BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

RICHARD HARRIS, Appellant, v. CBJ PLANNING COMMISSION, Appellee.	Appeal of: Notice of Decision CDD File No. AME2013 0006

DECISION ON APPEAL

Appellant Richard Harris filed a timely appeal of the City and Borough Planning Commission decision denying his request to rezone his property, located at 9050 Atlin Drive, from D-10 to Light Commercial ("LC").

After the record was prepared, Mr. Harris filed a non-opposed motion to supplement, which was granted. The parties filed comprehensive briefs on the issue on appeal. On January 6, 2014, the Assembly held a hearing at which it heard oral argument by each of the parties. The Assembly then deliberated in closed session and directed the Municipal Attorney to prepare a draft decision. As required by the CBJ 01.50.140, the draft decision was circulated to the parties and an opportunity to comment on the draft was provided.

For the reasons stated below, the appeal is granted. The Municipal Attorney shall draft an ordinance providing for the requested rezone and forward it to the Assembly for introduction.

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I. FACTUAL BACKGROUND

Appellant's parcel at 9050 Atlin Drive is approximately 2.68 acres. It is currently in a D-10 zone and abuts the LC zone encompassing the Mendenhall Mall.[1] Appellant's parcel is categorized as "MDR" or Medium Density Residential in the land use maps to the comprehensive plan.[2]

In 2011, the Appellant applied to change the zoning from D-10 to LC. The Planning Commission recommended against the zoning change asserting it was inconsistent with the maps of the comprehensive plan. CBJ 49.75.120 (2010) (requiring conformance with the land use maps of the comprehensive plan). Despite the Planning Commission's denial, the Assembly initially approved the rezone request, but on the advice of counsel, the Assembly reversed.

In 2012, the Appellant received a Conditional Use Permit (USE2012-0010) for 22 residential units.

Also in 2012, CBJ 49.75.120 was amended to only require rezone requests to be in "substantial conformance" with the land use maps of the comprehensive plan. Ord. No 2012-31(b) § 2.

In 2013, Appellant submitted applications for a comprehensive plan map amendment and simultaneous rezone request. AME2013-0006. Due to procedural concerns, the map amendment has been continued by the Planning Commission pending the outcome of this rezone request.[3]

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1 Parcel # 6B1601370010. Attachment 1 (2013 Zoning Map).

2 Attachment 2 (2008 Land Use Map G); Attachment 3 (2013 Land Use Map G).

3 CDD Staff Report at p3-4.

II. BURDEN OF PROOF AND STANDARD OF REVIEW

A Planning Commission decision to deny a rezoning request constitutes a final agency decision, appealable to the Assembly pursuant to CBJ 49.20.120, which provides that appeals shall be conducted in accordance with the Administrative Appeal Procedures outlined in CBJ 01.50.

CBJ 01.50.070 states that the Assembly may set aside the decision being appealed if "the appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing."[4] "Substantial evidence" is defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5]

III. THE REQUESTED REZONE CONFORMS TO THE LAND USE MAPS AND THE POLICIES AND GOALS OF THE CBJ COMPREHENSIVE PLAN.

The purpose of a comprehensive plan is to "guide and direct public and private land use activities" within the municipality. CBJ 49.05.200(b); A.S. 29.40.030 ("The comprehensive plan is a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public…").

The 2008 CBJ Comprehensive Plan[6] provides the following policies and guidance with respect to implementation and administration of the plan:

- That the failure of a "proposal to conform to one particular Policy in the Plan does not automatically mean that it is inappropriate if conformance is shown with other

4 CBJ 01.50.070 also allows the Assembly to set aside decisions where the decision is not supported by adequate written findings or where it is unclear upon what basis the decision was made, or when the agency fails to follow its own procedures or otherwise denies a party procedural due process.

5 CBJ 01.50.010.

6 The 2013 Comprehensive Plan was adopted by Ordinance 2013-26, with an effective date of December 4, 2013. The 2008 and 2013 plans are consistent with respect to the policies and guidelines cited herein.

policies of the Plan." The Plan directs that the analysis to be done is one of "balancing the many relevant policies and looking holistically at the particular situation, site and environs;"

- That the CBJ should "revise, as necessary, zoning, subdivision and other land development ordinances to ensure consistency with the Plan's provisions," and "[a]mend the Land Use Code Maps (zoning designation maps), considering them to be the official application of the Comprehensive Plan Maps, to ensure that the zoning delegations of specific sites within the CBJ are consistent with the Land Use Map designations of th[e] Plan;"

- That "[e]ach land use decision, from the most minor variance to the development of a New Growth Area, [should] be evaluated for its compliance with the policies, guidelines, standards and criteria established in the plan;" and

- That in implementing the Comprehensive Plan policies, the CBJ must assure the Plan is "responsive to public needs and changing conditions."

The purpose of the land use map is to manifest the policies articulated in the Plan into specific land use designations.[7] A land use map is aspirational in nature, "and not intended to reflect current land use, but the vision of future land use."[8]

With respect to rezoning requests, CBJ 49.75.120 provides 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."[9] "Substantial conformance" requires a fact-specific determination. It does not require that the requested rezone be in specific conformance with only the land use maps. It is, by definition, less absolute. When a term is not specifically defined, CBJ Code 01.15.020(6) provides that the word "shall be construed according to the context and customary usage of the language." As

7 2008 Comprehensive Plan at p. 159; 2013 CBJ Comprehensive Plan at p. 143.

8 Appellee's Brief at p. 6.

9 The 2008 Comprehensive Plan states that all rezones are required to be "consistent" with the land use maps of the plan. *Id*. at 159. The 2013 Comprehensive Plan states that rezones are required to be "substantially consistent with both the comprehensive plan and associated land use maps." *Id*. at 143. We consider both plans to be synonymous with the "substantial conformance" language used in the CBJ Code.

commonly defined, "substantial" means essentially or materially, thus "substantial conformance" should be understood to mean conform in material ways without being exact.[10]

Atlin Drive is found in Land Use Map G of the Comprehensive Plan, representing the East Mendenhall Valley.[11] The parcel at 9050 Atlin Drive is categorized as "MDR" or Medium Density Residential. The Comprehensive Plan describes MDR as "characterized by urban residential lands for multifamily dwelling units at densities ranging from 5 to 20 units per acre," with any commercial development being of a scale consistent with a residential neighborhood.[12]

According to the plain language of the Comprehensive Plan, land use categories, like MDR, "are intended to describe the overall character of development…and are not intended to be firm or restrictive definitions, such as with zoning district permitted and conditional uses."[13] There are no specific zoning districts identified in the Comprehensive Plan maps. Thus to determine whether a zoning district, like LC, is consistent with the identified land use category for any given parcel, it is necessary to consider the policies and guidelines stated in the Comprehensive Plan itself to determine if the use is consistent with the overall character of development specified for that parcel.

The Planning Commission's position seems to be that the MDR designation allowing for up to 20 units per acre should be construed as an absolute limit. Thus, according to the Planning Commission's interpretation, the LC zoning designation requested by Mr. Harris,

10 See August 27, 2012 Assembly Meeting No. 2012-24 for discussion of Ordinance 2012-31(b).

11 2008 Comprehensive Plan at 175; 2013 Comprehensive Plan at 157.

12 2008 Comprehensive Plan at 164; *see* 2013 Comprehensive Plan at 147.

13 2008 Comprehensive Plan at 161; 2013 Comprehensive Plan at 144.

which allows for a density of up to 30 units per acre, cannot by definition, be allowed in an MDR area.

The Comprehensive Plan does not support a decision-making process where the actual numeric density designation of the districts at issue is the deciding factor, to the exclusion of all other considerations. Land use decisions should be made considering the policies and guidance given in the Plan and translated in the maps, aiming to promote the highest and best use of the land under consideration. We believe the Planning Commission's strict reliance upon the actual numeric density designation in finding that the LC district density of 30 units per acre is inconsistent with the 20 unit per acre MDR, to be inconsistent with the guiding policies and considerations contained in the Plan.[14]

The Comprehensive Plan identifies a number of guidelines and considerations relevant to making land use decisions in Subarea 4, the area at issue.[15] According to the Plan, decisions should be made that:

- Provide for increased community commercial development close to existing commercial areas on the lower valley;
- Expand the Mixed Use district in the Mendenhall Mall vicinity that would incorporate general commercial uses, high density residential use and public transit services; and
- Maintain the density of existing neighborhoods while encouraging in-fill development of low-to moderate-income affordable housing.

With respect to the zoning designation sought by Mr. Harris, the CBJ Code defines Light Commercial (LC) districts as:

> Intended to accommodate commercial development that is less intensive than that permitted in the general commercial district. Light commercial districts are primarily

14 Additionally, although the maximum density in LC is 30 units per acre, a landowner could comply with both the LC and MDR designations by only building up to 20 units per acre.

15 2008 Comprehensive Plan 202-04; 2013 Comprehensive Plan 180-82.

> 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 development is allowed in mixed and single-use developments in the light commercial district.[16]

Light Commercial allows for a maximum of 30 units per acre.[17]

According to 49.25.230(a), the LC district should be adjacent to existing residential areas, is intended to accommodate less intensive commercial development, provides for a lower level of intensity of development (achieved by "stringent height and setback restrictions") and encourages residential development. We find that the LC district substantially conforms with the MDR land use category of the Plan and the Subarea 4 guidelines and considerations, namely: encouraging increased community commercial development close to existing commercial areas; expanding the medium density residential and light commercial uses in the Mendenhall Mall vicinity so as to incorporate light commercial uses; encouraging moderate density residential use; and maintaining the density of existing neighborhoods while encouraging in-fill development of low-to moderate-income affordable housing.[18]

In addition to relying upon the numeric density designation, the Planning Commission also denied Mr. Harris's request based upon a refusal to extend commercial uses across the Mendenhall Loop Road "hard boundary."[19] Reliance upon this concept was in error because the highest and best use of the property is as LC, which complies with: the

16 CBJ 49.25.230(a).

17 CBJ 49.25.500.

18 At the September 24, 2013 hearing before the Planning Commission, Mr. Harris stated it was his intention is to provide "housing over garages with retail shops below."

19 Appellee's Brief at p. 4.

MDR designation, the Subarea guidelines and considerations, and the broader Comprehensive Plan Policies (like Housing). Also, roads are not hard boundaries within the CBJ. For example, immediately southwest of Appellant's property, the LC zone crosses Glacier Highway/Mendenhall Loop Road, and non-road parcel boundaries define the LC zone instead of roads.[20] Appellant seeks the same zoning boundary arrangement that exists just across Egan Drive: extend the LC boundary one parcel width over and use the non-road parcel boundary as the zoning boundary.[21] Thus, while roads provide convenient locations for zoning boundaries, roads are not hard boundaries within the CBJ, especially when considering the highest and best use of the property and where the abutting LC boundary does not consistently follow the roads.

Finally, the Comprehensive Plan directs that

> In considering rezone requests, the Planning Commission and Assembly should aim to promote the highest and best use of the land under consideration: in some cases, the highest and best use may be increased density or more intensive use of the land…"[22]

The Planning Commission's decision fails to consider the highest and best use of the 9050 Atlin Drive parcel by failing to place any weight on the CBJ's long-standing commitment towards increasing affordable housing.[23]

The Comprehensive Plan's directive with respect to evaluating rezone requests specifically envisions something less than absolute reliance upon bright line rules or specific numerical density designations. For the reasons stated above, the Planning Commission's

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20 Attachment 1 (2013 Zoning Map).

21 Also, this rezone does not create an enclave or donut hole of an LC zone, which do exist in the CBJ. Attachment 1 (2013 Zoning Map).

22 2008 Comprehensive Plan, p. 159.

23 *See* 2008 Comprehensive Plan, p. 28, and Policies 4.1 – 4.8.

refusal to permit Light Commercial use within a Medium Density Residential land use category is not supported by the plain language of the Comprehensive Plan or by substantial evidence, and the Assembly grants Mr. Harris's appeal.

This is a final administrative decision of the Assembly of the City and Borough of Juneau, Alaska. It may be appealed to the Juneau Superior Court, pursuant to the Alaska Rules of Court, if such appeal is filed within 30 days of the date of distribution of this decision.

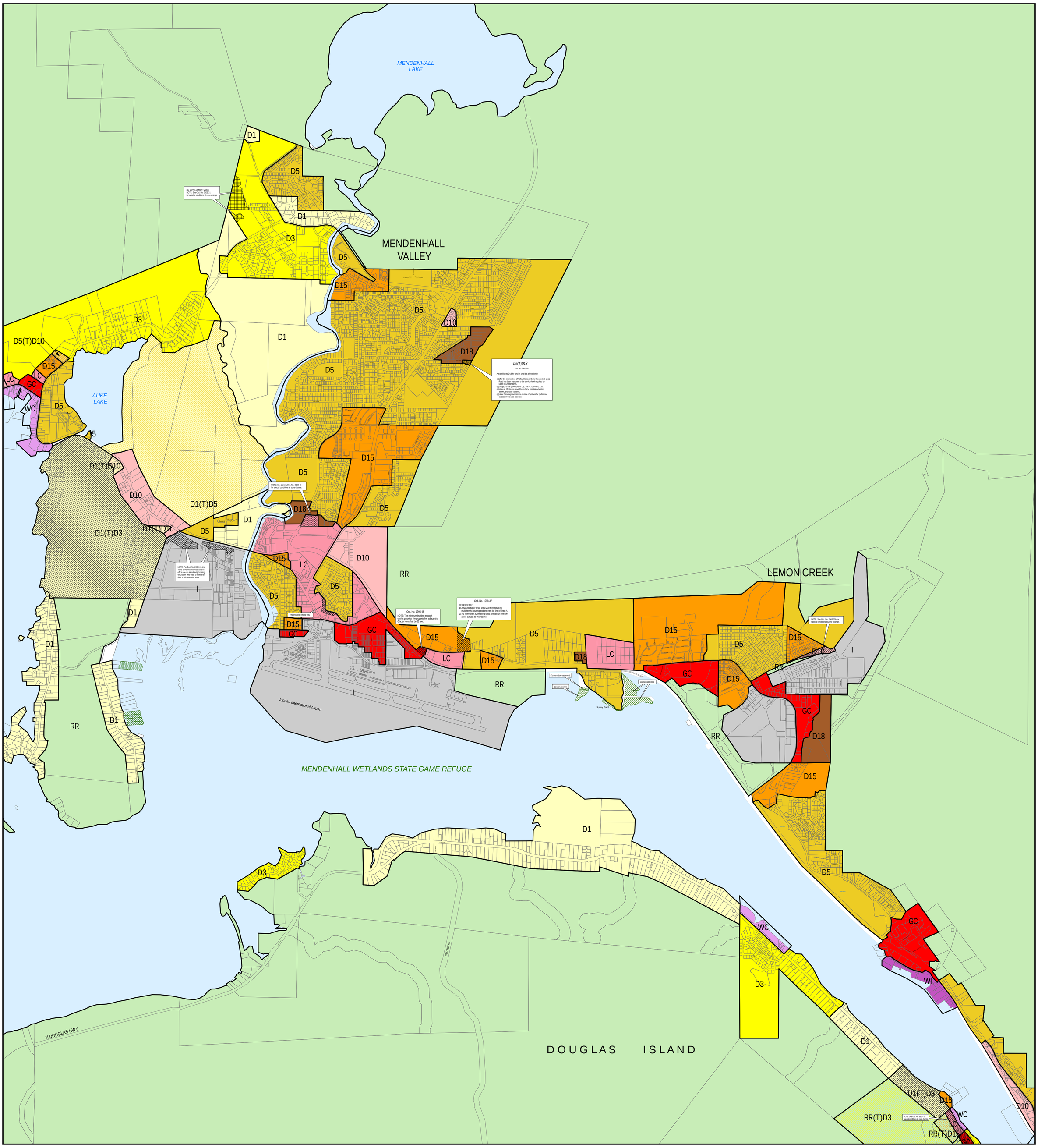
IT IS SO ORDERED.

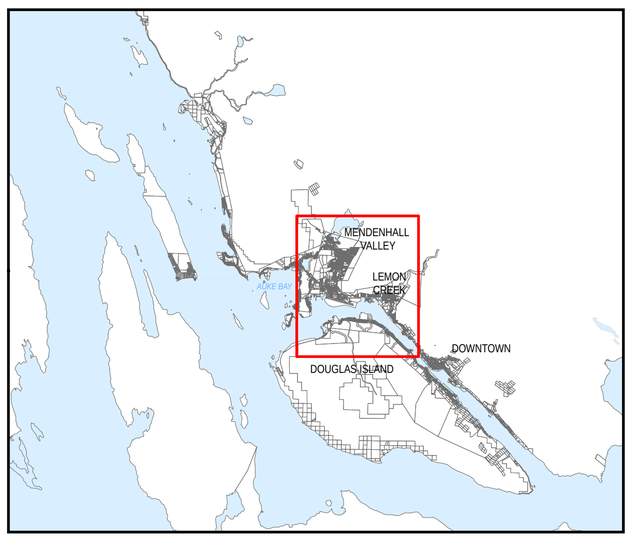
DATED this 19 day of March, 2014.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: Assemblymember Jerry Nankervis
Presiding Officer on Appeal

Attachment 1





Mendenhall Valley & Lemon Creek
ZONING MAP

ZONING DISTRICTS

- D1 Single Family & Duplex
- D3 Single Family & Duplex
- D5 Single Family & Duplex
- D10 Multi Family
- D15 Multi Family
- D18 Multi Family
- LC Light Commercial
- GC General Commercial
- I Industrial
- MU Mixed Use
- MU2 Mixed Use
- WC Waterfront Commercial
- WI Waterfront Industrial
- RR Rural Reserve
- RR(T)D15, RR(T)D3 — Transition Zones
- D1(T)D3, D1(T)D10, D1(T)D5, D10(T)D15, D3(T)D18, D3(T)D5, D5(T)D10, D5(T)D18 — Single Family & Duplex Transition Zones

Map current as of January 30th, 2013

Disclaimer:

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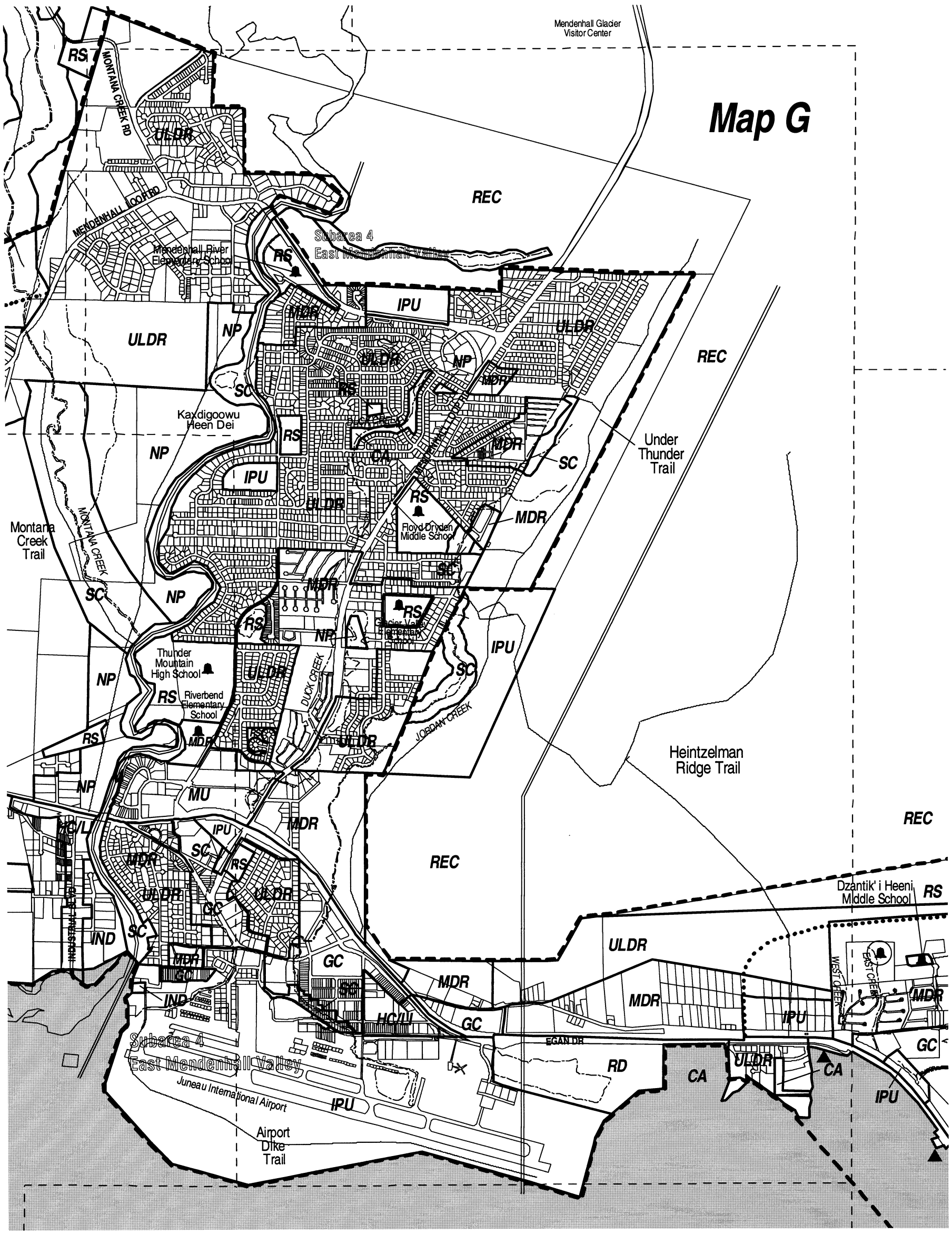
Suggestions for corrections and improvements to the CBJ zoning maps should be directed to:

Geographic Information Systems
gis@ci.juneau.ak.us
(907) 586-0762

CITY/BOROUGH OF JUNEAU
ALASKA'S CAPITAL CITY

Attachment 2

Map G



NATURAL RESOURCE
- REC Recreational Resource
- RD Resource Development
- SP State Park
- FP Federal Park
- NP CBJ Natural Area Park
- RS CBJ Recreational Service Park
- CA CBJ Conservation Area
- SC Stream Protection Corridor

COMMERCIAL INDUSTRIAL
- GC General Commercial
- WC Waterfront Commercial
- WCI Waterfront Commercial Industrial
- HC/LI Heavy Commercial/Light Industrial
- IND Industrial

2000 0 2000 Feet

RESIDENTIAL
- RDR Rural Dispersed Residential
- RLDR Rural Low Density Residential
- ULDR Urban Low Density Residential
- MDR/SF Medium Density Residential- Single Family
- MDR Medium Density Residential
- HDR High Density Residential
- MU Mixed Use
- M/MU Marine Mixed Use

PUBLIC
- IPU Institutional and Public Use
- Existing School
- Potential School Location

ROADS TRAILS
- Potential Arterial (alignment not specific)
- Potential Road (alignment not specific)
- Trails

OTHER
- New Growth Areas
- Mendenhall Wetlands State Game Refuge
- Subarea Boundary
- Urban Service Area
- Beach Access
- Streams

City & Borough of Juneau
COMPREHENSIVE PLAN
City & Borough of Juneau Alaska's Capital City
N
Adopted October 20th, 2008
Ordinance No. 2008-30

NOTE: Potential geophysical hazards, wetlands, flood zones, natural resource setbacks or other features which can affect properties may be present. CONTACT THE COMMUNITY DEVELOPMENT DEPARTMENT FOR DETAILED INFORMATION.

Prepared by: Community Development Department

Attachment 3

Map G

Mendenhall Glacier Visitor Center
Montana Creek Trail
Mendenhall River Elementary School
Kaxdigoowu Heen Dei
Thunder Mountain High School
Riverbend Elementary School
Floyd Dryden Middle School
Glacier Valley Elementary School
Under Thunder Trail
Heintzelman Ridge Trail
Dzantik' i Heeni Middle School
Juneau International Airport
Airport Dike Trail
Subarea 4 East Mendenhall Valley
MONTANA CREEK RD
MENDENHALL LOOP RD
DUCK CREEK
JORDAN CREEK
INDUSTRIAL BLVD
EGAN DR
EAST CREEK
WEST CREEK

NATURAL RESOURCE

- REC Recreational Resource
- RD Resource Development
- SP State Park
- NP CBJ Natural Area Park
- RS CBJ Recreational Service Park
- CA CBJ Conservation Area
- SC Stream Protection Corridor

COMMERCIAL INDUSTRIAL

- C Commercial
- MC Marine Commercial
- WCI Waterfront Commercial Industrial
- LI Light Industrial
- HI Heavy Industrial

2000 0 2000 Feet

RESIDENTIAL

- RDR Rural Dispersed Residential
- RLDR Rural Low Density Residential
- ULDR Urban Low Density Residential
- MDR/SF Medium Density Residential- Single Family
- MDR Medium Density Residential
- HDR High Density Residential
- TTC Traditional Town Center
- M/MU Marine Mixed Use

PUBLIC

- IPU Institutional and Public Use
- Existing School
- Potential School Location

ROADS TRAILS

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Prepared by: Community Development Department

Dissenting Opinion in the appeal of:

Notice of Decision

CDD File No. AME2013 0006

Richard Harris,)

Appellant,)

v.)

CBJ Planning Commission,)

Appellee)

On appeal Richard Harris seeks to have the Assembly overturn a denial of re-zone by the Juneau Planning and Zoning Commission. The Appellant has challenged the commission's decision solely on the basis that it "is not supported by substantial evidence in light of the whole record, as supplemented at the hearing". CBJ 01.50.070 (a) (1). As here, where agency expertise is involved, the Assembly is expected to defer to the Commission's interpretation of our zoning laws.

However, in voting to overturn the commission's decision, the majority ignored both the overwhelming evidence used by commissioners to cast a strong majority vote to uphold the Comprehensive Plan and deny the zone request based "upon staff's analysis and findings"[1] and the Commission's expertise.

The record shows that the planning commissioners examined aerial photos of the area, revealing that the commercial uses reasonably conceivable within the mixed use area across Mendenhall Loop Road from the proposed rezone do not and will not abut the road itself. Undevelopable wetland and anadromous stream parcels that cannot be developed lie on both sides of Mall Road. These undevelopable areas serve as an area of transition between the incompatible uses of the mixed use and medium density residential areas.

The minutes of the Planning Commission make clear that the decision came down to how the property is defined in the Comprehensive Plan - Medium Density Residential. One planning commissioner "contrasted Medium Density Residential at 5-20 dwelling units per acre to Light Commercial at 30 dwelling units per acre. Light Commercial use means a bar or restaurant of any size, or a vehicle sales or repair lot of any size." Another planning commissioner noted, "Based upon the analysis in the staff report, the rezone request does not substantially conform to the maps of the Comprehensive Plan."

[1] Record, at pages T68-70.

Far from relying on the number of units per acre as "an absolute limit,[2]" it was the judgment of the planning commission that many of the land uses allowed under light commercial zoning were inconsistent with the land uses allowed in medium density residential zones. This judgment is precisely what the Assembly charges the commission with doing. And, in so doing, the record makes clear the commission had substantial basis in the Comprehensive Plan and in the staff's analysis to deny the re-zone request.

The opinion of the majority to overturn the Planning Commission turns on an isolated phrase used by the chair of the planning commission: "hard boundary" which it employs to describe the five-lane roadway separating an area the land use maps of the comprehensive plan designate for mixed uses from the area in this rezone, which the comprehensive plan designates for residential uses. However, the verbatim minutes in the record make clear the commission's chair did not use the phrase "hard boundary" in the same sense. Instead, he intended it to reflect the separation of incompatible uses both on the ground and in the plan that the commission is charged with maintaining as a means to avoid conflicts.[3]

In arguing that the Planning Commission failed to consider the highest and best use of the parcel, the Majority suggests that light commercial zoning would enable increased affordable housing.[4] This notion ignores the appellant's own statements at oral argument that he would build far fewer housing units as part of a commercial development than as part of a strictly residential development.

The majority's decision suggests the question of whether a rezone substantially complies with the land use maps of the comprehensive plan has little to do with the uses that can and cannot be permitted under the zones in question. This standard makes the plan a meaningless document, and CBJ 49.75.120's requirement of substantial compliance a legal nullity.[5]

In our view, the Planning Commission's decision is supported by substantial evidence and the appellant did not meet the burden of proof to show otherwise. We would therefore uphold the Planning Commission's decision. For that reason we dissent from the order in this case.

Dissenting opinion by Assemblymembers Kiehl, Crane, Jones, and Troll.

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[2] Majority opinion, at page 5.

[3] If only the asphalt of Mendenhall Loop Road separated the potential uses, the appellant might reasonably have argued that extending a zone just over the line is "substantially" compliant. The appellant did not do so.

[4] Majority opinion, at page 8.

[5] The majority is correct in asserting that the comprehensive plan is aspirational and not a legally binding document. However, it should not lose sight of the fact that the comprehensive plan is implemented through its zoning and land use designations and the table of permissible uses. Uses allowed in a given zone are where the rubber of the plan meets the road of neighborhood harmony and conflict. Far from being clearly in error, the Planning Commission was entirely right to consider those uses.