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

10 KARLA HART,

11 Appellant,

12 v.

13 CITY AND BOROUGH OF JUNEAU
14 PLANNING COMMISSION,

15 Appellee.

16 Appeal Case No. APL 2023-AA01

17 **INTERVENOR’S RESPONSE IN OPPOSITION TO APPELLANT’S APPEAL BRIEF**

18 Intervenor Huna Totem Corporation (“HTC”) hereby responds to Appellant Karla Hart’s
19 Appeal Brief. Ms. Hart is appealing the decision made by the City and Borough of Juneau’s
20 Planning Commission on July 11, 2023, concerning the approval of Conditional Use Permit
21 USE2023-0003, HTC’s floating dock project (the “Project”). The Planning Commission’s decision
22 to approve the CUP was supported by substantial evidence as outlined in its Notice of Decision
23 (“NOD”) dated July 20, 2023, and the CUP is compliant with applicable regulations including the
24 Long Range Waterfront Plan and the 2022 amendment thereto. Appellant has failed to identify, let
25 alone establish, any permissible grounds to set the decision aside. The Planning Commission’s
26 approval of CUP USE2023-0003 should therefore be confirmed.
27

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I. STATEMENT OF FACTS

A. The Planning Process for a Fifth Dock has been Ongoing Since at Least 2019.

The Project is a floating dock slated to be built in the Juneau Subport in part on City and Borough of Juneau (“CBJ”) and Alaska state-owned tidelands. Record (“R”) 58, 61, 114.¹ Norwegian Cruise Lines (“NCL”) purchased the associated uplands property in 2019. R 57. During its ownership, NCL explored the possibility of developing the tidelands property with a floating cruise ship dock. R 58. These efforts included three online community meetings held during 2020 and 2021 as well as outreach at the Southeast Conference – Mid-Session Summit² in Juneau. R 75. HTC participated in NCL’s public outreach. R 1581 at lines 23-25.³

CBJ established a three-step “process for bringing this project through CBJ review,” requiring (1) an update to the Long Range Waterfront Plan (“LRWP”); (2) application for and receipt of a Conditional Use Permit, through which the Planning Commission would verify regulatory and plan compliance; and (3) application for a Tidelands Lease from the CBJ Division of Lands and Resources. R 55. Step one was completed on March 14, 2022, when the Assembly passed Ordinance 2022-12, An Ordinance Amending the Comprehensive Plan Related to the Long Range Waterfront Plan. R 779-82. The Ordinance amends the LRWP (codified at CBJ 49.05.200(b)(1)(C)) “to allow for creation of a dock facility capable of accommodating one large cruise ship”. R 279. Appendix B is the framework for development in the Subport area. See R 55, 58. The Appendix includes criteria for future development established by the Visitor Industry

¹ The Planning Commission Staff Report explains that the uplands portion of the development is on property owned by HTC and that the remainder extends across CBJ-held tidelands and DNR-held tidelands. R 61.
² The Southeast Conference is the “state and federally designated regional economic development organization for Southeast Alaska.” [Mission Statement - Southeast Conference \(seconference.org\)](https://seconference.org)
³ See also R 1583 (“the NCL meetings were via Zoom during the pandemic and were very well attended, and we [HTC] went to those as well. So there was a lot of feedback that came from those. The major amenities that were shown in that – in those meetings have not fundamentally changed”). Appellant asserts without support that HTC made “considerable changes” to NCL’s plans for a fifth dock. Appellant Brief at p. 6, n.15. The only issue relevant here is that HTC’s application specifies the dock will be built to accommodate shore power. R 119.

1 Task Force (“VITF”), which concluded CBJ should focus on “better tourism management.” R
2 282-83. In late 2022, following the LRWP amendment, NCL conveyed the property to HTC. R
3 58.

4 This appeal concerns step two of the three-step process, HTC’s application for and receipt
5 of a CUP. HTC submitted a Development Permit Application and an Allowable / Conditional Use
6 Permit Application on January 25, 2023, which was revised and updated on May 18, 2023. R 1-
7 52, R 86. The subject property is at 0 Egan Drive and is legally described as Juneau Subport Lot
8 C1. R 90. HTC’s application describes its planned development, dubbed Aak’w Landing, as
9 follows:
10

11 The project proposes a phased development of mixed use, including retail, food and
12 beverage, community park, docking and associated parking. Phase 1 includes a total
13 of 24,800 square feet of retail and food and beverage operations, and approximately
14 60,000 square feet of City park area.

15 External lighting is to be developed.

16 The Aak’w Landing uplands project will be a concrete Bus Staging and vehicle
17 Garage topped by a landscaped Park sloping up from Egan Drive. . . . The pier
18 portion of the project will utilize a proven steel float solution that will be built with
19 a deck up to 70 feet wide and 500 feet long, allowing for the best facility layout and
20 passenger handling solution.

21 R 120. The application states the dock will include “cable trays and structure for integrating future
22 shore power connections once the municipal feed is available.” R 119.

23 Agency review of the application occurred between May 30 and June 26, 2023. R 74.
24 Planning Commission staff produced a report on the application dated June 29, 2023. R 53-82
25 (plus attachments). The Staff Report recommended the Planning Commission approve HTC’s
26 application with nine (9) conditions in keeping with the LRWP amendment, including provision
27 of shore power by HTC and at its expense; a navigability study; limiting the use of the dock to one
large cruise ship every 24 hours; and no hot berthing. R 81-82 (conditions 5-8).

1 The Planning Commission hearing on the application was held as scheduled on July 11,
2 2023⁴. After a presentation from HTC, public comment and substantial discussion, the Planning
3 Commission adopted the analysis and findings of the Staff Report with regard to the floating dock
4 only. A Notice of Decision (“NOD”) was issued on July 20, 2023, stating in pertinent part:

5
6 The Commission approved a Conditional Use Permit for a floating steel dock up to
7 70 feet wide and 500 feet long. The project is to be conducted as described in the
8 project description and project drawings submitted with the application, . . . with
9 the following conditions: . . . (5) The dock owner will, at their own expense, provide
10 shore power within 24 months after an appropriately-sized power line is within 25
11 feet of the property line. When shore power is provided, large ships using the dock
12 will be required to use shore power instead of ship power.

13 R 362-63.

14 The Commission “did not adopt the analysis and findings that relate to the uplands portion
15 of the application” at the July 11 meeting. R 363. This was accomplished on August 8, 2023,
16 under a separate Conditional Use Permit (CUP USE2023 0010). The related NOD was issued on
17 August 9, 2023. CUP USE2023-0010 has not been appealed.

18 B. Procedural History.

19 Appellant filed her Notice of Appeal on August 4, 2023, alleging four bases of appeal.
20 Notice of Appeal at 2. The requested relief includes revocation of CUP USE2023-0003 and CUP
21 USE2023-0010 (the uplands portion of the Project), despite the lack of any appeal of CUP
22 USE2023-0010. The Assembly accepted Ms. Hart’s appeal at the Regular Assembly meeting on
23 Monday, August 21, 2023. HTC moved to intervene in this appeal by letter dated August 25,
24 2023.

25 Appellant’s brief substantially narrows the issues on appeal, which she now describes as:
26 “49.05.200, promote health and the general welfare; and . . . Visitor Industry Task Force
27

⁴ The hearing transcript is included in the Record beginning at R 1523.

1 recommendation 6, shore power is required.” Appellant Brief at 1. Appellant has not briefed any
2 additional issues and so has waived all other matters referenced in her Notice of Appeal. *Martinez*
3 *v. GEICO*, 473 P.3d 316, 326 (Alaska 2020).

4 II. AUTHORITY & ARGUMENT

5 A. Appellant’s Burden of Proof on Appeal.

6 Appellant has a heavy burden of proof in this appeal.

7 The hearing officer may set aside the decision being appealed **only if**:

8 (1) The appellant establishes that the decision is not supported by
9 substantial evidence in light of the whole record, as supplemented at the hearing;

10 (2) The decision is not supported by adequate written findings or the
11 findings fail to inform the . . . hearing officer of the basis upon which the decision
12 . . . was made; or

13 (3) The appeal agency or the hearing officer failed to follow its own
14 procedures or otherwise denied procedural due process to one or more of the
15 parties.

16 CBJ Code 1.050.070(a) (emphasis added). “The burden of proof is on the appellant.” CBJ Code
17 1.050.070(b).

18 Appellant has not invoked any of the grounds listed in .070(a) in her brief. The thrust of
19 her argument appears to be that the Planning Commission did not adequately consider air pollution
20 related to cruise ships and that CBJ should impose a moratorium on cruise ship-related
21 development. A CUP appeal is not, however, a vehicle for wholesale reassessment of CBJ policy
22 regarding tourism in general or cruise ships in particular. Rather, the scope of the appeal is limited
23 as set forth above.

24 B. The Planning Commission’s Decision is Supported by Substantial Evidence in Light of 25 the Whole Record.

26 There is substantial evidence in the record that (1) the LRWP amendment embodies CBJ’s
27 policy to regulate cruise ship tourism in a manner intended to safeguard the health, safety and well-
being of the Juneau community; and (2) that CUP USE2023-0003 fully complies with the LRWP

1 amendment. Appellant’s concerns regarding air pollution ignore that mitigation of this issue and
2 other public health and welfare-related concerns is baked into the LRWP. Electrification of the
3 dock, which is a condition of the CUP, is part of these mitigation efforts.

4 “Substantial evidence means such relevant evidence as a reasonable mind might accept as
5 adequate to support a conclusion.” CBJ Code 01.50.010; *see also Griswold v. City of Homer*, 55
6 P.3d 64 (2002). The Record in this case spans more than 1600 pages, including a 29-page staff
7 report with 275 pages of attachments. The Record includes documents tracing CBJ’s lengthy,
8 thorough, and public consideration of a fifth dock and related impacts on the community. *See*,
9 *e.g.*, R 765-71; 779-82. For example, Attachment D to the Staff Report is a January 21, 2020,
10 memo from Robert Palmer, Municipal Attorney, entitled Preliminary Legal Issues with Managing
11 Tourism (R 289-90). The memo specifically suggested a fifth dock in the Subport as a means of
12 limiting cruise ship tourism:
13

14
15 **Infrastructure and Geographical Limitations.** The size of ships, the location of
16 docks, and the geographical features of Gastineau Channel can indirectly limit
17 cruise ship tourism. Further consultation with the USCG could result in a
18 regulatory scheme that prohibits “anchoring out” if a new dock was constructed,
19 which would indirectly cap cruise ships.

20 R 290 (emphasis in original).

21 Prior to approving the LRWP amendment, the Assembly heard public comment concerning
22 the impact of a potential fifth dock on health and welfare issues including climate change. R 779-
23 80. The results of CBJ’s process, including the work of the VITF, are as set forth in the 2022
24 amendment to the LWRP and (Ordinance 2022-12(am)), R 279-85, which is intended as a
25 “framework to better manage cruise ship tourism”. R 279. The Ordinance includes the language
26 used in Palmer’s memo (quoted above), i.e., that a fifth dock would prevent cruise ships from hot-
27 berthing at existing docks and/or “anchoring out or use of dynamic positioning technology to stay
in Gastineau Channel” and minimize tourism related vehicular traffic. *Id.*

1 The subject Project was evaluated according to the criteria specified in the LRWP
2 amendment (*see* R 56, 74,76-77). Appellant nevertheless frets that the Commission failed to
3 consider public health, safety and welfare. The Staff Report demonstrates otherwise. *See, e.g.*, R
4 70-72. Under “Health,” for example, the Staff Report discusses shore power as a means of reducing
5 combustion byproducts. R 70-71. The “Safety” section focuses on pedestrian safety and ambulance
6 access. R 71. “Welfare” notes that per-passenger fees remitted by cruise lines go toward tourism
7 related improvements to offset impacts. *Id.*

8
9 In addition, of course, the Project, including the conditions imposed thereon by the
10 Planning Commission, fully complies with the LRWP. The condition that HTC must “provide
11 shore power within 24 months after an appropriately sized power line is within 25 feet of the
12 property line” (R 363, Condition 5) is intended to benefit the environment and reduce the overall
13 tourism-related impacts on CBJ. R 73. Other conditions included in the CUP also address this
14 goal:

15
16 **Condition:** The dock is limited to one (1) large cruise ship . . . each 24 hour
17 period beginning at midnight.

18 **Condition:** The dock will not accommodate hot berthing.

19 **Condition:** the dock will not accommodate lightering from a cruise ship at
20 anchor if that ship is over 750 feet in length or accommodates more than 950
21 passengers at full capacity.

22 R 74. These conditions are all specified in the LRWP. R 283.

23 Appellant has not made any showing that CUP USE2023-0003 would negatively impact
24 air pollution in CBJ. The evidence in the record is to the contrary. For example, the allowance
25 for small ship loading on the back side of the proposed dock allows for tour operators to load
26 customers directly from the dock; “they just walk across off the ship and onto a small tour boat
27 and this alleviates traffic throughout town and that’s part of the plan.” R 1542. Moreover, “the
plan doesn’t increase the number of ships coming into the market. All we’re doing is shuffling

1 ships that would – might go” to other docks. R 1577.

2 Appellant has also failed to show that the VITF criteria (such as shore power) are outright
3 requirements, rather than considerations. The LRWP amendment states that it “supports” the VITF
4 criteria and applications for development “need[] to be *evaluated consistent with*” the criteria. R
5 283. This is not mandatory language.⁵

7 If a statute is mandatory, strict compliance is required; if it is directory, substantial
8 compliance is acceptable absent significant prejudice to the other party. A statute
9 is considered directory if (1) its wording is affirmative rather than prohibitive; (2)
10 the legislative intent was to create “guidelines for the orderly conduct of public
11 business”; and (3) “serious, practical consequences” would result if it were
12 considered mandatory.

13 *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d
14 768, 772 (Alaska 2007). The first element of this test is met because the language of the LRWP
15 amendment is affirmative (development “needs to be evaluated”). As for the second element, the
16 legislative intent as set forth in the LRWP amendment is to provide “a framework to better manage
17 cruise ship tourism,” a near constant topic of the public business in Juneau. The third element of
18 the test is also satisfied, because serious practical consequences could ensue if the VITF criteria
19 were considered mandatory. Here, for example, the record is clear that HTC *cannot* immediately
20 electrify the dock, and no other developer could do so either. R 1544-47. If the VITF criteria were
21 mandatory and thus dictated the denial of this CUP, the development of a fifth dock would be
22 delayed indefinitely. But CBJ policy is in favor of a fifth dock as a means of limiting hot-berthing
23 and anchoring-out, and these benefits would also be indefinitely delayed, to the community’s
24 detriment. Both the clear language of the LRWP amendment and the test set forth in *South*
25 *Anchorage* dictate a finding that the LRWP is not mandatory.

26 _____
27 ⁵ Appellant’s assertion that criteria 1-6 are mandatory, while criteria 7 and 8 are set apart as mere recommendations is not correct. Criteria 7 and 8 are “related to uplands development,” while the first six items are “criteria for constructing a cruise ship dock at the Subport.” R 283.

1 The Staff Report and the Planning Commission’s decision approving HTC’s CUP adhere
2 to the LRWP, and impose conditions as specified therein. R 362-63. The allowance of an
3 acceptable timeframe for electrification is not prohibited by the LRWP and is an appropriate
4 exercise of the Planning Commission’s discretion under CBJ Code 49.15.330(g). “When a
5 planning agency . . . provides its interpretation of an ordinance within its area of expertise,” the
6 interpretation must be given ‘considerable deference.’” *South Anchorage Concerned Coalition,*
7 *Inc., v. Coffey*, 862 P.2d 168 (1993).

9 The merits of allowing cruise ships to dock in the Subport area – including but not limited
10 to any health aspects that may be associated with this use -- were not before the Planning
11 Commission in its consideration of CUP USE 2023-0003. CBJ’s policy with regard to the cruise
12 ship industry had already been considered and codified in the LRWP amendment. The Planning
13 Commission’s role was to “verify regulatory and plan compliance.” R 55; *see also* CBJ Code
14 49.15.330. The Commission appropriately and thoroughly considered the criteria included in the
15 LRWP – itself specifically intended to regulate the level of cruise ship tourism -- and imposed
16 several conditions in keeping therewith, including that the dock be electrified as soon as reasonably
17 possible. There is substantial evidence in the record supporting this decision.

18
19 C. The Written Findings are Adequate.

20
21 The written findings are more than adequate to support the Planning Commission’s
22 decision and to inform the hearing officer as to its basis. The NOD incorporates the staff report
23 and analysis and findings therein (but does not adopt the analysis and findings related to the
24 uplands portion of the project). R 362-63. The threshold requirements set forth in CBJ Code
25 49.15.330(e)(1) (that the proposed use is appropriate, the application is complete, and the
26 development complies with Code requirements) are set forth in the staff report at R 80-81. Contrary
27 to Appellant’s contention that “health impacts” and shore power were not “flagged as key issues”

1 in the staff report, there is a section entitled “Public Health, Safety and Welfare” beginning at page
2 70. This section applies specifically to the Project (as opposed to the Aak’w Landing project as a
3 whole), and states that shore power will reduce combustion byproducts. The section also addresses
4 the likely costs of electrification as well as pedestrian safety and comfort, vehicle congestion,
5 ambulance access, and the impact of fees remitted by cruise lines for use of CBJ infrastructure on
6 the welfare of CBJ’s residents. R 70-72.

8 Shore power was also discussed extensively during the hearing, where HTC repeatedly
9 assured the Planning Commission that the dock would be electrified as soon as possible, but that
10 the timeline was largely out of HTC’s control. R 1541-42; 1544-47. *Id.* In addition, the Staff
11 Report includes the LRWP amendment as attachment C thereto. R 279-85.

12 D. Applicable Procedures were Followed to the Letter.

14 The required procedure for consideration of a CUP application is set forth at CBJ Code
15 49.15.33(d). After receipt of an application, the Director of Community Development must
16 schedule the application for a hearing and give notice to the public as described in CBJ Code
17 49.15.230; forward the application to the commission along with a report recommending whether
18 to approve or disapprove the CUP and any suggested conditions; transmit the report to interested
19 agencies and invite comments therefrom. The Director did each of these things, and this is amply
20 supported by the record. As to scheduling a hearing, for example, *see* R 950-51, 960. Regarding
21 public notice of the hearing date, *see* R 75,1160, 1378-84 (public notice at site); 1366, 1489-90
22 (placing advertisement with Sound Publishing, publisher of the Juneau Empire); R 1600 at lines
23 1-4 (radio and social media). A public comment period was held, and written comments were
24 provided to the members of the Planning Commission and included in the record. R 75, 353-54.
25 The application was initially forwarded to interested agencies on February 2, 2023, (R 657, 736,
26
27

1 739) and again after it was revised (*see* R 960, 1081-82, 1158). Agency comments are included in
2 the resulting staff report. *See, e.g.*, R 74. The report contains the Director’s recommendation that
3 CUP USE2023-0003 be approved with conditions. R 53, 81. The Planning Commission did not
4 rubber stamp the Staff Report and recommendations, but rather exercised discretion consistent
5 with CBJ Code 49.15.330(f)(3) and withheld approval of the uplands portion of HTC’s project
6 pending the submission of additional information. R 363, 371-73.

8 E. The Uplands Portion of the Project (CUP USE2023-0010) was not Appealed.

9 No one has appealed the Planning Commission’s approval of CUP USE2023-0010, which
10 is the uplands portion of HTC’s Aak’w Landing project. The hearing officer should not consider
11 any written or oral argument with regard to that CUP. CBJ Code 01.50.030(c) (“no person shall
12 be entitled to an appellate review of a decision who fails to file a proper notice of appeal”).

14 **IV. CONCLUSION**

15 The subject Project is a floating dock. More than a year before CUP USE2023-0003 came
16 before the Planning Commission, CBJ Assembly considered whether a fifth dock is permissible in
17 the Subport. Its determinations in that regard are set forth in the LRWP. It was not necessary or
18 appropriate for the Planning Commission to revisit that basic premise in conjunction with this
19 CUP. The “Planning Commission’s role is to verify regulatory and plan compliance,” while the
20 Assembly may impose qualitative policy standards at such time as it considers the tidelands lease
21 – step 3 of the regulatory process. R 55. The Project was appropriately approved and there is
22 substantial evidence in the record supporting the Planning Commission’s decision. Appellant
23 seeks reinstatement of the 2003 LRWP, which contained (in Appellant’s words) “a strong decision
24 for no cruise ship development.” Appellant Brief at 8. That ship has sailed. This appeal is not an
25 appropriate means of repealing the 2022 LRWP amendment. The Planning Commission’s
26 decision should be confirmed.

1 DATED this 2nd day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January, 2024, the document to which this certificate is attached was served upon the following via the method indicated:

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