IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

HARRIS HOMES, LLC,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 1JU-19-855CI
	)	
CITY AND BOROUGH OF JUNEAU,	)	**DECISION AND ORDER**
	)	
	)	
Appellee.	)	

This appeal originally arises out of City and Borough of Juneau ("CBJ") Community Development Department ("CDD") letter of noncompliance sent on July 10, 2018 to Richard Harris ("Harris"), member and representative of Harris Homes, LLC, indicating that his recently filed plat for Sunset Meadows Condominiums did not comply with the Conditional Use Permit granted by the city's Planning Commission ("Commission") in 2011.[1] Harris appealed this decision to the Commission pursuant to CBJ Ordinance 49.20.110(a) on July 30, 2018.[2] During the pendency of the appeal, CBJ passed a new ordinance intended to provide a regulatory system in which developers could create planned communities in the manner that Harris had originally intended.[3] The Commission ruled that four of the five points on appeal sought improper advisory opinions from the Commission and that the remaining point was moot.[4] Harris appealed this decision to the CBJ Assembly on February 11, 2019.[5] On July 26, 2019 the Assembly Hearing Officer issued a proposed

[1] R. 967–69.

[2] Appellant's Brief, August 3, 2020, Exhibit 1.

[3] CBJ Code 49.15.900 et seq. (Ordinance 2018-41(c) adopted December 17, 2018).

[4] R. 444–53.

[5] R. 437–39 (this appeal was actually filed prior to the official Order Dismissing Appeal was signed and distributed on February 26, 2019).

decision affirming the Commission's ruling, finding four of the five points on appeal as non-justiciable and the remaining point moot.[6] This decision was adopted by the Assembly on August 19, 2019.[7] Harris then appealed to this court on September 12, 2019 pursuant to CBJ Ordinance 1.50.190 and Appellate Rule 602.

Harris now raises seventeen points on appeal and seeks a trial de novo.[8] Courts have wide discretion in determining whether to grant a trial de novo,[9] but they are rarely warranted.[10] Parties came before the court on February 11, 2021 for oral argument pursuant to Appellate Rule 605.5. A trial de novo is unnecessary here.

Before the court may address the bulk of the points on appeal, it must first determine whether Harris's underlying claims are moot and whether the

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[6] R. 2–18.

[7] R. 34.

[8] The points are: (1) the Commission failed to disqualify Commission members that had prejudged the issues; (2) the Assembly denied Harris notice and opportunity to be heard on the Commission members' disqualification; (3) the Commission and Assembly erred in finding that one of the points on appeal was moot; (4) the Commission and Assembly erred in determining that the issue would not occur again; (5) the Commission and Assembly erred in not applying the public interest exception to their determination of mootness; (6) the Commission and Assembly erred in not finding that the appellee had waived the issue of mootness and was therefore estopped from raising it as a defense; (7) the Commission and Assembly erred in allowing the appellee to file a reply brief, but not allow Harris to file a supplemental brief; (8) the Commission and Assembly erred in determining they had no jurisdiction over the appeal; (9) the Assembly erred in finding judicial policy supported a finding of mootness; (10) the Commission and Assembly erred in finding four of the five points on appeal as non-justiciable; (11) the Commission and Assembly erred in finding various factors mooted his appeal; (12) the Commission and Assembly erred in not giving Harris notice and opportunity to be heard on the new CBJ ordinance as it applied to the mootness issue; (13) the Commission and Assembly erred in barring Harris from presenting evidence and testimony; (14) the Assembly's mootness determination was not supported by substantial evidence; (15) the Assembly erred in finding the new CBJ ordinance made Harris' appeal moot; (16) the Assembly erred in not addressing Harris' underlying issue regarding Sunset Meadows' status as a condominium or subdivision and the legality of the new CBJ ordinance; and (17) that the Assembly denied Harris an opportunity to present evidence and issued a decision that was not supported by substantial evidence. Statement of Points on Appeal, September 12, 2019.

[9] Alaska R. App. P. 609(b)(1).

[10] *Gottstein v. State, Dep't of Nat. Res.*, 223 P.3d 609, 628 (Alaska 2010) (citing *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 774, 778 (Alaska 2007)).

issue of mootness has been waived as alleged by Harris, thereby estopping the CBJ from raising it as a defense.

The court refrains from deciding legal issues rendered moot under the facts.[11] A claim will be deemed moot if it has lost its character as a present, live controversy, i.e. when a party would not be entitled to relief even were the party to prevail.[12] Without possible relief, there is no adversity between the parties, and a case without adversity is rendered moot.[13] Mootness is a question of law that the court reviews de novo.[14]

Estoppel

First, Harris asserts that the CBJ is estopped from asserting mootness because the CDD did not raise the mootness issue at the time the Commission took the appeal—at the prehearing conference in front of the Commission on September 14, 2018, or in its September 28, 2018 motion seeking to simplify issues; rather, the CDD waited until November 15, 2018 to raise the issue. By this point in time, Harris asserts his company had invested substantial time and money in pursuing its appeal and that this "was simply a delaying tactic by the City which was attempting to drive up Harris Homes' costs in this litigation."[15]

Harris had appealed the CDD decision on July 30, 2018.[16] On August 7, Harris filed a revised plat declaration for Sunset Meadows.[17] On September 14, the parties met for a prehearing conference to discuss scheduling.[18] At this conference, it became apparent that Ms. Mores—the attorney for the CBJ

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[11] *Ahtna Tene Nene v. State, Dep't of Fish & Game*, 288 P.3d 452, 457 (Alaska 2012) (quoting *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 776 (Alaska 2001)).
[12] *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 776 (Alaska 2001).
[13] *Id.* (quoting 15 Martin H. Redish, *Moore's Federal Practice* ¶ 101.90 (3d ed. 1998)).
[14] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1092 (Alaska 2014) (citing *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (Alaska 2009)).
[15] Appellant's Brief, August 3, 2020, at 27–28.
[16] Appellant's Brief, August 3, 2020, Exhibit 1.
[17] R. 686–718.
[18] R. 1599–1668.

Department of Law and legal representative of CDD—had yet to fully apprise herself of the merits of the case.[19] Although the conference was primarily for scheduling purposes,[20] Harris attempted to raise substantive issues at the conference, which the hearing officer made clear would be inappropriate to discuss at such a preliminary conference[21] A scheduling order was thereafter issued which set out various deadlines for submission, including the simplification of issues on appeal, finalization of the record, briefing schedule, and hearing dates.[22] Following the dates for simplification of issues on appeal and the finalization of the record, but prior to any briefs being filed, CDD filed a Motion to Dismiss Appeal based on mootness on November 15, 2018.[23]

A stay on all substantive issues was put in place on December 5 based on Harris' November 25 Motion to Disqualify Planning Commission Members.[24] The disqualification motion was denied by the Commission on December 21,[25] and affirmed by the Assembly on January 8.[26] The stay was then lifted on January 10, 2019[27] and the Commission met to discuss the Motion to Dismiss on January 28, which was memorialized in a February 26 order that granted the motion and dismissed the appeal.[28]

Harris argues that because CDD did not raise the issue of mootness at the time the Commission accepted the appeal, at the prehearing scheduling conference, or in its motion attempting to simplify the issues on appeal, it should have been estopped from raising the argument in its November 15

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[19] R. 1609 ("I would like – I'd like a little time to come up to speed. I will do that as quickly as I can.); additionally, it should be noted that Harris' attorney was not present at this meeting.
[20] R. 1242.
[21] *See, e.g.*, R. 1616–17; R. 1648–50.
[22] R. 1243–1246.
[23] R. 1479–83.
[24] R. 1523–26.
[25] R. 1574–77.
[26] R. 1578.
[27] R. 1579–80.
[28] R. 1588–97.

motion.[29] He goes on to assert that had CDD raised the issue in August or September, it would have allowed him to "immediately appeal[ ] to the Assembly and then this court, thereby shortening by many months the time to resolve this matter."[30] However, this argument presupposes that the Commission would have ruled on the motion in an expedited manner without the aid of a full record and notwithstanding Harris's intent to disqualify an at-that-point unknown number of Commission members from hearing the case and ruling on substantive motions.[31] Harris does not explain how the issue would have been resolved earlier had CDD raised it sooner, nor does he cite to any case law, statute, or rule that would support the application of estoppel in such a situation.[32]

Although Harris is correct[33] that Alaska views the doctrine of mootness as a matter of judicial policy rather than a limit on jurisdiction,[34] the court must still refrain from issuing advisory opinions and resolving abstract questions of law.[35] The court will not decide questions of law when the facts have rendered the legal issues moot.[36] Were the court to adopt Harris' theory of mootness, parties would be required to raise it as a defense prior to filing any substantive pleading, placing greater restrictions on its use than civil procedure does on affirmative defenses.[37] Taking this idea further, should a party fail to notify the

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[29] Appellant's Brief, August 3, 2020, at 27.
[30] *Id.*
[31] R. 1633–34.
[32] Even were Harris' arguments regarding estoppel as an affirmative defense applied to the concept of mootness (*see* Appellant's Reply Brief, November 19, 2020, at 28–29) , CBJ would not have been required to raise it until filing their brief in opposition to Harris' November 19, 2018 opening brief (*see* Alaska R. Civ. P. 8(c)).
[33] The Planning Commission also misinterpreted the mootness doctrine in its Order Dismissing Appeal (*see* R. 448); however this misunderstanding was harmless error.
[34] *See, e.g., Regulatory Comm'n of Alaska v. Matanuska Elec. Ass'n, Inc.*, 436 P.3d 1015, 1027 (Alaska 2019) (citing *Bowers Office Prods., Inc. v. Univ. of Alaska*, 775 P.2d 1095, 1096–97 (Alaska 1988)).
[35] *Bowers Office Prods., Inc. v. Univ. of Alaska*, 775 P.2d 1095, 1097–98 (Alaska 1988).
[36] *Ahtna Tene Nene v. State, Dep't of Fish & Game*, 288 P.3d 452, 457 (Alaska 2012) (quoting *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 776 (Alaska 2001)).
[37] *See* Alaska R. Civ. P. 8(c).

court (or administrative agency) in the time Harris suggests, they would be forever estopped from asserting mootness regardless of any developing factual circumstances. This would create situations in which courts would need to rule on various issues long since made irrelevant due to changing situations and would be untenable as a matter of judicial policy.

Furthermore, even if CDD had intentionally delayed raising the issue of mootness with the intent to "drive up Harris Homes' costs in this litigation[,]"[38] it is unclear what costs Harris accrued as a result of the delay. Prior to CDD's filing of the Motion to Dismiss, Harris had appeared without counsel at the prehearing conference, filed a motion on the simplification of issues,[39] a motion for extension of dates,[40] and motions to supplement the record,[41] each being necessary for the Commission to resolve prior to ruling on the motion to dismiss. There is no indication that CDD intended to raise Harris' litigation costs, nor that Harris' costs were increased due to the motion to dismiss' time of filing.

For these reasons, it was proper for the Commission to not apply the principle of estoppel and prevent CDD from raising the issue of mootness in a pre-brief motion on appeal.

Mootness

Harris argues that the issue underlying his initial appeal—whether the CDD Director "wrongfully stoped [sic] a legally permitted condominium project midcourse, based on her misinterpretation of state & local code"[42]—is

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[38] Appellant's Brief, August 3, 2020, at 28.

[39] Which would have been unnecessary had parties met to come to a consensus as to those issues as discussed at the prehearing conference, however Harris' counsel was out of the country from September 16 to October 3 (*see* R. 1247), thereby preventing any discussion of the matter prior to the date upon which parties were to file the Joint Stipulation of Issues on Appeal of September 28, 2018 (R. 1244).

[40] R. 1261–62.

[41] R. 1274–75; 1462.

[42] Appellant's Brief, August 3, 2020, Exhibit 1.

not moot because (1) the July 10, 2018 letter of noncompliance can be retracted, (2) voluntary cessation of his proposed plat under duress does not moot the issue, and (3) that the public interest exception should apply even if the court finds the underlying issue moot.

The Letter

The primary relief sought is the overturning of the July 10, 2018 letter of noncompliance.[43] This letter put Harris on notice that plat number 2018-7 did not comply with the project approved by the Commission under Conditional Use Permit USE2011 0015.[44] However, soon after receiving this letter, Harris withdrew plat 2018-7 and filed plat number 2018-35, thereby abandoning his original intent of including land with each of the condominium units sold.

Harris asserts that "[t]he City continues to regulate the condominiums such as Sunset Meadows, because the City has never withdrawn the Notice refusing to issue necessary permits for site condominiums because of the City subdivision regulations."[45] However, the "Notice" was just that, a notification, which informed Harris of CDD's belief that Harris's 2018-7 plat did not conform to the city code. The letter refers to a plat which has been withdrawn, modified, and resubmitted, and was written under the authority of city ordinances which themselves have since been modified. Ordering the city to "withdraw" a letter referring to a situation that no longer exists and therefore has no actual effect would be an improper advisory opinion based on a moot set of facts.[46]

Harris also asserts that when "the ordinance under which the dispute arose remains in effect, the case is not moot[,]"[47] citing *Alaska Judicial Council v.*

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[43] This letter is also sometimes referred to in the record as "notice of noncompliance."
[44] *See* R. 666.
[45] Appellant's Reply Brief, November 19, 2020, at 23.
[46] *Alaska Judicial Council v. Kruse*, 331 P.3d 375, 379 (Alaska 2014).
[47] Appellant's Reply Brief, November 19, 2020, at 23.

Kruse.[48] Although it is true that CBJ continues to have ordinances that regulate subdivisions and has passed an additional ordinance regulating subdivisions since Harris modified and resubmitted his plat, whether the city has authority to regulate subdivisions is not (or should not) be in dispute.[49] Rather, Harris challenges CDD's interpretation and application of its ordinances in relation to its authority to regulate subdivisions as applied to plat number 2018-7. This is distinguishable from *Kruse* in which a former judge challenged the constitutionality of a statute regarding the Alaska Judicial Council's ability to make recommendations concerning judicial retention.[50] This distinction between determining the validity of a statute or ordinance on its face as opposed to as applied is a meaningful one, the former being independent of factual circumstances and therefore far less likely to encounter the mootness doctrine.

Harris attempts to evade the idea that his set of facts is moot by arguing that he "is a developer which may continue to develop outstanding and future site condominiums[,]"[51] citing *Bowers Office Products, Inc. v. University of Alaska*.[52] *Bowers* involved a computer distributor's challenge to the University of Alaska's bid reviewing practices, originally arguing lack of due process and failure to award Bowers a contract as the lowest bidder in violation of Alaska law.[53] On appeal to the Superior Court, Bowers abandoned any claims it had regarding its bid, focusing on pending and future bids instead, which resulted in the court dismissing Bowers's claim for lack of actual case or controversy before the

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[48] *Alaska Judicial Council v. Kruse*, 331 P.3d 375 (Alaska 2014).
[49] *See* AS 40.15.010 ("Before the lots or tracts of any subdivision or dedication may be sold or offered for sale, the subdivision or dedication shall be approved by the authority having jurisdiction, as prescribed in this chapter and shall be filed and recorded in the office of the recorder. The recorder may not accept a subdivision or dedication for filing and recording unless it shows this approval.").
[50] *Alaska Judicial Council v. Kruse*, 331 P.3d 375, 380 (Alaska 2014).
[51] Appellant's Reply Brief, November 19, 2020, at 24.
[52] *Bowers Office Prod., Inc. v. Univ. of Alaska*, 755 P.2d 1095 (Alaska 1988).
[53] *Id.*

court.[54] The Supreme Court found Bowers's argument that he was an "interest[ed] person" within the meaning of AS 44.62.300 persuasive, but affirmed the Superior Court's dismissal due to statutory and regulatory changes that made the case not ripe for adjudication.[55]

In the present instance, Harris has not specifically argued that he is an interested person under the Administrative Procedure Act and AS 44.62.300. However, even if he were to make and be successful in such an argument, much like in *Bowers*, the regulatory system has since changed, thereby making any injury under the new ordinances solely prospective and therefore not ripe, and any past injury moot as discussed above.

Voluntary Cessation

Harris then goes on to argue that voluntary cessation of a challenged practice does not deprive the court of the power to determine the legality of a practice unless it is absolutely clear the wrongful behavior cannot reasonably be expected to recur, thereby making such situations not moot.[56] Although Alaska has adopted this "voluntary cessation exception," it is inapplicable to the facts before us as its federal application has been strictly confined to the acts of defendants and no Alaska court has expanded its use to plaintiffs who voluntarily cease to perform an act.[57] As such, the exception cannot apply to

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[54] *Id.*at 1096.

[55] *Id.* at 1099.

[56] Appellant's Reply Brief, November 19, 2020, at 24 (citing *Slade v. State, Dep't of Transp. & Pub. Facilities*, 336 P.3d 699 (Alaska 2014)).

[57] *See, e.g.*, *Slade v. State, Dep't of Transp. & Pub. Facilities*, 336 P.3d 699 (Alaska 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("In the federal courts, there is a 'well settled' rule 'that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"); *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538–39 (2018) (A party cannot automatically moot a case simply by ending its unlawful conduct once sued, else it could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.").

the "voluntary cessation by Harris Homes"[58] nor would dismissal for mootness allow CBJ to resume challenged conduct as any such conduct was ceased upon Harris's withdrawal and modification of plat 2018-7.

The Public Interest Exception

Harris also asserts that even were his claims moot, the public interest exception should apply. This exception depends on whether (1) the disputed issues are capable of repetition, (2) the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) the issues presented are so important to the public interest as to justify overriding the mootness doctrine.[59] Harris argues that because CBJ's "subdivision ordinances continue in force and effect, and are being enforced . . . the issue is capable of repetition."[60]

It is true that CBJ continues to have ordinances that regulate subdivisions, but that is not in dispute; rather, Harris's complaint focuses on the subdivision ordinance as applied to plat 2018-7 and other such situated condominiums. The regulatory scheme under which Harris ran into conflict with the CDD has since been modified, which appears to provide a means to develop site condominiums as Harris had originally intended.[61] Accordingly, the dispute Harris had with CDD regarding plat 2018-7 would not be capable of repetition under the new ordinance scheme and the first prong of the public interest exception is not met, thereby failing to avoid the mootness doctrine.

CBJ Ordinance 2018-41(c)

As Harris' appeal progressed, CBJ worked on drafting and passing Ordinance 2018-41(c), "An Ordinance Amending the Land Use Code Relating

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[58] Appellant's Reply Brief, November 19, 2020, at 25.
[59] *Matter of Naomi B.*, 435 P.3d 918, 927 (Alaska 2019) (quoting *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 380–81 (Alaska 2007)).
[60] Appellant's Reply Brief, November 19, 2020, at 26.
[61] Appellee City and Borough of Juneau's Response Brief, October 5, 2020, at 16.

to Alternative Residential Subdivisions."[62] Among Harris's arguments regarding this ordinance is an assertion that it constitutes an "unconstitutional ex post facto law."[63] "An ex post facto law is a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed[,]"[64] takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.[65]

There has been no evidence presented that any of Ordinance 2018-41(c)'s provisions have been applied retrospectively or otherwise to Sunset Meadows's former or current plats and declarations. Nor does its enactment take away or impair any vested right Harris had acquired under then existing laws, or impose any new obligation, duty, or disability in relation to Harris's past acts.

For similar reasons, any challenge by Harris as to the validity of the new ordinance is not ripe and is therefore non-justiciable. Ripeness depends on whether there is a substantial controversy between parties having adverse legal interests of sufficiency and reality to warrant the issuance of a declaratory judgment.[66] A central concern of ripeness is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.[67] Harris withdrew, modified, and resubmitted

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[62] CBJ Code 49.15.900 et seq. (2018).
[63] Appellant's Brief, August 3, 2020, at 21.
[64] *In re Estate of Blodgett*, 147 P.3d 702, 711 (Alaska 2006) (quoting *Danks v. State*, 619 P.2d 720, 722 n. 3 (Alaska 1980)) (internal quotations omitted).
[65] *Underwood v. State*, 881 P.2d 322, 327 (Alaska 1994) (citing *Black's Law Dictionary*, 1317 –18 (6th ed. 1990)).
[66] *RBG Bush Planes, LLC v. Kirk*, 340 P.3d 1056, 1065 –66 (Alaska 2015) (quoting *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 369 (Alaska 2009)).
[67] *Brause v. State, Dep't of Health & Soc. Servs.*, 21 P.3d 357, 359 (Alaska 2001) (quoting 13A Charles Alan Wright, et al., *Federal Practice and Procedure* §3532, at 112 (2d ed. 1984)).

Sunset Meadows's 2018-7 plat prior to Ordinance 2018-41(c) having come into effect, and the ordinance has yet to be applied to either the 2018-7 plat or the 2018-35 plat. Any future application is speculative and uncertain. As such, the matter is not ripe for judicial review.

Other Points on Appeal

As noted above, the court refrains from issuing advisory opinions.[68] "A decision that would have no effect on the parties before the court is purely advisory and therefore is non-justiciable."[69] A justiciable controversy must be definite and concrete, affecting the legal relations of parties having adverse legal interests.[70] It must be a real and substantial controversy that can be remedied by specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.[71]

The Commission found four of Harris's five points on appeal called for improper advisory opinions and the other point to be moot.[72] The Court agrees despite Harris's assertion that these issues were not seeking advisory opinions because they "go to the heart of the substance of this case – namely whether Sunset Meadows is a condominium or subdivision."[73]

Whether resolution of these issues would help the court determine if Sunset Meadows is a condominium or subdivision is irrelevant, as that question

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[68] *Supra* notes 34–36; *see also Earth Movers of Fairbanks, Inc. v. State, Dep't of Transp. & Pub. Facilities*, 824 P.2d 715, 718 (Alaska 1992) (citing *Gieffels v. State*, 552 P.2d 661, 664–65 (Alaska 1976)) ("'Advisory opinions' are to be avoided.").

[69] *Gilbert M. v. State*, 139 P.3d 581, 588 (Alaska 2006).

[70] *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995) (quoting *Jefferson v. Asplund*, 458 P.2d 995, 999 (Alaska 1969)).

[71] *Id.*

[72] R. 1257 ((1) Does the CBJ regulate condominiums; (2) Is the Director's interpretation of subdivision wrong; (3) Does state law regulate condominiums; (4) Is Sunset Meadows a subdivision or condominium (found moot); and (5) Are the Director's actions a proper way to handle this situation).

[73] Appellant's Brief, August 3, 2020, at 28.

has been found to be moot, at least as to plat 2018-7 (see above). Further, the parties seem to be in agreement that Sunset Meadows, in its current form, is not a subdivision.[74] As such, there is no controversy regarding Sunset Meadows' status and any comment regarding it would be purely advisory.

Even so, two of Harris's points on appeal to the Commission are easily answered through the application of a statute that was repeatedly referenced throughout the history of this case, AS 34.08.730. While subsections (a) and (b) outline certain prohibitions as to the regulation of condominiums, subsection (c) notes that all other building code, zoning, subdivision, and other real estate use law, ordinance or regulations governing the use of real estate still apply to condominiums and other such common interest communities.[75] This means that validly enacted CBJ real estate code can be applied to condominiums so long as they do not violate subsections (a) and (b), thereby answering Harris's first point on appeal to the Commission regarding CBJ's ability to regulate condominiums. Based on AS 34.08.730 and Chapter 8 of Title 34 generally, it is also clear that the State regulates condominiums as well, thereby answering Harris's third point on appeal to the Commission.

Lastly, the court declines to issue opinions on Harris's second and fifth points on appeal to the Commission. Whether the CDD Director's interpretation of a subdivision was wrong is advisory and no longer relevant. The CDD Director's beliefs regarding the effect of a since changed regulatory scheme on a plat that was withdrawn and modified is irrelevant to any current case or controversy between the parties. Similarly, whether the Director's actions were a proper way to handle the situation is another question seeking

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[74] CBJ accepted Harris' revised plat as not constituting a subdivision (R. 293–94) and Harris has been adamant since the beginning that none of his plats were subdivisions.
[75] AS 34.08.730.

an advisory opinion on an action (sending a letter of noncompliance) that no longer carries any force.

Harris's remaining issues on appeal[76] would not affect the finding of mootness to his underlying claim, and therefore the alleged errors or defects on behalf of the Commission or Assembly are deemed harmless.[77]

Conclusion

For the reasons cited above, the court finds Harris's underlying claims moot and **AFFIRMS** the agency's decision to dismiss Harris's appeal of CDD's finding of noncompliance.

DATED this 11th day of March 2021 at Juneau, Alaska.

Daniel Schally
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

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[76] These other points include: (1) the Commission failed to disqualify Commission members that had prejudged the issues; (2) the Assembly denied Harris notice and opportunity to be heard on the Commission members' disqualification; (7) the Commission and Assembly erred in allowing the appellee to file a reply brief, but not allow Harris to file a supplemental brief; (8) the Commission and Assembly erred in determining they had no jurisdiction over the appeal; (9) the Assembly erred in finding judicial policy supported a finding of mootness; (12) the Commission and Assembly erred in not giving Harris notice and opportunity to be heard on the new CBJ ordinance as it applied to the mootness issue; (13) the Commission and Assembly erred in barring Harris from presenting evidence and testimony; (14) the Assembly's mootness determination was not supported by substantial evidence; (15) the Assembly erred in finding the new CBJ ordinance made Harris' appeal moot; (16) the Assembly erred in not addressing Harris' underlying issue regarding Sunset Meadows' status as a condominium or subdivision and the legality of the new CBJ ordinance; and (17) that the Assembly denied Harris an opportunity to present evidence and issued a decision that was not supported by substantial evidence.

[77] *See* Alaska R. Civ. P. 61.