BEFORE HEARING OFFICER FOR THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

HARRIS HOMES, LLC,

Appellant,

vs.

CITY AND BOROUGH OF JUNEAU COMMUNITY DEVELOPMENT,

Appellee,

Proposed decision adopted by CBJ Assembly as the final decision in this Appeal on Monday, August 19, 2019.
Beth McEwen, Municipal Clerk

Appeal of February 11, 2019
Notice of Decision January 28, 2018
Appeal Case No. 2019-02

PROPOSED DECISION ON APPEAL

I. Introduction.

The above captioned appeal from the January 28, 2019 decision, memorialized in a February 26, 2019 written Order Dismissing Appellant's Appeal to the Planning Commission,[1] was timely filed by appellant Harris Homes, LLC, on February 11, 2019. This is the hearing officer's proposed decision in this case. City and Borough of Juneau (CBJ) Code 1.50.140 provides that the hearing officer shall prepare a proposed decision and shall serve copies of the proposed decision with the municipal clerk and on each party in the appeal or the party's attorney no later than 45 days after the close of the hearing and the filing of all post-hearing briefs, if any. Here, the hearing date was declared to be July 19, 2019 for purposes of this matter.

The CBJ Code also provides that within five days of service of the hearing officer's proposed decision on a party, a party may file a written objection to all or any part of the proposed decision. The objection shall set forth with specificity the parts of the proposed decision to which objection is taken, the basis for the objection, and the action which the objecting party seeks to have the appeal agency take. Within three days of the service on a party of objections, a party may file a written statement in support of the proposed decision. The

[1] Record on Appeal (R.) at 1053-1062.

hearing officer shall reconsider the proposed decision in light of timely filed objections and statements of support and shall promptly prepare any amendments to be made to the proposed decision or shall issue a statement that the objections to and the statements in support of the proposed decision have been considered and that no change in the proposed decision should be made. The hearing officer shall set forth the reason for any amendment or for the rejection of timely filed objections

II. Procedural Posture.

The underlying decision appealed from was a July 10, 2018 notice of violation letter from Jill Maclean, Director Community Development Department, City and Borough of Juneau, to RH Development and Richard Harris.[2] RH Development[3] filed a Notice of Appeal from the Director's decision to the Planning Commission on July 30, 2018.[4] The Planning Commission accepted the appeal, voted to hear the appeal on the record, and designated a hearing officer on August 28, 2018.[5] Various motions delayed consideration of the appeal, among them a Motion to Dismiss filed by the appellee on November 19, 2018.[6] The Motion to Dismiss was fully briefed, and considered by the Planning Commission on January 28, 2019.[7] The Planning Commission granted the Motion to Dismiss and dismissed the Appeal for mootness without deciding whether the March/April 2018 Sunset Meadows Condominium plat (Plat 2018-7) was a condominium or a subdivision.[8]

III. Facts.

In 2011 the property in question was owned by RH Development, who applied for a permit to construct a 48-unit apartment complex.[9] That permit, permit USE 2011 0015, was granted, subject to certain conditions, on August 25, 2011.[10] The conditions included that the

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[2] R. 183-185.
[3] The 2018 appeal references RH development, while the February 11, 2019 is by Harris Homes, LLC. By order dated October 11, 2018, the parties substituted Harris Homes, LLC for RH Development. R. 730-732.
[4] R. 516, 931-939, 1054. The actual Notice of Appeal does not appear in the record, but the timing and existence are noted in two locations in the record, and there does not appear to be a dispute as to the timeliness of this appeal.
[5] R. 708.
[6] R. 944-948.
[7] R. 1052.
[8] R. 1053-1062.
[9] R. 1, 13-14.
[10] R. 25-26.

permit would expire 18 months from the effective date or February 23, 2013, if no Building permit had been issued.[11] Development did not occur right away. The record does not show issuance of a building permit prior to February 23, 2013.

In June 2013, Mr. Harris indicated to Community Development Department (CDD) Planner Eric Feldt that he wanted to separate some units into detached units. Mr. Harris was advised by e-mail that this was acceptable for zoning and was not a major change to the conditional use permit.[12] In May 2014 RH Development, through Richard Harris, made a presentation to the Planning Commission and proposed an alternate layout for the 48-unit apartment complex[13] and to pursue condominiums instead. Mr. Harris spoke under the "public participation non agenda items" portion of the meeting.[14] No Planning Commission approval of the revised development plan appears in the record, nor do the parties appear to have discussed whether or not permit USE2011 0015 had already expired by its terms, leaving the property without any current valid permit for the development as of February 2013.

March 8, 2018, Harris Homes, LLC[15] filed a condominium plat of the property (Plat 2018-7).[16] April 10, 2018, Harris Homes, LLC recorded Restated and amended Declaration of Covenants, Conditions and Restrictions for Sunset Meadows, the condominium development on the property.[17] Harris Homes, LLC began advertising and selling homes as condominiums in the spring and summer of 2018.[18] Following learning of the Sunset Meadows condominium configuration, the CBJ CDD began considering a proposal for an ordinance to specifically address "unit-lot development" or "site condominiums" such as those in Sunset Meadows.[19]

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[11] R. 26.
[12] R. 115. There was no mention of the expiration of the permit at that time.
[13] R. 86.
[14] R. 86.
[15] At some point the property was transferred from RH Development to Harris Homes, LLC. Appellant's Brief asserts that this occurred June 21, 2017, but the record does not appear to reflect this change. Nonetheless, neither party has raised an issue or objection to treating Harris Homes as the successor entity to RH Development, the entity which received the 2011 permit approval.
[16] R. 157.
[17] R. 123.
[18] R. 119, 121.
[19] R. 163.

The July 10, 2018, notice of violation letter was issued shortly thereafter.[20] The notice of violation letter takes the position that the "site condominiums" as described and established in the April 10, 2018, Restated and Amended Declaration of Covenants, Conditions and Restrictions for Sunset Meadows were a subdivision of land which did not comply with the terms of USE2011 0015 and would require either configuration approved under that earlier permit or a new subdivision application.[21] The letter indicated that inclusion of land in the boundaries of a condominium unit made it a subdivision of land subject to local Platting Authority review prior to recording of the condominium plat or offering property for sale.[22]

Harris Homes, LLC, through its attorney Mr. Spitzfaden, responded to the notice of violation by letter dated July 12, 2018, asserting, among other things, that there was no violation and that state law preempted the CDD from treating the Sunset Meadows condominiums as a subdivision of land.[23] The CDD declined to change its position,[24] and Harris Homes appealed the July 10, 2018 CDD decision on July 30, 2018.[25]

Harris Homes was concerned about the impacts that a delay in marketing properties pending resolution of its appeal might have on its financial condition, and elected to amend and record a plat and covenants which would be acceptable to the CDD so that it could proceed with pending sales without the cloud of the uncertainty as to the validity of its subdivision[26]. On August 7, 2018, Harris Homes provided revised declarations and covenants which the CDD did not consider an impermissible subdivision.[27] The August 8, 2018 letter from CDD to RH Development indicating acceptance set out some conditions relating to duplex versus zero lot line units and compliance with construction methods for those units.[28] The revised declarations

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[20] R. 183.
[21] R. 184. The letter did not address the question of expiration of permit USE2011 0015.
[22] R. 183-184.
[23] R. 199-201.
[24] R. 505-506;
[25] R. 515-516.
[26] R. 325.
[27] R. 465; 518-558; 568-569.
[28] R. 568-569.

were recorded August 13, 2018 (Plat 2018-35).[29] Harris Homes noted that the revised declarations and covenants were recorded under duress.[30]

Certificates of occupancy were approved for issue for phase one units 1-9 by August 14, 2018.[31] The CDD approved the Sunset Meadows developments under the revised condominium declarations on August 16, 2018 and lifted all enforcement action against Sunset Meadows.[32] Harris Homes maintained their position that the July 10, 2018 CDD interpretation was incorrect.[33] Subsequently, the CBJ adopted Ordinance 2018-41 in December 2018, effective January 17, 2019, setting out a process for consideration and permitting of alternative residential subdivisions, including unit-lot residential condominiums such as that involved here.

IV. Issues on Appeal.

The appellant asserted that the issues on appeal to the Planning Commission were: 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 a condominium; and 5) Is the Director's actions a proper way to handle this situation?[34] The Issues on Appeal to the Assembly were stated as:

1. The Planning Commission erred in determining the appeal of USE 2011 0015 (herein the Appeal) was moot.

2. The Planning Commission erred in not determining it was reasonably to be expected that the behavior at issue could be expected to occur.

3. The Planning Commission erred in not determining that the public interest exception to mootness applied so that the Appeal should not have been dismissed.

4. The Planning Commission erred in not determining that CDD was estopped to raise the mootness issue because it had already accepted the Appeal before CDD raised the mootness issue.

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[29] R. 625-627; 1054.
[30] R. 325; 1054.
[31] R. 671.
[32] R. 684-685; 689.
[33] R. 325; 696.
[34] These are the issues identified at page 2 of Appellant's Brief. See also R. 722; 1054. The actual points on appeal from the January 28, 2019 Planning Commission decision list nine issues on appeal, primarily targeting the issue of mootness.

5. The Planning Commission/Hearing Officer erred in allowing CDDD to file a Reply Brief and refusing to allow Harris Homes, LLC to file a Supplemental Brief addressing the CDDD's Reply Brief.

6. The Planning Commission erred in determining it had no jurisdiction over the Appeal.

7. The Planning Commission erred in determining appeal items 1,2,3, and 5 were advisory.

8. The Planning Commission erred in determining appeal item 4 is moot, there was no public interest in resolving appeal item 4, and a recently passed City ordinance mooted appeal item 4.

9. The Planning Commission erred in determining a recently passed City ordinance mooted appeal item 4 without providing Harris Homes notice and an opportunity to be heard on the issue.[35]

Appellants Brief addresses mootness, and apparently seeks a ruling both that the appeal is not moot and on the underlying merits not reached by the Planning Commission. If the appeal is not moot, then the remedy would appear to be a remand to the Planning Commission to address the merits of the July 30, 2018 appeal.

V. Standard of Review.

CBJ Code 1.50.070 sets out the standard for review and burden of proof. This section provides that the burden of proof is on the appellant. The hearing officer may set aside a decision only if: 1) The appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing; 2) The decision is not supported by adequate written findings or the findings fail to inform the appeal agency or the hearing officer of the basis upon which the decision appealed from was made; or 3) The appeal agency or the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.

VI. Discussion.

[35] See Appellant's February 11, 2019, Statement of Issues on Appeal.

The form of decision must be in writing, contain findings of fact and a determination as to each issue presented. 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 issues to be addressed are those raised in the notice of appeal. Many of the points on appeal are overlapping or interrelated. The primary issue on appeal is whether the Planning Commission's decision to dismiss the appeal as moot was supported by substantial evidence in the record as a whole.

A. *Was the Planning Commission Dismissing the July 30, 2018 Appeal as Moot Supported by Substantial Evidence in the Record?*

Initially, the appellant argues in part that mootness is not jurisdictional and cannot be raised at any time in the proceedings,[36] and further that the Planning Commission waived mootness when it accepted the appeal.[37] The Alaska Supreme Court has held that, unlike federal law, mootness in Alaska is not jurisdictional, but is a matter of judicial policy.[38] Mootness, like ripeness and standing, is a matter of judicial policy. It is a judicial rule of self-restraint[39]. The judicial policy requires that there is an actual justiciable case or controversy presented. The "actual case in controversy" term encompasses mootness, standing and ripeness[40]. The policy is based upon the principle that courts should not resolve abstract questions or issue advisory opinions.

The Planning Commission determined that:

> "Through the filing of Plat 2018-35, both parties are in agreement that Sunset Meadows is a condominium. While there was a dispute regarding Plat 2018-7, this plat has been abandoned. On the

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[36] Appellant's Brief at 12.

[37] See Appellant's Brief at 11-12, arguing, without citation to authority, that the CBJ is estopped from arguing mootness.

[38] See **Regulatory Commission of Alaska v. Matanuska Electric Ass'n.**, 436 P.3d 1015, 1027 (Alaska 2019).

[39] See **Bowers Office Products v. University of Alaska**, 755 P.2d 1095, 1096 (Alaska 1988); See Also **State v. Alaska Civil Liberties Union of Alaska**, 204 P.3d 364, 368 (Alaska 2009) (holding that The "actual case in controversy" requirement encompasses standing, mootness and ripeness.) And See **Hahn v. GEICO Choice Insurance Co.**, 420 P.3d 1160, 1167 (Alaska 2018) (holding that the "actual controversy" limitation in the statute giving courts power to render declaratory judgments "reflects a general limitation on the power of courts to entertain cases...and encompasses a number of more specific reasons for not deciding cases, including lack of standing, mootness, and lack of ripeness.")

[40] **Ruckle v. Anchorage School District,** 85 P.3d 1030, 1034 (Alaska 2004).

> surface, therefore, the dispute regarding Plat 2018-7 appears to be moot. A more thorough investigation verifies this conclusion".[41]

The Planning Commission's decision that the appeal of the July 10, 2018 letter regarding Plat 2018-7 is moot is supported by substantial evidence in the record as a whole.

An appeal may be moot when there is no relief the appellant would be entitled to even if the appellant prevailed in the appeal.[42] Here, even if the July 10, 2018 letter were reversed, subsequent events have occurred such that the appellant would not be entitled to relief if they prevailed. The appellant would have to take further action beyond simply prevailing to achieve its desired remedy.

It is undeniable that with the withdrawal of the administrative enforcement action there is no live case in controversy regarding the July 10, 2018 enforcement letter and the appeal is moot. The appellant has argued that if it prevails, it will act to modify the declarations and Covenants for Phase II and Phase III so that it can proceed with its original plan to have site condominiums with land and separate structures without CBJ planning oversight of the condominium boundaries. Appellant argues that AS 34.08.730 preempts regulation of the form of ownership of real estate, and thereby precludes the CBJ from regulating site condominiums differently than it would apartment buildings which may have identical physical attributes apart from the boundaries of ownership.[43]

The potential to either amend the condominium declarations for Sunset Meadows, or even the potential for a separate development proposing site condominiums, does not establish a cure for mootness. Such a change would present a new factual circumstance. The dispute as to the validity of the July 10, 2018 letter is moot on its facts. There is no pending actual case in controversy over the withdrawn letter. The facts of the present case do not present a live case in the mootness doctrine calls for dismissal of this appeal unless the appeal falls within an exception to the mootness doctrine.

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[41] R. 1058.
[42] See **O'Callaghan v. State**, 920 P.2d 1387, 1388 (Alaska 1996).
[43] Appellant's Brief at 8-10.

The Alaska Supreme Court has recognized two exceptions to the mootness doctrine: the public interest exception and the collateral consequences exception.[44] The appellant has not argued or discussed the collateral consequences exception, and the facts in the record do not establish collateral consequences meeting the exception.

The appellant has argued that the public interest exception applies. The public interest exception allows a court, or administrative agency, to continue to hear a case where the underlying case is moot, but the issue is capable of repetition evading review. The appellant argues that the issues are not moot under the doctrine that the allegedly wrong behavior could be reasonably expected to re-occur,[45] and that the public interest justifies review because the issues are capable of repetition and the mootness doctrine may circumvent review.[46] A third prong looks at whether the issues presented are so important to the public interest as to justify overriding mootness.[47] The appellant has argued that the CDD requirements precluding land associated with condominiums is capable of repetition because other developers may be under the same economic pressure to change their plat in order to be able to proceed rather than appealing.[48]

I find this argument unconvincing for at least three reasons. First, the amendment to the CBJ Code, which occurred after Harris Homes recorded its revised Declarations August 3, 2018, changed the rules to be applied by the CDD in situations of this type, effectively rendering the underlying situation not reasonably capable of repetition since any new effort to create site condominiums by Harris Homes would not be outright denied certificates of occupancy based upon being an illegal subdivision, but it would be reviewed under the new ordinance. If a new application were submitted, it would be reviewed under the standards in Ordinance 2018-41, not under the standards applied by the CDD in the July 10, 2018 notice of violation letter. A case seeking review under the new ordinance is not yet ripe, and the underlying appeal here does not present such a case as it was not decided by the CDD or the Planning Commission under the new ordinance, nor does appellant seek to challenge the new ordinance in this appeal.

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[44] See **In Re Necessity for Hospitalization of Mark V.**, 324 P.3d 840, 843 (Alaska 2014).
[45] Appellant's Brief at 6-7 citing **Alaska Trustee, LLC, v. Ambridge**, 372 P.3d 207, 225 note 106 (Alaska 2016).
[46] Appellant's Brief at 8 citing **Alpine Energy LLC v. Matanuska Electric Ass'n**, 369 P.3d 245,257 (Alaska 2016).
[47] See **Copeland v. Ballard**, 210 P.3d 1197, 1204 (Alaska 2009).
[48] Appellant's Brief at 8.

Second, appellant argues that Harris Homes could or would seek to amend the declarations and pursue its original development plan. However, it has not done so. Although it would be very difficult now that units have been sold, assuming it could convince the affected owners to consent, there is nothing preventing it from doing so and having the issue decided as a live case in controversy. However, were it to do so, the new declarations would be subject to the law at that time. Any rights to completion of a non-conforming development outside of Ordinance 2018-41 have been waived by Harris Homes by the filing of the August 13, 2018 declarations and cannot now be revived exempt from Ordinance 2018-41. The new development would need to meet the standards then in place, or establish an exemption from such standards. The dispute would be evaluated based upon the facts of that case, not the generic question of whether the CBJ lacks authority to regulate site condominiums. Until there are specific facts creating a case in controversy, the issues appellant seeks to have decided are not ripe, and a decision based upon the former law and former application would provide no relief to appellant.

Third, there is no showing that the review would be repeatedly circumvented. The argument about pressure on other developers to "knuckle under" is not supported by evidence. There is no evidence presented, nor argument providing reason to believe that other developers will commit resources in a manner which put them under coercive pressure without first determining whether their development requires CBJ approval, or which would cause them to abandon preserving their rights and seeking review of the CBJ CDD determination. Any land use permitting issue carries some economic pressure to resolve in a timely manner, but that normal circumstance is not the sort of situation which renders CDD decisions likely to repeatedly evade review.

This is distinguishable from the potential for evading review from amendments to salmon regulations in **Vanek**[49] or expiring permits in **DNR v. Greenpeace**[50] because the underlying rights do not expire in the same way. With land use rights, rights generally are fixed in time by a permit or plat and are not subject to substantial variation after that point.[51] Thus, such rights are not as

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[49] **Vanek v.Board of Fisheries,** 193 P.3d 283 (Alaska 2008).

[50] 96 P.3d 1056 (Alaska 2004).

[51] See, for example, CBJ Code 49.30.800 allowing completion of developments for which a permit has been issued prior to the effective date of an ordinance which renders the development non-conforming.

likely to evade review simply from the passage of time. The Planning Commission also discussed the voluntary nature of the change, and the significance that the mootness was caused not by the party whose actions were being challenged, but by the appellant's own actions.[52] Had the appellant not voluntarily changed the facts relating to the appeal by revising the plat, its rights would have been vested and not modified by Ordinance 2018-41.[53]

Further, the issues here are not so important to the public interest that they would justify overriding the mootness doctrine. The interests at issue here are a single developer, and there is no evidence that the public at large is significantly impacted by an interpretation under a former law.

The appellant argues that the new ordinance is an ex post facto law and therefore unconstitutional if applied to Sunset Meadows.[54] "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."[55] Ordinance 2018-41 applies prospectively only. As it stands, the current state of Sunset Meadows has been determined by the CDD to be in compliance. In order for the application of Ordinance 2018-41 to be an ex post facto fact pattern would require that the CBJ seek to prosecute an existing development as being in non-compliance. In the land use arena, pre-existing non-compliant lots or subdivisions rendered non-compliant due to a change in the law are regulated as non-conforming lots.[56] There is no ex post facto prosecution present on these facts.

This does not mean that the issues raised by the appellant regarding the preemptive effect of state statutes relating to condominiums may not be a valid point, just that this appeal is not the proper forum to decide an issue which is not a case in controversy on the facts of this case. Perhaps Harris Homes could seek a declaratory judgment that Ordinance 2018-41 is invalid because the CBJ is preempted by AS 34.08.730 from regulating site condominiums. However,

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[52] **Slade v. State, Dept. of Transp. & Public Facilities**, 336 P.3d 699, 700 (Alaska 2014), *see also* **Parents Involved in Community Schools v. Seattle School Dist. No. 1**, 551 U.S. 701, 719 (2007) (*citing* **Friends of Earth v. Laidlaw Environmental Services (TOC), Inc.**, 528 U.S. 167, 189 (2000)).

[53] See CBJ Code 49.30.800. However, the issue of expiration of the 2011 permit could impact the scope of rights preserved.

[54] Appellant's Brief at 11.

[55] **Doe v. State**, 189 P.3d 999, 1003 (Alaska 2008).

[56] See CBJ Code 49.30.300. And see CBJ Code 49.300.800.

the present forum and procedural posture is not the proper proceeding to address these arguments in the abstract. The Planning Commission decision that there is no live case in controversy is supported by substantial evidence in the record.

B. *The Planning Commission Did Not Err When It Determined that the Circumstances Were Unlikely to be Repeated.*

The appellant's second point on appeal argued that the Planning Commission erred in not determining it was reasonably to be expected that the behavior at issue could be expected to occur. This issue is addressed above in the context of the discussion of whether the appellant showed the likelihood of repetition necessary to meet the public interest exception to mootness. The Planning Commission found that repetition was unlikely and the change in the law makes the likelihood even more remote.[57] This finding is supported by substantial evidence.

C. *The Planning Commission Properly Applied the Public Interest Exception to Mootness.*

The appellant's third point on appeal argued that Planning Commission erred in not determining that the public interest exception to mootness applied so that the Appeal should not have been dismissed. This argument was also discussed above in the context of the public interest exception to the mootness doctrine. The Planning Commission's finding that none of the factors of the public interest exception were presented in evidence[58] is supported by the record.

D. *The Planning Commission Did Not Err in Determining that Estoppel did not Bar Raising the Mootness Issue.*

Appellant's fourth point on appeal argued that the Planning Commission erred in not determining that CDD was estopped to raise the mootness issue because it had already accepted the Appeal before CDD raised the mootness issue. Appellant's argument that mootness is somehow waived if a case is accepted for appeal is illogical because often mootness is not present at the outset of a case, and only arises during the course of a matter based upon facts as they develop. The facts giving rise to mootness, such as the repeal of a statute being challenged or the return of a piece of personal property the recovery of which is the purpose of the suit, often only occur during the course of a case.

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[57] R. 1061.
[58] R. 1061.

The record clearly shows that the underlying decision from which an appeal was taken, the July 10, 2018 letter refusing to issue certificates of occupancy and providing notice of the violation, has been resolved and the enforcement lifted from Sunset Meadows.[59] Treating the case as an appeal from a notice of violation, this is functionally a dismissal by the prosecution. When a charge is dismissed by the prosecution, the case is moot, and the defendant cannot go through with the criminal trial seeking to prove that they never should have been charged. The remedy would need to be sought in a separate case.

Mootness is not waived or one which parties are estopped from asserting when it becomes apparent. Mootness can be raised sua sponte.[60] The appellant has offered no authority to support the illogical position that failure to raise mootness waives or estops a party from later asserting mootness as a basis for dismissal. The Planning Commission found that Harris Homes presented no legal authority to support the argument that mootness was waived, nor could it.[61] The Planning Commission characterized it as an issue of subject matter jurisdiction. The more accurate description is that it is a matter of judicial policy. To the extent that the Planning Commission erred by calling mootness jurisdictional rather than prudential, that error is not material because there is no live case in controversy over the July 10, 2018 letter, and therefore dismissal for mootness is supported by substantial evidence in the record.

E. *The Planning Commission did not Err when it Denied Harris Homes, LLC Permission to File a Sur-Reply Reply Brief.*

The appellant asserts a violation of due process from the failure of the Planning Commission to grant the appellant's request to file a sur-reply to the CDD's Motion to dismiss for mootness. Appellant does not identify any procedural rule or other provision which was allegedly violated by the denial of the request to file a sur-reply. Appellant also fails to identify any facts or argument which appellant was prevented for making which could have prejudiced the appellant. On this record, the appellant has not met its burden to show that the Planning Commission failed to follow its procedures or denied appellant its due process rights. The Planning Commission followed its procedures in this case.

F. *The Appellant Abandoned the Argument that the Planning Commission Erred in Dismissing the Appeal on Jurisdictional Grounds.*

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[59] R. 689-691.
[60] See **Bowers Office Products v. University of Alaska**, 755 P.2d 1095, 1096 n.3 (Alaska 1988).
[61] R. 1057.

This point on appeal was not pursued apart from the discussion of mootness, which is addressed above. Where a point on appeal is not given more than a cursory statement in the argument portion of a brief it should not be considered.[62] Failure to argue a point constitutes abandonment of it.[63] As discussed above, the Planning Commission erred in characterizing mootness as depriving them of jurisdiction. Mootness is not jurisdictional, but is a doctrine of judicial restraint where there is no case of controversy. Regardless, the Planning Commission conclusion that the case is moot is supported by substantial evidence in the record.

G. *The Planning Commission Properly Concluded that Appeal Items 1,2,3, and 5 were Advisory.*

The appellant argues that issues 1,2,3 and 5 from the appeal to the Planning Commission were not advisory because they went to the heart of whether Sunset Meadows is a condominium. The Planning Commission decision found that quasi-judicial bodies may not issue advisory opinions or resolve abstract questions of law as part of the appeal process.[64] The appellant does not dispute this rule of law, rather appellant argues that the four questions are essential to determining whether Sunset Meadows is a condominium.[65]

I find that whether the CBJ regulates condominiums or whether the state regulates condominiums does not bear on whether a particular development is a condominium. These are abstract questions which need context. Both entities regulate condominiums with respect to the building code and other matters. The other two questions are mooted by the rescission of the enforcement letter. Whether the CDD director's interpretation of the former law was correct or whether the director acted appropriately in July 2018 are both moot questions, and are not justiciable. The Planning Commission did not err by failing to address the four issues it determined were advisory.

H. *The Planning Commission properly declined to decide whether the April 2018 declarations and covenants for Sunset Meadows represented a condominium or a subdivision.*

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[62] See **Shepherd v. Haralovich**, 170 P.3d 643, 651 (2007).
[63] **Associate Engineers and Contractors Inc v. H & W Const. Co.** 438 P.2d 224 (Alaska 1968).
[64] R. 1055 citing **State v. American Civil Liberties Union of Alaska**, 204 P.3d 364, 368-369 (Alaska 2009) (*quoting* **Bowers Office Products, Inc. v. Univ. of Alaska**, 755 P.2d 1095, 1097-98 (Alaska 1988)).
[65] Appellant's Brief at 8.

This point on appeal asserted that "the Planning Commission erred in determining appeal item 4 is moot, there was no public interest in resolving appeal item 4, and a recently passed City ordinance mooted appeal item 4." This point on appeal addresses the mootness question from a slightly different angle, but represents essentially the same argument. As discussed above, there is not a ripe case in controversy regarding application of Ordinance 2018-41. The facts presented in the Harris Homes appeal did not present a case in controversy regarding Ordinance 2018-41. The challenge to the July 10, 2018 determination is moot due to withdrawal of that letter. The claim is further mooted by the independent event that the facts here were changed by appellant's voluntary acts before adoption of Ordinance 2018-41. Those actions surrendered any vested non-conforming right. The Planning Commission decision that the question of whether Plat 2018-7 was a condominium or subdivision was moot is supported by substantial evidence in the record.

I. *The Planning Commission properly concluded that Ordinance 2018-41 mooted the appeal.*

The final point on appeal asserted that the Planning Commission erred in determining Ordinance 2018-41 appeal item 4 without providing Harris Homes notice and an opportunity to be heard on the issue. This point on appeal was not addressed in the briefing. Failure to argue a point constitutes abandonment of it.[66] Regardless, it was not error for the Planning Commission to take judicial notice of the adoption of Ordinance 2018-41 and how that altered the facts in relation to any future appeal. The Planning Commission's conclusion was supported by substantial evidence in the record.

VI. Conclusion.

The Planning Commission decision is supported by substantial evidence in the record. Additionally, the Planning Commission decision clearly sets out the basis for its conclusions. The appellant has failed to meet its burden to prove that the Planning Commission erred or failed to follow its procedures.

I make the following specific findings:

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[66] **Associate Engineers and Contractors Inc v. H & W Const. Co.** 438 P.2d 224 (Alaska 1968).

1. The CBJ Director of CDD issued a notice to Harris Homes on July 10, 2018 advising them that the Sunset Meadows Condominium development did not comply with CBJ development code, and certificates of occupancy could not be issued until it was brought into compliance.

2. Harris Homes appealed from the Director's decision on July 30, 2018.

3. Harris Homes voluntarily amended its declarations for the Sunset Meadows Condominium development sufficiently to come into compliance with the CBJ CDD Directors' July 10, 2018 notice on August 13, 2018.

4. The Director of CDD rescinded the violation notice on August 16, 2018 due to the now compliant circumstances, and allowed the issuance of certificates of occupancy.

5. The CBJ adopted an ordinance dealing specifically with "unit lot" developments which became effective January 17, 2019.

6. The Planning Commission dismissed the July 30, 2018 appeal on January 28, 2019 based upon mootness.

7. Substantial evidence in the record supports the conclusions that as of January 28, 2019 there was no live case in controversy regarding the CDD Director's July 10, 2018 determination.

8. The appeal here was rendered moot in two independent ways, first by appellant's voluntary action August 13, 2018 changing the underlying subdivision which resulted in rescission of the letter of July 10, 2018, and second by the adoption of Ordinance 2018-41 which changed the applicable law.

9. Due to the changed circumstances, the exceptions to the mootness doctrine do not apply here.

10. The collateral impacts exception to mootness does not apply, and was not argued.

11. The public interest exception does not apply as this fact pattern is unlikely to be repeated, and if repeated was not shown to be likely to evade review.

12. The controversy here is not one which significantly impacts the public interest. The issues here are not so important to the public interest to justify overriding mootness.

13. Harris Homes was not entitled to file a sur-reply to the Motion to Dismiss. The Planning Commission followed its procedures when it denied the request for a sur-reply. Further, the appellant has not presented evidence of prejudice from the denial.

14. Dismissal for mootness, while not strictly jurisdictional, is appropriate where, as here, there is no live case in controversy and a decision would afford no relief to the appellant even if they prevailed.

15. Issues 1,2,3 and 5 from the July 30, 2018 appeal do not present justiciable questions.

16. Issue 4 from the July 30, 2018 appeal is moot.

Submitted this 26th day of July, 2019.

Scott A. Brandt-Erichsen
Hearing Officer

Proposed decision adopted by CBJ Assembly as the final decision in this Appeal on Monday, August 19, 2019.
Beth McEwen, Municipal Clerk