

MINUTES

PLANNING COMMISSION
CITY AND BOROUGH OF JUNEAU
Daniel Bruce, Chairman

REGULAR MEETING
January 22, 2008

I. CALLED TO ORDER

Chair Bruce called the regular meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC), held in the Assembly Chambers of the Municipal Building, to order at 7:01 p.m.

Commissioners present: Nancy Waterman, Michael Satre, Dennis Watson, Dan Miller, Maria Gladziszewski, Linda Snow, Victor Scarano, Daniel Bruce

Commissioners absent: Frank Rue

A quorum was present.

Staff present: Dale Pernula, CDD Director; Benjamin Lyman, CDD Planner; John Hartle, CLD City Attorney

II. APPROVAL OF MINUTES

December 11, 2007 – Regular Meeting
January 8, 2008 – Regular Meeting

MOTION: *by Ms. Waterman, to approve the December 11, 2007, as presented, and the January 8, 2008 regular PC minutes, with corrections.*

There being no objection, it was so ordered.

III. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS - None

IV. PLANNING COMMISSION LIAISON REPORT - None

V. RECONSIDERATION OF THE FOLLOWING ITEMS - None

VI. CONSENT AGENDA

Chair Bruce announced there were three items on the Consent Agenda and inquired if there was public comment on those items. No one from the public had questions, and no one from the Commission had comments.

MOTION: by Ms. Waterman, to approve the Consent Agenda per staff's recommendations, as presented.

There being no objection, it was so ordered, and the three cases below were approved.

USE2007-00062

An Allowable Use permit to construct a 7,327 square foot storage/shop building on Airport Blvd.
Location: 8415 Airport Blvd.
Applicant: Mackinco

Staff recommendation: that the Planning Commission adopt the Director's analysis and findings and grant the requested Allowable Use permit with the following condition. The permit would allow the development of a 7,327 square foot storage and workshop building in an industrial district.

1. Before issuance of a grading permit, grading plans shall be reviewed and found to incorporate Best Management Practices into grading activities.

VAR2007-00041

A Variance request to reduce the 50-foot anadromous lake setback for reconstruction of the Auke Lake Trail.

Location: Glacier Hwy.
Applicant: Trail Mix Inc.

Staff recommendation: that the Board of Adjustment adopt the Director's analysis and findings and approve the requested Variance, VAR2007-00041, which would allow development of the Auke Lake Trail within the 50 foot anadromous lake setback from Auke Lake, in accordance with the project description and application materials. The Variance is subject to the following conditions:

1. The applicant shall revegetate or otherwise block access to old sections of the trail where the trail has been relocated so the vegetative buffer within these sections of the setback may be re-established.
2. During trail construction, the applicant shall utilize Best Management Practices such as utilization of silt fences or other measures to prohibit sedimentation into the lake. Construction shall not be allowed during periods of heavy rainfall or flooding.

VAR2007-00044

A Variance request to allow a second driveway to be created in a panhandle subdivision at 24755 Glacier Highway.

Location: 24755 Glacier Hwy.
Applicant: Dana Howard

Staff recommendation: that the Board of Adjustment adopt the Director's analysis and findings and approve the requested Variance, VAR2007-00044. The Variance would permit a second driveway to be established in a panhandle subdivision, as part of minor subdivision case SUB2007-00052. This is a relaxation to the panhandle ordinance 49.15.420(h)(C).

VII. CONSIDERATION OF ORDINANCES AND RESOLUTIONS - None

VIII. UNFINISHED BUSINESS - None

IX. REGULAR AGENDA - None

X. BOARD OF ADJUSTMENT - None

XI. OTHER BUSINESS

BREAK: 7:05 to 7:08 p.m.

Planning Commission Legal Training By The CBJ Law Department

(Note: Haines Borough Commissioners attended the training via teleconference.)

Conflicts of Interest

John Hartle, CBJ Attorney, said state law requires municipalities to have a Conflict of Interest Code that meets certain criteria. He stressed that if the Commissioners had any questions regarding whether or not there might be a conflict, they should immediately contact him at any time because it was always considered urgent. If the Commissioners recognize conflicts, they were to step down and not deliberate or vote on such matters. Mr. Bruce asked if that also pertained to the PC when they dealt with legislative matters, such as actions consisting of voting on introduction of ordinances. Mr. Hartle said the PC introduces ordinances, however recommendations were not exempt from the Conflict of Interest Code, and Commissioners were not allowed to deliberate or vote on matters where they had a personal or financial interest.

Per CBJ Article I §01.45.120, Mr. Hartle stated that if the Commissioners required a written advisory opinion on any matter, he asked that they contact him. Additionally, if a Commissioner sought advice from a CBJ Attorney, they were immune and not liable for an action carried out in §01.45.120 if a Commissioner fully disclosed all relevant facts reasonably necessary to the issuance of the advice.

Mr. Scarano said he was the CFO of Goldbelt who has a substantial amount of property in Juneau. If he brought potential business forth to the CBJ, he asked if there were requirements in the process in applying for permits to disclose that it was through his position at Goldbelt. Mr. Hartle said he should state in which role he was speaking to CBJ staff, as Commissioners often could and did request information and obtained permits from CBJ. Mr. Bruce asked how doing so might interact with §01.45.050 *Improper representation*. Mr. Hartle said they would need to review the specifics, and then make a determination. They have had this similar scenario with lawyers on the PC that could not represent a client on matters presented to the PC, and were required to step down. Mr. Bruce believes Mr. Scarano could be involved with Goldbelt projects, however the prohibition was to facilitate approval by the PC. Ms. Gladziszewski clarified that it was projects that a Commissioner might have a personal or financial interest in. Mr. Bruce explained that the method in which it has been interpreted in the past, which applies to Ms. Gladziszewski, was that even when her spouse was representing Goldbelt on a project, she

was still required to step down. Mr. Pernula believes the PC was correct in the method in which they were choosing to recuse themselves. If a Commissioner came to the CBJ Community Development Department (CDD) and requested a permit, without it being presented to the PC that was fine. However, if that permit were required to be presented to the PC, he said that Commissioner would need to step down. Mr. Scarano confirmed that he could be involved in the Goldbelt-side workings of a project that might be presented to the PC, although he would be completely excluded from the deliberations. Mr. Hartle suggested that they continue this discussion when Mr. Scarano contacts him in the near future. Ms. Snow stated that she was aware of an instance whereby an officer had a conflict, although they were able to make a statement before they stepped down, which was prior to deliberations on the subject. Mr. Hartle advised against it because it was basically apart of that deliberation. Mr. Bruce mentioned a similar situation took place during the review of a Glacier Seafoods case where there was a potential conflict that was disclosed by a Commissioner and the PC waived it, which later became one of the points of the appeal. Mr. Hartle stressed that if the PC believes a case might be appealed, the Commissioners needed to ensure they had a thorough record.

Mr. Hartle referred to §01.45.360 *Definitions* regarding *Financial interest*, stating that if it was based on a professional or private relationship from which the person receives or expects to receive compensation, other than securities traded on a national exchange. He said *Personal interest* was much more vague, which meant other than a financial interest, which includes any material advantage in the form of a promise, service, privilege, exemption, patronage, or advancement. Mr. Bruce supposed that if a developer wished to build a subdivision next to an existing subdivision that a Commissioner was part owner of, he asked if that Commissioner was prohibited from speaking for or against the new subdivision development. Mr. Hartle replied that if it was going to affect the value of the residential property of that Commissioner that they should step down. He said the definition of *Immediate family members* were "...a Commissioner's spouse, minor children and dependents, or a regular member of the Commissioner's household." In addition, he pointed out that the definition stated only "...*minor* children and dependents."

PC Rules of Order

Mr. Hartle requested that the Commissioners read and strictly follow the Rules of Order, as this could potentially be a topic of an appeal if the rules were not abided by, which could be utilized as the criteria for overturning a PC decision.

He referred to Rule 12. *RECONSIDERATION*, stating that if they did not have all the required information or did not believe staff or a project was complete and wished to continue a case, the PC was able to provide a Notice of Reconsideration. He said the motion was required to be completed at the hearing in which the decision was made. However, it was solely for substantive motions, and not for procedural motions. For example, if the motion was instead to hold the case over to the next PC hearing or forward it to a committee, that case could not be reconsidered. At the next meeting, any Commissioner could move to take up the Notice of Reconsideration, which requires a majority vote to bring it back before the PC. At that time, the case was in exactly the same status before voting to approve the reconsideration, and then any motion was appropriate. He said that might involve a procedural motion to hold the case over to a future meeting or to forward it on to a committee, as well as substantive motions to adopt or deny the case. Mr.

Bruce asked if the PC were able to amend the findings. Mr. Hartle said yes, and mentioned that the PC Agendas currently reflects *RECONSIDERATION OF THE FOLLOWING ITEMS as well.*

Mr. Hartle stated that a general rule in the Charter was that all boards and commissions had to be treated the same as the Assembly. He said the rule in the Assembly was that it takes five members to take an affirmative action, which could be decreased, although doing so was quite rare. He said two members would need to be present in person or via teleconference and not voting at a PC hearing because they had a conflict, and then it would be decreased to four, which then had an irreversible minimum of three.

Kathleen Menke, Haines Commissioner, asked if the CBJ rules applied to all Planning Commissions, or if they were specific to Juneau, and to what extent they might develop their own rules. Mr. Hartle replied that these were the CBJ PC's Rules of Procedure that the Commission adopted, and invited the Haines PC to obtain a copy to review while they developed their rules.

Mr. Miller stated that the PC previously suspended the rules, and asked Mr. Hartle to expound on when it was appropriate to do so. Mr. Hartle referred to Rule 10. *VOTE REQUIRED*, stating that if the PC wished to change the order in which they were holding a meeting, they could do so by Suspension of the Rules. Although it could be achieved by unanimous consent, it requires at least six members. Mr. Bruce noted that typically the most common instance was when the PC meeting was running late. However, the PC Rules stipulate that they were not to undertake any new items after 10:30 p.m., although there were items the Commission has not yet addressed on the Agenda. Because members of the public remained through the entire meeting, he explained that the PC traditionally made the determination that it was unfair to request that they return; therefore the Commission suspended the rules.

Appeals

Mr. Hartle said the Charter provides that decisions of the PC could be appealed to the Assembly, some of which the Commissioners were able to contemplate. Therefore, the PC needs to be particularly cautious with the main criterion whether the PC's decision might stand or be reversed, and whether the PC has substantial evidence justifying making that decision. He said 'substantial evidence' was evidence necessary to convince a reasonable person of the PC's decision, which was a broad continuum. It was basically the structure of the CBJ to delegate permitting decisions to the PC, and in most instances that was the final word. He said the appellant has to establish and prevail in the appeal that the decision was not supported by substantial evidence according to the entire record. He cited the definition of *Substantial Evidence*, which states "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." He said the PC usually decides on an entire set of findings and conditions, and then the appellant might have 20 days to specifically scrutinize and choose which of those they wish to appeal. The most recent appeal pertained to an issuance of a variance regarding CBJ §49.20.250(b)(5)(C) "Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive;..." However, he said there was only one page of the appeal regarding that specific section of the Code. He believes that the Assembly instead wished that an analysis were provided, as opposed to the conclusion provided by the PC. Whether or not the Commission knew that this or future

cases were going to be appealed, the PC truly needed to look behind the findings, and then look to the analysis on what might be key points, i.e., §49.20.250(b)(5)(C) regarding any variance. Regarding a Conditional Use permit (CUP), a key point was neighborhood harmony, and the PC needed to ensure they had sufficient evidence to uphold their decision. Therefore, the Commission should require the developer to respond to the PC's questions and provide firm information for the record that was not provided to the PC on that specific variance. Instead, he said they had a record that was quite thin on the key points. That said, he was currently working on a project with Mr. Lyman to craft a volume of conditions, which were standardized. Doing so would provide a set of conditions that staff could select from a menu, and then edit in advance before presenting them to the PC. This alleviates the PC or staff crafting conditions on the spot or during the crunch time before the meeting packets were finalized.

Thane Neighborhood Association v. CBJ

Mr. Hartle said 12 years ago the PC permit for the AJ Mine by Echo Bay Alaska Inc. was appealed to the CBJ Assembly, to the State Superior Court, and then to the State Supreme Court, (Attachment C). The State Supreme Court reversed the decision of the Superior Court, and the Assembly and PC, finding that the permitting for the project was illegally phased. Therefore, he asked the PC to be alert and avoid phasing projects, whereby there were various methods in which that could happen, thereby he requested that the Commissioners closely re-read Attachment C. Fundamentally, what the PC did at the request of the developer was to provide the AJ Mine a CUP for a large mine permit, segmenting off the tailings dam, and then provided a permit for the rest of the mine. He said the Supreme Court decision states, "The proposed dam will be 332 feet high and 750 feet long. If the mine goes into production 100 million tons of tailings are expected to be produced and pumped into the pond." Therefore, he stated that it was quite a substantial item that the PC left out of the analysis. The Supreme Court basically stated that a large mine would generate tailings, and the developer needed to determine what was going to happen with the tailings before the PC could approve the mine. He explained that was somewhat of a political decision because if the PC approved the mine, and then the mining company spent hundreds of millions of dollars developing that mine, it would be extremely difficult to deny the next phase when they returned with the request for the proposed tailings dam. The Supreme Court recognized that problem and required instead that the PC review the cumulative impacts of all parts of the project. He cited from the decision, "...the Commission withheld approval of the dam, the tailings pond and marine water discharges until further information was provided, yet granted the permit for the remainder of the project."

Mr. Bruce referred to a potential multiple phased subdivision where a developer plans to build it in segments, and asked if that was considering building in phases or segments. Mr. Hartle said with a subdivision development they were likely to find that they could build one part, and then not build or build the next part. However, with the AJ Mine permit they were going to have to deal with the tailings, as there was no way around it. Mr. Bruce confirmed that the issue was the materiality of the linkage. Mr. Hartle said yes, adding that it was also the materiality of the unpermitted portions of the project. Thereby, the courts disallowed segmentation of a proposed project to assure the cumulative effects were adequately considered. Mr. Watson asked if that was based on the estimate of value of different project segments. Mr. Hartle believed that might have been one of the indicators. He said the Commission provided a condition stating that they would solve the water quality issues and follow the Clean Water Act, which substituted a

condition for an initial pre-permitting analysis that could have been conducted with reasonably obtainable information that includes spending money, rather than directing them to find a solution to the problem. However, if it were impossible to obtain that information, they would not have needed to complete an analysis. Mr. Bruce said the PC routinely granted certain permits before an essential Corps permit was issued. Mr. Hartle explained that it depends whether the PC has adequate and substantial information to determine that the developer could meet the requirements of the law, as opposed to the only proof being that they could only meet those requirements by obtaining a permit. Mr. Pernula believed at some point the PC might foresee five subdivisions, which might generate sufficient traffic requiring a signaled intersection. On the other hand, the developer might choose to complete only one subdivision, and then a new owner choosing to complete later additional subdivisions might be required to install such a traffic signal. He stated there were instances where they did not have a large applicant, versus a series of small ones, and the last developer was required to do so. Therefore, he asked when might a cumulative impact analysis be required, and by whom. Mr. Hartle clarified that these were completely independent developments from each other. However, with the AJ Mine project, they referred to a case where the state leased oil lands and decided to open up the entire area to a group of leases, and then said they would complete the detailed analysis lease by lease. The court did not agree, stating that if that information was reasonably available that they were required to do so up front, otherwise they would miss the cumulative impacts of the entire leasing scheme. Mr. Miller said from his experience during subdivision construction projects, CBJ Engineering Dept. staff reviewed the cumulative drainage during the first design of the first segment. However, as each additional segment was designed, he asked if it was done so as a stand-alone subdivision. Mr. Hartle replied citing Attachment C, stating, "The more interlinked the components of a project area and the greater the danger that phasing will lead to insufficient consideration of cumulative impacts, the greater the need to bar phasing."

Mr. Scarano asked if consideration of cost was provided for in determining if information was readily available. Mr. Hartle said this Supreme Court case has cost developers a lot of money throughout the state, and requires Commissioners and CBJ planning staff to have the developers provide more information that costs more money upfront as well. He referred to Attachment C stating "...permit conditions may not serve as a substitute for an initial pre-permitting analysis that can be conducted with reasonably obtainable information." Mr. Bruce said this case ends up raising more questions than it answers. He referred to another section of Attachment C, "...phasing through the use of conditions is prohibited where it is feasible to obtain the information necessary to determine whether environmental standards will be satisfied before granting an initial permit, but allowed where it is impractical or impossible to create detailed development plans without conducting additional physical exploration." He believes that statement undercuts what was previously stated in the appeal. He felt that if the PC found reasons that it was either impracticable or impossible that it might work, although they did not know that for certain. Mr. Hartle replied that the Commissioners should already know which cases the PC needed to review fairly closely where those might become issues.

Mr. Watson said adjacent neighbors were concerned regarding affordable housing issues, specifically when a developer builds a small subdivision, and does not declare that they later intend to build additional subdivisions adjacent to it. Mr. Hartle stated that with those types of cases, the Commission has to examine phasing questions, reasonably available information, and

pre-permitting analysis, which were where a PC case might be appealed. Mr. Bruce said fortunately staff provides an excellent job laying out the analysis that allows the PC to make those findings. However, sometimes it would be a judgment call, and the PC would need to clearly articulate the reasons for doing so. Mr. Pernula stated that was the reason he did not wish to discourage developers from showing the full project for any type of development. Particularly regarding subdivisions, as they wanted to review the entire project holistically regarding the alignment of the streets, pathways, and buffers for a more cumulative impact review process.

Alaska Open Meetings Act

Mr. Hartle said the Open Meetings Act in general applies to the PC and its subcommittees. However, he referred to AS §44.62.310(d)(1) “a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding.” However, when they applied rules to facts in deciding whether or not to grant a permit was a quasi-judicial function, whereby the Opens Meetings Act does not apply. He said the CBJ CDD staff prepares and distributes PC meeting notices, which the Commission needs to follow. Mr. Bruce said the PC often meets solely to take evidence. Mr. Hartle understood, although if the Commissioners wished to deliberate, the PC would be able to do so in private. For example, he explained that the Assembly frequently deliberates in private regarding appeals, although it was not technically titled an ‘Executive Session.’

Ex Parte Communications

Mr. Hartle said the PC should make decisions based on the record from testimony provided at the hearing, from information in the packet and submitted material, and not from other matters. He believes that valuable information could be gathered from viewing the site of a proposed development; therefore he did not wish to discourage the Commissioners from doing so. However, he discourages the Commissioners from talking to people about a case. If the Commissioners receive telephone calls from people wishing to comment on a case, they needed to request that those people contact the CBJ Law Department Attorneys directly. He said the proper method was to have the PC conduct the site visit as a body so everyone views the same project, which would be part of the record, however he did not believe CBJ had the time nor the budget to do so. Therefore, site visits by the Commissioners would be somewhat random, although discussions with the developer or neighbors about the project were not allowed. Mr. Bruce noted that if all the Commissioners did conduct a site visit as a body, they would need to provide appropriate notice. Mr. Pernula supposed if a Commissioner was walking down the street, and a person attempts to influence that Commissioner’s vote on a particular action, he asked how the Commissioner should remedy that. Mr. Hartle said to provide that information on the record by informing the PC body what happened, and then the PC would need to decide what they wished to do with that information. He noted that PC decision might exclude that Commissioner from deliberating or voting on that matter and request that they step down. The body would be the judge as to whether or not there was a conflict with the Chair making the call, however the entire PC body could overrule the Chair. He stated that if a client was the developer, financier, or contractor for the developer that would provide to the PC the basis for stepping down.

Mr. Watson recently attended several neighborhood meetings, and asked if that might pose a conflict. Mr. Hartle said the Commissioners should avoid attending non-official neighborhood meetings that were not held by CBJ CDD staff, which could potentially create ex parte contact situations.

Mr. Pernula noted that several Commissioners were members of other boards and committees. Specifically, the Wetland Review Board (WRB) where often developments were reviewed, with recommendations being forwarded to the PC. He recalled instances where developers and neighbors attempted to influence the outcome of what was before the WRB. Therefore, he asked how advisory boards or committees should conduct those meetings, and particularly if the WRB should take testimony. Mr. Bruce said it was not an ex parte contact if it occurred while a member was attending a meeting in their representative capacity with other members of that board, versus doing so individually. Additionally, there was a record created at those meetings. Mr. Hartle agreed, stating that the Rules of Procedures for those individual bodies should be followed, including the ordinance and/or resolution that created them. He preferred that Commissioners who were also members of other CBJ committees and boards, including attending neighborhood meetings, where they obtained information on projects that would later come before the PC that they immediately disclosed the information to the PC for the record.

Mr. Hartle provided his contact information to the PC. He stated that if the Commissioners had a conflict of interest question, the earlier they contacted him with a complete set of facts the better. Furthermore, if any Commissioners had legal questions on proposals being presented to the PC, he requested that they should do the same.

XII. DIRECTOR'S REPORT - None

XIII. REPORT OF REGULAR AND SPECIAL COMMITTEES

Ms. Snow reported that the Lands Committee recently met and were provided an update on the Lena Land Sale. She said 11 lots were not sold; therefore they would wait for one year to once again contemplate doing so. Mr. Miller asked if the Wood Smoke Ordinance was discussed. Ms. Snow replied that it was not. Ms. Gladziszewski noted the CBJ website contained updated information via a Wood Smoke Hotline link.

XIV. PLANNING COMMISSION COMMENTS AND QUESTIONS - None

XV. ADJOURNMENT

MOTION: *by Ms. Gladziszewski, to adjourn the meeting.*

There being no objection, it was so ordered, and the meeting adjourned at 8:30 p.m.