BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

MARCIA DONNELLY,

Appellant,

v.

CBJ PLANNING COMMISSION,

Appellee,

and

CHRIS CRENSHAW,

Appellee-Intervenor.

Case No. 2002-04

DECISION

I. Background

Chris Crenshaw on behalf of Alaska Glacier Seafoods proposes to construct and operate a seafood processing plant ("the Project") on 27,500 square feet of private land on the beach at Auke Nu Cove, adjacent to the Alaska Marine Highway terminal. The Project would consist of an 80x100-foot pre-engineered metal building on H-pile supporting structures with a concrete panel retaining wall system. It would operate as a wholesale business processing primarily halibut, with some salmon and crab. The workforce would vary seasonally between 15 and 25 employees.

The Table of Permissible Uses specifies at CBJ 49.25.300(§4.220) that seafood processing plants are allowed only by conditional use permit in areas zoned Waterfront Commercial and Waterfront Industrial. CBJ 49.50.300 requires that developments in Waterfront Commercial zones have vegetative cover on at least 10% of the property. The Project property is zoned Waterfront Commercial, but its cobble beach location affords limited opportunity for landscaping. On July 3, 2002, Crenshaw applied for a conditional use permit and on July 24, 2002 he applied

for a variance to reduce the vegetative cover requirement. The Planning Commission sitting as itself and as the Board of Adjustment took up the CUP and variance applications at its regular meeting of October 8, 2002.

At the hearing, the Commission heard from the developer and 13 members of the public, including Ms. Donnelly. Testimony in favor of the development focused on how the fishing industry would benefit from a plant north of Douglas Island, 8 hours closer than downtown to northerly fishing grounds. Opposition testimony focused on the odor, appearance, and neighborhood and environmental impacts of a processing plant. At the conclusion of the hearing, the Commission granted the conditional use permit subject to 8 conditions. Sitting as the Board of Adjustment, it also granted a variance waiving the vegetative cover requirement. Both decisions incorporated staff reports submitted by CDD planners. This appeal followed.

II. Analysis

a. *The Juneau Coastal Management Plan*

By adoption of the staff report, the Commission found that the Project would "harm important habitat and highly productive tideflats" (R12). This finding was based in good measure on the presence of a 3.8-acre bed of eelgrass near the Project property. Eelgrass beds are an important habitat for a range of fish and invertebrates.

Donnelly argues that the quoted finding requires denial of the permit, given that the Juneau Coastal Management Program (JCMP) at CBJ 49.70.930(a) says with respect to fish and seafood propagation and processing:

> (a) Shoreline use shall not adversely impact important fisheries habitat, migratory routes and harvest of significant fish or shellfish species. Shorelines having banks, beaches, and beds critical to the preservation or enhancement of the fisheries resource base shall be maintained in, or restored to, their original condition wherever and whenever feasible and prudent. Upland areas shall be managed to maintain water quality standards necessary for the propagation of anadromous fish species.

Donnelly contrasts this language with CBJ 49.70.905(18) and 49.70.950, also parts of the JCMP, which allow adverse impacts if there is no feasible and prudent alternative. The absence of any such escape clause in .930, Donnelly argues, mandates denial of the CUP.

The Commission argues that Donnelly is taking language out of context. It cites many cases for the proposition that sound statutory construction requires reading the JCMP as a whole. It points to CBJ 49.70.905 as evidence of the JCMP is not intended to bar seafood processing plants even if they have some impacts.

Reading the JCMP as a whole requires some appreciation of its structure, which establishes three kinds of standards: (1) those applicable to all developments in all habitats, (2) those applicable to specific developments, and (3) those applicable to specific habitats. These standards tend to repeat and overlap, and perfect consistency is not always achieved. Perhaps the drafter of these sections was not at his best, but we can discern the pattern and purpose of the ordinance and thereby meet our duty to construe it as a "harmonious whole." *Louisiana-Pacific Corp. v. State Dept. of Revenue*, 26 P.3d 422 (Alaska 2001).

Taking this broad view, we agree with the Commission. CBJ 49.70.930 establishes standards for a particular development: seafood processing plants. Donnelly relies on the first sentence of this section as a complete bar on plants having impact. However, the following sentence of the same section allows use of critical "banks, beaches, and beds" provided they are maintained in or restored to their original condition wherever feasible and prudent. At oral argument, counsel for Donnelly argued that the second sentence does not exhaust all possible types of sites for a seafood plant, and therefore the first sentence retains meaning as an absolute bar on development in the remaining types. Application of this argument to the present case would require us to conclude that the Project property is not a bank, beach, or bed: it is something else. But plainly it is a "cobble beach" (R3) and therefore may be impacted because the second sentence allows beaches to be "restored".

Interestingly, an argument similar to Donnelly's is available from CBJ 49.70.950, which lists 13 different habitats subject to the JCMP, including estuaries, rocky islands, and lagoons, but not including banks, beaches, or beds. We do not therefore conclude that beaches are an unregulated habitat.

This linguistic analysis is strained in view of the remainder of the JCMP. The other development-centered sections allow managed impacts from recreational developments, energy facilities, transportation and utilities, timber harvesting, and mining and mineral processing. It would be incongruous if the coastal zone act did not also allow managed impacts from seafood processing: the only one of the listed developments directly linked to the coast.

b. *Feasible and Prudent Alternatives*

CBJ 49.70.905, applicable to coastal development generally, allows even unmitigated development impacts if there is no alternative.

> (4) Dredging and filling shall be prevented in highly productive tideflats and wetlands, subtidal areas important to shellfish, and water important for migration, spawning and rearing of salmon and other sportfish species, unless there is a significant public need for the project and there is no feasible and prudent alternative to meet the public need.

CBJ 49.70.950(d)(2), applicable to enumerated habitats, contains essentially the same standard.

Donnelly does not argue that there is no significant public need for a fish processing plant, but does argue that the Commission failed to adduce substantial evidence in support of the proposition that there is no feasible and prudent alternative to the Auke Nu site. Donnelly notes that the Commission considered only two other sites: Harris Harbor and the opposite side of the ferry terminal. These, she argues, are feasible and prudent alternatives but were rejected for reasons of mere economy and convenience. We agree with the Commission that the Harris Harbor site was carefully considered but rejected on the reasonable grounds that it provides no on-site processing

capability and affords no savings in time or money for fishermen seeking a northerly processor. The other ferry terminal site suffers from the major disadvantage that the owner would not allow permanent construction of the Project.

Donnelly argues that it defies common sense to conclude that in all of the City and Borough there is no other site for a seafood processing plant. This argument misses the mark because, as noted above, all of the City and Borough is not available: only waterfront sites, and only those zoned Waterfront Commercial or Waterfront Industrial. We agree with Donnelly that either the applicant or the CDD staff could have better documented that there are no alternatives other than those considered, but it is difficult to prove a negative and we accept as probative CDD's statement that it is aware of no other suitable sites. (R8)

c. *Fill on Tidelands*

Donnelly argues that the Commission failed to adequately address the criteria established by CBJ 49.70.905(13) for the placement of fill in tidelands:

> (13) Filling of intertidal areas below mean high tide, not specifically addressed in section 49.70.960, for the expansion of upland area is specifically prohibited unless clear and convincing evidence is provided showing that all of the following conditions exist that:
> (A) Strict compliance with the policy would prevent the applicant from making a reasonable use of the property or would make compliance unreasonably burdensome;
> (B) Fill is the only means to allow development of the property which is similar to other properties in the vicinity;
> (C) Less than the proposed fill would prevent the applicant from making a reasonable use of the property or would make compliance unreasonably burdensome;
> (D) The proposed project meets the requirements of the other enforceable policies of the Juneau Coastal Management Plan;
> (E) The proposed project will not be detrimental to the public health, welfare and safety or to other properties in the vicinity;

(F) Approval of the project will not authorize uses on the property otherwise not allowed by other state, federal and local laws and regulations; and
(G) If applicable, the meaning of the phrase "feasible and prudent" has been considered and found to support approval of the proposal to fill.

Several of these criteria, such as compliance with the JCMP and application of "feasible and prudent" repeat standards discussed elsewhere in this opinion, but sections (A)-(C) do not. They require us to determine whether it is reasonable to demand that the Project be completed using something other than fill. The alternative is piling, but it is not a reasonable alternative because it would double the cost of the Project. Other properties in the area have been developed with fill. (R8) It is reasonable to allow the Appellant to do so as well.

d. *Neighborhood Harmony*

Donnelly argues that the Project constitutes spot zoning because under the rule in *Griswold v. Homer*, 925 P.2d 1015 (Alaska 1996) it is a small parcel of land that has been singled out for a use classification totally different from that of the surrounding area. This is patently wrong, regardless of what a CDD staff member said at the hearing (T5). The Project is a commercial use in a commercial zone, specifically allowed by the Table of Permissible Uses.

The commercial zone at issue has been in place since before the City and Borough was unified (T 25,44). It was in place before construction of most of the residences whose owners now complain that its use will degrade their view and decrease their property values. A review of photographs (R31) and analysis (R15) in the record confirm the Commission's finding of the minor visual impact of a small plant adjacent to a large ferry terminal viewed from the nearest residence a half-mile away.

Donnelly points out that the CUP does not explicitly impose conditions to limit noise, lighting, and traffic impacts. However, such limitations are imposed implicitly by the Notice of Decision, which requires (R94) that the Project be operated in accordance with the project description submitted by the developer. This description includes limitations on Project lighting and hours of operation (R4).

Donnelly is correct to point out that her own testimony to the Commission regarding property values (T26) went unrebutted. However, the testimony was an anecdotal account of one lost sale and in our view insufficient to overcome the Commission's finding regarding value. (R15)

e. *Conflict of Interest*

Donnelly argues that Commissioner Bruce should not have participated in the hearing because of a conflict of interest. The transcript of the hearing (T1) establishes that Commissioner Bruce disclosed that his law firm had "done some minor legal work for the applicant or for the underlying property owner." From this, Donnelly concludes that Commissioner Bruce has a financial interest in completion of the Project, should have disqualified himself, and his failure to do so requires reversal of the decision.

We agree with Donnelly that Commissioner Bruce should have provided more information about his conflict, but we agree with the Commission that in the absence of such information, we cannot conclude that Commissioner Bruce has an interest in the Project. We agree with counsel for Donnelly, who observed during oral argument that it is the obligation of the Commission, not applicants, to police their compliance with the Conflict of Interest Code. But we agree with the Commission that for purposes of our review, issues should not be raised for the first time on appeal. We would add that in the case of clear error, an issue can be raised on appeal, either by a party or on our own. However, it is far from clear that Commissioner Bruce's participation constituted clear error.

Commissioner Bruce stated that his firm had done "minor" work for Mr. Crenshaw or Mr. Erickson. We think it reasonable to assume in the absence of any other evidence, that Commissioner Bruce, a lawyer, would not have described work on the Project as "minor" for purposes of ethical analysis. Moreover, given that only five of the nine commissioners were present at the Commission's hearing and one of them disqualified himself, the unanimous vote in favor of the CUP meant that even if Commissioner Bruce had stepped down, the vote of the remaining four would have been sufficient to adopt the motion. See Charter §3.16(e). Thus, Commissioner Bruce did not cast the deciding vote, his "minor" work for the applicant is not so great as to create an intolerable appearance of impropriety, and the Commission's action is not invalid. *Griswold, supra.*

f. *The Vegetative Cover Variance*

Donnelly argues that the variance was unwarranted because the Project property is not unique, as required by the variance ordinance, CBJ 49.20.250. We note first that the Commission did not completely waive the 10% vegetative cover requirement: it merely relaxed it to a buffer zone in order to allow development of the small lot. And while it is true that small lots as a class do not constitute a unique physical feature, physical uniqueness is not the only predicate for a variance. CBJ 49.20.250 also allows a variance for "an extraordinary situation". We believe that small underwater lots in waterfront commercial zones heavily regulated by state and federal resource agencies is sufficiently extraordinary to warrant the limited relief granted by the Commission.

This is the final administrative decision of the Assembly of the City and Borough of Juneau; it may be appealed to the Juneau Superior Court if such appeal is brought within 30 days pursuant to the Alaska Rules of Appellate Procedure.

For the reasons stated above, the appeal is denied.

IT IS SO ORDERED.

DATED this 24th day of March, 2003.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Presiding Officer Dale Anderson

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