BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

HAMILTON STREET HOMEOWNERS
ASSOCIATION

Appellants,
v.

CBJ PLANNING COMMISSION
Appellee,

ROY AND ELVA BUEHLER
Appellee-Intervenor

Case No. 2001-03

REPLY BRIEF

I. INTRODUCTION:

The Planning Commission offers this brief in response to the Appeal of the Planning Commission’s August 28, 2001 decision to approve a Conditional Use Permit allowing the operation of a bed and breakfast facility along Glacier Highway near Hamilton Street. The Commission will show the standards of review were met and therefore, that the Commission’s decision should be affirmed. Approval for this permit was reached after weighing considerable public testimony and discussion of potential impacts to the neighborhood including traffic safety and sewage disposal. The permit was approved with several conditions crafted to address neighborhood concerns.

It is important to remember while considering this appeal that the question is not whether any structure should be built on the developer’s property but rather, should the lot host a Bed and Breakfast operation. To build a single-family structure with the same design as proposed does not require a Conditional Use Permit or a public hearing. The only question before the Planning Commission
concerned the difference between using the proposed structure for a single-family residence or as a Bed and Breakfast facility.

The option to lodge an appeal is available to any citizen. However, CBJ appellant code contains high standards that must be met before the action of a subordinate body is overturned or remanded. The appellant code is thus arranged to respect and appreciate the time, effort and dedication 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.

II. Standard of Review

The CBJ Appellant 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.

The main points in the Open Brief will be rebutted below for the purpose of reassuring the Assembly that the Commission and its staff were operating properly. However the Opening Brief does nothing to suggest that the substantial evidence requirement was not met. The Opening Brief does question 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 Appellants disagree with the findings and criticize the Commission and staff for the findings they made, but this is different from showing that there were no findings at all or that the findings weren’t sufficient to explain the Commission’s actions.
The balance of this reply brief will address individual points in the Appellants’ Opening Brief:

Finding No. 1 – Application Complete:

The Appellants contend that the application was not complete and did not contain sufficient evidence necessary to determine if the development would comply with Conditional Use permit requirements. Four separate items were identified by the Appellants as missing from the Conditional Use permit application.

1. Identification of nearby streams.

The Applicant, Roy Buehler, did submit a topographic survey showing drainage features on and near the site (Record Page15). Providing a topographic survey for the purposes of operating a Bed and Breakfast exceeded the Title 49 requirements for this type of proposal. This information was adequate to evaluate the location of the proposed development in relation to drainages found on the property. It is not the responsibility of an applicant to identify the location of anadromous streams in relation to a proposed project. This responsibility falls to staff when evaluating the project. Identification of any anadromous streams which might be in the project’s vicinity is done during a staff level review and not by the developer. Therefore the Planning Commission properly found that the Applicant’s submission was complete without indicating where anadromous streams might be located in the area.

The Opening Brief (Page 2) claims that there are several references to nearby streams in the record. During staff’s review of this proposal, drainage ditches were identified in the vicinity but none of them are listed anadromous streams. This issue will be further addressed under Finding No. 6 later in this document.

2. Soils, water table and septic performance issues.

On lot sewage treatment and disposal was an issue considered by the Planning Commission at the Public Hearing. It is uncommon for the Planning Commission to require a developer to hire a design professional such as an Engineer or Architect to design a project prior to receiving conceptual approval through the Conditional Use Permit process. There are several reasons a Conditional Use
Permit may be denied which have nothing to do with design specifics, it is therefore customary for the Planning Commission to evaluate projects without requiring the applicant to expend substantial sums of money for a project which may ultimately be denied.

Perhaps more importantly, the City and Borough of Juneau does not regulate the installation of on lot septic systems. On site wastewater disposal is permitted through the State of Alaska Department of Environmental Conservation (DEC). When reviewing Previous Conditional Use Permit applications which have proposed on site septic disposal, the Planning Commission has deferred wastewater disposal permitting issues to DEC. The Planning Commission is not empowered to waive any City, State or Federal regulations. Granting of a Conditional Use Permit does not give the applicant the right to carry out a project if some aspect of the project is in conflict with other codes or laws. The review process simply provides the Planning Commission the opportunity to place additional restrictions on projects beyond existing regulations or to deny a project if it is found to be inappropriate.

Therefore, it would have been a significant departure from past practices for the Planning Commission to have required the applicant to have hired an engineer to design a septic system prior to receiving conceptual approval provided by the Conditional Use Permitting process. Prior to construction of the facility, the developer will have to receive a building permit for the project. During the building permit process any relevant information concerning construction details would be reviewed. Therefore the Planning Commission properly found that the application was complete without a septic system design included.

3. **Information about existing septic system on the lot.**

Although the applicants specifically included information in their application about the existing septic system, which had been installed on the lot by a previous owner, this information was purposely not included in the staff report. The previously installed system was designed for a single-family dwelling and was similar to the systems on Hamilton Street which were failing to operate properly under residential loads (Record Pages 23,26,27,29,39,57-60). Staff determined early in the process that
the existing system should not be included in the staff report because it might create the impression that
the developer was proposing to use an undersized septic system. Staff determined, and later the
Planning Commission concurred, that the proposed Bed and Breakfast required a professionally
designed and installed septic system to meet a Bed and Breakfast’s septic load. The existing system
might become a component of the newly designed system or it might be abandoned. Staff determined
that including information detailing the existing system would be confusing and misleading. At the
hearing Commissioner Pusich specifically commented:

PUSICH…I am concerned that our staff didn’t know about an existing system that was already in
the ground. Did you know about that Greg?

CHANEX: I know that there is a system in the ground, but they are going to build a new house.
They could upgrade, tear it out, put a new one in and that was what my expectation was. …a
building permit was issued for this lot for a single-family driveway and it has a grading permit. A(s)
part of the grading permit, they put in a septic system for a single-family residence. When I looked
at that, I said “well, to me that doesn’t mean anything, you are putting in a 12 guest bed and
breakfast so you’ll have to start from scratch. Maybe the system will work, but I doubt it, and you’ll
need to upgrade it.” That’s why I put in the condition that an engineer will need to review the
proposal and come up with an appropriate system. (Record Page 65)

From the above quote it is clear that information was intentionally not included in the staff report for
the purpose of clarity and the Planning Commission was aware of this at the hearing. The information
was not missing from the original application and was not relevant to the decision to operate a Bed and
Breakfast on the site. Therefore the Planning Commission properly found that the application was
complete without this information included.

4. Court decision of Thane Neighborhood Association versus CBJ.

The purpose of Finding No. 1 is to determine if the application was complete. It would be
extremely unusual for an applicant to submit case law in support of an application for a Conditional
Use Permit. It is the role of staff to determine if the application complies with relevant regulations and case law. Therefore the Planning Commission properly found that the application was complete without this information included.

**Finding No. 3 – Comply with other Requirements of this Chapter:**

**Failed to mail application to interested agencies**

The Appellants in their opening brief have made the assertion that staff and the Planning Commission failed to follow their own procedures by not mailing the proposed Bed and Breakfast plans to the following agencies:

- Alaska Department of Fish and Game
- Alaska Department of Environmental Conservation - Sewage
- Alaska Department of Environmental Conservation – Water Quality
- US Army Corps of Engineers
- US Environmental Protection Agency
- US Fish and Wildlife Service
- NOAA

It is paramount to keep in mind that the Planning Commission reviews a project to see if it complies with Land Use Code requirements. The Planning Commission is not empowered to exempt projects from relevant State or Federal Laws. Planning Commission approval of a project does not give final approval for a project, it is one step in a multi-agency approval process. In this case the developer will have to receive permits from the Alaska Department of Environmental Conservation prior to installation of a new septic system. Planning Commission approval does not exempt the Applicant from any wastewater disposal or water quality regulations. It is inappropriate for the CBJ to attempt to enforce State or Federal law.
The Appellants have claimed that staff and the Planning Commission failed to follow their own procedures. When evaluating similar cases in the past, the Planning Commission has been very careful not to assume the role of evaluating on-site wastewater treatment. This is a State responsibility and is covered by State law. After considering public comment about failing septic systems in the area, the Planning Commission took the extraordinary step of requiring installation of a septic system which may exceed other minimum legal requirements.

When the Alaska Department of Environmental Conservation (DEC) has been contacted in the past about Conditional Use Permit requests, the agency has rarely responded. When DEC has responded to inquiries in the past their correspondence has usually been prefaced with the comment: “As you are aware ADEC is critically short on staff resources…” Therefore, the standard procedure for staff and the Planning Commission in such cases has been not to contact DEC for on site septic disposal questions at the Conditional Use Permit stage of the process. DEC’s comments are still solicited for larger projects or where exotic pollutants such as hydrocarbons are involved. CBJ will require proof of DEC’s septic system permit approval as part of the building permit process. If DEC does not approve the project’s proposed wastewater disposal system, a building permit will not be issued and the project will not be built.

The Appellants have also contended that the US Army Corps of Engineers should have been contacted. The site has already been filled under a previous grading permit. No wetlands were identified on the site in the Juneau Wetlands Management Plan Atlas (Opening Brief page 24) and there was no indication that the US Army Corps of Engineers required a wetland fill permit for the previous project. Standard procedure for staff and the Planning Commission in these cases is not to contact the Army Corps of Engineers when wetlands are not known to be on the site and the project is not anticipated to impact wetlands. Once again, this does not relieve the developer from the responsibility of complying with any relevant Corps regulations.
The Appellants have stated that several fisheries habitat agencies should have been contacted in relation to this permit. It is standard practice for staff to contact these agencies when a listed anadromous stream passes through or near a site. In this case the Appellants have erred in identifying the ditch near this property which parallels Glacier Highway as an anadromous stream that is protected by the CBJ.

In order to understand this issue, a quick review of how a stream becomes listed by the Community Development Department as an “anadromous” stream (and therefore subject to habitat protection standards) is in order. Anadromous streams are first identified by the Alaska Department of Fish and Game (ADF&G). These streams are labeled with a number and are listed by Fish and Game in an ADF&G Catalog of Anadromous Streams. Each tributary of a stream receives a unique number. Even though a stream is listed in the ADF&G stream catalog, the stream is not protected by the CBJ Land Use Code. Designating a stream by the CBJ as “anadromous” affords the stream significant legal protection under CBJ’s Land Use Code. On private property, the zone of protection extends 50 feet beyond the stream’s banks so if the stream runs through private property, a corridor over 100 feet wide is restricted from development. Imposing such development restrictions on private property can only be done through a public process. The last time any streams were added to CBJ’s list of anadromous streams was in 1995 under Appendix “B” of the Comprehensive Plan. The CBJ has the option of periodically adopting ADF&G cataloged streams into CBJ’s Comprehensive Plan’s list of streams afforded protection but ADF&G continuously updates its own list. At the present time there are several stream segments which have been identified by ADF&G but have not been adopted by the CBJ to be included its anadromous stream list.

The Appellants have claimed that an anadromous stream listed by CBJ in the Comprehensive Plan (stream number 111-50-10490-2020-3005) runs by the project site. Stream 111-50-10490-2020-3005 does appear in Appendix “B” of the Juneau Comprehensive Plan. The location of this stream is also shown in the CBJ Wetland Atlas included in the Appellant’s Opening Brief (Page 24).
looking at this map, it becomes apparent that the stream forks when it emerges from under Glacier Highway. One branch proceeds eastward and above it is the ADF&G catalog number 111-50-10490-2020-3005. The other branch proceeds toward the northwest and terminates near the developer’s lot. This branch of the stream is not numbered in the CBJ Wetland Atlas perhaps because it is a drainage ditch which parallels Glacier Highway. When there is some doubt about the location of streams shown in the Wetland Atlas, the original ADF&G maps are consulted. Attached to this document is an enlarged copy of ADF&G’s Stream Catalog map for this area (See Next Page Figure 1). This map shows stream number number 111-50-10490-2020-3005 as being a considerable distance from the project’s location. The closest stream is over 300 feet from the site.

Staff reviewed this site for proximity to CBJ’s listed anadromous streams prior to compiling the staff report. No anadromous streams were found to be within 50 feet of the proposed project so no further review was conducted concerning this issue. Standard practice has not been to require additional restrictions for projects that are located on lots which drain into ditches that in turn connect to anadromous streams. If construction was restricted on properties that eventually drained into anadromous streams, nearly every property in the Mendenhall Valley would be subject to special development restrictions.

The site of the proposed Bed and Breakfast is roughly 300 feet from the nearest mapped anadromous stream and the subject lot has already been filled. The question under consideration is whether or not the proposed structure can be operated as a Bed and Breakfast facility. Under staff’s normal procedures, habitat regulatory agencies would not be asked to comment on the operation of a Bed and Breakfast facility roughly 300 feet from the nearest mapped anadromous stream. Therefore staff and the Planning Commission did not deviate from required procedures when they did not contact the agencies listed above.
Figure 1
Enlargement of ADF&G Anadromous Stream Catalog map used by CDD staff to evaluate proximity of the Bed and Breakfast project to mapped anadromous streams.
Finding No. 4 – Public Health and Safety

1. Septic System

As mentioned above, the CBJ and the Planning Commission in particular have not regulated on-site wastewater disposal systems in the past. In this case, after hearing public comment concerning this issue, the Planning Commission took the extraordinary measure of requiring a septic system design which may exceed State requirements. Planning Commission approval of this permit does not exempt the applicant from compliance with State and Federal water quality laws. By requiring Condition 1 (Record Page 67), the Planning Commission has addressed this aspect of Public Health and Safety and made the proper finding that this project would not endanger Public Health and Safety.

2. Traffic Hazards

The Appellants contend that health and safety issues related to traffic were not adequately addressed. This issue was reviewed by staff and information concerning this topic was presented to the Planning Commission orally during the hearing. Traffic issues were initially reviewed while compiling the staff report. CBJ Engineering was consulted and no problems were identified. Negative findings are customarily omitted from a staff report. For example, the site was found not to be in the Historic District, Hazard Zone, Eagle Nest Area, or in a mapped wetland but these findings are customarily left out of a staff report for the sake of concentrating on significant issues related to the project. In this case, staff received several comments questioning traffic safety at the site after the written staff report was distributed. In response to these concerns, staff contacted CBJ Engineering and DOT to re-evaluate the earlier finding that the project did not pose any significant threat to traffic safety. Since the written staff report had already been distributed, the findings of these inquires were presented orally to the Planning Commission as noted below:

CDD PLANNER GREG CHANEY: …Hamilton Street is over here and this is where most of the residential traffic is in the area, as well as Engineer’s Cutoff on the other side. I talked to
Fred Thorsteinson as well as Terry Brenner today. Fred Thorsteinson is the DOT permits officer for driveway permits. He did a site visit at my request and looked at this and said that the site distance at this point is acceptable (emphasis added). There is a minimum of 339 feet for this type of a roadway and there is over 500 feet existing. Many of the residents here have commented that they didn’t feel that is was a particularly safe area for increased traffic. When I mentioned that to Fred, he said that the desired distance would be 1,180 feet, but that would only be if you were designing it fresh and you didn’t have any obstacles. So it’s not ideal but it does exceed the minimums and he did not see any problems with their existing driveway access (emphasis added). (Record Page 52)

Therefore, the Planning Commission made an appropriate finding that the proposed Bed and Breakfast operation would not pose a significant threat to public health or safety.

Finding No. 5 – Neighborhood Harmony and Property Values

Since the reason for the Appellant’s disagreement with finding No. 5 is not documented in the Opening Brief, it will not be discussed further here.

Finding No. 6 – Conformity with Official Plans

Streams

The Appellants have submitted a copy of a map from the Juneau Wetland Management Plan Atlas pages 9 and 14 (Opening Brief Page 24). The primary purpose of this Atlas series is to show the location of mapped wetlands but stream locations are shown as well.

As mentioned above, the Appellants have mistakenly determined that the roadside drainage ditch (paralleling the subject lot and Glacier Highway) has been listed by the CBJ as an anadromous stream.
Staff reviewed this site for proximity to listed anadromous streams prior to compiling the staff report and no anadromous streams were found to be within 50 feet of the proposed Bed and Breakfast operation. Standard practice has not been to require additional restrictions for projects that are located on lots which drain into ditches that in turn connect to anadromous streams. Therefore, the Planning Commission acted properly when it did not include a discussion of anadromous streams in the region for in its finding that the project was in conformity with Official Plans.
**Water Quality**

In this case there was no indication that water quality would be further impaired by the proposed development. Approval of this project by the Planning Commission in no way relieved the developer from meeting State water quality standards. Further, the Planning Commission reduced the maximum capacity of the facility from 12 to 10 and added a condition which required specific engineering to be completed prior to issuance of a building permit so that wastewater discharge would not be problematic. In any event, the operator of a Bed and Breakfast would be the most motivated individual to ensure that the facility’s septic system is functioning properly. Few things would be worse for business than to have a failing septic system as a centerpiece. Therefore, the Planning Commission acted properly in approving the project by adding appropriate conditions to ensure that water quality would not be degraded as a result of this operation.

**Wetlands**

No wetlands are identified on this site in the Juneau Wetland Management Plan Atlas (Opening Brief Page 24) CBJ only regulates “C” and “D” wetlands mapped in the Juneau Wetland Management Plan Atlas [CBJ§49.70.1060]. Since no wetlands are identified on the site in the Atlas, any remaining wetlands would be under US Army Corps of Engineers jurisdiction. Most of the site was previously filled under a CBJ grading permit. Even if wetlands are present on the remaining unfilled portion of the site, there was no indication in the application that further fill is proposed. If the lot owner decides to add additional fill in the future, no aspect of the current approval would exempt the placement of new fill from compliance with relevant Army Corps of Engineers wetland fill regulations.

**Conclusion**

The Planning Commission acted properly even though they may not have followed every policy of the Comprehensive Plan to the letter. The Comprehensive Plan contains multiple directives, some of which may not be mutually achievable. Several policies are listed in the Comprehensive Plan,
the purpose of which is to guide development and adoption of CBJ Land Use Code Ordinances. Comprehensive Plan policies are not Ordinances and do not have the force of law. Staff and the Planning Commission are not expected to substitute goals of the Comprehensive Plan for adopted Ordinances when reviewing projects. This is stated in the Land Use Code: "Where there is a conflict between the comprehensive plan and any ordinance adopted under or pursuant to this title, such ordinance shall take precedence over the comprehensive plan" [49.05.200(b)]. Therefore, the Planning Commission acted properly in approving the operation of this Bed and Breakfast in a manner which meets the spirit of the Comprehensive Plan even if the Findings did not clearly articulate how each relevant Comprehensive Plan policy was addressed.

Finding No. 7 – Juneau Coastal Management Plan

1. **Habitat/Streams**

   As mentioned when discussing Finding No. 3 above, no anadromous stream listed in CBJ’s Comprehensive Plan is within 50 feet of the lot on which the proposed Bed and Breakfast is proposed. Therefore the Planning Commission made the proper finding when noting that this section of the Juneau Coastal Management Plan does not apply to this proposal.

2. **Water Quality**

   As discussed under Finding No. 6 – “Water Quality”, there was no indication that the project will cause significant water quality degradation. In addition, this issue was discussed at length during the public hearing. The Planning Commission properly conditioned the permit to reduce the probability that the Bed and Breakfast operation would cause water quality problems. In addition, nothing in the Conditional Use Permit exempts the owner/operator of the facility from compliance with appropriate State water quality regulations. Perhaps the most compelling aspect of this proposal is that the operator will be extremely motivated to insure the septic system is functioning appropriately
to attract guests to the business. Since there is no indication the proposed operation will cause
degradation of water quality, the Planning Commission made a proper finding that no aspects of the
Juneau Coastal Management Plan apply to this project.

Condition No. 1 – Letter from an Alaskan Civil Engineer

1. Potential Phasing

The case cited by the Appellants, Thane Neighborhood Association versus CBJ, dealt with
approval of a large mine permit that included a proposal to build a large tailings impoundment dam.
Such structures are very unique and have several site-specific considerations. The Alaskan Supreme
Court found that approval of a Conditional Use Permit for a complex mine project was premature
without a better understanding of the potential impacts from this comparatively unusual tailings
disposal method. On the other hand, the case at hand deals with an extremely common on-site
wastewater disposal system. Such systems are well understood and can be properly designed for
projects such as this. The accepted wastewater volume per person in the United States is 100 gallons
per person per day. Since septic system loads are rated in terms of the number of occupants, so the
primary information needed is the number of occupants who will be using the system. Perhaps the
only limitation on whether such a system could be installed is if the developer can afford to install the
system. Therefore the central question in the two cases is fundamentally different, in the tailings
impoundment case the proposal was unusual and complex so more information was required prior to
approval. In the case of on site septic disposal, the technology and design criteria are well established.
The only information to be determined was the number of occupants, which would determine the
anticipated load on the system.

As the name implies, operational and development conditions are commonly required by the
Planning Commission when approving a Conditional Use permit. Adding conditions to a Conditional
Use Permit to ensure its operation is appropriate for the unique circumstances of a particular location
is integral to the Conditional Use permitting process. If conditioning a permit were not allowed at all, then all aspects of a project (including professionally prepared designs) would be required prior to accepting an application for consideration. Phasing occurs when project approval is based on the substitution of a condition that states “impacts will be evaluated at a later time” instead of evaluating a project’s potential impacts prior to approval.

An example of how a project can be approved with a condition and not engage in phasing is when Conditional Use Permit applications are reviewed for construction in a mapped Hazard Zone, an analysis of the potential slide impact is required prior to the hearing. This analysis establishes the magnitude of the hazard such as location, height and anticipated impact force of a potential slide event. However, a professionally engineered design for a retaining wall to mitigate the hazard is not required prior to reviewing the application. It is common practice for the Planning Commission to add a condition requiring a professional engineer to prepare a design for a retaining wall prior to issuance of a building permit. This process has been adopted in order to protect developers from having to expend more resources than necessary on an application when the project’s permit might be denied.

In this case, the maximum occupant load of 10 guests and 2 operators for the Bed and Breakfast was established at the public hearing. To design an on-site wastewater treatment facility for this occupant load, which will meet water quality standards, is merely an engineering exercise. The only unknown is whether the developer will be able to afford to build the system once it is designed. Since the Planning Commission understood this, they approved a condition which would allow the Bed and Breakfast’s occupant load to be downsized administratively to match the occupant load of the septic system. Reducing the magnitude of the project administratively would only reduce impacts beyond those already evaluated. Therefore, the Planning Commission acted properly when it approved Condition No. 1 and did not engage impermissible “phasing.”
2. **Cumulative Impacts**

In reviewing the Appellants’ Opening Brief, it is difficult to determine which cumulative impacts the Appellants are concerned about. Based on other sections of the Opening Brief it is likely that the Appellants are concerned with the cumulative impacts of wastewater disposal in the Casa del Sol Creek’s watershed. By installing a properly designed and maintained wastewater treatment facility on the site, little if any additional impact to the watershed is anticipated. The major source of water pollution in the area is from poorly maintained and failing septic systems as well as existing industrial uses. To deny this permit application for a facility which would operate lawfully because other property owners in the region are not in compliance with wastewater discharge regulations would be unfair. While improving the water quality in Casa del Sol Creek is a worthy goal, such efforts should be directed at sources of pollution and not by restricting appropriately designed facilities. Therefore, the Planning Commission properly approved this condition because it assures the wastewater facility will be properly designed so as not to contribute to regional pollution problems.

**Condition No. 2 – Sight Obscuring Fence**

1. **Height**

The intent of this condition is to reduce the impact of operating a Bed and Breakfast on the adjacent property owners. By requiring a six foot sight-obscuring fence to be built along the common property line, owners of adjacent properties will have some visual separation from Bed and Breakfast guests on the first floor of their houses and while in their yards. The minimum height of six feet allows for line of sight separation at ground level. As mentioned in staff’s oral presentation (Record Page 52) this fence won’t block upper story views but that is why the condition contained the additional recommendation that sight obscuring evergreen trees be planted along the property line to create a higher long term visual buffer (Record Page 67). This type of condition is clear, easily measured and verifiable in the field. No maximum height was established for the fence because it is
intended to provide a buffer between the Bed and Breakfast operation and adjacent properties. Higher sight-obscuring fences generally create better buffers, so no upper limit for height was placed on the permit. Fence height tends to be self-regulating because fences over 6 feet high must be extremely strong to withstand wind loading and are very expensive to build. The maximum height allowed for a fence in the D-1 zoning district is 25 feet but the Community Development Department rarely receives building permit applications for sight obscuring fences over 10 feet high [CBJ§49.25.400 Table of Dimensional Standards]. Therefore, the Planning Commission properly adopted this condition because it is easily quantifiable and verifiable.

2. Enforcement

Conditional Use Permit conditions are requirements which must be met during operation of the permitted use. Unless otherwise stated in the text of a condition, the proposed activity may only be conducted when the conditions are being met. In this case a sight-obscuring fence must be installed prior to operation. As mentioned above, this is easily measurable and verifiable. If the fence was removed, the facility could not be utilized for a Bed and Breakfast. If the operators continued to operate a Bed and Breakfast without a fence, as required, the Community Development Department would require the operation to be shut down through legal action if necessary. Therefore the Planning Commission acted properly when adopting this condition since it is readily enforceable through standard enforcement procedures.

3. Condition is Too Vague and Could Cause Conflict

This condition in itself is not intended to address all issues related to the operation of a Bed and Breakfast at this site. It is one part of the effort to ensure this facility does not place unnecessary or excessive impacts on adjacent property owners. By adding this condition, the Planning Commission established that when the neighbors are on the ground floor of their homes, or are in their yards, they
will be visually screened from activities outside the Bed and Breakfast building (such as arrival and
departure of guests).

Conclusion

The Appellants claim that since this condition is too vague and is not adequate to address
Neighborhood Harmony requirements, it will only lead to further conflict. It is difficult to imagine
how this condition could have been more clearly crafted. Fence height and placement are measurable,
verifiable and readily enforceable. It seems doubtful that the wording of this particular condition will
generate further conflict. Therefore, the Planning Commission properly adopted this condition in an
effort to reduce some of the impacts associated with operating a Bed and Breakfast in a residential
neighborhood.

Condition No. 4 – Color Scheme

This condition was placed on the facility by the Planning Commission at the public hearing in
response to public testimony that asserted Covenants had been adopted for the neighborhood.

DUANE GATES: “There are covenants on the property so that all the exterior window treatments,
siding and such will be of similar types and grades so that it all blends together.” (Record Page 60)

Through the pre-hearing procedure for this Appeal, it has come to light that no Covenants were in
place when this case was brought before the Planning Commission. Since this condition was created
in an attempt by the Planning Commission to address false testimony presented at the hearing, the
Appellee will not attempt to offer a vigorous defense of this condition. The Appellee finds it
particularly disturbing that adjacent property owners would offer false testimony in an attempt to
modify a project and then appeal conditions placed on the project which attempted to respond to these
issues.
1. **Color Consistent With Neighboring Properties**

   The Appellants claim this condition is too vague. Enforcement of this condition will be somewhat subjective but was crafted to address issues raised during public comment. To ensure compliance with this condition, the Planning Commission will be asked for approval of a color scheme prior to operation of the Bed and Breakfast. This type of condition is common in the downtown Historic District and was common when the “Design Review Board” was in operation. Samples of roofing materials, siding and paint colors can be presented to the Planning Commission for approval or modification. The Hamilton Street neighborhood has been developed with several tan, gray and other earth tones. The Planning Commission attempted to ensure that the Bed and Breakfast would “fit in” with regional color scheme and specific colors will be selected prior to installation.

2. **Enforcement**

   Conditional Use Permit conditions must be complied with during operation. In this case, the Bed and Breakfast could not operate until approved colors had been installed. Although at the outset, enforcement of a color scheme can appear subjective, once specific colors have been approved through selection of paint samples, siding and roofing; enforcement is straightforward. If a component of a building does not match an approved color, the operation will be considered out of compliance with its Conditional Use Permit and the facility will not be permitted to operate until the situation is corrected.

3. **Neighborhood Harmony**

   Many of the homes on Hamilton Street were constructed by the same builder and have similar appearances. Most houses along the street were decorated with tan, gray and other earth tones. During public testimony several nearby residents expressed the desire that the Bed and Breakfast have similar colors as other buildings in the area. Once again this condition is not intended to solve all
neighborhood harmony issues related to this development, only those related to the existing
neighborhood color scheme.

Conclusion

This condition was partially developed in response to false public testimony therefore the
Appellee will not offer further justification for the condition.

Summary

When weighing the merits of this Appeal, it is helpful to remember that property owners have
the legal right to build the building and use it for a single-family residence exactly as proposed in their
application without a Conditional Use Permit. None of the conditions imposed by the Planning
Commission would be relevant to the building permit process for a single-family home. The only
question before the Planning Commission was “Should the proposed structure be operated as a 12
guest Bed and Breakfast?” In response to significant public testimony and lengthy debate, the
Planning Commission reduced the maximum occupancy to 10 guests and added several strict
conditions on the development to address concerns raised by neighboring property owners. The
Planning Commission acted aggressively in adding conditions to this project that exceeded the scope
of conditions imposed for similar projects in the past. When considering Conditional Use Permit
applications, the Planning Commission must weigh adjacent property owner’s concerns against the
rights of private property owners to develop the property. This case represents a good example of how
a balance can be reached between these divergent interests.

The Appellants have expressed their view that the Commission should have found reason to act
differently than it did, but this is not the question before the Assembly in this appeal. The Appellants
disagree with the findings but this is different from showing that there were no findings at all, or that
the findings weren’t sufficient to explain the Commission’s actions.

In light of the record, the Planning Commission appropriately approved the requested
Conditional Use Permit. The decision was supported by substantial evidence and adequate written
findings. Due process was afforded to the appellants and other nearby property owners therefore, the
Planning Commission respectfully requests that the Assembly to affirm its decision and deny the
appeal.

Dated January 11th, 2002

CITY AND BOROUGH OF JUNEAU

PLANNING COMMISSION

By:

Greg P. Chaney

Community Development Department