes to heroin, cocaine, and nonprescribed uses of Fentanyl, if one looks beyond wordplay, it cannot be disputed that Safehouse's efforts are focused on the safety *through supervision* of the *user*, not the safety of the act of injection.

In earlier correspondence from the Government to the Court, which Safehouse has attached to its response here, the United States Attorney referred to his office's duty to enforce the law, which, if Safehouse were to open, would cause "chaos" and "deteriorate into a literal street fight." ECF 137, Ex. B. As noted above, enforcing the law certainly would be the Government's prerogative, but why such chaos needs to ensue is difficult to comprehend. The crime that would occur on the premises of Safehouse is the same crime that already occurs daily outside its doors and indeed in communities across the United States—and one that the federal government rarely prosecutes.

Indeed, in 2018 and 2019, there was not a single federal prosecution for drug possession in the Eastern District of Pennsylvania.[3] Widespread prosecution of simple possession has only occurred in tandem with other law enforcement initiatives, such as border control strategies. In 2019, nationwide, there were only 560 federal cases brought for simple possession, and 243 of those emanated from just two districts, one in a border state.[4] In 2018, there were 777 prosecutions for simple possession nationwide.[5] When the federal government does choose to prosecute it, simple possession is a misdemeanor for a first-time offender, 21 U.S.C § 844, and, except for offenses involving unlawful entry, it results in probation or a fine more than seventy percent of the time.[6]

These numbers reflect the fact that simple possession and attendant use together represent the prototypical example of a victimless crime, apart from the sad reality that users are victimizing themselves. Certainly, the cumulative consequences of such use have far broader negative effects, which account for societal efforts to prevent or stop it. But acts of individual use and possession have little impact in isolation, as reflected by the rarity of prosecution except to serve other law enforcement purposes. The Government has not explained its sudden

[3] U.S. Sentencing Comm'n, 2019 Federal Sentencing Statistics for the Eastern District of Pennsylvania 3 (statistical information packet for fiscal year 2019 for the Eastern District of Pennsylvania accessed online); U.S. Sentencing Comm'n, 2018 Federal Sentencing Statistics for the Eastern District of Pennsylvania 3 (statistical information packet for fiscal year 2019 for the Eastern District of Pennsylvania accessed online).

[4] U.S. Sentencing Comm'n, Fiscal Year 2019 Datafile 64 (accessed online).

[5] U.S. Sentencing Comm'n, Fiscal Year 2018 Datafile 64 (accessed online).

[6] U.S. Sentencing Comm'n, Weighing the Charges: Simple Possession of Drugs in the Federal Criminal Justice System 9 (Sept. 2016) (accessed online).

imperative to prosecute such cases, let alone one that would be catalyzed by Safehouse's operation. And the Government can hardly claim irreparable harm from a confrontation of its own creation that it could avoid with minimal impact on the rule of law. The Government's position is therefore difficult to rationalize, except as a symbolic act.

2. *The Government has not shown that the opening of Safehouse would cause more or riskier drug use.* The Government also invokes a moral hazard surrounding supervised injection sites, relying on the theory that permitting such conduct normalizes it, and that reducing the "cost" of opioid use enables continued or riskier use. The Government further contends that in addition to an increase in destructive behavior, there likely will be an increase in crimes related to drug use. *See* ECF 145, at 11. There is an intuitive appeal to this argument, and in many ways, it exemplifies the fundamental premise of a law enforcement approach to opioid misuse as contrasted with a public health approach. As I previously opined—and as is reflected in my conclusion as to the proper scope of Section 856—that debate is properly held in Congress. Given the procedural posture here, however, I must assess whether the Government has met its burden of establishing that the harm it invokes is more likely to occur than not. On that score, the Government relies exclusively on inference rather than facts, leaving it at a significant disadvantage.[7]

Safehouse, in opposition to the Government's motion, points to a vast body of literature that evaluates the effects of supervised injection sites. As with most research, it is of varying quality, and the amount of available data makes it difficult to survey. But some researchers,

[7] As noted in my second opinion entering final judgment, the Government strenuously resisted the development of a factual record. ECF 141, at 4.

publishing in peer-reviewed journals, have attempted to evaluate and summarize the data using various techniques of analysis, providing a useful way to access research in the field.

In 2014, French researchers selected 75 studies for review, including cohort studies, analytical studies, and evaluative studies.[8] As to the specific issue of whether supervised injection sites increase drug use, they noted that, while "it was feared that [supervised injection sites] might foster the initiation of new users into intravenous drug use . . . no study found any increase in the total number of local [persons who inject drugs], irrespective of the [supervised injection sites] studied."[9]

In 2017, Canadian researchers reviewed 341 potentially relevant studies conducted between 2003 and the date of publication,[10] and screened them for quality using three evaluation methods. Based on the quality of the research, the authors chose for review 47 studies employing varying methodologies. Like the French researchers, the Canadian researchers did not find that supervised injection sites resulted in normalization or increased usage: "While concerns persist that [supervised drug consumption facilities] may increase illicit drug use and

[8] Chloé Potier, et al., *Supervised injection services: What has been demonstrated? A systematic literature review*, 145 Drug and Alcohol Dependence 48 (2014). The authors selected which research studies to review by applying two evaluation scales for quality, STROBE (for observational studies) or CHEERS (for medical economic studies). STROBE is an acronym for "Strengthening the reporting of observational studies and epidemiology," a standard created by and International collaborative of researchers to improve the quality of research. CHEERS is an acronym for "Consolidated health economic evaluation reporting standards," a similar standard established by the Professional Society for Health Economics and Outcomes Research. *Id.*

[9] Potier, *supra*, at 64.

[10] Mary Clare Kennedy, et al., *Public Health and Public Order Outcomes Associated with Supervised Drug Consumption Facilities: a Systematic Review*, 14 Current HIV/AIDS Report 161 (2017). The researchers screened the studies for quality using three evaluation methods, including the Quality Assessment Tool for Observational Cohort and Cross-sectional Studies. The Quality Assessment Tool was created by a branch of the National Health Institutes as a method for evaluating the quality of research. *See* Study Quality Assessment Tools, Nat'l Heart, Lung, and Blood Inst., available at https://www.nhlbi.nih.gov/health-topics/study-quality-assessment-tools.

discourage [people who use drugs] from seeking addiction treatment, such concerns are not supported by existing evidence."[11] The researchers also found that the frequent use of supervised injection sites "has not been found to increase non-fatal overdose risk, which challenges the contention that these facilities promote riskier drug use practices (e.g. taking higher doses) associated with overdose."[12]

With the case in its current posture, the question is not whether these researchers are ultimately correct. The question is whether, considered against the research to which Safehouse points, the Government's argument based solely on inference suffices to meet its burden to establish irreparable harm. The research reviewed above, which summarizes much of the data that Safehouse has cited as the rationale for its operation, leads me to conclude that there is significant doubt as to whether the inference the Government would have me draw is supportable. Because the Government bears the burden, this aspect of its argument fails.

3. ***The Government has not shown that Safehouse opening without the full support of various governmental actors would cause tangible harm.*** The Government further contends that because Safehouse is proceeding on its own and without the guidance or supervision of various governmental and public health officials, there is a significant risk to the public's safety. ECF 145, at 13. Specifically, the government argues that the "public will also be harmed because the ruling will radically alter the approach to opioid addiction treatment in the Commonwealth of Pennsylvania without providing an opportunity for the U.S. Secretary of Health and Human Services, the U.S. Surgeon General, the Pennsylvania General Assembly, the

[11] Kennedy, *supra*, at 177.

[12] *Id.*

Pennsylvania Board of Medicine, or the Philadelphia City Council to provide input or suggest safeguards or regulations for such unprecedented activity." ECF 145 at 13. The Government invokes an opinion from the United States Surgeon General that, based upon his review of the available data, the effect of "front-line strategies such as medication assisted treatment should be optimized before having conversations about more controversial interventions." The Surgeon General adopted this position in part, he said, because "safer doesn't mean safe." *Id*. at 14.

The Government accurately notes that in every other instance supervised injection sites have proceeded with the active participation of public officials. It also is correct when it observes that although the American Medical Association has endorsed the concept of supervised injection sites, its endorsement assumed the participation of governmental officials. ECF 127, at 52:8-59-19. In response to this and related arguments, the City of Philadelphia Health Commissioner, Dr. Thomas Farley, notes that Safehouse's operational plan was created in collaboration with his office, which consulted with experts in the field of opioid abuse. ECF 151, at 4-5. Commissioner Farley also emphasizes that "both the American Medical Association and the Pennsylvania Medical Association are in favor of overdose prevention sites." *Id.* at 6.

The Government is correct that it would be far better to have Safehouse commence operation with the direct involvement of public health officials above the level of municipal government. Whether Safehouse's failure to do so constitutes irreparable harm is, however, a far closer question. The services Safehouse will provide—the administration of medications to combat overdose, defibrillation, and the administration of oxygen—are not medically complex. They are also the exact same services that Safehouse's sister organization, Prevention Point, already provides on the street, where the Government concedes their legality.

The Government also is correct that there are no established standards that would apply to how Safehouse operates. But as I observed in a previous opinion, that is typically the case as new medical subspecialties evolve, even as to critically important areas such as specialty board qualifications for medical practitioners. *Estate of Goldberg v. Nimoityn*, 193 F. Supp. 3d 482, 490-91 (E.D. Pa. 2016). Standards emerge over time based upon the innovations of practitioners in the field, and the Philadelphia Health Commissioner represents that the Safehouse model is based upon the operation of similar facilities abroad, which are operating under the auspices of public health authorities. Further, there are well-established standards for the core medical interventions Safehouse would use.

On balance, the Government has shown that how Safehouse is proceeding is less than optimal, but I cannot say that it rises to the level of irreparable harm.

4. *The Government has not shown that the surrounding community will be adversely affected absent a stay*. The Government finally raises the possibility of harm to the community surrounding any location where Safehouse operates. Although I have previously held that such concerns are most properly addressed to local authorities, the equitable nature of the standard controlling the motion to stay necessarily requires me to consider community impact here. It should be emphasized that, however one gauges the true risk presented by public health initiatives such as supervised injection sites, the concerns of neighbors are understandable and worthy of consideration. While it is true that opioid abusers suffer from a medical condition, that condition frequently results not just in self-destructive behavior, but also behavior that causes some form of harm or disruption to others. Anyone with meaningful experience in recovery work, and anyone who has ever had to ban a family member from the home because of persistent negative behaviors related to opioid addiction, understands that.

Once again, the Government presents mostly argument rather than evidence. The Government asks the Court to take judicial notice of "news media stories, reports of governmental entities, and academic studies" that document the negative effects of supervised injection sites. ECF 155, at 5-6. However, neither the Government nor any amici cite any academic study. The media accounts to which the Government refers largely are set forth in the amicus brief filed by the Fraternal Order of Police and an assortment of local community groups. *See* ECF 148. As to reports from public authorities, the Government cites a single study from the Canadian province of Alberta, which, as discussed below, has proven controversial.

The test for granting a stay requires that I look at the issue using a broad lens to determine whether the Government has carried its burden to show irreparable harm. Safehouse cites to a meaningful body of research dealing with the community safety aspects of supervised injection sites. For example, in 2019, a Canadian researcher conducted a systematic review of data on supervised injection sites relating to crime, disorder, and community health issues such as discarded syringes.[13] The author considered thirteen studies published in peer-reviewed journals that examined data from sites in Canada, Germany, Australia, Denmark, the United Kingdom, and the Netherlands.[14] In all, the author concluded that "analysis of the relevant research literature on [supervised injection sites] and their effects on public crime, disorder and community health issues (discarded syringes) shows that the preponderance of evidence thus far

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[13] Laura Huey, *What is Known About the Impacts of Supervised Injection Sites on Community Safety and Wellbeing? A Systematic Review*, Sociology Publications (2019).

[14] Like the researchers in the Potier and Kennedy studies, an attempt was made to evaluate the papers for the quality of their research, but such evaluation was deemed impractical by virtue of the fact that different researchers had each employed different study techniques. In any case, as I have mentioned previously, in resolving the Government's motion to stay, the question is not whether these researchers are ultimately correct but whether the Government has met its burden to establish irreparable harm.

is tilted towards supporting the view of these sites as producing favorable outcomes not only for [individual drug users] but also for potentially enhancing the well-being of the local community."[15] These results were consistent with results from a team of French researchers,[16] as well as those from a previous team of Canadian researchers.[17]

In contrast to this academic research, the Government through their amici cite multiple news stories reporting the perception that supervised injection sites cause deleterious community effects. ECF 148, at 6-8. I would expect the journalists reporting these experiences to accurately recount what they were being told and will further assume that those conveying the information were recounting their experiences as they perceived them to be. But it is difficult to rely on such anecdotal accounts as an evidentiary basis for finding irreparable harm in the face of substantial peer-reviewed research.

Moreover, studies of methadone clinics suggest that a community's perception of supposed negative effects of drug treatment facilities does not necessarily conform to the sites' actual effects. Patients attending methadone clinics are not violating the law but participating in medically assisted treatment under supervision. Their presence is nonetheless feared and

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[15] Huey, *supra*, at 16.

[16] Potier, *supra*, at 64. In their review, the authors found no increase in crime beyond some increase in small-scale drug trafficking in the immediate vicinity of supervised injection sites. And, like the Canadian researchers, they concluded that the relevant data from Canada and Australia showed no increase in crime and reduced instances of public self-injection and discarded paraphernalia. For the sake of accuracy, it must be noted that not every study reviewed by these teams of researchers addressed crime or issues of public disorder, but of those that did the evidence did not reflect serious problems.

[17] *See* Kennedy, *supra*, at 179.

shunned.[18] This is consistent with research confirming that addiction is widely stigmatized.[19] Such stigma or fear does not suffice to establish actual harm, let alone likely, irreparable harm.

The one substantial item of evidence cited by the Government is a recent report from the provincial government of Alberta, Canada.[20] The report was compiled by a commission appointed after a freeze of funding for supervised injection sites enacted by a newly elected government opposed to their operation. The report's principal conclusion was as follows:

> During the public consultations, the Review Committee was made aware of numerous concerns of residents living near the respective sites. Although stakeholder feedback on the socioeconomic impact was mixed, it was predominantly negative, except for the Edmonton town hall meeting. The issues raised ranged from increases in needle debris to increases in crime and increases in

[18] *See, e.g.*, C. Debra M. Furr-Holden, et al., *Not in My Back Yard: A Comparative Analysis of Crime Around Publicly Funded Drug Treatment Centers, Liquor Stores, Convenience Stores, and Corner Stores in One Mid-Atlantic City*, 77 Journal of Studies on Alcohol and Drugs 17 (2015). The community effect of methadone clinics provides a useful analogue more generally. Although there are no supervised injection sites in the United States, methadone clinics are lawful and recognized by public health experts as a significant tool for addressing opioid misuse. Nevertheless, many communities have opposed the establishment of such initiatives, advancing similar arguments to those now deployed by opponents of supervised injection sites. To combat that opposition, some researchers have evaluated whether methadone clinics are accompanied by the increase in crime and social disorder that their critics fear. In one study, which focused on the effects of the opening of nine outpatient methadone clinics in Philadelphia from 2007 to 2017, researchers at the University of Pennsylvania came to mixed conclusions. *See* Ruth A. Moyer & Greg Ridgeway, *The effect of outpatient methadone maintenance treatment facilities on place-based crime*, Journal of Experimental Criminology (2018). Near the facilities, they found a small increase in violent crime and a moderate increase in drug-related crime, but a reduction in property crimes and crime overall. These conclusions lend some support to the Government (outpatient drug treatment facilities can be magnets for at least some forms of criminal activity) but also to Safehouse (with appropriate police support, which the City has represented it will provide, ECF 151, at 7, risk to the surrounding community can be identified and mitigated). In the Furr-Holden study cited above, researchers at Johns Hopkins University evaluated crime statistics in the vicinity of 53 publicly funded outpatient drug treatment centers in Baltimore. Focusing on violent crime, the Johns Hopkins researchers found only a minimal difference in rates of a violent crime closer to such facilities. Furr-Holden, *supra*, at 22. A similar study conducted in Baltimore several years earlier drew the same basic conclusions, finding no statistically significant increase in crime within 100 meters of methadone treatment centers. Susan J. Boyd, et al., *Use of a 'microecological technique' to study crime incidents around methadone maintenance treatment centers*, 107 Addiction 1632 (2012). These conclusions, if anything, weigh against the Government's contention that the surrounding community will suffer harm should a supervised injection site open.

[19] *See, e.g.*, Douglas L. Polcin, et al., *Community context of sober living houses*, 20 Addiction Research & Theory 480 (2012).

[20] Alberta Health, Government of Alberta, *Impact: A socio-economic review of supervised consumption sites in Alberta*, Supervised Consumption Services Review Committee (March 2020) (accessed online).

> overall social disorder since the sites opened. The Review Committee was also made aware of issues relating to the operations and oversight of various sites.[21]

The Report was first cited in the Government's reply brief, and Safehouse has not filed any sur-reply. It is therefore difficult to assess the weight it should be assigned. But it was not published in a peer-reviewed journal or prepared in accordance with a specific research methodology, and it relied heavily upon town hall style meetings. Further, to the extent that the Government elsewhere urges me to take judicial notice of media accounts, it only seems fair to take note that the Alberta report was not well-received in a variety of circles.[22]

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[21] *Id.*

[22] *See, e.g.*, Benjamin Perrin, *Alberta's war against safe injection sites*, Maclean's (Mar. 12, 2020) (accessed online) ("[T]he review is dangerously biased, methodologically flawed and explicitly ignores over 100 peer-reviewed studies on the benefits of [supervised-consumption sites]."); Alana Smith, *Academics question methodology of UCP-approved supervised consumption sites report*, Calgary Herald (Mar. 8, 2020) (accessed online) ("The [] commissioned report into supervised drug-use sites is drawing ire from academics, some of whom are questioning its data collection, analysis and perceived findings."); *id.* ("'I would say that the only conclusion that a reasonable and fair-minded reader should draw is that the report is a political document and not an objective or scientifically credible evaluation of supervised consumption sites.'") (quoting Cameron Wild, then professor at the University of Alberta School of Public Health); *id.* ("The report gives no indication of how participants were selected for the online survey and if there is any verification to prove people say and live where they said they do. . . . [or] whether someone could submit responses more than once."); *id.* ("[T]he amount of participants from differing cities varied significantly, creating an imbalanced sample. . . . [and, thus, the] results of the report were then heavily driven by Lethbridge respondents, who greatly outnumbered participants from any other city.") (paraphrasing in story of Jenny Godley, then professor in the University of Calgary's sociology department); *id.* ("Let's just say [this report] wouldn't pass my undergrad stats class.") (quoting Godley).

The Alberta report is representative of continued political debate in Canada over supervised injection sites with periodic attempts to defund them or limit their operation. *See* Thomas Kerr et al., *Supervised injection facilities in Canada: past, present, and future*, 14 Harm Reduction Journal 28 (2017). That political debate has played out against the backdrop of a notable decision from the Supreme Court of Canada, *Canada (Att'y Gen.) v. PHS Community Services Society*, 2011 SCC 44 (Can.), which in itself has some degree of relevance as to the available evidence concerning the operation of supervised injection sites. The case arose when Canada's Minister of Health refused to renew permission for the first facility in Canada (Insite in Vancouver) to continue operating. A trial was held, and evidence was submitted as to whether the site was effective in meeting its public health objectives and whether it had negative community impact. On appeal, in a unanimous opinion rendered on constitutional grounds, the Supreme Court permitted its continued operation and ordered the Minister to renew Insite's operating charter. In doing so, the court construed the available evidence as demonstrating positive public health outcomes with no discernable community harm. Indeed, it noted that "Insite saves lives"; that Insite's "benefits have been proven"; that "[t]here has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation"; and that "[t]he effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics." *Id.* ¶ 133. Such a conclusion from Canada's highest court certainly lends support to Safehouse's

On balance, in the face of substantial and seemingly credible social science research, the Government's reliance upon media accounts and a single governmental report falls short of meeting its burden as to the community impact aspect of irreparable harm.

Considering the Government's presentation as a whole, the irreparable harm it asserts is supported far more by argument than by evidence. In making such arguments, the Government has failed to carry its burden to show that it more likely than not will suffer irreparable harm absent a stay.

C. Because of events separate from the proceedings in this case, Safehouse will not be irreparably harmed by a stay

As to the balance of harms, Safehouse contends that a stay will cause it irreparable harm because it will be prevented from opening, depriving opioid users from potentially life-saving care, and undermining the Philadelphia Health Commissioner's public health initiative. In support, it cites Third Circuit precedent dealing with alcohol treatment centers, *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 183-84 (1987), and methadone treatment centers, *New Directions Services v. City of Reading*, 390 F.3d 293, 303-04 (3d Cir. 2007). ECF 149, at 17-18. It further argues that a stay would violate the religious beliefs of Safehouse's founders, reviving their claims under the Religious Freedom Restoration Act previously dismissed without prejudice as moot.

The harm that Safehouse and its founders might otherwise have claimed has fallen prey to outside events. First, Safehouse's naïve attempt to begin operation in the "City of Neighborhoods" without consulting the affected neighborhood generated substantial opposition,

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characterization of the available evidence about the comparative risks and benefits of supervised injection sites and counsels against the Government's argument that the opening of Safehouse would cause the public irreparable harm.

supported by elected officials,[23] effectively preventing it from opening. Second, the opioid epidemic has been overshadowed by the COVID-19 pandemic, followed by momentous demonstrations protesting excessive use of force by police, straining the City's resources.

As to the first issue, no state or local legislation has yet been enacted that would bar Safehouse from opening.[24] Regardless, public reaction to Safehouse's attempt to open without employing a transparent process assures that substantial outreach to both neighbors and elected officials alike will be required before operation is a realistic possibility.

That was true even before Philadelphia was hit by the pandemic. To be sure, the threat imposed by COVID-19 does not diminish the threat posed by opioid addiction. But, by any measure, the challenges of coping with the pandemic and with recent community unrest understandably triggered by the death of George Floyd present strains on the City—government and citizens alike—that make the proposed opening of Safehouse unrealistic any time soon. These same considerations guide my decision as to why a stay is now in the public interest.

D. Recent events compel the conclusion that a stay is in the public interest

In the first instance, the Government seeks to "merge" its alleged irreparable harm with the harm it believes the public will suffer absent a stay, arguing that it is entitled to a stay

[23] Philadelphia City Council, Resolution No. 200195, adopted March 5, 2020.

[24] Proposed state legislation, Senate Bill 933, Regular Session 2019-2020, currently pending in the Pennsylvania Senate Judiciary Committee, would impose requirements for the operation of supervised injection sites—including that there be three public hearings before an opening—but otherwise permit it to proceed if a medical director is on site and a public safety plan is put in place. Proposed municipal legislation, Philadelphia City Council, Bill No. 200189, introduced February 27, 2020, would not explicitly prohibit operation of supervised injection sites, but it would require any prospective operator of a supervised injection site to obtain support from the overwhelming majority of the surrounding community and, for practical purposes, operate as a ban. It remains striking that no legislation has been initiated federally. Eighteen months have elapsed since Safehouse stated its intention to begin operation. A one-sentence clarifying amendment to the statute would achieve what the Government seeks to achieve in the courts.

because "the government's interest *is* the public interest." ECF 145, at 10. As set forth in my discussion of the controlling legal standard, I reject that argument because it based upon a misreading of *Nken*. Under *Nken*, such an argument only has merit where the Government is the party opposing a stay. *See Nken*, 556 U.S. at 435.

The Government goes on to argue that the injunctive powers conferred by 21 U.S.C. § 856(e) reflect a congressional determination that irreparable harm will result if the law is not enforced, thereby compelling the issuance of a stay in this case. ECF 145, at 12 (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 799 (3d Cir. 1989)). Section 856(e) states that "[a]ny person who violates [Section 856(a)] shall be subject to declaratory and injunctive remedies" as set forth in a subsequent statutory provision. The Government's argument would have merit if Congress by enacting Section 856(a) had in fact intended to criminalize supervised injection sites (and with it granted courts the power to enjoin their operation), but here I have concluded that it did not.

A stay is nonetheless in the public interest for reasons apart from those advanced by the Government. All change results in some level of disruption, and Philadelphia has already experienced two profound disruptions. It is confronted with a public health crisis even larger than the opioid epidemic, which has strained municipal government and individual citizens to an unprecedented degree, imposing extreme demands on the City's resources and employees. At the same time revenues have dwindled because of the deep downturn in economic activity. The nerves of citizens are frayed by fear and uncertainty, and that was true before the death of Mr. Floyd and the widespread protests that arose in its aftermath.

The opening of Safehouse would require multiple public meetings, the time and attention of the City Health Department, and the allocation of police resources. Even if one assumes a flawless opening process, the operation of Safehouse would represent a significant change in how the City responds to opioid abuse, and such change would necessarily be disruptive. As committed as the founders and supporters of Safehouse may be, and without discounting the seriousness of the opioid epidemic, I am persuaded that a stay of the judgment is at this time manifestly in the public interest.

IV. Conclusion

I construe *Revel* as allowing a district court to balance all traditional stay factors, including the public's interest, when circumstances warrant it. Although the Government has failed to show that it will suffer harms that cannot be prevented or fully rectified by a successful appeal, the ongoing challenges posed by COVID-19 and the deep social currents and introspection following the tragic killing of Mr. Floyd make this the wrong moment for another change in the status quo. Accordingly, the Government's request for a stay will be granted. An appropriate Order follows.

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **SAFEHOUSE, a Pennsylvania nonprofit Corporation;** **JOSE BENITEZ, as President and Treasurer of Safehouse,** **Defendants.**	:	**CIVIL ACTION** **No. 19-0519**
SAFEHOUSE, a Pennsylvania nonprofit Corporation, **Counterclaim Plaintiff,** **v.** **UNITED STATES OF AMERICA,** **Counterclaim Defendant,** **and** **U.S. DEPARTMENT OF JUSTICE; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; and WILLIAM M. McSWAIN, in his official capacity as U.S. Attorney for the Eastern District of Pennsylvania,** **Third-Party Defendants.**	:	

McHugh, J. **October 2, 2019**

MEMORANDUM

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This is a declaratory judgment action brought by the United States seeking to enjoin the operation of a proposed safe injection site for opioid users in the City of Philadelphia. The Government contends that its operation is unlawful under the Controlled Substances Act (CSA). As an initial matter, it is useful to delineate what is not before the Court. The question is not whether safe injection sites are an appropriate means of dealing with the opioid crisis, either as a matter of public policy or a matter of public health. Nor does this Court have jurisdiction to address the concerns raised by residents of the beleaguered neighborhood of Kensington in Philadelphia as to the appropriate location for the operation of such a facility, if it is lawful. It is also helpful to observe that, although both parties globally invoke various aspects of the Controlled Substances Act, a sprawling statute amended many times over many years, this case focuses on a single narrow provision of the Act, 21 U.S.C. § 856(a)(2)—colloquially known as the "Crack House" statute—as the legal basis for the injunction sought by the Government.

This narrowness of focus reflects a fundamental underlying reality, which is that no credible argument can be made that facilities such as safe injection sites were within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003. And that baseline reality ultimately has substantive significance in determining whether this statute is properly applied to the safe injection site proposed by Safehouse.

Having examined the text and employed a number of tools of statutory construction, I conclude that the provision on which the Government relies is reasonably capable of more than one interpretation. This supports a further conclusion that consideration of the legislative evidence surrounding passage of this provision is appropriate. As discussed below, courts must exercise extreme care in discerning the objective sought by Congress in enacting a statute. That said, having reviewed materials I consider appropriate in discerning what Congress sought to address in enacting § 856(a)(2), there is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse. Although the language, taken to its broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site, to attribute such meaning to the legislators who adopted the language is illusory. Safe injection sites were not considered by Congress and could not have been, because their use as a possible harm reduction strategy among opioid users had not yet entered public discourse. Particularly in the area of criminal law, it is the province of Congress to determine what is worthy of sanction. A line of authority dating back to Chief Justice John Marshall cautions courts against claiming power that properly rests with the legislative branch.[1] A responsible use of judicial power under those circumstances is to decline to expand the scope of criminal liability under the statute and allow Congress to address the issue.

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[1] *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)).

I. The Relevant Factual Background

Safehouse seeks to open an "Overdose Prevention Site," which will offer a variety of services aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment. According to Safehouse's representations about its protocol,[2] when one arrives at Safehouse, they will first go through a registration process. The participant will provide certain personal information and receive a physical and behavioral health assessment. Safehouse staff will then offer a variety of services, including medication-assisted treatment, medical care, referrals to a variety of other services, and use of medically supervised consumption and observation rooms. There is nothing in the protocol that suggests Safehouse will specifically caution against drug usage.

Participants who choose to use drugs in the medically supervised consumption room will receive sterile consumption equipment as well as fentanyl test strips once they enter the room. At no point will Safehouse staff handle or provide controlled substances. Staff members will supervise participants' consumption and, if necessary, intervene with medical care, including reversal agents to prevent fatal overdose. Before leaving the room, participants will dispose of used consumption equipment. After participants finish in the medically supervised consumption room, staff will direct them to the medically supervised observation room. Nothing in the Safehouse protocol appears to require that a participant remain in the observation room for a specified period of time. In the observation room, certified peer counselors, as well as recovery

[2] I base this summary of Safehouse's proposed operation and protocol only on the facts presented in the pleadings, including Exhibit A to the Government's Amended Complaint, which is a printout of a previous version of Safehouse's website. I have disregarded all witness testimony presented at the evidentiary hearing held on August 19, 2019.

specialists, social workers, and case managers will be available to offer services and encourage treatment. The same services will again be offered for the third time at check out.

II. Procedural Posture

After Safehouse announced its plans, the Government engaged in some correspondence with Safehouse's leadership. The parties could not reach agreement, and the United States then initiated this action against Safehouse and its President and Treasurer, Jose Benitez.[3] *See* Pl.'s Compl., ECF No. 1; Pl.'s Am. Compl., ECF No. 35. The Government seeks a declaratory judgment that the medically supervised consumption rooms violate 21 U.S.C. § 856(a)(2). I commend the Government for proceeding in this manner, rather than with criminal prosecution. Defendants answered the Government's Declaratory Judgment Complaint with several affirmative defenses, including an argument that application of the statute to their proposed site would be unconstitutional. Defs.' Answer to Compl., ECF No. 3; Defs.' Answer to Am. Compl., ECF No. 45. Safehouse also brought counterclaims and third-party claims, first seeking a declaratory judgment that its proposed operation will not violate § 856(a) and second seeking a declaratory judgment that the Department of Justice's efforts to enforce the statute, threats to prosecute Safehouse, and litigation against Safehouse violate 42 U.S.C. § 2000bb, the Religious Freedom Restoration Act. *Id.* The Government answered Safehouse's counterclaims and third-party complaint, Pl. & Third-Party Defs.' Answer, ECF No. 46, and then filed a Motion for

[3] The Government initially brought the action against Safehouse and Jeannette Bowles, whom it expected to be Safehouse's Executive Director. Pl.'s Compl., ECF No. 1. After it became clear that Jeannette Bowles had severed ties with Safehouse, the parties stipulated to her dismissal, Stipulation of Dismissal, ECF No. 30, and the Government amended its complaint, naming Jose Benitez instead. Pl.'s Am. Compl., ECF No. 35.

Judgment on the Pleadings as to its claim as well as the counterclaims and third-party claims. Pl. & Third-Party Defs.' Mot. for J. on the Pleadings, ECF No. 47.[4]

After considering the pleadings, the Government's Motion for Judgment on the Pleadings, Safehouse's Response, ECF No. 48, and the Government's Reply, ECF No. 115, I have concluded that 21 U.S.C. § 856(a) does not prohibit Safehouse's proposed medically supervised consumption rooms because Safehouse does not plan to operate them "for the purpose of" unlawful drug use within the meaning of the statute. Accordingly, I need not consider whether application of the statute to Safehouse's proposed conduct violates the Commerce Clause. As to the Religious Freedom Restoration Act, Safehouse's claim that the Government's effort to enforce 21 U.S.C. § 856(a) violates the Religious Freedom Restoration Act is now moot, as Safehouse sought only prospective injunctive relief. The Government's Motion will be denied as to its claim for declaratory judgment, as well as Safehouse's counterclaim for declaratory judgment.

[4] At the outset of the case, the Government represented that the issue was purely one of law that could be decided on a Motion for Judgment on the Pleadings. Safehouse objected and requested a full trial. I adopted the Government's view but sought more detail as to the protocol under which Safehouse was to operate. Therefore, I requested an evidentiary hearing on a limited number of issues, with the goal of having the parties amend the pleadings to frame the issues. Safehouse provided a summary of proposed testimony that broadly addressed issues of public policy and public health. I declined to allow it such leeway, and attempted to provide the parties with clear guidance as to the narrow scope of the proposed hearing. The hearing was held on August 19, 2019. Safehouse presented substantial evidence that went well beyond the scope of my guidelines. The Government raised no objection, however, and it became clear during cross-examination that the Government also sought to use the hearing to address a number of public policy and public health issues.

After considering the record, I held a telephone conference on August 23, 2019, and advised both parties that neither had abided by my ground rules for the hearing. I then sought to secure agreement as to nine discrete factual items to be incorporated into the record by agreement. The parties were able to reach agreement on eight of the nine points but had a vigorous dispute as to the ninth. I then ruled that I would consider nothing beyond the pleadings. Ironically, during oral argument, the Government repeatedly invoked portions of the testimony from Mr. Benitez in an attempt to support is arguments. Significantly, however, the Government has not withdrawn its Motion for Judgment on the Pleadings or altered its original position that no further record is necessary. I have therefore proceeded to address the pending Motion for Judgment on the Pleadings without reference to the testimony presented at the evidentiary hearing, as originally requested by the Government.

III. The Controlling Procedural Standard

A Rule 12(c) motion for judgment on the pleadings "is analyzed under the same standards that apply to a Rule 12(b)(6) motion." *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 134 (3d Cir. 2010). This well-established standard requires that I view the pleadings in the light most favorable to the non-moving party. *Leamer v. Fauver*, 288 F.3d 532, 535 (3d Cir. 2002). "A Rule 12(c) motion should not be granted unless the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law." *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 271 (3d Cir. 2014) (internal quotations and citations omitted). I may consider all pleadings in ruling on a motion for judgment on the pleadings. *Id.* (citing to Rule 12(c)).

IV. The Statutory Question

For purposes of this motion, the facts outlined above are undisputed, and the sole question is one of law.

a. The Absence of a Controlling Standard of Statutory Construction

District courts must faithfully apply the law Congress enacts. Binding precedent usually dictates or substantially influences the way in which district courts apply the law. But the Third Circuit has not yet considered the proper construction of 21 U.S.C. § 856(a), and although other courts of appeals have addressed that subsection, no court has yet considered its application to medically supervised consumption sites.[5]

When a district judge must address a novel question of statutory construction, part of the challenge is that "[s]tatutory interpretation does not have a defined set of predictable rules. The

[5] The Third Circuit has considered the meaning of the word "maintained" under U.S.S.G. § 2D1.1(b)(12) and looked to other circuit courts' interpretations of the word "maintained" in § 856. *United States v. Carter*, 834 F.3d 259, 262-63 (3d Cir. 2016).

doctrines of the field are not treated as law. They do not have a theorized jurisprudence that legitimates their source, or even indicates what it might be." Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 Notre Dame L. Rev. 2053, 2054 (2017). There are instead competing models and schools of thought, and a judge's choice of methodology carries a risk of dictating the outcome of a case. For that reason, I first address the various methods available, both because I believe transparency is important, and because I am convinced that judges must be conscious of the inherent limitations in all the various methods employed.

The Third Circuit has noted that a court's "goal when interpreting a statute is to effectuate Congress's intent." *S.H. ex rel. Durrell v. Lower Merion School Dist.*, 729 F.3d 248, 257 (3d Cir. 2013) (quoting *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012)). Stated differently, "[w]hen a court interprets a statute, the court articulates the meaning of the words of the legislative branch." Robert A. Katzmann, *Judging Statutes* 8 (2014). In this endeavor, the Third Circuit has, as recently as this past August, again emphasized that "words matter" and that interpreters must begin the process of statutory construction by looking to the text. *Pellegrino v. Transp. Sec. Admin.*, 937 F.3d 164, 2019 WL 4125221, at *12 (3d Cir. Aug. 30 2019) (en banc) (Ambro, J.) (majority opinion); *id.* (Krause, J., dissenting). Accordingly, where the meaning of a provision is clear, a court need not look beyond the statutory language.

To determine whether language is unambiguous, the Third Circuit has instructed that one should "read the statute in its ordinary and natural sense." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010) (quoting *In re Harvard Indus., Inc.*, 568 F.3d 444, 451 (3d Cir. 2009)). "A provision is ambiguous only where the disputed language is 'reasonably susceptible of different interpretations.'" *Id.* (quoting *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)).

In application, however, reliance on the plain meaning of the text is hardly as simple as its proponents contend, as evidenced by cases where both the majority and dissent claim that the language of a statute is clear and unambiguous while reaching opposite results. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ*, 550 U.S. 81 (2007). I find substantial merit to the observation that "[p]lain meaning is a conclusion, not a method." Victoria Nourse, *Misreading Law, Misreading Democracy* 5, 66, 68-69 (Harvard Univ. Press 2016) (hereinafter Nourse, *Misreading Law*).

Where plain meaning proves elusive or "a statute is unclear on its face," the Court of Appeals has recently reaffirmed that "good arguments exist that materials making known Congress's purpose 'should be respected, lest the integrity of legislation be undermined.'" *Pellegrino*, 2019 WL 4125221 at *11 (quoting Robert A. Katzmann, *Judging Statutes* 4 (2014)). In fact, respecting Congress's purpose is necessary to preserve both the legislative and judicial roles, and legislative materials often provide helpful insight into what Congress meant to accomplish with a given statute. Among the criticisms leveled at courts' use of legislative materials is that they are cited selectively and cited indiscriminately without recognition that different sources are entitled to different weight.[6] Judges must therefore consider legislative materials with an accurate understanding of Congress's rules and procedures. Katzman, *supra* at 49; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 802-05 (1983) (hereinafter Posner, *Statutory Interpretation*).

[6] Indeed, the Government at oral argument voiced the oft-repeated criticism that using legislative history is like looking over the heads of guests at a cocktail party and choosing one's friends. *See* Tr. at 12; *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993). In reality, the same potential problem also pervades the realm of judicial canons of statutory construction, as judges choose which canons to employ, Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909 (2016), and the realm of textual analysis, as judges select the specific words on which to focus, Victoria Nourse, *Picking and Choosing the Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 60 Fla. L. Rev. 1409 (2017). Whatever tools judges employ, it must be with an awareness of their limitations.

Recently, Georgetown Law Professor Victoria Nourse[7] articulated five guiding principles to facilitate a disciplined, objective use of legislative history—which she prefers to call "legislative evidence"—in statutory interpretation. Nourse, *Misreading Law*, *supra* at 68-69; *see also* Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70 (2012). First, she observes that "Statutes Are Elections." By that she means that the legislature makes choices, and one side prevails. Accordingly, statements of a law's opponents should never be cited for the authoritative meaning of the law, much in the way that a dissenting opinion would not be cited as authority without explanation. Nourse, *Misreading Law*, *supra* at 68. Nourse's second principle emphasizes the sequential nature of how laws develop. Just as subsequent appellate decisions trump trial court decisions, later text or legislative evidence can trump earlier legislative evidence. *Id.* at 69. One should therefore read legislative history in reverse, beginning with the last point in the decision-making process related to the text at issue. *Id.* at 79-80. The third principle recognizes that Congress's own rules can provide meaningful interpretive guidance when used as legislative canons. *Id.* at 85-88. Nourse's fourth principle rejects the view that any particular "type" of legislative history will always be the most reliable. Any type of legislative history may mislead the interpreter absent an understanding of the realities of legislative conflict, sequence, and congressional rules. *Id.* at 88-90. Finally, the fifth principle recognizes that Congress operates with different institutional expectations and incentives than the courts, which may cause courts to misunderstand the

[7] I am indebted to Judge Michael Boudin, of the First Circuit, for first acquainting me with Professor Nourse's work. I note as well that he has cited her scholarship in his own opinions. *See, e.g.*, *United States v. Acosta-Joaquin*, 894 F.3d 60, 63 (1st Cir. 2018) (citing Victoria Nourse, *Misreading Law, Misreading Democracy* (Harvard Univ. Press 2016)).

significance of certain congressional language. *Id.* at 91-94. To the extent that I consider legislative context, it is with these principles in mind.

Necessarily, statutory construction also requires consideration of the "canons" of construction given new life by the late Justice Scalia, and now widely used. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012). Indeed, a critical case relied upon by the Government based its holding on the application of a canon. *See United States v. Chen*, 913 F.2d 183 (5th Cir. 1991). But like legislative evidence, judicial canons need to be employed with an awareness of their limitations. *See, e.g.*, Katzmann, *supra* at 51-53; Posner, *Statutory Interpretation, supra* at 805-17. Two criticisms in particular resonate with me. First, many canons are premised on unrealistic assumptions about how Congress creates law. Katzmann, *supra* at 52-53; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Posner, *Statutory Interpretation*, *supra* at 806. Second, the manipulability of canons carries the potential for judges to rewrite statutes based on personal preferences under the guise of adherence to objective rules. Nourse, *Misreading Law*, *supra* at 105-06; Posner, *Statutory Interpretation, supra* at 816 ("Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained."). Canons' prevalence in the case law requires their consideration, but with the same caution that accompanies use of the legislative record.

The challenge of statutory construction is such that fidelity to method must often yield to the need to answer a specific, complex question. For example, textualists are fond of praising Justice Frankfurter's admonition to "(1) Read the statute; (2) read the statute; (3) read the statute!" Judge Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in*

Benchmarks, 196, 202 (1967). But Justice Frankfurter more broadly recognized that "there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947), *in Judges on Judging: Views from the Bench* 221, 229 (David M. O'Brien ed., 1997). In practice, therefore, most judges do not subscribe to purely one method. Katzman, *supra* at 55; Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 13 Harv. L. Rev. 1298, 1313-14 (2018); *see also* Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. Legis. 1 (2003). Instead, they draw upon multiple tools with the goal being to interpret the statute in question "in a way that is faithful to its meaning." Katzmann, *supra* at 29. Although both parties to this case claim the statute is clear, to resolve the question here requires the use of multiple tools as well.

I employ these tools of statutory construction to illuminate the statute's ordinary meaning. I take a statute's "ordinary meaning" to refer to the meaning consistent with the undisputed, prototypical examples of circumstances in which the statute applies—those to which legislators and members of the public would have expected the statute to apply at the time of enactment. *See* Lawrence Solan, *The New Textualists' New Text*, 38 Loy. L.A. L. Rev. 2027, 2040-42, 2044 (2005). Expressing a preference for a statute's ordinary meaning is not to say that the statute *only* applies to those examples. But just as courts should not interpret the law in a way that excludes the ordinary examples to which it undisputedly applies, courts should hesitate to extend a statute far beyond its ordinary meaning.

Such principles reflect appropriate respect for the role of Congress. Justice Gorsuch, writing for a majority of the Court, observed that it is fundamental that "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Absent binding precedent or some compelling rationale, courts should hesitate to expand the reach of a statute—particularly a criminal statute—far beyond the ordinary meaning conceived of at the time of enactment.

b. Interpretation of 21 U.S.C. § 856(a)

The sole question in this case is one of statutory construction. Specifically, the Court is tasked with construing 21 U.S.C. § 856(a), the most relevant portion of which makes it unlawful for any person to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance." § 856(a)(2). I must then determine whether Safehouse's planned activity, specifically the operation of the consumption room, falls within the scope of the statute's criminal prohibition.[8]

Section 856(a) was enacted in 1986 as part of the Anti-Drug Abuse Act and subsequently amended in 2003 as part of the PROTECT Act. The full text reads:

Except as authorized by this subchapter, it shall be unlawful to--

> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;

[8] Neither party disputes that the other aspects of Safehouse's operation—providing sterile consumption equipment, naloxone, respiratory support, medical care, and addiction treatment referrals—do not violate the CSA. *See* Pl.'s Reply at 10. In fact, the Government conceded at oral argument that even mobile vans parked near public places to provide the same services offered inside Safehouse would not violate the statute. Tr. at 38.

> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

Some aspects of the statute's application to these facts are clear. Safehouse will manage or control a place and make that place available to participants. Safehouse participants undisputedly will use drugs on Safehouse's property. The remaining question is whether Safehouse will knowingly and intentionally make its property available "for the ***purpose*** of unlawfully . . . using drugs" within the meaning of the statute. In the parties' view, this is a simple question. I disagree.

The impetus for § 856(a) initially was a concern about crack houses, and a similar concern about drug-fueled raves motivated the 2003 amendment. The question is how far beyond those undisputedly covered activities the statute reaches. While I agree that, taking each of the statute's words literally, it might be possible to read § 856(a) to apply to Safehouse, I am not convinced that a plain or ordinary reading of the statute allows that application.

The Government argues that (a)(2) prohibits Safehouse's medically supervised consumption rooms because the purpose requirement there applies to the third party using the property, not the actor charged with violating the statute. That is, in the Government's view, only the third party must act "for the purpose of unlawfully . . . using drugs." The Government further contends that, even if the relevant purpose under the statute is that of Safehouse, Safehouse is necessarily acting for the purpose of unlawful drug use. Safehouse disagrees, arguing that the relevant purpose is the purpose for which the property itself is used and contending that its site is not "for the purpose of unlawfully . . . using drugs." Safehouse also asserts that § 856(a) does not prohibit safe consumption rooms because the CSA authorizes their operation and because the statute does not define "unlawfully . . . using."

I reject Safehouse's latter two arguments for reasons explained more fully below. With respect to the purpose requirement, I conclude that the relevant purpose is that of the *actor*, not the third party or the property. However, "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance" remains ambiguous, susceptible to multiple interpretations. Consistent with the common understanding of purpose to refer to one's end or goal, along with the statutory scheme and legislative context, I interpret that provision to require that the actor have a significant, but not sole, purpose to facilitate drug activity. Because Safehouse does not plan to make its facility available "for the purpose of" facilitating unlawful drug use, I ultimately conclude that § 856(a) does not criminalize Safehouse's proposed conduct.

i. Authorization

Safehouse contends that its proposed conduct is "authorized by" the Controlled Substances Act (CSA) and therefore falls within the "[e]xcept as authorized by this subchapter" exemption of § 856(a). According to Safehouse, this follows not from any express authorization, but from the fact that medically supervised consumption sites constitute a legitimate medical practice "which the CSA does not regulate and Section 856 does not prohibit." Defs.' Resp. to Pl.'s Mot. J. on the Pleadings at 28, ECF No. 48 (hereinafter Safehouse Response). As a logical matter, Safehouse advances an argument that is both simplistic and circular: because the proposed conduct is not prohibited or regulated by the CSA, it is therefore necessarily authorized by the statute and excluded from the reach of § 856 of the CSA. I reject the premise that Congress's failure to prohibit activity constitutes an affirmative authorization. Rather, I am confident that the statute neither expressly prohibits nor authorizes the sites for the same reason—the legislature simply never contemplated them when enacting the law. Granted, if

§ 856 does not prohibit Safehouse's medically supervised consumption sites—a matter explored further below—additional express authorization would of course be unnecessary. That may make the sites "authorized" in the colloquial sense that they are not illegal, but it does not render them "authorized by this subchapter" within the meaning of the statute.

Safehouse relies heavily on *Gonzales v. Oregon*, 546 U.S. 243 (2006), in support of its contention that the Controlled Substances Act allows for safe consumption sites. *See* Safehouse Response at 30; Transcript of Oral Argument, ECF No. 131, at 49-50. Specifically, Safehouse contends that its medically supervised consumption rooms are authorized because the Attorney General lacks the power to "promulgate rules 'based on his view of legitimate medical practice'" and the CSA does not regulate the legitimate practice of medicine. Safehouse Response at 30 (quoting *Gonzales*, 546 U.S. at 260, 270). *Gonzales* involved a federal challenge to an Oregon statute, passed through a voter ballot initiative, allowing physicians to assist with suicide. 546 U.S. at 250. The statute in question established a detailed protocol for physicians to follow under the supervision of the Oregon Department of Human Services. Or. Rev. Stat. § 127.800 *et seq.* (2003). The Attorney General of the United States later published an "Interpretative Rule" that physician-assisted suicide was not a legitimate medical purpose, with the result that prescribing, dispensing, or administering drugs to facilitate it could be deemed a violation of federal law and lead to the suspension or revocation of a physician's registration under the CSA. 546 U.S. at 254.

Although the Supreme Court ruled against the Government, *Gonzales* does not control on the facts of the current case for several reasons. As a preliminary matter, the proposed activities of Safehouse here are not analogous to the detailed state-regulated scheme at issue in *Gonzales*. Safe injection sites are recognized as a legitimate harm reduction strategy among some public health experts and recognized medical authorities such as the American Medical Association, *see* Defs.' Answer at 31, but as Safehouse concedes, no state medical board has issued standards governing their operation. Tr. at 52. It is clear that the Supreme Court in *Gonzales* was also concerned with issues of federalism, which are not present in a case where the conduct in question is not formally endorsed by any state or local governmental entity.[9] *See* 546 U.S. at 270.

Furthermore, an important concern of the Court in *Gonzales* was the Attorney General exceeding the bounds of his authority by interpreting a specific regulation governing the issuance of prescriptions by physicians. 546 U.S. at 266 (interpreting 21 C.F.R. § 1306.04). Similar concerns do not exist here where the Government seeks no more than direct enforcement of the statute.

Finally, as to Safehouse's argument that because "Congress does not regulate the legitimate practice of medicine" under *Gonzales*, the CSA does not prohibit safe consumption sites, Tr. at 49, I again find the facts of this case distinguishable. Although medication-assisted treatment, which requires the involvement of a physician, is part of the Safehouse protocol, medical practitioners are not directing that participants make use of safe consumption rooms as part of any formal course of treatment. Even if they were, *Gonzales* cannot be read so broadly as to exempt all legitimate medical practices from all provisions of the CSA. *Gonzales* may shed some light on the proper interpretation of the statute—a matter I address further below—but it does not by itself prohibit a criminal prosecution simply because the conduct in question is related to medical practice.[10]

[9] I do not recognize the support of individual public officials as the formal support of a governmental entity.

[10] Safehouse also cites several cases for the proposition that, to convict a practitioner, the Government must prove the practitioner acted outside the course of professional practice and without a legitimate medical purpose. But the

ii. Meaning of "unlawfully . . . using"

Safehouse also suggests that, because the statute does not offer a technical definition of "unlawfully . . . using," the meaning of that phrase is indecipherable, and § 856 cannot apply where the drug activity in question is consumption or use. With this argument, Safehouse advocates a problematic isolationist approach to statutory interpretation that can lead courts to conclusions far from the legislature's meaning. I decline to isolate "using" and read that term out of the text when the statutory and legislative context easily clarify the meaning of "unlawfully . . . using." Although the CSA does not criminalize "use" alone, the statute criminalizes possession, which, as the Government points out, is a necessary predicate to use.[11] By definition, a person cannot lawfully use or consume[12] a substance that the person cannot even lawfully possess. In the context of the statute, a reader can fairly understand "unlawfully . . . using" to refer to use of a substance the person cannot lawfully possess. This view is consistent with the legislative evidence, which refers to "using illegal drugs." *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 108-66, 108th Cong., 1st Sess. 49, at 68 (2003) (hereinafter Joint Explanatory Statement).[13] In a case where the illegality of the

cases cited exclusively concern distribution under 21 U.S.C. § 841(a) and its implementing regulation concerning prescriptions, 21 C.F.R. § 1306.04. These cases might be relevant if the Government were accusing Safehouse of distributing medication, but they offer no insight into the question about § 856(a)(2)'s applicability to the facts at hand.

[11] The hypothetical used by Safehouse to advance its position at oral argument—one who unlawfully consumes a prescription they initially lawfully possessed for another, Tr. at 55, simply has no relevance to the issues here.

[12] Neither party seems to dispute that the term "using" unambiguously refers to consumption in this context.

[13] The joint explanatory statement to a conference report offers explanations of how conferees resolved disputes between the House and Senate versions of a bill or why any new language was added to the final bill text, which is embodied in the conference report. *See* Nourse, *Misreading Law*, *supra* at 80; Christopher M. Davis, *Conference Reports and Joint Explanatory Statements*, Congressional Research Service (2015). The statements are therefore helpful and proximate evidence of the meaning of text, particularly text added or modified in conference committees.

controlled substances involved is undisputed, the use of the term "unlawfully using" is not ambiguous. The question remains whether Safehouse plans to knowingly and intentionally make a place available for the purpose of unlawfully using drugs.

iii. To whose purpose (a)(2) refers

With respect to the purpose requirement, the first dispute concerns *whose* purpose is at issue. The text of (a)(2) requires that the actor charged with violating the statute "knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. § 856(a)(2). The Government contends that the actor in (a)(2) simply needs to have knowingly made a place available to *others who have the purpose* of engaging in drug activity. Pl. & Third-Party Defs.' Mot. for J. on the Pleadings at 9. Safehouse argues that the relevant purpose is that of the place itself. I reject both constructions and conclude that the statute requires that the *actor* have acted for the proscribed purpose.

A natural reading of the text indicates that, for a person to knowingly and intentionally make a place available for use for the purpose of unlawful drug activity, *that person*—the actor—must make the place available with the proscribed purpose. Section 856(a)(2) applies only when a person knowingly and intentionally makes a place available for use or rents the place "for the purpose of" unlawful drug activity, not when he knowingly makes it available for use or rents it to others who have the purpose of engaging in drug activity. In the most natural reading of the sentence, the "for the purpose of" clause refers to the mental state of the actor.

The context of the whole statute supports this reading. Sections 856(a)(1) and (a)(2) both contain the requirement that one engage in the prohibited conduct "for the purpose of" drug activity. No party—and no court, for that matter—disputes that the actor in (a)(1) must act "for the purpose of" drug activity. The same requirement exists in (a)(2) structured in precisely the same way. Both provisions have the same subject, identified in § 856(b) as "any person." Both further identify a knowledge requirement—"knowingly" or "knowingly and intentionally"—followed by a set of verbs and a direct object—"place"—and conclude with the "for the purpose of" clause. In both provisions, the purpose requirement applies to the person who acts knowingly—an elaboration of the requisite mental state. The text suggests no reason to read the requirement differently in (a)(2) than in (a)(1).[14]

The substantive difference between the two provisions, as the Government agrees, Tr. at 9, and as many courts have recognized, is that (a)(1) targets actors who themselves use or maintain the place in question to engage in drug activity, whereas (a)(2) encompasses actors who manage or control a space and then make the place available *to others* who engage in drug activity. The legislative context confirms as much. Joint Explanatory Statement at 68 (explaining that the 2003 amendment to § 856 aimed to make "clear that anyone who knowingly and intentionally uses their property, or allows another person to use their property, for the purpose of distributing or manufacturing or using illegal drugs will be held accountable"). But that distinction does not mean that in (a)(2) the actor need not have the proscribed purpose. One can still make a place available to others for the purpose of those people manufacturing, distributing, or using illicit substances there.[15] Reading § 856(a) naturally, the purpose

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[14] The Government at oral argument made much of the fact that (a)(2) begins with "manage and control" as opposed to "knowingly open" in (a)(1) and that "knowingly and intentionally" appears later in (a)(2). Tr. at 24-27. But the introductory clause in (a)(2) simply adds that one must first "manage and control" the place *and then* "knowingly and intentionally" make it available for use for the purpose of drug activity. Although "knowingly and intentionally" appears later in (a)(2), it precedes several verbs and the "for the purpose of" clause, just as in (a)(1). Moreover, the verbs in (a)(1) and (a)(2) share the same subject—"any person," as indicated in § 856(b). At no point has the Government presented a compelling textual reason why the structure of (a)(2) dictates that the purpose requirement must refer to the purpose of the third party.

[15] At oral argument, the Government referred to this reading of the statute as "nonsensical and self-defeating" because it would allow "a stone-cold crack dealer" to claim a benign purpose of making money to support his family. Tr. at 19. That argument erroneously merges two distinct issues. *Whose* purpose is at issue is a distinct question from whether the proscribed purpose must be the sole purpose. I address the latter question below and conclude that the proscribed purpose may be one of multiple purposes for which the actor makes the space available.

requirement applies to the actor in both (a)(1) and (a)(2) on its face, and absent evidence that it should apply differently in each, I decline to assign (a)(2) a lower mental state than its text requires.

Legislative evidence confirms that the purpose requirement applies to the actor in both provisions. When Congress most recently considered § 856, in 2003, it amended the statute, including (a)(2).[16] The amendment to § 856, originally introduced as the Illicit Drug Anti-Proliferation Act, was added to the PROTECT Act in the Conference Committee, an Act aimed at preventing child abuse and facilitating prosecution of crimes against children. Then-Senator Joseph Biden sponsored the Illicit Drug Anti-Proliferation Act and was a conferee at the Conference Committee on the PROTECT Act.[17] His remarks during the subsequent debate on the Conference Report offer strong evidence that § 856's meaning requires the actor or defendant to act with the purpose of drug use. The remarks were made just prior to Congress's collective decision to agree to the Conference Report, which represented the final decision about the text at issue. Because these comments were made by a sponsor of the original bill containing the amendment, who was also a conferee to the Conference Committee, they carry weight as

Because one of the primary purposes of the "stone-cold crack dealer" is undoubtedly facilitating drug use, his purpose of facilitating drug activity would assure he did not "get off scot free," as the Government laments. *See id.* at 19, 20. Moreover, the Government's hypothetical profoundly underestimates the capacity of federal judges to avoid being duped by criminal defendants engaging in wordplay.

[16] Although the "for the purpose of" language was also in the original version of § 856, the legislative evidence from 2003 carries no less weight simply because the language was not entirely new in 2003. Congress revisited the language in question in 2003 and decided to enact the modified provision with the "for the purpose of" language. The context surrounding that decision constitutes evidence of the most recent legislative decision about the relevant text and can therefore shed light on its meaning. *See* Nourse, *Misreading Law*, at 69, 80.

[17] In the Senate, a conferee is also called a "manager" and is appointed to serve on a conference committee, typically from the committee or committees that reported the legislation. Conferees "are expected to try and uphold the Senate's position on measures when they negotiate with conferees from the other body" about the text of a bill. *Conferees*, United States Senate Glossary, *available at* https://www.senate.gov/reference/glossary_term/conferees.htm (last visited Oct. 1, 2019).

evidence of the text's meaning. *See* Nourse, *Misreading Law*, *supra* at 69. Biden stated explicitly that the actor must make the place available for the purpose of drug activity: "My bill would help in the prosecution of rogue promoters who **not only know** that there is drug use at their event but also **hold the event for the purpose of illegal drug use** or distribution. That is quite a high bar." 149 Cong. Rec. 9384 (emphasis added). He further commented that "[t]he bill is aimed at the defendant's predatory behavior," which points to the requirement of purposeful action on the part of the person accused of violating the statute. 149 Cong. Rec. 9383. Coupled with the text of the statute, the legislative context makes clear that, to be liable under (a)(2), an actor must make the place in question available for the specific purpose of drug activity.

A deeper textual analysis, tested by application of judicial canons, leads to the same conclusion. On the face of (a)(2), "for the purpose of" modifies the preceding verbs (rent, lease, profit from, make available for use), the subject of which is the actor accused of violating the statute.[18] The "grammar canon" therefore supports the view that the purpose applies to the actor, rather than an unspecified third party. *See* Scalia & Garner, *supra* at 140. The "presumption of consistent usage" likewise encourages this view. That canon holds that, if a phrase has a clear meaning in one portion of a statute, but the meaning is less clear in a related section, courts should presume that the phrase carries the same meaning in both. *Id.* at 170; *see Si Min Cen v. Attorney General*, 825 F.3d 177, 193 (3d Cir. 2016). Though canons must be applied with caution, the presumption of consistent usage carries inherent logical force where, as here, the two provisions in question are part of the same subsection, were enacted together, and use the phrase

[18] Safehouse asks the Court to read "for the purpose of" to modify the place itself rather than any person's action with respect to the place. As a technical matter, I read "for the purpose of" to modify the verbs, rather than the direct object. One *acts* for a purpose; a place does not carry an inherent purpose separate from a person's intentions for its use. Because any "purpose" of a place is simply the purpose a person or group has given it, there is little meaningful difference between referring to the purpose of a place and the purpose of the actor controlling it.

in the same way. In that regard, the presumption of consistent usage canon is one that directs the court to focus on how *Congress* used terms within the structure of a statute, reducing the risk of judges importing a meaning of their own. "For the purpose of" in (a)(1) clearly and undisputedly refers to the purpose of the actor accused of violating the provision. Although the implication in (a)(2) that third parties will use the place in question may make the purpose clause there less clear to some readers than in (a)(1), courts should presume—absent context indicating otherwise[19]—that the clause carries the same meaning. That is, courts should presume that (a)(2) requires that the *actor* act "for the purpose of" drug activity.

The inclusion of "and intentionally" in (a)(2) further emphasizes that the actor allowing others to use the property must do so "for the purpose of" drug activity. Unlike (a)(1), which requires only that the defendant act "knowingly," (a)(2) requires that the defendant have "knowingly *and intentionally*" made the place available for the proscribed purpose—expressly requiring not only knowledge of the drug-related circumstances but the intention that the proscribed purpose occur. The Government concedes that the combination of "knowingly" and "for the purpose of" in (a)(1) unambiguously requires that the actor "open" or "maintain" the

[19] The close reader may notice that the terms "rent" and "lease" also appear in both provisions, but context clarifies that these terms carry different meanings in (a)(1) and (a)(2). In (a)(2), the indication that the actor must "manage or control" the property as an owner or lessee *and then* rent, lease, or make it available, clarifies that "rent" and "lease" in that provision refer to renting and leasing a space to others. In (a)(1), the same words refer to renting and leasing a space for one's own use. The legislative context reinforces this interpretation. When Congress added these terms to the statute in 2003, it did not change the primary distinction between (a)(1) and (a)(2)—that the former applies to use of one's own property and the latter to making a property one controls available to others. *See* Joint Explanatory Statement at 68; 149 Cong. Rec. 1849 (Statement of Senator Grassley at introduction of the Illicit Drug Anti-Proliferation Act that the bill was "an important step, but a careful one"). Construing "rent" and "lease" to mean the same thing in both would run counter to the meaning the legislature gave the two sections. Proponents of the "Latin canons" will also note that the *noscitur a sociis* canon, which holds that interpreters should give related meanings to words in a list, requires this interpretation. *See* Scalia & Garner, *supra* at 195. In (a)(1), "rent" and "lease" take on meanings related to "open," "use," and "maintain," and in (a)(2), their meaning must relate to "profit from" and "make available for use," both of which imply a third party using the property. Nothing in the text counters the presumption that "for the purpose of" has consistent meaning in both provisions. In fact, both the statutory and legislative context confirm that "for the purpose of" applies to the actor in both.

place in question "for the purpose of" drug activity. The addition of "intentionally" to that combination cannot possibly signal a change in the purpose requirement from (a)(1)—particularly not a change that would *lower* the requisite mental state for an (a)(2) violation. Congress's addition of the term "intentionally" resolves any doubt over whether the actor must act with the proscribed purpose of fostering drug activity under (a)(2).[20]

The Government would have me read a combination of "knowingly," "intentionally," and "for the purpose of" to require mere knowledge of an unidentified third party's purpose. Its requested interpretation would require judicial editing of the statutory text, ignore a critical term, read (a)(1) and (a)(2) inconsistently, and lower the requisite mental state of (a)(2) in a manner that directly contradicts the legislative context surrounding the provision. I am compelled to reject the Government's view of whose purpose (a)(2) concerns and accept the interpretation that, as in (a)(1), the purpose requirement applies to the actor charged with violating the statute.

The Government correctly points out that more than one circuit court has adopted the interpretation the Government advocates. But these circuit courts do not include the Third Circuit, and upon closer review, all of those decisions rest upon *United States v. Chen*, 913 F.2d 183 (5th Cir. 1991), adopting its conclusion without critical analysis. This is not said as a criticism of those other circuits; the cases before them did not require rigorous analysis of *Chen*. This case does, and though it may seem presumptuous for a lone district judge to look behind so many circuit decisions, the unique facts of this case require me to do so, and judges must not shirk from their responsibility to follow where reason and logic take them.

[20] Depending on the context, "intentionally" can mean either "purposely"—having the conscious object to cause a specific result, or "knowingly"—being practically certain that one's conduct will cause a result. *See* 3d Cir. Model Crim. Jury Instructions § 5.03 cmt. (2018). In this context, it would be redundant to treat "knowingly" and "intentionally" as synonymous when they appear together in (a)(2).

In *Chen*, the Fifth Circuit analyzed the 1986 version of 21 U.S.C. § 856(a) to determine whether the trial court had erred in giving a deliberate ignorance instruction as to the knowledge requirement in both (a)(1) and (a)(2). The *Chen* court concluded that "for the purpose of" in (a)(1) referred to the purpose of the actor charged with violating the statute, making the deliberate ignorance instruction inappropriate, but that in (a)(2) the actor need not have the purpose that drug activity take place. In reaching this conclusion, the Court spent little time analyzing the text of (a)(2). Rather, most of its analysis focused on (a)(1), specifically concluding that, in combination with "knowingly," "for the purpose of" unambiguously applies to the actor who opens or maintains the place in question—a proposition with which I agree.[21] I accept the *Chen* court's conclusion that the actor in (a)(1) must act for the purpose of drug activity. But I see no reason why the court's reasoning should not extend to (a)(2).

Rather than analyze (a)(2) as it did (a)(1), however, the *Chen* court stated in an almost offhand way that reading (a)(1) differently would make it superfluous in relation to (a)(2). This conclusion was, according to the Court, simply "[b]ased on [its] reading" of (a)(2)—a reading that involved little to no analysis of the text. *Chen*, 913 F.2d at 190. Under the Fifth Circuit's reading, "§ 856(a)(2) is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use . . . for the purpose of unlawfully' engaging in such activity." *Id.* at 190. Without elaboration, the court then concluded that in (a)(2), "the person who manages or controls the building and then rents to

[21] In that regard, the Government's assertion that the *Chen* court found (a)(2) unambiguous is inaccurate. Notably, the court only remarked that the statute was unambiguous in its discussion of (a)(1). *Chen*, 913 F.2d at 190.

others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose)."

Five concerns lead me to decline to follow *Chen.* First, I cannot read (a)(1) and (a)(2) as redundant. Second, the *Chen* court's interpretation of (a)(2) is inconsistent with its analysis of (a)(1). Third, the court unnecessarily applied the rule against surplusage to address a redundancy that in my view does not exist, and then violated it by failing to give meaning to the term "intentionally." Fourth, the court selectively applied statutory canons, invoking the rule against surplusage but violating the presumption of consistent usage by giving "purpose" one meaning in (a)(1) but a different meaning in (a)(2). Fifth, legislative evidence directly refutes the Fifth Circuit's construction of the statute.

First, the baseline premise of *Chen*, that (a)(1) and (a)(2) overlap, is not one I can accept. Read naturally, (a)(1) addresses circumstances where the actor uses their property for their own unlawful drug activity, whereas (a)(2) addresses circumstances where the actor makes the property available to others for the purpose of those individuals engaging in unlawful drug activity. As I have described above, a violation of (a)(1) requires that "any person" "knowingly open, lease, rent, use, or maintain any place . . . for the purpose of" drug activity. §§ 856(a)(1), (b).[22] Section (a)(2) then makes it unlawful for "any person" to "manage or control any place," in one of a variety of capacities, "and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of" unlawful drug activity. §§ 856(a)(2), (b). I find it clear from the face of subsection (a) that (a)(1) and (a)(2) are different: (a)(1) refers to one's use of their property for their own drug activity, and (a)(2) refers to one

[22] Section 856(b) delineates the criminal penalties for "[a]ny person who violates subsection (a)." "Any person" therefore can be fairly understood as the subject associated with the verbs in subsection (a).

making property available for the purpose of others engaging in drug activity. I do not see the redundancy that concerned the *Chen* court.

Second, as to the inconsistency between the court's interpretation of (a)(2) and its analysis of (a)(1), the court offered no textual reason why the terms "for the purpose of" should apply to a different person in (a)(2) than (a)(1). In its analysis of (a)(1), the court emphasized that the combination of "knowingly" and "for the purpose of" clearly signified that the relevant purpose was that of the actor—the person controlling the property. To hold otherwise would "twist the clear and plain language of the statute." *Id.* at 190. In support of that conclusion, the court noted that, in sixteen other federal statutes combining the terms "knowingly" and "for the purpose of," the purpose clearly referred to that of the actor. *Id.* at 190 n.9. The problem with this analysis is that the *same* combination of "knowingly" and "for the purpose of" appears in (a)(2), *reinforced* by the addition of the term "intentionally." Yet the court offered no explanation why its reasoning as to whose purpose matters in (a)(1) should not apply equally if not with greater force in (a)(2).[23]

Third, the court unnecessarily altered the meaning of the statute. As discussed above, the court did not need to change the purpose requirement to retain the key distinction that (a)(2) involves *others* engaging in drug activity. It reached that result applying a statutory canon, the rule that "a statute should be construed so that each of its provisions is given its full effect," *id.* at 190 (citation omitted), also known as the rule against surplusage. Ironically, that same cannon

[23] One portion of the court's opinion even seemed to contradict this conclusion. The court initially noted that "[t]he government agrees both that the offense requires two mental elements—knowledge and purpose—and that the jury had to find that Chen maintained (§ 856(a)(1)) or operated (§ 856(a)(2)) the motel with the *specific purpose* of unlawfully using, storing, or distributing a controlled substance, and not merely that she 'operated a motel where drug activity was rampant.'" *Chen*, 913 F.2d at 188. Although the *Chen* court seemed to accept the Government's concession that *the actor* must have the specific purpose of drug activity under both paragraphs, the court then inexplicably interpreted the purpose requirement as pertaining to a third party.

requires that *every* word in a statute be given meaning when possible. *See Bastardo-Vale v. Attorney General*, 934 F.3d 255, 261-62 (3d Cir. 2019) (en banc) (Schwartz, J.) (majority opinion); *id.* at 271-72 (McKee, J., dissenting); Scalia & Garner, *supra* at 174-79. Yet the *Chen* court read "intentionally" out of the statute.[24] Earlier in its opinion, the *Chen* court noted that "intention" is a synonym for purpose, *id.* at 189, and quoted the trial court jury instruction stating that "[a]n act is done 'willfully' or 'intentionally' if done voluntarily and purposely with the intent to do something the law forbids." *Id.* at 187.[25] Yet the court failed to examine the implication of the inclusion of "intentionally" in (a)(2) before concluding that (a)(2) requires a person to act with a significantly lower mental state than (a)(1).

The *Chen* court's use of the rule against surplusage brings me to my fourth point about the selective application of the canons of construction and underscores one of the risks of their use.[26] The rule against surplusage generally presumes that Congress is not redundant. But it applies in different ways. When a court deems two provisions of a statute redundant, it is *the court* who then proceeds to supply meaning by means of inference. Necessarily, there is a risk that the meaning supplied by the court is different from that of Congress. In contrast, when a court invokes the rule for the purpose of giving meaning to every word of a statutory provision,

[24] The Government concedes the responsibility of a judge to give meaning to every word in a statute, Tr. at 28, but its briefing, like the *Chen* court, simply ignores the term "intentionally," and it offered no insight at argument as to how this term should be construed.

[25] Confusingly, the trial court's "knowingly" instruction also said that "[a]n act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." *Chen*, 913 F.2d at 187. This is consistent with the Fifth Circuit's current model instruction for "knowingly." *See* 5th Cir. Model Crim. Jury Instructions § 1.37 (2015). But, in context, the suggestion that "intentionally" is akin to "voluntarily" conflicts with the court's immediately preceding suggestion that "intentionally" is a synonym for "willfully," which requires one act with a specific purpose. *Chen*, 913 F.2d at 187.

[26] As indicated above, Judges and academics alike have offered various criticisms of the canons. Katzmann, *supra* at 52-53; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Nourse, *Misreading Law*, *supra* at 105-06; Posner, *Statutory Interpretation*, *supra* at 806.

the focus is on the actual term employed by Congress, reducing the risk of legislating from the bench. In failing to assign any meaning to the term "intentionally," but deeming (a)(1) and (a)(2) redundant save for the court's inferred meaning, *Chen* applied the rule against surplusage selectively.

Moreover, when statutory canons are applied, what is the standard for choosing *which* to apply? *See* Richard A. Posner, *The Federal Courts: Crisis and Reform* 277 (1985) ("[T]here is no canon for ranking or choosing between canons; the code lacks a key.") Along with the rule against surplusage, a separate canon is the presumption of consistent usage, which provides that "[a] word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, *supra* at 170. Absent some reason, and I can identify none, the phrase "for the purpose of" should be interpreted consistently, particularly when it appears in contiguous paragraphs of the statute. The same sixteen federal criminal statutes supporting the Fifth Circuit's construction of (a)(1) would apply equally to (a)(2). Yet the *Chen* court neglected this canon in favor of a selective application of the rule against surplusage, claiming redundancy on the one hand, while simply ignoring the term "intentionally."[27]

Finally, as reviewed above, legislative evidence directly contradicts the *Chen* court's interpretation. The court gave life to the precise interpretation that the sponsor of the 2003 amendment expressly rejected. Then-Senator Biden rejected the concern that the law might allow prosecution of businesses that knew individuals would come onto their property and use drugs. He specifically stated that the provision would allow for prosecution of those who "**not**

[27] This graphically illustrates Professor Llewellyn's classic critique of statutory canons, the observation that for almost every canon, there is a counter-canon. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Constructed*, 3 Vanderbilt L. Rev. 395, 400 (1949-1950); *see also* Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909 (2016).

only know that there is drug use at their event but also **hold the event for the purpose of illegal drug use** or distribution. That is quite a high bar." 149 Cong. Rec. at 1847, 9384. Biden further remarked that "[t]he bill provides federal prosecutors the tools needed to combat the manufacture, distribution or use of any controlled substance at any venue **whose purpose is to engage in illegal narcotics activity**." 149 Cong. Rec. at 9383 (Apr. 10, 2003). These statements make clear that the event-holder or the venue—in practice the venue operator—must have the proscribed purpose.

Biden's remarks were directed at criticisms that the mental state required to support conviction was too low and would allow prosecution of legitimate businesses for knowingly allowing others to use drugs on their property without some greater involvement in the unlawful conduct. *Id.* Earlier in the debate, Senator Leahy, who ultimately voted for the Act, had voiced concerns about the Government using the existing crack house statute, or any expanded version, to pursue legitimate business owners. 132 Cong. Rec. 9378 (addressing reports of the Government using the statute to prosecute business owners who take precautions against drug use rather than "solely against property owners who have been directly involved in committing drug offenses" and contending that business owners' worries "about being held personally accountable for the illegal acts of others" warranted a fuller hearing).[28] Senator Leahy's

[28] Senator Leahy noted that these concerns were raised in a prior House Judiciary Hearing. The previous Congress's House Judiciary Committee hearing on the RAVE Act—the prior version of the Illicit Drug Anti-Proliferation Act—is not properly considered as legislative evidence of the meaning of the statute. However, Senator Leahy's citation to the hearing gives it some relevance. At that hearing, a witness raised concerns about what he considered "a frightening interpretation of the law" expressed in *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991), a case that relied on *Chen* to conclude that "the person who manages and controls the building and then rents it to another need not have the express purpose in doing so that drug-related activity is engaged in by others." *Reducing Americans' Vulnerability to Ecstasy Act of 2002: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 56 (2002) (statement of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union); *see also id.* at 58 (statement of Boyd noting the Fifth Circuit's interpretation in *Chen*). This appeared to surprise and confuse some members of Congress. *See id.* at 56-58. Even the representative from the DEA at the hearing said he was unfamiliar with the *Tamez* case but "would be flabbergasted if that was the majority opinion." *Id.* He proceeded to indicate that the "knowingly" requirement sufficiently protects an innocent owner because it requires one act "purposely and deliberately." *Id.* at 60. During

comments draw attention to a risk that law enforcement could improperly apply the statute to actors without a purpose of unlawful drug activity. Senator Biden's subsequent comments then confirm that the statute means to subject to punishment only those who act for the purpose of drug activity, and Senator Leahy supported the conference report that included the amendment. This exchange reinforces the view that only actors who make their space available for the purpose of drug activity were meant to face criminal liability for the activity of others on their property.[29]

Of course, the *Chen* court—and most of the cases following *Chen* for that matter—did not have the benefit of this 2003 legislative evidence, nor did it look to the 1986 legislative record. That is no reason, however, for this Court to ignore a clear explanation of the meaning of the most recent congressional decision as to the text.[30] The legislative evidence demonstrates

comments on the PROTECT Act, Senator Leahy shared the alarm expressed at the House Judiciary Committee hearing in the previous Congress about a *Tamez*-like interpretation allowing the government to criminally prosecute property owners and managers for drug use that occurred on their property even if they did not act for the purpose of permitting drug use.

[29] Notably, the only statement arguing that § 856 requires an affirmative effort by business owners to prevent drug use—and implying that they need not act "for the purpose of" unlawful activity to be liable—came from an opponent, Representative Kilpatrick, who voted against the bill, in a statement inserted into the record after debate. 132 Cong. Rec. 9093. To take as authoritative the meaning attributed to a provision after debate by an opponent who voted against the bill would give legal effect to the minority view that lost the debate. Nourse, *Misreading Law*, *supra* at 74; *see also* Parliamentarian of the House Thomas J. Wickham, Jr., *House Practice*, U.S. House of Representatives, 383-84 (2017) (providing that extraneous materials, including extensions of remarks, submitted on the day of a bill's consideration or later are inserted into the congressional record *after* the general debate on the bill and identified by a distinct typeface), *available at* http://clerk.house.gov/legislative/legprocess.aspx.

[30] As noted above, Congress revisited the statutory text in 2003 and decided to enact the modified provision, with the original "for the purpose of" language included. The context surrounding that decision constitutes evidence of the most recent legislative decision about the relevant text and sheds light on its meaning. *See* Nourse, *Misreading Law*, *supra* at 69, 80. To the extent one might argue that Congress incorporated *Chen* and related decisions in 2003, the legislative record reveals no evidence that *Chen*'s interpretation of (a)(2) was debated or considered by the 108th Congress prior to the enactment of the PROTECT Act. It is true that courts often employ the so-called prior-construction canon. That canon presumes that Congress, if it adopts language used in an earlier version of the act, must also be considered to have adopted "judicial interpretations [that] have settled the meaning of an existing statutory provision." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also Berardelli v. Allied Servs. Inst. Of Rehab. Med.*, 900 F.3d 104, 117 (3d Cir. 2018). Judicial interpretations are "settled" only if a word or phrase has been authoritatively interpreted by the jurisdiction's highest court or has been given a uniform interpretation by the lower courts. *See id.* Neither has occurred here. At the time of the 2003 amendment, the Supreme Court had not interpreted the meaning of (a)(2)'s "purpose" clause. Nor had the courts of appeals produced anything close to a

that *Chen* misinterpreted whether the actor in (a)(2) must act for the purpose of drug activity. For this and the four other reasons described above, I decline to follow *Chen*'s interpretation.

The other Circuits that have endorsed *Chen*'s interpretation have largely done so without question, simply citing the rule against surplusage and choosing not to engage in independent analysis of the statute. The first case to address § 856(a)(2) after *Chen* was *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991). Although faced with an argument from the appellant "that the statute require[d] that he *intend* to use the building for a prohibited purpose under section 856(a)(2)," the *Tamez* court never addressed the implication of the word "intentionally" in the statute. *Id.* at 774. The court rejected the appellant's argument as to § 856(a)(2) exclusively "on the logic of *Chen*," finding that, because (a)(1) "applies to purposeful activity," it follows that "if illegal purpose is . . . a requirement of 856(a)(2), the section would overlap entirely with 856(a)(1)." *Id.* at 774. The Court did not explain why this was so but simply concluded that "§ 856(a)(2) requires only that proscribed activity was present, that [the actor] knew of the activity and allowed that activity to continue." *Id.* at 774. Inexplicably, the Ninth Circuit noted that § 856(a)(1), which does *not* include the word "intentionally," "requires purpose or intention" to engage in drug activity, *id.*, without paying heed to the addition of intentionally in (a)(2).

Since *Tamez*, several other circuit courts have reached the same conclusion on the authority of *Chen*, but the facts of the cases before them did not require that they engage in any independent interpretation of the text. *See United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) (accepting *Chen*'s conclusion without question or elaboration); *United States v. Wilson*, 503 F.3d 195, 196-97 (2d Cir. 2007) (relying on *Chen* and *Tamez* to reach the same conclusion

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"uniform body of . . . judicial precedent." *See Bragdon*, 524 U.S. at 645. To be sure, *Chen* (in the Fifth Circuit) and *Tamez* (in the Ninth Circuit) were on the books, but no other court of appeals had sought to interpret (a)(2), and as discussed below, *Tamez* relied exclusively "on the logic of *Chen*." 941 F.2d at 744.

without elaboration, despite appellant's argument that § 856(a)(2) required that "she herself intended that the premises would be used for the unlawful purpose"); *United States v. Tebeau*, 713 F.3d 955, 959-61 (8th Cir. 2013) (relying on the aforementioned cases to reach the same conclusion without question or elaboration[31]); *see also United States v. Ramsey*, 406 F.3d 426, 429 (7th Cir. 2005) (relying on *Chen*, *Tamez*, and *Banks* to conclude that deliberate ignorance satisfies the knowledge requirement and approving of removal of the word "intentionally" from jury instructions on § 856(a)(2) because the "'intentionally' element can be satisfied by the government proving . . . the defendant intentionally permitted another person to use the property at issue and that the other person used it for an illicit purpose about which the defendant knew").[32] Given the importance of close analysis of the statute on the facts of this case, I cannot simply rely upon other circuits' uncritical embrace of *Chen* when the cases before them did not require critical reflection on its analysis.

The Government has cited only one Third Circuit case, a non-precedential decision that, ironically, does not support its position. In *United States v. Coles*, 558 F. App'x 173, 181 (3d Cir. 2014), a panel of the Court considered an appeal where a defendant convicted under § 856(a)(2) argued the Government had failed to establish his knowledge of drug activity at an apartment he rented but allowed his cousin to live in. The Court reviewed the record, including evidence that the defendant had coached his cousin to cook crack, and concluded that "the jury was entitled to infer [the defendant] intended that the property be used for manufacturing and

[31] The Eighth Circuit also cited their own model jury instructions on § 856(a)(2), but those instructions simply relied on the authority of *Chen* and *Banks*. *Tebeau*, 713 F.3d at 961.

[32] The Government further cites *United States v. Bilis*, 170 F.3d 88, 92 (1st Cir. 1999), as a case that supports its interpretation of "for the purpose of." But the First Circuit in that case did not address the "for the purpose of" clause, nor did it discuss the implication of "intentionally." It simply evaluated whether a willful blindness instruction was appropriate based only on a test recognized in the First Circuit.

storing controlled substances." *Id.* In short, this panel of the Third Circuit appears to have read the purpose requirement of (a)(2) as I do, referring to the purpose of the actor in control of the property. The Government is certainly correct that this case is not binding, and that non-precedential decisions of our Circuit are not meant to involve the same depth of analysis as precedential decisions. But in a case where ordinary meaning is the question, I give at least some weight to the fact that no ambiguity arose in the minds of these jurists applying the statute to a trial record.[33]

Absent any instruction from the Third Circuit to follow *Chen* and its progeny, I cannot do so in good conscience, given my own analysis of § 856(a). For the foregoing reasons, I conclude that the actor charged with violating § 856(a)(2)—in this case Safehouse—must have acted "for the purpose of unlawfully . . . using a controlled substance." I turn next to the meaning of that phrase.

iv. *Meaning of "for the purpose of unlawfully . . . using a controlled substance"*

Having determined *who* must act "for the purpose of" unlawful drug activity under (a)(2)—that the actor who manages or controls the place must make it available "for the purpose of unlawfully . . . using a controlled substance"—does not end the inquiry. There remains a question of what it means to make a space available "for the purpose of unlawfully . . . using a controlled substance"—and whether Safehouse is acting for that purpose.[34] I begin with the

[33] I have reviewed the briefs from *Coles* and take note that neither side advanced arguments rooted in the text of the statute.

[34] Setting aside the dispute resolved in the preceding section about whether the actor must have the purpose in question, the parties seem to accept that the conduct (a)(2) addresses involves making a space available to *others* who use, manufacture, distribute, or store drugs. In contrast, cases brought under § 856(a)(1), at least in this circuit, typically center on drug activity in which the defendant is directly involved. *See, e.g.*, *United States v. Sawyers*, 2019 WL 3816940, at *1 (M.D. Pa. Aug. 14, 2019) (defendant charged under § 856(a)(1) stemming from his "selling drugs from [his residence]"); *United States v. Fuhai Li*, 2019 WL 1126093, at *1 (M.D. Pa. Mar. 12, 2019) (defendant "charged [with] violations of 21 U.S.C. § 856(a)(1)" for "maintaining locations . . . for the purpose of

observation that, by its very nature, the phrase "for the purpose of" can be assigned many different meanings and can operate on multiple levels.

In the Government's view, Safehouse plans to make safe consumption rooms available for the purpose § 856(a)(2) proscribes. It argues in part that even an ultimately lawful purpose does not suffice to avoid liability if unlawful drug use is required to accomplish that purpose. In that regard, the Government cites a number of cases that can accurately be described as civil disobedience cases. Common among those cases is a defendant deliberately violating a law to achieve some higher moral purpose. *See, e.g.*, *United States v. Romano*, 849 F.2d 812, 816 n.7 (3d Cir. 1988) (defendant broke into naval air station and damaged government property but argued that his conduct was justified because it would save lives). I do not find these cases instructive. Unlike the civil disobedience cases the Government cites, Safehouse does not concede that it is violating § 856(a) or any other law.[35] Safehouse has not argued that its ultimate purpose justifies an intermediate purpose of unlawful drug use. Rather, Safehouse argues that it will not unlawfully make a place available "for the purpose of . . . using a controlled substance" as that clause is properly understood under § 856(a)(2).

To determine whether Safehouse is acting with the proscribed purpose, I must examine the scope of the purpose requirement—what it means to act "for the purpose of unlawfully . . . using a controlled substance." Faced with these differing interpretations, I again begin with the text, and where the text remains unclear, I turn to a variety of contextual sources for guidance as

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unlawfully distributing controlled substances"); *United States v. Rice*, 2017 WL 6349372, at *1 (W.D. Pa. Dec. 13, 2017) (defendant charged under § 856(a)(1) stemming from discovery of "grow operation" at defendant's residence and commercial building used by defendant).

[35] Technically, certain defendants in *Romano* asserted they lacked the requisite mens rea or that their actions were "necessary" and, in those ways, did not concede illegality. But there was no dispute whether the defendants broke into the military installation and damaged government property.

to the meaning of "for the purpose of unlawfully . . . using a controlled substance." I note that even in the course of determining whether the text is clear on its face, the Third Circuit has relied on an array of extra-textual sources. *See, e.g.*, *Pellegrino*, 2019 WL 4125221, at *5-6, *11 (citation omitted) (considering dictionaries, the broader statutory and regulatory scheme, and Fourth Amendment case law to determine the meaning of "execute searches" before concluding that the statutory text was clear). Where the evidence points toward multiple interpretations, an interpretation consistent with the law's original, ordinary meaning is the most responsible course to take in an effort to avoid unwarranted judicial expansion of the statute.

The text itself does not specify the scope of § 856(a)(2)'s purpose requirement, let alone address the legal status of public health projects that would make property available for drug use to facilitate the administration of treatment. Safehouse knows and intends that some drug use will occur on its property, but it does not necessarily follow that the organization will knowingly and intentionally make the place available *for the purpose of* unlawful drug activity. That is so because, as noted above, the purpose requirement in (a)(2) is susceptible of multiple meanings. The condition that one act "for the purpose of" unlawful drug activity could refer to any purpose (however insignificant), to one's sole purpose, or to one's ultimate purpose.

Although I am certain the parties would each claim "plain meaning" on the face of the text, both their interpretations implicitly add some meaning to the language of the statute. The Government argues that "for the purpose of unlawfully . . . using" drugs plainly includes *any* intended allowance of drug use on one's property, even as part of an effort to administer medical treatment. Safehouse, on the other hand, argues that "for the purpose of unlawfully . . . using" drugs plainly does not extend to a purpose that would allow drug use on-site only to provide life-saving treatment to drug users. Safehouse reads the statute to require a *primary* purpose to *encourage* drug use, not just any purpose that involves allowing drug use and certainly not a purpose aimed at stopping drug use.

To determine the scope of the purpose requirement, I must initially examine whether the proscribed purpose must be the primary or principal purpose of the actor, as Safehouse contends, or whether it may be one of multiple purposes, as the Government argues. I next address whether any purpose involving the allowance of drug use satisfies the purpose requirement or whether the purpose requirement must be applied in a more discerning way.

I turn first to whether the proscribed purpose must be the primary purpose of the actor or whether it may be one of many purposes. To answer that question, I consider the dictionary definition of "purpose." Both the Supreme Court and the Court of Appeals cite to dictionaries as a tool of statutory construction, observing that "[o]rdinarily, a word's usage accords with its dictionary definition." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015); *Pellegrino*, 2019 WL 4125221, at *3. Dictionary definitions offer substantial support to Safehouse's view, as neither party seems to dispute that, as a definitional matter, "purpose" refers to one's objective, goal, or end. Safehouse Response at 21; Tr. at 31; *see Purpose*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("[S]omething set up as an object or end to be attained."); *Purpose*, Black's Law Dictionary (7th ed. 1999) ("An objective, goal, or end."); *Purpose*, Oxford English Dictionary (1986) ("That which one sets before oneself as a thing to be done or attained; the object which one has in view.").[36] Based on this definition, Safehouse insists that the only relevant purpose under § 856(a) is the *primary* or principal purpose, because the term "purpose"

[36] The definitions in earlier editions of the same authorities are essentially the same. *Purpose*, Webster's Deluxe Unabridged Dictionary (2d ed. 1983) ("[T]hat which a person sets before himself as an object to be reached or accomplished; aim; intention; design."); *Purpose*, Black's Law Dictionary (5th ed. 1979) ("That which one sets before him to accomplish; an end, intention, or aim, object, plan, project.").

would ordinarily refer to one's ultimate objective. If one literally reads the dictionary definitions into the statute—"for the [objective, goal, end] of unlawfully using a controlled substance"—Safehouse's interpretation would appear to be correct, for the dictionary definitions do in fact consider purpose as referring to one's ultimate end, goal, or objective, rather than an intermediate step. Those who find dictionaries sufficient to determine the ordinary meaning of statutory language might stop here.[37] But it remains conceivable that an intermediate purpose could be relevant under the statute or that one could act with more than one ultimate purpose. I therefore decline to adopt Safehouse's position merely on the authority of Webster or Black.

Looking beyond the dictionary definitions of "purpose," I agree with the Government that requiring a *sole* purpose of unlawful drug use would render § 856(a)(2) inapplicable to the undisputed examples of behavior it targets. If the drug-related purpose for which the place was made available had to be the sole purpose of the actor, the statute would fail to reach rave promoters who encourage dancing *and* drugs and crack house operators who live in the house *and* use it as a crack house. Neither party disputes that the statute targets those individuals. The conclusion that the proscribed purpose in § 856(a)(2) need not be the actor's sole purpose thus reflects the "prototypical" meaning of the statute. *See* Solan, *supra* at 2040-42, 2044. Multiple

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[37] In modern practice appellate courts have made extensive use of dictionaries, making it necessary for district courts to employ the same tool. This was not always the case. Learned Hand famously noted:

> It is not enough for a judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled [the statute's] plain purpose.

Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, in The Spirit of Liberty 103, 106 (Irving Dilliard ed., 1952); *see McBoyle v. United States*, 283 U.S. 25 (1931) (Holmes, J.). As modern scholars increasingly conduct empirical research into how Congress actually operates, there is also reason to question whether the drafters of legislation rely on dictionaries to the same degree as the courts. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 938-939 (2013) (noting that more than fifty percent of legislative staffers either rarely or never consult dictionaries when drafting, and awareness of judicial citation to dictionaries has not changed staff practice.)

courts have reached this conclusion when interpreting § 856(a)(1). *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995); *United States v. Church*, 970 F.2d 401, 406 (7th Cir. 1992). It follows logically that the proscribed purpose in (a)(2) may also be one of multiple purposes for which the property is made available. That is not to say, however, that any drug-related purpose would satisfy the statute's purpose requirement. In fact, the Government agreed at oral argument that an incidental purpose would be insufficient. Tr. at 34-35.

I conclude that the proscribed purpose must be a "significant" purpose or "one of the primary" purposes. *See United States v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) (finding that the purpose must be "at least one of the primary or principal uses to which the house is put").[38] This view is consistent with the proposition which multiple courts of appeals have endorsed that the "'casual' drug user does not run afoul of § 856 because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose." *United States v. Russell*, 595 F.3d 633, 642-43 (6th Cir. 2010) (citation omitted); *see also United States v. Johnson*, 737 F.3d 444, 449 (6th Cir. 2013); *United States v. Shetler*, 665 F.3d 1150, 1161 (9th Cir. 2011); *Verners*, 53 F.3d at 296; *United States v. Robinson*, 997 F.2d 884, 896 (D.C. Cir. 1993). Although the user maintains and uses the residence and has, at the time of the use, the purpose of unlawfully using drugs—all within the strict language of § 856(a)(1)—courts have found no violation of § 856(a)(1). As a matter of logic, then, it would seem that one who makes a place available to another for a purpose other than drug use does not necessarily violate § 856(a)(2) even if they know some consumption of

[38] By finding that the drug-related purpose must be *one of the* significant or primary purposes, I do not endorse Safehouse's view that the proscribed purpose must be the *singular* primary or principal purpose. This is a subtle, but important distinction.

drugs therein occurs in addition to that other lawful purpose. Although such a limitation has not been expressly articulated in cases considering (a)(2), it is implicit in the analysis of those circuit courts and is reflected in practice by the fact that cases brought under (a)(2) typically have not involved individuals who allowed casual drug use in their homes.[39] I therefore accept that there is a limitation on the scope of the purpose requirement in that the proscribed purpose must bear a significant relationship to the conduct that Congress sought to prohibit.

The statutory context supports the view that the purpose must be a significant, not incidental, purpose. Looking to the whole statute, a requirement that the purpose be significant enables the statutory scheme to make sense. The severity of the sentence permitted by § 856(a)(2)—up to 20 years in prison—strongly favors such a conclusion. Those who knowingly and intentionally allow use secondary to another lawful purpose would be subject to a far harsher penalty than opioid users whose possession is undisputedly criminal but who would be subject to at most three years if prosecuted for possession under 21 U.S.C. § 844. Such disparity would be inconsistent with the overall statutory scheme, particularly where courts agree that a user in his own home could not be punished under § 856(a)(1). *See Russell*, 595 F.3d at 642-43. I also find this interpretation consistent with the legislative background's focus on *predatory* actors rather than casual users or friends of users. *See* 149 Cong. Rec. 9383 (2003). The drug-related purpose in § 856(a)(2) must therefore be a significant purpose, even if not the sole purpose, of the actor.

There is the additional question of whether a purpose of unlawful drug use includes any purpose that involves allowing drug use or only purposes to encourage, promote, or facilitate

[39] Indeed, Safehouse represented at oral argument that, since the statute's inception, the Government has not brought a single § 856(a) case predicated solely on use. Transcript at 58. This is consistent with the Court's own research.

drug use. Safehouse assumes the latter view, while the Government's briefing embraces the former. But the Government conceded an important limitation on the scope of the purpose requirement when, at oral argument, it recognized that not every allowance of drug use on one's property would constitute a purpose of unlawful drug use within the meaning of the statute.

The Government was presented with a hypothetical of parents whose adult child is using drugs, leading the parents to have them move back home. Tr. at 35. The parents then instruct the child to inject drugs there, in the parents' presence, to allow for resuscitation. *Id.* The United States Attorney responded that (a)(2) would not apply, because it was not the parents' "purpose for their son, their adult son or adult daughter to be in the home [] to use drugs." *Id*. As an initial matter, it should be noted that the Government's response to the hypothetical was inconsistent with its embrace of *Chen*, because it invoked the purpose of the parents as the owners of the property. I do not raise this as a judicial admission, but only to point out that the Government's instinctive response to a specific factual scenario underscores that (a)(2) is most naturally and logically read as I have analyzed it above, and as a panel of the Third Circuit did in *Coles*. It also illustrates how reading (a)(2) as *Chen* did would lead to an absurd result.

The Government's answer is further instructive because it admits there are limitations on the scope of (a)(2) that turn on the actor's purpose vis-à-vis the user. Specifically, the Government replied that, where the actor does not want the drug use to occur or has the goal of "trying to stop that person from using drugs," the statute does not prohibit their actions. *Id.* at 35. In fairness to the Government, it should be noted that the Court's hypothetical also included a statement by the parents that they would prefer the child not use drugs, a fact the Government emphasized because the Safehouse protocol does not reflect that participants will be actively discouraged from use before entering the consumption room.[40] But that fact's relevance pertains to the statute's specific application to Safehouse, a matter I take up below. I raise the Government's response to the hypothetical at this juncture as I consider the *scope* of the statute's purpose requirement. Its response supports a conclusion that a purpose involving some known and intended drug use may nonetheless fall outside the reach of the statute, at least where the actor aims to stop drug use. In short, both parties agree that there is some limit to the scope of the purpose requirement; I now look to the usual tools of statutory interpretation to define that limit.

Returning to dictionaries, the definition of "purpose" as an objective, goal, end, aim, or intention indicates that a purpose is something one seeks to advance, "something set up as an object or end to be attained." *Purpose*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); *see also Purpose*, Black's Law Dictionary (7th ed. 1999) (similar); *Purpose*, Oxford English Dictionary (1986) (similar). An action taken "for the purpose of" unlawful drug use would therefore refer to a purpose of facilitating drug use, not an effort to reduce drug use. Again, those who deem dictionary definitions sufficient to determine a statute's ordinary meaning might stop here, but in my view an analysis that ends here would be superficial. I will therefore consider the Government's view that an intermediate purpose of allowing drug use on one's property, even as one component of an overall effort to combat drug use, could fall within the scope of the statute, and test it through the prism of § 856(a)(2)'s statutory and legislative context.

[40] In the final analysis, the specific details of Safehouse's model only go so far in answering the statutory question. Whether to approach opioid users confrontationally or empathetically is a therapeutic decision. If the delivery of a lecture on the hazards of opioid abuse would render Safehouse's facility legal, I am confident that Safehouse would even allow the Government to supply its content.

The context of the larger statutory scheme, something the Supreme Court deemed relevant in *Gonzalez v. Oregon*, provides support for both parties' interpretations, albeit to different degrees. On the one hand, as Safehouse points out, the statutory scheme largely permits medical practice and treatment efforts. No provision in the CSA contains a broad exemption from its prohibitions for all legitimate medical practices, nor did *Gonzales* create any such exemption. But the Supreme Court emphasized that the CSA generally does not regulate medical practice. 546 U.S. at 270. With respect to medical harm reduction efforts in particular, federal law expressly permits a number of tactics that aim to reduce harm and increase access to treatment for drug abuse. *See* Appropriations Act of 2016 § 520, 129 Stat. 2652 (permitting federal funding to be used for syringe exchange programs that address risk of HIV or hepatitis outbreaks); Comprehensive Addiction and Recovery Act of 2016 § 911(e)(1), 130 Stat. 759 (requiring that the Secretary of Veterans Affairs "maximize the availability of opioid receptor antagonists, including naloxone, to veterans"); Support for Patients and Communities Act § 3201, 130 Stat. 3894 (allowing for greater flexibility with respect to medication-assisted treatment for opioid use disorders).[41]

On the other hand, the Government emphasizes that § 812 of the CSA expresses a congressional judgment that Schedule I drugs have "no currently accepted medical use in treatment in the United States" and that "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b). Similarly, Schedule II reflects a congressional judgment that covered drugs, including fentanyl, cannot be used safely without a prescription. 21 U.S.C. § 812(b). The Government goes on to cite *United States v. Oakland*

[41] Although one might then question why Congress has not specifically authorized safe injection sites, congressional failure to act is generally not considered a reliable tool for statutory construction. *See In re Visteon Corp.*, 612 F.3d 210, 230 (3d Cir. 2010).

Cannabis Buyers' Coop., which held that medical necessity could not be a defense to the CSA prohibition on distribution of marijuana because Congress had made a judgment that marijuana has no medical use. 532 U.S. 483, 490-91 (2001). But unlike the defendant in *Oakland Cannabis Buyers' Cooperative*, Safehouse does not propose to provide or administer any prohibited substance. In that case, there was no dispute about whether the defendants had directly violated the CSA by engaging in distribution. *Id.* at 487. The Court refused to recognize a medical necessity defense because it would require a rejection of Congress's judgment that marijuana has no therapeutic purpose. *Id.* at 491-95. I do not understand Safehouse in any respect to contradict Congress's conclusion that, even under medical supervision, heroin use remains unsafe. Rather, I understand Safehouse to assert that, when drug users engage in the undisputedly unsafe behavior of consuming Schedules I and II drugs, providing a space to facilitate immediate medical intervention, although insufficient to make that behavior safe, does not violate § 856(a) of the CSA. At best, § 812 offers limited support for the Government's position, and can hardly be read to criminalize harm reduction strategies like the one proposed by Safehouse.

A review of the legislative evidence confirms that the reach of § 856(a)(2) is limited to purposes to facilitate drug use, which would in turn exclude a purpose to curb or combat drug use that may involve some allowance of use. I begin with the last decision-making point related to the text in question: the 2003 agreement to the Conference Report including the amendment to the crack house statute.[42] The 2003 amendment, originally called the Illicit Drug Anti-

[42] A conference committee report contains the final proposed text of a bill, which emerges from the conference committee, where members of both houses have resolved differences between versions of the bill passed by the House and the Senate. Davis, *supra* at 1. Each chamber then votes on whether to agree to the conference report. Christopher M. Davis, *The Legislative Process on the House Floor: An Introduction*, Congressional Research Service 9 (2019). The decision to agree to the conference report is therefore the final legislative act with respect to

Proliferation Act and incorporated into the PROTECT Act, aimed to expand the crack house statute to address events, such as raves, at which promotors encourage use of "club drugs" and other controlled substances by children and teens. *See* 149 Cong. Rec. 9383. In determining the scope of the amendment, is important to recognize the significance of the amendment being inserted in conference. Under both Senate and House Rules, any addition to a bill in conference must be germane to the subject of the legislation, in this case the protection of children. *See* Senate Rule XXVIII; House Rule XXII.[43] It is for that reason that the joint explanation to the Conference Report emphasized the amendment's goal of protecting children. Joint Explanatory Statement at 68. Prior to the vote on the Conference Report, then-Senator Biden, sponsor of the original bill, expressly noted that "[t]he bill is aimed at the defendant's **predatory behavior**, regardless of the type of drug or the particular place in which it is being used or distributed." 149 Cong. Rec. 9383 (2003) (emphasis added). This evidence makes clear that, when Congress decided to amend the statute, it expanded the meaning of the law to include a larger category of "predatory behavior" that involved increasing access to illicit drugs at a variety of events, particularly those attracting young people. It broadened the meaning of the statute from targeting crack houses to targeting events, like raves, that encourage drug use and prey on potential drug users.

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the text, and the debate prior to the vote on whether to agree offers proximate evidence of the legislature's decision. *See* Nourse, *Misreading Law, supra* at 80.

[43] Both Houses' rules require that any changes made in conference be germane to the matters committed to conference. *Id.* It bears mention that the addition of an entirely new provision in conference pushes the limits of the matters properly before the conferees under the rules of both Houses. Senate Rule XXVIII, ¶ 3; House Rule XXII, cl. 9. Nonetheless the § 856 amendment was included in the Protect Act without objection. *See* Senate Rule XXVIII, ¶ 3 (providing members with recourse to raise a point of order in objection to non-germane additions); House Rule XXII, cl. 10 (same). Both Houses then agreed to the conference report, and the legislative evidence pertaining to debate on that decision is therefore relevant.

Although the Government is correct that Congress expanded the statute, that expansion was minimal. The change to the statute clarified that single events as well as ongoing operations were included, that the place involved need not be a building or enclosure, and that renters and lessees could also be liable.[44] *See* Conference Report to S. 151 at 43; 149 Cong. Rec. 9383 (statement of then-Senator Biden). At the introduction of the Illicit Drug Anti-Proliferation Act, co-sponsor Senator Grassley commented on the limited nature of the change. 149 Cong. Rec. 1849. He described the amendment as an effort to "update our laws so they can be used effectively against drug dealers who are pushing drugs on our kids." 149 Cong. Rec. 1848. His comments specifically focused on raves and other temporary events. One statement, which referred to "illegal drug use in any location," could lend support to the Government's position, but the remainder of his remarks do not support such a broad interpretation. Senator Grassley referred to "cover activity" created to hide drug transactions and emphasized that the amendment was not designed to hamper "legitimate" activities. *Id.* He noted that § 856 would be a means for law enforcement to target events at which dealers "push their product," and addressed the party drug Ecstasy at length. *Id.* at 1848-49. He specifically referred to drug reduction efforts as an example of conduct that would be inconsistent with criminal intent. *Id.* at 1849. He closed his remarks by characterizing the amendment as a "careful step," with a recognition that drug abuse must be addressed "not only through law enforcement but education and treatment as well." *Id.* at 1849. Similarly, although the legislative evidence includes a description of the statute applying to "any type of event for the purpose of drug use or distribution," 149 Cong.

[44] The Government also references the change in title to "maintaining drug-involved premises." I do not reject looking to titles for guidance, but in this instance the wording is not particularly enlightening. The statute cannot possibly apply to *all* "drug-involved premises," just as under the previous title it could not have applied *only* to "manufacturing operations."

Rec. 9384 (statement of then-Senator Biden), nothing in the legislative record reveals an expansion of the statute's meaning beyond events and operations to facilitate drug use, and certainly not an expansion to reach activities designed to stop drug use.[45]

[45] The Government cites a statement from Senator Biden in which he said, "section 856 has always punished those who knowingly and intentionally provide a venue for others to engage in illicit drug activity." 149 Cong. Rec. 20539. Safehouse cites to another portion of the same statement in support of its position. The statement in question was made in July 2003, several months *after* the April passage of the PROTECT Act.

Courts generally reject such "post hoc" statements as unreliable tools for construing a statute. *See, e.g.*, *Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 132 (1974); *Pa. Med. Soc. v. Snider*, 29 F.3d 886, 898 (3d Cir. 1994). In part this is because they were not part of the consideration or debate in which the legislature engaged prior to voting to enact the law in question. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483, 568 (2013); Nourse, *Misreading Law*, *supra* at 155 (arguing that to the extent "group process determines the legitimacy of legislative evidence . . . evidence incapable of influencing the group, should be rejected"). Statutory interpreters largely agree that "post-enactment history" is therefore minimally helpful in determining the meaning of legislative decisions. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 2035 (2011) (suggesting that a rule considering post-enactment evidence authoritative would be unconstitutional); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vanderbilt L. Rev. 1457, 1522-23 (2000) (describing general agreement that post-enactment legislative history deserves less weight); *see also* § 48:20. Post-enactment history, 2A Sutherland Statutory Construction § 48:20 (7th ed.). In part, this is a recognition that legislators are also politicians, whose statements after a bill becomes law may serve other purposes.

But to the extent that the Government focuses on this specific comment, it must be reviewed in the context of Biden's immediately preceding remarks clarifying that his amendment to § 856 in the PROTECT Act did not greatly expand that statute. He sought to emphasize the point that the crack house statute has always been used, not only against traditional crack houses, but also against "seemingly 'legitimate businesses' used as a front for drug activity," such as motels, car dealerships, and bars. 149 Cong. Rec. 20539. Later in his remarks he referred to the same venues as "non-traditional crack house[s]." *Id.* What Safehouse proposes, whether within the scope of the statute or not, is certainly different from a "non-traditional crack house."

The remainder of these post-hoc remarks would lend no support to the Government. First, Senator Biden clarified the limited effect of the bill's changes to the statute, contradicting the Government's assertions that the amendment significantly broadened § 856. *Id.* Next, Biden repeatedly emphasized that the amended statute only targets those who intentionally hold or promote events for the purpose of unlawful drug activity. *Id.* Third, during a lengthy discussion of the "'knowledge' and 'intent'" requirement and the "requirement that the defendant make their property available 'for the purpose' of illicit drug activity," Biden made no distinction between how the purpose requirement should be understood in (a)(1) and (a)(2), undercutting the Government's argument for a lower mental state requirement in (a)(2). *Id.* at 20539. In a discussion clearly considering (a)(2), given references to the "knowingly and intentionally" requirement and the language about making a property available, Biden cited the *Chen* court's discussion of (a)(1)'s purpose requirement, evidently assuming it applied to (a)(2) as well. *Id.* Specifically, he noted that a purpose is "that which one sets before him to accomplish; an end, intention, or aim, object, plan, project" and that "it is strictly incumbent on the government to prove beyond a reasonable doubt that a defendant knowingly maintained a place for the specific purpose of distributing or using a controlled substance." *Id.* (quoting *Chen*, 913 F.2d at 189). In discussing knowledge and intent, he clarified that actual knowledge is required and referred to the portion of *Chen* in which the court quoted the trial court's instructions, including the instruction that an act is done "'intentionally' if done voluntarily and purposely with the intent to do something the law forbids." *Id.* (quoting *Chen*, 913 F.2d at 187). These statements indicate that Biden understood the purpose requirement to refer to the actor's purpose and to set a high bar for the Government to clear. Fourth, in a point that Safehouse emphasizes as part of its analysis, Biden explicitly endorsed the view that the purpose must be the

The 1986 legislative record related to the provision reveals that the original meaning of the statute, prior to any expansion in 2003, contemplated only purposes to facilitate drug use. The 1986 act focused specifically on crack houses. For instance, the section-by-section description read: "Outlaws operation of houses or buildings, so-called 'crack houses,' where 'crack' cocaine and other drugs are manufactured and used." 132 Cong. Rec. 26474. The original meaning of places made available "for the purpose of unlawfully . . . using a controlled substance" referred to spaces designed to facilitate drug use.

The legislative focus on making places available for such illicit purposes does not limit the provision's applicability to only crack houses and raves, but it does caution against extending the statute too far beyond similar circumstances. The evidence indicates that the statute targets exploitive behavior like that of crack house operators, rave promoters, and others creating spaces to facilitate drug use and access to drugs. A common denominator among the actions of these individuals is the goal of enabling drug use and supporting the market for unlawful drugs. To read § 856(a)(2) to apply to medical purposes and efforts to combat drug abuse would take the statute well beyond what it aimed to criminalize. As employed by Congress, the words "for the purpose of unlawfully . . . using a controlled substance" in § 856(a) are properly understood as referring to significant purposes to facilitate, rather than reduce, unlawful drug use.

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primary purpose of the place in question, *id.* at 20538, 20539, quoting a DEA memo that likewise stated that the activity on the property must be "primarily for the purpose of drug use." *Id.* at 20538. Finally, the remarks expressed that the bill's only goal was to "deter illicit drug use and protect kids" and made repeated references to crack houses, "non-traditional crack houses," raves, and other events that perpetuate illicit drug activity. *Id.* at 20538-39.

Thus, even if properly considered, nothing about this post-hoc statement suggests contemplation of efforts to facilitate medical care and access to drug treatment.

V. Application of (a)(2) to Safehouse

I cannot conclude that Safehouse has, as a significant purpose, the objective of facilitating drug use. Safehouse plans to make a place available for the purposes of reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services. None of these purposes can be understood as a purpose to facilitate drug use.

The Government contended at oral argument that Safehouse's purpose cannot be to stop or reduce drug use. Tr. at 32-34. But its own Complaint belies that argument. It acknowledges that Safehouse will offer all its participants treatment referrals and on-site initiation of medication-assisted treatment. Pl.'s Am. Compl. at 4. Treatment, along with a variety of other services, will be offered during at least three stages of Safehouse's protocol. Pl.'s Am. Compl. Ex. A at 4-5; *see also* The Safehouse Model, https://www.safehousephilly.org/about/the-safehouse-model (last visited Oct. 1, 2019). One offer of services will be made before any participant enters the consumption room. *Id.* Any participant who then chooses to use the medically supervised consumption room will, in the subsequent medically supervised observation room, meet with peer specialists, recovery specialists, social workers, and case managers who will specifically encourage treatment. *Id.* The Court is hardly being "anti-factual," as the Government accuses, Tr. at 34, when it construes the pleadings as describing a program that ultimately seeks to reduce unlawful drug use.

Within the consumption rooms themselves, Safehouse will engage in the legal acts of providing sterile injection equipment and administering emergency medical care. The Government has not contended that the provision of medical treatment facilitates or advances drug use. In fact, other federally supported initiatives recognize that such services prevent fatalities from drug use. The use that will occur is subsidiary to the purpose of ensuring proximity to medical care while users are vulnerable to fatal overdose. The Government has conceded that similar harm reduction strategies would be lawful if executed through mobile vans or if Safehouse personnel monitored drug use in public places. The Government seeks to distinguish consumption rooms from the ways in which other entities currently engage in harm reduction (and ways that they could, such as through use of a mobile van) by observing that in those efforts no real property is used, and "what matters [is] the statutory language." Tr. at 39. This is myopic textualism that seeks to avoid the central issue. The statutory language that matters most is "purpose," and no credible argument can be made that a constructive lawful purpose is rendered predatory and unlawful simply because it moves indoors. Viewed objectively, what Safehouse proposes is far closer to the harm reduction strategies expressly endorsed by Congress than the dangerous conduct § 856(a) seeks to prohibit. Safehouse therefore is not making a place available "for the purpose of unlawfully . . . using a controlled substance" within the meaning of § 856(a)(2).

When pointedly asked—twice—whether Safehouse was promoting drug use, the Government could only respond obliquely. Tr. at 36-37. It replied that because Prevention Point, an existing program run by Safehouse's President and Treasurer, Jose Benitez, is already successfully moving some of its clients into treatment, in the absence of proof that Safehouse will accomplish more, the net effect of Safehouse will simply be more drug use. *Id.* at 37. Specifically, the Government replied that "the logical implication of setting up Safehouse is there's going to be more drug use. So yes, they are promoting drug use." *Id*. In a case that turns on "purpose," the nature of the Government's response is revealing. Rather than attribute any unlawful purpose to Safehouse, it pointed instead to what it presumes will be a deleterious

outcome.[46] And as observed at the beginning of this opinion, the wisdom or effectiveness of safe injection sites is not the issue before me. One might criticize the Safehouse model from the standpoint of therapeutic soundness or effectiveness, but again that is not the issue before me.

It would be an issue for Congress, but there can be no question that Safehouse's approach to harm reduction and increasing access to treatment was not within the contemplation of Congress when it enacted or amended this statute. The records of Congress are now searchable electronically, and a global search of the legislative record prior to the statute's amendment in 2003 reveals a single passing reference to a 1998 article in *Foreign Affairs* magazine discussing safe injection facilities as a potential harm reduction strategy. *See The Decriminalization of Illegal Drugs: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov't Reform*, 106th Cong. 8 (1999) (statement of Thomas A. Constantine, Former Administrator, Drug Enforcement Administration (citing Ethan A. Nadelmann, *Commonsense Drug Policy*, Foreign Affairs, Jan.–Feb. 1998)). Even then, the article cited by the witness discussed safe injection facilities as a "[h]arm reduction innovation . . . to stem the spread of HIV," not in relation to an opioid crisis. *Id.*

Aside from the legislative record, there is an additional governmental source to consult that sheds light on when safe injection sites became a subject of public debate. The National Center for Biotechnology Information, in collaboration with the United States National Library of Medicine and National Institutes of Health, maintains a searchable database of medical literature, PubMed, which includes articles that cut across multiple disciplines, including public

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[46] For the sake of completeness, it must be mentioned that the Government's rebuttal was not as carefully nuanced. Referring to Safehouse's description of its program, counsel derided it as "Bizarro World," urged the Court to "be real," and seemingly rejected any therapeutic purpose, stating, "They're not inviting people onto their property just to get treatment or whatever other services they're offering. The whole purpose here is for people to use drugs." Tr. at 71-72. My inclination is to discount these remarks as a moment of overly zealous advocacy. But in any case, no plausible reading of the pleadings before me supports such a caricature of what Safehouse proposes.

health. The statute here was last amended in April 2003. If one conducts a search using the term "safe injection sites," multiple publications appear, none having to do with management of opioid addiction prior to 2003.[47] If one adds the limiting term "opioid," there are still no relevant results. A search for the related term "supervised injection" through the end of 2003 reveals only two relevant articles published within five months of the amendment, both in a Canadian specialty law review focusing on HIV and AIDS prevention efforts. Simply put, supervised injection sites as a harm reduction strategy for opioid abuse were not a subject of public discourse when the statute was last amended.

At argument, the Government was invited multiple times to point to any legislative evidence that supervised injection programs were specifically considered by Congress, but counsel skillfully avoided giving a direct answer to the question. Tr. at 7-12. The most the Government could offer as to a specific focus on safe injections sites was for the Court to go back in time to reconstruct what Congress *might* have thought had the subject actually been considered at the time. Tr. at 7. This method is mentioned in the scholarly literature and termed "imaginative reconstruction." Posner, *Statutory Interpretation*, *supra* at 817. Such an approach is inherently speculative and has not been endorsed by case law.[48] As Justice Gorsuch has noted, although new applications of statutes may arise, "every statute's meaning is fixed at the time of enactment." *Wisconsin Central, Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

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[47] Judges are rightly cautioned to limit internet research. I am not concerned with doing so here because the exercise is akin to judicial notice. The search conducted can be objectively replicated by anyone, with the results speaking for themselves. And the purpose is not to garner substantive input for the Court to consider without the perspective of the litigants, but simply to test what resources were publicly available at the time Congress was deliberating.

[48] To adopt the Government's suggestion would fly in the face of the admonition that courts should "not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 214 (1958); *accord Reno v. Koray*, 515 U.S. 50, 65 (1995) (Rehnquist, C.J.).

Accordingly, I confine myself to the documented evidence of what Congress did, in fact, mean to accomplish at the time of enactment.

The Government's refusal to concede that there was not specific consideration by Congress reveals its concern over a core weakness in its position. It urges me to hold that even though harm reduction efforts like safe consumption facilities were indisputably beyond the contemplation of Congress, I should apply the language of the statute in the broadest possible way, leaving it to Congress to clarify if it does *not* wish to criminalize safe consumption facilities. But the law does not default to criminalization, requiring Congress to clarify when it wishes not to incarcerate citizens. Rather, as Chief Justice John Marshall explained, "penal laws are to be construed strictly" because "the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Modern cases echo those same principles: "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

Congress here determined that making places available to facilitate drug use, supporting the drug market as crack houses and raves do, warranted moral condemnation and punishment. Congress has not had the opportunity to decide whether such moral condemnation and punishment should extend to consumption facilities that are components of medical efforts to facilitate drug treatment. By any objective measure, what Safehouse proposes is not some variation on a theme of drug trafficking or conduct that a reasonable person would instinctively identify as nefarious or destructive. Even if one believes it to be misguided, the nature and character of what it proposes is not prototypically criminal.

A consistent theme in the Government's case is what it describes as the "hubris" of Safehouse in seeking to open its safe injection site without first securing some form of official approval from federal authorities. There is, however, no mechanism under the CSA for seeking review from any governmental entity for the activity that Safehouse proposes, which the Government conceded at oral argument. Tr. at 43. Physicians and researchers can seek exemptions from the prohibition against administering Schedule I and Schedule II drugs. Safehouse does not seek to administer prohibited drugs but rather to ameliorate the harm from their unlawful use. In the Government's view, Safehouse literally needs an Act of Congress to proceed. But that begs the question. The question is whether current law criminalizes Safehouse's proposed conduct. As Justice Rutledge memorably phrased a core tenet of federal law, "[b]lurred signposts to criminality will not suffice to create it." *United States v. C.I.O.*, 355 U.S. 106, 143 (1968) (Rutledge, J., concurring).

Although irrelevant for the Court's purposes, the numerous policy arguments raised by the parties and amici indicate that there is a vibrant debate to be had about the possible advantages, risks, and costs of safe consumption sites.[49] A narrow interpretation of § 856(a)(2)

[49] The Court received thirteen amicus briefs from various individuals and groups from around the nation. Brief of and by Professors of Religious Liberty Law as Amici Curiae; Brief of Amici Curiae Harrowgate Civic Association, Bridesburg Civic Association, Juniata Park Civic Association, Kensington Independent Civic Association, Port Richmond on Patrol and Civic, South Port Richmond Civic Association, and Fraternal Order of Police, Lodge 5; Brief of Amici Curiae Philadelphia-Area Community Organizations; Brief of Current and Former Prosecutors, Law Enforcement Leaders, And Former Department of Justice Officials and Leaders as Amici Curiae; Amicus Curiae Brief of Homeless Service Providers; Amicus Curiae Brief of Friends and Family of Victims of Opioid Addiction in Support of Defendant's Safehouse and Jose Benitez; Proposed Brief of Amici Curiae Aids United, Association for Multidisciplinary Education and Research in Substance Use and Addiction, Association of Schools and Programs of Public Health, California Society of Addiction Medicine, Drug Policy Alliance, Harm Reduction Coalition, National Association of State and Territorial Aids Directors, The Foundation for Aids Research, Positive Women's Network, Treatment Action Group, Vital; Amici Curiae Brief of Religious Leaders in the Philadelphia Community and Beyond; Amici Curiae Brief of Constitutional Law Scholar and Commerce Clause Expert Professor Randy Barnett; Brief of Amici Curiae King County, WA; New York, NY; San Francisco; Seattle, WA; Pittsburgh, PA; and Svante L. Myrick, Mayor of Ithaca, NY; Brief Amici Curiae of the American Civil Liberties Union and The American Civil Liberties Union of Pennsylvania; Brief of Amici Curiae Mayor Jim Kenney and Health Commissioner Dr. Thomas Farley.

appropriately defers to Congress to engage in this debate and determine whether and how it wants to criminalize the conduct of medical providers and recovery specialists who seek to manage safe consumption facilities. A narrow interpretation of § 856(a)'s purpose requirement and restrained application of that statute also protects the important separation of powers principles discussed above. Such principles are one of the foundations of the longstanding rule of lenity,[50] which Safehouse invokes here. I do not rely on the rule of lenity as the basis for this decision. Nonetheless, the separation of powers principles underlying the rule carry substantial weight in this case, where the Executive has invited the Judiciary to expand the reach of a criminal statute to include conduct that I am convinced was never contemplated by the Legislature.

VI. Application of (a)(1) to Safehouse

The Government has only brought this action under (a)(2), but in its Counterclaim Safehouse seeks a declaratory judgment as to § 856(a) as a whole. However, no motion for relief on that aspect of the Counterclaim is pending before me.

VII. Religious Freedom Restoration Act

Because I have determined that § 856(a)(2) does not apply to Safehouse's proposed conduct, I need not consider whether the Government's effort to enforce the statute violates Safehouse's rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. In connection with that claim, Safehouse sought: (1) a declaration that any prohibition or

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[50] Another policy underlying the rule of lenity is that the law must provide fair notice of the punishment imposed "if a certain line is passed," and "[t]o make the warning fair, . . . the line should be clear." *Bass*, 404 U.S. at 348. This policy is somewhat less applicable here, where the Government seeks a declaratory judgment, which by definition will provide notice as to whether the law prohibits the conduct in question. It bears mention, however, that courts have applied the rule of lenity in declaratory judgment cases. *See, e.g.*, *Bingham, Ltd. v. United States*, 724 F.2d 921, 924-25 (11th Cir. 1984) (noting the rule of lenity applies "even though we construe the [statute] in a declaratory judgment action, a civil context").

penalization of Safehouse would violate RFRA and (2) an injunction permanently enjoining the Third-Party Defendants from enforcing or threatening to enforce 21 U.S.C. § 856 against Safehouse. Defs.' Answer at 43-44. Because I have concluded that § 856(a)(2) does not criminalize Safehouse's proposed actions, the RFRA claim is now moot.

VIII. Conclusion

Both sides skillfully argue that Congress's meaning in § 856 is consistent with their own, and further argue that to conclude otherwise would be a judicial usurpation of legislative power. Here, however, the Government asks the Court to apply statutory language to a set of facts beyond the comprehension of Congress when the bill was passed. I find the most conservative, circumspect approach to favor the original, ordinary meaning of the statute. On the record before me, having applied multiple tools of construction, I find that the purpose at issue under § 856 must be a significant purpose to facilitate drug use, and that allowance of some drug use as one component of an effort to combat drug use will not suffice to establish a violation of § 856(a)(2). The ultimate goal of Safehouse's proposed operation is to reduce drug use, not facilitate it, and accordingly, § 856(a) does not prohibit Safehouse's proposed conduct.

The Government's Motion will be denied as to its claim for declaratory judgment as well as Safehouse's counterclaim for declaratory judgment. I need not consider Safehouse's Religious Freedom Restoration Act claim, which is now moot.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **SAFEHOUSE, a Pennsylvania nonprofit Corporation; JOSE BENITEZ, as President and Treasurer of Safehouse,** **Defendants.**	:	**CIVIL ACTION** **No. 19-0519**
SAFEHOUSE, a Pennsylvania nonprofit Corporation, **Counterclaim Plaintiff,** **v.** **UNITED STATES OF AMERICA,** **Counterclaim Defendant,** **and** **U.S. DEPARTMENT OF JUSTICE; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; and WILLIAM M. McSWAIN, in his official capacity as U.S. Attorney for the Eastern District of Pennsylvania,** **Third-Party Defendants.**	:	

McHUGH, J. **FEBRUARY 25, 2020**

MEMORANDUM

This case arises out of Defendant Safehouse's proposal to open a safe injection site in Philadelphia to mitigate the harms resulting from unlawful opioid abuse, and the Government's determination that opening such a site would be unlawful. Previously, I denied a motion for judgement on the pleadings filed by the United States. ECF 134. In doing so, I concluded that, "[a]ccepting the facts in the pleadings as true, as required under Rule 12 of the Federal Rules of Civil Procedure, 21 U.S.C. § 856(a)(2) would not prohibit Safehouse from establishing and operating an overdose prevention facility that provides medically supervised consumption services." ECF 134, at 1-2.

That ruling was a nonfinal interlocutory order because it represented nothing more than denial of a motion. Safehouse did not cross-move for relief, and thus the prior order did not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Following consultation with the Court, the parties agreed to a stipulated set of facts, *see* ECF 137, Ex. A, and filed cross-motions intended to produce a final, appealable order. To that end, Safehouse moves for final declaratory judgment under Federal Rules of Civil Procedure 56 and 57, ECF 137, and the Government opposes and cross-moves for summary judgment, ECF 139.

The recent filings recapitulate the arguments previously advanced by the parties. Safehouse argues that the establishment and operation of its overdose prevention services model, which would include supervised consumption rooms, does not violate Section 856(a)(2), which makes it unlawful for any person to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance." *See* ECF 137-3. Because Safehouse relies on a statutory argument, it suggests that the Court "need not reach Safehouse's remaining claims under the Religious Freedom Restoration Act . . . and the Commerce Clause of the U.S. Constitution." ECF 137, at 7 n.5. I agree that the Court can render a final judgment on the application of Section 856(a)(2) alone.[1]

[1] Safehouse requests the Court dismiss without prejudice its counterclaim under the Religious Freedom Restoration Act as moot, *see* ECF 3, at 42-43 (pleading counterclaim); ECF 137-3, ¶ 3 (proposing dismissal without prejudice),

In response, the Government principally restates its "core contention" that Safehouse's overdose prevention model "violate[s] § 856(a)(2)." ECF 139, at 3. To the Government, the plain text of Section 856(a)(2) demands this result—"(1) Safehouse would manage and control a place as either an owner or lessee, that (2) it would knowingly and intentionally make available, (3) for the purpose of unlawfully using a controlled substance." ECF 139, at 5. I addressed those arguments in my prior opinion and, even accepting an evolved standard of review, nothing warrants revisiting them now. ECF 133, at 49-55.

The Government also seeks to inject some procedural uncertainty into the dispute. First, the Government argues that Safehouse's motion for declaratory relief should be resolved pursuant to Rule 56 and not Rule 57 because "a motion for declaratory judgment under [Rule] 57 would be procedurally improper." ECF 139, at 5 n.3. To support its contention that declaratory relief is improper, the Government cites to *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014), for the proposition that "[r]equests for declaratory judgment are not properly before the court if raised . . . by motion." ECF 139, at 5 n.3 (quoting *City of Tucson*, 761 F.3d at 1010). That misreads *City of Tucson*. In that case and the other cases relied upon by the Government for support, the movants sought declaratory relief by filing a Rule 57 motion without first seeking declaratory relief in their initial pleadings. Indeed, in *City of Tucson*, in the very sentence before the sentence quoted by the Government, the Court held that a "request for declaratory relief is properly before the court when it is pleaded in a complaint for declaratory judgment." *Id.* Here, Safehouse sought a declaration pursuant to the Declaratory Judgment Act in its counterclaims and third-party

and, in doing so, seeks to "reserve[] the right to press those claims if this Court's declaratory judgment on the underlying statutory question were vacated, reversed, or remanded by an appellate court or if changed circumstances otherwise established a ripe controversy as to those claims." *Id.* The Government contends that by making this request Safehouse has "abandon[ed] its claim[s]" under RFRA and a related claim under the Commerce Clause. ECF 139, at 11-12, 12 n.8. I disagree. Given that Safehouse has won the declaratory judgment it seeks, there is no need to reach its additional claims, and its request that this Court dismiss the RFRA and Commerce Clause claims without prejudice is sensible. The claims are therefore deemed to be preserved.

complaint. *See* ECF 3, at 41; ECF 45, at 5. A final declaratory judgment under Rule 57 is the appropriate vehicle to conclusively resolve the immediate and actual legal controversy on the statutory question. *See* Fed. R. Civ. P. 57, Notes on Advisory Committee on Rules (1937). The parties maintain a live and actual legal controversy, have stipulated to all material facts, and have moved for declaratory relief as to the reach of Section 856(a)(2).

Such maneuvering by the Government at this late stage is not constructive. At no point until its latest filing did the Government suggest that consideration of a motion for declaratory judgment would be procedurally improper. From the inception of this case Safehouse requested a full trial on the merits to resolve whether its proposed operation comports with federal law, and with it the opportunity to develop a detailed factual record. And for just as long the Government has strenuously resisted such an approach. The Government has never argued there was a need for additional evidence, a fact of which they were reminded at oral argument. *See* ECF 133, at 6 n.4. The present motions were filed in consultation with the Court for the express purpose of creating a final appealable order, something sought by both sides. *See* ECF 137, at 3. And the parties' stipulation to specific facts—an approach first suggested by the Court to the parties in late August—was intended to complete the record to finally adjudicate a difficult and complex matter of first impression.

The Government further contends that inferences drawn in resolving a motion to dismiss under Rule 12 are not properly drawn in resolving the pending motions. Specifically, the Government protests that Safehouse "never said in its pleadings that it would reduce unlawful drug use, nor do the Stipulated Facts so state," and that, because Safehouse has moved affirmatively for final relief, "the Court cannot make this factual inference in Safehouse's favor." ECF 139, at 11 n.4. In advancing this argument, the Government continues to confuse purpose with outcome. The reach of Section 856(a)(2) did not then and does not now depend to any degree on whether Safehouse's model actually "would reduce unlawful drug use." Section 856(a)(2)'s applicability turns on the *objective* of the relevant actor, not on the *effectiveness* of a proposed intervention model. In fact, my opinion of October 2, 2019, explicitly declined to address "whether safe injection sites are an appropriate means of dealing with the opioid crisis." ECF 133, at 2.

In any case, no inference is necessary at this stage because the parties have stipulated to various facts as recommended by the Court. These include that "Safehouse seeks to open the first safe injection site in the U.S. in the City of Philadelphia and is . . . [a] nonprofit corporation whose mission is to save lives by providing a range of overdose prevention services," and that "the overdose prevention services it intends to offer are aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment." ECF 137, Ex. A, ¶ 1. Admittedly, that stipulation is prefaced by "according to Safehouse" or "according to [Safehouse's] website," but later stipulations remove any ambiguity. The parties agree that "Safehouse intends to offer each participant its services, which include use of supervised drug consumption and observation rooms, medical services, including wound care, onsite initiation of Medication-Assisted Treatment, recovery counseling, HIV and HCV counseling, testing and treatment, referral to primary care, and referrals to social services, legal services and housing opportunities." *Id.* ¶ 9. The parties also agree that Safehouse "intends to encourage every participant to enter drug treatment, which will include an offer to commence treatment immediately." *Id.* Given those stipulations, the analysis in my memorandum opinion of October 2, 2019, applies with equal validity to the record before me, and there is nothing procedurally improper in granting the declaratory relief sought by Safehouse.

The Government's sudden focus on factual nuances overlooks the complexity of determining the proper application of the law. Safehouse does not hide that illegal substances will be used on its premises. To the Government, that alone is enough to resolve the statutory question. But that position depends upon an overly simplistic formulation of "purpose," one that it struggled to defend at oral argument. For instance, the Government acknowledged that Safehouse could skirt the proscriptions of Section 856(a)(2) if it operated essentially the same overdose prevention model out of a mobile van instead of a fixed piece of real property so long as no user "c[a]me into the mobile unit." ECF 131, at 42:4-43:5. And when confronted with a hypothetical about parents who instructed their child to use unlawful drugs in their home so that they could resuscitate the child if necessary, the Government—contrary to its previously avowed core reading of the statute—responded that Section 856(a)(2) would *not* apply to that conduct. It conceded the parents would not have an unlawful "purpose" in participating in such life-saving activity. ECF 133, at 41; *see also* ECF 131, at 38:17-42:3.

The Court's objective in encouraging the parties to supplement the record by stipulation and agree upon a mechanism for entering final judgment was to eliminate any factual ambiguity and thereby facilitate appellate review of difficult and subtle issues, including the meaning of "purpose." Such clarity and precision have particular importance here, where it is a criminal statute that the Government seeks to invoke in exercising its authority.

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Given the history of this case, and the parties' supplementation of the record, there is nothing procedurally improper in granting the declaratory relief sought by Safehouse. The analysis in my memorandum opinion of October 2, 2019, applies with equal validity to the expanded record. I will therefore grant Safehouse's Motion for Final Declaratory Judgment and deny the Government's Motion for Summary Judgment. An appropriate Order follows.

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge

CITY OF PORTLAND

Planning & Urban Development

Christine Grimando, AICP, Director

To: Chair Ray and Members of the Health & Human Services and Public Safety Committee

From: Christine Grimando, Director of Planning & Urban Development

Date: September 4, 2020

Re: Shelter Zoning Update

Following the July Committee meeting, below is a recap of current emergency shelter zoning, the previously proposed small shelter zoning, accompanying maps for each, as well as information on how other uses asked about by the Committee are currently addressed in the City's Land Use Code.

Emergency Shelter Existing Zoning

There are six emergency shelters currently in the City of Portland. Five are shown on the attached map, and a sixth, Through These Doors, serving women that have been subjected to domestic violence, has an address not mapped out of consideration of the safety of those it serves.

Portland's emergency shelters:

Shelter	Address	Zone
Family Shelter (City of Portland)	54 Chestnut Street	R-6
Oxford Street Shelter (City of Portland)	203 Oxford Street	R-6
Milestone Emergency Shelter (Milestone Recovery)	65 India Street	IS-FBC
Florence House (Preble Street)	190 Valley Street	Contract Zone
Joe Kreisler Teen Shelter (Preble Street)	38 Preble Street	B-3
Through These Doors		

In addition, there have been provisional shelter arrangements in the City, including overflow beds at the Preble Street Resource Center, temporary shelter beds provided by USM in the first months of Covid-19, and beds at the Portland Expo, in response to urgent conditions, but not planned as permanent arrangements. An application for a new emergency shelter at the Preble Street Resource Center is currently under review.

An emergency shelter is defined by the City of Portland Land Use Code as:

Emergency shelter: A facility providing temporary overnight shelter to homeless individuals in a dormitory-style or per-bed arrangement.

Though a simple definition, requirements for emergency shelters are included as conditional use standards, specifically that they

1) provide adequate space for conducting security searches and other assessments;
2) be designed with a centralized shelter operations office on each level providing sight lines to sleeping areas;
3) include a Management Plan;
4) provide adequate access to and from METRO service, with maximum distances from a Metro line, and assistance to shelter guests for utilizing transit;
5) provide on-site services to support residents, such as case management, life skills training, counseling, employment and educational services, housing assistance, or other programs; include laundry, kitchen, pantry, bicycle storage, and secure storage facilities for shelter stayers on-site; and
6) include an outdoor area for guest use with adequate screening for privacy.

Zones where emergency shelters are currently permitted as conditional uses are:

EMERGENCY SHELTERS ALLOWED AS CONDITIONAL USES IN BUSINESS & INDUSTRIAL ZONES

	B-3/B-3-b/B-3c	B-4	B-5/ B-5b	I-L/I-Lb	I-M/I-Mb	I-H/I-Hb
Emergency shelters	◐	◐	◐	◐	◐	◐

In addition to the zones that explicitly permit emergency shelters, the B-2 zone allows for performance based uses, and the IS-FBC could permit them if the standards of the form based code were met, making it a potential use in each.

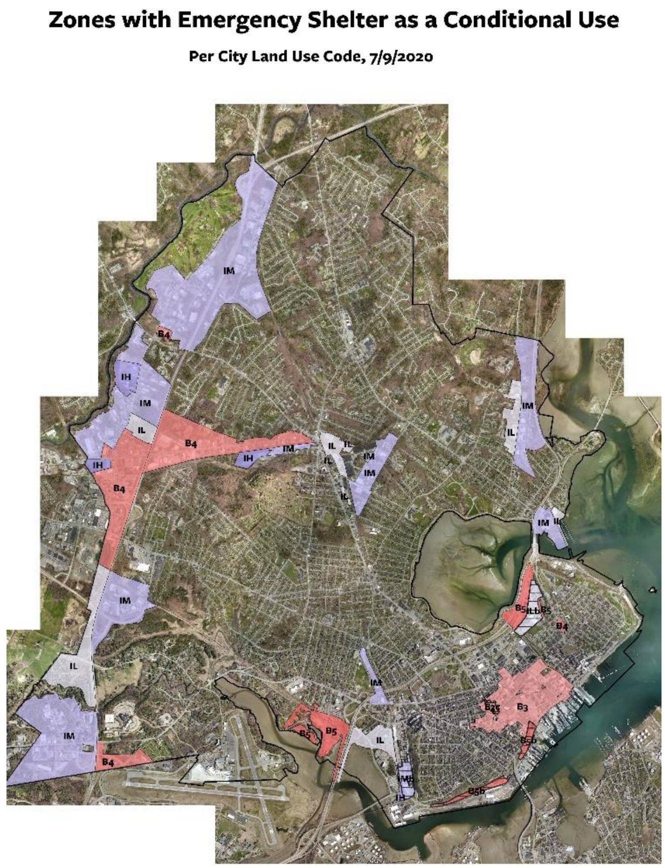


Figure 1, Current shelter zoning

Small Shelter Zoning
The small shelter zoning amendments that were last considered by the Planning Board in 2017 included two new tiers of shelter zoning, adding a maximum number of beds to a number of other zones:

Zone	Max. # of Beds
R-1, R-2, R-3, R-4 ,R-5, R-5a, R-6, R-6a, R-7, B-1, B-1b	20
B-2, B-2b, B-2c, B-6, B-7, IS-FBC	40

All other zones that permit shelters have no bed # maximums. At the time, the Planning Board expressed a wish for greater public outreach on the topic, a wish to have other dimensional standards included, concerns about transit limitations, the viability of small shelters, and the impacts of new transient uses in residential zones. They also wished to review the changes when there were licensing requirements were developed, for a fuller picture for how these would be regulated.

Planning staff's current assessment of the last draft is that it offers several positive contributions to the overall shelter zoning framework. These include making all shelters, regardless of size, subject to Planning Board review. Currently certain shelter proposals of a smaller scale would be reviewed as conditional uses by the Zoning Board of Appeals. This change makes for consistency in the review process for all shelters. The proposal also gives more certainty to the two zones where shelters aren't explicitly permitted, but could be allowed if they were to meet other standards. These include the B-2 and the India Street Form Based Code, which would be given size maximums and clear conditional use standards.

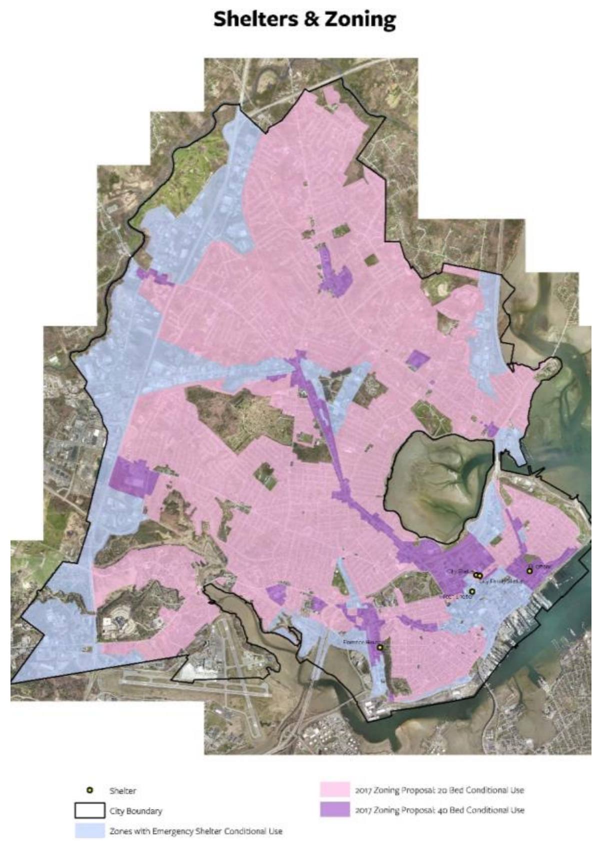


Figure 2, 2017 Small shelter zoning proposal + current shelter locations

The draft submitted to the Planning Board included a section on design which read: *Design guidelines for emergency shelters may be adopted by the Planning Board. At a minimum, emergency shelters shall be sited to provide privacy for any abutting residential properties through screening, location of windows, siting of outdoor areas, and comparable factors*. The Planning Board may always adopt design guidelines, and the Design Manual contains some design standards for this use already (attached). Some of the design elements mentioned, such as screening, may best work in the Land Use Code, in the conditional use standards. This draft standard regarding design could use some additional teasing out and reworking before new shelter zoning is adopted.

Regarding dimensional standards, one of the areas of concern the Planning Board flagged, the maximum number of beds is one way that the overall size of the project will be determined, but there are other potential ways to set standards for size and neighborhood impact. These could include minimum lot sizes, minimum square footage per person sheltering at the facility, minimum outdoor space, and minimum standards for facilities. Similarly, staff has been discussing introducing additional lodging house requirements into the Land Use Code, into Chapter Six (Buildings), and into a licensing framework, with different requirements having their most appropriate place in each.

The Planning Board raised some other concerns worth addressing here, as well. One was the introduction of additional transitory uses to residential zones. This is sure to be a shared concern in many neighborhoods, but residential zones already allow for some non-residential, transitional, and institutional uses (see attached draft Residential Use table from ReCode Phase I). Adequate attention to scale, design, and mitigation of impacts will be critically important, but the use itself is not a drastic outlier in the context of the full use table. It’s worth noting that only one of the five mapped shelters is located in a zone that currently permits shelters.

The value of the proximity to transit requirement was also raised as a concern by the Planning Board and warrants some additional discussion. The principle of proximity to transit guiding land use decisions was not questioned, but whether our transit system was robust enough to support the proposal was. However, the proximity to transit standard is one that reinforces existing transit patterns and reinforces the City’s land use and transportation goals for future growth in *Portland’s Plan 2030*, which identified major corridors and intersections of particular importance for new development and transit, and which largely align with current transportation corridors.

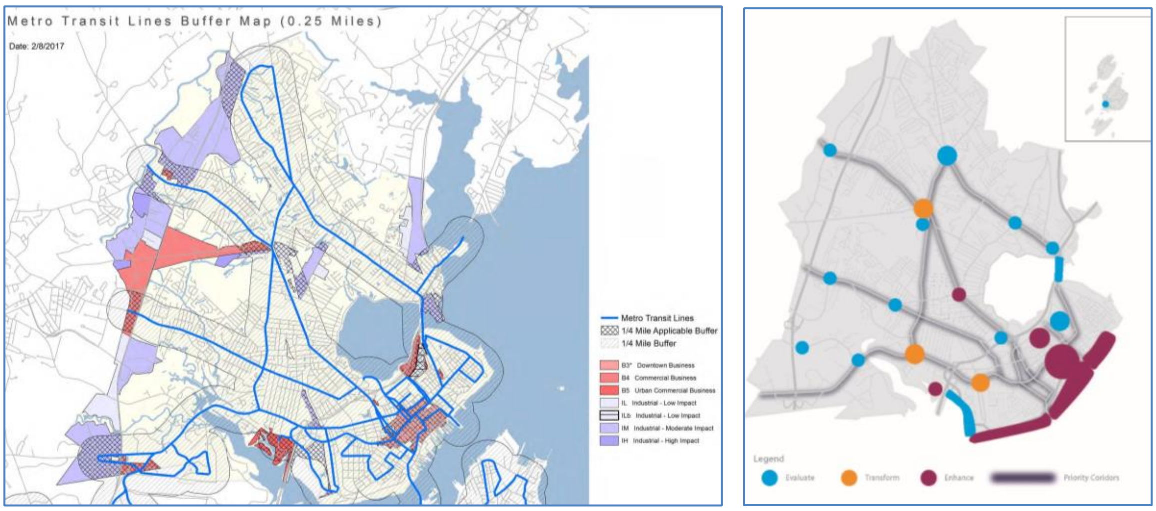


Figure 3, 1/4 mile metro line buffers/Portland's Plan priority corridors

In sum, there are some elements of the 2017 proposal that could benefit from some additional fleshing out around site design and dimensional requirements, but the overall land use framework for small shelters previously discussed is a solid basis to work from. This assessment doesn’t evaluate questions of spacing requirements or other elements that would be incorporated into a complementary licensing framework still need to occur.

Finally, the Committee raised other questions about related but distinct uses, such as group homes, places that offer various supporting services, and others. Some of these uses are difficult and/or sensitive to map, and so there’s not a corresponding visual at this time of the universe of accommodations and services discussed in July. However, a spreadsheet as an attachment is included that shows a range of related uses that offer accommodation and/or services, for discussion. It does not include changes to certain definitions included in the table that are being proposed as part of ReCode Phase I.

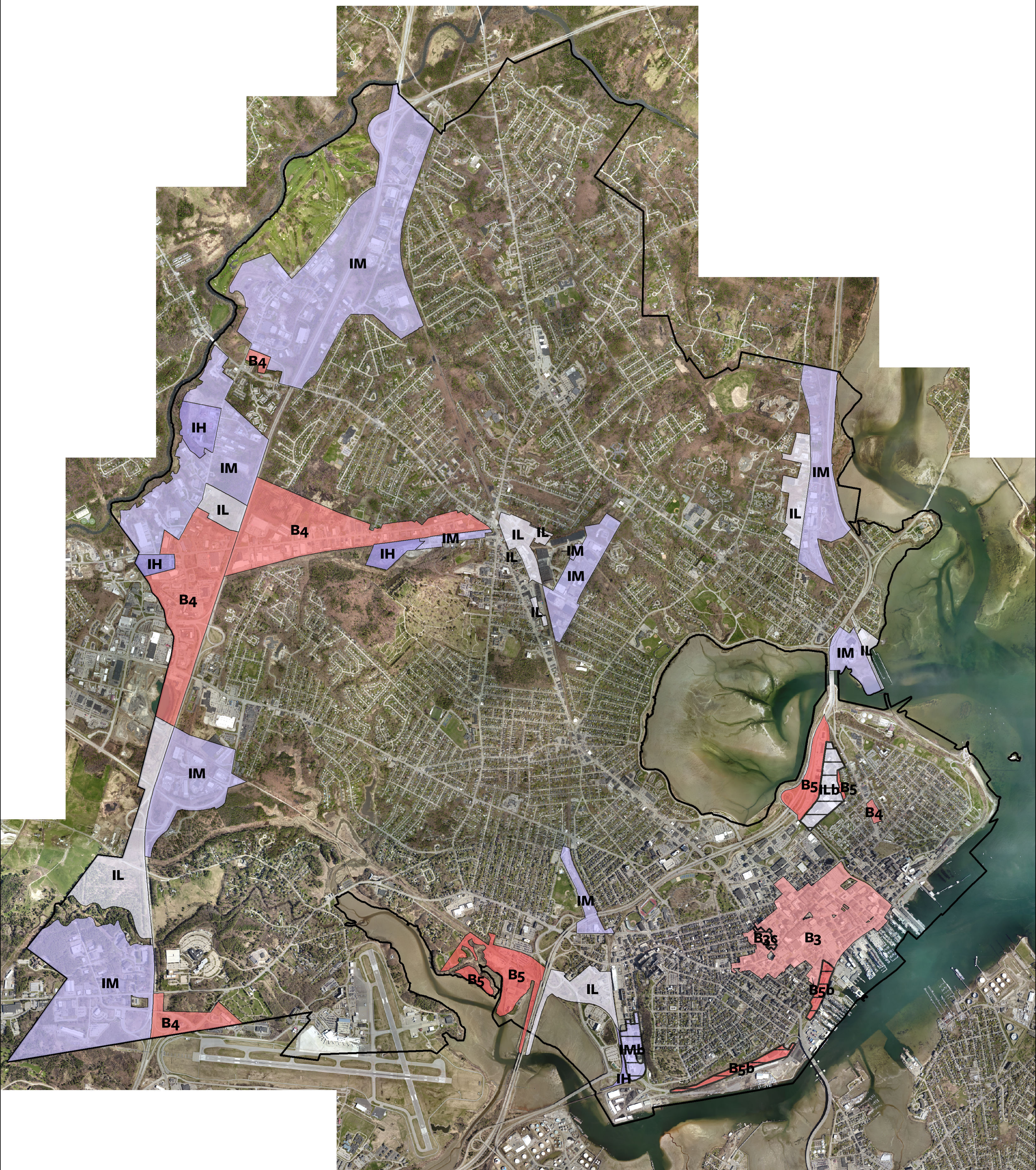
Attachments

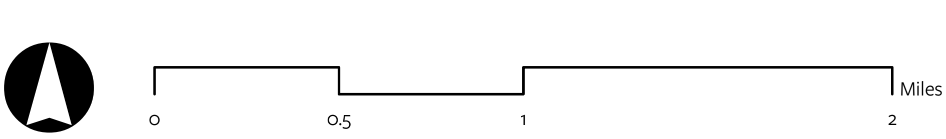
1. Current Shelter Zoning map
2. Small Shelter Zoning + shelters map

3. Draft 2017 small shelter zoning amendment
4. ReCode residential use table
5. Design Manual excerpt
6. Accommodations spreadsheet

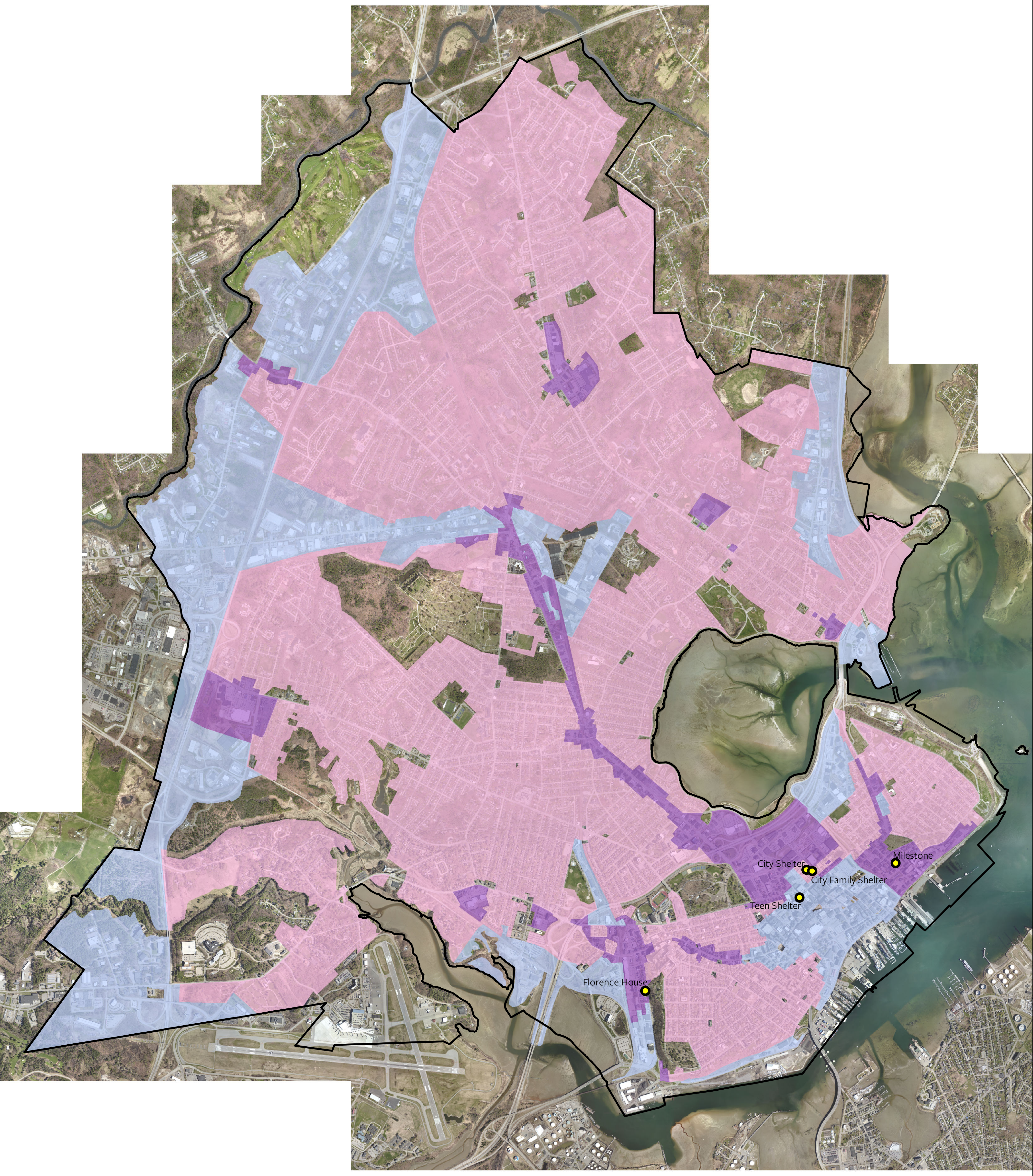
Zones with Emergency Shelter as a Conditional Use

Per City Land Use Code, 7/9/2020





Shelters & Zoning



Shelter*

City Boundary

Zones with Emergency Shelter Conditional Use

2017 Zoning Proposal: 20 Bed Conditional Use

2017 Zoning Proposal: 40 Bed Conditional Use

0 0.5 1 2 Miles

* Domestic violence shelter is not indicated on this map

[TO BE ADDED TO EACH ZONE WHERE SHELTERS WILL BE PERMITTED]

Sec. 14-xxx.1. Conditional uses.

The following use shall be permitted only upon the issuance of a conditional use permit, subject to the provisions of section 14-474 (conditional uses), and any special provisions, standards or requirements specified below:

(xx) xx. Emergency shelters, subject to the following conditions, in addition to the provisions of section 14-474 and the use specific standards of Section 14-474 (c) 3.

[TO BE ADDED TO THE NEW CONDITIONAL USE STANDARDS]

Sec. 14-474. Conditional uses.

…

3. *Use Specific Standards*. The following additional standards of review apply to the specific uses.

a. Emergency shelters are subject to the following conditions, in addition to the provisions of section 14-474 (c) 2. Notwithstanding section 14-474(a) or any other provision of this Code, the Planning Board shall be substituted for the Board of Appeals as the reviewing authority for any shelter ~~also subject to Level III site plan review~~:

1. The facility shall provide adequate space for conducting security searches and other assessments;
2. The facility shall be designed with a centralized shelter operations office on each level providing sight lines to sleeping areas;
3. A Management Plan adequately outlining the following areas shall be provided: Management responsibilities; Process for resolving neighborhood concerns; Staffing; Access restrictions; On-site surveillance; Safety measures; Controls for resident behavior and noise levels; and Monitoring Reports.

i. Adequate access to and from METRO service shall be provided. The facility shall be within a ¼ mile of a METRO line, or shall be within ½ mile of a METRO line and provide adequate indoor space to permit all shelter guests day shelter, as well as implement strategies to help residents utilize transit;

ii. The facility shall provide on-site services to support residents, such as case management, life skills training, counseling, employment and educational services, housing assistance, or other programs;

4. Suitable laundry, kitchen, pantry, bicycle storage, and secure storage facilities for shelter stayers shall be provided on-site; and

5. An outdoor area for guest use shall be provided on-site with adequate screening to protect privacy of guests.

6. Design guidelines for emergency shelters may be adopted by the Planning Board. At a minimum, emergency shelters shall be sited to provide privacy for any abutting residential properties through screening, location of windows, siting of outdoor areas, and comparable factors.

7. The number of beds permitted in an emergency shelter shall be limited as follows:

Zone	Maximum Number of Beds
R-1, R-2, R-3, R-4 ,R-5, R-5a, R-6, R-6a, R-7, B-1, B-1b	*20*
B-2, B-2b, B-2c, B-6, B-7, IS-FBC	*40*
All other zones where permitted	No maximum

TABLE 6-A: PERMITTED AND CONDITIONAL USES IN RESIDENTIAL ZONES

		R-1	R-2	R-3	R-4	R-5/R-5a	R-6/R-6a	Use Standards
Residential	Single-family dwellings	●	●	●	●	●	●	
	Two-family dwellings				●	●	●	
	Multi-family dwellings			◐		◐[1]/●[2]	●	6.5.6(G)
	Multiplex				◐	●[1]		6.4.12
	Handicapped family units	●	●	●	●	●	●	
	Planned Residential Unit Developments			●[4]		●[4]		
	Special needs independent dwelling units				●	●[1]	●	
	Lodging houses					◐[1,3]	●	6.4.9
	Sheltered care group homes	◐	◐	◐	◐	◐	◐	6.5.6(K)
Institutional	Congregate care facilities					●[2]		6.5.6(F)
	Elementary, middle, and secondary schools	◐	◐	◐	◐	◐[1]	◐	
	Governmental uses	●	●	●	●	●	●	
	Hospitals			◐		◐[1]	◐	6.5.6(F)
	Intermediate care facilities	◐	◐	◐		◐[1]/●[2]	◐	
	Long-term and extended care facilities	◐	◐	◐		◐[1]/●[2]	◐	
	Places of assembly (<10,000 SF)	◐	◐	◐	◐	◐[1]	◐	
	Places of assembly (>10,000 SF)	◐	◐	◐	◐	◐[1]	◐	
	Preschool facilities	◐	◐	◐	◐	◐	◐	6.5.6(I)
	Post-secondary schools		◐			◐[1]	◐	6.5.6(F)
Comm.	Bed and breakfasts						●/◐[5]	6.4.4
	General offices (<5,000 SF)						◐	6.5.6(C)
	Hostels						●/◐[6]	6.4.8
Other	Agriculture	●	●					
	Cemeteries	◐	◐		●		●	
	Off-street parking			◐	◐	◐[1]	◐	6.5.6(H)
	Parks and open spaces	●	●	●	●	●	●	
	Raising of domesticated animals	◐						6.5.6(J)
	Solar energy system (minor)	●	●	●	●	●	●	6.4.16
	Utility substations	◐	◐	◐	◐	◐	◐	6.5.6(L)

[1] In the R-5 zone only.
[2] In the R-5a zone only.
[3] Conversions of existing two-family or multiplex structures into lodging houses are permitted as a conditional use, provided that the lodging house shall not be located within 500 ft. of another as measured along street lines.
[4] Must consist of horizontally attached dwelling units or a series of such units in the R-3 zone and horizontally or vertically attached dwelling units in the R-5/R-5a zone, or a series of such dwelling units, with all land owned and used in common. PRUDs shall be subject to review and approval by the Planning Board under Article 15.
[5] Permitted if a conversion of a structure existing as of 3/3/97 to up to four guest rooms and conditional if a conversion of the same to five to nine rooms.
[6] Permitted if for no more than 10 overnight transient guests and conditional if for between 11 and 20 overnight transient guests. An owner, manager, or operator shall be a permanent resident of the building.

greater than forty (40) feet in length shall provide variation in roof and facade character through changes in facade setback, roof configuration, and projecting or recessed building elements.

c. Recreation and open space: All open spaces on the site shall be integrated into the development and designated on the site plan. Each development shall have the following features:

1. External buffers: An effective and permanent screening from neighboring properties and roadways;

2. Internal buffers: Areas planted, maintained and located in such a manner as to provide privacy between units and buildings and paved areas and screening of parking, utilities, roadways, waste collection facilities and storage facilities;

3. Passive recreational open space: Open spaces, designated and improved with such features as gardens, picnic areas, walking trails; benches and lawn and seating areas;

4. Active recreational open space: Open spaces designated and improved for active recreational use with facilities such as tennis courts, basketball courts, multipurpose game fields, swimming pools, and children's playgrounds; and

5. Private open spaces: Open spaces designated for the individualized use of unit owners such as yards, decks and patios;

(i) TWO-FAMILY, SPECIAL NEEDS INDEPENDENT LIVING UNITS, MULTIPLE-FAMILY, LODGING HOUSES, BED AND BREAKFASTS, AND EMERGENCY SHELTERS

(1) **STANDARDS.** Two-family, special needs independent living units, multiple-family, lodging houses, bed and breakfasts, and emergency shelters shall meet the following standards:

a. Proposed structures and related site improvements shall meet the following standards:

1. The exterior design of the proposed structures, including architectural style, facade materials, roof pitch, building form and height, window pattern and spacing, porches and entryways, cornerboard and trim details, and facade variation in projecting or recessed building elements, shall be designed to complement and enhance the nearest residential neighborhood. The design of exterior facades shall provide positive visual interest by incorporating appropriate architectural elements;

2. The proposed development shall respect the existing relationship of buildings to public streets. New development shall be integrated with the existing city fabric and streetscape including building placement, landscaping, lawn areas, porch and entrance areas, fencing, and other streetscape elements;

3. Open space on the site for all two-family, special needs independent living unit, bed

and breakfast and multiple-family development shall be integrated into the development site. Such open space in a special needs independent living unit or a multiple-family development shall be designed to complement and enhance the building form and development proposed on the site. Open space functions may include but are not limited to buffers and screening from streets and neighboring properties, yard space for residents, play areas, and planting strips along the perimeter of proposed buildings;

4. The design of proposed dwellings shall provide ample windows to enhance opportunities for sunlight and air in each dwelling in principal living areas and shall also provide sufficient storage areas;

5. The scale and surface area of parking, driveways and paved areas are arranged and landscaped to properly screen vehicles from adjacent properties and streets;

6. Two-family or multiple-family dwellings shall not be converted to lodging houses unless all units in the building have been vacant for at least one (1) year prior to the date conversion is sought or unless the individual multiple-family units are less than one thousand (1,000) square feet in size. In no event shall any single-family dwelling in the R-5 or R-6 zone be converted in whole or in part to a lodging house.

(j) MULTIPLEX AND SMALL RESIDENTIAL LOT DEVELOPMENT LOCATED IN THE R-5 ZONE

(1) **STANDARDS.** Multiplexes and small residential lot development in the R-5 zone shall be designed to be architecturally compatible with the residential buildings in the surrounding neighborhood, as demonstrated by compliance with the R-5 Small Residential Lot Development and Multiplex Design Standards contained in Appendix 6 of this manual.

(k) SMALL RESIDENTIAL LOT DEVELOPMENT LOCATED IN THE R-6 ZONE

(1) **STANDARDS.** Small residential lot development located in the R-6 zone on lots of ten thousand (10,000) square feet or less shall provide a high degree of architectural quality and compatibility with the surrounding neighborhood as demonstrated by compliance with the principles and standards of the R-6 Infill Development Principles and Standards, promulgated by the Planning Board and contained in Appendix 7 of this manual. Any proposal required to obtain a certificate of appropriateness under Portland's historic preservation ordinance is exempt from the R-6 design review standard.

(l) INDIA STREET FORM-BASED CODE ZONE: BUILDING DESIGN STANDARDS

(1) **STANDARDS.** The IS-FBC Building Design Standards are contained in Appendix 8 of this manual and applicable to all types of development within the zone.

	Accomodation Type	# of Residents Permitted	Level of Care	R-1	R-2	R-3	R-4	R-5	R-5a	All R-6	IR-1	IR-2	IR-3	I-B	All B-1	All B-2	All B-3	B-4	B-5	B-6	B-7	R-P	I-L	All I-M	All I-H	IS-FBC
Single Dwelling Unit	**Handicapped Family Unit:** A dwelling which provides living facilities for handicapped persons. A handicapped family unit may also provide counseling and support services. Staff members may also be included in the population.	To be consistent w/ family definition	Staff may be included w/in population	●	●	●	●	●	●	●	●	●	●	●			●		●	●	●	●				●
Single Dwelling Unit	**Sheltered Care Group Home:** A facility which, in addition to providing food and shelter to a defined population, provides guidance or counseling services. Such services are a primary function of the facility.	Up to 12 individuals	Food, shelter, counseling	◐	◐	◐	◐	◐	◐	◐																●
Single Dwelling Unit	**Community Living Arrangement:** A state approved, authorized, certified or licensed group for eight (8) or fewer mentally handicapped or developmentally disabled persons																									●
Single Dwelling Unit	**Special Needs Independent Living:** A dwelling unit developed and managed by a nonprofit organization for habitation by persons with special social, physical or mental needs beyond strictly economic needs. Such persons shall be provided required levels of supervision, care and/or counseling services appropriate to their special needs, and the services shall be provided by either the sponsoring nonprofit agency or through another entity with which the agency has entered into a contractual arrangement.	Unspecified, though range of density requirements (2,800, 3,600, 4,800 SF)	Supervision, care/counseling				●	●	●	●																●
Multi-Family	**Congregate Care Facility:** A residential development which provides individual living or dwelling units with support services which provide assistance to residents. Services to be provided shall include those listed under 'Level of Care'. Population limited to 55 and over, and may include spouse.	Multi-family development (1,600 SF of Net Land Area per unit)	(a)Transportation for essential support activities (included in base rent); (b) One meal per day; (c) Programmed social activities (included in rent); (d) Personal care services such as housekeeping, laundry, minimal health monitoring; (e) emergency call buttons in each d.u.					●	●																	●
Accomodation Without Dwelling Unit	**Intermediate Care Facility:** A facility which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or extended care facility is designed to provide but who, because of their mental or physical condition, require such care and services above the level of room and board. Said facility must be licensed as a board care, residential care facility or equivalent pursuant to the regulations promulgated by the State of Maine Department of Health and Human Services.	13 or more indiviuals (8,000 SF gross land area per first 35 residents, 350 SF per additional resident)	Health-related care and services, (assumed overnight supervision) and licensure by State	◐	◐	◐		◐	●	◐						●								●		●
Accomodation Without Dwelling Unit	**Lodging House:** House, building or portion thereof containing 2 or more rooming units and providing such units, with or without meals, to individuals on not less than a weekly or monthly basis for compensation. A lodging house, except on islands, shall contain common areas for use by all residents, including kitchen. A kitchen need not be available if meals are provided on daily basis. May not operate as hotel/hostel/B&B unless otherwise permitted by code.	Unit limits set by either lot area/per d.u. requirements, minimum unit sizes, or quantity of units, depending on zone.	May provide food as part of lodging, or access to common kitchen.						◐	●		◐	●	●	●	●	●	●	●		●					●
Accomodation Without Dwelling Unit	**Emergency Shelter:** A facility providing temporary overnight shelter to homeless individuals in a dormitory-style or per-bed arrangement.	No established limit	On-site services to include life skills training, counseling, employment/educational services, housing assistance. Facilities to include laundry, kitchen, pantry, bicycle storage, storage for residents. Overnight supervision.														◐	◐	◐				◐	◐	◐	●
Unspecified	**Long-Term or Extended Care:** An institution or a distinct part of an institution that is licensed or approved to provide full-time convalescent or chronic care, or health care under medical supervision for twenty-four (24) or more consecutive hours, to nine (9) or more individuals who, by reason of advanced age, illness, or infirmity are unable to care for themselves, and who are not related to the governing authority by marriage, blood, or adoption.	More than 9 individuals	24-hour medical supervision	◐	◐	◐		◐	●	◐						●										●
Unspecified	**Correctional Prerelease Facility:** Correctional prerelease facilities for up to twelve (12) persons, plus staff, serving a primary clientele of parolees or persons in correctional prerelease programs, provided that, if a facility requires state/federal licensing, staff of facility shall be as required by license (otherwise, as stated under 'Number of Residents Permitted')	Up to 12 individuals (1 staff per 10 residents) not within 1,000 feet of another facility, on lots of 10,000 SF or greater	24-hour supervision of residents															●						●	●	●

Permitted Use = ●

Conditional Use = ◐

Single-Family D.U. = ●   Multi-Family = ●   Accomodation without D.U.= ●   Unspecified = ●

SHELTER ZONING UPDATE

Health & Human Services and Public Safety Committee

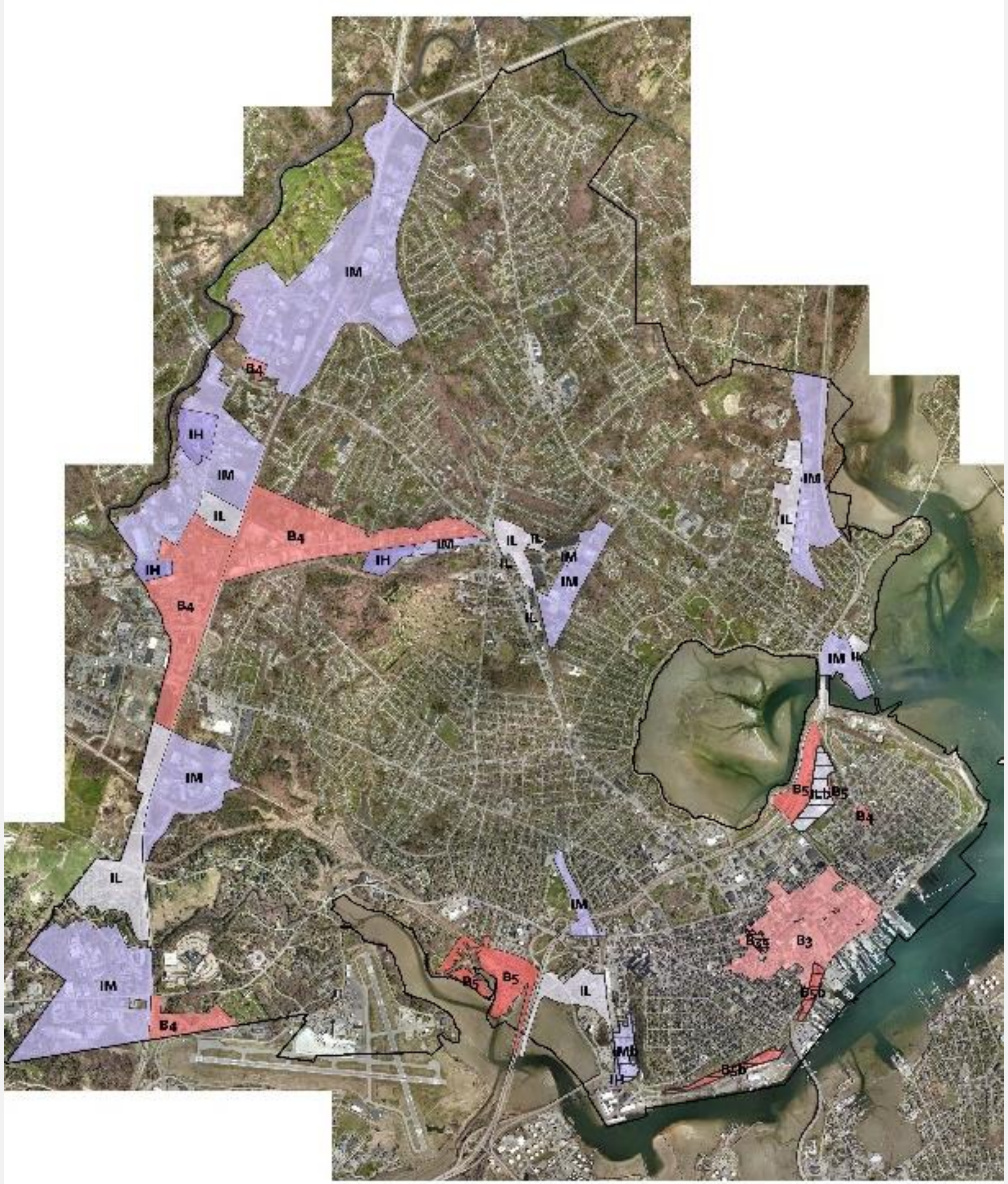
September 8, 2020

EXPANDED AREA

Prior to June 2017, emergency shelters were permitted in the B-3 zone as conditional uses. 2017 permitted emergency shelters in additional Business and Industrial Zones.

EMERGENCY SHELTERS ALLOWED AS CONDITIONAL USES IN BUSINESS & INDUSTRIAL ZONES

	B-3/B-3-b/B-3c	B-4	B-5/B-5b	I-L/I-Lb	I-M/I-Mb	I-H/I-Hb
Emergency shelters	◐	◐	◐	◐	◐	◐



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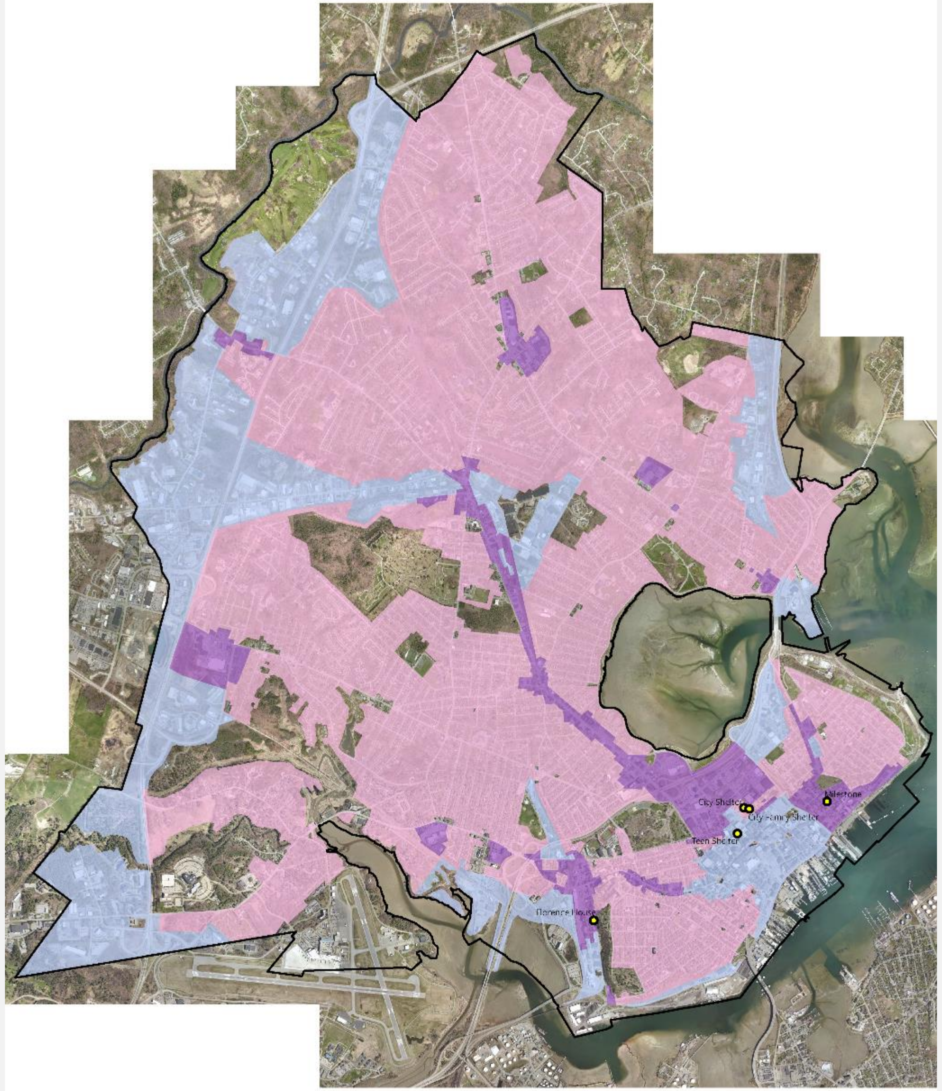
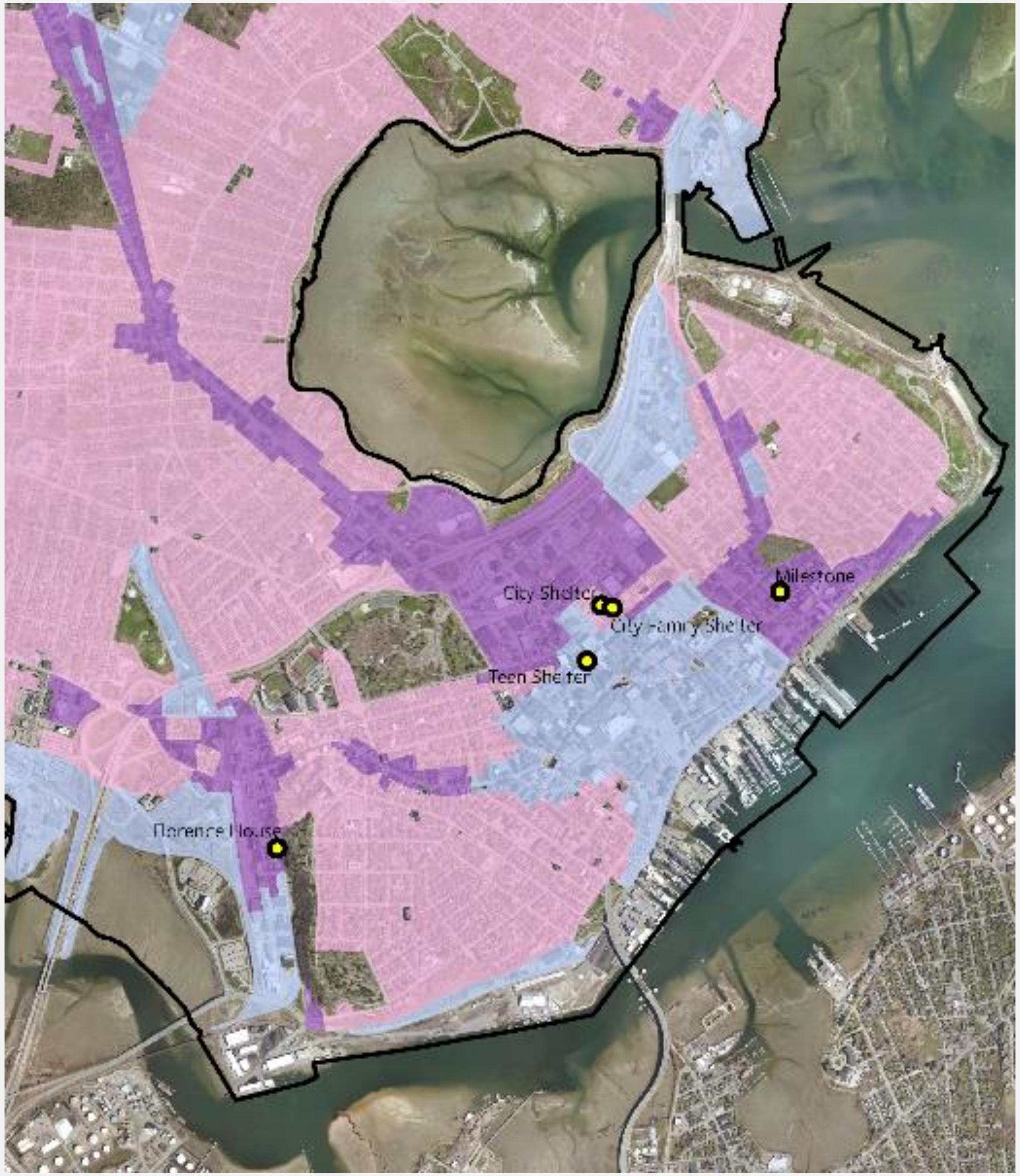
SMALL SHELTER ZONING

- June 19th City Council refers topic of small shelter zoning to HHS Committee
- July – October HHS Committee deliberation
- October 24, 2017 Planning Board Public Hearing. Postponed action.

- Concerns about timing, outreach, viability, compatibility
- Asked to see licensing when ready for complete picture

Shelters & Zoning





Shelter*

City Boundary

Zones with Emergency Shelter Conditional Use

2017 Zoning Proposal: 20 Bed Conditional Use

2017 Zoning Proposal: 40 Bed Conditional Use

SMALL SHELTER DRAFT ORDINANCE

- All shelters subject to PB review
- Greater predictability for B-2 and IS-FBC
- Specific Conditional Use standards

- *Site & building design need fleshing out*
- *Other dimensional standards*
- *Relationship to other uses*
- *Licensing*
- *Outreach*

TABLE 6-A: PERMITTED AND CONDITIONAL USES IN RESIDENTIAL ZONES

		R-1	R-2	R-3	R-4	R-5/R-5a	R-6/R-6a	Use Standards
Residential	Single-family dwellings	●	●	●	●	●	●	
	Two-family dwellings				●	●	●	
	Multi-family dwellings			◐		◐[1]/●[2]	●	6.5.6(G)
	Multiplex				◐	●[1]		6.4.12
	Handicapped family units	●	●	●	●	●	●	
	Planned Residential Unit Developments			●[4]		●[4]		
	Special needs independent dwelling units				●	●[1]	●	
	Lodging houses					◐[1,3]	●	6.4.9
	Sheltered care group homes	◐	◐	◐	◐	◐	◐	6.5.6(K)
Institutional	Congregate care facilities					●[2]		6.5.6(F)
	Elementary, middle, and secondary schools	◐	◐	◐	◐	◐[1]	◐	
	Governmental uses	●	●	●	●	●	●	
	Hospitals			◐		◐[1]	◐	6.5.6(F)
	Intermediate care facilities	◐	◐	◐		◐[1]/●[2]	◐	
	Long-term and extended care facilities	◐	◐	◐		◐[1]/●[2]	◐	
	Places of assembly (<10,000 SF)	◐	◐	◐	◐	◐[1]	◐	
	Places of assembly (>10,000 SF)	◐	◐	◐	◐	◐[1]	◐	
	Preschool facilities	◐	◐	◐	◐	◐	◐	6.5.6(I)
	Post-secondary schools		◐			◐[1]	◐	6.5.6(F)
Comm.	Bed and breakfasts						●/◐[5]	6.4.4
	General offices (<5,000 SF)						◐	6.5.6(C)
	Hostels						●/◐[6]	6.4.8
Other	Agriculture	●	●					
	Cemeteries	◐	◐		●		●	
	Off-street parking			◐	◐	◐[1]	◐	6.5.6(H)
	Parks and open spaces	●	●	●	●	●	●	
	Raising of domesticated animals	◐						6.5.6(J)
	Solar energy system (minor)	●	●	●	●	●	●	6.4.16
	Utility substations	◐	◐	◐	◐	◐	◐	6.5.6(L)

	Accomodation Type	# of Residents Permitted	Level of Care	R-1	R-2	R-3	R-4	R-5	R-5a	All R-6	IR-1	IR-2	IR-3	I-B	All B-1	All B-2	All B-3	B-4	B-5	B-6	B-7	R-P	I-L	All I-M	All I-H	IS-FBC
				List of Zones																						
Single Dwelling Unit	**Handicapped Family Unit:** A dwelling which provides living facilities for handicapped persons. A handicapped family unit may also provide counseling and support services. Staff members may also be included in the population.	To be consistent w/ family definition	Staff may be included w/in population	●	●	●	●	●	●	●	●	●	●	●			●		●	●	●	●				●
Single Dwelling Unit	**Sheltered Care Group Home:** A facility which, in addition to providing food and shelter to a defined population, provides guidance or counseling services. Such services are a primary function of the facility.	Up to 12 individuals	Food, shelter, counseling	◐	◐	◐	◐	◐	◐	◐																●
Single Dwelling Unit	**Community Living Arrangement:** A state approved, authorized, certified or licensed group for eight (8) or fewer mentally handicapped or developmentally disabled persons																									●
Single Dwelling Unit	**Special Needs Independent Living:** A dwelling unit developed and managed by a nonprofit organization for habitation by persons with special social, physical or mental needs beyond strictly economic needs. Such persons shall be provided required levels of supervision, care and/or counseling services appropriate to their special needs, and the services shall be provided by either the sponsoring nonprofit agency or through another entity with which the agency has entered into a contractual arrangement.	Unspecified, though range of density requirements (2,800, 3,600, 4,800 SF)	Supervision, care/counseling				●	●	●	●																●
Multi-Family	**Congregate Care Facility:** A residential development which provides individual living or dwelling units with support services which provide assistance to residents. Services to be provided shall include those listed under 'Level of Care'. Population limited to 55 and over, and may include spouse.	Multi-family development (1,600 SF of Net Land Area per unit)	(a)Transportation for essential support activities (included in base rent); (b) One meal per day; (c) Programmed social activities (included in rent); (d) Personal care services such as housekeeping, laundry, minimal health monitoring; (e) emergency call buttons in each d.u.					●	●																	●
Accomodation Without Dwelling Unit	**Intermediate Care Facility:** A facility which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or extended care facility is designed to provide but who, because of their mental or physical condition, require such care and services above the level of room and board. Said facility must be licensed as a board care, residential care facility or equivalent pursuant to the regulations promulgated by the State of Maine Department of Health and Human Services.	13 or more indiduals (8,000 SF gross land area per first 35 residents, 350 SF per additional resident)	Health-related care and services, (assumed overnight supervision) and licensure by State	◐	◐	◐		◐	●	◐						●								●		●
Accomodation Without Dwelling Unit	**Lodging House:** House, building or portion thereof containing 2 or more rooming units and providing such units, with or without meals, to individuals on not less than a weekly or monthly basis for compensation. A lodging house, except on islands, shall contain common areas for use by all residents, including kitchen. A kitchen need not be available if meals are provided on daily basis. May not operate as hotel/hostel/B&B unless otherwise permitted by code.	Unit limits set by either lot area/per d.u. requirements, minimum unit sizes, or quantity of units, depending on zone.	May provide food as part of lodging, or access to common kitchen.						◐	●		◐	●	●	●	●	●	●	●		●					●
Accomodation Without Dwelling Unit	**Emergency Shelter:** A facility providing temporary overnight shelter to homeless individuals in a dormitory-style or per-bed arrangement.	No established limit	On-site services to include life skills training, counseling, employment/educational services, housing assistance. Facilities to include laundry, kitchen, pantry, bicycle storage, storage for residents. Overnight supervision.														◐	◐	◐				◐	◐	◐	●
Unspecified	**Long-Term or Extended Care:** An institution or a distinct part of an institution that is licensed or approved to provide full-time convalescent or chronic care, or health care under medical supervision for twenty-four (24) or more consecutive hours, to nine (9) or more individuals who, by reason of advanced age, illness, or infirmity are unable to care for themselves, and who are not related to the governing authority by marriage, blood, or adoption.	More than 9 individuals	24-hour medical supervision	◐	◐	◐		◐	●	◐						●										●
Unspecified	**Correctional Prerelease Facility:** Correctional prerelease facilities for up to twelve (12) persons, plus staff, serving a primary clientele of parolees or persons in correctional prerelease programs, provided that, if a facility requires state/federal licensing, staff of facility shall be as required by license (otherwise, as stated under 'Number of Residents Permitted')	Up to 12 individuals (1 staff per 10 residents) not within 1,000 feet of another facility, on lots of 10,000 SF or greater	24-hour supervision of residents															●						●	●	●

Permitted Use = ●

Conditional Use = ◐

Single-Family D.U. = ●

Multi-Family = ●

Accomodation without D.U. = ●

Unspecified = ●

Health & Human Services and Public Safety Committee

Councilor Belinda Ray, District 1, Chair
Councilor Tae Chong, District 3
Councilor Pious Ali, At-Large

HHS & PS 2020 Workplan – A Living Document

MEETING DATE	**PRIMARY FOCUS**	**ITEMS TO SCHEDULE/ONGOING ISSUES** (Council Goal Addressed, if applicable)
Jan 14	Health of Portland Report, Committee Work Plan for 2020	**Homeless Services Center:** Staff will update committee and seek guidance as necessary during planning, design, and construction phases (Goal #1) **Small Shelter Zoning:** In limbo since 2017 after Planning Board declined to act w/o licensing regs in place (Goal #1) **Walkable Communities/8-80 Cities:** Walkable communities/cities designed for all ages enhance both transit capacity and public health (Goal #3) **Mental Health:** HHS staff identified mental health as a priority area based on data from the Health of Portland Report. Committee will take up policy issues around mental health as they arise. Mental health issues can be an underlying cause of homelessness. (Goal #1) **Wellness Check Program for Seniors**: Staff is working on emergency management plans around this. Committee will review as necessary. (Goal #1) **Public Health Note:** Add a public health note to all items coming before the council (similar to fiscal note) **Vaping Regulation**: Staff would like "menthol" added (locally) to flavor ban enacted by CDC **Addiction & Opioid Misuse (ongoing)**: Follow-up after *Communities Addressing Addiction & Opioid Misuse* workshop as necessary
Feb 4	Marijuana Regs w/ EDC	
Feb 11	Noise Ordinance Amendment re: fees (public hearing, vote); Sprinkler Requirements for ADUs (overview)	
Feb 25	Marijuana Regs w/ EDC (public hearing & vote)	
~~Mar 24~~ cancelled COVID-19	Sprinkler requirements for ADUs (public hearing, debate, vote); Coronavirus Update; Sober/Recovery Housing	
Apr 28	Walkable Communities (or Wellness Check Program, if Coronavirus impact looking serious for Maine?)	
May 12	Walkable Communities or Wellness Check	
June 9	Small Shelter Zoning – Revisit, adapt as necessary, add buffer/distance requirements)	
July 14	Topic TBD	
Sep 8	Topic TBD	
Oct 13	Topic TBD	
Nov. 10	Topic TBD	

Council Goals – December 13, 2020

1. *Increase access to rental and home ownership that is safe, affordable, and accessible*
2. *Continue effort to reduce homelessness, assist people experiencing homelessness through city, regional, and state efforts*
3. *Increase public transit infrastructure and capacity in the city*
4. *Seek to address the high property tax burden in Portland by passing an affordable combined school/city budget and by pursuing other revenue sources*

Updates Tentatively Scheduled

- MAY: Police Department Body cameras; Addiction & Opioid Misuse
- JUNE: Portland Opportunity Crew
- JULY: India Street Public Health Update
- SEPTEMBER: Barron Center
- OCTOBER: Mental Health services overview
- NOVEMBER: Long Term Stayers Initiative

Other issues suggested as potential topics for workplan (currently and historically) but not identified as committee priorities for this year. These items will be held over until such a time as they are identified as priorities or officially dismissed from the committee's workplan.

1. Facial Recognition Technology Ban (Council workshop scheduled for June 15th 2020 will determine whether this item is referred to committee and with what level of priority)

2. Regulations for Backyard Fire Pits (suggested by a few constituents and by former Councilor Brenerman in past years)

3. Retail Fur Ban in stores within the City (suggested in 2018/19 by constituents involved in animal rights and protections who brought forward the puppy mill ban passed in 2016 and the exotic animal ban passed in 2017; they continue to press for this item to be taken up by the committee, but it has not been identified as a priority to date)

4. Rock Row concert noise issues, the City's letter to Waterstone, Waterstone's response (suggested by former Mayor Strimling in 2019)

April 28 – COVID-19 Update, homelessness update, Bayside update; Sprinkler for ADUs; sober/recovery housing

May 12

June 9

July 14

Sept 8

Oct 13

Nov 10