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BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

MICHAEL A. DAU AND CINDY DAU,

Appellants,

vs.

CBJ PLANNING COMMISSION,

Appellee,

and

SECON (COLASKA, INC.),

Appellee/Intervenor.

Appeal of:
Notice of Decision
CDD File No. USE2012-0019

DECISION ON APPEAL

I. Introduction.

Michael and Cindy Dau have appealed to the Assembly a Conditional Use Permit issued by the CBJ Planning Commission to Secon (Colaska, Inc.) to mine gravel from a patented mining claim in the streambed of Lemon Creek close to the Dau’s home in Rivers Edge Condominiums. The main focus of the Dau’s challenge is the noise and vibration caused by gravel mining close to their home. The appeal process is governed by the CBJ Appeals Code (CBJ 01.50), the CBJ Charter, and relevant case law from the Alaska Supreme Court.

The appeal was timely filed; the Assembly accepted the appeal and appointed Assemblymember Karen Crane as Presiding Officer; a pre-hearing conference was held with the parties at which Secon was allowed to intervene as an appellee; and a briefing schedule was set. Motions were filed by the parties and decided by the Presiding Officer regarding the final content of the record on appeal; all parties submitted briefs on schedule; and oral argument was conducted at which all parties provided

1 argument as to why the Commission's decision should be affirmed, modified, or reversed. The
2 Assembly met twice in closed session to deliberate.¹

3 **II. Issues on Appeal.**

4 By motion decided by the Presiding Officer, the issues on appeal were modified from Appellant's
5 Notice of Appeal pursuant to CBJ 01.50.050(a)(2), and are set forth below:

- 6 1. The proposed mining project is not compatible with the surrounding
7 neighborhood due to noise, intensity, and resulting property damage.
- 8 2. Evidence of vibration damage to homes from past gravel extraction
9 activities, and resulting loss of property value, was presented at the hearing.
10 Planning Commissioners failed to adequately consider this evidence and
11 provided inadequate safeguards when the permit was approved.
- 12 3. Relevant public testimony was not adequately considered by Planning
13 Commissioners.

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

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

16 (a) The appeal agency or the hearing officer may set aside the decision being appealed
17 only if:

- 18 (1) The appellant establishes that the decision is not supported by substantial
19 evidence in light of the whole record, as supplemented at the hearing;
- 20 (2) The decision is not supported by adequate written findings or the findings
21 fail to inform the appeal agency or the hearing officer of the basis upon
22 which the decision appealed from was made; or
- 23 (3) The appeal agency or the hearing officer failed to follow its own procedures or
24 otherwise denied procedural due process to one or more of the parties.

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

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

1 **IV. Conclusion.**

2 The CBJ Charter, Section 3.12(f)(1), provides: "The prevailing vote of at least five members
3 shall be required for official action." In this case, after briefing by the parties, oral argument, and two
4 substantial sessions of deliberation on the question, the Assembly was unable to reach a prevailing vote
5 of at least five members on a decision resolving this appeal.

6 Accordingly, with no official action by the Assembly to set aside or modify the Commission's
7 decision under CBJ 01.50.070, the appeal is deemed denied.

8 This is a final administrative decision of the City and Borough of Juneau. It may be appealed if
9 such an appeal is filed pursuant to the Alaska Rules of Court with the Juneau Superior Court *within 30*
10 *days* from the date it is distributed to the parties.

11 IT IS SO ORDERED.

12 Dated this 12 day of June, 2013.

13 ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

14 Karen R. Crane
15 By: Karen Crane, Presiding Officer

16 Attest:

17 Laurie J. Sica
18 Laurie J. Sica, Municipal Clerk
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21 Distributed:

22 6/13/2013 to Davis + Secon
23 + CDD staff + Assembly via email.
24 EJM
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