

1 The Planning Commission held:

2 Considering the remedy that Appellant sought – she did not ask to correct a
3 design specification to bring the project into compliance with one of the technical
4 building codes contained in Title 19, but instead urged that the CUP [Conditional Use
5 Permit] process be reopened to start from scratch – this appeal was effectively an
6 untimely appeal of the CUP issued by this Commission back in January 2005.
7 Appeals of a CUP must be taken within 20 days, and are addressed to the Assembly.
8 CBJ 01.50.030(c). Considered as an appeal of the Building Permit issued by CDD
9 on April, 28, the appeal filed 46 days later – on June 13, 2005 – is also untimely.
10 Finally, if this is considered as an appeal of a Director’s Decision, [sic] as
11 characterized by Appellant, it is also untimely. Appeals to this Commission from a
12 decision of the Director of CDD must be filed within 20 days. CBJ 49.20.110(a).

13 R. 12.

14 In addition, the Commission noted:

15 Ms. Parke’s depiction of her “appeal” as one taken from a “final” decision of the
16 CDD Director on June 8 to “not enforce” the Building Permit is without merit. It is
17 axiomatic administrative law that “[h]owever denominated, a claim is functionally an
18 administrative appeal if it requires the [Commission] to consider the propriety of an
19 agency determination. *Haynes v. State, Commercial Entry Comm’n*, 746 P.2d
20 892, 893 (Alaska 1987). Ms. Parke effectively asked this Commission to determine
21 the validity of CDD’s actions in issuing the Building Permit and to even reconsider the
22 original CUP. She urged that the whole permit process be reopened. See. [R. 44-45].
23 To grant Appellant’s request, this Commission would have to determine that CDD’s
24 action on April 28 (the day that the CDD Director visited her home and issued the
25 Building Permit) had been improper. That is precisely the determination that is made
26 in an administrative appeal. *Haynes*; see also *Diedrich v. City of Ketchikan*, 805
P.2d 362, 365-66 (Alaska 1991).

The decisions of this Commission (the January 25, 2005 CUP) and the CDD
(the April 28, 2005, Building Permit) must be accorded finality, and the appeal clock
allowed to run. If adverse parties are allowed repeated opportunities to contest the
same issues, disputes will never be settled and citizens cannot be confident that their
investments of time and financial resources into permitted developments will be
honored. Appellant has not shown good cause for enlargement of the appeal period.

R. 13.

Ms. Parke appeals these findings to the Assembly. (Notice of Appeal).

The standard of review on appeal is set forth in the CBJ Appeals Code at CBJ 01.50.070:

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:

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- (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.

The appeals code standard of review, requiring that the Commission’s decision be supported by substantial evidence, is deferential to the Commission. This deference expresses the Assembly’s structural delegation of these decisions to the Commission, and the Assembly’s respect for the Commission’s expertise.

Discussion.

Ms. Parke argues that she is not in fact appealing either the CUP or the building permit. She argues that she is appealing the CDD director’s “final” decision not to enforce the terms of the building permit, a decision she argues, that was made on June 8, 2005, in a telephone call between her attorney and CDD staff. R. 93. Because she filed the appeal to the Commission within 20 days following that date, she argues, her appeal is timely. Ms. Parke argued to the Commission that the CUP process could be reopened based on her concerns. R. 127.

Appellee/Intervenor Heather McCarty, and the Commission, argue that an unwritten “decision not to enforce” by CDD staff is not an appealable final decision of the CDD director. Considered as an appeal of the building permit and CUP, Ms. Parke’s appeal was not filed until well after the deadlines set forth in the Land Use Code and the CUP.

Appellees express two further concerns. They argue that allowing an appeal of a “decision not to enforce” a permit condition (or ordinance) would have the undesirable effect of limiting CDD’s discretion in enforcement matters, and also that it would make a large number of routine staff decisions into appealable issues.

1 Finally, Appellees note that there is a high interest in finality in these types of cases. Land Use Code
2 decisions are required for every new development in the City and Borough, and often involve very substantial
3 amounts of money: In this case, Ms. McCarty stated that she spent approximately \$100,000 on rebuilding
4 her second story and roof.

5 At the appeal hearing before the Planning Commission, Ms. Parke, represented by Mr. Sholty, testified,
6 as noted in the Commission minutes, that:

7 She [Ms. Parke] learned of the addition on the week of April 28th, and she looked at
8 a copy of the [Building] permit. Ms. Parke read condition 5 of the building permit in
9 Exhibit 7, which requires verification of roof compliance, and she interpreted what that
10 statement meant to her, and said that it is not stated anywhere in the permit that the
11 roof would be 43 feet 6 inches high. *On April 28th she asked for a copy and noted
12 the roof height which was inconsistent with that in the Conditional Use Permit.*

13 R. 17 (emphasis added). CDD staff had discussed the roof height at a staff meeting before issuing the
14 building permit. R. 23. April 28, 2005, when the record indicates that Ms. Parke reviewed the permit file
15 and noted the new roof height, was the same day that the Building Permit was issued, and the day that CDD
16 Director Dale Pernula and Planner Ben Lyman visited Ms. Parke at her home. R. 23. By May 5th, CDD
17 had responded to Ms. Parke's public record requests, and she had reviewed the permit files. R. 167, 168,
18 173, 217.

19 The construction project was, of course, directly in front of her house. Before Ms. Parke filed her
20 appeal, the record indicates, the entire second story of Ms. McCarty's home had been torn off. R. 76. The
21 record also notes that Ms. Parke "made several requests for information, and she had numerous
22 conversations with [CDD] staff." R. 20.

23 Ms. McCarty sent her neighbors individual letters indicating that she expected to be "mostly finished
24 with the major construction by July." R. 132. Ms. Parke testified that "Dale Pernula and Ben Lyman met
25 with her [April 28] and did not mention the roof height." R. 17. That testimony is contradicted by a "time
26 line" created by CDD Planner Ben Lyman, which notes:

1 4/28/05 Dale Pernula and Ben Lyman visit the home of Mary Ann Parke to discuss
2 the project and decision regarding roof height discrepancy made at 4/15/05 staff
meeting.

3 R. 23.

4 Ms. Parke filed her appeal to the Commission on June 13, 2005. R. 173.

5 Ms. Parke also testified that she had received mailed notice of the hearing on the Conditional Use
6 Permit. R. 18. ("Ms. Parke said she received it and did not attend the Planning Commission hearing.") That
7 notice, mailed individually to adjacent property owners, gives the time and date of the hearing, and notes that:

8 You are invited to attend this Public Hearing and present oral testimony. The Planning
9 Commission will also consider written testimony. You are encouraged to submit
written material to the Community Development Department no later than 8:30 A.M.
on the Wednesday preceding the Public Hearing. . . . Written material received after
the deadline will be provided to the Planning Commission at the Public Hearing.

10 The notice also provides the planner's phone number and email address for questions. R. 18. A 3-foot
11 by 3-foot, red sign was also posted on the property advertising the CUP hearing date. R. 61, 68. The CUP
12 hearing was held on January 25, 2005. R. 196.

13 The CUP itself spells out the appeals period, as does the CBJ Land Use Code. R. 70, 89. CBJ
14 49.20.110-120.

15 ***Conclusion.***

16 Ms. Parke's appeal was untimely. She had adequate notice, and should have filed an appeal before
17 the reconstruction project was so far along toward completion. Developers, landowners, and homeowners
18 need to have assurance that if they secure the proper permits, and follow the permit terms, they will be
19 allowed to complete their project free from regulatory reversals. Appellants challenging a construction
20 project have a duty under the Land Use Code to bring their challenge in a timely manner. This finality interest
21 underlies the Commission decision, and the Assembly's. Ms. Parke is, in essence, challenging the CUP
22 finding that her view will not be excessively blocked by the new, higher roof, and CDD's approval of a
23 building permit which, she argues, allows the roof to exceed a height limitation imposed by the
24 CUP.

