

**BEFORE THE PLANNING COMMISSION OF THE CITY AND BOROUGH OF  
JUNEAU**

BILL YANKEE,

Appellant,

v.

CBJ COMMUNITY DEVELOPMENT  
DEPARTMENT,

Appellee,

CHRIS AND ANN GILBERTO,

Intervenors.

Appeal of: APL2013 0004  
Notice of Decision  
CDD File No. APL2013 0004

**ORDER DENYING APPEAL**

On February 18, 2014, the appeal hearing was held in this matter. Bill Yankee was present as the appellant. The Community Development Department, represented by Laura Boyce and Travis Goddard, were present as the appellee. Lastly, the Gilbertos were present as intervenors. After the hearing concluded, the Planning Commission entered executive session and reviewed the record and arguments presented at the hearing.

In this matter, the Planning Commission has been asked to interpret the meaning of two Montana Creek subdivision plat notes: (1) No Disturbance to 20' Natural Green Belt & Visual Buffer Easement; and (2) 30' "No-Build" Structure Setback.<sup>1</sup>

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<sup>1</sup> While this order notes the overlapping nature of the plat notes several times, the Planning Commission here at the beginning wants to clearly note the overlapping nature of the easement and setback at issue because it appeared to serve as the basis of several of Mr. Yankee's arguments. Thirty feet from the edge of the rear property line the "No-build" structure setback ends. Twenty feet of those thirty feet is a natural green belt and buffer easement. Therefore, from the rear property line moving towards the center of a lot, the setbacks and easements would be: (1) twenty feet of a "No-Build" Structure setback and greenbelt buffer easement; and (2) the remaining ten feet would be a 'No-build' structure setback. Meaning, when discussing the green belt visual

The Planning Commission finds Mr. Yankee did not meet his burden of establishing his interpretation by a preponderance of the evidence. The following evidence in the record indicates non-disruptive fences are allowed within the 20' Natural Green Belt and Visual Buffer easement: (1) 1994 Planning Commission Minutes; (2) May 1996 CDD policy concerning fences in Montana Creek subdivision; and (3) the complete policy from which the plat notes arose. This evidence becomes further reinforced by examining the definitions of setback and yard.

**I. Statement of Facts**

**A. Procedural History**

On May 6, 2013, Bill Yankee contacted CDD and discussed the legality of Chris and Ann Gilberto's fence in Montana Creek Subdivision based on the subdivision plat having two plat notes, in particular a "30' 'No-Build' Structure Setback" note.<sup>2</sup>

On June 19, 2013, CDD issued its decision about the legality of the Gilberto's fence.<sup>3</sup> The decision relied on an October 5, 1994 staff report, the complete basis for the two plat notes, and a policy since 1999 allowing for fences to be built within a no build buffer as long as the fence was not built with heavy equipment.<sup>4</sup>

On July 9, 2013, Bill Yankee appealed the director's decision that Chris and Ann Gilberto's fence, built using hand tools and in Montana Creek subdivision, was permissible.<sup>5</sup>

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buffer easement in Montana Creek subdivision, it subsumes the "No-Build" structure setback. Therefore, discussions about the 20' greenbelt buffer easement include – by this overlap – analysis of the "No-Build" structure setback.

<sup>2</sup> Appeal Record p. 11.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Appeal Record pgs. 8-10.

On August 13, 2013, the Planning Commission held its initial hearing in the matter. The Planning Commission, consistent with CDD's report, decided to hear the appeal *de novo*.<sup>6</sup>

On October 22, 2013, the Planning Commission held a special meeting to assign a prehearing officer. Planning Commissioner Dan Miller was the prehearing officer in this matter.

On November 6, 2013, Mr. Miller issued his prehearing order and on November 7, 2013 allowed the Gilbertos to intervene. After responses from both parties regarding the dates selected, Mr. Miller issued a modified prehearing order on November 11, 2013 which changed the dates for certain pleadings would be submitted.

The record was provided by CDD on November 8, 2013. Throughout, given the holidays and scheduling, extra time was consistently given either via email or order.

On December 6, 2013, after the record had been closed, CDD moved to supplement the record after finding a written policy from 1996 pertaining to fences in Montana Creek subdivision. Mr. Yankee did not oppose the inclusion of the policy, which then became part of the record.

Mr. Yankee then filed his initial brief on December 30, 2013.

CDD and the Gilbertos provided their briefs on January 13, 2014.

Mr. Yankee then filed his reply brief on January 24, 2014. Mr. Yankee also filed a witness list which included Laura Boyce and Hal Hart.

The appeal hearing was held on February 18, 2014 at 5:00 p.m.; after being rescheduled from February 10, 2014. The following Planning Commissioners were present: Mr. Satre, Ms. Grewe, Mr. Haight, Mr. Jackson, Mr. Miller, Ms. Lawfer, and Mr. Watson. At the hearing, testimony was taken first. Mr. Yankee called and questioned Ms. Boyce of CDD. After this questioning,

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<sup>6</sup> Appeal Record pgs. 3-7.

and due to Mr. Hart's absence, CDD objected to Mr. Hart being questioned. After Mr. Yankee provided an offer of proof of what his questions would contain, the Planning Commission sustained the objection finding the content and information as to his questions were already in the record and would not be beneficial in determining the intention of the plat notes.

Each side was then given thirty minutes to argue their respective positions. Mr. Yankee presented his argument first, reserving time for his rebuttal. CDD and the Gilbertos then presented their arguments. Mr. Yankee then presented his rebuttal argument. During the arguments, Planning Commissioners questioned the parties.

After hearing the arguments, the Planning Commission retired into executive session and reached a decision; provided here in writing consistent with AS 49.20.110(b).

### **B. Factual History**

Bill Yankee's home is in Nunatak Terrace subdivision. A buffer exists between Mr. Yankee's subdivision and the Montana Creek subdivision, where Chris and Ann Gilberto own a home. Therefore, Mr. Yankee is not a direct neighbor and not even in the same subdivision as the Gilbertos.

Mr. Yankee's home, nevertheless, abuts the same buffer as the Gilbertos' home.

The Gilbertos built a fence around their property within the 20' natural greenbelt buffer easement.<sup>7</sup> The fence did not require a building permit. As noted by Mr. Yankee at the appeal hearing, the fence has wire mesh. This prevents, according to Mr. Yankee, ducks and various wildlife from using and moving freely throughout the buffer and waters therein.

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<sup>7</sup> As noted, this means the fence is built in an area where the two plat notes overlap.



The fence, of note, does not enter Mr. Yankee's property. The fence cannot be seen by Mr. Yankee from his house. The fence does not appear to aggrieve Mr. Yankee except -- as he noted at the appeal hearing -- to the movement of wildlife through the buffer.

The Montana Creek subdivision plat includes the following notes: (1) No Disturbance to 20' Natural Green Belt & Visual Buffer Easement; and (2) 30' "No-Build" Structure Setback.

## **II. Standard of Review**

Pursuant to an appeal of a director's determination where the Planning Commission has agreed to hear the case de novo, CBJ 49.20.110(b) states

The burden of proof in the appeal shall be on the party challenging the decision of the director. In a hearing de novo, proof shall be established by a preponderance of the evidence.

Therefore, Mr. Yankee has the burden of proving his interpretation and analysis are correct by a preponderance of the evidence. This differs from an on the record appeal, which grants significant deference to the director's decision.<sup>8</sup>

## **III. Analysis**

As to interpreting a plat note, Alaska courts have "announced a three-step approach to deed interpretation, and an easement depicted on the face of a plat is interpreted using this same approach. First, the court must look at the four corners of the document "to see if it unambiguously presents the parties' intent. If a deed when 'taken as a whole' is open to only one reasonable interpretation, the interpreting court 'need go no further. But if the document is ambiguous, the court considers extrinsic evidence of the surrounding facts and circumstances. [T]his inquiry can be broad, looking at 'all of the facts and circumstances of the transaction in

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<sup>8</sup> See CBJ 49.20.110(b).

which the deed was executed, in connection with the conduct of the parties after its execution.”<sup>9</sup>

Ambiguity arises if there are two or more reasonable interpretations for a term or plat note.

Therefore, first there must be a determination of whether ambiguity exists. If ambiguity exists, then the Planning Commission needs to consider extrinsic evidence to best interpret the plat notes and their application herein.

**A. These plat notes are ambiguous and require considering extrinsic evidence to determine their meaning.**

CBJ 49.80.120 defines “structure” as

Anything which is constructed or erected and located on or under the ground, or attached to something fixed to the ground, including the following:

- (1) A building, regardless of size, purpose, or permanence;
- (2) A Tower, sign, antenna, pole or similar structure;
- (3) A basement, foundation, or mobile home pad;
- (4) A fence;
- (5) A sign;
- (6) A street, road, sidewalk, driveway, parking area, or storage area.

“No-build” is not defined in the code.

Here the main plat note at issue reads, “30’ ‘No-Build’ Structure Setback” which can lead to two different interpretations with the inclusion of “no-build” in quotation marks. This language implies in this 30’ setback there cannot be structures which are actually “built” structures. In the context of the definition of “structure” under CBJ 49.80.120, this would modify “structure” to only those which could be classified as “built.” Reading this closer, this could mean a 30 foot setback for actual housing structures, the foundation of the housing itself. The opposite meaning may exist as well, with “no-build” not modifying “structure” but instead reinforcing that no structures are permitted in the 30’ setback. Therefore, one interpretation would allow fences and the other

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<sup>9</sup> *HP Ltd. Partnership v. Kenai River Airpark, LLC*, 270 P.3d 719, 727(Alaska 2012)

would prohibit fences. Both of these appear reasonable, and thus to resolve the matter evidence must be examined to determine the meaning and intent of these plat notes.<sup>10</sup>

**B. Mr. Yankee did not meet his burden of proof and establish by a preponderance of evidence that the Montana Creek subdivision plat notes were included to bar fences in the overlapping 20' greenbelt buffer easement and 30' 'no-build' structure setback.**

The evidence reveals fences are allowed in the 20' natural greenbelt and buffer easement because the 30' "no-build" setback concerned actual structures and not fences which did not require a building permit. In reviewing the evidence, the Planning Commission determines the purpose of the setback and easement were to prevent homes from being too close to the visual buffer and was not to prevent the placement of small fences within the greenbelt.

To clarify, the Montana Creek subdivision is separated from the Nuntak Terrace subdivision. These two subdivisions are separated by a greenbelt buffer easement. This keeps the two subdivisions separate, and the logical purpose for such a greenbelt becomes the starting point for the Planning Commission's analysis here.

As to Montana Creek subdivision, a 1994 CDD memorandum to the Planning Commission indicates a 30' 'no-build' structure setback worked to preserve the natural greenbelt easement's vegetation to ensure the longevity of the visual buffer between the two subdivisions. On July 18, 1994, the Planning Commission received a CDD memorandum outlining the preliminary plat of Montana Subdivision Phases I and II. The memorandum noted

The final plat shall contain a requirement for greenbelt and visual buffer setback for all lots on the outer perimeter of the site along Montana Creek Road and adjacent to Brigadoon Subdivision. The setback shall provide that no building or structure may be located closer than 30 feet to a perimeter lot line and that the outermost 20

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<sup>10</sup> The plat notes' ambiguity was implicitly addressed in the Planning Commission's August 7, 2013 when the Planning Commission considered whether to hear the matter. See Appeal Record pgs. 3-7.



feet of the setback area must be left in natural vegetation and topography. The setback area shall be wider if necessary to retain special features, and shall be maintained to preserve an effective visual screening along the perimeter using vegetation. Existing trees and other vegetation shall be retained as much as possible. Removal of any vegetation from the setback area must be done using methods that will insure the stability of remaining trees and the safety of residents and property. Where necessary to maintain effective screening, for example because of the removal of existing trees, buffers shall be replanted. The developer may propose, and the Community Development Department (CDD) may require that the buffer areas be created as “non-disturbance” areas within lots of greater depth adjoining other property and right of way. Alternative methods of managing the screening setback may be proposed for approval by CDD.<sup>11</sup>

This policy indicates vegetation can be removed in the 30 foot setback, however if the disturbance to the visual buffer remains unharmed. This policy indicates the setback serves to provide adequate screening. The 30 foot setback ensures a large enough and environmentally strong enough buffer to prevent the Montana Creek subdivision from seeing the old subdivision; to thus keep the two subdivisions discrete. Therefore, the resulting plat notes appear to serve to preserve the greenbelt and the visual buffer between the two subdivisions, not to bar building fences within the subdivision. If fences or any work was entirely barred in the 30 foot setback, then the policy would not allow for “removal of vegetation.”

The committee minutes clarify the setback and easement were to prevent homes from being graded too close to the greenbelt buffer and causing stress or harm to the buffer which could then in turn compromise the adequacy of the visual buffer between the two subdivisions. On July 12 and 18, 1994, the Planning and Zoning Commission met and discussed subdivisions and various restrictions on those subdivisions. During the hearing, the planning commission discussed the 30’ ‘no-build’ structure setback and the 20’ greenbelt buffer easement for the new phase of the

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<sup>11</sup> Appeal Record p. 55.



Montana Creek subdivision. Concerning this setback and easement, planning director Murray

Walsh stated

The idea there is that the relocated line would be underground, either part of the wiring for the new subdivision or it could be underground or overhead through Brigadoon. The developer and AEL&P (Alaska Electric and Power) have that choice. But it would be removed, the poles and the wires would be removed from where they presently are running along the line between the applicant's property and Brigadoon. That way the buffer could then grow up natural, and you're right, it has been mowed and cleared and whatnot from time to time. But once the lines are in there then we can allow the brush to come back whichever way it can. We're saying that between the property line, the first 20 feet that brush should be left to grow, and then another ten feet for the building setbacks. That allows you room to have cleared space around your building. That's why the distinction between 30 feet and 20 feet.<sup>12</sup>

This comment reveals the purpose of the 30 foot setback and 20 foot easement buffer were concern for a home or building and its proximity to the buffer easement. Meaning, the Planning Commission, given the nature of the land in the subdivision, feared grading for future homes could harm the buffer easement. If this happened, then the buffer between the subdivisions could be lost. Nothing from this language can be deemed to prevent constructing a fence – with certain restrictions – within the 30 foot setback. This comment suggests the purpose of the policy and the resulting plat notes were to restrict the placement of homes and decks, not fences.

Before continuing, it should be noted an often confused issue here has been how the two plat notes coordinate with each other. The 20' greenbelt and 30' 'no-build' structure setback overlap. This means from the edge of a property, the first 20 feet are both a greenbelt setback and a 'no-build' structure setback. Therefore, the remaining 10 feet of the 30 foot 'no-build' structure setback is only a 'no-build' structure setback. The overlap means if the 20' greenbelt setback has

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<sup>12</sup> Appeal Record, pgs. 212-213.

a policy determination, that 20' greenbelt setback policy also includes a determination about the 30' 'no-build' setback.

A CDD policy from 1996 allowed fences in the 20 foot natural greenbelt and visual buffer easement which overlaps with the 30 foot 'no-build' setback in Montana Creek Subdivision.<sup>13</sup> On May 31, 1996, Gretchen Keiser of CDD examined what these same plat notes meant as far as the first 20 feet being both a greenbelt easement and 'no-build' setback and as to the remaining 10 feet of the 'no-build' setback.<sup>14</sup> In particular, Ms. Keiser had to determine whether a fence would be allowed in the initial 20 feet, and then if a deck could be built in the final 10 feet; the final 10 feet, again, falling under the 'no-build' structure setback.<sup>15</sup> In answering these questions, the Ms. Keiser concluded:

- (1) Fence within 20' Greenbelt. A fence would be allowed within the 20' "no disturbance" natural greenbelt, consistent with CBJ Policy on Streamside Setbacks for Development and Changes to Natural Vegetation. In that policy, ". . . limited changes to natural vegetation . . ." within the 25-foot stream corridor for landscaping purposes can occur, including ". . . installing a fence without significant disturbance of vegetation . . ."  
In keeping with the intent of the Montana Creek Subdivision Phase I natural greenbelt and to minimize disturbance to natural vegetation, the fence should be constructed with hand tools, rather than mechanized equipment.<sup>16</sup>
- (2) Deck Within 30' Setback. The intent of the restrictive setback is no structures, period. A deck would not be allowed. A lawn is okay

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<sup>13</sup> When CDD first reviewed this issue, it did not have the luxury of the 1996 policy drafted by Gretchen Keiser on May 31, 1996. The Planning Commission finds it noteworthy – and potentially persuasive — that the CDD reviewed the policy notes and 1994 committee minutes and reached the same conclusion as Ms. Keiser reached in May 1996.

<sup>14</sup> Gretchen Keiser, "Activities Allowed Within 20' Natural Greenbelt and 30' Setback Along Outside Boundaries of Montana Creek Subdivision Phase 1," (May 31, 1996).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* This implicitly defines what is meant by "no-build structure" and setback.

within the inner 10 feet of the setback, interior to the 20' natural greenbelt.<sup>17</sup>

Ms. Keiser's policy reiterates fences – which do not significantly disturb vegetation – are permitted in the 20' natural greenbelt buffer easement – and thus the 30' 'no-build' structure setback. Ms. Keiser's policy determination, in reaffirming the Planning Commission minutes from 1994, reiterates the preservation of the buffer easement influenced the setbacks and easement determination. Meaning, the plat notes' primary concern was the vitality of the buffer easement from grading the lots in preparation of building homes. Fences, which did not require a building permit and thus did not disrupt this vegetation, were not the basis and concern pursuant to the 30' setback and 20' buffer easement.

A 1999 building permit provides the full application of these policies by outlining an impermissible enclosure in the 30' 'no-build' structure setback. In 1999, Randy Hulse applied for a permit to build a partial privacy fence on his rear property lot line.<sup>18</sup> Because Mr. Hulse's fence was 8 feet tall, he had to obtain the building permit.<sup>19</sup> The permit allowed Mr. Hulse to build the fence, which included substantial work, on the edge of his property line in the 20' greenbelt buffer easement and thus in the overlapping 30' 'no-build' structure setback. The comments for the building permit stated, "Fence along rear property line in 'No-Build' and 'No disturbance' easements OK per CDD policy as long as it is constructed with minimal disturbance of natural

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<sup>17</sup> *Id.*

<sup>18</sup> Record p. 427-435.

<sup>19</sup> See CBJ 19.01.105.2.1 which states "A building permit shall not be required for the work described in subsections 1 through 14 of this section if only the provisions of the exempted code apply. . . 2. Fences as well as sign support structures and similar free-standing structures not over six feet (1,829 mm) high other than fences required for protection of swimming pools and hot tubs which are regulated by IRC Appendix AG105 or IBC Section 3109." Therefore, a permit would not be required for a fence six feet high or shorter. Meaning the Gilbertos' mesh enclosure did not require a permit.



vegetation in greenbelt & vegetation removed is replanted per Laurie Sica.”<sup>20</sup> This reveals a direct application – pertinent to the fence here – of the CDD policy and the application of the plat notes to the Montana Creek subdivision.

The definitions of setback and yard reveal the plat notes in question were concerned with the location of a building and not all enclosures. Setback is defined as “the minimum required yard between a building and a parallel lot line. See ‘Yard.’” Yard is defined as “an open space, unoccupied by any building.” Therefore, a setback serves to set limits on where a building can be built, not a structure. The plat note referring to “no-build” structure reinforces the 30 foot setback serves to prevent the building of a home or significant structure – like a deck – in the area. But that does not bar enclosures, such as fences which do not require a building permit, from being built in the setback.<sup>21</sup>

Lastly, the nature of the plat note, by containing the words “no-build” in quotation marks further bulwarks the finding the setback sought to eliminate the close proximity of buildings and not preclude fences. Quotation marks are often used to add emphasis to a word. Here, “no-build” has been given emphasis in the plat note to clearly demarcate the setback prevents “buildings” as to “structure.” This would again suggest, consistent with all of the evidence and definitions, the 30’ setback sought to limit the location of buildings and the harm caused by buildings, not fences.

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<sup>20</sup> *Id.* p. 429.

<sup>21</sup> In *Hurst v. Victoria Park Subdivision Addition No.1 Homeowner’s Ass’n*, 59 P.3d 275 (Alaska 2002), the Alaska Supreme Court analyzed whether a fence violated a restrictive covenant which barred “permanent structures.” The Court, in examining the intention of the covenant, determined a fence does not constitute a “permanent structure” and thus did not violate the covenant. While the case before the Planning Commission concerns a plat note, *Hurst* does provide legal guidance as to the appropriate legal analysis for the Planning Commission to undertake and an example where a restrictive term like “permanent structure” did not preclude fences.

#### IV. Conclusion

Like most things, when the plat notes were reduced from a lengthy policy to five or six words and as more time passed, the intended meaning became forgotten. This, as a result, created a situation where the plat notes could be read and interpreted by two individuals as constituting two separate concepts.

Mr. Yankee relied on a variety of arguments which either showed confusion about the overlapping nature of these plats or contentions about the timing and genesis of CDD's policy determinations. The issue here was whether fences which do not disrupt vegetation are allowed in the 20' greenbelt buffer which overlaps with the 30' 'No-build' setback.

Mr. Yankee's appeal falters based on the history underlying these plat notes, their purposes, and thus their intentions. Therefore, Mr. Yankee never established by a preponderance of the evidence that his interpretation of the plat notes constituted the correct interpretation. Given this failing, Mr. Yankee's appeal is denied.

Consistent with CBJ 49.20.120 and CBJ 1.50.020, Mr. Yankee has the right to appeal this matter to the Assembly. Mr. Yankee, consistent with CBJ 1.50.030(c), has twenty days from the date of this decision to appeal this matter to the Assembly.

IT IS SO ORDERED.

DATED this 20<sup>th</sup> day of March, 2014.

PLANNING COMMISSION OF THE CITY AND BOROUGH OF  
JUNEAU, ALASKA



By: Michael Satre on behalf of the Planning Commission