

1 BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

2
3 ARTHUR AND LINNEA OSBORNE,
4 Appellants,

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6 ALASKA COMMERCIAL FISHERMEN'S
7 MEMORIAL IN JUNEAU; AND
8 DIXIE HOOD,

9 Appellant/Intervenors,

10 vs.

11 CBJ PLANNING COMMISSION,

12 Appellee,

13 CITY AND BOROUGH OF JUNEAU DOCKS AND
14 HARBORS DEPARTMENT,

15 Appellee/Intervenor.

Appeal of Planning Commission
Notice of Decision USE2011-0030

16 **DECISION ON APPEAL**

17 **I. Introduction.**

18 Appellants Arthur and Linnea Osborne filed a timely appeal of a decision by the City and
19 Borough Planning Commission to approve a conditional use permit for applicant CBJ Docks and
20 Harbors Department. The conditional use permit is for construction of two offshore cruise ship
21 berths and a moorage float located off the existing downtown cruise ship docks, generally known
22 as the "16b" Project.

23 The Appellant/Intervenors are the Alaska Commercial Fishermen's Memorial in Juneau, and
24 Ms. Dixie Hood. The Appellee/Intervenor is the CBJ Docks and Harbors Department.
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1 The record was prepared by the Community Development Department based upon the
2 materials considered by the Planning Commission, and application of CBJ Appeals Code Section
3 01.50.110. The parties were given time to file motions to supplement or object to the proposed
4 record.

5 Two Pre-hearing Orders and an "Order on Motions" were issued by the Presiding Officer.
6 The issues were limited to those set forth in the Notice of Appeal, liberally construed pursuant to
7 CBJ 01.50.030(e)(2).

8 The parties filed briefs on the merits of the appeal. On November 26, 2012, the Assembly
9 held a hearing at which it heard oral argument by each of the parties. The Assembly deliberated in
10 closed session, and the City Attorney was directed to prepare a draft decision. As required by the
11 CBJ Appeals Code, the draft decision was circulated to the parties for comment.

12 13 **II. Burden of Proof and Standard of Review.**

14 Under the CBJ Code, decisions concerning an application for a conditional use permit are
15 made in the first instance by the Planning Commission. CBJ 49.15.330. A final decision of the
16 Planning Commission may be appealed to the Assembly under the provisions of CBJ Chapter
17 01.50, the Administrative Appeal Procedures Code. Under CBJ 01.50.070(b), Appellants bear the
18 burden of proof. In this case, Appellants have the burden to show that the Commission's decision
19 is "not supported by substantial evidence in light of the whole record, as supplemented at the
20 hearing" or that the Commission failed to follow its own procedures. CBJ 01.50.070(a)(1) and (3).
21 "Substantial evidence" is defined to mean "such relevant evidence as a reasonable mind might
22 accept as adequate to support a conclusion." CBJ 01.50.070 provides:

23 CBJ 01.50.070 Standard of review and burden of proof.

24 (a) The appeal agency or the hearing officer may set aside the decision being
25 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 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.

(b) The burden of proof is on the appellant.

Alaska case law also provides that a decision “within the sphere of expertise of the Planning Commission . . . is entitled to considerable deference.” *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995), citing *South Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993) (“The majority rule, and the one we adopt, is that judicial review of zoning board decisions is narrow and that a presumption of validity is accorded those decisions.”).

III. Issues.

Appellants list the following points in the Notice of Appeal.

- (1) Failure to do outreach and notification to all harbor stakeholders, including independent commercial fishermen.
- (2) Cruise ship navigation studies of Juneau harbor fail to include weather analysis for months other than May through September.
- (3) Failure to provide risk management assessment for any liability or damages caused to the fishing fleet or seafood processor or damages to fishing vessels due to allusions with 16b dock or intermediate vessel dock or collisions with vessels approaching/departing Taku Dock.

1 **IV. Discussion.**

2 Outreach.

3 Appellants argue “a failure to conduct outreach and notification to all harbor stakeholders,
4 including independent commercial fishermen...”

5 The Planning Commission responds that the legal notice requirements for conditional use
6 permits are set forth at CBJ 49.15.230, and that these notice requirements were far exceeded in this
7 case. For example, after the first Commission hearing on the permit application, which had proper
8 notice under the Code section above, the matter was held over by the Commission for six months
9 for further work, and the same full notice was again provided for the second hearing. The
10 Commission also points out that the public could have – and, in fact, did – provide written
11 comments during the six months between the two hearings, including written comments by
12 members of the fishing industry. The Record includes these comments. Appellant Linnea
13 Osborne, for example, testified at both hearings, and before the Docks and Harbors Board, and
14 provided written comments as well.

15 Appellee Docks and Harbors Department also points out that the required notice was twice
16 provided, and that the project had been discussed in numerous public meetings going back to the
17 1990's. A Corps of Engineers permit has been obtained for the project, also entailing a full public
18 process.

19 The Docks and Harbors Department also points out on appeal that between the first and
20 second hearing of the Planning Commission, Docks and Harbors Department staff worked
21 extensively with Icy Strait Seafoods, and that a substantial redesign of the project was undertaken,
22 at considerable expense, to accommodate the concerns raised by the Appellants and fishing
23 industry.

24 Under the CBJ Appeals Code, the Assembly must determine if the Appellants have met their
25 burden of proof to show that the Planning Commission failed to follow its own procedures or

1 otherwise denied Appellants procedural due process. The essence of due process is notice and the
2 opportunity to be heard. It is clear from the Record that the legal notice requirements were more
3 than met, and that there were numerous other opportunities for the public to be heard. Appellants
4 have failed to meet their burden of proof on this issue.

5 Navigation studies.

6 While Appellants listed this issue in the Notice of Appeal, they fail to elaborate on it in their
7 brief. The Planning Commission notes in its brief that the first navigation simulation was run in
8 February, 2012, and that the changes to the project design made between the first and second
9 Commission hearings, increased the fairway width and swapped the north and south berths. In
10 addition, the Taku Fisheries Dock will be realigned with the prevailing winds. Taken together,
11 these changes adequately address the safety issue raised by the Appellants with respect to
12 navigation, even in the winter with its higher winds. After the redesign, navigation tests were done
13 in an 80-foot tender and the wider fairway was found to be adequate. Substantial evidence
14 supports the Commission's decisions on this issue.

15 Safety concerns for fishing vessels using the Taku Fisheries Dock.

16 Appellant Linnea Osborne stated at oral argument that safety is the main concern, based on
17 the difficulty of navigation for fishing boats using the Taku Fisheries Dock. This issue overlaps
18 the previous issue regarding navigation studies.

19 The Assembly finds that the Docks and Harbors Department, in the permitting process for
20 this project, responded appropriately to public testimony, substantially redesigning the project to
21 accommodate the needs of the fishing industry, at considerable expense. The proposed dock was
22 moved seaward, opening the space between it and the Taku Fisheries Dock. Cleats and a rub-rail
23 for fishing boats were added to the design. The pilings were made steeper to provide more sea
24 room. In analyzing the width of the fairway, national design standards were used, and the
25 redesigned fairway well exceeds those standards. The Docks and Harbors Department will install

1 wind and current sensors and a communication system to provide real-time data to boats using the
2 Taku Fisheries Dock. Overall, the Assembly finds that the Commission's determination that the
3 project will not constitute a danger to the fishing industry is supported by substantial evidence.

4 Intervenors.

5 Three parties were allowed to intervene in this appeal. The Docks and Harbors Department
6 was allowed to intervene as an appellee, based on its having been granted the permit being
7 challenged on appeal.¹ The Alaska Commercial Fishermen's Memorial in Juneau (Fishermen's
8 Memorial) and Ms. Dixie Hood were also allowed to intervene as appellants challenging the
9 conditional use permit.

10 When the draft decision on appeal was circulated as required by CBJ 01.50.140, Mr. Carl
11 Brodersen, on behalf of the Fishermen's Memorial, emailed the Municipal Clerk asking why the
12 issues argued by the Fishermen's Memorial, e.g., relocating the Memorial, were not addressed in
13 the draft decision.

14 Unlike the Osbornes, Ms. Hood and the Fishermen's Memorial did not file an appeal of the
15 Planning Commission's decision, nor did they pay an appeal fee. This was their choice. Instead,
16 they intervened in the Osbornes' appeal after the appeal deadline (which is set forth in the Appeals
17 Code and stated in the Commission's Notice of Decision).

18 All parties were provided the order issued by the Presiding Officer, which allowed the
19 intervention and directed: "The issues shall be as set forth in the Notice of Appeal"² (filed by the
20 Appellants).

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22 ¹Allowing the developer to intervene has been the longstanding practice in appeals to the
23 Assembly. The most recent example is the Mattson appeal, in which the developer (Coogan General,
LLC) intervened.

24 ²Three separate orders contained this exact language limiting the issues, including the order
25 which accepted Ms. Hood and the Fishermen's Memorial as intervenors in this appeal. This language
26 is, again, longstanding CBJ appeal practice, and a well-known principle of appellate practice employed
by the Alaska Court System.

1 The Appellant/Intervenors did not make a motion to expand the issues on appeal. Rather, it
2 appears, they simply disregarded the three orders. By failing to appeal by the deadline, or seeking
3 to expand the issues considered on appeal, Appellant/Intervenors have failed to exhaust
4 administrative remedies.

5 In any event, the issues of whether to construct a new dock or where the Memorial is properly
6 located - legislative questions - were not at issue in this appeal; all that was at issue was the
7 conditional use permit decision by the CBJ Planning Commission.

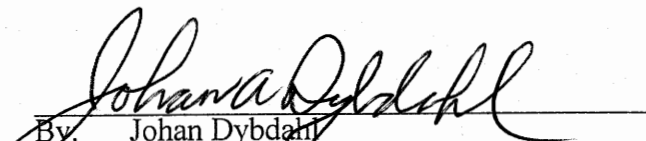
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9 **V. Conclusion.**

10 For the reasons outlined above, and those provided by the Appellees, the Planning
11 Commission's decision in this matter is affirmed; Appellants have failed to meet their burden of
12 proof in light of the standard of review set forth in the CBJ Appeals Code.

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

16 DATED this 7th day of January, 2013.

17 ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

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19 
20 By: Johan Dybdahl
21 Presiding Officer on Appeal