



## **II. Facts and Proceedings**

### ***A. The Project Background***

The project at issue involves the proposed construction of a fifth dock in the Juneau Subport at the southeast corner of Eagan and Whittier Streets.<sup>1</sup> The subport consists of tidelands owned in part by CBJ and in part by the State of Alaska, as well as 2.2 acres of associated uplands currently owned by HTC.<sup>2</sup>

Efforts to build a dock have been ongoing since at least 2019, when Norwegian Cruise Lines (NCL) purchased the uplands property and began exploring the possibility of a floating cruise ship dock and related waterfront development.<sup>3</sup> NCL engaged in various outreach efforts during its ownership of the property, including three community meetings, in which HTC participated.<sup>4</sup>

### ***B. Process for Consideration of a Fifth Dock***

The CBJ's process for considering a fifth dock in Juneau was outlined at a public meeting in January 2022.<sup>5</sup> The process entails three steps: (1) an update to the Long Range Waterfront Plan (LRWP), which is included in the CBJ Comprehensive Plan and codified at CBJ Code (CBJC) 49.05.200(b)(1)(C);<sup>6</sup> (2) the application for a conditional use permit for consideration by the Planning Commission for compliance with Title 49 of the CBJC and related plans; and (3) an application for a tidelands lease, to be submitted to the CBJ Division of Lands and Resources for consideration by the CBJ Assembly.<sup>7</sup>

The first step in the process was completed on March 14, 2022, through the CBJ Assembly's adoption of Ordinance 2022-12, which amended the LRWP "to allow for creation of a dock facility capable of accommodating one large cruise ship."<sup>8</sup> The ordinance also contained an appendix (Appendix B) that listed criteria for future dock construction projects, for reference

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<sup>1</sup> R. 57.

<sup>2</sup> R. 61. The property at issue is identified as Lot C1 on the Plat 2009-37, which subdivided the Subport. R. 57. The tidelands are zoned Waterfront Commercial, and the uplands are zoned for mixed use development. R. 346.

<sup>3</sup> R. 75; Tr. at 60.

<sup>4</sup> Tr. at 60.

<sup>5</sup> This process was established when NCL still owned the property. R. 55.

<sup>6</sup> CBJ Tourism manager Alexandra Pierce has described the LRWP as "an infrastructure plan and guidebook to manage waterfront change along four overarching goals identified by the CBJ: (1) enhance community quality of life; (2) strengthen tourism product offerings as well as downtown retail, entertainment, residential and service activities; (3) improve Juneau's image and attractiveness for investment; and (4) recognize all current waterfront uses." R. 765. The LRWP was originally adopted in 2004. R. 765.

<sup>7</sup> R. 55.

<sup>8</sup> R. 280.

during the conditional use permitting process.<sup>9</sup> The criteria had been recommended by the Visitor Industry Task Force, a task force established by the CBJ Mayor in 2019 in part to make recommendations on tourism and updating the LRWP.<sup>10</sup> Appendix B of the 2022 amendment to the LRWP states:

**VITF Criteria for Subport Dock Construction**

In 2020, the CBJ VITF established the following criteria for constructing a cruise ship dock at the Subport. This amendment supports the VITF’s criteria and any application for development needs to be evaluated consistent with the following:

1. One larger ship per day using one side of the facility;
2. Maximum of five larger ships in port per day;
3. No hot berthing at the new facility;
4. No larger ships allowed to anchor as the sixth ship in town. Larger ships may anchor but the number of larger ships in port would still be limited to five (CBJ to consider legal ramifications of limiting size of ships at anchor.”)
5. CBJ manages dock to some extent through a public private partnership or management agreement;
6. **Dock is electrified;**

The following criteria are related to uplands development and remain strong recommendations for uplands-related proposals:

7. High quality uplands development for community and visitors;
8. Year-round development orientation.<sup>11</sup>

The bolding in the above quotation has been added.

Later in 2022, NCL transferred the uplands property to HTC.<sup>12</sup>

***C. HTC’s Conditional Use Permit Application***

The appeal in this case concerns the second step in the three-step process: an application for a CUP for development of the Subport. On January 25, 2023, HTC submitted a CUP application, which it revised and updated on May 18, 2023, for a development project referred to as the Aak’w Landing project.<sup>13</sup> HTC described the project as:

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<sup>9</sup> R. 55 and 58.

<sup>10</sup> R. 283 and 803. After meeting twelve times, holding two public meetings, and receiving written and public testimony, the task provided a final report with its recommendations to the Assembly. R. 803.

<sup>11</sup> R. 283 (emphasis supplied).

<sup>12</sup> R. 58.

<sup>13</sup> R. 1-52; R. 58 R. 86. The original application was for development of the uplands only. The revised application proposed the construction of a floating dock in the tidelines. R. 1-52; R. 86.

a phased development of mixed use, including retail, food and beverage, community park, docking and associated parking. . . . The Aak’w Landing uplands project will be a concrete Bus Staging and vehicle Garage topped by a landscaped Park sloping up from Egan Drive. The project will include 34,000 sf of Retail spaces in the first phase with future phases adding 9,000 sf of additional Retail and 40,000 sf of facilities with a use yet to be determined. . . .

The pier portion of the project will utilize a proven steel float solution that will be built with a deck up to 70 feet wide and 500 feet long, allowing for the best facility layout and passenger handling solution.<sup>14</sup>

The application also states that the dock will include “cable trays and structure for integrating future shore power connections once the municipal feed is available.”<sup>15</sup>

***D. Review and Approval of the CUP***

The CUP application was distributed to various CBJ departments and outside agencies for review and comment, and a public comment period was held from June 2-20, 2023.<sup>16</sup> Only one public comment, which opposed the project due to over-tourism concerns, was received.<sup>17</sup> On June 29, 2023, the Community Development Department (CDD) submitted a staff report to the Planning Commission, evaluating the proposal under the permitting standards in CBJ 49.15.330(e) and (f), concluding, among other things, that the project would not materially endanger public health and safety and would conform with the CBJ comprehensive plan, the LRWP as amended, and various other adopted plans.<sup>18</sup> The CDD recommended that the Commission approve the application with nine conditions, including the provision of shore power by HTC within 24 months of a power line being located nearby; the completion of a navigability study; a limit of one large cruise ship at the dock every 24 hours; no hot berthing; and no temporary certificate of occupancy for the dock until a tidelands lease is recorded.<sup>19</sup>

The Commission convened a public hearing on the CUP application on July 11, 2023.<sup>20</sup> Public interest in the application was surprisingly low, with only three members of the public

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<sup>14</sup> R. 120. HTC described the first phase of the project as developing the dock and a retail/welcome center; the second phase as adding retail space and an upper-level plaza; and the third phase as parking and a flexible space.

<sup>15</sup> R. 119.

<sup>16</sup> R. 74-75, 292-300, and 337.

<sup>17</sup> R. 353.

<sup>18</sup> R. 8—81.

<sup>19</sup> R. 81-82.

<sup>20</sup> R. 346 and 1521.

(other than the applicant) testifying, each in support of the project.<sup>21</sup> Although Commissioners expressed concern that the uplands portion of the application (particularly phase 3) required further clarification, they determined that they had sufficient information about the proposed dock to take a vote on that portion of the project.<sup>22</sup> At the conclusion of the hearing, they voted 5-2 to approve the CUP for the floating dock.<sup>23</sup> On July 20, 2024, they issued a decision approving a floating steel dock up to 70 feet wide and 500 feet long, with the nine conditions specified in the CDD’s staff report, including condition 5:

The dock owner will, at their own expense, provide shore power within 24 months after an appropriately-sized power line is within 25 feet of the property line. When shore power is provided, large ships using the dock will be required to use shore power instead of ship power.<sup>24</sup>

Ms. Hart’s notice of appeal followed, which was accepted by the CBJ Assembly, and HTC was allowed to intervene as a real party of interest in the subject of the appeal. The appeal was referred to Alaska Office of Administrative Hearings to supply a hearing officer as permitted by CBJC 01.50.040.<sup>25</sup>

A hearing by Zoom videoconference was held on January 24, 2024. In this context, a “hearing” consists of oral argument by the parties, with an opportunity for the hearing officer to ask questions of the presenters. Participants in the oral argument included Ms. Hart, and counsel for the Commission and HTC, respectively. A proposed decision was issued on March 12, 2024, followed by a written objection to the proposed decision by Huna, and a written response by Ms. Hart to the objection. On April 25, 2024, the undersigned requested additional briefing from the

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<sup>21</sup> Tr. 38-48. Commissioner Pedersen expected there would have been more public comment on the project, and Commission Chair LeVine described being “baffled” by the level of public participation. Tr. at 103-104.

<sup>22</sup> Tr. at 81. Commission Chair LeVine expressed his hope that the Commission’s approve of the CUP for a dock “will signal to the developer and the Assembly that we’re supportive of this development and would like to see a complete application come back before the Commission as quickly as possible.” Tr. at 104.

<sup>23</sup> Tr. at 105.

<sup>24</sup> R. 362-363. The Commission did not adopt the analysis and findings regarding the uplands portion of the application because it “did not contain sufficiently specific information, particularly about the portion designated Phase 3, to support a conclusion that the project as a whole would comport with Title 49, including the MU2 land use designation.” R. 363. The uplands portion of the project was heard at the Planning Commission’s August 8, 2023, an approved as a separate CUP.

<sup>25</sup> The appeal was referred to the Office of Administrative Hearings after the Assembly granted a motion by Ms. Hart to disqualify the hearing officer originally designated to hear this case. Order Re Disqualification of Hearing Officer, October 25, 2023.

parties. Upon consideration of the parties' briefs and all information in the record, this amended proposed decision follows.<sup>26</sup>

The appeal points and arguments raised at the hearing and in the parties' written filings are discussed below. Before turning to the merits of the arguments, however, a short explanation of the process and legal standards is provided.

### **III. Discussion**

#### ***A. Procedure***

A decision of the Commission to grant or deny a CUP may be appealed by "any party affected by the proceedings," a member of the Assembly, or a municipal officer or employee.<sup>27</sup> The appeal is to the Assembly, which may appoint a hearing officer to conduct a hearing and issue a proposed decision for the Assembly's consideration.<sup>28</sup>

Appeals of a CUP are heard on the established record, as supplemented by relevant and admissible "new information" - i.e., information that was not presented to the Commission and that could not have been presented for reasons beyond the control of the party seeking its submission.<sup>29</sup> After briefing and oral argument, a proposed decision is issued, followed by the opportunity for parties to file written objections or statements of support after which either an amended proposed decision is issued, or a statement that no changes to the proposed decision should be made.

#### ***B. Standard of Review***

The standard of review governing this appeal is established by the CBJC. For the Commission's decision to be set aside, the appellant has the burden of proving at least one of the following: (1) the decision is not supported by substantial evidence in light of the whole

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<sup>26</sup> Under the CBJC, after briefing and oral argument, a proposed decision is issued, to which the parties may file written objections and, potentially statements of support. CBJC 01.50.140(c)(1). Ultimately, upon consideration of these submissions, the Assembly issues a written decision affirming, modifying, or setting aside the proposed decision in whole or in part, remanding the matter to the Commission, or directing that the matter be reheard. CBJC 01.50.140(a) and (c).

<sup>27</sup> CBJ Home Rule Charter, 3.16(b).

<sup>28</sup> CBJC 01.50.030(e)(4)(A); CBJ 01.05.040.

<sup>29</sup> CBJC 01.50.030(f). CUP applications must be submitted to the CDD Director. Once the application is accepted, the CDD Director is required to schedule and notice a public hearing in front of the Commission. CBJC 49.15.330(d)(2). The Director shall also forward the application to the Commission with a report containing the Director's recommendation for approval or denial of the application, and a determination of whether (1) the proposed project is an appropriate use of the property, (2) the application is complete, and (3) the project will comply with the requirements of Title 49. CBJC 49.15.330(d)(3) and 49.15.330(e).

record;<sup>30</sup> (2) the decision is not supported by adequate written findings, or the findings fail to identify the basis upon which the decision was made;<sup>31</sup> or (3) a due process or other material procedural violation occurred.<sup>32</sup>

“Substantial evidence” means “such relevant evidence a reasonable mind might accept as adequate to support a conclusion.”<sup>33</sup> This standard requires the reviewer to uphold the original factual findings if they are supported by substantial evidence, even if the reviewer may have a different view of the evidence. In a case reviewed on the substantial evidence standard, “[i]t is not the function of the [hearing officer] to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists.”<sup>34</sup> For decisions based on the interpretation of a zoning ordinance implicating the Commission’s expertise or the formulation of fundamental policies, the decision is “entitled to considerable deference” and is reviewed under the “reasonable basis” standard of review.<sup>35</sup> In those circumstances, review of the Commission’s decisions is narrow, and a “presumption of validity” is applied.<sup>36</sup> Otherwise, the decision is reviewed under the “independent judgment” standard of review.<sup>37</sup>

### **C. CUP Requirements**

The standards applicable to CUP applications are set forth CBJC 49.15.330(e) and (f). Under section 330(e), at the hearing on the CUP, the Commission shall review the CDD Director’s report to consider:

- (1) Whether the proposed use is appropriate according to the table of permissible uses;
- (2) Whether the application is complete; and
- (3) Whether the development as proposed will comply with the other requirements of this title.<sup>38</sup>

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<sup>30</sup> CBJC 01.50.070(a)(1).

<sup>31</sup> CBJC 01.50.070(a)(2).

<sup>32</sup> CBJC 01.50.010. A fourth basis for setting aside the Commission’s decision, that it would violate the law, is implicit.

<sup>33</sup> CBJC 01.50.010.

<sup>34</sup> *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

<sup>35</sup> *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 176 (Alaska 1993); *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 254 (Alaska 2000).

<sup>36</sup> *South Anchorage*, 862 P.2d at 173.

<sup>37</sup> *Balough*, 995 P.2d at 254.

<sup>38</sup> CBJC 49.15.330(e)(1).

The Commission is required to adopt the Director’s determination on each of these items “unless it finds by a preponderance of the evidence that the Director’s determination was in error, and it states its reasons for each finding with particularity.”<sup>39</sup>

Under CBJC 49.15.330(f) if the Commission decides to adopt the staff report, it may nevertheless deny or place conditions on the permit in some circumstances. That section states:

- (f) *Commission determinations; standards.* Even if the commission adopts the Director’s determinations pursuant to subsection (e) of this section, it may nonetheless deny or condition the permit if it concludes, based on its own independent review of the information submitted at the hearing, that the development will more probably than not:<sup>40</sup>
  - (1) Materially endanger the public health or safety;
  - (2) Substantially decrease the value of or be out of harmony with the property in the neighboring area; or
  - (3) Lack general conformity with the comprehensive plan, thoroughfare plan, or other officially adopted plans.

#### ***D. Points on Appeal***

Ms. Hart raised a number of points in her notice of appeal, which she expressly narrowed through briefing to the two issues summarized below. She has not briefed any additional issues identified in her notice of appeal. Thus, those issues are waived.<sup>41</sup>

##### **1. Appellant’s Arguments Regarding Health, Safety, and Welfare**

Ms. Hart argues that the Commission’s finding that the project will not materially endanger public health and safety is not supported by substantial evidence, and the project is inconsistent with the goal of the Comprehensive Plan to “promote public health and the general welfare.”<sup>42</sup> As support for her position, she contends that the CDD failed to consider relevant studies and research concerning the effects of cruise ship emissions on human health. She quotes a statement from a CBJ Dock Electrification Fact Sheet by the Juneau Commission on Sustainability regarding significant health problems from exposure to cruise-ship related air pollution; she cites an EPA Shore Power Calculator she purportedly used to estimate the costs of

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<sup>39</sup> CBJC 49.15.330(e)(2).

<sup>40</sup> The language of the section that the Commission “may” deny a CUP if specific circumstances exist suggests that the Commission has the discretion, but not the obligation, to deny a CUP in those circumstances.

<sup>41</sup> *Martinez v. GEICO*, 473 P.3d 316, 326 (Alaska 2020); *Hagen v. Strobel*, 353 P.3d 799, 805 (Alaska 2015) (argument “given only a cursory statement in the argument portion of a brief” was waived due to inadequate briefing and “will not be considered on appeal”).

<sup>42</sup> Appellant Brief, November 30, 2023, at p. 1



one year of air emissions from a large cruise ship at dock for 16 hours per day during the cruise season, which she claims “are realized as deaths, disabilities, emergency room visits, asthma attacks, and other harms;” and she references a Harvard School of Public Health publication as “one of many examples” of scientific studies and other “peer-reviewed federal government tools” about diesel air pollution she alleges the CDD should have examined to properly assess the health effects of emissions from the project.<sup>43</sup>

The threshold problem with Ms. Hart’s assertions on these points is that the studies and documents she references are not in the record in this case.<sup>44</sup> In the context of appellate review, the Commission’s approval of the CUP must be evaluated solely based on the established record – i.e., the information that was before it – not some larger body of evidence that was not presented to the Commission.<sup>45</sup>

There are similar problems with other assertions by Ms. Hart. For example, she contends generally that “[d]iesel air pollution has been associated with respiratory, cardiovascular, and neurodegenerative disease (such as Parkinson’s and Alzheimer’s), as well as cancer,” and “[p]renatal exposure is also of concern” – without citing any supporting authority or clarifying how these concerns are related to potential cruise ship emissions in this case.<sup>46</sup> She also maintains that to properly assess the effect of emissions from the project on human health, the CDD should have commissioned its own studies.<sup>47</sup> Again, Ms. Hart cites no legal authority in the CBJC or elsewhere that supports this position. Where legal authority is asserted without citation, it is waived.<sup>48</sup>

Here, the question is whether the finding that the project would not materially endanger public health and safety is supported by substantial evidence in the record. The 30-page CDD staff report that was presented to the Commission looked at the whole project and included a section on health, with a particular focus on shore power. The report recognized that shore

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<sup>43</sup> Appellant Brief, November 30, 2023, at pp. 2-4.

<sup>44</sup> Nor did Ms. Hart seek to supplement the record to include any of these items. The deadline for motions to supplement the record was November 9, 2023. Prehearing Order, September 25, 2023, at p. 2.

<sup>45</sup> Ms. Hart wanted the Commission to consider particular information in its decision-making process, she could have availed herself of the opportunity to submit that information to the Commission through the public comment and public meeting process. She did not elect to do so.

<sup>46</sup> Appellant Brief, November 30, 2023, at p.4.

<sup>47</sup> Appellant Brief, November 30, 2023, at p. 2; Appellant’s Response Brief to Opposition Briefs of Appellee and Intervenor Appellee, January 16, 2023, at p. 4.

<sup>48</sup> *Coppe v. Bleicher*, 318 P.3d 369, 378–79 (Alaska 2014) (upholding determination that issues are waived where argument “lacked citation to authority or a legal theory to support it.”)

power would improve health through reduction of combustion byproducts, that the dock would be built to accommodate shore power when a municipal line is available, and identified suggestions of the local electric utility, Alaska Electric Light & Power (AEL&P), about options for a transmission line to the Subport. The report provided information on the effects of the project on safety, noting that sidewalk and traffic congestion in downtown are major concerns of Juneau residents, and the project would take pressure off downtown by moving roughly 120,000 passengers west of Main Street. The report provided information about sanitation, traffic, noise and lighting (among other things), and discussed the dock and related issues, including sidewalks, walkways, and bus traffic from the dock, passenger fees to offset impacts, and the percentage of local residents employed by tourism.

The Commission then reviewed the staff report and conducted its public hearing in July 2023. Following a presentation of the project proposal by HTC, the Commissioners asked many questions about the project design and timing, parking and traffic, and most notably, shore power. There was considerable discussion about the timing of shore power to the project, with HTC stating that it is “investing in the infrastructure as part of the initial plan” so it will be “plumbed and ready for shore power” as soon as a transmission line is available to the property. Because of power capacity limitations in Juneau, HTC emphasized that the timing of a power line to the property is largely out of its control, but it explained that it has met with the power utility to discuss the project, and approving the CUP would serve as a catalyst to help prioritize bringing power to the property.

The Commission considered and weighed all this evidence in deciding to adopt the staff report’s findings regarding the dock. There is substantial evidence in the record to support the conclusion that the CUP as conditioned will not materially affect public health and safety.

2. Appellant’s Argument that the Proposed Project Violates the LRWP

Ms. Hart contends that the conditions in Appendix B of the LRWP are mandatory, including the criterion that “the dock is electrified.” She observes that condition 5 of the CUP does not require shore power before the dock is allowed to operate – only that shore power be provided within 24 months of a line becoming accessible to the property. This means the dock could operate without shore power for at least some period of time, contrary to the condition about shore power in Appendix B. Thus, Ms. Hart argues that approving the CUP violated the LRWP.

The Commission and HTC dispute this contention, arguing that the LRWP is part of the CBJ comprehensive plan, which consists of aspirational goals and policies, rather than obligatory standards. Thus, they claim that the Appendix B criteria are likewise aspirational only, and while they should be considered in deciding whether to approve a CUP, but they are not compulsory. The Commission and HTC argue that if the criteria were mandatory, development of a fifth dock would be delayed indefinitely, contrary to the LRWP’s purpose “to allow a large cruise ship dock that accommodates one large cruise ship. . . .”<sup>49</sup> They reason that if a dock were required to have shore power before operating, no one would try to build a dock in Juneau, given the considerable uncertainty about electrical capacity beyond the dock operator’s control.

*a. The conditions in the LRWP are aspirational goals and policies rather than mandatory requirements.*

Whether the Appendix B condition that the “dock is electrified” is a mandatory requirement or an aspirational goal requires an interpretation of the land use ordinances concerning the LRWP. Because the Commission has expertise applying zoning and land use ordinances, including officially adopted plans of the CBJ, the reasonable basis standard of review applies to the Commission’s interpretation of the ordinances in this instance. According to the plain language of CBJC 49.05.200(c), the LRWP is a part of the CBJ comprehensive plan. That section specifically states:

There is adopted the comprehensive plan of the City and Borough of Juneau, that publication titled The Comprehensive Plan of the City and Borough of Juneau, Alaska, 2013 Update, including the following additions:

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(C) The Long Range Waterfront Plan for the City and Borough of Juneau, dated January 22, 2004, as amended including by Ordinance 2022-12.

Thus, understanding the nature of the LRWP necessitates an understanding of CBJ comprehensive plan and its role in municipal land use planning and zoning. Alaska law defines a comprehensive plan as “a compilation of policy statements, goals, standards, and maps for guiding the physical, social and economic development. . . of the borough. . . including recommendations for implementation of the comprehensive plan.” Consistent with this definition, CBJC 49.05.200(b) identifies the CBJ comprehensive plan as “the policies that guide and direct public and private land use activities in the City and Borough.”

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<sup>49</sup> R. 282.

The CBJC makes clear that the policies of the comprehensive plan are aspirational only; they are not regulations of land. CBJ 49.05.200(c) specifically states:

**The goals and policies set forth in the comprehensive plan are aspirational in nature**, and are not intended to commit the City and Borough to a particular action, schedule, or methodology. **Neither the comprehensive plan nor the technical appendix adopted under this section nor the amendment of either** creates any right in any person to a zone change nor to any permit or other authority to make a particular use of land; neither do they **constitute a regulation of land nor a reservation or dedication of privately owned land for public purpose.** (Emphasis supplied)

Because the comprehensive plan consists of aspirational goals and policies, and the LRWP, including Appendix B, is part of the comprehensive plan, it follows logically that the Commission reasonably construed the Appendix B conditions as aspirational goals and objectives, albeit goals specific to development of the downtown waterfront area.<sup>50</sup> As aspirational goals, they are not mandatory requirements, despite their seemingly mandatory language, including that the “dock is electrified.”<sup>51</sup>

The language of the CBJ comprehensive plan supports this conclusion. The plan contains 123 policies, each of which contains an associated “Standard Operating Procedure”, “Development Guideline”, and/or “Implementing Action,” described as “directives for how to carry out [each] policy.”<sup>52</sup> These actions include the adoption and revision of zoning ordinances. The language of the plan specifies that it is the zoning ordinances that “regulat[e] the use of land and the improvements on it. . . which implement the land use policies and maps of this Comprehensive Plan,” by “establish[ing] standards for development and create[ing] different zoning districts or classification of land. In CBJ, zoning regulations are adopted within Title 49, the Land Use Code.”<sup>53</sup>

This conclusion is reinforced by the Alaska Supreme Court’s general description of the land use planning and zoning process in *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment and Appeals*, 904 P. 2d 373, 378 (Alaska 1995). In that case, the Court drew a distinction between development policies and goals, which are contained in a

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<sup>50</sup> This conclusion would be the same even if the independent basis standard of review were applied.

<sup>51</sup> This conclusion is also supported under the “independent basis” standard of review.

<sup>52</sup> <https://juneau.org/index.php?gf-download=2017%2F08%2F20170316UPDATEComp.Plan2013WEB.pdf&form-id=22&field-id=11&hash=44bf8467abf6aacec02114d42e16e845d6a7d6c9ebb1b73a4e0e299b018299a8>, p. 227.

<sup>53</sup> *Id.* at 243.

comprehensive plan and the measures that implement them. The Court described land use planning and zoning as a “hierarchical process in which the comprehensive plan of a municipality serves as a ‘long-range policy guide for development of the [municipality] as a whole,’”<sup>54</sup> which is then implemented through measures such as zoning regulations and permit requirements.<sup>55</sup>

The determination that the Appendix B conditions are aspirational goals rather than mandatory requirements is not altered by the language of CBJC 49.05.200(b) regarding the relationship between the policies in the comprehensive plan and the ordinances implementing them. CBJC 49.05.200(b) states that the “implementation of policies” in the comprehensive plan “includes the adoption of ordinances in this title,” and “[w]here there is a conflict between the comprehensive plan and any ordinance adopted under or pursuant to this title, such ordinance shall take precedence over the comprehensive plan.” Relying on this language, Ms. Hart suggests that the ordinance adopting the LRWP, Ordinance 2022-12, conflicts with and takes precedence over the comprehensive plan, rendering the Appendix B conditions mandatory. But this argument is misplaced. Ordinance 2022-12 was not adopted pursuant to the comprehensive plan to implement the plan’s policies. As explained previously, the adoption of the ordinance incorporated the LRWP into the comprehensive plan, establishing goals and policies for development of the downtown waterfront area – not legally binding requirements.<sup>56</sup>

The CBJ could certainly adopt specific ordinances providing mandatory permitting requirements for a fifth dock in the Subport, including a requirement mandating shore power, to implement the LRWP specifically. But the CBJ has not done so to date. Thus, only the general CUP requirements in CBJC 49.15.330(e) and (f) are binding in this context.

*b. The application of CBJC 49.15.330(f) supports the Commission’s determination that the proposed project is in conformity with the LRWP.*

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<sup>54</sup> *Lazy Mountain*, 904 P.3d at 377.

<sup>55</sup> *Id.*, 904 P.3d at 377 (“the legitimate function of a zoning regulation is to implement a plan for the future development of the community.” Citing 1 Robert M. Anderson, *American Law of Zoning*, § 5.02, at 263 (2d. ed. 1976)).

<sup>56</sup> The CBJ could have adopted ordinances with specific permitting requirements for proposed dock projects in the Subport, to specifically implement the LRWP, but it has not yet done so. Thus, only the general CUP requirements in CBJC 49.15.330(e) and (f) apply here.

In this case, the Commission adopted the findings in the CDD staff report. Under CBJC 49.15.330(f), the Commission nevertheless had the authority to deny or condition the permit in certain circumstances. CBJC 49.15.330(f), in pertinent part, states:

- (f) *Commission determinations; standards.* Even if the commission adopts the Director’s determinations pursuant to subsection (e) of this section, it may nonetheless deny or condition the permit if it concludes, based on its own independent review of the information submitted at the hearing, that the development will more probably than not:<sup>57</sup>

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**(3) Lack general conformity with the comprehensive plan, thoroughfare plan, or other officially adopted plans.**  
(Emphasis supplied)

Here, the Commission concluded that the proposed development was in “general conformity” with the comprehensive plan and other officially adopted plans. The legal question is whether the Commission’s determination is supported by substantial evidence in the record.

The record reflects that proposed project is in general conformity with the goal of the LRWP that a fifth dock be electrified. The CDD recognized there is not currently a power line to the property, but it sought to ensure that the project be ready for shore power within a reasonable time of a power line becoming accessible. The CDD made note that the proposal includes cable trays and structures for integrating shore power once a power line to the property is available, and it recommended a condition requiring the dock owner to pay for and provide shore power within 24 months of a power line being within 25 feet of the property, and for large ships to use shore power at the dock once it is available.<sup>58</sup>

For its part, the Commission spent substantial time at the public hearing on the subject of shore power. Vice-Chair Cole asked multiple questions about the timeline for the availability of a power line to the property, and Chair Levine asked whether any portion of the project could be expedited to enable shore power to be provided sooner.<sup>59</sup> HTC’s representatives explained that HTC is “committed to shore power,”<sup>60</sup> the dock will be “plumbed and ready” for shore power,<sup>61</sup>

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<sup>57</sup> The language of the section that the Commission “may” deny a CUP if the specified circumstances exist suggests that the Commission has the discretion, but not the obligation, to deny a CUP in those circumstances.

<sup>58</sup> T. 70, 77, 79, and 81.

<sup>59</sup> T. 20 -24, 30-31.

<sup>60</sup> T. 31.

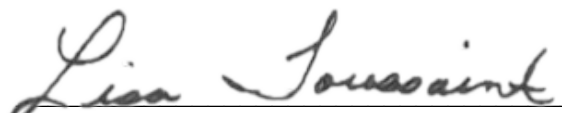
<sup>61</sup> T. 20.

and all of the necessary infrastructure will be in place for the “power to come to us.”<sup>62</sup> But HTC does not know when a transformer will be available to run power to the property,”<sup>63</sup> claiming that is “outside of our control,”<sup>64</sup> so it cannot promise shore power will be available on day one.<sup>65</sup> After robust questioning and discussion, the Commission voted to adopt the CDD’s findings and approve the project with condition that HTC pay for and provide shore power within 24 months of a power line being within 25 feet of the property. This condition was aimed at balancing the goal of providing shore power with the practical reality that the timing of availability of electricity to the dock is uncertain. Substantial evidence supports the Commission’s conclusion that the proposed project is in general conformity with the LRWP, including the goal in Appendix B that the dock “is electrified.

#### IV. Conclusion

Under the standard of review afforded to the Commission’s land use determinations, there is sufficient evidence to persuade a reasonable mind that the proposed CUP will not materially endanger the public health or safety, and that it is in general conformity with the LRWP. Accordingly, the Commission’s decision to adopt the CUP is AFFIRMED.

DATED: June 21, 2024.

  
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Lisa M. Toussaint  
Administrative Law Judge

**Certificate of Service:** I certify that on June 21, 2024, this document was distributed by email to Karla Hart, Sherri Layne, Garth Schlemlein, Even Garcia, Dan Bruce, Robert Palmer, Emily Wright, and the Juneau City Clerk.

By:   
\_\_\_\_\_  
Office of Administrative Hearings

<sup>62</sup> T. 22 (“ . . . all the electricity is to the place where the transformer would sit.”); R. 24.

<sup>63</sup> T. 24 (“ . . . we’ve already been talking with the designer to have all of the connections and everything needed to bring the power to the ships that are ready to go, but the problem is going to be connecting from our property to the power supply. . . ”)

<sup>64</sup> T. 22 (“ . . . the city has already ordered or is in line for two transformers, so we’d be the third in line, but we wanted to make sure that we are plumbed, meaning that all the electricity is to the place where the transformer would sit, it’s run all the way to the dock, that we’ve invested in that infrastructure as part of the initial plan.”)

<sup>65</sup> T. 24 (“So we were initially anticipating that the project would have shore power on day one, and then we were told that there’s not enough capacity in town to provide it. So the problem wasn’t us; the problem was bringing power to us, and then to our location. . . ”)