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BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

SMUGGLERS' COVE NEIGHBORHOOD ASSOC.,
Appellant,
vs.
SPUHN ISLAND, LLC ,
Appellee/Intervenor,
and
CBJ PLANNING COMMISSION,
Appellee.

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Case No. 2004-02

ORDER DENYING APPEAL

Background.

This is an appeal of a preliminary plat granted by the CBJ Planning Commission to Spuhn Island, LLC, for a subdivision of Spuhn Island. There are three parties: appellant, Smugglers' Cove Neighborhood Association, represented by Loren Domke; appellee, the CBJ Planning Commission, represented by Deputy City Attorney Margaret H. Boggs; and intervenor (formerly cross-appellant), Spuhn Island, LLC, the developer of the proposed subdivision, represented by Robert Spitzfaden.

The parties met in pre-hearing conference, a record was produced by the municipal clerk and agreed to by the parties, the issues were briefed, and oral argument was held before the Assembly on January 19, 2005.

The proposed Spuhn Island Subdivision comprises some 156 acres on an island lying off the end of Fritz Cove Road. It is zoned Rural Reserve. The CBJ Planning Commission, at its meeting of June 15, 2004, granted a preliminary plat for the proposed subdivision creating three large parcels and 38 lots. This appeal was timely filed by the Smugglers' Cove Neighborhood Association. Spuhn Island, LLC, also appealed the Commission's decision, but later, on resolution of its concerns regarding

1 bonding requirements for the subdivision, withdrew its appeal while remaining a party as
2 appellee/intervenor.

3 The main issues in this appeal center on the impact the proposed new subdivision may have on
4 the existing Smugglers' Cove and Fritz Cove Road neighborhood, and in particular, the impact of
5 traffic and parking generated by future residents of Spuhn Island. The appellants' main concern is that
6 "the end of Fritz Cove Road will become the staging area for travel to Spuhn Island," (At. Br. at p.
7 4), with associated impacts. The neighborhood association also argues that granting the preliminary
8 plat violates the Alaska Supreme Court's holding in *Thane Neighborhood Assn. v. CBJ*, 922 P.2d 901
9 (Alaska 1996), comprises illegal "spot zoning," and violates the CBJ Comprehensive Plan.

10 In light of the CBJ Appeals Code's standard of review and the Planning Commission's extensive
11 record in this matter, the Assembly finds that appellant has failed to meet its burden of proof, and
12 denies the appeal.

13
14 ***Standard of Review.***

15 When reviewing an appeal, the Assembly must act within the standard of review set out in the
16 CBJ Appeals Code, at CBJ 01.50.070. That Code section assigns the appellants the burden of proof,
17 and sets out a standard which is deferential to the Planning Commission. The Code allows the
18 Assembly to reverse the decision of the Planning Commission in only three circumstances: 1) a lack
19 of substantial evidence supporting the decision, 2) inadequate written findings, or 3) a failure of
20 procedural due process. CBJ 01.50.070. A fourth basis for reversing the Commission, that its action
21 would violate the law, is implicit.

22 The standard of review is an expression of the basic structure of the City and Borough, delegating
23 most planning and permitting functions to the Planning Commission and including the Assembly only
24 as a check against gross deviation from ordinance standards. Under this deferential standard of review,
25 even if the Assembly would reach a different conclusion if presented the matter in the first instance,
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1 it must affirm unless the limited circumstances set forth above are proven by the appellant. By the
2 same token, mere disagreement by appellants with the Commission’s decision will not suffice to see
3 it overturned.

4
5 ***Discussion.***

6 Parking and Access Issues.

7 Development permits within the city and borough are governed by the CBJ Land Use Code,
8 Table of Permissible Uses, (“TPU”), CBJ 49.25.300. The TPU sets out the type of permit required
9 for each listed type of development for each type of zoning designation. Under the TPU, a major
10 subdivision like that proposed for Spuhn Island, in the Rural Reserve zoning district, requires a
11 conditional use permit.

12 Accordingly, Community Development Department staff and the Commission analyzed the
13 subdivision plat application under the standards set forth in the Land Use Code for a conditional use
14 permit, CBJ 49.15.330. The Land Use Code, at CBJ 49.15.330(d)(5)(B), provides that a conditional
15 use permit may be denied if the Commission finds that the development:

16 Will substantially decrease the value of or be out of harmony with property in the
17 neighboring area

18 In this case, the Commission found, despite an initial staff recommendation to the contrary, that
19 Spuhn Island Subdivision, as conditioned, will not violate this provision. On appeal, of course, the
20 question is not whether the provision would be violated, but whether the Commission had substantial
21 evidence to support its finding that the property values/harmony provision will not be violated. Mere
22 impacts on the neighborhood will not suffice; a substantial decrease in property value would be
23 required. Again, on appeal, to reverse the Commission, the Assembly would have to find that the
24 Commission did not have substantial evidence to fail to find that the subdivision would substantially
25 decrease the value of the neighboring property, or be out of harmony with it.

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1 The Commission held several hearings on the proposed preliminary plat, including a
2 neighborhood meeting, two reviews by the Wetlands Review Board, and three meetings of the full
3 Commission. Through these hearings, the Commission took testimony from the neighbors and
4 developers, reviewed staff reports and other materials, and amassed a record comprising some 700
5 pages. The record indicates that the Commission took the neighbors' comments seriously, and
6 struggled to find an acceptable solution to a difficult problem. The neighbors do not have a right to
7 have the island entirely undeveloped indefinitely, but do have a right to see their concerns addressed
8 within reasonable limits.

9 Parking and access issues are addressed by the Commission through adoption of Conditions 4
10 and 5 to the preliminary plat approval. Those conditions provide:

11 4. Prior to final plat recording the applicant shall provide five parking spaces for
12 the owners of lots in Spuhn Island Subdivision. The parking spaces will be
13 located within a reasonable walking distance of marine access facilities, located
14 within 5 nautical miles of Spuhn Island. To guarantee the continued presence of
the parking spaces, a deed restriction, or some other binding document, must be
recorded on the property providing the parking spaces, prior to final plat
recording.

15 5. Prior to final plat recording the applicant must provide a financial guarantee,
16 as provided for in CBJ 49.55.010, for 25 parking spaces provided as follows:

- 17 (A) Providing five additional parking spaces for the owners of lots
18 in Spuhn Island Subdivision within five years of recording of the
19 final plat of Spuhn Island Subdivision.
 (B) Providing 10 additional spaces within ten years of final plat
recording.
 (C) An additional ten spaces within fifteen years of final plat
recording.

20 Appellant argues that these conditions provide "no solution" to the problem of Spuhn Island
21 Subdivision residents using the Smugglers' Cove neighborhood for access to the island, and the
22 impacts this may cause. In particular, appellant argues that "a lease of private land for parking at the
23 end of the Fritz Cove Road, adjacent to the Cove, will fulfill the letter of the parking condition." (At.
24 br. at p. 6). Spuhn Island terms the parking condition "flexible," and points out that the requirement
25 extends into the indefinite future.
26

1 In general, the proposed large-lot, high-end, residential development is very much in harmony
2 with the neighborhood; the only real neighborhood harmony question is that of parking and marine
3 access to the island. Largely by adoption of Conditions 4 and 5, but through other measures as well,
4 the Commission and developer have tried to discourage access to the island through the use of the
5 Smugglers' Cove neighborhood, and have attempted to direct island traffic and marine access through
6 Statter Harbor at Auke Bay. For example, in addition to the requirements of Conditions 4 and 5, the
7 developer is required to build a dock on the island with capacity for 30 vessels at least 20 feet in length
8 (Condition 6); also, Spuhn's covenants, conditions, and restrictions on the lots are intended to
9 discourage access at Smugglers' Cove.

10 It may not be the best possible solution to the problem; it certainly is not the neighbors' preferred
11 solution, but it will suffice to meet the code requirements as viewed through the standard of review.
12 Adding parking and other facilities at the end of Fritz Cove Road would only serve to exacerbate the
13 present congestion by encouraging additional use of the area.

14 The Assembly finds, based in part on the comments of the developer and CDD Planner Nathan
15 Bishop at oral argument, that merely adding a parking lot at the end of Fritz Cove Road for use by
16 island residents will not meet the intent of the Condition 4. The Assembly wishes to make clear that
17 "marine access facilities" in Condition 4 means more than mere parking next to the Cove. To the
18 extent necessary to clarify Condition 4, the Assembly modifies the permit to make clear that "marine
19 access facilities" means more than a beach at the end of the road, with or without parking. To find
20 otherwise would deprive the phrase of any meaning; the entire shoreline of the City and Borough
21 would qualify.

22 As clarified above, the Planning Commission's issuance of this permit is supported by substantial
23 evidence.

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1 “*Spot zoning.*”

2 Appellants argue that approval of the preliminary plat constitutes illegal “spot zoning.”

3 “Spot zoning” is defined as:

4 Granting of a zoning classification to a piece of land that differs from that of the
5 other land in the immediate area.

6 BLACK’S LAW DICTIONARY. Alaska case law provides a similar definition.

7 Since the approval of the preliminary plat for Spuhn Island Subdivision does not involve a re-
8 zoning decision, the question of spot zoning does not arise. Appellant’s analogies are unavailing.

9 Comprehensive Plan.

10 Appellants argue that the subdivision would violate the requirements of the CBJ Comprehensive
11 Plan.

12 Under the CBJ Land Use Code, the Comprehensive Plan does not override the requirements of
13 ordinance; in fact, the contrary is true, as provided in CBJ 49.05.200(b):

14 (b) The comprehensive plan adopted by the assembly by ordinance contains the
15 policies that guide and direct public and private land use activities in the City and
16 Borough. The implementation of such policies includes the adoption of
 ordinances in this title. Where there is a conflict between the comprehensive plan
 and any ordinance adopted under or pursuant to this title, such ordinance shall
 take precedence over the comprehensive plan.

17 Under this ordinance, it is clear that the specific provisions of the Table of Permissible Uses,
18 permitting a major subdivision on Spuhn Island upon issuance of a conditional use permit, override
19 the general, aspirational language of the CBJ Comprehensive Plan. Accordingly, the Assembly will
20 not reverse the Planning Commission on this basis.

21 Thane Neighborhood Association.

22 Appellant argues that approval of the preliminary plat would violate the “phasing” admonitions
23 of the *Thane* Alaska Supreme Court case. As the Court decided, the *Thane* holding is violated when
24 a project is separated into phases permitted separately without proper consideration of the cumulative
25 environmental impacts of the complete project, (“phasing is prohibited if it can result in disregard of
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1 the cumulative potential environmental impacts of a project.” *Thane* at p. 20). The neighbors are
2 concerned that in the future the remaining large lots on the island will be further subdivided, adding
3 impacts which will cumulate with those of the present proposed subdivision, and therefore, the
4 cumulative impact of the entire development would not be addressed. They liken this to the *Thane*
5 case, in which a mine permit was issued without including the associated proposed tailings dam.

6 In this case, however, *Thane* can be distinguished. In applying *Thane*, the Planning Commission
7 has to look at the question of whether the developer’s application is complete, whether it is addressing
8 only part of “a project,” and determine just what the “project” comprises. In this case, any proposed
9 subdivision will stand – or fall – on its own merits; when, and if, the rest of the island is subdivided,
10 such subdivision will have to go through the full application and Commission review process.

11 On this issue, the Supreme Court noted:

12 The more interlinked the components of a project are and the greater the danger
13 that phasing will lead to insufficient consideration of cumulative impacts, the
14 greater the need to bar phasing.

15 *Id.*

16 In Spuhn Island Subdivision, future possible subdivisions do not form “components of a project.”
17 The present proposed subdivision and any future subdivisions on the island are not “interlinked
18 components” of “a project.”

19 While the *Thane* case restrictions apply to this case, they don’t require rejection of the
20 preliminary plat.

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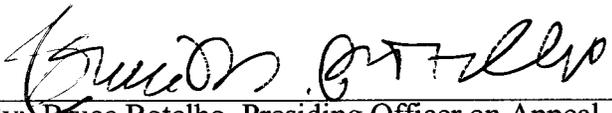
Conclusion.

The appeal is denied for the reasons outlined herein. Appellants have not met their burden of proof in light of the standard of review required by the CBJ Appeals Code, CBJ 01.50.070.

IT IS SO ORDERED.

DATED this 18th day of February, 2005.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA


By: Bruce Botelho, Presiding Officer on Appeal

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