

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"<sup>1</sup> 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."

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<sup>1</sup> Record, at pages T68-70.

Far from relying on the number of units per acre as “an absolute limit,<sup>2</sup>” 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

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.

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<sup>2</sup> Majority opinion, at page 5.

<sup>3</sup> 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.

<sup>4</sup> Majority opinion, at page 8.

<sup>5</sup> 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.