BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

End of Gastineau Society (EGS)
Appellants,
v.
CBJ Planning Commission,
Appellee,
Trucano Construction,
Appellee-Intervenor.

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ANSWERING BRIEF

I. Introduction:

Appellee-Intervenor (Trucano Construction) is a contractor and developer with a long history of successful activity in Juneau and is the applicant for vacation of the Rodenberg Way right-of-way (ROW) that exists between Boroff Way and Carroll Way above South Franklin Street in downtown Juneau. Boroff and Carroll are stairways that provide access from South Franklin up to Gastineau Avenue. Rodenberg Way is not developed and never has been. The applicant’s purpose in seeking the vacation was to consolidate the properties on either side of Rodenberg Way into more useful parcels, and in particular to allow creation of a single large parcel with frontage on South Franklin Street. The current status of these properties and ROWs is shown at Record, Page 7 (R. 7). The layout that would result from the proposed vacation is shown at R. 8. The result would be that Lots 3A and 2A1, each of which has a small house, would be enlarged to the uphill side. Lot 1A would be enlarged by about 2000 square feet to a total of about 8700 square feet.
The Planning Commission approved the requested vacation, but in doing so, required that Rodenberg Way be relocated rather than vacated altogether. The resulting layout will be as shown on Exhibit A, attached hereto. The vacation was opposed at the Commission’s hearing by a few individuals who have recently organized as the End of Gastineau Society, or EGS hereafter and alternatively referred to as Appellants. EGS’ clear intention in appealing the vacation decision is to interfere with subsequent development of Lot 1A, which will be created when the vacation is finalized. Trucano does indeed plan for such development and applications for permits to do so have already been filed.

The option to lodge an appeal is available to any citizen. However, the CBJ appellate code contains high standards that must be met before the action of a subordinate body is overthrown or remanded. The reason why the appellate code is thus arranged is to respect and appreciate the time, effort, and dedication that the subordinate boards and bodies bring to public service. Simple disagreement with a given board’s action is not enough of a reason for the Assembly to overturn it. Moreover, the reason why EGS has brought this action has virtually nothing to do with the ROW vacation itself. Had the vacation been a prelude to development of a public park, it is highly unlikely that this matter would be in front of the Assembly. EGS is using this opportunity to frustrate and complicate a totally lawful endeavor to develop very valuable private property. There are likely more appeals to come.

II. Standard of Review

The CBJ appellate code provides the following guidance for the Assembly in considering appeals:

01.50.070 STANDARD OF REVIEW AND BURDEN OF PROOF. (a) The appeal agency may set aside the decision being appealed only if:

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 of the basis upon which the decision appealed from was made; or

3. The agency failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.
With regard to (1) above, nowhere in the Appellants’ Opening Brief is there any assertion that the decision was not supported by substantial evidence nor is there any argument to support such an assertion. What the Opening Brief does do is re-argue the various points made by EGS members at the original hearing. That is not the purpose or intent of the appellate code. The main points in the Opening Brief will be rebutted below, for the purpose of reassuring the Assembly that the Commission and its staff were operating properly, but the point here is that the Opening Brief does utterly nothing to suggest that the substantial evidence requirement was not met. The Opening Brief does attack the evidence and analysis offered to the Commission by its staff and suggests that the Commission should have found reason to act differently than it did. Again, this is not the test. The Commission needed substantial evidence, but this evidence doesn’t have to be the “most” evidence or even the best evidence, it just has to be substantial, and it is. The most compelling element of the evidence is that Rodenberg Way has not been developed and there is no plan by any party to do so.

With regard to (2) above, the Opening Brief also does not assert, anywhere, that the Commission failed to incorporate written findings, or that those findings were insufficient to show why the Commission did what it did. Again, the Appellants disagree with the findings and condemn the Commission and its staff for the findings they made, but this is entirely different from a showing that there were no findings at all or that they weren’t sufficient to explain the Commission’s action.

With regard to (3) above, the Appellants assert that the placement of the public notice sign was improper and that this constitutes a procedural failure. There is also an assertion that mailed notice was not correct. Both assertions are untrue and specifically addressed below. There is no assertion of denial of due process.
III. Public Notice Sign and Mailed Notice

Vacating streets and ROWs is regulated by the Land Use Code at CBJ 49.15.450. Subsection (1) of that section specifies as follows with regard to public notice:

(B) All street vacations shall be considered by the commission after public notice according to Section 49.15.230.

Section 49.15.230 is a general section specifying public notice requirements for "development permits and rezonings" and is referenced several places in the code to specify notice for various actions. Subsection 3 of 230 is specific to public notice signs and says, in pertinent part:

(3) The developer shall post a sign on the site at least 14 days prior to the meeting. The sign shall be visible from a public right-of-way... (emphasis added)

So, what is the "site" in this instance? We argue that it is the whole of the properties that would be affected by the action. That is, the subject ROW itself and all properties that will be changed by the vacation. The sign was unarguably posted on one of the properties that will be so affected. However, the real question here is whether the public notice sign was effective. After all, the reason for the existence of Section 230 is to assure that the public is aware of a pending action. If the sign had been posted on one end or the other of the Rodenberg Way ROW itself, it would have been barely visible from South Franklin Street and not at all readable from that street. It would have been visible and readable from Boroff Way or Carroll Way, but not both. Nowhere in the Opening Brief do Appellants argue that someone who would have been interested in the matter was unaware of it due to the placement of the sign. The applicant should not be penalized by either an over-strict interpretation of the code or for placing the sign at a more effective location.

At the bottom of Page 8 of the Opening Brief, there is a claim that the CBJ code requires mailed notice by certified mail, return receipt requested, to residents of multifamily structures. This is
subsection (5) of Section 230, but it only applies to “change in use” situations that actually affect the multi-family structures themselves. There is an apartment complex above the Rodenberg Way ROW but the ROW does not abut the parcel upon which the apartments are built nor will vacation of the ROW have any effect on current uses within the apartment complex. This notice requirement is intended to alert residents to proposals that would change uses within the multi-family structure such as changing apartments into commercial uses or offices.

It is tempting to end this Answering Brief at this point because nothing in the Opening Brief provides any basis for review of the Commission’s action, let alone a reversal or remanding of that action. However, the Opening Brief does make a large number of claims and assertions that seek to damage the credibility of the Commission, its staff, and Appellee-Intervenor. So, the remainder of this brief will respond to the major points in the Opening Brief.

IV. Opening Brief (OB) Claims

OB 6. “CDD lost the tape of the hearing” This has nothing to do with the Commission’s action and would appear to be moot because EGS had obtained a copy prior to CDD’s loss of the original. We presume EGS will make their copy available for CDD to restore its records. The Pre-Hearing Order does not specify this tape as a component of the Record for this case.

OB 6. “Health and Safety: Noise of construction and danger to hill” To begin with, the issues brought up under this heading are irrelevant to the ROW vacation. Moreover, the claims are inaccurate. EGS will have a proper forum for these issues when the Commission hears a Conditional Use Permit application now under review by CDD. Construction on this site is challenging and thorough review by the CBJ is entirely appropriate and will be done. The people who will be managing construction on Lot 1A are the same people who built the adjacent H&H Building (incorrectly identified as the Alaska Fur Gallery building in OB) on Lot 5A. That project did result in very minor effects on some other structures, which
have been made good by the developer. The end result, however, is that the hillside above the H&H
building is now more stable than had been the case prior to the work. The same will be true with
development on Lot 1A. EGS and any other interested party will be able to participate in review of the new
development proposal in a short time and so arguments about stability and proper measures should occur in
that proceeding.

OB 7. "This public right of way is held in trust for the public." Appellants are apparently unaware
of where ROWs come from. Streets and other forms of ROW are not fee simple land ownerships. They
come from donations of land by underlying landowners, who at some time in the past decided to enhance
access to their properties by giving space for access to the borough. Over time, some ROWs are found to
be either not needed, or in the wrong place. Rodenberg Way was never put into use. No footpath or
walkway exists on it now or ever did in any party’s memory. It contains no utilities or other public
infrastructure. See R. 2. EGS isn’t actually interested in the ROW as a means of access anyway. The
OB second paragraph under this issue contains the following: "This right-of-way separates a beloved
and beautiful green open space from commercially-owned property." [sic] The “green space” in question
is privately-owned, commercially-zoned land! Relocation of the Rodenberg ROW will allow this land to
be joined with the commercial land below so that the resulting parcel can be developed as a whole.

While not relevant here, we want to make note that this same area – the narrow strip of green space –
will still be green space after the development is completed. The CBJ Land Use Code, in this area, limits
buildings to 80 percent lot coverage. Trucano’s plan for the building on Lot 1A will indeed show that the
building will occupy 80 percent of the lot area but the remaining 20 percent will be maintained as
vegetated open space and is the same space coveted by EGS. There is no plan to construct anything on
the relocated ROW so it too, will be kept as vegetated open space. EGS is getting what it says it wants.
This was explained to the Commission by Trucano's representative, Steve Landvik, at the hearing. See R. 28.

Appellants quote a CBJ application form saying "Street vacation is inappropriate where the principal purpose is to bestow a private benefit." This sentiment does not appear in the CBJ code or in the Comprehensive Plan. It is not law, not regulation, and not policy to be used in judging applications. It is also fundamentally inappropriate. Streets exist because first, landowners donated the land for them and second, because developers paid to construct them. In the past, the first step was often taken without the second – hence Rodenberg Way. If, in a given circumstance, the landowners who expected to benefit from a donation of land have now seen that they will not benefit, then simple fairness would suggest that their land be restored to them. Virtually every one of the street vacations processed by the CBJ over past decades was initiated by the adjacent landowners. The only meaningful test, in considering such an application is whether the public might still have a need for the ROW.

The question of further need was addressed by the Commission when it acted. Both the applicant and CDD staff believed the ROW to be superfluous, insofar as any need to provide a pedestrian connection between Carroll Way and Boroff way or any other public purpose. See R. 2-3. The Commission wasn't so sure and chose to reposition it to run adjacent to the Knudson Apartments parcel, on the downhill side. See R. 29. Doing so kept open the very remote possibility that the pedestrian connection might one day be made. Ironically, the effect of the Commission's action is to take more land from private use because the new location will result in a somewhat longer ROW than the current configuration.

OB 7. "The right-of-way as replatted has no connection to any landings." The Boroff Way stairway will be rebuilt in the course of developing Lot 1A and a landing can easily be provided to accommodate the new location of Rodenberg Way. Likewise, the Carroll Way stairway can easily be adjusted to provide a
landing. The cost of doing so is minimal compared to the cost of building an actual walkway on Rodenberg Way, wherever it is located.

OB 9. “The Comprehensive Plan protects...all of which this vacation would destroy:” The OB cites several items regarding buffers, open space, and aesthetics found in the Plan. None of the citations is relevant to the question of what to do with Rodenberg Way. All of them are aimed at Trucano’s development plans. We can cite at least as many items which support development. The key point, however, is that this vacation proceeding is not the time or place at which to debate the application of these policies. That time is coming soon for review of the actual project for Lot 1A. The same debate will occur whether Lot 1A is proposed for development as we expect it to be configured, or as it is configured now. The single overwhelming expression of public policy – the one that means more than anything else – is the fact that this property is zoned Mixed Use. This classification allows the highest density of development and is appropriate because this is extremely valuable property. Nearly all of EGS’s claims and assertions are directed at whether development should be allowed, and they seek to use the Comprehensive Plan excerpts as ammunition to oppose development. This approach completely overlooks the fact that the owner has the right to develop this property. The code and the Comprehensive Plan are used to determine how this will be done, not whether it may be done.

Opening Brief Pages 11 through 15 contain discussion about previous development activity and about hazard conditions. All of this material is irrelevant to the question of whether the Rodenberg Way ROW should have been relocated. Most of it is inaccurate as well. OB 15, also contains several wholly inappropriate and inflammatory personal remarks to which we will not respond. The Planning Commission sits to judge applications, not applicants, and it would be well if the Assembly makes that point loud and clear.
OB 18 brings up the matter of the Development Permit Application Forms (DPAs) signed by the Knudson Apartment owner. There were indeed two of them, and one contained the conditions at the bottom. Appellants try to suggest that this constitutes some form of deceit. The facts are much simpler. Working through her attorney, Ms. Knudson signed the form without any conditions. The attorney wanted to reinforce Ms. Knudson’s desire for protection from construction related damage and he added the conditions at the bottom of the DPA. When advised that CDD could not accept the DPA with those conditions (because the CBJ cannot enforce them) he submitted the original, unaltered form. Ms. Knudson and the developer have reached a separate arrangement to provide the protection she desires.

The Opening Brief also contains several references to “Belgian developers” that are also wholly inappropriate. Juneau wouldn’t exist at all if development capital from outside its borders hadn’t been invested to begin with. Again, the Appellants are asking the Commission and the Assembly to make decisions on the nature or characteristics of the applicant, and the applicant’s associates – an intolerable act of prejudice.

V. Conclusion

This is a classic case of a citizen group that disagrees with an action taken by the Commission. We disagreed as well, with regard to relocating Rodenberg Way rather than vacating it in part as originally proposed. Yet, the decision is made and we are prepared to live with it. It is perfectly acceptable for any citizen to disagree with any action taken by any governmental entity. The fact that the Appellants don’t like what the Commission did does not mean that the Commission’s action was wrong under the law.

Appellants’ primary grievances break down into two categories:

1. Preservation/retention of green space. The focus seems to be on the presently vegetated area of Rodenberg Way itself and of the area above it. As said above, the relocation of Rodenberg Way will not endanger the continued status of that area as vegetated. If that is
really all EGS wants, then their wish will be granted. If, however, their true desire is to
maintain all of the undeveloped privately-owned land in the area as vegetated, then they are
asking the CBJ to condemn private land for a public purpose by means of withholding
permits. The Assembly simply cannot support such aspirations.

2. **Fear of construction impacts/slope stability concerns.** The decision to vacate or relocate a
right-of-way is not the place to address these issues. We have not yet made our case for
reassurance on these matters and the Planning Commission has not held a hearing on them.
For the moment, we can say with confidence that the hillside will be far more stable after
our proposed development is in place than it is now. All we ask is the opportunity to make
our case.

We ask that the Assembly reject this appeal and affirm the decision of the Commission. For the
protection of applicants as well as for the well-being of citizen volunteer boards, simple disagreement is
simply not enough to overturn a properly made decision.

DATED This 10th day of October, 2001

Respectfully Submitted,

Murray R. Walsh, AICP
For Appellee-Intervenor

One Drawing Attached