

Agenda
Planning Commission
Committee of the Whole
CITY AND BOROUGH OF JUNEAU
Ben Haight, Chairman
March 13, 2018

I. ROLL CALL

Ben Haight, Chairman, called the Committee of the Whole Meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC), held in the Assembly Chambers of the Municipal Building, to order at 5:35 p.m.

Commissioners present: Ben Haight, Chairman; Paul Voelckers, Vice Chairman; Nathaniel Dye, Percy Frisby, (telephonically), Dan Hickok, Andrew Campbell, Carl Greene

Commissioners absent: Mr. LeVine, Mr. Miller

Staff present: Rob Steedle, CDD Director; Beth McKibben, Planning Manager; Robert Palmer, Assistant Municipal Attorney, Amy Liu, Planner I

Assembly members: Beth Weldon

II. REGULAR AGENDA

Training Topic: Variances versus Conditional Use

Comparison of Variance and Conditional Use

By Lee Sharp

Preston Gates & Ellis LLP

Variance	Conditional Use
Purpose is to ensure that the application of zoning regulations does not operate to deny all reasonable uses of a property that is peculiar when compared to other nearby property to which the same regulations apply.	Purpose is to deal with uses that have a particular, potentially adverse, impact on the surrounding area that cannot be predetermined and controlled by general regulations. Is used to ensure such uses will be compatible with surrounding development by placing conditions on the use to minimize or eliminate adverse impacts.

Variance	- Continued -	Conditional Use
To accommodate peculiarities of the land.		Not dependent upon peculiarity of the land, but triggered by the peculiar defect of the use on the neighborhood.
Exceptional hardship must be shown.		Hardship is not relevant.
Deals with density restrictions (and not use restrictions in most cases in Alaska).		Deals with use and with restrictions on use and density.
Allows relaxation of density restrictions where peculiarity and undue hardships are shown. Relaxation not allowed for a trade-off.		Not for the purpose of relaxing density restrictions but to permit additional restrictions to be placed on the use; however, relaxation of density restrictions may occur if the conditional use procedure is applied to planned unit developments where trade-offs are allowed.
Allows a condition expressly prohibited by the regulations.		Allows a use that is expressly permitted (but which requires special conditions).
Is a dispensation to violate the law.		Is a permitted use within the district.
Very strict standards apply.		More generalized standards apply, e.g., consistency with the comprehensive plan and purpose for the zoning ordinance.
Is a property owner right if property meets requirements; is not a flexible planning tool.		Generally is not a right if use cannot be made compatible with neighborhood; is a flexible planning tool.
Property owner is entitled to a variance if can show peculiarities of property leading to hardship under the regulations.		Generally entitled to a permit if property owner can show use is compatible with neighboring property and other permitted uses within the district.
Quasi-judicial proceeding (little discretion involved in granting or denying).		Quasi-legislative or quasi-judicial proceeding depending on situation, but substantial discretion involved.

Ms. McKibben told the Planning Commission that Alaska state law requires all boroughs to exercise planning powers on an area-wide basis. Title 49 of the CBJ code establishes the Planning Commission to perform the functions of planning, platting and zoning, she said. The Planning Commission is appointed by the Assembly. Commissioners are appointed with three-year staggered terms.

Legislative Decisions

The Planning Commission has several roles, said Ms. McKibben. It has an advisory role in which it advises the Assembly on issues related to the planning, platting and land use regulation and community development, said Ms. McKibben. For example the Commission recently approved and recommended to the Assembly adoption of the Lemon Creek Area Plan, said Ms. McKibben. The Planning Commission recently recommended the variance section of code to the Assembly, which has final action.

Regulatory Role

In its regulatory role, the Commission administers the land use regulations including zoning and subdivision ordinances, said Ms. McKibben. The Conditional Use Permit for a marijuana facility is on the agenda tonight for the Commission which is a quasi-judicial action in which the Commission exercises its regulatory role, she said. Those types of decisions by the Planning Commission are final, she added.

Procedural Role

It is important that the Commission conduct fair meetings and makes fair decisions, she said.

Open Meetings Act

Mr. Palmer told the Commission that any time it has a meeting of more than three Planning Commission members that it must comply with the Public Open Meeting Act. The meeting must be properly noticed, which is in general at least 24 hours prior to the meeting, he said. Planning Commission regular meetings are a little bit different, and that is set forth in Title 49, said Mr. Palmer. The meeting also has to be accessible and recorded, he said.

Planning Powers for Alaska Communities

Ms. McKibben referenced a poster provided by the Department of Community and Regional Affairs and Economic Development which can be accessed [here](https://www.commerce.alaska.gov/web/Portals/4/pub/Planning_Powers_Poster.pdf).
(https://www.commerce.alaska.gov/web/Portals/4/pub/Planning_Powers_Poster.pdf)

The role of the Planning Commission is very complex, said Ms. McKibben. Planning is an exercise of police powers, and land-use regulation. The Alaska Constitution and state statutes provide the maximum jurisdiction to adopt and implement planning and zoning powers to protect the public health, safety and general welfare, said Ms. McKibben. These are the key components of the Planning Commission power, she said. The provisions of the Planning Commission have to be reasonable and fair, said Ms. McKibben.

The duties of the Planning Commission are outlined in Title 49 and the Comprehensive Plan, the Capital Improvement Plan, land acquisitions and disposals, land use regulations, rezones, platting, Conditional Use Permits, appeals of administrative decisions; and the Commission sits as the Board of Adjustment for variances, she said. The Commission now also decides parking waivers and waivers to street standards could be added as well, said Ms. McKibben.

One of the primary concepts of planning is the common good, said Ms. McKibben. This means that the Commission apply planning and goals fairly and evenly, she said, and that it is consistent in its application. Commission members may not use their position for personal gain or to benefit a small number of people, said Ms. McKibben, with no benefit to the community

at large. The concepts of public health, safety and welfare are the key concepts to keep in mind, she said.

Public Involvement

Public involvement gives the Commission the opportunity to educate, build support and encourage ownership by the community, said Ms. McKibben. The staff also engages the public in a variety of different ways, noted Ms. McKibben. This also gives the staff and the community the opportunity to tap into local knowledge and talent offered by the community, she said. It creates a sense of ownership by the community in its planning and regulations, she said. Ms. McKibben noted that the Lemon Creek Area Plan is a good example of this community involvement.

Staff

Staff plays a critical role in the process and in the overall effectiveness of the Commission, said Ms. McKibben. They administer the land use regulations, and they prepare the reports and the meeting notices, she said. The staff knows and interprets the laws of the ordinances, they do the community planning and research, they advise the Commission, they educate and assist the public, and they negotiate with various agencies. In addition, they practice enforcement and they provide continuity, said Ms. McKibben.

Planning

Planning maintains and enhances the quality of life of the community for the public health, safety and welfare, said Ms. McKibben. Planning identifies how the community wants to grow, is a device for problem-solving, promotes economic development, can conserve community resources and balance competing points of view, she said.

Good planning creates a degree of predictability and certainty over patterns to development, said Ms. McKibben. People want to know how their neighborhood will develop and how it will grow, she said. Planning also provides developers with the information that they need, said Ms. McKibben.

Variety of Plans

There are a variety of plans which provide guidance for decision-making, said Ms. McKibben. The Comprehensive Plan is the overall guiding document for the community, she said. It provides a vision and goals and sets out implementing actions for the community. The Comprehensive Plan has chapters on sustainability, energy, housing, community and economic development, resources, land use and transportation, said Ms. McKibben. There are also land use plans which can be specific for smaller areas or embodied in the larger Comprehensive Plan, she said. Lemon Creek and Auke Bay are the first specific area plans for the community, she said, in addition to the downtown waterfront and Willoughby district plans. The Capital Improvement Plan is one of the implementation tools for the Comprehensive Plan, noted Ms. McKibben.

Transportation Plans

There is an Area Wide Transportation Plan, a Non-Motorized Transportation Plan, a Safe Routes to Schools Plan, and the Parking Plan, said Ms. McKibben. She noted that not all of these plans are incorporated into the Comprehensive Plan. The Economic Development Plan was adopted in 2015, said Ms. McKibben. There are also community action plans, she added.

Comprehensive Plan

The Comprehensive Plan usually includes population and demographics, projected growth rates, land-use, environment, transportation, housing, public facilities and economic development, said Ms. McKibben.

Zoning is the implementation of the Comprehensive Plan most familiar to the Planning Commission, said Ms. McKibben. Zoning dictates what kind of uses can occur, how they are to take place, the size of the development including the height and proximity of the development to other buildings including subdivision regulations, she said. It includes floodplain regulations and the Land Management Plan, said Ms. McKibben.

Quasi-Judicial

The Comprehensive Plan and all of its different parts and the land use code are responsibilities of the Commission that are legislative, said Ms. McKibben. The Commission makes recommendations to the Assembly in its legislative role, said Ms. McKibben. Conditional Use Permits, variances and subdivisions are considered quasi-judicial, which means that the Commission is the deciding body on those issues, she said. That is why it is very important that public notice requirements are met, and that the proper meeting procedures are followed, said Ms. McKibben.

Conditional uses are things that may or may not be appropriate in a particular zoning district according to the character and intensity or size of the surrounding uses, said Ms. McKibben. They have to have a pre-application conference with the applicant, send it out for agency review, write a report for the Planning Commission, and the Commission makes the ultimate decision, said Ms. McKibben. The procedure is intended to afford the Commission the flexibility necessary to make determinations appropriate to individual sites, she said. The Commission can attach permits which are necessary to mitigate external adverse impacts, said Ms. McKibben. This is a very important function of the Commission, she noted. The Commission can only legally consider external impacts, said Ms. McKibben.

If the Commission determines that the impacts cannot be satisfactorily overcome then the permit will be denied, said Ms. McKibben. As an example, Ms. McKibben brought up the library constructed in the Mendenhall Valley. In order for that project to take place, the Commission had to evaluate numerous impacts to the community such as traffic, visual, environmental, nuisance, privacy, safety and welfare; whether it was located in a flood zone or not.

Community members had expressed concern to the Department about the tree buffer for that library being removed, said Ms. McKibben. Air and water pollution were also evaluated, she said. Conditions had also been proposed to mitigate the impacts, she said.

Variances

The Commission has recommended to the Assembly that a variance is prohibited from varying any requirement or regulation concerning the use of land or structures, housing density, or lot area, said Ms. McKibben. An example of specified uses which cannot be varied are sand and gravel extraction, marijuana and child care, and public and private improvements, said Ms. McKibben. The variance criteria that are recommended are relief from requirements prescribed after the Board of Adjustment has determined it would result in an unreasonable hardship and that the unusual or special conditions are not caused by the person seeking the variance, she added. It also cannot be detrimental to the public health, safety or welfare, said Ms. McKibben. It must be narrowly tailored to relieve the hardship, she said.

A variance is a permission to violate the law, said Ms. McKibben. The property must be unique or extraordinary which is one of the criteria, that it causes a hardship or practical difficulties, and that it is the minimum necessary, she said. Some examples of a self-created hardship are a bad measurement when adding on a deck, or ignorance of the law. A variance is not intended to be granted because it makes it more profitable to use the property, said Ms. McKibben. It can also be determined whether Title 49 needs to be amended, said Ms. McKibben, such as properties in the downtown area that are zoned D-5, but many of the buildings do not meet that designation, she said. It is very challenging for many in that area to meet the stipulated 20 foot front and rear yard setbacks for example, she said.

Quasi-Judicial

The Commission also acts as a quasi-judicial body through subdivision regulation, said Ms. McKibben. Subdivisions give the community its shape, she said. A minor subdivision is up to 13 lots and is approved administratively by the staff, said Ms. McKibben. A major subdivision is 14 or more lots and it is approved by the Planning Commission with a two-step process of a preliminary and final plat, as is the minor subdivision, said Ms. McKibben.

Cumulative Impacts

The general rule is that the cumulative impacts of the entire project need to be considered, not just the impacts of the individual phases, said Ms. McKibben. If a developer proposes a development to be implemented in phases, said Ms. McKibben, the entire development has to be considered for its impact, not on a phase by phase basis. The effects of things like traffic and water need to be considered in a holistic manner, said Ms. McKibben, before the individual phases of the project can be addressed.

Commission Comments and Questions

Mr. Voelckers said there are instances where a second phase of a project occurred without it being apparent in the first phase. He said there is a gray line between the conditions.

Mr. Palmer agreed that there can be a gray line between conditions. The Pedersen Hill Subdivision is a good example of all phases being considered prior to implementation of the subdivision, said Mr. Palmer. It will be developed in three phases. The Commission reviewed all three phases as one, and then they would be developed individually, he said. The Thane mining decision made by a previous Commission was not viewed favorably by the Supreme Court as the water quality effects were not fully analyzed, he said.

Mr. Voelckers said the incremental development along Reninger has not been fully analyzed.

Mr. Palmer said if the developer wants to implement a large development but only wants to provide plans about the first phase of the development, the Supreme Court would have issues with that. It would need to be clear on the initial application that a large development was intended, said Mr. Palmer.

Mr. Dye asked how looking at the entire development could be compared to the recent action the Commission took on the Riverside Drive condominium project. The developer came back to the Commission to add another four units, said Mr. Dye.

Ms. McKibben said the developer came to the Commission initially with a full build-out request for a maximum number of units and the Planning Commission approved fewer units, she said. The original staff evaluation was for all of those units, she said.

Mr. Palmer said when a developer comes before the Planning Commission there are times when the Commission can evaluate the full project. There is a balance involved, said Mr. Palmer, and as stated by Mr. Voelckers, there is a gray area.

Rezoning

Rezoning is an example of a legislative action in which the Planning Commission makes a recommendation to the Assembly, said Ms. McKibben. A few years ago the code was changed so that when the Planning Commission decides that a rezoning does not meet the criteria within the code and it is denied; that is a final decision and does not need to go before the Assembly, said Ms. McKibben. Approval of the rezone must go before the Assembly because only the Assembly can change the maps within the Comprehensive Plan, she said.

Applications for rezones are accepted in January and in July, said Ms. McKibben. The maps within the Comprehensive Plan are meant to for guidance, said Ms. McKibben.

When looking at a rezone request Mr. Voelckers asked if they are supposed to be evaluating for the full potential buildout impact or if they are to make the evaluation based upon the actual rezone request. Is the Commission supposed to just look at the general adherence to the Comprehensive Plan or are they to be very specific about impacts on streets, for example.

Ms. McKibben said it is very difficult to make a determination without an actual development proposal before them.

Mr. Palmer said the rezone is a very broad brush. It is the highlighter compared to a fine drafter's pen, he said. The purpose is to take the big picture view, he said.

Chairman Haight said it appeared to him that they were meshing one type of evaluation with another when at times they had to narrow the scope of a rezone evaluation, for example.

They can also make recommendations of public improvements that would need to happen before they could implement a rezone, said Ms. McKibben.

Pedersen Hill is zoned medium density residential, said Ms. McKibben. It used to be zoned D-3, she said. The Planning Commission then recommended that it be rezoned to D-10, she said, which is consistent with Medium Density Residential.

Conflict of Interest

There are two broad types of conflict of interest, said Mr. Palmer; the first is financial and the second is personal, he said. Financial conflicts of interest are things that prohibit a Commissioner from taking action on an item if he or she were to experience financial gain, said Mr. Palmer. For example a Commissioner could not participate or vote upon a Conditional Use Permit in which he or she was the underlying land owner, said Mr. Palmer. The area gets more gray if it is a project in which the Commissioner had an interest many years ago but no longer does now, said Mr. Palmer. When in doubt the Commissioner is to contact the City Attorney's office, and that Commissioner is protected if they follow the advice of the City attorneys, said Mr. Palmer, even if that decision turned out to be wrong in the future, such as in an appeal.

Personal interest is more difficult to define, said Mr. Palmer. A personal interest is defined as anything that is not a financial interest, he said. If you had a former neighbor coming before the Planning Commission for an item, said Mr. Palmer, that would be something to disclose, he said.

A few years ago the former chair of the Planning Commission let someone speak at great length during a public hearing and it later turned out to be the partner of the chairman, said Mr. Palmer. That was not disclosed at the time and the Assembly subsequently decided to remove the chairman from the Commission. Any substantial personal relationship with someone should trigger a call to the attorney's office, said Mr. Palmer.

Commission Comments and Questions

Chairman Haight noted that if the potential conflict was disclosed to the Chair ahead of time then it could also be disclosed to the public for their comments.

Ms. McKibben said this is clear when it is an item on the agenda, but not so clear when it's an item under the Consent Agenda.

Mr. Palmer noted that at a recent meeting several Commission members had possible conflicts of interest under an item on the Consent Agenda. He said the way that the Planning Commission handled this issue was fair and reasonable, in his opinion. He said he recalled that the entire Commission voted on the Consent Agenda minus the item which carried a potential conflict for a few Commission members. Then the conflicted item was called and the members with potential conflicts stepped down from voting on that particular item, said Mr. Palmer. If the public and the Commission have been notified there are potential conflicts and both have been notified, it has been the history of the Alaska Supreme Court that they honor that decision, said Mr. Palmer.

Mr. Voelckers asked if that objection could be raised later by someone who did not attend the meeting at the time that the vote took place.

Mr. Palmer responded that generally that would not be honored, since the individual was not at the meeting.

Ms. McKibben asked about a situation in which a Commissioner said they did not think that they could be unbiased on a particular issue. In this particular instance, she said, the Commission told the member that they felt he or she could be unbiased and therefore that member did not step down for the subsequent vote.

Mr. Palmer said that is a tough question and that he does not have an answer for that particular situation at this time. He said that is an issue they would have to tackle as it arose.

Mr. Voelckers said generally the Commission does not have a problem with a potential declared conflict but that perhaps in the future the Commission should be more assiduous in deciding whether there is a conflict or not.

Mr. Campbell asked if a Commission member declares a potential conflict and the Commission finds that is not an issue if that individual is therefore shielded, as they would be if they had declared a potential conflict to a municipal attorney.

Mr. Palmer said there would be no liability perhaps to the Commission member who declared the conflict but there could be a potential due process question involving the Commission. Mr. Palmer said an undeclared conflict is a crime; a Class B Misdemeanor. There is also a

constitutional due process piece for the applicant and the public. He said a lot must be addressed on a case by case basis.

He said in the Landscape Alaska case which went to court, several residents complained about conflict of interest violations of one or two Commission members after the hearing. The City Attorney ruled there was no conflict of interest. The issue was later raised in the appeal and both the Superior Court and the Alaska Supreme Court found no grounds for that complaint, said Mr. Palmer.

Mr. Frisby asked how long the public has after the Commission has rendered a decision to appeal that decision.

Ms. McKibben said they have 20 days to appeal the decision.

Mr. Campbell said that he is a general contractor so that a lot of projects the Commission reviews are projects that he could potentially be bidding on. He asked if that is a conflict or if it is a conflict if he could potentially be bidding on an item before the Commission.

Mr. Palmer said that he and Mr. Campbell can meet and discuss this issue because it is potentially a confusing situation.

Mr. Voelckers said he has potential conflicts due to the nature of his business as well. For example, he said, if the Commission approves a stretch of waterfront for a certain type of zoning, and that he subsequently bid on a project stemming from that new zone, if this would be a conflict of interest.

Mr. Palmer said he will address the issue and draw up some helpful information for Commission members who may have this type of potential conflict in the future.

Ex Parte

Mr. Palmer said that *ex parte* is defined as “prohibited communication”. When the Commission is sitting in its quasi-judicial function such as dealing with variances or Conditional Use Permits, part of the fairness aspect is that Commission members can have no communication with certain people, such as having a direct conversation with an applicant about their project. Also, a conversation with an interested neighbor is forbidden, said Mr. Palmer.

There is a balancing act for the staff, however, said Mr. Palmer. On the one hand the CBJ charter dictates that every municipal employee is empowered to protest or appeal a decision to the Assembly. This puts the staff of the planning Department in an awkward position because it is also a party which can appeal the decision it has helped create. When the Planning Commission has a question it is encouraged to call the staff. The staff can reply to that question immediately on the phone or it could respond via email to all of the commission members. The

reason behind this is so that all of the Commission members are provided with the information that was requested by one of its members, said Mr. Palmer. This way there are no secrets, and the delicate balance of staff and potential conflicts is alleviated, he said. The staff can also provide an oral report at the meeting in front of the public, said Mr. Palmer.

Mr. Palmer said if an individual has a potential conflict and they have not heard back regarding this conflict, to make sure that they disclose it during the meeting so that it goes on the record. He has been asked when a Commission member runs into somebody at the store who wants to talk about an ongoing case, how they should manage that situation. For example, he said that he and Chairman Haight had recently served on the Mining Committee and that there were many individuals within the community who wanted to chat about the topic or even provide information about it.

Mr. Palmer said at the moment that an interaction takes place with a member of the public to draw the line between quasi-legislative role and quasi-judicial role. In the quasi-legislative capacity, Mr. Palmer said he is not that concerned about an *ex parte* communication. He said they can have discussions about rezones, for example. It would be better if they did not, but it is not totally prohibited, said Mr. Palmer. In those instances the Assembly makes the final decision and it is a legislative process, he added. However, he said, Commission members need to be very careful when they are dealing with an actual permit, said Mr. Palmer. He said Commission members should be most concerned about variances and Conditional Use Permits.

Ms. McKibben said they can also direct that individual to the staff if they wish to discuss a particular matter.

Mr. Dye asked if questions to the staff from the public are also relayed to the applicant.

Mr. Palmer said the idea is that the applicant or the public would have essentially the same information with equal opportunities given to provide that information. When it is too close to a meeting time to get that information out to the public, it would be provided with the meeting materials within the chambers during the meeting, said Mr. Palmer.

Chairman Haight emphasized how important it is to put Commission questions and concerns on the record. He said it is important to ask those questions in front of the public so that that information is on the record, and it can be shown that the Commission considered this during its deliberation.

III. OTHER BUSINESS - None

IV. ADJOURNMENT

The meeting was adjourned at 6:37 p.m.