

BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

ANTHONY ZENK, RUTH BAUMGARTNER,
ELIZABETH MIYASATO, G OLE OLSON
and DAVID WILSON,

Appellants,

vs.

CBJ PLANNING COMMISSION,

Appellee,

and

DAVID LENDRUM,

Appellee/Intervenor.

Appeal of:
Notice of Decision
CDD File No. USE2013-0027

DECISION ON APPEAL

Appellants Anthony Zenk, Ruth Baumgartner, Elizabeth Miyasato, G. Ole Olson and David Wilson filed an appeal of the Planning Commission's Notice of Decision, dated February 13, 2014, granting a conditional use permit for a commercial greenhouse to David Lendrum, operating as Landscape Alaska (File No. USE2013 0027). Mr. Lendrum intervened in the appeal.

After the record was prepared, Appellants filed two motions to supplement the record dated April 24, 2014 and April 29, 2014. (A third motion to supplement the record was filed on April 30, 2014 but subsequently withdrawn.) Appellants' motions to supplement the record were granted in part and denied in part by order dated June 4, 2014. On June 5, 2014, Appellants filed a motion to reconsider. That motion was denied on June 10, 2014. Appellants filed a fourth motion to supplement the record on June 23, 2014. That motion was denied on June 25, 2014 (with notice to the Municipal Clerk to forward Appellants' motion to the Community Development Department to review for possible permit violations.)

All parties submitted briefing. Oral argument in front of the Assembly was held on August 18, 2014. The Appellants represented themselves. The Planning Commission and Mr. Lendrum were represented by counsel. After argument, the Assembly deliberated in closed session. When deliberations concluded, the Assembly directed the Municipal Attorney to prepare a draft decision. As required by CBJ 01.50.140, the draft decision was circulated to the parties and an opportunity to comment on the draft was provided.

For the reasons stated below, the appeal is denied.

I. The Planning Commission's Decision was Supported by Substantial Evidence in Light of the Record as a Whole.

The appeal code requires the Assembly to uphold the decision being appealed unless “the appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing.” (CBJ 01.50.070) “Substantial evidence” is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (CBJ 01.50.010.) The Alaska Supreme Court has held that with respect to decisions made within its “sphere of expertise,” a Planning Commission’s decisions are “entitled to considerable deference.”¹ According to the Supreme Court, in reviewing a Commission’s zoning decisions, a “presumption of validity” must be applied.² Per CBJ 01.50.070(b), the Appellants have the burden of proof.

The Appellants have not met their burden in this case. The Appellants clearly disagree with many of the factual findings relied upon by the Commission. But the fact that the Commission did not find the concerns raised by the Appellants sufficient to warrant denying the permit is not a legally sufficient basis upon which we could reverse the Commission’s decision. The Assembly may not substitute its judgment for that of the Commission.

¹ *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995).

² *South Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993).

As the use proposed by Mr. Lendrum was an appropriate use according to the Table of Permissible Uses, the Commission was required to adopt the director's determination as articulated in the February 3, 2014 staff report unless the Commission found by a preponderance of the evidence that the determination was in error. (CBJ 49.15.330(e)(2)) The Commission did not make such a finding.

Once a decision is adopted, the Commission may impose permit conditions in accordance with CBJ 49.15.330(g) if it finds doing so is warranted under CBJ 49.15.330(f).

The Appellants argue that the Commission should have nevertheless denied the permit under CBJ 49.15.330(f) or alternatively, that the conditions imposed were insufficient. Appellants argue that the Planning Commission's decision should be reversed for failing to adequately address either the negative impacts of the proposed business on their neighborhood or their concerns. The record as a whole clearly indicates, however, that the Commission considered – either at the February 11, 2014 hearing or as presented in the Staff report – buffers, traffic and road access, storm water runoff, neighborhood harmony and security, the impact of the proposed business on the neighborhood's property values and relevant policies articulated in the City and Borough of Juneau Comprehensive Plan. As a result of the evidence presented, the Commission found CBJ 49.15.330(f) warranted setting conditions in accordance with CBJ 49.15.330(g). The fact that the Commission reached a different conclusion after hearing the evidence than the Appellants might have liked is not enough to overcome the presumption of validity we must afford Planning Commission decisions.

II. The Planning Commission was Supported by Adequate Written Findings

The Assembly may set aside an agency decision “if the decision is not supported by adequate written findings or the findings fail to inform [the Assembly] of the basis upon which the decision appealed from was made.” Because we find the notice of decision and the record as a

whole sufficient to provide us with a clear understanding of the basis of the Commission's decision, we find the Planning Commission's findings sufficient under CBJ 01.50.070(a)(2).

III. The Planning Commission Followed its Rules of Procedure

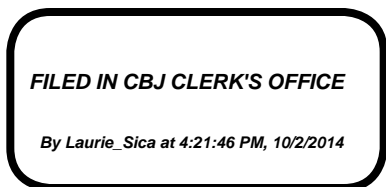
The Appellants argue that the Planning Commission's decision should be set aside because the Commission only afforded the opposing neighborhood residents three minutes to speak, while the applicant was provided "unlimited time to speak and refute testimony and concerns by neighborhood residents." (Appellants' Brief at p. 17.)

The consideration of a conditional use permit application is not an adversarial proceeding. Because we find the Commission properly adhered to its rules of procedure with respect to hearing public testimony, we find the Appellants failed to meet their burden under CBJ 01.50.070(a)(3).

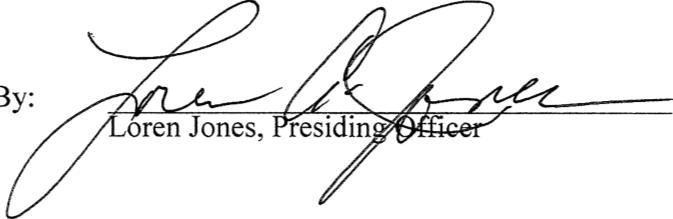
IV. Conclusion

In light of the deferential standard of review the Assembly must apply to Planning Commission zoning decisions and the applicable burden of proof, we must deny the appeal. We find that the record as a whole provided the Planning Commission with substantial evidence to support it granting a conditional use permit (USE2013 0027) for a commercial greenhouse to the applicant. The Appellants have failed to meet their burden of proof. The Commission's decision is affirmed.

DATED this 30th day of September, 2014.



ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: 
Loren Jones, Presiding Officer