

1 BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

2
3 THANE NEIGHBORHOOD ASSOCIATION,

4 Appellant,

5 vs.

6 PLANNING COMMISSION,

7 Appellee,

8 and

9 ALASKA ICEFIELD EXPEDITION, INC.,

10 Appellee/Intervenor.

Case No. 2006-01

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12 **ORDER DENYING APPEAL**

13 This is an appeal of a decision by the CBJ Planning Commission in which it declined to add a
14 certain condition to a Conditional Use Permit granted to Alaska Icefield Expedition, Inc., to operate
15 a dog kennel and tour operation in Sheep Creek valley. The condition, which was requested by
16 Appellant, would have required the permit to be reopened if complaints were received regarding
17 commercial traffic hazards on Thane Road. Appellant (Thane) is not asking that the permitted
18 development be halted; Thane is only seeking to have its requested condition added to the Conditional
19 Use Permit. At Appellant's request, a second issue was added to the appeal regarding changes to the
20 permit which were allowed by the Community Development Department Director after the permit was
21 granted and this appeal was filed.

22 This appeal was timely filed, two pre-hearing conferences were held to set out the briefing
23 schedule and appeal procedure, the record was prepared, the parties filed briefs, and a hearing was
24 held before the full Assembly at which the parties argued their positions.

25 The Assembly, after deliberation on the facts and arguments, denies the appeal for the reasons
26 outlined below. In addition, however, the Assembly sets out guidelines for the CDD Director in
27 making changes to permits after they are issued.

1 **Background.**

2 The CBJ Planning Commission granted a Conditional Use Permit to Appellee/Intervenor Alaska
3 Icefield Expedition, Inc., to operate a dog kennel and seasonal dog sled tour in Sheep Creek valley.
4 During the hearings before the Commission, Thane Neighborhood Association, neighbors of the
5 commercial kennel and tour project, requested that certain conditions be added to the Conditional Use
6 Permit relating to the traffic on Thane Road. The neighbors expressed concern that the traffic added
7 to Thane Road by this development, along with existing commercial and residential traffic, would
8 aggravate a dangerous condition on Thane Road, which is narrow and lacking shoulders along much
9 of its length. While the Commission added conditions relating to noise emanating from the dog
10 operation, the issue on which much of the staff report and testimony centered, it declined to add the
11 requested permit condition relating to traffic. Thane Neighborhood Association appeals the
12 Commission decision to decline the traffic condition.

13 **Discussion.**

14 Under the CBJ Appeals Code, the Appellant bears the burden of proof to show that the Planning
15 Commission's decision is not supported by substantial evidence. CBJ 01.50.070. Because
16 "substantial evidence" is defined broadly, the standard of Assembly review gives deference to the
17 Planning Commission's expertise, and the Appellant's burden of proof is difficult to meet.

18 1. *Thane Road Traffic Condition.*

19 The Appellant asserts two grounds for overturning the Commission's decision to decline to
20 include the traffic condition: 1) that the decision is not supported by substantial evidence in light of
21 the whole record; and 2) that the Commission's written findings are not adequate. Thane is not
22 seeking revocation of the permit. Because the Commission issued a Notice of Decision which
23 incorporated a lengthy and detailed staff report covering all relevant issues, the question of the
24 adequacy of the Commission's findings can be easily dismissed. The findings are adequate to
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1 communicate to an appellate review the basis for the Commission's decision, and, accordingly, are
2 sufficient under the standard set forth in the appeals code.

3 Because the Commission considered the detailed staff report, the testimony of Thane
4 Neighborhood Association, and the response of the applicant to the concerns raised by Thane, the
5 Assembly finds that the Commission's decision is supported by substantial evidence. Thane asked
6 the Commission to include a new condition which would have the CDD Director recommend a new
7 Commission review of the permit, which could include revocation of the permit, "if there are
8 significant public complaints over the public safety hazard on Thane Road for vehicle or non-vehicle
9 users, relating to the commercial bus traffic." This condition would parallel a condition added by the
10 Commission relating to noise from the kennel and tour operation. Appellee/Intervenor opposes adding
11 the traffic-related condition, arguing that "the practical effect of such a condition would be to imperil
12 the validity of AIE's CUP and put a one million dollar investment at risk." Intervenor also points out
13 that the meaning of "significant" public complaints is subjective and essentially impossible to
14 articulate.

15 In two public hearings, the Commission considered substantial evidence relating to traffic
16 hazards on Thane Road, and its relation to the proposed project. This evidence included testimony
17 and letters from the neighbors, the development plan which includes a description of all bus and other
18 traffic which will be caused by the project, and the steps taken to consolidate and minimize trips, and
19 the CDD staff report, which included Alaska Department of Transportation and Public Facilities
20 statistics for accidents on Thane Road. After considering these items and other testimony the
21 Commission was within its discretion to decline to add the condition requested by the neighbors.
22 Substantial evidence encompasses a broad continuum, even if Appellant may disagree with the result.
23 The Commission's decision is supported by substantial evidence, and, accordingly, is affirmed.

1 2. *Permit Changes Allowed by the CDD Director.*

2 The second issue raised by Appellant centers on the CDD Director's letter of June 12, 2006, to
3 Alaska Icefield Expedition of June 12, 2006. In that letter, the Director, based on field work by CDD
4 staff and Trail Mix, Inc., allows Alaska Icefield to delay implementation of the permit condition
5 requiring it to construct a new trail segment on the Sheep Creek trail, until after the tourist season, and
6 until further noise information has been gathered, if the permittee posts a bond to ensure that the trail
7 work will be done if necessary. Thane is careful to point out that it is not so much concerned about
8 the content of the Director's letter, *i.e.*, the decision he made, but the process by which the Director's
9 decision was adopted and implemented. In fact, Thane indicates that "with hindsight, it appears that
10 a better decision may have been to delay the condition requiring the construction of a new trail until
11 after the noise assessments and surveys had been completed to determine if it were really necessary."

12 Alaska Icefield argues that no mistake was made:

13 The director did not suspend, revoke or invalidate the condition. He *deferred* it,
14 with an AIE-provided security bond, until further study could be done and with
15 the promise that if staff ultimately finds that the condition should be repealed,
16 that such a proposal would be proffered to the commission.

17 The Commission and Intervenor cite the broad general authority of the Director set forth in CBJ
18 49.10.500:

19 The director is authorized and empowered to carry out all of the duties as set
20 forth in this title and title 19, and shall have all other power and authority
21 reasonably necessary or desirable to carry out those duties, including the power
22 to delegate those duties to other employees of the department or other
23 appropriate city and borough agencies.

24 Thane points out that the timing of the administrative change to the permit was somewhat
25 problematic in that it was done six weeks after this appeal was filed. Thane argues that if the Director
26 has the authority to modify the permit in the way requested by the permittee, then he could modify it
27 by adding the condition the neighbors request and the appeal could be withdrawn.

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The Assembly has concerns about this process as well. While the Director does have broad authority, we believe that modifying a permit after it is issued can give an appearance of unfairness, and doing so may short-circuit the public process before the Commission and the right of appeal. However, when there are, as in this case, exigent circumstances that compel the Director to act before the matter can be considered by the Commission for possible modification,¹ the Director may do so, but the matter should be brought to the Commission at the earliest possible opportunity.

Conclusion.

Appellant has failed to meet the burden of proof that the Planning Commission’s decision to decline to add traffic conditions lacked substantial evidence. Accordingly, the appeal is denied, for the reasons outlined above. The Manager is directed to work with the CDD Director to implement guidelines for changes to permits consistent with this decision.

This is a final administrative decision of the Assembly of the City and Borough of Juneau, Alaska, which may be appealed to the Juneau Superior Court *if* such appeal is brought pursuant to the Alaska Rules of Court within 30 days.

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¹ In this case, the Assembly accepts the fact that, given notice requirements, there was not adequate time to convene a meeting of the Commission to consider the issue; the deadline in the conditions was fast approaching and unnecessarily tearing up the Sheep Creek trail would have been a bad result.

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IT IS SO ORDERED.

DATED this 9th day of October, 2006.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA



By: Mayor Bruce Botelho,
Presiding Officer on Appeal

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