

**BEFORE THE HEARING OFFICER FOR THE ASSEMBLY OF THE
CITY AND BOROUGH OF JUNEAU**

In the Matter of

KARLA HART,

Appellant,

vs.

CITY AND BOROUGH OF JUNEAU
PLANNING COMMISSION,

Appellee,

and

HUNA TOTEM CORPORATION,

Intervenor Appellee.

Notice of Decision July 20, 2023
Appeal Case No. 2023-AA01

**OPPOSITION BRIEF OF THE PLANNING COMMISSION REQUESTING THE
ASSEMBLY AFFIRM THE PLANNING COMMISSION'S DECISION**

This is an administrative appeal of a final decision by the City and Borough of Juneau ("CBJ") Planning Commission's ("Commission") issuance of a conditional use permit, CUP USE2023-003, for a floating dock. As discussed below, the Appellant has not met its burden under CBJC 01.50.070. The Planning Commission's approval of the dock project specified in CUP USE2023-003 should therefore be affirmed.

Statement of Facts and Procedural History

The CBJ's process for considering a fifth dock in Juneau was outlined in January 2022 and included (1) an update to the Long Range Waterfront Plan ("LRWP"), which was accomplished with Assembly Ordinance 2022-12;¹ (2) application for and approval for a Conditional Use Permit

¹ R 279

(“CUP”), which would go through the Planning Commission process; and (3) an application for a Tidelands Lease from the CBJ Division of Lands and Resources heard by the Assembly.² Assembly Ordinance 2022-12 amended the LRWP “to allow for creation of a dock facility capable of accommodating one large cruise ship.”³ While the property at the heart of this appeal was originally owned by Norwegian Cruise Line (“NCL”) who planned to build a fifth dock, in late 2022, NCL transferred the property to Huna Totem Corporation (“HTC”).⁴ HTC then submitted its CUP Application in January 2023 and revised and updated it on May 18, 2023.⁵ The Commission held a public hearing on July 11, 2023, and issued a Notice of Decision (“NOD”) on July 20, 2023.⁶ Appellant timely appealed the decision on August 4, 2023 and it was accepted by the Assembly on August 21, 2023. HTC moved to intervene on August 25, 2023. While Appellant’s original notice of appeal listed a variety of potential issues, Appellant, in its brief dated November 30, 2023, has narrowed its issues to only: 1) promoting health and the general welfare, under CBJC 49.05.200; and 2) the recommendation by the Visitor Industry Task Force (through the amended LRWP) that shore power is required.

Authority and Process

The Assembly has jurisdiction over the properly raised substantive issues within the scope of the administrative appeal pursuant to CBJC 49.20.120 and CBJC 01.50.020. The conditional use process provides a forum for an applicant to present its project proposal to the Commission for public comment and for the Commission’s consideration of the comments and concerns. Land use decisions by the Commission are entitled to “considerable deference.”⁷ The decision whether to

2 R 55

3 R 279

4 R 58.

5 R 1-52, R 87, R 86.

6 R 362-364

7 *S. Anchorage Concerned Coal., Inc. v. Coffey*, 862 P.2d 168, 173 n. 12 (Alaska 1993)

grant the CUP is within the Commission's area of expertise and within the establishment of their powers.⁸

CBJC 01.50.070 - Standard of review and burden of proof.

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

Appellants must show more than simply a disagreement with the Commission's decision; as the code states, it must establish at least one of the following from above: (1) the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing;⁹ (2) the decision is not supported by adequate written findings;¹⁰ and/or (3) the agency failed to follow its own procedures or a due process violation against one or more parties occurred. "On review we will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the board."¹¹ In applying the substantial evidence standard "even when conflicting evidence exists, we uphold the Board's decision if substantial evidence supports it."¹²

⁸ CBJ 49.110.70(e), Land use actions.

⁹ CBJC 01.50.070(a)(1); *Griswold v. City of Homer*, 55 P.3d 64, 67-68 (Alaska 2002) (defining substantial evidence as "what a reasonable mind might accept as adequate to support a conclusion.")

¹⁰ CBJC 01.50.070(a)(2); *Luper v. City of Wasilla*, 215 P.3d 342, 346 (Alaska 2009) (describing when a Planning Commission decision is supported by adequate findings).

¹¹ *Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948, 952 (Alaska 2005); *Griswold 2002*, 55 P.3d at 67-68

¹² *Lindhag*, 123 P.3d at 952; *Commercial Fisheries Entry Comm'n, State of Alaska v. Baxter*, 806 P.2d 1373, 1375 (Alaska 1991) ("It is well settled that substantial evidence to support an administrative agency's finding of fact may take the form of circumstantial evidence or indirect proof.").

“We have held that, although a planning commission is not required to make specific findings supporting its decisions, it must articulate reasons for its decisions sufficient to assist the parties preparing for review and to restrain agencies within the bounds of their jurisdiction.”¹³

CBJC 49.15.330(e)(1) Review of director's determinations.

(1) At the hearing on the conditional use permit, the planning commission shall review the director's report to consider:

(A) Whether the proposed use is appropriate according to the table of permissible uses;

(B) Whether the application is complete; and

(C) Whether the development as proposed will comply with the other requirements of this title.

(2) The commission shall adopt the director's determination on each item set forth in paragraph (1) of this subsection (e) unless it finds, by a preponderance of the evidence, that the director's determination was in error, and states its reasoning for each finding with particularity.

Discussion

Appellant has not specifically argued any issues that meet its burden on appeal under CBJC 01. 50.070. Appellant’s main argument, addressed in both of its issues, appears to be that shore power is required prior to a CUP for a fifth dock and that the Commission granted a CUP in “violation” of the LRWP.¹⁴ As explained below, Appellant mischaracterizes the shore power requirements under the LRWP for a CUP as mandatory and has not met its burden on any appealable issue.

A. The Commission’s Decision is Supported by Substantial Evidence in Light of the Whole Record.

The amended LRWP explains “...the Assembly’s intent of this ordinance is to change the Long Range Waterfront Plan to allow a fifth cruise ship dock in the Subport area if the fifth dock:

¹³ *South Anchorage Concerned Coalition v. Coffey* (862 P.2d 168 (Alaska 1993) (Commissioner comments constituted adequate findings).

¹⁴ Appellant Brief, page 3-6.

provides infrastructure to prevent hot-berthing at the existing docks, especially at the AJ dock; provides infrastructure that prevents a large cruise ship from anchoring-out or using dynamic positioning technology to stay in Gastineau Channel for tourism purposes; minimizes congestion of pedestrians and tourism related vehicles east of Seward Street; and other purposes to balance the needs of the community...”¹⁵

The Community Development Department (“CDD”) staff report, presented to the Commission, detailed the process and considerations, specifically referencing the amended LRWP.¹⁶ As part of the required analysis under CBJC 49.15.330, the CDD Director looked at the entire project and provided information in the report on health (including a section on shore power), safety, welfare, property values, the Americans with Disabilities Act requirements, sanitation, traffic, noise, and lighting, and then conditioned the project as needed pursuant to Title 49.¹⁷ The staff report specifically addressed the dock and all the dock-related issues, including, the matters of sidewalks and walkways from the dock, bus traffic from the dock, passenger fees to offset impacts, the percentage of Juneau residents employed by the tourism industry, and support that shore power improves health.¹⁸ After an analysis of the entire project, including the health and welfare of the entire population of Juneau, the Director noted that the project would not “materially endanger public health or safety.”¹⁹ The Director’s recommendation and conditions conform with the amended LRWP and the comprehensive plan, and the issue of shore power for the dock was flagged in the staff report for the Commission.²⁰ The Director recommended the Commission approve HTC’s full application

¹⁵ Ordinance 2022-12, R 279.

¹⁶ R 64.

¹⁷ R 70, R 70-82.

¹⁸ R 70-74.

¹⁹ R 80. “Materially” defined, Cambridge dictionary: *substantially; to a great extent*.

²⁰ R 70-79.

for three phases with nine (9) conditions, including a condition regarding the requirement of shore power by HTC; a navigability study; limiting the use of the dock to one large cruise ship every 24 hours; and no hot berthing.²¹ The Appellant’s argument that the analysis for the use (a floating dock) was not sufficient is not supported by the record.²²

“Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²³ The record is over 1600 pages long, including a 100-page transcript and hundreds of relevant documents considered by the Director prior to recommending approval for one floating dock. The staff report for the Commission referenced precisely what Appellant raises as a basis for its issues, the LRWP, the comprehensive plan, the VITF, and Title 49, among others.²⁴ The Commission then reviewed a 30-page staff report prior to the meeting and, as the record indicates, was prepared with many questions for the applicant and staff, including questions about shore power and traffic.

The Commission held its public hearing on July 11, 2023, and reviewed each portion of the proposed project in detail. HTC gave a presentation explaining its plan and was available for lengthy questioning by the Commission.²⁵ The Commission devoted time to reviewing issues related to all phases, with specific relevance to bus traffic, parking, and Appellant’s briefed issue – shore power.²⁶ HTC indicated it was “plumbed and ready for shore power as part of this design.”²⁷ Commissioners Cole and Bell and Chair Levine all specifically asked about shore power, the equipment, and the timeline.²⁸ HTC indicated that it was “investing in the infrastructure

21 R 81-82.

22 Appellant Brief page 3, line 10-15.

23 CBJ Code 01.50.010; *see also* *Griswold v. City of Homer*, 55 P.3d 64 (2002).

24 R 53-79.

25 R 1535-61, 1570-84.

26 R 1545, 1552-26, 1563.

27 R 1542.

28 R 1544-47.

as part of the initial plan” and “ready for shore power” as soon as it is available through the power company and/or CBJ.²⁹ The Commission also heard from HTC about the routing of buses and traffic from the proposed dock to ease congestion in the downtown core.³⁰

After a prolonged discussion and deliberation, the Commission voted to adopt the Director’s analysis and findings with respect to the floating dock and approved the CUP. The Board memorialized its decision with a written NOD dated July 20, 2023, that also included nine (9) conditions. One essential condition included is that HTC must, at its own expense, “provide shore power within 24 months after an appropriately sized power line is within 25 feet of the property line.”³¹ Additionally, consistent with the amended LRWP, the Commission added, “the dock is limited to one (1) large cruise ship . . . each 24 hour period beginning at midnight, the dock will not accommodate hot berthing, and the dock will not accommodate lightering from a cruise ship at anchor if that ship is over 750 feet in length or accommodates more than 950 passengers at full capacity.”³² The LRWP amendment states that it “supports” the VITF criteria, however, Appellant, who has the burden, has failed to show that the VITF criteria, including shore power, are mandatory requirements prior to the Commission granting a CUP.

Further evidence of the Commission carefully evaluating the project is supported by the fact that it did not approve the entire CUP application at the July 11, 2023 hearing, but rather only the dock portion of the application. The Commission did exactly what it is required to do under its analysis of a CUP application; it held a public hearing, gave community members a chance to comment, had rigorous discussion about the application and project, discussed Title 49 and its

29 R 23-24.

30 R 51, 53-55.

31 R 363.

32 R 362-364.

implications, voted, and imposed a list of conditions on the dock approval.³³ Commissioner Cole succinctly stated “... the Planning Commission has enough information and analysis to issue a CUP for the dock...”³⁴ Despite what Appellant implies, the Commission did not issue a blanket approval; it questioned, discussed, and analyzed each part of the project. There is substantial evidence, in light of the whole record and supplemented at the hearing, showing the approval of this CUP was appropriate and the Commission’s interpretation and decision must be given “considerable deference.”³⁵ The Appellant has not met its burden.

B. The Commission Issued Adequate Written Findings

Commission decisions are given great deference: “review of zoning board decisions is narrow, and board decisions are accorded a presumption of validity.”³⁶ “We have held that, although a planning commission is not required to make specific findings supporting its decisions, it must articulate reasons for its decisions sufficient to assist the parties preparing for review and to restrain agencies within the bounds of their jurisdiction.”³⁷ The Commission’s NOD adopts the staff report, findings, and conditions for the dock (but does not adopt the information related to the uplands portion of the project).³⁸ As explained above, the staff report was an adequate analysis under Title 49, CBJC 49.15.330 and the Commission’s adoption of relevant portions of it was appropriate. The Commission not only issued specific written findings, but also provided lengthy commentary about the dock in its motions and discussion leading up to the final vote.

33 NOD, R 279.

34 R 1604.

35 *South Anchorage Concerned Coalition, Inc., v. Coffey*, 862 P.2d 168 (1993), *Griswold v. City of Homer*, 55 P.3d 64 (2002).

36 *Griswold v. City of Homer*, 55 P.3d 64 (2002).

37 *South Anchorage Concerned Coalition, Inc., v. Coffey*, 862 P.2d 168 (1993) (Commissioner comments constituted adequate findings).

38 R 362-63

As stated in the section above, shore power to the dock was discussed at length during the hearing and HTC indicated that the dock would be electrified as soon as possible, but that the timeline for such dock electrification was dependent on other factors such as the local electric company. R 1553-1555. The written findings also address the topic of shore power. The Appellant has not met its burden.

C. The Commission and CBJ procedures were followed.

The extensive 1600-plus record supports the fact that the processes spelled out in CBJC 49.15.330 and 49.15.230 were followed and have not been raised as an issue by the Appellant.

Conclusion

Appellant does not agree that a fifth dock should be allowed at all unless there is an immediate required connection to shore power – but that is not what the LRWP or VITF require. Shore power is a consideration when evaluating a project; it is not mandatory before the issuance of a CUP. The record demonstrates the Commission’s decision to grant the conditional use permit is supported by substantial evidence. The Commission did its job and reviewed the project, asked relevant questions, and ultimately granted only partial approval with many conditions attached, including the requirement for shore power. The Commission produced adequate written findings and followed all its own procedures. Appellant has not met the burden to show anything more than a disagreement with the Commission’s decision to grant the CUP for the dock. Appellant’s overarching issue is shore power, but Appellant has not shown evidence that the allowance of a reasonable timeframe for future dock electrification (shore power), as indicated throughout the record, is prohibited by the LRWP, the Comprehensive Plan, or the VITF criteria or recommendations. The Commission is not arguing that shore power should not be included as a condition of the CUP (*see*, NOD), but there is not a requirement that it must be available *prior* to

the issuance of a CUP for a dock. Therefore, the Commission requests a denial of Appellants' appeal and affirmation of its decision granting the CUP for the dock.

RESPECTFULLY SUBMITTED this 27th day of December, 2023.

By: Sherri Layne
Sherri Layne
Attorney for CBJ Planning Commission
Alaska Bar No. 1306042

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2023, the document to which this certificate is attached was served upon the following via the method indicated:

City Clerk:

City.Clerk@juneau.gov



E-mail

Office of Administrative Hearings

doa.oah@alaska.gov



E-mail

Appellant:

Karla Hart

karlahart@gmail.com



E-mail

Appellee:

Huna Totem Corporation

Attn. Garth A. Schlemlein

SCHLEMLEIN FICK & FRANKLIN

PLLC

gas@soslaw.com



E-mail

Dan Bruce - Baxter Bruce & Sullivan
dbruce@bbslawyer.com

Counsel for the CBJ Assembly:

Robert Palmer
robert.palmer@juneau.gov



E-mail