

BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

Appeal of Planning Commission Notice of Decision

RICHARD HARRIS,

Appellant,

v.

CBJ PLANNING COMMISSION,

Appellee,

Appeal of AME2013 0006

Request for zone change from D-10 to LC at
9050 Atlin Drive or 2600 Mendenhall Loop
Road

PLANNING COMMISSION OPPOSITION BRIEF

The appellant's issue of appeal is that he believes the Planning Commission improperly found Light Commercial (LC) zoning does not substantially comply with the 2008 Comprehensive Plan land use maps and policies.

CBJ 49.75.130 – PROCEDURE. A rezoning shall follow the procedure for a major development permit except for the following:

(1) The commission decision for approval shall constitute only a recommendation to the assembly.

(2) As soon as possible after the commission's recommendation, the assembly shall provide public notice and hold a public hearing on the proposed rezoning. A rezoning shall be adopted by ordinance, and any conditions thereon shall be contained in the ordinance. Upon adoption of any such ordinance, the director shall cause the official zoning map to be changed in accordance therewith.

(3) The commission decision for denial shall constitute a final agency decision on the matter which will not be presented to the assembly unless it is appealed to the assembly in accordance with CBJ 49.20.120.

CBJ 49.20.120 – APPEAL TO THE ASSEMBLY. Appeal to the assembly is a matter of right. Unless ordered otherwise by the commission or the assembly, a decision by the commission shall not be stayed pending appeal, but action by the appellee in reliance on the decision shall be at the risk that the decision may be reversed on appeal. The appeal of a commission decision not to hear a case shall be limited to that issue, the remedy for which shall be a remand to the commission for a hearing on the merits of the case. Appeals shall be conducted according to chapter 01.50 of this Code, except as provided in this section.

CBJ 01.50.070 - *Standard of review and burden of proof section A* establishes the standard by which the decision on AME2013 0006 may be set aside, as follows:

(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;

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.

Furthermore, CBJ 1.50.010 defines substantial evidence as - *Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.*

The history of this zone change is explained both in the record (pages P3 & P4) as well as in the appellant's brief (page 1). The review standard in CBJ 49.75.120 has changed since the first rezone was considered by the Planning Commission and the Assembly. CBJ 49.75.120. RESTRICTIONS ON REZONINGS now requires that "*A rezoning shall only be approved upon a finding that the proposed zoning district and the uses allowed therein are in substantial conformance with the land use maps of the comprehensive plan.*" (emphasis added). The record shows the Planning Commission found the requested zone change to not be in substantial conformance with maps of the comprehensive plan.

The Planning Commission decision is supported by substantial evidence in the record as shown in the discussion below.

The first point in the Appellant's brief:

Light Commercial for 9050 Atlin Drive substantially conforms to the maps of the comprehensive plan.

The site is located in Subarea 4 of the 2008 Comprehensive Plan (map G). The plan shows this lot as MDR (Medium Density Residential). The 2008 Comprehensive Plan describes MDR as follows:

These lands are characterized by urban residential lands for multi-family dwelling units at densities ranging from 5 to 20 units per acre. Any commercial development should be of a scale consistent with a residential neighborhood.

The CBJ Land Use Code 49.25.230 (a) describes Light Commercial as follows:

The LC, light commercial district, is intended to accommodate commercial development that is less intensive than that permitted in the general commercial district. Light commercial districts are primarily located adjacent to existing residential areas. Although many of the uses allowed in this district are also allowed in the GC, general commercial district, they are listed as conditional uses in this district and therefore require commission review to determine compatibility with surrounding land uses. A lower level of intensity of development is also achieved by stringent height and setback restrictions.

Residential density in the LC zoning district is now beyond the 5-20 units per acre described in the MDR land use designation of the Comprehensive Plan. The LC zoning district allows for 30 units per acre. This was discussed at length by the Commission and is shown in the record, in the transcript, pages T63, T64, T65, T66, and in the minutes on page P52. The staff report goes into some detail about density as well, which is shown on page P9 of the record.

The appellant argues that the Comprehensive Plan offers a medium density residential, single-family (MDR-SF) land use designation and this reinforces the Plan's intention that the Atlin Drive property is intended for both residential and commercial. The appellant is correct in that there is a MDR-SF land use designation in the comprehensive plan. The Plan describes MDR-SF as follows:

These lands are characterized by single-family detached homes at densities ranging from 10 to 20 units per acre. Only single family detached homes, single family detached homes with an accessory apartment, cottage houses, and bungalow houses are permitted within this zone. Any commercial development should be of a scale consistent with a single-family residential neighborhood.

This differs from the description of MDR in the approach to commercial development because it states commercial development will be of a scale consistent with a single family residential neighborhood, versus residential neighborhood as described in MDR. When considering current zoning districts the only district that conforms to the land use designation of MDR-SF is D10 SF, which is described in CBJ 49.25.210 (d) as follows:

The D-10 SF residential district, in intended to accommodate primarily single-family residential development at a density of ten dwelling units per acre. This is the highest density single-family residential district.

The Table of Permissible Uses shows there are number of non-residential uses allowed in the various residential zoning districts, and that the size and intensity of the permitted commercial uses increases as the density of the residential zone increases. The Table of Permissible Uses describes what commercial development is considered to be of a scale consistent with the neighborhood. This is true when comparing the D-10 and D-10 SF districts. There are some non-residential uses that are permitted in the D-10 zoning district, such as offices greater than 1,000 square feet but not more than 2,500 square feet and small restaurants less than 1,000 square feet without drive through service that are not permitted in the D-10 SF zoning district.

The appellant argues that D-10 is not consistent with the maps of the Comprehensive Plan because it is intended for low density multi-family dwellings without commercial uses. This is not accurate according to Comprehensive Plan policies. The D-10 zoning district density of 10 dwelling units per acre precisely fits with the description of MDR in the Comprehensive Plan which is 5 to 20 dwelling units per acre. Commercial uses are allowed in the D-10 zoning district that are of a scale consistent with a residential neighborhood as delineated by the Table of Permissible Uses, but they are not the scale and intensity that the appellant would like to develop.

The appellant further argues that LC zoning substantially conforms to the Comprehensive Plan because it allows for multifamily dwellings and commercial development. However as discussed above, the density allowed in the LC zone is well beyond that described for the MDR land use designation, and the Table of Permissible Uses allows many commercial uses that are not of a scale consistent with a residential neighborhood. The Planning Commission gave this consideration when deliberating this rezone request, pages T63, T64, T65, and T66.

The second point in the Appellant's brief:

The Comprehensive Plan Supports Light Commercial Zoning of 9050 Atlin Drive

The Appellant states that there is nothing in the Plan that speaks against the requested rezone. The staff report, pages P6, P7 and P8 identifies many of the policies, guidelines, standard operating procedures, and general discussion that relate to this rezone request. Commissioner Bishop summarized this, page T63, by saying there are policies and standard operating procedures that both support and oppose the request. Chair Satre summarized (page T69 and T70) that the Commission is charged by the Comprehensive Plan with minimizing conflicts and the best way to do so is to use Loop Road as a hard boundary for zoning districts.

The appellant states on page 4 of the brief that analyses are not conducted on an absolute basis and that failure of a proposal to conform to one particular policy does not automatically mean

that is inappropriate if conformance is shown with other policies of the Plan. Therefore the analysis is one of balancing the many relevant policies and looking holistically at the situation. The record clearly shows that the Commission was made aware of and gave serious consideration to many of the policies of the plan as they deliberated this rezone request and that their decision to deny the request was based on a holistic and comprehensive review.

The appellant correctly notes that nothing in the Plan or the Land Use Code requires that only one zoning district can substantially conform to the maps of the Comprehensive Plan. The staff report on page P12 states that the current zoning districts appropriate to MDR are D5 through D18 and the table on page P9 compares D10, D15, D18 zoning to the requested LC.

On page 5 of the brief the appellant provides an analysis of low, medium and high residential density. The analysis is not flawed; it reflects basic math. However, the Planning Commission, staff and the Assembly are required to use the Comprehensive Plan when evaluating such proposals and the Plan clearly describes what low, medium and high density mean to Juneau. If the community wishes to use the high, medium, and low density values described by the appellant, the Plan could be amended to reflect this. The Plan, as it is written now, does not support his approach.

The third point of the Appellant's brief:

Development of the Lower Mendenhall Valley and the Atlin Neighborhood Support Light Commercial Zoning.

The appellant's brief states that this neighborhood is not residential and that it is developed with churches and non-residential mixed use. CBJ 49.25.300, Table of Permissible Uses categorizes churches, synagogues and temples as "educational, cultural, religious, philanthropic, social and fraternal" uses (CBJ49.25.300.5.200). This particular category of land use is allowed with a Conditional Use Permit in any zoning district except Industrial and Waterfront Industrial. This land use is allowed by right (without a Conditional Use Permit) in the Light Commercial, General Commercial, Mixed Use, Mixed Use-2, and Waterfront Commercial when the building is less than 10,000 square feet (CBJ 49.25.300 (c)). Conditional use permits are required for this land use category in all the residential zoning districts regardless of the size of the use because the conditional use process affords the Commission the opportunity to evaluate whether the use is appropriate according to the character, size and intensity of the use or the surrounding uses.

The appellant's brief discusses the vacant 69.43 acre site at the end of Atlin Drive, correctly stating it is currently being used for construction maintenance, storage and sand and gravel processing. These uses are "non-conforming," meaning the land use was in place and operating before the current zoning district was instituted. At such time the lot is redeveloped it will be required to conform to the requirements of the zoning district requirements in effect at the time of redevelopment. This very large parcel was not considered as part of the neighborhood in the staff discussion.

The appellant also suggests that CBJ should have updated the land use maps to match the actual development pattern that is happening in this area, which is mixed use. First, as discussed above, churches are considered appropriate in the D-10 zoning district with an approved conditional use permit. The Comprehensive Plan states that the maps translate the policies of the plan into specific land use designations. The land uses are expressed in a range of development intensities and that in some cases the maps will provide a range of densities that can be allowed, which means that the corresponding zoning classification could be one of several selections. This means that the maps are aspirational and not intended to reflect current land use, but the vision of future land use.

The fourth point in the appellant's brief:

Comments of the Planning Commissioners Do Not Support Denial of Light Commercial Zoning.

The appellant cites several statements from the Commission from the transcripts to support this argument. In reviewing the transcripts there are many points of discussion that do support the denial of LC zoning:

Commissioner Bishop (T63, T64, T65) referred to the definition of MDR and then pointed out that 30 units per acre allowed in LC is beyond the 5-20 units per acre specified in MDR. He continued by stating the zoning designations that have a higher density than D-10 and allow for some commercial development presumably of a consistent scale within the MDR land use designation. He listed a number of non-residential uses allowed in LC that have no size restriction. He also noted that when a rezone is approved, any commercial use permissible in that zoning district could be allowed.

Commissioner Medina (T66) stated that commercial uses allowed in LC extend beyond what is normally considered to be a scale consistent with the residential neighborhood as described in the Comprehensive Plan. He noted that they do not know if the property will change hands in the future and if the site is rezoned to LC they have no control other than the Table of Permissible Uses.

Commissioner Grewe (T66, T67) said that in addition to the technical aspects of the zoning code in relation to the plan mentioned by Commissioner Bishop, she felt the plan is on the side of the neighborhood.

Chairman Satre (T68, T69, T70) discussed the prior the Comprehensive Plan map update and the desire to increase areas of mixed use as well as the decision that Loop Road acts as a hard boundary between uses. He also noted that using Loop Road as a hard boundary minimizes conflicts, which is one of the policies of the Comprehensive Plan. He also noted that in his opinion it is the multitude of uses that could be permitted in LC is the concern and that his vote came down to minimizing conflicts.

Conclusion

The record shows the Planning Commission did not err when deciding that the Light Commercial zone does not substantially conform to the maps of the Comprehensive Plan.

Respectfully submitted, December 9, 2013:

Beth McKibben, AICP, Senior Planner, on behalf of CBJ Planning Commission, Appellee