OFFICE OF THE MUNICIPAL CLERK
CITY AND BOROUGH OF JUNEAU

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Clerk's Certification of Assembly Action

Re: *Bicknell v. Planning Commission and Territorial Sportsmen*

I HEREBY CERTIFY that at its regular meeting of August 31, 2015, The Assembly of the City and Borough of Juneau recessed into executive session to deliberate regarding adoption of the attached proposed decision in the above-referenced appeal. Upon returning from executive session the Assembly discussed the case and took action as set forth in the attached verbatim transcript, which I have prepared by listening to an audio recording of the meeting.

Digitally signed by Laurie J Sica
DN: cn=Laurie J Sica, o=City and Borough of Juneau, ou=Office of Municipal Clerk, email=laurie.sica@juneau.org, c=US
Date: 2015.09.10 13:44:47 -08'00'

Laurie Sica
Municipal Clerk

Date: September 10, 2015

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Transcript

Re: *Bicknell v. Planning Commission and Territorial Sportsmen*

Excerpt from a portion of the Regular Assembly Meeting, August 31, 2015
Begin - 10:33 p.m.:

Mayor Sanford: Ms. Becker, can you move us into executive session?

Mary Becker: Thank you, Mr. Mayor. I move that we go into executive session to discuss the proposed Bicknell decision on appeal, per CBJ 01.50.140.6.3, and ask for unanimous consent.

Mayor Sanford: Is there any objection? Is there any objection from the public of us going into executive session? Seeing and hearing none, if you want to stay, I don't know how long this is going to take us, but you can see we have extended our time to 11:30, and if you want to take chairs out there and sit you are more than welcome to. So we will take a little five minute break right here and if you come back in five minutes we will get going.

11:19 p.m.

Mayor Sanford: Mr. Nankervis, I want to make sure you are there (on the telephone).

Jerry Nankervis: I am, thank you.

Mayor Sanford: OK, loud and clear, thank you. So, we will come back into regular meeting. During executive session we discussed the decision brought down by the hearing officer, Mr. John Corso, on the Bicknell v Planning Commission and Territorial Sportsman proposed decision. So, what is the wishes of the Assembly, Ms. Crane?

Karen Crane: Well, I will start with a motion that we move to concur with the

hearing officer that this appeal is ultimately a legislative decision of this body.

Mayor Sanford: Is there any objection to that first step? Hearing and seeing none, so ordered. Ms. Crane?

Karen Crane: I would further make a motion to move to concur with the Planning Commission that the proposed rezone did not substantially conform with the land use maps and we therefore decline to have an ordinance brought before us.

Debbie White: I object.

Mary Becker: I object.

Mayor Sanford: Thank you. Did you get all of that? I'm going to depend on you Ms. Sica and not repeat it myself.

Laurie Sica: Motion, by Crane, to concur with the Planning Commission that the rezone did not substantially conform with the land use maps and to decline to have an ordinance brought before the Assembly. And it was objected to by Ms. White and Ms. Becker.

Mayor Sanford: OK, so any discussion?

Debbie White: You know, I think the staff recommendations were a little bit closer to what is actually going on and while I know that this is relatively young land which is experiencing isostatic rebound and the land is changing, the fact is that it is adjacent to a very busy airport, it is really close to two heliports, a four lane highway, window manufacturing, welding shop, Fred Meyers, it is not wilderness. And, I just, whatever it is today, in 20 years it is going to be another 20 inches out of the wetlands status. I would prefer that we put forward a rezoning ordinance.

Jerry Nankervis: Mr. Mayor?

Mayor Sanford: Mr. Nankervis.

Jerry Nankervis: Mr. Mayor, I would concur with Ms. White. I also object to the motion. I sat through, I believe, all of the Planning Commission meetings on this topic and then I sat through a year and a half, almost two years, waiting for this appeal to reach us. And I know as I sat through the Planning Commission meetings I disagreed with the commissioner's decision at the time and I still do, thank you.

Mayor Sanford: Thank you Mr. Nankervis. Ms. Becker, anything?

Mary Becker: I agree. I think we should rezone it and let that land be used for something that would be valuable to our community.

Mayor Sanford: Anyone else down the way? Mr. Kiehl.

Jesse Kiehl: Thank you Mr. Mayor. I will support the motion. The land is not zoned anything like wilderness and the land owner has significant rights in its current zoning. At the same time, the Planning Commission did spend vast amounts of time as Mr. Nankervis said. I won't pretend I read everything, but I read hundreds of pages of staff reports, public comments and minutes, and I think former Planning Commissioner Bishop may have been the most outspoken when he talked about the will of the public. But others talked about the land use map to the Comprehensive Plan and so nobody should get the impression that my vote tonight has the effect of preserving this land untouched in its current zoning. There are, there is a lot of development potential to it, but I think the Planning Commission ultimately got this one right, so I will support the motion.

Mayor Sanford: Thank you. Anyone else? So we have objection, can we get a roll call please, Ms. Sica?

Laurie Sica: Mr. Jones?

Loren Jones: Yes.

Laurie Sica: Ms. Gladziszewski?

Maria Gladziszewski: Yes.

Laurie Sica: Mr. Kiehl?

Jesse Kiehl: Yes.

Laurie Sica: Mr. Nankervis?

Jerry Nankervis: No.

Laurie Sica: Ms. Troll?

Kate Troll: Yes.

Laurie Sica: Ms. White?

Debbie White: No.

Laurie Sica: Mrs. Becker?

Mary Becker: No.

Laurie Sica: Ms. Crane?

Karen Crane: Yes.

Laurie Sica: Mayor Sanford?

Mayor Sanford: No.

Laurie Sica: Motion carries.

Mayor Sanford: Thank you. Ok, Ms. Mead, is there anything else we need to do on this issue?

Amy Mead: You need to make a decision about the rest of the decision. You need to accept it as written, modify it, or reject it. There was a motion that you concurred with Mr. Corso's final conclusion that this is a legislative decision, but as to the rest of the decision, what is your wish?

Mayor Sanford: Mr. Kiehl?

Jesse Kiehl: Thank you Mr. Mayor, I move that as to the remainder of the decision we adopt the hearing officer's findings, except for his finding that the decision of the Planning Commission is not supported by adequate written findings.

Mayor Sanford: Is there objection? Hearing none, so ordered.

Mayor Sanford: Anything else Ms. Mead?

Amy Mead: No.

End - 11:25 p.m.

FROM THE DESK OF

JOHN CORSO

August 20, 2015

Re: *Bicknell v. Planning Commission and Territorial Sportsmen*; proposed decision

Dear Mayor Sanford and Assemblymembers:

Here is my proposed decision in the Bicknell appeal together with the Planning Commission's objection to the proposed decision, and my response; all placed before the Assembly at a regular or special meeting as required by the appellate code. At the meeting, the Assembly has three options:

- ***Take no action at this meeting.*** The proposed decision will be deemed adopted and shall be the Assembly's decision in this case. The result will be as specified in the findings on page 22: the Planning Commission's decision will be set aside and the question of whether to grant or deny a rezone will be forwarded as a legislative proposal to the Assembly. The findings expressly disavow any recommendation regarding the introduction or adoption of the legislation.
- ***Reject the proposed decision by an affirmative vote.*** The form of motion would be "I move to reject the proposed decision." If the motion passes, the matter shall be immediately referred to me for a rehearing of the appeal after notice to the parties; provided, the Assembly may refer the appeal to a different hearing officer, may limit the scope of the rehearing to specified issues, may place similar or different limits or conditions on the rehearing or reconsideration by the hearing officer, may remand the matter back to the Planning Commission, or may rehear the matter itself after notice to the parties.
- ***Modify the proposed decision by affirmative vote.*** The form of motion would be "I move to modify the proposed decision by [additions, deletions, or corrections to the text of the proposed decision]"

Whichever of these options the Assembly selects, it should do so without receiving testimony or evidence of any nature. All documents in the case and a recording of the hearing are available at bicknellappeal.com.

Thank you for the opportunity to work on this interesting case. If I may be of further assistance, please advise the City Attorney and I will be happy to work with her to again serve the Assembly.

copies: Parties
City Attorney

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Before the Assembly of the City & Borough of Juneau

On Appeal from the Planning Commission

Bicknell, Inc.
Appellant
v.
CBJ Planning Commission
Appellee
and
Territorial Sportsmen, Inc.
Appellee-Intervenor

CCD File
AMD 2013 0015

- The Planning Commission decision is set aside because it is not supported by adequate written findings. The Commission diligently examined facts and opinions over a fair and lengthy hearing process, then adopted wholly inadequate findings. In effect, the Commission ran for 95 yards, then dropped the ball.
- It is not necessary to remand this case to the Planning Commission to address differences between the 2008 and 2013 comprehensive plans because for purposes of this appeal there is no difference.
- Denial of the requested rezone does not constitute an unlawful taking without just compensation because Bicknell does not have a right to a rezone.
- Whether by remand back to the Planning Commission, by referral from this appeal, or by a third rezone application and a protest under the new rezone procedures, only the Assembly can resolve this matter by adopting or rejecting an ordinance. Justice is served by referring the case now.

This summary is for the convenience of the reader and is not part of the Proposed Decision. The official proposed findings are on page 22.

Proposed Decision

I. Factual and Procedural Background

This appeal concerns the use of 82 acres of land located near the east end of the Juneau International Airport runway ("the Property").[1] The Property is currently zoned Rural Reserve (RR) under a Comprehensive Plan Future Land Use Designation of Resource Development.[2] The owner, Bicknell Inc., seeks to have the Property rezoned to a mixture of Industrial, Light Commercial, and Rural Reserve.

1 The legal description is USS 1568 TR B. The CBJ Parcel Code Number is 5-B14-0-102-007-0.
2 (Record, page 30)

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The Property has been in use as a gravel dredge pond since being granted its original CBJ permit by the Assembly in 1965. The pit and access road were opened in 1966. The CBJ permit was renewed as a gravel extraction permit in 1997, then again as a conditional use permit in 2007.[3] The CDD staff report for the 2007 permit—approved by the Planning Commission on its consent agenda—noted that the applicable 1995 Comprehensive Plan "categorizes this site as '*Identified for Future Park*'", but that "The site is private property and the applicant has the right to use the property in conformance with current zoning.[4]

The 1995 Comprehensive Plan was updated[5] in 2008. The sequence of relevant procedural events thereafter is:

July, 2012	Bicknell submits, then withdraws an application to rezone the Property to a mixture of Industrial and Light Commercial.
August 27, 2012	The Assembly amends the rezoning standards at CBJ 49.75.120 to allow a rezone which is in "substantial conformance" with land use maps of the Comprehensive Plan. Previously, the ordinance had prohibited uses which "violate" the maps.
February 2, 2013	Bicknell applies for an amendment to Comprehensive Plan Map G from Resource Development to a mix of Industrial, General Commercial, and Resource Development in the area of Honsinger Pond. Staff recommends approval.
April 9, 2013	The Commission denies the requested map amendment but does not adopt findings.
May 10, 2013	At the request of the Law Department, CDD staff makes "an attempt to draft the attached proposed findings based on the recorded deliberations of the Commission at the April 9, 2013 hearing, for the Commission's review and consideration."[6]
May 14, 2013	The Commission approves the 2013 Comprehensive Plan update.
May 17, 2013	The Commission issues a Notice of Decision denying the map amendment. The NOD incorporates staff's proposed findings without change.

3 Toner-Nordling & Associates, Inc. application for CBJ use permit 07-13, April 11, 2007. Staff report, April 18, 2007. I take official notice of CDD records pursuant to CBJ 01.50.130, Chapter 8, Paragraph G(7) of the Alaska Hearing Officer's Manual, and Rule 201(b) of the Alaska Rules of Evidence. The parties are free to object to noticed evidence in their comments to this Proposed Decision. All officially noticed records were accessed via public CBJ websites.

4 Staff Report, USE2007-00013, page 4. (Emphasis in original, citation omitted.)

5 "Updated", like "review" and "amendment" is a term of art in CBJ comp plan procedure. As the current Plan notes, at page 229, "It is important to highlight the distinction between the Planning Commission's 'review' of the *Plan*, their entertaining a specific 'amendment' to the *Plan*, and 'updating' the *Plan*." Basically, review means to look at, amendment means limited review and changes, and update means extensive review and changes.

6 Memo, CDD staff to Planning Commission re AME2013 0007, May 10, 2013.

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September 18, 2013	Bicknell submits the current rezone application. CDD staff recommends approval of Industrial and denial of Light Commercial rezoning.
November 4, 2013	The Assembly adopts Ordinance 2013-26, amending CBJ 49.05.200 to incorporate the 2013 Comprehensive Plan update in the CBJ code.
November 26, 2013	The Commission takes up Bicknell's rezone request.
December 4, 2013	The 2013 Comprehensive Plan update becomes effective.
December 10, 2013	The Commission denies the rezone. For findings, it slightly amends then adopts findings from its denial of Bicknell's map amendment request. Notice of reconsideration is given.
January 14, 2014	A motion for the Commission to take up reconsideration fails. A motion to rescind is ruled out of order.
January 15, 2014	The Commission issues a Notice of Decision incorporating the findings .
February 3, 2014	Bicknell files this appeal.
September 29, 2014	The Assembly adopts Ordinance 2014-14(c)(am) amending CBJ 49.75.130 to provide a legislative protest rather than an adjudicatory appeal procedure for rezone denials. The effective date of the amendment is "30 days after current, outstanding appeals are resolved."
April 6, 2015	The Assembly amends Ordinance 2014-14(c)(am) to make it effective "30 days after April 16, 2015".

II. Changed Laws; which version rules?

A. Changes to the Rezone Procedures Ordinance

The history summarized above shows how the substantive and procedural law applicable to this case has changed since Bicknell applied for a rezone. These changes are important issues in the case.

Rezoning is governed by Article I of CBJ 49.75, the substantive section of which has not changed during this case and provides:

> **49.75.120 Restrictions on Rezonings**. Rezoning requests covering less than two acres shall not be considered unless the rezoning constitutes an expansion of an existing zone. Rezoning requests which are substantially the same as a rezoning request rejected within the previous 12 months shall not be considered. A rezoning shall only be approved upon a finding that the proposed zoning district and the uses allowed therein are in substantial conformance with the land use maps of the comprehensive plan.

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Rezoning procedures are governed by CBJ 49.75.130. This ordinance has a tortured history that reflects an essential but problematic characteristic of rezones: they are accomplished by changing zoning and, if necessary, comprehensive plan maps[7] that were adopted by ordinance. Only the Assembly can change an ordinance, and must do so in accordance with Charter requirements. It has long been the case that a rezone follows the procedure for a major development permit, with the proviso that a Commission decision for approval is only a recommendation to the Assembly, which must act on it by adopting or rejecting an ordinance. However, until 2012, a Commission decision to *deny* a rezone was a procedural orphan, unmentioned in the code but handled the same way—as a recommendation— by a code interpretation.[8] On April 2, 2012, the Assembly addressed this situation by adopting Ordinance 2012-11, which amended CBJ 49.75.130 by the addition of a new subsection (3), providing that a rezone denial could be appealed to the Assembly with the usual procedures under the general CBJ appellate code.

> **49.75.130 - Procedure.** A rezoning shall follow the procedure for a major development permit except for the following:
>
> (1) The commission decision for approval shall constitute only a recommendation to the assembly.
>
> (2) As soon as possible after the commission's recommendation, the assembly shall provide public notice and hold a public hearing on the proposed rezoning. A rezoning shall be adopted by ordinance, and any conditions thereon shall be contained in the ordinance. Upon adoption of any such ordinance, the director shall cause the official zoning map to be changed in accordance therewith.
>
> (3) The commission decision for denial shall constitute a final agency decision on the matter which will not be presented to the Assembly unless it is appealed to the Assembly in accordance with CBJ 49.20.120.[9]

The use of legal appeal procedures for a rezone denial but not for an approval was described by the City Attorney as a "middle course" that would "provide due process for the applicant and a check against error in the Commission's decision, without putting the decision on an equal footing with

7 Zoning maps are adopted by reference in ordinances codified at CBJ 49.25.110. The Comprehensive Plan and its included maps are likewise adopted and codified at CBJ 49.05.200. The CBJ charter at §5.2(f), in what may be its most awkwardly worded section requires that "In addition to other actions required by this Charter, those actions of the assembly shall be by ordinance which: … (f) Adopt or modify the official map, platting or subdivision controls or regulations, or zoning controls."

8 Memo, City Attorney to Assembly, March 28, 2012, at ¶3.

9 CBJ 49.20.120 is a part of the land use code, but adopts CBJ 01.50, the appellate code, by reference with modifications not relevant here.

[an approval]."[10] The Assembly adopted the ordinance by unanimous consent without discussion.[11]

The rezone-denial appeal procedure established by Ordinance 2012-11 has been used twice: in *Harris v. Planning Commission*[12] and in this case. In *Harris*, a property owner requested a Comprehensive Plan map amendment from MDR, medium density residential, and a rezone from D-10 to Light Commercial for his property at 9150 Atlin Drive. He requested that the Comprehensive Plan amendment be put on hold while he pursued the zoning map amendment. The Commission denied the rezone on the grounds suggested by CDD staff in its report, "LC Zoning does not substantially conform with the Land Use Maps of the Comprehensive Plan."[13] On appeal, the Assembly reversed and directed the City Attorney to draft an ordinance providing for the requested rezone and forward it to the Assembly for introduction.

The procedure described above lasted until May 6, 2015, the effective date of Ordinance 2014-14(c)(am), the current law. The ordinance amended rezone procedures to create a "protest" procedure for people dissatisfied with a Commission rezone decisions. The procedure following Commission approval is much the same as before: staff prepares an ordinance amending the zoning map[14] and presents it to the Assembly. Interested parties then attack and defend it politically as with any ordinance. The big change was to procedures following a denial. Under Ordinance 2014-14, the disappointed applicant files a legislative protest, not a legal appeal. The net effect of the two procedures is much the same as the informal interpretation-based procedure employed before Ordinance 2012-11: the protest of a Commission decision—whether approval or denial—is handled by the Assembly legislatively. Ordinance 2014-14 adds one entirely new feature: if the Assembly "approves the zoning map amendment with modifications" the ordinance "shall become effective only with the written consent of the owner(s) of the property to be rezoned."[15]

10 March 28 memo, *supra*, at ¶5. The Manager's Report accompanying Ordinance 2012-11 said that the appeal procedure was suggested by a landowner in the Atlin Drive area affected by a 2011 rezone denial.
11 Minutes, Assembly Meeting of April 2, 2012, page 4.
12 *Harris v. CBJ Planning Commission*, CDD File No. AME2013 0006 (March 19, 2014)
13 Minutes of Planning Commission Meeting of September, 24, 2013, page 14, and attached Staff Report, September 19, 2013, page 12.
14 The ordinance does not address a rezone that requires amendment of the Comprehensive Plan maps.
15 This provision was added at the request of Assemblymember Kiehl at the September 22, 2014 meeting of the Assembly Committee of the Whole (Minutes, p. 3) Mr. Kiehl cited the Anchorage Municipal Code as the source of this idea, an apparent reference to AMC 21.03.160(D)(8)(b), which requires owner consent, but only to the modifications rather than the entire ordinance. A consent provision such as this, which allows owners to withhold consent for any reason or no reason, is subject not only to being gamed among property owners in a multi-owner rezone, but to attack as an unconstitutional standardless delegation of legislative power to private citizens. *Eubank v. City of Richmond*, 226 U.S. 137, 141 (1912)

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Which procedure to apply in this case; the legal appeal system of Ordinance 2012-11 or the protest system of Ordinance 2014-14(c)(am)? The new ordinance was first adopted by the Assembly at its regular meeting of September 29, 2014 with an effective date of "30 days after current outstanding appeals are resolved". This language was suggested by Assemblymember Troll who said she did not want to change any rules mid-stream on any appeals underway. The City Attorney noted that an unidentified pending appeal would otherwise be directly effected by the ordinance.[16] At the time, this case was "the only relevant outstanding appeal" and was "understood at the time to be close to resolution" according to the Manager's Report accompanying the ordinance when it was revisited by the Assembly at its regular meeting of April 6, 2015.[17] The purpose of the revisit was to deal with the reality that this case was not, in fact, "close to resolution", that the Commission had a new round of rezone applications coming up, and the new procedures were needed right away. Accordingly, the effective date of the April 6 ordinance was amended to the usual "30 days after its adoption."

The Commission argues that "Although the Assembly specifically described that ordinance 2014-14 does not apply to this appeal, the protest provisions of Ordinance 2014-14 provide the proper means for the legislative body to resolve the matter."[18] Bicknell opposes this view, arguing that its appeal was filed on February 3, 2014, well before the amended effective date of May 6, 2015.[19] The Commission's argument conflates two different versions of the ordinance—one with a *Bicknell* trigger and one without—then dismisses without analysis the Assembly's intent in the first version to protect Bicknell from a mid-stream procedural alteration. The Commission would instead apply what it regards as the more proper second version of the ordinance and thereby compel Bicknell to start all over again.

(lack of discretion in the streets committee to determine whether a building line should be established when neighbors along the street could make such determination held unconstitutional delegation of legislative authority); *Thomas Cusack Company v. City of Chicago*, et al., 242 U.S. 526 (1916) (Property owners could waive an existing prohibition on billboards); *Washington ex rel. Seattle Title Trust Company, Trustee, etc. v. Roberge, Superintendent of Building of Seattle*, 278 U.S. 116 (1928)(standardless delegation allowing neighbors to withhold consent for any or no reason is repugnant to the due process clause of the Fourteenth Amendment because it subjects one property owner to the whim and caprice of another). Under this line of cases, the distinction between "waiver" and "consent' is crucial.

16 Minutes, September 29 2014 Assembly Meeting, page 5

17 Minutes, April 6 2015 Assembly meeting, page 18

18 Planning Commission Answering Brief, page 11

19 Bicknell also resists application of the amended effective date, arguing, as did Assemblymember Kiehl at the April 6 hearing, that the amending ordinance was adopted with insufficient public notice. Bicknell Reply Brief, page 3 and footnote 9. Given my disposition of the retroactivity issue, it is not necessary to reach the notice issue, which probably turns on whether the change in effective date is a "matter of major substance" under CBJ Charter §5.3(a).

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Bicknell has the better argument here, and it turns on the concept of a "retroactive"[20] law, a concept described by the Alaska Supreme Court:

> A statute will be considered retroactive insofar as it gives to pre-enactment conduct a different legal effect from that which it would have had without passage of the statute. A statute creates this different legal effect if it would impair rights a party had when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.[21]

In this case, Bicknell acted—applied for a rezone—well before Ordinance 2014-14(c)(am) was adopted. The ordinance would impair the appeal rights Bicknell had when it acted. Therefore, Ordinance 2014-14(c)(am) would be retroactive if applied to the current permit application.

CBJ law is silent on the subject of retroactive ordinances.[22] Charter Section 5.3(b) specifies with some exceptions not relevant here that an ordinance becomes effective "at the expiration of 30 days after adoption unless a later date is specified in the ordinance", but does not specify whether this applies to an amendment making an ordinance retroactive.

At the state level, AS 01.10.090 provides "No statute is retrospective unless expressly declared therein", a reflection of the "undisputed proposition that all statutes are presumptively non-retroactive."[23] CBJ lacks a similar recognition of retroactivity, but that does not mean retroactive ordinances are disallowed. Retroactive legislation is not in and of itself unconstitutional[24], although it can be as applied.[25] Some cities address the problem of retroactive land use laws and the related issues of "vested rights" by specifying in ordinance that a developer is entitled to rely on the law as it existed at the time the developer applied for a permit, the time the permit was granted, or some other point in the permitting process.[26] CBJ has no such provision in its land use code, but the effective date of the first version of Ordinance 2014-14 made clear that the Assembly wanted to avoid making it retroactively applicable to this case. When the amended version was before the Assembly on April 6,

20 The Alaska Supreme Court uses the terms "retroactive" and "retrospective" interchangeably in this context. *Pfeiffer v. State Dept. of Health and Social Services*, 260 P.3d 1072, footnote 31 (Alaska, 2011).
21 *Rush v. State, Dep't of Natural Res.*, 98 P.3d 551, 555 (Alaska 2004)
22 The CBJ land use code does address the related concept of nonconforming uses, CBJ 49.30, but that is not in issue here.
23 *Eastwind, Inc. v. State*, 951 P.2d 844, 846 (Alaska 1997)
24 *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985)
25 *Pfeifer*, *supra*., at footnote 19, in which the court considered whether retroactive application of a statute constituted a taking, an ex post facto law, or a denial of substantive due process.
26 See the discussion at footnote 34 herein, relating to comprehensive plan retroactivity.

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there was no such express reservation, but in response to a question by Assemblymember Jones, the City Attorney responded that the change was "to make clear that the new process was in place and there were several rezoning issues before the Planning Commission, and that this ordinance would apply."[27]

Given the general presumption against retroactive application of laws, the Assembly's initial effort at its September 29, 2014 meeting to preserve Bicknell's procedural rights, and its focus at its April 6 meeting on providing new procedures for post-*Bicknell* cases, I believe the better course is to preserve Bicknell's right to the appeal process of Ordinance 2012-11 and not send it back to the Planning Commission for proceedings under Ordinance 2014-14.[28]

B. Changes to the Comprehensive Plan

As noted above, the CBJ adopted the 2013 "update"—document-wide review and changes—to the 2008 Comprehensive Plan while Bicknell's rezone request was pending. The Commission approved the update on May 14, 2013. Bicknell filed for this rezone on September 18, the Assembly adopted the update as an ordinance on November 4, and it became effective on December 4.

At my request, The Statement of Issues on Appeal[29] includes this inquiry: "Which version of the CBJ Comprehensive Plan—2008 or 2013—applies to which issues in this case?" In its opening brief Bicknell responded that it doesn't matter because the 2008 and 2013 versions are the same with respect to the issues in this case.[30]

The Commission responded[31] that the two versions are different in their description of Resource Development (the land designation applicable to the Property) but the 2008 version cannot be applied because the requested rezone has not yet been granted and therefore Bicknell has no vested right to the 2008 version. Further, says the Commission, the 2013 version cannot now be applied to

27 Minutes, April 6 Assembly Meeting, page 19.
28 This approach also avoids the problematic "consent" provision of Ordinance 2014-14 and preserves the Assembly's sole authority to modify the requested rezone by, for example, disallowing Light Commercial, as the CDD staff report recommended. (Record at page 23) See footnote 15, above.
29 This May 6, 2014 document is styled "Preliminary Statement of Issues on Appeal" in order to preserve the parties' right to add or object to its contents, but they did not do so and thus it became the final Statement of Issues on Appeal.
30 Bicknell Opening Brief at page 10, footnote 4.
31 Commission Reply Brief at page 2.

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this legal proceeding because in its decision, the Commission applied the 2008 standards, not the 2013 standards and only it or the Assembly in its legislative capacity can correct this error. The Commission concludes that Bicknell must start over.

TSI responded that the 2013 version should apply because "all of the issues, dates, and actions in this appeal are either coincident with, or subsequent to the adoption of the 2013 Comprehensive Plan…"[32] TSI also argues that the 2013 version should apply because by its own terms it must be kept current, because there is nothing in the record that refers to the 2008 plan, and because the 2013 version is the later-adopted plan.

Bicknell in its reply brief acknowledged the Commission's discovery of a difference between the 2008 and 2013 descriptions of the RD designation and argued that the 2013 language supports reversal of the Commission's decision, but to the extent the 2008 version is more favorable to Bicknell, it should be applied.[33]

These arguments are variously persuasive[34], but not dispositive. Bicknell's opening argument is simply incorrect. As pointed out by the Commission, there is indeed a difference in language between the two plans. However, in my judgment there is no difference in meaning.

As shown below (legislative-style emphasis added) the differing language appears in Chapter 11, "Comprehensive Plan Land Use Maps" in the subsection titled "Description of Land Use Categories". The 2008 version describes the Resource Development category as:

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32 TSI Answering Brief
33 Reply Brief at page 7, footnote 9
34 The Commission's reference to "vested rights" is particularly interesting. The cited authority, *Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Alaska 1984), concerned an attempt by Anchorage to revoke a building permit that had been issued in violation of a zoning restriction imposed by a rezone that the parties were unaware of when the permit was issued. The court found that the developer had reasonably relied on the permit and so Anchorage was estopped from revoking it. The instant case does not involve a developer's reliance on a mistaken permit the government has revoked, but it does involve a developer's reliance on a law that the government has changed. *Schneider* does not mention vested rights, but the concept is commonly used by legislatures and courts for resolving these kinds of issues. The majority rule is that the developer's right to rely on a zoning standard vest only when a building permit is issued. The minority rule is that rights vest when the government issues any site-specific approval such as a preliminary plan. An emerging minority rule grants vesting as of the date the developer applies for a permit. CBJ could adopt one of these rules by ordinance and define "vesting" along the way, saving itself and developers much guessing. See Karen L. Crocker, *Vested Rights and Zoning: Avoiding All-or-Nothing Results*, 43 B.C.L. Rev. 935 (2002), http://lawdigitalcommons.bc.edu/bclr/vol43/iss4/4

> Land to be managed primarily to identify and conserve natural resources until specific land uses are identified and developed. ~~Such specific uses may include, where appropriate, resource extraction and development, recreational and visitor-oriented facilities, and residential uses~~. The area outside the study area of this Comprehensive Plan is considered to be designated Resource Development.

The 2013 version describes the Resource Development category as:

> Land to be managed primarily to identify and conserve natural resources until specific land uses are identified and developed. The area outside the study area of this Comprehensive Plan is considered to be designated Resource Development. *As resources are identified or extracted from these lands, they should be re-designated and rezoned appropriately*.

The emphasized sentences use different words but say the same thing: Resource Development land should be put to other uses when appropriate. The 2008 plan mentions several specific uses and may thereby appear to be more restrictive than the 2013 plan, but these uses are merely examples, they are not limitations. The key is the predicate phrase "may include". This idea is often phrased as "may include but is not limited to" but the additional language is superfluous. The code, at CBJ 01.15.010, provides that "Include and including mean 'by way of illustration only' and shall not be interpreted as a limitation, except where expressly so provided." The 2008 plan does not so provide, and thus its mention of recreational and visitor-oriented facilities and residential uses are by way of illustration only and other appropriate uses can be allowed, just as they can in the 2013 plan.

The 2013 plan mentions that "as resources are identified or extracted from RD lands they should be re-designated and rezoned appropriately"—a phrase not found in the 2008 version— but this language does little more than restate the first sentence and adds nothing of substance to the RD description generally, and especially as applied in this case. The first clause is in the disjunctive— identified *or* extracted—and in this case there is no doubt that this land has been identified as a gravel resource and little doubt that the gravel has been extracted.[35]

The second clause says that lands should be appropriately re-designated and rezoned by the Assembly when appropriate, but this is true under either version of the plan: the Assembly needs no authorization to do so, certainly not from the same plan it adopted in the first place. The clause serves no better as a standard, at least in rezone cases, where the very question being presented is

35 Record at page 97.

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whether it is appropriate to grant a rezone.

The new language in the 2013 version might be a useful bit of commentary, but viewing it as a requirement in need of a finding would, in this case, put the Commission in the position of saying "The applicant says that it is appropriate to rezone this gravel pit. In order to resolve this issue, we must first determine whether this gravel pit is a gravel pit and whether it is appropriate to rezone it." This circular question does not need to be asked or answered.[36]

The essential part of the RD description in both the 2008 and 2013 versions is the unchanged first sentence: RD land is "to be managed primarily to identify and conserve natural resources until specific land uses are identified and developed." The changed language is just commentary; it establishes no new policies, standards, or guidelines for the Planning Commission to consider.

I conclude that for purposes of this appeal, the 2008 and 2013 comprehensive plans are the same.

III. The Planning Commission Decision

The Planning Commission has devoted a lot of time and hard work to this and the preceding case regarding the Property. At the November 26, 2013 hearing on the rezone request it heard 22 witnesses and reviewed 170 pages of material. It ran out of time to deliberate and continued the matter to December 10, when it engaged in another discussion that extends through 8 pages of the official minutes. Testimony was at times impassioned.

Unfortunately, when it came time to make a decision at the December 10 meeting, the matter suffered from a disadvantage that has plagued Planning Commission decisions through the ages: because the commissioners disagreed with the recommendation of the CDD director, they could not use his proposed findings. The director recommended granting the Industrial but not the Commercial rezone, and the Commission decided to deny both. The director had prepared a set of findings to support his recommended decision, but not any other decision. Mr. Satre, Chair of the Commission, announced that in preparation for this eventuality, he had asked a member of the staff to make available the findings of fact from the last time the issue was before the Commission as a compre-

36 The logical fallacy here is *petitio principii*, ("asking for the starting point") in which the Planning Commission would attempt to prove a proposition based on a premise that itself requires proof. The fallacy is more often known as "begging the question".

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hensive plan map amendment and he now proposed that the Commission adopt those findings "with some wordsmithing to reflect the existing application". Commissioner Lawfer moved "That the Commission adopt the findings as previously stated with the following changes with number four that 'General' be changed to 'Light' and that on number 10 the 'map amendment' is changed to say 'there has been a significant amount of public opposition to this rezoning proposal'. It would remove 'map amendment' and [her] prior [form of the motion] withdrawn." after a further amendment was defeated, the motion carried without objection. [37]

There are two problems here. One is that a Comprehensive Plan map amendment is not the same thing as a rezone. A rezone must be "in substantial conformance with the land use maps of the comprehensive plan" CBJ 49.75.120. Although a map amendment should be in conformance with the Plan as a whole[38] it must necessarily be out of conformance with whatever map it is amending. Thus, findings sufficient to support a map amendment, while similar to those supporting a rezone or a rezone denial, cannot be just copied and pasted into a rezoning decision, which is what the Planning Commission did.

The second problem is that the findings in this case—copied and pasted from a hearing at which the Commission likewise rejected the staff recommendation and findings—are completely inadequate to support a map amendment, a rezone, or any other land use decision. They are not really Commission findings at all,[39] they are just a loose confederation of warring thoughts from individual commissioners:

1. The parcel, as it is zoned today, has development opportunities. The current zoning does not prohibit it from being used or developed. Current uses can include resource extraction, recreation, visitor-oriented, and residential uses.
2. The City has missed an opportunity by not purchasing the property to maintain the scenic and habitat values.
3. Industrial uses so close to a sensitive habitat area is a concern.
4. Light commercial is not appropriate for the area.
5. Working with the situation, we can maintain the view shed.

37 Record at page 217.
38 If an amendment does not conform to the plan as a whole, it could be illegal "spot zoning". "Faced with an allegation of spot zoning, courts determine first whether the rezoning is compatible with the comprehensive plan or, where no plan exists, with surrounding uses." *Griswold v. City of Homer*, 925 P.2d 1015, 1020 (Alaska 1996)
39 They barely qualify as "written": they are transcribed oral remarks.

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6. The Comprehensive Plan shows a need for industrial land and also shows intent to acquire the land for public purposes, for a park and viewshed protection.
7. This parcel of land is an important scenic corridor and iconic viewshed that defines the community.
8. The wetlands and the parcel have value to the community of Juneau. We can't allow further degradation of the wetlands. The loss of 39 percent of the wetlands over time, per public comment, is credible and concerning.
9. This parcel of land, as it is currently zoned has social, environmental, and financial value to future generations.
10. There has been a significant amount of public comment in opposition to this rezoning proposal. There hasn't been any public support shown for this development concept.
11. Large water fowl create safety concerns for the airport, but there is a float plane pond adjacent to the airport. And, there is a water canal system that has been developed between the airport and the airport dike trail. These water systems also attract birds and are very close to the airport.
12. The Wetlands Review Board recommended the best use of this parcel would be to restore the developed portions to their natural state and to not disturb the undeveloped area. The benefits of this approach would be to increase the safety of the airport by removing the pond that attracts large birds and also to provide additional buffer for the Mendenhall State Game Refuge.[40]

CBJ 01.50.070(a)(2) provides that the hearing officer may set aside the decision being appealed if it is not is supported by adequate written findings or the findings fail to inform the appeal agency of the basis upon which the decisions were made. Findings are so important that courts require them even if ordinances do not.

> Although no ordinance requires the Commission to make specific findings of fact to support its conditional use decisions, we have held that zoning boards and other agencies making adjudicative decisions must articulate the reasons for their decisions. Such findings facilitate judicial review, insure careful administrative deliberation, assist the parties in preparing for review, and restrain agencies within the bounds of their jurisdiction. The test of sufficiency is thus a functional one: do the Commission's findings facilitate this court's review, assist the parties and restrain the agency within proper bounds?[41]

The "proper bounds" for a rezoning decision are established by CBJ 49.75.120, which is nowhere

40 Record at pages at 225-226 (1/15/14 PC decision).
41 *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 175 (Alaska 1993)(Citations omitted)

mentioned in the findings. The Comprehensive plan is mentioned once, in paragraph 6, where it is cited in support of industrial development. The findings are internally inconsistent, with paragraph 1 saying the Property has development opportunities as currently zoned, paragraph 6 citing a need for industrial land, and paragraph 12 promoting restoration to its natural state. Individual findings lack any clear relationship to the Property, such as paragraph 11 discussing large water fowl and airport water systems, or outside the Commission's jurisdiction, such as paragraph 2, lamenting a missed opportunity for CBJ to purchase the property, paragraph 10, citing a lack of public support for the rezone and paragraph 9, claiming that the parcel as currently zoned has financial value to future generations.

These criticisms of the findings are essentially the same as those raised by Bicknell in its opening brief. Neither the Commission nor TSI responded to this issue in their answering briefs[42] and therefore waived any argument in defense of the findings.[43]

I conclude that the Planning Commission findings in this case do not satisfy the requirements of CBJ 01.50.070(a)(2) and the decision is set aside. Accordingly, it is not necessary to address the other issues raised by Bicknell, with the exception of its claim that a denial of its rezone request constitutes a unconstitutional taking without just compensation. This issue may have consequences for further proceedings.

IV. Further Proceedings

The Commission's main argument is that only the Assembly can resolve this issue, and must do so in its legislative capacity by consideration of an ordinance, not in its quasi-judicial capacity by deciding this appeal. This is not a formalistic issue of which hat the Assembly should wear: there are significant differences in the procedures and criteria for an appeal and those for an ordinance. Most notably, in an appeal the Assembly is required to defer to the body below if it can. The appellate code

42 TSI in its answering brief was under the misapprehension that it was permitted to brief only the three questions that I asked in the February 26 Amended Pre-Hearing Order. However, that Order amended only paragraphs 5 and 8 of the May 29 Pre-Hearing Order, which referred in paragraph 2 to the Preliminary Statement of Issues on Appeal, which lists ten issues. In its brief, TSI entertained the possibility that I might consider more than the three questions and, if so, reserved the right to address them in supplemental briefing. At the hearing, after considering many more issues than three, I offered counsel for TSI the opportunity for supplemental briefing. He declined.

43 *Fernandes v. Portwine*, 56 P.3d 1 at n.9(Alaska 2002)

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at CBJ 01.50.070(a) provides that the appeal agency or the hearing officer may set aside the decision being appealed *only* if evidence, findings, or due process are inadequate. But when the Assembly considers legislation, its members are free to adopt or reject an ordinance because it is wise, because it is the least unwise alternative, because they want to be re-elected, or for any other reason that does not offend the constitution.

This primacy of the CBJ Assembly's legislative function was affirmed by the Alaska Supreme Court in a case[44] involving Chuck Keen and his plan to acquire city land in order to build a tram. Mr. Keen claimed that CBJ was obligated by contract to convey land to him, an action that would require adoption of an ordinance.

> Not only does the contract place an obligation on the city which may create conflicts of interest, but it also creates an obligation to legislate in the future. The area of zone changes, changes in street entrances, flood control, etc., are all legislative in nature. A contract which binds a legislative body, present or future, to a course of legislative action is void against public policy. The conveyance of City land can only be authorized by the Assembly. See CBJ Ordinance 53.09.200. Thus, even if Ordinance No. 85-53am constituted a contract providing that the City would both treat Keen's tunnel claim as valuable in the future and transfer land to Keen in exchange for an agreement to abandon it, such a contract would likely be unenforceable because it requires future legislative action. That is, it would require the Assembly to agree in advance to authorize the exchange of unspecified parcels of land in the future.[45]

Mount Juneau Enterprises addresses the distinction between the Assembly's legislative function and its proprietary, not its quasi-judicial function. However, the case does make clear that zone changes are legislative, and a later case from Kenai[46] establishes that this is true for small-scale rezonings—even spot zoning— that affect the rights and liabilities of particular persons and for that reason are regarded as quasi-judicial in some other states.

Bicknell does not directly challenge the legislative status of rezones or claim that this appellate case can accomplish the rezone it seeks. It agrees that "At a minimum, the Assembly can direct the

44 *Mount Juneau Enterprises, Inc. v. City and Borough of Juneau*, 923 P.2d 768, 776 (Alaska 1996)

45 CBJ 01.01.020 provides that the "Code sections in history notes and cross references shall be cited by giving the title, chapter and section numbers preceded by CBJ." The Supreme Court has never been comfortable with this form of citation and has taken to using the form "CBJ ordinance xx.xx.xxx" This at least is better than the unfortunate "CC & BJ" it used in the otherwise judicious *Thane Neighborhood Ass'n v. City and Borough of Juneau*, 922 P.2d 901 (Alaska 1996). I suggest "CBJC", which provides acronymical accuracy but avoids confusing code sections with ordinances, many of which are noncode or amend multiple code sections.

46 *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833 (Alaska 2001)

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Municipal Attorney to "draft an ordinance providing for the requested rezone and forward it to the Assembly for introduction" as it did in *Harris*."[47]

In its briefing on this case, the Commission took the position that there is no legal remedy for a rezone denial and the current appeal is futile. Further, says the Commission, because the new language in the 2013 Comprehensive Plan imposes new standards that only the Commission can analyze, I cannot recommend reversal[48] and Bicknell's only option is to start all over again with a new rezone request.

At the hearing, counsel for the Commission refined its position, proposing a second option: that this appeal be rejected, that the Assembly, on its own, order that the rezone be submitted to it in its legislative capacity, consistent with Ordinance 2014-14. The Assembly would then likely need the Community Development Department to draft an accompanying staff report analyzing whether the rezone is consistent with the 2013 Comprehensive Plan. In its brief and in the hearing the Commission offered to waive the limitation of CBJ 49.75.110 that rezone requests be submitted only in January and June, and the limitation of CBJ 49.75.120 that rezoning requests which are substantially the same as a rezoning request rejected within the previous 12 months shall not be considered.[49]

Procedural disagreements in this case are becoming less significant. The parties agree that only way to address the merits of this rezone is to present legislation to the Assembly. The Commission acknowledges that the equities of this case warrant relief from the usual scheduling requirements. The Commission argues that the Assembly must analyze the rezone under the 2013 Comprehensive Plan, and while it cannot do so within the procedural framework of this legal appeal, it could in the legislative process, with the availability of advice from CDD.

As noted above, I think the comprehensive plan changes are more form than substance and require no revisiting of facts or analysis by CDD or the Planning Commission, especially given that the

47 Bicknell Reply Brief at page 6. At the hearing, counsel for Bicknell explicitly confirmed that only the Assembly in its legislative capacity can accomplish a rezone.

48 Commission Brief at page 19. At the hearing, counsel for the Commission made it clear that he was not picking on the hearing officer: the argument is that neither the HO nor the Assembly in its quasi-judicial capacity can conduct the analysis and arrive at findings under the new standard. Also, I assume that by "reversal", the Commission means "grant the rezone request" and not "set aside for failure to provide findings."

49 At the hearing, neither Bicknell nor TSI responded to this second option. TSI—consistent with the terms of the order granting intervention—confined most of its argument to the importance of considering the cumulative environmental impact of development in the Mendenhall Wetlands.

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rezone requires only "substantial conformance" with the plan. But even if the 2013 plan did impose new standards, the Assembly could analyze them in its quasi-judicial role. The Commission has cited *Bolieu v. Our Lady of Compassion Care Center*[50] for the proposition that a quasi-judicial body cannot make its own factual findings.[51] However, *Bolieau* was an appeal from the Alaska Workers Compensation Board to Superior Court. Unlike a court, the CBJ Assembly in its quasi-judicial role is largely unrestricted by separation of powers notions and enjoys considerable fact-finding authority courtesy of its organic legislation. The CBJ appellate code allows the Assembly to supplement the record[52], issue subpoenas[53], consider depositions[54], affidavits[55] and exhibits[56], allow the cross-examination and impeachment of witnesses[57], take official notice[58], modify the decision below[59] and request a hearing officer to reconsider the proposed decision in light of new evidence raised in objections to it.[60] The Assembly's situation is more like that in *Anchorage Board of Adjustment v. LBJ, LLC* in which the Anchorage Platting Board required a developer to improve a road, but on appeal, the Board of Adjustment reversed for lack of substantial evidence, and substituted its own judgment. On appeal to superior court, the appellant argued that the court should view the BOA decision just as the supreme court views a decision of the superior court sitting as an intermediate court: with no deference. The court disagreed, saying it owed deference to both municipal bodies and this would be true even if the two bodies came down on opposite sides of an important issue: "Given the deferential standard, it is conceivable that both decisions could be supported by substantial evidence. While courts try to be consistent in applying the standard of review, it is not always a completely straight-

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50 983 P.2d 1270 (Alaska 1999)
51 Commission Brief at footnote 6 and again at page 19, the former citing the case as a limitation on the judiciary, the second stating that it applies to a hearing officer. At oral argument, counsel applied it to quasi-judicial bodies.
52 CBJ 01.50.030(f)
53 CBJ 01.50.080
54 CBJ 01.50.090
55 CBJ 01.50.120
56 CBJ 01.50.110(b)(2)
57 CBJ 01.50.110(3) and (4)
58 CBJ 01.50.130
59 CBJ 01.50.140(a). In theory, issues and evidence not presented to the agency below cannot be raised on appeal unless it is "Newly discovered evidence which by due diligence could not have been discovered previously and disclosed during the prehearing process, and further could not have been submitted to the agency whose decision is being appealed" CBJ 01.50.110(e)(1). This somewhat porous due diligence standard is nonetheless well-suited to this case, where the new evidence in issue—the 2013 plan—became effective at the very end of the Planning Commission process.
60 CBJ 01.50.140(c)(3)

forward exercise."[61]

Although the Assembly in its quasi-judicial capacity could consider the possible impact of the 2013 language, the disposition of this appeal as ordered by this decision does not require it to do so. The case could be returned to the Commission for better findings, including a finding about the new 2013 RD language. Whether that procedure would be subject to the old rezone-appeal procedures or the new rezone-protest procedures is unclear, but given the dubious relevance of the 2013 language there is little to gain by finding out. As stated above, the 2013 language creates no new standard implicating Planning Commission expertise. The better solution is much the same as that used by the Assembly in the *Harris* case and proposed by the Commission as its second option here: to simply set aside the Planning Commission decision and refer the matter to the Assembly in the form of an ordinance for introduction.

At the hearing, counsel for the Commission expressed some concern about the lack of cases in support a referral from a quasi-judicial body to a legislative body, and the point is well taken. However, there is no doubt that one remedy in any appeal from the Planning Commission is to send the matter back to the Planning Commission. And if, as the Commission argues in its brief, the Planning Commission is a legislative committee of the Assembly, there seems little separation-of-powers reason to deny the legislature what its committee may have. More importantly, a direct referral will serve the interests of justice. This rezone effort has required Bicknell to expend significant time and money in numerous different procedures seeking the same thing but with no clear result. It is manifest that it would work an injustice to require strict adherence to yet more such procedures when current rezone applicants enjoy direct access to the lawmaking powers of the Assembly.

> **01.50.260 - Relaxation of requirements**. This chapter is designed to facilitate the business of the appeal agency or hearing officer, and shall be construed to secure the reasonable, speedy and inexpensive determination of every appeal. The procedural requirements of this chapter may, in the discretion of the appeal agency or hearing officer, be relaxed in any case where it is manifest to the appeal agency that a strict adherence to them will work injustice.

61 228 P.3d 87, 89 (Alaska 2010). The case featured an ordinance not present here: AMC 21.30.190 provides that both the Platting Board and the BOA shall not be reversed except for a lack of substantial evidence.

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V. The Takings Issue

Both the federal and state constitutions prohibit the government from taking property without just compensation. The state prohibition[62] also requires compensation when private property is "damaged", and Bicknell correctly cites *Tlingit-Haida Regional Electrical. Authority v. State*[63] for the proposition that Alaska thus provides broader protection to property owners. Bicknell would make the protection broad enough to require compensation in this case, but its briefing does not clearly identify the property which it believes has been taken or damaged. At the hearing, counsel for Bicknell argued that it had a very solid case for the rezone it sought and CDD staff recommended a rezone, but the Commission denied the rezone for the principal reason of keeping the Property zoned RR as a form of leverage so CBJ could acquire the Property at a depressed price and that this effect would extend to Bicknell's efforts to market the Property to other buyers. The property that Bicknell sees taken, then, appears to be the difference in value between the Property zoned as it is and the Property zoned as Bicknell wishes it were.

Bicknell is arguing that the government can be liable for a taking when it does nothing; a calamitous rule given the nature of governments everywhere. But it conditions this argument on the premise that in this case the government *should* have done something—grant Bicknell's rezone request—and its failure to do so is compensable.

It is true that the concept of a "taking" has evolved over the years from the notion of a physical seizure to that of a diminution of the owner's rights and attributes of ownership. In *Anchorage v. Sandberg*[64] the Alaska Supreme Court acknowledged this evolution but cautioned against taking it too far. The case involved a developer, SD&R, who acquired several lots in an undeveloped subdivision with the intention of improving and selling them. Over several years, SD&R and the municipality engaged in a variety of actions with each other: local improvement districts, buying and selling lots with adjoining property owners, subdividing property; all circling around the possibility that the city would develop a park and associated water, sewer and road improvements in the neighborhood. The developer wound up with eight lots surrounded on three sides by municipal property designated

62 Alaska Const. art. I, § 18
63 15 P.3d 754 (Alaska 2001)
64 861 P.2d 554, 558 (Alaska 1993)

as park land, and suggested that the city buy them. The parties entered into negotiations, and when a cash purchase became unworkable, the city suggested a land trade, but that didn't work either. Then the city initiated a petition to "re-ballot" the LID's, claiming that soil tests now showed that construction costs would be much higher than originally planned. SD&R protested, claiming that the city was attempting to walk away from the situation created by its park acquisitions. In the re-ballot, the city voted its majority interest and the new LID's were defeated. The Anchorage Assembly then abolished the earlier districts. The developer sued, claiming inverse condemnation.

The court first reiterated the factors which the court must consider in taking cases where, as here, the government has neither physically invaded the property nor denied its owner all economically feasible use of the property: (1) the character of the governmental action; (2) its economic impact and (3) its interference with reasonable investment-backed expectations. This test was a hard one for SD&R:

> Government actions become "takings" under principles of inverse condemnation when a private land owner is forced to bear an unreasonable burden as a result of the government's exercise of power in the public interest.
>
> This case involves neither a physical invasion nor even a regulation constraining SD&R's use of its property. Instead, it involves a series of municipal decisions which, indirectly, have rendered SD&R's development plans economically infeasible. To find a taking where the infringement of SD&R's property rights is so unclear, the severity of the economic impact and the reasonableness of SD&R's expectations concerning its development plans must weigh heavily in SD&R's favor.
>
> …
>
> This case differs significantly from [earlier regulatory takings cases] in that the municipality has never threatened or initiated condemnation proceedings. In fact, unlike the typical regulatory taking case, the municipality has never placed any direct restrictions on SD&Rs right to use and develop any portion of its property. Nevertheless we recognize that it has now become economically infeasible for SD&R to develop its land in part due to the municipality's change of plans. The real question presented by this case is whether SD&R's expectations concerning its development plans were reasonable and whether those expectations should be afforded constitutional protection.
>
> …
>
> It is undisputed that SD&R's lots could not be developed without the approval and construction of the necessary water, sewer and road improvements. In order to find a compensable taking under [an earlier case], we would have to conclude that the Assembly's approval of the water and sewer districts constituted some kind of "guarantee" or "express promise" that the road improvement district providing access to SD & R's property would eventually be approved and constructed. There is absolutely no basis for such a conclusion.[65]

65 The court noted, at 560, that the ruling was "in the absence of a viable estoppel claim". Bicknell has not

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In this case, Bicknell has acknowledged[66] that CBJ condemnation proceedings are not a threat. The city has placed no direct restrictions on Bicknell's use of its land, other than the zoning it has always had.

Bicknell does not allege that CBJ has evidenced an unequivocal intention to take the Property, nor any evidence that the rezone was denied for the purpose of depressing its price.[67] *In Ehrlander v. Alaska Department of Transportation*[68] A property owner sought damages for a decrease in the value of his property resulting from an impending condemnation by the state. The court adopted a four-part test to determine whether the condemnation valuation date should be advanced to a time well before the impending condemnation depressed the value:

> For the time of valuation to be advanced, marketability must be substantially impaired and the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose.

Bicknell may claim that it has a very strong case for its rezone under the comprehensive plan, but a strong case is not the same as a guarantee, as every lawyer who walks the earth can tell you. It is not even a reasonable investment-backed expectation, given the language of CBJ 49.05.200:

> (c) *No rights created*. The goals and policies set forth in the comprehensive plan are aspirational in nature, and are not intended to commit the City and Borough to a particular action, schedule, or methodology. Neither the comprehensive plan nor the technical appendix adopted under this section nor the amendment of either creates any right in any person to a zone change nor to any permit or other authority to make a particular use of land; neither do they constitute a regulation of land nor a reservation or dedication of privately owned land for public purpose.

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claimed estoppel. The court also quoted with approval from *Habersham at Northridge v. Fulton County, Georgia*, 632 F.Supp. 815, 823-24 (N.D.Ga.1985) which held that a county zoning board's refusal to change a property's zoning from residential to commercial did not constitute a taking.

66 Record, at page 97.

67 At page 13 of its opening brief, Bicknell cites to pages 101 and 178 of the Record, where a member of the public argues that a rezone would increase acquisition costs, but this view should not be attributed to the Planning Commission, which avoided such speculation, as stated by Commissioner Watson, in the minutes of the December 10 meeting, "He said the Commission has an application before it, and it is charged with making a decision on land use only, not on speculative purchases. He said purchasing the land has always been the plan of Parks and Recreation, but it has never had the funds to do so. He said that is not something for the Commission to even consider at this point, since it is all hypothetical." Record, at page 213.

68 797 P.2d 629, 634 (Alaska 1990)

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Similarly, in *Tlingit-Haida Regional Electrical Authority v. State*, cited above, an electrical utility that claimed a property right to a government certificate was denied compensation when it was revoked because the government had explicitly reserved the right to modify the certificate.

Bicknell did not have a reasonable investment-backed expectation that it would be granted a rezone, nor has it presented any evidence of extraordinary delay, bad faith, estoppel or other mitigating factors. I conclude that it has not made out a case for inverse condemnation.

VI. Proposed Findings

Pursuant to CBJ 01.50.140(a) and for the reasons set out above, the Assembly finds:

1. The decision by the Planning Commission is not supported by adequate written findings and is set aside by authority of CBJ 01.50.070. The parties will each bear their own costs.
2. Under the rule of *Harris v. Planning Commission,* in correspondence to current rezone procedures, and in the interests of justice pursuant to CBJ 01.50.260, the rezone at issue is forwarded as a legislative proposal to the Assembly. The Manager is directed to prepare and submit to the Assembly for introduction an ordinance or ordinances amending the comprehensive plan map, the zoning map, or both as necessary to accomplish the rezone as recommended by CDD staff in its memos of April 4, 2013 and November 21, 2013, which memos shall also be submitted. The Manager will make the record on appeal in this case available to the Assembly and shall include such staff reports as may be necessary or useful to advise the Assembly of facts or laws that have become relevant since the rezone application was filed.
3. This disposition of this appeal is based on the legal reasoning set out herein and implies no recommendation regarding the introduction or adoption of the legislation described above.

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This proposed decision will be circulated to the parties for their review and any objections pursuant to cbj 01.50140(c). Thereafter, the decision, any objections, and my response to any objections will be forwarded to the Assembly. Unless rejected or modified by an affirmative vote of the Assembly on a motion to reject or modify, the proposed decision, as amended if such an amendment has been filed, shall be deemed adopted by the appeal agency and shall be the appeal agency decision. At that point it will be a final administrative decision of the Assembly of the City and Borough of Juneau, Alaska and may be appealed to the Juneau Superior Court, pursuant to the Alaska Rules of Court, if such appeal is filed within 30 days.

Ordered this 19th day of August, 2015

John Corso
Hearing Officer

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BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

ON APPEAL FROM THE PLANNING COMMISSION

BICKNELL, INC., *Appellant* v. CBJ PLANNING COMMISSION, *Appellee* and TERRITORIAL SPORTSMEN, INC. *Appellee-Intervenor*	Appeal of: CDD File: AMD 2013-0015

APPELLEE CBJ PLANNING COMMISSION'S OBJECTION

The Proposed Decision was circulated to the parties on July 29, 2015. A party may file an objection within five days of distribution of the proposed decision. CBJ 01.50.140(c)(1). August 5, 2015, is five working days from the date the Proposed Decision was circulated. *See* Civil Rule 6(a).

The Commission does not object to the conclusion that the Assembly has complete discretion whether to consider a rezone ordinance. Proposed Decision pages 14-18, 22.

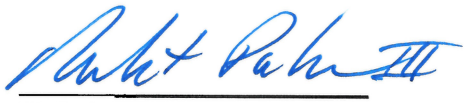
However, the Commission submits this objection because the Proposed Decision appears to adjudicate the merits of this case, Proposed Decision pages 3-14, without describing how this quasi-judicial body has subject matter jurisdiction. This case is governed inconsistently by Ord. 2012-11 and by CBJ 49.10.170(d), CBJ 01.50.020(a), CBJ 01.50.020(b), and CBJ 01.50.030(e)(2). As such, the Commission reiterates that the Hearing Officer lacked subject matter jurisdiction over this appeal, primarily because the relief requested was enactment of

legislation and only the Assembly—sitting in its legislative capacity—has authority to enact legislation. Commission Opposition Brief at 10-16 and 19-20.

This appeal should be denied and the Assembly—in a separate agenda item and in its legislative capacity—could decide whether to have a rezone ordinance introduced. Alternatively, Bicknell would be free to file a similar rezone request consistent with CBJ 49.75.120 or sooner as determined by the Assembly, which would be governed by Ord. 2014-14.

Finally, Appellant in its opening brief cited to *Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270 (AK 1999), for authority. *Compare* Appellant's Opening Brief at 5:16-18 *with* Proposed Decision at 17:2-7. Additionally, Appellant appears to concede that "Orders based on contradictory findings are not adequate and are routinely subject to vacation and remand." Appellant's Opening Brief at 6:22-25. The Hearing Officer has discretion to determine whether these distinctions are relevant on the sub-issue of adequacy of written findings. *See* Appellant's Opening Brief at 9 (requesting reversal and implicitly remand).

Dated this 5th day of August, 2015.

By: 
Robert H. Palmer III,
Attorney for Planning Commission
Alaska Bar No. 1405032

CERTIFICATE OF SERVICE

I hereby certify that the foregoing CBJ Planning Commission's Objection and this Certificate of Service were served on the following parties as indicated below:

For Appellants Daniel Bruce, ABA #8306022 Baxter Bruce & Sullivan P.C. P.O. Box 32819 Juneau, AK 99803 (907) 789-3166, tel / (907) 789-1913, fax dbruce@baxterbrucelaw.com	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ☑ *Email*
Appellee-Intervenor Territorial Sportsmen, Inc Bruce Weyhrauch, ABA #8706057 whyrock@gci.net	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ☑ *Email*
Hearing Officer Mr. John Corso appeal@corso.org	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ☑ *Email*
Municipal Attorney for the Assembly Amy Mead Amy.Mead@juneau.org	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ☑ *Email*
Municipal Clerk City.Clerk@juneau.org	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ☑ *Email*

DATED at Juneau, Alaska, this _5_ day of August, 2015.

Samantha J. Senkiw

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City and Borough of Juneau
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Juneau, AK 99801
Ph: (907) 586-5242
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Before the Assembly of the City & Borough of Juneau

On Appeal from the Planning Commission

Bicknell, Inc.
Appellant
v.
CBJ Planning Commission
Appellee
and
Territorial Sportsmen, Inc.
Appellee-Intervenor

CCD File
AME 2013 0015

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Hearing Officer's Response to Appellee's Objection to Proposed Decision

As required by the CBJ appellate code[1], I provided the parties with copies of the Proposed Decision for their review and comment. The Commission filed a timely Objection. The other parties did not respond. I have reconsidered the Proposed Decision in light of the Commission's Objection, have concluded that no change in the Proposed Decision should be made[2], and herein set forth the reason for the rejection of the Commission's Objection.

In its Objection, the Commission reiterates its argument that I[3] lack subject matter jurisdiction primarily because the relief requested by Bicknell was enactment of legislation, and only the Assembly in its legislative capacity can do that. The Commission is correct to argue that this appeal cannot grant an ordinance, but incorrect to end the analysis there.

The precise relief requested by Bicknell in its Notice of Appeal is "Reversal of the Decision being appealed *and* granting of the rezone request." [emphasis added] Granting a rezone request does indeed require an ordinance, but reversing the decision being appealed does not, and is well within the

1 CBJ 01.50.140(c)
2 I did correct a typographical error, and clarified the language at page 13, line 18 to eliminate a confusing use of "required" and "requirement".
3 As noted in footnote 48 of the Proposed Decision, I assume that the Commission does not mean to raise an objection unique to the hearing officer and would likewise argue that the Assembly in its appellate capacity lacks subject matter jurisdiction.

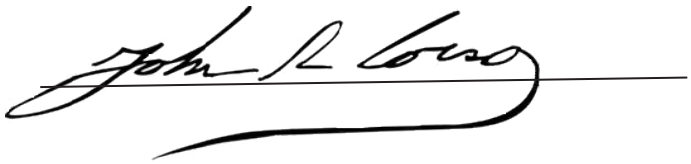
subject matter jurisdiction of the Assembly in its appellate capacity and the derived jurisdiction of this hearing officer.[4]

The appellate code does not use the term "reversal" but does provide that the Assembly may "set aside" the decision being appealed.[5] The Proposed Decision does just that, and for a reason—inadequate findings—that no party has contested. It is difficult to see how this constitutes, as the Objection suggests, "a decision on the merits". Only the Assembly in its legislative capacity can make a decision on the merits of a rezone. The Proposed Decision merely resolves this appeal on procedural grounds in a "reasonable, speedy and inexpensive"[6] manner so that the Assembly in its legislative capacity may consider the other half of Bicknell's requested relief.

The Proposed Decision, the Commission's Objection, and this Response shall be forwarded to the Assembly for its consideration under CBJ 01.50.140(c)(2). Unless rejected or modified by an affirmative vote of the Assembly on a motion to reject or modify, the Proposed Decision shall be deemed adopted by the Assembly and shall be the Assembly's decision. No testimony or evidence of any nature may be received by the Assembly at the meeting at which the Proposed Decision is presented.

ORDERED this 19th day of August, 2015

John Corso
Hearing Officer



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4 A "reversal" is not necessarily an order imposing the opposite of what was decided below. It can be an order to conduct further proceedings such as making better findings, *Elk v. McBride*, 344 P.3d 818, 826 (Alaska 2015), or it can be a method of vacating a judgment, Alaska R. Civ. P. 60(b)(5), or it can be an unexplained part of a judgment in which a lower court ruling is "reversed, vacated, and set aside", *Matter of Mendel*, 897 P.2d 68, 77 (Alaska 1995)

5 CBJ 01.50.140(a) says in relevant part "A decision may affirm, modify, or set aside an agency decision in whole or in part. A decision may be to remand any issue to the agency." The Commission asserts in its Objection at page 2, line 18 that Bicknell in its opening brief "implicitly" requested a remand, but a careful review of the cited briefing provides no support for this assertion. A better indicator is Bicknell's explicit request in its reply brief at page 6, line 2 for precisely the relief provided by the Proposed Decision, though not, as the koan on page 9, line 15 would have it "for each of the reasons which Bicknell has stated, each of which applies to every other reason."

6 CBJ 01.50.260