BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

PEGGY MATTSON, ET AL.,

Appellants,

vs.

CBJ PLANNING COMMISSION,

Appellee,

and

COOGAN GENERAL, LLC,

Appellee/Intervenor.

Appeal of Planning Commission
Notice of Decision SGE2011-0003

NOTICE OF ADOPTION OF CORRECTED DECISION OF HEARING OFFICER

This is the CBJ Assembly's final decision in the Mattson appeal.

Appellants Peggy Mattson, *et al.*, filed a timely appeal of the decision of the City and Borough Planning Commission to approve a conditional use permit (SGE2011-0003) for applicant Coogan General, LLC, for a sand and gravel operation with an associated rock crusher.

Pursuant to the CBJ Appeals Code, the Assembly opted to assign the appeal to a hearing officer, attorney Michael Lessmeier.

As required by the Appeals Code, after full briefing and oral argument, the decision drafted by the hearing officer was circulated to the parties for an opportunity to comment. No substantive comments were received; one typographical error was corrected.

The Assembly reviewed the draft decision, deliberated on the matter in closed session, and adopted the draft decision, pursuant to CBJ 01.50.140.

Accordingly, the Planning Commission's decision in this matter is affirmed.

This is a final administrative decision of the Assembly of the City and Borough of Juneau; it may be appealed to the Juneau Superior Court pursuant to the Alaska Rules of Court, if such appeal is filed within 30 days of the distribution of this notice to the parties.

DATED this 11th day of December, 2012.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: Mayor Merrill Sanford

BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

PEGGY MATTSON, ET. AL., Appellants, vs. CBJ PLANNING COMMISSION, Appellee, And COOGAN GENERAL, LLC, Appellee/Intervenor.	SGE2011 0003

CORRECTED DECISION OF HEARING OFFICER

INTRODUCTION

This appeal concerns the April 10, 2012 grant of a Conditional Use Permit to Coogan General, LLC for a sand and gravel operation, to include a rock crusher, at the Montana Creek West borrow pit. After careful review of the record, I have reached the conclusion that there is a reasonable basis for the interpretation of the relevant ordinances by the Planning Commission and that the decision of the Planning Commission is supported by substantial evidence. I therefore recommend that the Assembly uphold the grant of the Conditional Use Permit to Coogan General, LLC.

FACTS AND PROCEEDINGS

1. In June of 2011 Coogan General LLC filed an application for a 10 year Conditional Use permit to continue a sand and gravel extraction operation at the Montana Creek West borrow pit, located on the West side of Montana Creek Road.

2. The Montana Creek West borrow pit, legally described as Glacier Lands Lot 1, is 17.35 acres in size and was originally part of a single 63.79 acre parcel that included the Montana Creek East borrow pit, located on the opposite side of Montana Creek Road.

3. The Montana Creek East borrow pit is now a separate sand and gravel

extraction operation that is currently owned by West Glacier Development LLC and was most recently permitted in 2007.

4. The original parcel, known as the West Glacier Borrow Pit, opened in the mid-1950's. In 1961 Green Construction Company established an asphalt plant at the Montana Creek pit and extracted material for general fill, D-1 and asphalt aggregate. Green Construction Company operated the site until the mid 1970's and then leased it to other contractors until it was sold in 1983.

5. On August 16, 1988, the BARANA Company received a Conditional Use Permit from the CBJ to continue gravel extraction. In 1989 Glacier Lands, Inc., acquired the entire site, with BARANA retaining a business interest. In July of 1996 the Conditional Use Permit was transferred to BARANA and then in August of 1996 the Conditional Use Permit was transferred to Glacier Lands, Inc.

6. In November of 1997 a new Conditional Use Permit was approved for a ten year, nine month gravel and sand extraction permit, which expired on August 25, 2008. During this time, adjacent land uses included the residential developments of Brigadoon Estates Subdivision and Montana Creek Subdivision to the southeast, undeveloped USFS land to the west and recreational use of the Juneau Community Garden and Juneau Gun Club to the north. Montana Creek West Subdivision, a residential development to the southwest, has been developed.

7. In 2003 Glacier Lands, Inc., subdivided the 63.79 acre site into three lots and began restoration work on Lot 3. The area was rezoned from D-1 to D-3 in 2004. In April of 2007, Lot 3 was sold to West Glacier Development LLC. The gravel pit on Lot 3 continued to operate under the 1997 permit (USE1997-0075), which allowed mining and processing of gravel, including the crushing and screening of the material extracted. In 2007 another Conditional Use Permit was approved for the Lot 3 site (USE2007-00042). This permit allowed the continuation of the sand and gravel extraction, including rock crushing and reclamation landfill activity at the West Glacier Borrow Pit on Lot 3. The Lot 1 site was not included in that application.

8. The original parcel has been an important source of sand, gravel and rock for the Juneau Community for more than 40 years. This parcel has provided borrow material for use in construction of municipal, State and private roads, building pads and other infrastructure.

9. Currently nearby developments include those mentioned above, as well as the Bicknell Enterprises, Inc. borrow pit, currently inactive, to the south. The Applicant recently received a Conditional Use Permit for storage units on Lot 2, immediately to the north.

10. The most current Conditional Use Permit on this site expired in 2008. There currently is no active excavation taking place at the site. The area is zoned D-3. The D-3 designation allows for sand and gravel extraction. Sand and gravel operations are conditional uses with the D-3 zoning.

11. According to the permit application, the excavators and a dragline crane will be used to excavate and gather borrow material. After the material is extracted and cleaned, it is trucked to a crusher, screened and/or crushed into marketable sand and gravel to be stockpiled on site. Occasional blasting, described as an "extremely rare occurrence," is anticipated. Most of the borrow material will be trucked off-site via Montana Creek Road and then the Back Loop Road, with a minor amount to be sold on-site. The closest resident is approximately 175 feet from the borrow pit edge and approximately 1700 feet from the crusher.

12. The Montana Creek West borrow pit provides fair to good quality sand and gravel after processing and tends to be better higher quality sand and gravel, with less silt than the active Montana Creek East borrow pit. Approximately 210,900 cubic yards of good quality material is located on the Montana Creek West property. It is expected that up to 25,000 cubic yards can be extracted annually. It is not anticipated that the borrow reserve in the pit will be depleted within the proposed ten year permit period.

13. On April 6, 2012, the Community Development Department (CDD) issued its report to the Planning Commission. It described the application as "for sand and gravel extraction, washing and crushing of borrow material on site. Rock crushing is limited to

crushing of materials extracted on site only. No new material will be brought to the site for crushing or other processing." The CDD summarized the history of development in the area as above, noting that in 2003 Glacier Lands, Inc. subdivided the parcel into three lots, and began restoration work on Lot 3. The area was rezoned from D-1 to D-3 in 2004.

14. In April of 2007 Lot 3 was sold to West Glacier Development LLC. The gravel pit on Lot 3 continued to operate under USE1997-00075, which allows the mining and processing of gravel, and also crushing and screening of the material. In 2007 the PC approved USE2007-0042, which approved a CUP for the continuation of sand and gravel extraction, including rock crushing and reclamation landfill activity on Lot 3. The site under consideration, Lot 1, was not included in the application. The applicant recently received a conditional use permit for storage units on Lot 2, located immediately to the north of the site under consideration.

15. The CDD noted it received significant public opposition to the proposal, raising concerns such as noise, increased truck traffic, speeding trucks and drainage. Some of the comments suggested the crusher is not an accessory use. The CDD analyzed this issue as follows:

> Staff notes the concept of a crusher as an accessory use to the primary use of sand and gravel operations, which is also listed in the Table of Permissible Uses (14.500) as a conditional use in the D-3 zoning district was given substantial consideration by Community Development staff, as well as the CBJ Law Office.
>
> CBJ §49.65.200 Extraction permit required, as noted in the analysis below, includes the processing of materials. The use listed in the Table of Permissible Uses (TPU) uses the term "operations" not "extraction" which indicates more than excavating. Item 4.150 in the TPU is rock crusher, which applies as the crushing is the primary principal use taking place on the site.

16. Furthermore, CDD staff noted that USE 2007-00042 had been granted to Lot 3, across the street from the proposed site and also in the D-3 zoning district, as an

extension of a 1997 CUP. A rock crusher was described in the application and the staff report.

17. The CDD found the application complete and the proposed use appropriate according to the TPU. It found the proposed development in compliance with the applicable ordinances, that it would not materially endanger the public health or safety nor substantially decrease the value or be out of harmony with property in the neighboring area. It found the proposed development in general conformity with the land use plan and that it would comply with the Juneau Coastal Management Program.

18. The CDD recommended the PC adopt the Director's analysis and findings and grant the requested Conditional Use permit, subject to 15 conditions set forth in its report.

19. The PC took up consideration of the Coogan Conditional Use Permit at its April 10, 2012 meeting. The PC received a verbal report from staff, which included a slide of a 2006 aerial photograph of the site, a slide of a topographic map which also shows Lot 3, a slide of a photograph taken from the entrance of the driveway, which shows an existing 30 foot wide vegetated buffer along Montana Creek Road that contains a small berm within the vegetated buffer, and additional slides of photographs showing how the property is screened and the proposed location of the crusher to ensure sufficient separation from the residential neighborhood. The PC spent significant time discussing the proposed conditions, the issue of whether the crusher was a permissible use and issues raised by concerned citizens. Testimony was given by Wayne Coogan, the applicant representing Coogan General LLC, who was questioned extensively. Testimony was given by nine concerned citizens, including counsel for Appellants. The PC discussed the issues raised extensively until late in the evening, revising several of the proposed conditions and adding several new conditions. The minutes summarize the following final comments by the Chair of the PC:

> [T]his is a neighborhood in transition. The PC truly appreciates the neighbors coming forward and expressing their concerns. The PC would not be moving forward with this project if they did not think they addressed their concerns, which has been through the CUP process. The PC appreciates the applicant's willingness to do what it takes to get this

> proposal moving forward, and Mr. Coogan knows that he will have the neighborhood carefully watching him. The PC looks forward to extracting gravel resources, and then moving onto full residential development in the future in this area.[1]

By a vote of 7 to 0 the PC passed the motion to approve the CUP as revised. The PC then concluded its meeting at 11:39 p.m.

20. On May 2, 2012, the Appellants filed their Notice of Appeal. They outlined the following issues for their appeal: (1) The PC did not comply with CBJ Code Title 49 by granting a permit for a rock crusher in a D-3 zone; (2) The finding that the project would not endanger public health and safety due to traffic, noise and water impacts is not supported by substantial evidence and (3) The evidence does not support a finding that the project is in harmony with the surrounding area.

21. The parties thereafter agreed to a briefing schedule, and briefs were filed by Appellants, the PC and by Coogan. Oral argument was held on September 19, 2012.

STANDARD OF REVIEW

CBJ Code 01.50.010 sets forth the following with respect to the Standard of Review:

> (A) The appeal agency or the hearing officer may set aside the decision being appealed only if:
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> > (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 findings or the findings failed 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 deny procedural due process to one or more of the parties.

[1] P45.

(B) The burden of proof is on the appellant.[2]

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3]

The Alaska Supreme Court has adopted the rule that "judicial review of zoning board decision is narrow and that a presumption of validity is accorded with those decision."[4] The Court has noted that the "great weight of authority also suggests that zoning board interpretation of zoning ordinances and planning documents 'should be given great weight and should be accepted when there is a reasonable basis for the meaning given by the board.'"[5] The Court has elsewhere set forth the following guidelines for its review of an administrative decision:

> When an administrative decision involves expertise regarding either complex subject matter or fundamental policy formulation, we defer to the decision if it has a reasonable basis. In contrast, we exercise our independent judgment when interpreting a statute which does not implicate an agency's special expertise or determination of fundamental policies.[6]

The Court has held that the evaluation of the specific planning needs of a municipality is a judgment within the "sphere of expertise" of the planning commission and therefore is entitled to considerable deference."[7] The Court has explained that the appropriate standard of review when a planning agency is interpreting an ordinance within the area of its expertise is the "reasonable basis" test.[8] Under this test, a court need not find that CBJ PC construction is the only reasonable one or even that the court would have reached the same result if the question had first arisen in a judicial proceeding.[9] The Court there also noted that the underlying purpose of a conditional use permit requirement is to allow the planning commission to make a case by case determination about the appropriateness of

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[2] CBJ 01.50.070
[3] CBJ 01.50.010.
[4] *South Anchorage Concerned Colilition Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993)
[5] *Id.* at note 12 citing 3 Edward Ziegler, *Rathkoph's The Law of Zoning and Planning*, § 42.07 at 42-65. See also *Luper v. City of Wassilla 215 P.3rd 342, 345 (Alaska 2009).*
[6] *Keane v. Local Boundary Commission* 893 P.2d 1239, 1241 (Alaska 1995).
[7] *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment and Appeals*, 904 P2d 373, 379 (Alaska 1995).
[8] *Id.* at 385.
[9] *Id.*

placing a particular use in a particular area, as well as the necessity of imposing particular conditions to mitigate the impact on the neighboring property.

DISCUSSION

A. THERE IS A REASONABLE BASIS AS A MATTER OF LAW AND FACT FOR THE PLANNING COMMISSION'S DETERMINATION THAT A ROCK CRUSHER IS ALLOWABLE AS AN ACCESSORY USE

(1). There is a Reasonable Basis For the Planning Commission's Determination that a Rock Crusher is Allowable as an Accessory Use in Connection with a Sand and Gravel Operation

The Appellants assert the CBJ Table of Permissive Uses does not allow a crusher in a D-3 zone because under TPU 4.150 a crusher can be allowed only temporarily in connection with an approved state or municipal public road construction project. The CDD analyzed this issue and came to a different conclusion, reasoning that TPU 14.500 applies to "[s]and and gravel operations" and that TPU 14.500 references CBJ 49.65.200, which in relevant part states:

> The use of property for the excavation, removal or other extraction of stone, sand, gravel, clay or other natural deposits and formations, including the processing of the materials, may be authorized in any district only under a conditional use permit issued by the commission under the procedures set forth in chapter 49.15, article III, as modified by this article. For purpose of this article, processing does not include the use of the material for the manufacturing of asphalt, concrete or similar processes requiring the incorporation of significant substances from off the site.

The CDD reasoned that the reference to "operations" in TPU 14.500 and the further reference to "processing of the materials," in CBJ 49.65.200 shows the intent was to allow the use of a crusher as an accessory use to the primary use of a sand and gravel operation. The CDD further noted that the use of a crusher has previously been approved in a D-3 zone, across the street from this proposal in USE 2007-00042.[10] The record also contains other evidence of the same interpretation by CDD in the form of a letter stating

[10] *See* R96-7.

that "the land use code requires that a Conditional Use permit be obtained prior to the use of a rock crusher in a residential zoning district as per CBJ 49.25.300.[11]

The issue of whether the crusher was allowable in the D-3 zone was discussed thoroughly in public testimony before the PC. The applicability of CBJ 49.65.200 was raised at the outset by CDD staff.[12] It was raised by the PC.[13] It was raised by concerned citizens.[14] The related issue of whether rock could be brought in from off site for processing was also thoroughly discussed, with the Applicant wanting to preserve that option, but CDD staff advised that processing would only be for material excavated onsite.[15] Finally, after the presentations by CDD staff and hearing all testimony from the Applicant and the public, the PC Chair noted that he wanted to "ensure that the PC has properly considered staff's arguments and public comments on the TPU and crusher issue."[16] The record shows the members extensively discussed the issue, concluding that crushing was incidental to the gravel extraction process.[17] And in the end, the PC unanimously adopted the Director's analysis and findings, and granted the CUP, subject to conditions outlined by staff as revised.[18]

I have carefully reviewed the record and the arguments made by the parties. I believe there is a reasonable basis for the determination reached by the PC and therefore recommend that decision be upheld. I reach this conclusion for several reasons. First, it is not my role to second guess the judgment of the PC. As set forth above, the interpretation given of its own statutes by an entity such as the PC is entitled to considerable deference, regardless of whether I or a court is reviewing that interpretation. I cannot conclude that the interpretation given by the PC is unreasonable.

Second, the interpretation given by the PC is the only interpretation that gives meaning to all provisions, a basic element of statutory construction. To adopt the

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[11] R89.
[12] R12.
[13] R15.
[14] R15, R22-23.
[15] R29.
[16] R34.
[17] R34-35.
[18] R44.

argument of the Appellants would mean that in this instance, CBJ 49.65.200, incorporated by TPU 14.500, would have no meaning. And yet, TPU 14.500 very specifically references sand and gravel "operations" and CBJ 49.65.200 very specifically references "processing of the materials." The only way to give meaning to the language of both TPU 14.500 and TPU 4.150 is to apply the latter to a crusher as a primary stand alone use, and the former to a crusher as incidental to a sand and gravel operation. To do otherwise would ignore use of the terms "[s]and and gravel operations" and the terms "processing of the materials," terms that cannot be said to be superfluous.[19]

The meaning of these terms was discussed with and carefully considered by the PC. In response to a question by one of the members, CDD staff explained that "crushing rock in association with sand and gravel extraction on a site is processing material."[20] Mr. Coogan, who has extensive experience in this field, having co-managed Lot 3 for 18 years and been in this business for some 40 years, explained that "they have to crush the rock onsite in the pit just as they have done over the years in all the pits."[21] The contrary argument was presented through the testimony of various members of the public, including counsel for Appellants.[22] The members themselves discussed this issue at length.[23] Indeed, there appears to be no dispute that the term "processing" includes crushing, as Appellants candidly conceded at oral argument.

Third, the interpretation given by the PC is consistent with its interpretation over the years. USE 2007-00042, which included a rock crusher, was granted to Lot 3, across the street from the proposed site and also in the D-3 zoning district, as an extension of a 1997 CUP. The previous permit, CU-13-88 was issued in 1988 and allowed crushing and screening of material.[24] In its 1997 application the applicant sought permission to recycle asphalt and concrete fragments and to manufacture concrete mix at the site. The Director

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[19] It is a basic proposition of statutory construction that the words used are presumed not to be superfluous and that different sections of a statute are to be "'construed together so that all have meaning and no section conflicts with another.'" *Monzulla v Voorhess Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011)(Citation omitted).
[20] R15.
[21] R28.
[22] R20-23.
[23] R27-R29.
[24] R132.

concluded those uses were not accessory to sand and gravel operation. The Director reasoned that sand and gravel operations did not typically include concrete manufacture or recycling of concrete or asphalt, and therefore could not be considered as customarily subordinate to sand and gravel operations.[25] At the same time, the Director approved the continuation of the sand and gravel operation, which included the use of a rock crusher. The PC approved this analysis.[26]

The arguments raised by Appellants do not change my belief that there is a reasonable basis for the PC's interpretation of the two TUP provisions at issue. Mr. Corso's April 9, 2002 memorandum is at best ambiguous and can reasonably be read to address only the principal use of a crusher, not the case here. Indeed, the CDD in the context of the proposed amendment noted that "[a] crusher can be permitted in any zoning district as a component of a quarry operation. . ."[27] The CDD elsewhere explained that:

> Under the current Land Use Code most industrial activities are restricted to the industrial zoned areas of the CBJ. One common exception is gravel extraction and quarry operations which can be permitted throughout the CBJ. A rock crusher may also be allowed if it is in conjunction with a permitted gravel/quarry operation." [28]

This history, when viewed in context, clearly supports the interpretation given by the PC.[29]

Nor do I believe the application of CBJ 49.25.300, which governs uses listed more than once, dictates a contrary result.[30] In granting the CUP, the PC adopted the analysis and findings of the CDD as set forth in its April 6, 2012 memorandum. That analysis noted the permit "has been reviewed and processed according to Title 49 section

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[25] PC133.
[26] PC 121.
[27] PC 102.
[28] PC 109.
[29] As correctly noted by Appellants, the CDD planner initially wrote that a rock crusher is not permitted in this zoning district. R140. This comment does not change the history that is a matter of record or the ultimate decision the PC had to make. This comment was pointed out to the PC (R23), which was entitled to determine the weight to give it in context with the other evidence presented.
[30] CBJ 49.25.300(a)(3) reads: "*Uses listed more than once.* Where a use might be classified under more than one category, the more specific shall control. If equally specific, the more restrictive shall control."

49.65.210(a) *Extraction Permit*" and then specifically referenced 49.65.200, emphasizing the language "including the processing of the materials".[31] That analysis also specifically referenced "the concept of a crusher as an accessory use to the primary use of sand and gravel operations" and noted that in contrast TPU 4.150 applied "when crushing is the primary principal use taking place on the site."[32] Under this analysis, which I believe is a reasonable construction of the applicable ordinances, 49.25.300 (a)(3) is not applicable, for the uses cannot be classified under more than one category.

I also believe it reasonable for the PC to conclude that the TPU categorizes principal and not accessory uses. Where that not the case, there would be no reason to have an "accessory" use. All uses would be subject to the TPU zoning restrictions.

(2). The Planning Commission's Determination that the Rock Crusher is a Valid Accessory Use is Supported By Substantial Evidence

An accessory use is a use "constituting an incidental or insubstantial part of a permissible use and commonly associated with the permissible use".[33] There is substantial evidence in the record that a crusher is commonly associated with a sand and gravel operation. As outlined above at page 10, there is no dispute that the "processing of the materials" allowed by CBJ 49.65.200 (a) includes a crusher. The history of this site supports this conclusion, as does the history of sand and gravel extraction in Juneau as testified to by the Applicant. So too does the permitting history.

The closer question is whether the crusher is an "incidental or insubstantial" part of the permissible use. Incidental is commonly defined as "happening as a result of or in connection with something more important".[34] "Insubstantial" is commonly defined as not substantial. The Alaska Supreme Court in considering a similar definition of what constituted an accessory use has noted that the approach is a flexible one, with different courts defining the terms in different ways. [35] This inquiry is necessarily factually

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[31] R97.
[32] R96.
[33] CBJ 49.25.300(a)(4).
[34] Collins English Dictionary – Complete and Unabridged, HarperCollins Publishers 1991, 1994, 1998, 2000, 2003.
[35] *Dykstra v Municipality of Anchorage, Land Use Division*, 83 P.3d 7, 10-11 (Alaska 2004). The Court there said: "These cases illustrate that the Anchorage zoning code's flexible approach to accessory use is neither uncommon

dependent and the issue here is whether there is substantial evidence to support the PC's determination.

The evidence here consists of the history of this particular site, the permitting history and the history of sand and gravel extraction in Juneau, as testified by the Applicant. It also consists of the April 6, 2012 CDD report and the testimony given before the PC. This evidence includes the fact that excavation of sand and gravel and crushing has been going on at the original parcel (that until recently included this site) since the mid 1950's.[36] More specifically, the evidence includes testimony that the crusher will operate intermittently.[37] It will run only when enough large material is stockpiled or when an order is placed for rock of a certain size.[38] It will not operate year round, but rather from April until freeze up.[39] Even when it does operate, it will not operate every day.[40] It will only process material excavated from the site, not material brought to the site.[41] The applicant testified he thought people would be surprised "by how benign the whole operation truly would be."[42] For 18 years the applicant was involved in the gravel operation on Lot 3 and he can "count on one hand" the number of complaints they received.[43] He described the project as a "small project" by industry standards.[44]

Appellants have argued the crusher cannot permissibly be included within the definition of an "accessory use" because the applicant testified the project would not be economically feasible without the crusher.[45] But there is no authority, legal or otherwise, that supports the notion that this factor alone is determinative. It is simply evidence the

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nor impermissibly vague; they show that a pliant, objective test of this kind—one that asks whether a reasonable person would consider the particular level of use in question as customary and relatively minor---can be readily understood and applied."

[36] R13.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] R29.
[42] R28.
[43] R17
[44] *Id.*
[45] R29.

PC was entitled to consider and according to the record, did consider. The record here shows the PC had before it all of the evidence summarized above, carefully considered that evidence and made its determination. [46] Given the record, which includes the thorough report of the CDD, and the unique facts here, I believe the PC's conclusion that the crusher is a valid accessory use is supported by substantial evidence.

B. THE PLANNING COMMISSION'S FINDINGS OF HARMONY AND PUBLIC HEALTH/SAFETY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

I address these issues together because the issues of public health/safety were not addressed in Appellant's opening brief (except perhaps as part of the issue of harmony) and in any event the evidence relating to those issues is much the same. The PC's conclusion of harmony is essentially a factual one. And again here, there is substantial evidence to support that conclusion.

Much of the evidence that relates to the PC's conclusion of harmony is summarized above. That evidence shows that sand and gravel operations have existed on this site since the 1950's. There is another recently permitted sand and gravel operation that includes a crusher on Lot 3 of the original parcel. The crusher on the proposed site will be located approximately 1700 feet from the closest residence. The closest residence is 175 feet from the borrow pit edge. The gravel extraction activities on Lot 1 will provide competition to the same ongoing activities on Lot 3, so the net impact will not double traffic or any other aspect of currently ongoing extraction operation already underway.

The record shows the PC carefully considered this evidence, as well as the concerns raised by local residents. Concerns of both noise and odor were thoroughly addressed in the CDD report.[47] It is clear from the record that this is an area in transition and an area with a long history of sand and gravel operations, which are important to the community. The CDD report thoroughly addressed these competing considerations, noting that page 58 of the 2008 Comprehensive Plan states that "smaller gravel extraction

[46] R 29.35.
[47] R17 and R161-2 (odor); R100; *see also* R176-7 (noise).

operations offer a critical resource to the CBJ's private and public sector and development and maintenance operations." That same report quotes two relevant policies:

> *POLICY 5.1 IT IS THE POLICY OF THE CBJ TO DEVELOP AND SUSTAIN A DIVERSE ECONOMY, PROVIDING OPPORTUNITIES FOR EMPLOYMENT FOR ALL RESIDENTS*
>
> *POLICY 5.9 IT IS THE POLICY OF THE CBJ TO SUPPORT THE EXTRACTION AND PROCESSING OF MINERAL RESOURCES IN AN ENVIRONMENTALLY-SOUND MANNER, GIVING PROPER RECOGNITION TO THE UNIQUE VALUES OF THIS COMMUNITY.*[48]

The record shows the PC carefully considered, revised and added to the conditions proposed by CDD in order to address the concerns of local residents.[49] The restrictions ultimately adopted include restrictions on the location of the crusher, the days/times of operation, sound levels, blasting, screening and berming. Reclamation and sloping was also required.

As set forth in 49.15.330 (a) the conditional use permit procedure is intended to afford the PC the flexibility necessary to make determinations appropriate to individual sites. I believe the PC here carefully and thoughtfully considered the evidence before it and that there is substantial evidence to support the conclusion that the proposed operation is not out of harmony with the neighboring area. To the extent the Appellants raised issues relating to public health and safety, I believe there is substantial evidence to support the PC's determination of those issues as well.

CONCLUSION

For all of the above reasons, I recommend the Assembly affirm the decision of the Planning Commission in all respects. To the extent I am allowed to allocate costs pursuant to CBJ 01.50.150(a), I order each party to bear its own costs and attorney fees. The issues raised here are important to all parties and were litigated in complete good faith. The participation of local residents was important and resulted in both the revision

[48] R107. The Comprehensive Plan at page 100 also recognizes the importance of gravel resources and the importance of minimizing land conflicts relating to such resources.
[49] R45.

of conditions and addition of conditions, albeit before the PC. Nonetheless, for these reasons, I believe each party should bear its own costs and attorney fees.

Dated this 28th day of November, 2012 at Juneau, Alaska.

Michael L. Lessmeier
Hearing Officer