BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

JOE MEEK and JCM Rentals, Inc., Appellant, vs. CBJ PLANNING COMMISSION, Appellee, and MILLER CONSTRUCTION, Appellee/Intervenor.	Appeal of: Notice of Decision CDD File No. USE2016-0016

DECISION ON APPEAL

Appellants Joe Meek and JCM Rentals, Inc., (hereinafter collectively "Meek") filed an appeal of the Planning Commission's decision to grant a conditional use permit to Miller Construction for a temporary asphalt plant in an area zoned industrial. The applicant, Miller Construction, intervened in the appeal.

The record was prepared by the Community Development Department based upon the materials considered by the Planning Commission and application of CBJ 01.50.110. The record was supplemented with a verbatim transcript of the June 14, 2016, Planning Commission hearing upon stipulation by the parties.

The issues on appeal were as set forth in the presiding officer's October 3, 2016, Order on Motion to Simplify the Issues.

The parties filed briefs on the merits of the appeal. On December 19, 2016, the Assembly heard oral argument from the parties. The Assembly deliberated in closed session, and directed the Municipal Attorney to prepare a draft decision based on the Assembly's

findings. As required by the CBJ Appeals Code, the draft decision was circulated to the parties for comment.

We find the reasoning set forth in the Commission's briefing persuasive. For the reasons relied upon by the Commission and as stated below, the appeal is denied.

I. Burden of Proof and Standard of Review.

Under CBJ Code, applications for conditional use permits are decided by the Planning Commission. CBJ 49.15.330. The Planning Commission's decision is appealable to the Assembly, and is heard in accordance with CBJ Chapter 01.50. (CBJ 49.20.120.) The appellant bears the burden of proof. (CBJ 01.50.070(b).)

Meek challenges the Commission's decision on the following three grounds:

1. The decision is not 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." (CBJ 01.50.070.)

2. The Commission failed to follow its own procedures.

If the Assembly finds the Commission "failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties," the Assembly may set aside the decision being appealed. (CBJ 01.50.070.)

3. The Commission's decision is not supported by substantial evidence in light of the whole record.

In this context, "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] In reviewing the Commission's decisions, a "presumption of validity" must be applied.[2] As correctly noted by Meek, when a fact-finding agency such as the Planning Commission chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion, the Commission's findings should be affirmed on appeal. (Meek Opening Brief at p. 5, *citing*, *Anderson v. State*, 26 P.3d 1106 (Alaska 2009).) This direction, in conjunction with the standard of appeal articulated in CBJ 01.50, suggests the role of the Assembly on appeal is limited. The Assembly does not re-weigh the evidence or second-guess the Commission's findings as long as there is evidence in the record to support those findings.

II. The Planning Commission's Decision Was Supported by Substantial Evidence.

Meek argues the Assembly should reverse the Commission's finding that the asphalt plant would not materially endanger public health or safety because the finding was not supported by substantial evidence. Meek argues the Commission failed to give sufficient consideration of airborne emissions, odor, neighborhood harmony, the plant's negative impact on property values, or the project's consistency with the comprehensive plan. Meek argues the Planning Commission simply "rubber stamped" the staff report. (Reply Brief at p. 1, and December 19, 2016, hearing.)

Meek does not challenge that the proposed asphalt plant was an appropriate use under the CBJ's Table of Permissible Uses. (*See* 49.25.300, Table of Permissible Uses, at 4.100.) As such, the Commission was required to adopt the director's determination as articulated in the June 1, 2016, staff report unless the Commission found, by a preponderance of the evidence, that

[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).

the director's determination was in error. (CBJ 49.15.330(e)(2).)[3] If the Commission determines it will adopt the staff report, the Commission may also consider whether to impose conditions in accordance with CBJ 49.15.330(g) if it finds doing so is warranted to under CBJ 49.15.330(f).

The record reflects that the Commission – at its June 14, 2016, hearing and as presented in the staff report – considered and heard evidence on parking, traffic impacts and mitigation, noise, public health and safety (especially as related to odor), impacts to habitat, dust, lighting, property values and neighborhood harmony, and the project's conformity with the CBJ's comprehensive plan. The Commission also had before it comments from the Alaska Department of Environmental Conservation (finding the proposal met ADEC's requirements for such a use), the Alaska Department of Transportation, and the Alaska Department of Fish and Game. At the public hearing, the Commission heard from fifteen members of the public – speaking both for and in opposition to the project, from staff, and from the applicant and his representative. In light of this evidence, the Commission adopted staff's findings and determined that CBJ 49.15.330(f) warranted setting conditions in accordance with CBJ 49.15.330(g).

Based upon our review of the staff report and the evidence presented at the June 14, 2016, hearing, we find the Commission's decision was supported by substantial evidence. The fact that the Commission reached a different conclusion after hearing the evidence than Meek might have liked is not enough to overcome the presumption of validity we must afford Planning Commission decisions.[4]

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[3] The Commission may nevertheless deny the application if it determines it is warranted to do so under CBJ 49.15.330(f).

[4] In connection with the "rubber stamping" argument, Meek complains the applicant's communications with staff while the conditional use permit application was pending amounted to inappropriate *ex parte* contact. (Reply brief at p. 1.) We reject this argument given the pre-application requirement stated in CBJ 49.15.330(b). Additionally, because this issue was raised for the first time in Meek's reply, we also find this argument waived.

III. The Commission's Decision 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 – which includes the thirteen page staff report and its fourteen attachments[5] - sufficient to provide us with a clear understanding of the basis of the Commission's decision, we find the findings sufficient under CBJ 01.50.070(a)(2).

IV. The Commission Properly Followed Its Rules of Order.

Meek argues the Planning Commission's decision should be set aside because the Commission failed to follow its rules of procedure. We will address each of Meek's arguments.

1. Meek argues that it was improper for the Commission to allow Mr. Miller and his business associate to provide public testimony. Meek argues this gave "the impression that there were members of the public who supported the Plan when they were actually interested parties."

Rule 5(b)(4) and Rule 7(D)(3) of the Commission's Rules of Order provide that any member of the public having an interest in being heard shall be given an opportunity to testify. We find it would have been inappropriate for the Commission to have refused Mr. Miller or his business associate the opportunity to speak.

2. The Commission allowed the applicant time to respond to questions from the Commission after public testimony was closed.

We find that allowing the applicant the opportunity to respond to issues raised by the public and to address questions from the Commission after the close of public testimony is

[5] *Brown v. Personnel Board, City of Kenai*, 327 P.3d 871 (Alaska 2014).

specifically provided for by Rule 5(B)(6) of the Commission's Rules of Order.

3. The Commission permitted the applicant's representative to speak in "derogatory terms" about members of the public.

In support of this claim, Meek cites to the public testimony of Mr. Miller. In reviewing the transcript of the hearing, we cannot find Mr. Miller's testimony was disparaging or demeaning and find no appealable error in the Planning Commission Chair's management of the hearing.

4. The Commission did not deliberate on issues raised during public comment.

The general rule is that when a decisional document shows on its face that an important factor was not considered, the matter should be remanded for further consideration by the decision-making body.[6] Here, we find the public's testimony went to all of the same issues upon which the Commission decided the permit: parking, traffic impacts and mitigation, noise, public health and safety (especially as related to odor), impacts to habitat, dust, lighting, property values and neighborhood harmony, and the project's conformity with the CBJ's comprehensive plan. Though it would have been helpful if the Commission had more specifically acknowledged some of the public comments, we cannot find the Commission committed reversible error. There is substantial evidence in the record as a whole to support the Commission's decision.

Because we find the Commission properly adhered to its rules of procedure, we find the Appellants failed to meet their burden under CBJ 01.50.070(a)(3).

V. Conclusion

In light of the deferential standard of review the Assembly must apply to Planning

[6] *Keane & Concerned Citizens of Bristol Bay v. Local Boundary Commission*, 893 P.2d 1239 (Alaska 1995).)

Commission zoning decisions and the applicable burden of proof, we must deny the appeal. The Commission's decision was supported by substantial evidence, the Commission followed its rules of procedure, and its decision was supported by adequate written findings.

The Planning Commission's decision is affirmed.

This is a final administrative decision of the City and Borough of Juneau. It may be appealed pursuant to the Alaska Rules of Court. Appeals should be filed with the Juneau Superior Court within 30 days from the date this decision is distributed to the parties.

DATED 2/14, 2017.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: Loren Jones, Presiding Officer