BEFORE THE PLANNING COMMISSION OF THE CITY AND BOROUGH OF JUNEAU

HARRIS HOMES, LLC, Appellant, vs. CBJ COMMUNITY DEVELOPMENT, Appellee.	APL 2018 0003 Appeal of: USE2011 0015 CDD Director's Decision dated July 10, 2018

ORDER DISMISSING APPEAL

On January 28, 2019, the Planning Commission convened as the Board of Adjustment to deliberate Appellee CBJ Community Development's ("CDD") Motion to Dismiss the Appeal. Based on the motion, Appellant Harris Homes, LLC's ("Harris Homes") opposition, CDD's reply thereto, and a careful review of the record, the appeal filed by Harris Homes is **DISMISSED.**

I. Background

This appeal concerns a development project undertaken by Harris Homes called Sunset Meadows. Sunset Meadows is intended to be developed in three phases.[1] The underlying plat for the development, Plat 2018-7, was recorded as a condominium plat of Sunset Meadows on March 8, 2018.[2] Restated and amended declarations for this plat were recorded on April 10, 2018.[3] The amended declarations purported to provide air, surface, and subsurface rights to the owners of the parcels.[4]

Based on the plat and amended declarations, the CDD Director sent a notice of violation to Harris Homes on July 10, 2018.[5] The notice informed Harris Homes that it had recorded a subdivision without review and approval of the platting authority. CDD provided Harris Homes

[1] R. 124-155
[2] R. 157
[3] R. 123
[4] R. 125
[5] R. 183

several options to correct this violation, including the option to refile the condominium plat and associated declarations as were previously reviewed and approved under USE2011 0015.[6]

Harris Homes filed a notice appealing the CDD Director's decision on July 30, 2018, as authorized under CBJ 49.20.110. In its notice, Harris Homes raised the following questions for appeal:

1) Does the CBJ regulate condominiums?
2) Is the Director's interpretation of subdivision wrong?
3) Does state law regulate condominiums?
4) Is Sunset Meadows a subdivision or condominium?
5) Are the Director's actions a proper way to handle this situation?

The Planning Commission accepted Harris Homes' appeal at its regular meeting on August 28, 2018.

Subsequent to filing the appeal, on August 7, 2018, Harris Homes submitted a revised plat and amended declarations for CDD review.[7] The revised plat, 2018-35, was filed and recorded on August 10, 2018.[8] The First Amended and Restated Declaration of Covenants, Conditions and Restrictions for Sunset Meadows Condominiums ("first amended and restated declarations") were recorded on August 13, 2018.[9] CDD accepted the revised plat and first amended and restated declarations on August 16, 2018, approving Phases I, II, and III of the Sunset Meadows development, but conditioning such approval on the phases remaining a condominium development.[10] Prior to this acceptance, the City approved certificates of occupancy for Phase I of the development.[11]

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[6] R. 184

[7] R. 283-317

[8] R. 237, recorded under document no. 2018-003471-0.

[9] This document was cited in the record at pg. 243. Review of the record makes it clear that this document is not exactly the same as the first amended and restated declarations that were recorded on August 13, 2018 under document no. 2018-003507-0. The recorded declarations contain language under Paragraph Z, Section 7 that is not present in the declarations included in the record. This section reads as follows:

> Section 7. Duress. Harris Homes, L.L.C. is filing these revised and restated declarations under duress and forced by the CBJ. These declarations have been reviewed, altered and approved by CBJ.

Though neither party identified the error, there are references to this language contained elsewhere in the record, and it is clear this document is part of the record as defined under CBJ 49.20.110. Therefore, all references to the first amended and restated declarations in this order will refer to recorded document no. 2018-003507-0.

[10] R. 684

[11] R. 671

The parties met on September 14, 2018 for a pre-hearing conference to discuss scheduling and briefing for the appeal. Following this conference, the record was completed and a series of motions were filed and decided. On November 15, 2018, CDD moved to dismiss the appeal, arguing the Planning Commission lacked subject matter jurisdiction because the appeal was moot. Harris Homes filed its opposition on November 19, 2018, and CDD filed its reply on November 20. Deliberation on the motion was stayed pending Harris Homes' Motion to Disqualify Planning Commission Members. On January 8, 2019, the CBJ Assembly affirmed the Planning Commission's decision to deny the request for disqualification, and the stay was lifted. CDD and Harris Homes were notified that the Planning Commission would undertake deliberation of the Motion to Dismiss as its next order of business, and the parties were invited to request a hearing on this motion. Harris Homes affirmatively waived a hearing and requested that the Planning Commission decide the motion at its next regularly scheduled meeting. The Planning Commission met in its quasi-judicial capacity as the Board of Adjustment on January 28, 2019 to deliberate the Motion to Dismiss. Following deliberations, the Planning Commission voted unanimously to dismiss the appeal.[12]

II. Legal Analysis

The parties' briefing focuses on CDD's primary argument that, by filing amended Plat 2018-35, Harris Homes rendered the appeal moot. This argument goes to issue number four raised in Harris Homes' appeal ("Is Sunset Meadows a subdivision or condominium?"). In order to grant the motion to dismiss, the Planning Commission must also address the other four issues. As explained below, those questions (1, 2, 3, and 5) request advisory determinations that the Planning Commission cannot provide.

A. Points on Appeal Requesting an Advisory Opinion

Quasi-judicial bodies may not issue advisory opinions or resolve abstract questions of law as part of the appeal process.[13] A party must have an interest that is sufficiently adversely affected by the dispute to maintain standing, and without it, the quasi-judicial body is without subject

[12] The Planning Commission voted 8-0 to dismiss the appeal. Commissioner Campbell was not present during deliberations and did not vote on this matter.

[13] State v. American Civil Liberties Union of Alaska, 204 P.3d 364, 368-369 (Alaska 2009) (*quoting* Bowers Office Products, Inc. v. Univ. of Alaska, 755 P.2d 1095, 1097-98 (Alaska 1988)).

matter jurisdiction to decide the appeal.[14] Four of Harris Homes' points on appeal request the Planning Commission to issue such an opinion. These questions will be discussed briefly, as Harris Homes has not provided any argument regarding these points or demonstrated how the Planning Commission may offer Harris Homes concrete relief if it should decide them in Harris Homes' favor.

1. Does the CBJ regulate condominiums?

This question is purely academic in nature and does not present a justiciable controversy between the parties. Deciding this question will not offer the parties concrete and specific relief, and the Planning Commission, therefore, cannot hear it.

2. Is the Director's interpretation of subdivision wrong?

This question does not present a real and substantial controversy on which the Planning Commission can provide "specific relief to the parties through a decree of conclusive character."[15] No argument or other information is presented to distinguish this general question from the more specific one posed in issue number 4: whether Sunset Meadows is a subdivision or condominium.

3. Does state law regulate condominiums?

This question is the inverse of the first question posed above asking whether the CBJ regulates condominiums. It, likewise, requests an advisory decision and cannot be heard by the Planning Commission.

5. Are the Director's actions a proper way to handle this situation?

Providing an opinion regarding the propriety of conduct by a City employee is outside the authority of the Planning Commission and not germane to the appeal.

B. <u>Is Sunset Meadows a subdivision or condominium?</u>

The remaining question on appeal is whether Sunset Meadows is a condominium or subdivision. CDD argues this question was rendered moot when Harris Homes filed Plat 2018-35. In response, Harris Homes argues that its filing of the amended plat did not render the appeal moot because the violation could be expected to reoccur and that Harris Homes could seek relief by amending the plat back to its configuration under Plat 2018-7 if it prevailed. Harris Homes further argues that the public interest exception to the mootness doctrine applies and that CDD is estopped

[14] 755 P.2d at 1098.

[15] <u>Aetna Life Ins. Co. of Hartfor, Conn. V. Haworth</u>, 300 U.S. 227, 241 (1937).

and has waived its right to argue mootness.

1. Estoppel or Waiver

Harris Homes argues that CDD is estopped and waived any right to raise mootness once the Planning Commission accepted the appeal. Harris Homes does not present any legal authority for this position, nor could it. Subject matter jurisdiction may be raised at any time during a proceeding, even by the quasi-judicial body if noticed and not raised by one of the parties.[16] Subject matter jurisdiction is the quasi-judicial body's authority to adjudicate a dispute, and if such jurisdiction is not present, the dispute must be dismissed "*sue sponte* if necessary."[17] Because subject matter jurisdiction is not waivable, it can be raised at any time, even very late in the proceedings.[18]

While the Planning Commission accepted Harris Homes' notice of appeal, it cannot agree to hear an appeal that it does not have authority to decide, nor can it estop either party from challenging that lack of authority. Harris Homes' argument regarding estoppel and waiver, therefore, is without merit.

2. Mootness as to Sunset Meadows

At the center of the dismissal request is whether the appeal was rendered moot when Harris Homes abandoned disputed Plat 2018-7 and recorded Plat 2018-35, which was subsequently accepted by CDD. As further discussed below, there is no active controversy that can be decided by the Planning Commission, which renders the appeal moot and necessitates dismissal.

a. Mootness

An appeal is moot "if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief even if it prevails."[19] If facts arise during an appeal that renders the legal issues moot, the quasi-judicial body must refrain from deciding the appeal.[20] Without a live controversy, the Planning Commission does not have subject matter jurisdiction to decide an appeal based on the lack of "an actual controversy involving a genuine relationship of

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[16] Hydaburg Co-op. Ass'n v. Hydaburg Fisheries, 925 P.2d 246, 248 (Alaska 1996).
[17] Douglas Indian Association v. Central Council of Tlingit and Haida Indian Tribes of Alaska, 403 P.3d 1172, 1178 (Alaska 2017) (*quoting* Pistor v. Garcia, 791 F.3d 1104, 1111 (9th Cir. 2015)).
[18] 925 P.2d at 259.
[19] Bridges v. Banner Health, 201 P.3d 484, 290 (Alaska 2008). *See also* Alaska Railroad Corp. v. Native Village of Eklutna, 142 P.3d 1192, 1198 (Alaska 2006); Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks, 48 P.3d 1165, 1167 (Alaska 2002).
[20] O'Callaghan v. State, 920 P.2s 1387, 1388 (Alaska 1996); Alpine Energy, LLC v. Matanuska Elec. Ass'n, 369 P.3d 245, 256 (Alaska 2016).

adversity between the parties."[21] As Alaska Courts have noted, "the basic requirement for standing in Alaska is adversity."[22]

Because mootness is a jurisdictional question, the merits of the appeal have not been considered or debated.[23] The only question before the Planning Commission is if there is a live legal controversy between the parties on which the Commission is empowered to issue a decision and grant relief. As a result, the Planning Commission has not considered the underlying dispute and will not render any judgment regarding the legality of CDD's or Harris Homes' actions in this matter.

Through the filing of Plat 2018-35, both parties are in agreement that Sunset Meadows is a condominium. While there was a dispute regarding Plat 2018-7, this plat has been abandoned. On the surface, therefore, the dispute regarding Plat 2018-7 appears to be moot. A more thorough investigation verifies this conclusion.

b. Voluntary Cessation

Harris Homes argues that its filing of the amended plat and declarations does not render the appeal moot, as voluntary cessation does not render a dispute moot unless subsequent events make it clear that the alleged wrongful behavior cannot reasonably be expected to occur. Harris Homes' argument appears to be that, though it filed an amended plat and declarations, its disputed action- filing a plat that includes surface, subsurface and airspace in a condominium unit- can be expected to reoccur. This argument thoroughly misinterprets the relevant law. The rule regarding voluntary cessation applies to the alleged wrongdoer, not the aggrieved party.[24] CDD has not argued that it voluntary ceased any challenged practice that could create a future cause of action if repeated. The voluntary cessation exception to the mootness doctrine cannot be used to set aside Harris Homes' own actions that led to mooting its appeal.

c. Future Relief

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[21] Myers v. Robertson, 891 P.2d 199, 203 (Alaska 1995). Subject matter jurisdiction applies to "quasi-judicial bodies to ensure that they do not overreach their adjudicative powers" (Hawkins v. Attatayuk, 322 P.3d 891, 895 (Alaska 2014)).

[22] 48 P.3d at 1167.

[23] Angleton v. Cox, 238 P.3d 610, 615 (Alaska 2010).

[24] Slade v. State, Dept. of Transp. & Public Facilities, 336 P.3d 699, 700 (Alaska 2014), *see also* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 719 (2007) (*citing* Friends of Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000)).

Harris Homes argues that if the Planning Commission rules in its favor, it may amend Plat 2018-35 as provided under the first amended and restated declarations. However, the first amended and restated declarations do not provide support for this argument. Despite the language contained in Paragraph Z, Section 7 of the first amended and restated declarations (claiming the declarations were filed under duress and force),[25] the declarations do not contain provisions that would allow reversion back to the form of Plat 2018-7 at the sole election of Harris Homes should the Planning Commission decide in its favor.[26]

Moreover, the relief claimed would not be available to Harris Homes for the units already sold to third parties that have issued certificates of occupancy. Such relief would necessarily change the boundaries of each unit, requiring consent of the unit owners.[27] No unit owner has intervened in this appeal, and there is no evidence or support to demonstrate that the unit owners would approve such relief. Harris Homes cannot unilaterally amend the Plat back to the way it was, as Harris Homes is no longer the owner of the units where certificates of occupancy have issued.

Finally, Harris Homes has offered no evidence to demonstrate that it would seek to revert back to the previous form of Plat 2018-7. Nor has Harris Homes provided a declaration or any other demonstration of harm suffered by the new form of the Plat or how that harm would be addressed or alleviated by a reversion back to the old form.

d. Legislation

The Planning Commission cannot wholly ignore the fact that during the course of this appeal, the CBJ Assembly enacted Ordinance 2018-41(c), which amended the CBJ Land Use Code to provide for Alternative Residential Subdivisions. As it applies to future development in Sunset Meadows, Harris Homes may avail itself to the newly enacted provisions of CBJ 49.15.900 *et. seq.* which appear to allow for the type of development proposed in Plat 2018-7.

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[25] CDD challenged these assertions within the record. R. 319, 625.

[26] Harris Homes cites to Paragraph N for the position that he may amend the Plat back to the original configuration if he prevails as it relates to Phase I and II, and to Paragraph C & Y to support such an amendment for Phase III. The paragraphs do not appear to support this position. As cited, such an amendment will change boundary lines for the developed phases and cannot be unilaterally altered by Harris Homes without vote of the unit owners.

[27] Paragraph N, Section 4 of the first amended and restated declarations.

Alaska has determined that an issue is moot if the appellant is able to secure relief, even if the means of relief are different from those argued by the appellant.[28] Moreover, if legislative action occurs that may offer relief, the quasi-judicial body cannot assume that the new code will be applied in such a way that will harm an interested party.[29] Harris Homes has provided no declaration or other evidence to show that its development would be disadvantaged by complying with the provisions of Ordinance 2018-41(c).

It is acknowledged that Ordinance 2018-41(c) was enacted after the Motion to Dismiss was fully briefed. The implementation of the new ordinance is not the deciding factor in determining that the appeal is moot. The appeal was moot through filing amended Plat 2018-35 and abandoning Plat 2018-7. While this ordinance is not decisive in this appeal, the Planning Commission does recognize that Ordinance 2018-41(c) will provide a path forward for unit site developments such as those originally contemplated under Plat 2018-7.

e. As it Relates to Sunset Meadows, the Appeal is Moot

The record does not demonstrate there is an active controversy between the parties. Through the filing of Plat 2018-35, both parties are in agreement that Sunset Meadows is a condominium. While there was a dispute regarding Plat 2018-7, this plat has been abandoned. As a result, Harris Homes will not receive relief even if he prevails, as the Planning Commission cannot revive Plat 2018-7. The most the Planning Commission may do is offer an opinion regarding the abandoned plat, and such an opinion will not entitle Harris Homes to relief.

C. Public Interest Exception

Finally, Harris Homes argues that even if the Planning Commission determines that the appeal is moot as it applies to Sunset Meadows, the case should still proceed under the public interest exception to the mootness doctrine. In order to demonstrate the public interest exception applies, three factors must exist: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[30]

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[28] 48 P.3d at 1168.

[29] 755 P.2d at 1099.

[30] Akpik v. State, Office of Management and Budget, 115 P.3d 532, 535 (Alaska 2005) (*quoting* Kodiak Seafood

Harris Homes argues that the question of whether condominiums are an impermissible subdivision by including surface, subsurface, and air rights is capable of repetition as future condominium projects are developed and additional developers take the same course of action. Harris Homes provides no evidence to support this assertion[31] and, in fact, Harris Homes asserted that it was the first development in Juneau to take the action that led to the original dispute in this appeal.[32] A finding that a dispute is capable of repetition cannot be justified wholly from unsupported assumptions and speculation.

Regarding the second factor, Harris Homes argues the disputed issue may be repeatedly circumvented because the economic pressure on a developer is so great that they would be required to amend a disputed plat and associated declarations rather than challenge CDD's actions. Again, no evidence or legal authority is presented to support this argument, and to make such a finding requires the Planning Commission to rely on speculation. Moreover, developers are fully able to avail themselves to the review process outlined under CBJ Title 49 in challenging disputed actions. There is no showing that the appeal process is inadequate or unavailable to future developers.

Finally, as noted above under Section B(2)(d), Ordinance 2018-41(c) complicates Harris Homes' argument for application of the public interest exception. By allowing the sort of development Harris Homes sought to pursue, the new legislation renders the disputed issue in this appeal significantly less capable of repetition, thus defeating the first and second factor of the public interest exception. Further, the legislation went through the public process, enabling potentially interested parties to provide comments on the ordinance to better serve their interest and the public interest. As a result, the third factor is not present to justify overriding the mootness doctrine.

None of the factors to the public interest exception to the mootness doctrine are present in this appeal. The exception, therefore, does not apply.

III. Conclusion

Harris Homes raises five issues on appeal. As explained above, four of those issues seek advisory opinions that the Planning Commission cannot provide. The remaining issue has been

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Processors Ass'n v. State, 900 P.2d 1191, 1195 (Alaska 1995). *See also* Alaska Railroad Corp, 142 P.3d at 1198.

[31] No affidavit or even unsworn statement from another developer has been provided showing potential future public interest in filing the type of Plat that was originally contested in this matter.

[32] R. 119-121

rendered moot, and as a result, the Planning Commission lacks jurisdiction over it and cannot proceed to hear the appeal on its merits.[33] Harris Homes' appeal, accordingly, is **DISMISSED**. Pursuant to CBJ 49.20.120, this decision may be appealed to the CBJ Assembly. Any appeal to the Assembly shall be conducted in accordance with CBJ 01.50 and shall be limited to the issue of subject matter jurisdiction.

DATED this 26th day of February, 2019.

PLANNING COMMISSION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: _____
Michael LeVine, Presiding Officer

[33] 238 P.3d at 615.