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BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

VETERANS FOR PEACE,
CHAPTER 100, IN JUNEAU,

Appellant,

vs.

CBJ PLANNING COMMISSION,

Appellee,

and

JUNEAU MERCANTILE AND ARMORY, LLC,

Appellee/Intervenor.

Appeal of:
Notice of Decision
CDD File No. USE2012-016

DECISION ON APPEAL

I. Introduction.

This is the Assembly's decision in an appeal brought by the Juneau Chapter of Veterans for Peace, challenging a Conditional Use Permit issued by the CBJ Planning Commission to Juneau Mercantile and Armory, LLC, to construct a 13,000 square-foot commercial building containing retail, food vending, and an indoor shooting range.

The appeal was timely filed, the Assembly accepted the appeal and appointed Assemblymember Loren Jones as Presiding Officer, a pre-hearing conference was held with the parties at which Juneau Mercantile was allowed to intervene as an appellee, and a briefing schedule was set. Motions were decided by the Presiding Officer regarding the final content of the record, all parties submitted briefs on schedule, and oral argument was conducted at which all parties provided argument as to why the Commission's decision should be affirmed or reversed. The Assembly then met to deliberate in closed

1 session,¹ reached a tentative decision, and directed the City Attorney to provide a draft opinion for its
2 consideration.

3 The appeal process is governed by the CBJ Appeals Code, CBJ 01.50, and relevant case law from
4 the Alaska Supreme Court.

5 **II. Issues on Appeal.**

6 By motion decided by the Presiding Officer, the issues on appeal were modified from Appellant's
7 Notice of Appeal, and are as follows:

- 8 • The permit applicant has already commenced work on the project (see photos below), even
9 though the Commission's decision on the application is not final. We [Appellant] understand
10 that a building permit has been issued for the construction of a building to house the
11 proposed food service and gun shop, a fact that leads us to the supposition that the applicant
12 was anticipating approval of the shooting range at some point after the construction began.
13 (Unmodified).
- 14 • CBJ Planning Commission's review of the proposal did not adequately address Public Health
15 and Safety issues related to the proposal. (Simplified).
- 16 • CBJ Planning Commission's review of the proposal did not adequately address the
17 proposal's conformance with the CBJ Comprehensive Plan. (Simplified).

18 **III. Burden of Proof and Standard of Review.**

19 CBJ 01.50.070, Standard of review and burden of proof, provides:

- 20 (a) The appeal agency or the hearing officer may set aside the decision being appealed only
21 if:
 - 22 (1) The appellant establishes that the decision is not supported by
23 substantial evidence in light of the whole record, as supplemented at the
24 hearing;

25 ¹ The Open Meetings Act does not apply to governmental bodies performing a quasi-judicial function.
26 AS 44.62.310(d)(1).

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- (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 Supreme Court case law provides that a decision “within the sphere of expertise of the Planning Commission . . . is entitled to considerable deference.”² The Court has also held: “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.”³

It is the Appellant’s burden to refute that presumption of validity.

The standard of review and burden of proof set forth in the CBJ Appeals Code determines the level of scrutiny that the Assembly gives to a decision of the Commission. That standard, along with the Code requirement that, absent particular circumstances,⁴ appeals are based solely on the record made by the Planning Commission, is a reflection of the basic structure of the CBJ. That basic structure allocates permitting decisions to the Planning Commission in the first instance; the Commission decides based on the evidence put before it; and the role of the Assembly on appeal is quite limited. The Assembly does not re-weigh the evidence. As the appeal agency, the Assembly provides only a check against error, meaning that the Commission can only be reversed if the evidence before it in total could persuade *no reasonable mind* that a permit should be issued. The CBJ Appeals Code mirrors the standards applied by most appellate reviewing courts for this type of decision.

² *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995)

³ *South Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993)

⁴ CBJ 01.50.110(e)

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IV. Discussion.

Appellee/Intervenor Juneau Mercantile strongly argues that the review standard outlined above drives the entire CBJ appeal process, and that it should determine the result reached by the Assembly in this appeal.

Juneau Mercantile also argues that Appellant has waived the first issue on appeal (regarding the start of construction) by failing to address the issue in its Opening Brief. Striking issues which are not briefed is standard practice in appellate review. Veterans for Peace makes no objection to Juneau Mercantile’s waiver argument on this, nor does it make any effort to cure the lack of argument in its Reply Brief. Accordingly, the first issue will be considered waived.

The second issue is:

CBJ Planning Commission’s review of the proposal did not adequately address Public Health and Safety issues related to the proposal.

This is the main issue on appeal.

Under the CBJ Land Use Code, consideration of a Conditional Use Permit proposal is a two-step process. First, the CDD Director reviews a development proposal and makes a recommendation which is then considered by the Commission.

Regarding review of public health and safety by the CDD director, CBJ 49.15.330(e) provides:

...

(5) Even if the proposed development complies with all the requirements of this title and all recommended conditions of approval, the director may nonetheless recommend denial of the application if it is found that the development:

(A) Will materially endanger the public health or safety;

...

1 In this case, the Director recommended granting the applied-for Conditional Use Permit, finding
2 that the proposal met the requirements of the Land Use Code, including a finding that the development
3 would not materially endanger the public health or safety.
4

5 Under the second step of the review process, after the Director's determination, the Commission
6 may make a similar determination.

7 CBJ 49.15.330(f), regarding review by the Commission, provides:

8 (f) *Commission determinations; standards.* Even if the commission adopts the director's
9 determinations pursuant to subsection (e) of this section, it may nonetheless deny or
10 condition the permit if it concludes, based upon its own independent review of the
11 information submitted at the hearing, that the development will more probably than not:

- 12 (1) Materially endanger the public health or safety;
- 13 (2) Substantially decrease the value of or be out of harmony with property in the
14 neighboring area; or
- 15 (3) Lack general conformity with the comprehensive plan, thoroughfare plan,
16 or other officially adopted plans.

17 In this case, the Commission adopted the Director's findings, and did not find that the proposed
18 development would materially endanger the public health or safety.

19 It is important to note that the legal question is whether the Commission's decision is
20 supported by substantial evidence "in light of the whole record." CBJ 01.50.070. In this case, the
21 Appellant primarily focuses on CDD staff work and the Staff Report. On appeal, however, the
22 Assembly must review the entire record, including public testimony, CDD Planner testimony, the
23 Staff Report, the permit application, and additional materials, including the CBJ inter-departmental
24 reviews.
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1 In Alaska, issues relating to firearm sales, use, and handling, are primarily governed by Federal
2 and state law, leaving very little scope at all to municipal regulation.⁵ The CBJ Land Use Code,
3 which governs the issuance of conditional use permits, has no provisions governing firearms except
4 for the one line in the Table of Permissible Uses which allows development of indoor shooting
5 ranges in certain zoning districts. The Commission makes this argument in its brief on appeal: “The
6 issue of whether it is appropriate to lawfully sell, rent or discharge Class III firearms within the City
7 and Borough of Juneau is not within the scope of a land use permit review.”
8

9 In this case, the evidence supporting the Commission’s decision is not confined to the Staff
10 Report; it is in the report, the Planner testimony, and the testimony of Mr. Walsh representing the
11 applicant, and the testimony of Mr. Menzies, a Juneau resident with considerable expertise in the
12 issue, and recognized as an expert by the Appellant. The testimony noted, for example, that, given
13 that state law allows the use of Class III automatic weapons within the CBJ, a below-grade concrete
14 shooting range supervised by trained range officers, “is the safest way to do it.” (M. Walsh, R. 62)
15 Planning Commissioner Bishop agreed regarding automatic weapons; “they are legal and given
16 there is a demand for them, I think the place for them is in a controlled environment.” (R. 63) The
17 Commission’s brief points this out as well: “Indeed it is difficult to imagine a safer location to
18 lawfully discharge firearms than a supervised environment, in an underground basement specifically
19 designed for this purpose.”
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24 ⁵ The Alaska Constitution provides: “...The individual right to keep and bear arms shall not be denied
25 or infringed by the State or a political subdivision of the State.” Art. I, Sec. 19 (emphasis added); *See, also* AS
26 29.35.145(a) (“The authority to regulate firearms is reserved to the state, and, except as specifically
provided by statute, a municipality may not enact or enforce an ordinance regulating the possession,
ownership, sale, transfer, use, carrying, transportation, licensing, taxation, or registration of
firearms.”)

1 The permit applicant, through its consultant Murray Walsh, testified regarding gun safety at the
2 proposed development, noting, for example, that: "Each shooter will have a range officer with them
3 as they are shooting." (R. 58) Mr. Walsh compared the proposed range favorably with the existing
4 Hank Harmon Gun Range. He also described air handling, bullet traps, and noise containment.
5

6 Appellant argues that the proposed development does not conform to the CBJ Comprehensive
7 Plan. The question on appeal is whether the record contains substantial evidence that the proposed
8 development will be "in general conformity with the Comprehensive Plan."
9

10 Regarding conformance with the CBJ Comprehensive Plan, the CDD Staff Report presented to
11 the Commission identified two relevant policies in the Plan, regarding diversified tourism
12 opportunities and the growth of local businesses. The Comprehensive Plan does not address the use
13 of firearms (and, very likely, it could not, given the state law - see Footnote 5). No contrary
14 provisions of the Plan were identified. Appellant has failed to meet its burden on this point; there is
15 nothing in the Plan on firearm use, and the identified policies are generally supportive.
16

17 **V. Conclusion.**

18 Under the limited scope of municipal regulation of firearms, and the deferential standard of
19 review and burden of proof, the Assembly finds that, on reviewing the Record as a whole, there is
20 sufficient evidence to persuade a reasonable mind that substantial evidence supports the
21 Commission's finding that the development will not materially endanger the public health or safety.
22 Appellant has failed to meet its burden of proof. Accordingly, the Commission's decision is
23 affirmed.
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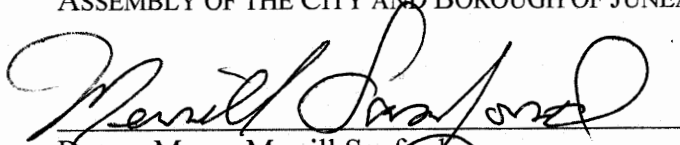
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IT IS SO ORDERED.

Dated this 23rd day of April, 2013.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA



By: Mayor Merrill Sanford