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BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

KELLY CORRIGAN and
MARY KAY PUSICH,

Appellants,

vs.

CBJ PLANNING COMMISSION,

Appellee.

USE 2007-0037
USE 2007-0053
USE 2007-0054

DECISION ON APPEAL

Introduction.

Appellants Kelly Corrigan and Mary Kay Pusich brought a timely appeal of the decision of the CBJ Planning Commission to grant the three conditional use permits listed above, to Bicknell, Inc., to develop cottage housing under the recently-adopted cottage housing ordinance, CBJ 49.15.700.¹ Appellants are the developers of an adjacent subdivision. Bicknell, Inc., declined intervention in the appeal.

Appellants' main argument is that, while Bicknell, Inc., applied for, and received, three conditional use permits for three cottage housing developments on three lots, in substance, Bicknell is constructing a single cottage housing development with 22 units, thereby exceeding the maximum 12 units allowed by the Land Use Code in a cottage housing development. Appellants point out that the developments share a number of common elements such as one road system, one sewer system, one water system, common cottage designs, one access from Back Loop Road, a connected walkway system, a common drainage system, *etc.*, (see below) and therefore should be disallowed because they constitute in substance a single cottage housing development that exceeds the maximum 12 units.

¹Adopted as Ordinance 2005-52(b), January 30, 2006.

1 Appellants also argue that cottage housing development in this location violates one of the purposes
2 of the cottage housing ordinance because the developments are not “in-fill.”

3 The Planning Commission, defending the grant of the conditional use permits, notes that the
4 proposed developments are located on three separate lots, and argues that there is no provision in the
5 Land Use Code that prohibits separate cottage housing developments from occupying adjacent lots.
6 The Commission argues that each of the proposed developments on a single lot meets the definition
7 of “cottage housing development,” on a “cottage housing development lot,” and all other relevant
8 Land Use Code requirements. Each of the three lots would have 7 or 8 cottages clustered around a
9 common open space.

10 The Assembly finds that the Appellants have not met their burden of proof, and denies the appeal
11 for the following reasons: (1) the Land Use Code contains no prohibition on locating cottage housing
12 developments adjacent to one another; and (2) even an arguable “violation” of one of the listed
13 “purposes” of the cottage housing ordinance (CBJ 49.15.700) does not amount to sufficient
14 justification to vacate the permits.

15 **Standard of Review / Burden of Proof.**

16 Under the CBJ Code, development permitting decisions are made in the first instance by the
17 Planning Commission. Appellants bear the burden of proof. CBJ 01.50.070(b). In this case,
18 Appellants have the burden to show that the Commission’s decision violated the Land Use Code or
19 was “not supported by substantial evidence in light of the whole record,” CBJ 01.50.070(a)(1), *i.e.*,
20 “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” CBJ
21 01.50.010.

22 Alaska case law also provides that a decision “within the sphere of expertise of the Planning
23 Commission . . . is entitled to considerable deference.” *Lazy Mountain Land Club v. Matanuska-*
24 *Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995), citing *South*
25

1 *Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993) (“The majority rule,
2 and the one we adopt, is that judicial review of zoning board decisions is narrow and that a
3 presumption of validity is accorded those decisions.”)

4 **Discussion.**

5 At oral argument, counsel for Appellants displayed an enlarged copy of Record page 298 that
6 depicted the proposed cottage housing developments. Counsel pointed out the common elements
7 among the three developments, and argued that calling the proposal three developments rather than
8 one development places “form over substance.” The substance, Appellants argue, is that the proposal
9 comprises a single development exceeding the maximum number of dwelling units allowed under CBJ
10 49.15.760(b)(2).

11 The Commission approved three separate cottage housing developments to be located on three
12 separate lots. The question on appeal to the Assembly is whether that action violated the Land Use
13 Code or was not supported by substantial evidence in light of the whole record. Appellants point to
14 no provision of the Land Use Code or other law prohibiting adjacent cottage housing developments.

15 The Planning Commission explicitly addressed the precise question presented on appeal. After
16 consideration of the facts and arguments presented on appeal, the Assembly finds that the
17 Commission’s decision was supported by substantial evidence, and the Assembly agrees with the
18 decision.

19 Appellants’ second main argument is that cottage housing – any cottage housing – should not
20 be allowed in this location because it does not meet one of the purposes of the cottage housing
21 ordinance. Appellants argue that the development does not constitute “in-fill.”
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23 CBJ 49.15.700 provides:

24 **49.15.700 Purpose.**

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The purpose of this article is to:

- (a) Provide for development of housing that responds to changing demographics and smaller-sized households;
- (b) Provide for single-family cottage ownership in a neighborhood setting;
- (c) Support the efficient use of land and higher density in-fill in developed areas;
- (d) Provide additional opportunity for housing development; and
- (e) Provide standards for cottage housing development and design.

(Serial No. 2005-52(b), § 3, 1-30-2006).

One of the purposes of the ordinance is, indeed, “higher density in-fill in developed areas.” “In-fill” is not defined in the Code.

At oral argument, counsel for Appellants pointed to an aerial photo of the site which shows that the proposed subdivision is surrounded on two sides by raw land; on one side by Appellants’ subdivision; and on the fourth side by the Back Loop Road. Because of this, Appellant argues, the cottage housing cannot be termed “in-fill,” and, therefore, the conditional use permits should have been denied.

For the reasons outlined below, the Assembly will not reverse the Commission’s decisions on the basis of this argument. The “Purpose” section should be viewed as essentially aspirational, not as an enforceable mandate. The site is within the Urban Service Area boundary, on the Capital Transit route, and served by CBJ water and sewer; this will suffice as a working definition of “in-fill” for these purposes. Finally, the Purposes section is not an “adopted plan.” *See* 49.05.200(b)(1) (adopting listed plans).

1 The Land Use Code defines a “cottage housing development” as follows:

2 **49.80.120.**

3 **Cottage Housing Development.** A cottage housing development is a
4 cluster of four to fourteen cottages and common open area. A cottage
housing development shall have the following characteristics:

5 (1) Each cottage is of a size and function suitable for one to
6 three people;

7 (2) Each cottage has the construction characteristics of a
8 single-family house as set forth in this article;

9 (3) Cottages are developed as a detached dwelling, common
10 interest community, and share use of common elements such as a
common open area, tool shed, workshop and parking areas; and

11 (4) The site is designed with a coherent concept in mind,
12 including: shared common open area, off-street parking, access
13 within the site and from the site, and visually consistent
landscaping and architecture.

14 Each cluster of cottage housing units around a common area is a cottage housing
15 development on a “cottage housing development lot.”² Three cottage housing lots; three common
16 areas; three developments. The Land Use Code and proper planning requires that the three clusters
17 of cottage housing units, sewer, road, drainage, and water systems connect. CBJ 49.35.340 –
18 420(b).

19 Lot lines are not “form;” the cottage housing development ordinance – indeed, the entire
20 Land Use Code – is focused on development (uses) of *lots*. A “cottage housing development” is
21 built on a “cottage housing development lot.”
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25 ²A “cottage housing development lot” is the undivided lot on which the cottage housing
development takes place. CBJ 49.80.120.

Conclusion.

1 The appeal is denied; Appellants have not met their burden of proof. The Community
2 Development Department and the Planning Commission analyzed the relevant issues thoroughly
3 and correctly, and more than met all requirements of due process.

4 The Assembly – without expressing a preference – asks the Commission to look into the
5 question of whether the Code should limit the proximity of cottage housing developments to one
6 another.

7 This is a final administrative decision of the Assembly of the City and Borough of Juneau,
8 Alaska. It may be appealed to the Juneau Superior Court, pursuant to the Alaska Rules of Court,
9 if such appeal is filed within 30 days.

10 IT IS SO ORDERED.

11 DATED this 23rd day of June, 2008.

12
13 Assembly of the City and Borough of Juneau, Alaska

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16 By: Mayor Bruce Botelho
17 Presiding Officer on Appeal

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