

## MINUTES

### **PLANNING COMMISSION** CITY AND BOROUGH OF JUNEAU Michael Satre, Chair

#### **REGULAR MEETING** February 28, 2012

#### **I. CALLED TO ORDER**

Chair Satre called the regular meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC), held in the Assembly Chambers of the Municipal Building, to order at 7:00 p.m.

Commissioners present: Karen Lawfer, Jerry Medina, Nathan Bishop, Marsha Bennett, Nicole Grewe, Dan Miller, Dennis Watson, Michael Satre

Commissioner absent: Benjamin Haight

A quorum was present.

Staff present: Dale Pernula, CBJ Community Development Department (CDD) Director; Greg Chaney, Beth McKibben, CDD Planners

#### **II. APPROVAL OF MINUTES**

January 31, 2012 – Committee of the Whole Meeting (COW)

February 14, 2012 – COW Meeting

February 14, 2012 – Regular Meeting

**MOTION:** *By Mr. Miller, to approve the January 31 and February 14, 2012 COW, and February 14, 2012 regular PC meeting minutes, with corrections.*

There being no objection, it was so ordered.

#### **III. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS - None**

#### **IV. PLANNING COMMISSION LIAISON REPORT**

Carlton Smith, Assembly Liaison to the PC, said members of the Assembly have a high interest in the Willoughby District Land Use Plan (WDLUP), particularly in relation to obtaining higher density housing. At a previous COW meeting there was reference to consultation that occurred with the Central Council of the Tlingit and Haida Indian Tribes of Alaska (CCTHITA), which he would like to speak to later in this PC meeting.

#### **V. RECONSIDERATION OF THE FOLLOWING ITEMS - None**

#### **VI. CONSENT AGENDA**

Chair Satre announced that there are three items on the Consent Agenda, and inquired if there is public comment on these items. No one from the public had comments. Ms. Bennett said she would like to remove AME20120003, which Chair Satre moved to the Regular Agenda.

**MOTION:** *By Mr. Watson, to approve the Consent Agenda, as presented.*

There being no objection, it was so ordered and the two cases below were approved as presented by the PC.

**CSP20120002**

A proposed easement on City land for the expansion of the Stephen Richards Memorial Drive and Mendenhall Loop Road intersection undergoing new safety improvements.

Applicant: City and Borough of Juneau

Location: Mendenhall Loop Road & Stephen Richards Memorial Drive

Staff recommendation: That the PC adopt the Director's analysis and findings and recommend approval of the intersection modifications and use of City property for the expanded right-of-way.

**CSP20120005**

State project to establish a High Intensity Activated Crosswalk (HAWK) pedestrian hybrid beacon at the crosswalk on Glacier Highway at the driveway entrance to Walmart.

Applicant: State of Alaska

Location: Glacier Highway/Walmart

Staff recommendation: That the PC find that the proposed HAWK beacon at the intersection of Glacier Highway and the Walmart driveway is consistent with adopted plans and CBJ Title 49, pursuant to CBJ 49.15.580 and AS 35.30.010.

**VII. CONSIDERATION OF ORDINANCES AND RESOLUTIONS** - None

**VIII. UNFINISHED BUSINESS** - None

**IX. REGULAR AGENDA**

**AME20120003**

WDLUP – a plan to increase and improve housing, mixed-use development, investment, and bike/pedestrian/vehicle transportation.

Applicant: City & Borough of Juneau

Location: Willoughby District

Chair Satre said the WDLUP was reviewed several times at recent COW meetings when the Commissioners held discussions with CDD planners, including Heather Marlow the Lands Manager and Cynthia Johnson the Deputy Lands Manager of the CBJ Lands and Resources Division.

Staff report

Ms. McKibben said the staff recommendation is to adopt Chapter 5 of the WDLUP and Figures 7 and 8 as part of the CBJ Comprehensive Plan (Comp Plan). This includes amendments outlined in attachment B that documents recommended changes the Title 49 Committee forwarded per their last meeting.

Ms. Bennett stated that she is a member of the Title 49 Committee and was unable to attend the last meeting, although she agrees with their revisions to the WLDUP. She referred to appendix A of the plan, which states in the 1960s that many people in the Willoughby area were displaced by attempts to eliminate low-income housing, which is when a new alternative was supposed to be provided, but that was never implemented. The survey was recently conducted in regards to the WDLUP, which states that only 2% of the people who actually reside in the neighborhood were surveyed, and of those 15% have ever attended an event in the Andrew Hope Building, including <10% who have ever patronized the Zach Gordon Youth Center. It appears as though a poor representation of that neighborhood was surveyed. On the other hand, >80% of transient people who were surveyed said they went to the A&P Market, and >75% said they went to Centennial Hall or the Zach Gordon Youth Center. The committee supported flexibility in the vision allowing for more public involvement, including mentioning a subarea plan for the Willoughby District as being a goal. Therefore, she proposes the following theme to be added to section 5.2 Willoughby District Development Themes of the WDLUP, and to also include this in the Comp Plan, which states:

“A subarea plan for this district will include substantial interaction with area residents and institutions in overseeing changes and supporting the vision for their neighborhood.”

In the beginning, she noticed that the WDLUP does not connect with the neighborhood, which is what she is trying to accomplish by the additional of this proposed goal. Mr. Bishop referred to Table 6, stating that a category is labeled Village Neighborhood Plan, but the description for it appears to be rather vague so the PC might consider adding more detail. Ms. Grewe explained that Ms. Bennett is looking at the themes section of the WDLUP, and Mr. Bishop proposed a solution by adding Ms. Bennett’s verbiage to a description on Table 6 because both are related, which ensures that this would happen in the short- to medium-term. These recommended additions are in respect to the Willoughby District history, culture, and residency, and it’s too bad Mr. Haight is not present because he previously voiced an idea about widening Whittier Street to provide a view from the village to the water as well. Chair Satre said the inclusion of this proposed goal for Chapter 5 is great, but it is also important to add similar verbiage to Table 6 to ensure that the description is assigned a cost estimate to the Village Neighborhood Plan section so decision and budget makers can take this into consideration in the future. Mr. Watson asked what “subarea neighborhood” Ms. Bennett is referring to. Ms. Bennett said the residential overlay within the basic footprint of the WDLUP. Chair Satre requested that a header also be provided to the proposed goal to describe the value of the residents, including the residential nature of the district.

**BREAK:** 7:20 to 7:22 p.m.

Ms. Grewe said the header should state:

- The Willoughby District has a varied and long history and all past and present residents and stakeholders input will be valued and incorporated in future planning endeavors.

Mr. Miller asked when the lease expires for the Zach Gordon Youth Center, and if it would be automatically renewed. Ms. Marlow said it expires in [date was inaudible], and it would not be automatically renewed.

#### Public testimony

Carlton Smith, Assembly Liaison to the PC, said it was mentioned at a previous COW meeting that Ms. Marlow had overseen consultation with CCTHITA in regards to the WDLUP. He explained that CCTHITA is one of five native organizations, which are all active in the Willoughby District area. Therefore, the PC should consider including the word “consultation” in the new goal as well as the addition of “the village,” as the Willoughby District consists of the original community, which is where his great grandparents had their house. The PC might also consider adding “complete consultation with other groups” in addition to the native community, which would be moving forward in the spirit of Ms. Bennett’s concern to provide for such a connection with the neighborhood.

Heather Marlow, Manager of the CBJ Lands and Resources Division, stated that the Title 49 Committee held previous conversations with this line of thought, which is why they provided the addition of Table 6 in the WDLUP. They did so due to text found on page 46 of the WDLUP that describes the Nature of the Area in sections 1-4, which she cited. Therefore, this information has been included, but it is now a matter of how much more information along those lines the PC wishes to further include in the plan.

Ms. Bennett said she agrees with Mr. Smith for the inclusion of the word “consultation” as part of the bulleted goal because it emphasizes a respect for the native community and its history. She referred to page 46, Nature of Area, section 4, which in part states “Public art is installed to celebrate the area’s deep Tlingit past...” She explained that she was somewhat offended, as this is just “frosting on the cake” and without consultation or a wider amount of public participation that verbiage would be insulting.

Public testimony was closed.

#### Commission discussion - None

Staff recommendation: That the PC, based on previously discussed amendments to the draft plan, recommend adoption by the CBJ Assembly.

#### Commission action

Chair Satre said the new goal would be incorporated under Chapter 5, section 5.2 Willoughby District Development Themes as being the sixth bulleted goal, as follows:

Ms. Grewe’s header revised:

- The Willoughby District has a varied and long history and all past and present residents and stakeholders input will be valued, consulted, and incorporated in future planning endeavors.

Ms. Bennett’s description to follow the header:

A subarea plan for this district will include substantial interaction with area residents and institutions in overseeing changes and supporting the vision for their neighborhood.

Mr. Bishop said he prefers to split these up and retain the bulleted text where Chair Satre proposed that it be placed, but place the descriptive text under Table 6 of the Village Neighborhood Plan section. Chair Satre said the latter would become an Implementation Action per Table 6, so both would still be incorporated into the Comp Plan if the PC were to do so. He explained that the current description for the Village Neighborhood Plan states, “Plan for land use and improvements in this area,” but the PC is stating that there needs to be proper consultation with residents and organizations that represent the Willoughby area, rather than some planner or consultant “working in the dark” and coming up with their own plan. There are also cost estimates associated with doing so, including a recommendation to work with CCTHITA, which they might want to include based on comments from the PC to work with appropriate organizations. Ms. Bennett said this is why she used the word “institutions” because it is broader than “organizations.” Mr. Bishop asked staff if Table 6 is incorporated in Chapter 5 of the WDLUP. Ms. McKibben said it is not, as Table 6 is in Chapter 6. Mr. Bishop said with that being the case, Table 6 would not be incorporated into the Comp Plan. Ms. Bennett said she prefers that both the header and bulleted text be incorporated together under Chapter 5, section 5.2 as being the sixth bulleted item; Chair Satre agreed.

**MOTION:** *By Mr. Bishop, that the PC incorporates into the WDLUP under Chapter 5, section 5.2 Willoughby District Development Themes as the sixth bullet with the following verbiage, as revised:*

- *The Willoughby District has a varied and long history and all past and present residents and stakeholders input will be valued, consulted, and incorporated in future planning endeavors.*  
*A ~~subarea~~ neighborhood plan for this district will include substantial interaction with area residents and institutions in overseeing changes and supporting the vision for their neighborhood.*

*In addition, the PC incorporates the non-bulleted description above in Chapter 6, Table 6 under Village Neighborhood Plan as well.*

Mr. Bishop explained that he made the verbiage revision to the description because the WDLUP is the “subarea” plan, so he prefers to state in the description that it is a “neighborhood” plan.

There being no objection, it was so ordered.

Mr. Miller asked whether staff is able to incorporate wordsmithing to the added verbiage per the motion for inclusion in the WDLUP prior to it being forwarded to the Assembly for adoption and/or if this verbiage will be reviewed by Department of Law beforehand. Mr. Pernula said the WDLUP is not law, rather it is a plan, but the Assembly is able to change verbiage within the WDLUP if they choose.

**MOTION:** *By Mr. Miller, that the PC forwards to the Assembly a recommendation to approve the proposed Ordinance, AME20120004, per inclusion to the WDLUP of the verbiage by the previous motion, including amendments by the Title 49 Committee.*

There being no objection, it was so ordered.

Chair Satre thanked staff, the Title 49 Committee, and the PC for their hard work on the WDLUP.

**AME20120004**

An Ordinance amending the Land Use Code Title 49 Section 49.75.130 regarding Rezoning Procedure.

Applicant: City & Borough of Juneau

Location: Boroughwide

**Staff report**

Mr. Pernula said a new draft of the ordinance was provided in the Blue Folder, and one change is to the code that came up in relation to the recent proposed rezoning of a property along Atlin Drive. The PC denied that proposal, but it was unclear whether it was supposed to be provided as a recommendation or an appeal to the Assembly. He cited 49.75.130 – Procedure (1), noting that it does specify what a decision for denial would be. According to the appeal section of Title 49, only final decisions by the PC can be appealed to the Assembly so staff assumed it would be a recommendation. Therefore, staff is proposing this ordinance to make it clear that it would be a final decision if the PC makes a denial of rezones to the Assembly, and if so, that is the only method in which such denials could be later be appealed to the Assembly. This verbiage is found on page 2 of the ordinance that contains a slight change as well, which he cited. Another alternative would be to clearly state that if the PC denies a rezone that it is only a recommendation by the PC to the Assembly.

Mr. Bishop said he is unclear as to the reasoning for the proposed ordinance. Mr. Pernula explained that the PC made a decision to deny the Atlin Drive rezone case so the Assembly would appeal it through the full appeal procedure, and therefore it would not come back to the PC unless the Assembly decides to remand it. Through the appeal process the Assembly can affirm the decision of the PC, remand it back to the PC with instructions, or overturn the PC's decision and make their own. Mr. Bishop said either way that case is going to the Assembly whether it be as an appeal or a recommendation, but it does not have to be appealed for that case to be provided to the Assembly, and if so, it would be presented with a negative recommendation by the PC. Mr. Pernula said that would be true if this proposed ordinance or some other ordinance is changed to state that denial is a recommendation of the PC, because right now Title 49 is silent on that issue. Mr. Bishop stated that if the PC were to recommend denial on the proposed ordinance, he asked if it would still be forwarded to the Assembly. Mr. Pernula said it would not unless it was appealed. Chair Satre said this proposed ordinance puts the onus on the PC to ensure that if they are going to deny a rezoning case they are arbiters of that decision, which is appealable, not just a recommendation. However, per Mr. Bishop's comments he is now somewhat unsure, and asked if the PC were to deny a rezone case, the applicant would have to hire an attorney if they wished to appeal it. Mr. Pernula said that would not necessarily be the case, explaining that individuals who are not attorneys oversee many appeals presented to the Assembly. Chair Satre said the applicant would simply file a Notice of Appeal, which is a relatively simple start. Mr. Pernula agreed, but the remaining appeal process tends to be rather complicated and formal.

Ms. Lawfer asked if additional information could be provided to a rezone case in the appeal process. Mr. Pernula noted that CBJ Attorney Hartle is present who can possibly provide a better response, although he believes the Assembly could decide whether it would be an appeal on the record, or a de novo hearing where additional information could be provided.

Ms. Grewe asked what the disadvantage might be in assuming whether the PC approves or denies a rezone case, as in either case it would be presented to the Assembly for their final decision. However, the Assembly makes decisions at a more political level than the PC, so she also asked why wouldn't the PC give them the decision-making benefit. In addition, she knows the answer from a planning and land use perspective that if the PC denies a rezone case it is for good reason, but she does not know if she would rather have that authority lie with the PC or the Assembly, which is the crux of this issue. Mr. Pernula said the ordinance would bring rezoning decisions on cases more in line with how the PC currently deals with Conditional Use permits (CUPs), so if a rezone is later denied the applicant can choose go to the Assembly to appeal it, which is what would occur in this case. However, rezones have to be followed up with an ordinance that the Assembly also has to approve, so there is always a secondary approval process for rezones. He believes that by having a denial process for rezones, it will bring the appeal process more in line with how they handle other permits. Mr. Miller said that's true, but it is not in line with how rezones are currently dealt with so he is leaning more towards setting it up as a denial, which should be heard at the Assembly level for political reasons. Since he has been a Commissioner of the PC, they approved one rezone that was remanded by the Assembly back to this body. That rezone was in regards to property adjacent to the Evergreen Cemetery, which the PC made their decision of denial on due to land use reasons, but the Assembly for did so for political reasons and sent it back to the PC. However, the Assembly could have approved it for political reasons, which is an option that should continue to be provided to them.

Mr. Bishop said the Atlin Drive rezone case was clearly in violation of the Land Use Code so the PC was obligated to deny that case, which should clearly follow the path of being appealed as with other permits. This is a process under which the PC verifies that they followed proper procedures, so they cannot change the law. He explained that the Assembly should not be overriding a law unless they want to change it for all rezone cases, as they should not be making exceptions just because one applicant provides a case where they want to do something against the law. This is because if that were the case every other applicant requesting rezones should be able to do so as well, rather than issue an ad hoc and non-code ordinance. He does not believe the proposed ordinance entirely clarifies what the process is. He referred to 49.75.130(3), which he cited, and asked what "agency" is referring to. Everybody in the past knows that rezone cases go to the Assembly regardless, but now the PC has to state that rezone cases reviewed by the PC that are denied are not automatically going to be presented to the Assembly unless they are later appealed. If so, such cases would not be as a rezone case, rather they would be whether the PC made proper decisions on them so he thinks this subsection requires greater clarification. Mr. Pernula said he believes it has to do with language in the appeals code, and he deferred to Mr. Hartle. Mr. Hartle said the CBJ has 01.50 Administrative Appeal Procedures portion of code that governs appeals from any board or body to the Assembly. Section 01.50.020 - Application of chapter, subsection (b) states, "An appeal shall be filed only from a final agency decision." In this case the "agency" is referring to the PC, but in other cases it might refer to other CBJ agencies, i.e., Docks & Harbors, the Airport Board, and so on. With the proposed ordinance, they would state that a decision to deny is a "final agency decision" that could be appealed. He supposes that the purpose of this language is if the PC denies a proposed rezone the applicant would still have an opportunity for due process. The applicant is able to do so in hopes that the

Assembly will reverse the PC's decision, but it provides for deference to the PC who is the body that has expertise in zoning. Therefore, a record is generated at PC hearings so there is deference to the PC's expertise unless that decision is clearly wrong, otherwise it would probably stand, but an ordinance would still be required to be approved by the Assembly so there is still the opportunity for a degree of political decision to come into play. The PC denied the Atlin Drive case, and that applicant wanted to bring it forward as a recommendation to the Assembly, but the code states that a decision supporting a rezone is a recommendation, but the code is silent on what the decision of denying it would be. Another section of the code states that the PC makes all rezone determinations, so it was his call to state that if the code is silent in regards to denial in this particular case he thinks the policy makers should make the final decision and bring that case forward with a negative recommendation by the PC to the Assembly. It is the Assembly who will ultimately decide whether to amend the zoning code, as all rezoning cases are done by ordinance. After the Assembly struggled hard in terms of this case, they requested that staff and the Department of Law provide language in the ordinance that speaks to the silence as to what a negative decision means in order so that the process is made clear. He explained that Chuck Cohen who was somehow involved in that case suggested doing this, and Mr. Pernula said this has been done in other jurisdictions as well, which he believes makes sense. While he was sitting in the audience this evening, Ms. McKibben asked what happens if the decision by the PC was neither a denial nor an approval, e.g., in the Atlin Drive case an application for rezoning to D-18 might have been approved, while the application to rezone to Light Commercial (LC) was denied, so there could have been two different processes. If so, he supposes that it would be up to the applicant to decide whether to appeal the denial of the rezone to LC, or support the recommendation to approve a rezone to D-18.

Chair Satre said part of the code in terms of denying rezone cases has always been silent and there have been previous concerns at the PC level about this as well, so now the proposed ordinance will provide a vehicle for addressing this issue if the Commissioners choose to do so.

Ms. Lawfer likes the fact that the PC would have a recommendation for approval or denial, but the appeal process is quasi judicial. Mr. Hartle said in regards to the Atlin Drive case, if the applicant had been denied a rezone to LC the decision to deny would be a final agency decision, which could be appealed to the Assembly within 20 days of the filing of the Notice of Decision to file a Notice of Appeal, pay a fee, and then the Assembly accepts the appeal and the process gets underway. Ms. Lawfer said at that point the Assembly would make a determination as to whether they are going to uphold the denial, not state that the applicant shouldn't rezone to LC, but go with a rezone to D-18. Mr. Hartle explained that when the Assembly decides to take on an appeal they could affirm, reverse, or modify the decision of the PC. Ms. Grewe said the Assembly has those three options, but when rezone cases moves forward as an appeal the Assembly is supposed to provide deference to expertise of the PC. Therefore, the Assembly has to ensure the PC followed the correct processes by holding public hearings and provide findings, so unless the PC violated those processes the Assembly is supposed to carry forward the PC's decision, which is the issue. Mr. Hartle said 01.50.070 - Standard of review and burden of proof is where the following subsection of code states:

“(a) The appeal agency or the hearing officer 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 or the hearing officer of the basis upon which the decision appealed from was made; or
  - (3) The appeal agency or the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.
- (b) The burden of proof is on the appellant.”

He explained that the burden of proof is on the appellant in relation to substantial evidence in light of the entire record on a rezone case, which is a deferential standard. Where the Assembly does not re-weigh evidence and makes its own decision, i.e., looking at a case anew, the code just states if there is evidence that would support a decision, which is even if they did not make the same one, but if there is evidence that would persuade a reasonable mind to that conclusion it should be affirmed. This is where deference is provided for in the breadth of the substantial evidence in light of the same test that courts use.

Mr. Miller said he was almost swayed by Mr. Bishop, but when Mr. Hartle mentioned Ms. McKibben’s suggestion he believes in such situations when decisions on rezone cases are both in the positive and negative, the PC would be cutting the Assembly out of the potential decision-making process when new evidence could be brought forward. Instead, the PC would be placing the entire burden on the applicant for an appeal case, or they would have to accept the decision by the PC. He does not think the PC should recommend cutting the potential decision-making ability of rezone cases by the Assembly either as a negative and a positive, or just a negative, or just a positive decision on rezone cases by the PC.

Mr. Hartle said, e.g., if he had a lot in town in the middle of a residential neighborhood not located on the waterfront and he applied for a rezone to Waterfront Industrial (WI) and the PC denies his case, he would then appear before the Assembly requesting an appeal so he would have the same shot of an appeal being granted as anybody else. However, in the Atlin Drive case they requested a rezone to LC rather than to D-18, which was denied by the PC because it would have been illegal, and so would a rezone in his scenario of a non-waterfront lot to WI. Because the PC is going to sort out illegal cases such as these, it makes sense to have deference to the CDD staff and the experts on the PC.

Mr. Bishop referred to 49.75.130(2) of the proposed ordinance, stating that this subsection explains the process rather clearly, although subsection (3) is somewhat brief, which does not clearly state that rezone denial cases will not be forwarded to the Assembly. He thinks it would be worthwhile given that they have historically been provided to the Assembly in either case whether they are approved or denied, but they should clearly state that denial of rezone cases would not be moving forward to the Assembly unless appealed.

Mr. Chaney explained that if a PC decision on a rezone case is appealed to the Assembly and the appellant does not have counsel, he asked how the Department of Law handles such situations. Mr. Hartle said Jane Sebens is the Deputy Attorney assigned to the CDD who takes an appeal case on if the appellant does not have a lawyer, or Mr. Pernula, Mr. Chaney, or some other staff member of the CDD might handle it, which has historically taken place many times.

#### Public testimony

Heather Marlow, 11909 Glacier Highway, stated that in a different jurisdiction where she previously worked in regards to the same scenario being discussed tonight is when that particular

PC would deny a rezone case, which was announced to the County Commission that the rezone request had been denied. The County Commission would make a decision as to whether they wanted to review the denial by the PC, which is the same as they would with a positive recommendation. In many cases, the County Commission deferred to the PC and did not take the positive recommendations forward, which is when the appeal process kicked in. There was a timeframe of about 30 days after a PC decision that the Assembly could be informed of the PC's negative recommendation, and then decide on their own whether they wanted to on an appeal of a rezone, and if they chose not to that is when the applicant had the opportunity to appeal for the next 30 days. This type of process worked well in that another jurisdiction.

Public testimony was closed.

#### Commission discussion - None

Staff recommendation: That the PC forward to the Assembly a recommendation to approve the proposed Ordinance.

#### Commission action

Chair Satre said the PC could either move the proposed ordinance forward with revisions they might wish to incorporate, or continue the item with suggestions for staff to bring it forward at a subsequent PC meeting.

**MOTION**: *By Mr. Watson, that the PC forwards to the Assembly a recommendation to approve the proposed Ordinance, AME20120004, including requesting staff to revise 49.75.130 (3) verbiage per Mr. Bishop's suggestion mentioned earlier to ensure it is clearly stated.*

Mr. Pernula said he would add such language stating, "it would not go forward to the Assembly unless it is appealed." Chair Satre requested Mr. Pernula to re-present the ordinance to the PC should there be any questions; Mr. Pernula said he is sure Mr. Hartle will help him figure this out.

Mr. Miller asked if ordinances are law; Mr. Pernula said they are. Mr. Miller spoke against the ordinance. If a rezone case is forwarded to the Assembly with a negative recommendation that is a process he does not necessarily think the PC should do away with. The applicant deserves to have the full measure of such process whether the PC agrees with their vision or not, but if the Assembly agrees even though the PC does not, the Assembly will end up passing an ordinance into law, and therefore doing so would not be illegal. He believes the Assembly should not be cut out of the system.

Mr. Bishop spoke in favor of the motion, stating that rezones are one of the most important decisions the PC makes, so the process should be clearly spelled out by following the same rules and regulations as other permit processes. Doing so would not obstruct the ability of applicants to appear before the Assembly, as it only clarifies decisions based upon legal findings the PC makes on rezoning cases that are presented to the Assembly.

Ms. Grewe spoke in strong support of the motion. Although her first instinct was to suggest letting the Assembly make decisions on denials, but in light of her planning background she believes there are strong reasons to support this motion. The PC has the expertise to make these decisions, there is strong support from other jurisdictions that have codes that read similar to

what staff is proposing, and this body provides land use and planning for this community. The PC recommends plans for adoption, and reviews land use ordinances at the Title 49 Committee level. The PC has staff resources to advise the PC to make their decisions, and Mr. Pernula noted staff's perspective, which brings it in line with other permit processes. The appeal is a process to provide rezone cases to the Assembly, but it defers to the PC who are the experts and she feels confident in this body to carry out that duty and make final decisions. The PC has processes to make decisions with findings based on evidence. Mostly, she thinks the applicants would be provided the full opportunity to take rezone cases to the Assembly, but they also would be provided a full hearing before the PC as well. When the PC reviews rezone cases they review plans and land use laws, and if an applicant wishes to appear before the Assembly on a rezone case they would have to provide a good reason for an appeal, which is when the Assembly would review the PC's processes and findings because it is the job of the Commissioners to uphold the law and CBJ approved plans.

Ms. Bennett supports the motion, stating that the PC and staff are experts and the Assembly should respect that. She is glad that the Assembly is able to review rezone cases if they are appealed, but for them to conduct their own research and delve into such cases does not sound plausible because that would not be respecting the expertise of staff and the PC.

Mr. Medina spoke in favor of the motion, stating that he has no problem with the ordinance as it is written, but he understands Mr. Bishop's desire to make a subsection clearer.

Ms. Lawfer said she supports the motion, stating that she believes if the PC denies rezone cases that they should be presented if they are appealed to the Assembly in a quasi-judicial manner. The onus would be on the PC to ensure when they review rezone cases that the laws and plans are adhered to, which provides for a cleaner format for an appeal, rather than being presented to the Assembly in a political realm type of situation.

Chair Satre agrees with Mr. Miller, although he understands the arguments and support of motion by other Commissioners, as this is the type of ordinance and clarification that many on the PC have previously requested. However, ultimately when the PC is making recommendations on rezone cases they do so through recommendations on ordinances just as they are with the proposed ordinance tonight, but he sees value in preserving the current process by which the PC evaluates ordinances for rezone cases, which is different than the process by which they evaluate permits.

#### Roll call vote

Ayes: Lawfer, Medina, Bishop, Grewe, Bennett, Watson

Nays: Miller, Satre

Motion passes: 6:2; and AME20120004 was approved as revised by the PC.

**BREAK:** 8:16 to 8:21 p.m.

**X. BOARD OF ADJUSTMENT** - None

**XI. OTHER BUSINESS**

Legal Training with John Hartle, CBJ Attorney

Mr. Hartle said he is their lawyer and he gets paid to answer questions of the Commissioners, in particular regarding potential conflicts of interest (attachment A). Violating the Conflict of Interest code is a crime, which is a Class B misdemeanor that has a maximum penalty of 90 days in jail, and a \$5,000 fine. The Commissioners are able to avoid that crime 100%, as they get the free “stay out of jail” card by talking to him and following his advice. They are to contact him with any questions via his direct telephone number at work, which is 586-5340 and his cellular number is 321-2889 (321-ATTY), and he stressed that they do so several times throughout his presentation.

### Conflict of Interest

He strongly recommends the Commissioners read the Conflict of Interest code (attachment A) and telephone him if they have questions. Everybody has conflicts of interest, and there is nothing nefarious about it, as some people because of their work situations are going to have more conflicts than others, but there are methods in which to handle them. There will be certain instances when a Commissioner will work with the Chair, and then possibly have to step down from hearing a case. He suggests when that happens the Commissioners provide the Chair notification of potential conflicts prior to the PC meetings, so the Chair is able to address this in the beginning when the case is ready to be heard.

Mr. Miller said a couple of occasions previously happened when cases were on the Consent Agenda when he has had to step down because he felt he might have potential conflicts of interest, but he did not do so at other times. He asked if the Commissioners should step down every time when this occurs even though it will take longer for them to leave the meeting room. Mr. Hartle said if such occurrences happened he would call them “minor informalities.” However, there is a method in which Commissioners are able to remove Consent Agenda cases to other portions of the Agenda to discuss them, so he thinks the Commissioners should make every effort to step down if they have potential conflicts on Consent Agenda cases. He explained that there have been a couple appeals of cases that were on the Consent Agenda, and one of the reasons to step down is because appellants do not care about the Commissioners, and only care about what they want and generally do not care either about causing Commissioners pain if it’s to their advantage. Mr. Watson said when members of the Assembly step down they do so to the back of the chambers, but the Commissioners exit the room. Mr. Hartle said in many cases the person who has the conflict exits the room, but he does not think doing so is actually necessary. Ms. Grewe said there have been many times that the PC has quickly approved the Consent Agenda when no Commissioners stepped down, but if an applicant were to later find out that a Commissioner had a conflict and did not step down then that could be a found as being the grounds for a potential appeal. Mr. Hartle agreed, as the code states that a potential conflict is a self-reporting requirement, and it is a crime not to step down so it places the onus on each Commissioner to do so. In addition, if the spouse or immediate family members of a Commissioner has conflict on cases it is their conflict as well, e.g. if your spouse or immediate family members are not able to vote that Commissioner is unable to as well per the code.

He referred to 01.45.008 Scope of code (a), which basically states that representatives are drawn from society so they cannot and should not be entirely without conflicts, which is important because the Commissioners are municipal officers. He referred to 01.45.010 – Misuse of official position (a), which he cited, stating that it is a basic rule. A municipal officer may not take or withhold official PC action to affect the matter in which the officer has a personal or financial interest. A definition of some of these terms is found at the end of this code, which they will

discuss later on. He stressed that a member of any board or commission may not deliberate or vote on any matter in which they have a conflict of interest.

Mr. Pernula said legislative matters, as opposed to matters dealing with a particular property, i.e., a major change of the zoning code that a Commissioner may benefit from but the community at large benefits as well, so he asked if such situations might pose conflicts of interest. Mr. Hartle said making determinations of conflicts of interest is driven by particular facts. He referred to 01.45.008(b)(1), which basically states that there is no violation if the interest is of a type possessed generally by the public or large class of persons. For instance, the members of the Assembly set the mill levy rate even though they own houses, which will effect how much taxes they pay, but because it is the type of interest possessed generally by the public or a large class of persons there is no conflict. Mr. Pernula said it seems like there could be close calls in regards to determining these types of conflicting situations. Mr. Hartle said if so, staff or the Commissioners should telephone him so he can make such determinations on a case-by-case basis.

He referred to 01.45.020 Gifts, stating that the best approach is for the Commissioners not to take any gifts. He described a situation when he previously received a telephone call from a member of the Assembly when they were out to lunch with another person. That is when the person produced two bottles of wine as a gift, which is when he informed that member of the Assembly not to accept it. He explained that per the code the Commissioners could accept gifts under \$50, but if it is intended to influence their work on the PC then they cannot accept it.

He referred to 01.45.050 Improper representation, stating that the Commissioners are not allowed to represent, advise, or assist another person in bringing a matter before the PC. He explained that an issue in relation to this came up quite some time ago when people approached individual Commissioners to advise or assist them in matters pending before the PC, but they were told not to do so. Chair Satre asked if the Commissioners are able to describe in generalities the process a person might have to undergo for a case to be heard. Mr. Hartle said in generalities probably would be fine, but it could quickly advance to the point where a Commissioner might end up advising or assisting, which they are unable to do on any matter before the PC. Chair Satre stated that when he knows he has to recuse himself from a case, he asked if he would then be able to assist them. Mr. Hartle said he should not because Chair Satre would have a conflict, so then he would be advising and assisting. Mr. Miller said this happens to him a lot due to his type of work so he receives quite a few telephone calls, which he refers to Mr. Chaney. Mr. Hartle added that Mr. Miller and the other Commissioners are able to refer such callers to him as well. Mr. Chaney commented that staff advises and assists people all the time because it's their job. Mr. Watson said there was an occasion at a different forum when a member of the panel stepped down, and then became a speaker on a case. Mr. Hartle said such a situation happened previously with the PC as well. Situations such as those are dubious, but they are not advising, although they are probably assisting another person in the pending matter so they probably should not do so. Chair Satre said it is different if it is a Commissioner's property and permit, which is when they have every right to do so; Mr. Hartle agreed. Mr. Bishop referred to subsection (2), which states that Commissioners are unable to do so if they have a personal or financial interest, but if not, then they would be allowed to, which he previously did not think was the case. Mr. Hartle said if it is without compensation, but the circumstance he previously mentioned was with compensation. He still thinks it is dubious to advise or assist another person, which is due in part to other sections of the code that they have not yet discussed. Mr. Bishop said it appears there is a bit of a gray area because the definition of "personal

interest” is fairly broad. Mr. Hartle said “personal interest” is a nebulous term so it is difficult to define.

He referred to 01.45.360 Definitions, and cited the definition for “financial interest.” He explained that if a person was a former employee of an entity they would have had a professional relationship where they received previous compensation, or they might expect to receive compensation in the future as well. There is no timeframe on the “has received compensation” in the past, which he believes should have been changed to six years like the Municipal Statute of Limitations, but it was not.

Ms. Lawfer said she has been involved in the Parks & Rec planning for Marine Park and the Fishermen’s Memorial so people tend to approach her when she is walking through A&P and they ask her questions about those projects, which is a gray area that gives her concern. Mr. Hartle said if those projects are not pending before the PC, the question is what is a “matter” because the Commissioners are unable to make a decision with respect to a “matter,” which will have to be determined on a case-by-case basis. One end of the continuum is if a “matter” is important that will be taking place fairly soon when the PC will be holding a substantial discussion on it, and the other end of the continuum is if the “matter” is not important and is far off and the PC will only be holding minor discussions on it, which is when the Commissioners are going to have to use their judgment or telephone him to discuss those specific situations. They are also able to inform people that their lawyer says they are unable to talk about certain cases. Chair Satre said when the Commissioners are approached they are able to ask that person if they have an application pending with the CDD or if they expect to submit an application soon, and if the answer is in the affirmative no discussion should take place.

Mr. Miller said the definition of “financial interest” is rather shocking because over the past six years he has completed about 1,000 jobs in this community, but he is unsure if he is able to remember all of them. Mr. Hartle referred to 01.45.008 Scope of code, stating that is where he determines whether “financial interest” is insignificant, possessed generally by the public or large class of people, or if his actions or influence would have an insignificant or conjectural effect on the matter type of exceptions.

He referred to 01.45.360 Definitions, and cited the definition for “personal interest.” He said it is difficult to state what a “material advantage” might be for, including “patronage, or advancement.” He explained that, e.g., this would apply if you were the person who brought in the Kensington Mine and created jobs for a specific group or organization, or if they had a fiduciary duty by serving on a particular board, although non-profits are exempt and that took place about 10 years ago. Chair Satre asked if Mr. Hartle has examples of when decisions have been appealed or complaints filed on either the Assembly or PC level where this has come into play. Mr. Hartle said none come to mind, but they keep a log in the form of a spreadsheet of advice they have provided, which he offered to research. In terms of non-profit organizations, there was a member of the Assembly who served on such a board and wanted to be able to vote on the City budget, which is when the non-profit exemption was added to this portion of code.

Chair Satre stated that recently a Commissioner had a fairly minor conflict and the fellow Commissioners did not perceive that as being major, so the PC allowed them to hear the case. Mr. Hartle said the PC is allowed to do so, because there has to be a substantial conflict to require a Commissioner to be recused, but the body is the ultimate decision maker in such cases. Chair Satre asked if a Commissioner is required to state what the conflict is prior to stepping

down. Mr. Hartle said they have to provide a reason why they are doing so for it to be reflected in the record should someone later wish to appeal the PC's decision. Chair Satre said if a Commissioner thinks they have a conflict they probably do, but if they are unsure they should call Mr. Hartle as soon as possible for a determination before the PC meeting, so he can make adjustments beforehand. Ms. Grewe said many of the nine Commissioners are active in this community of 30,000 people so certain Commissioners are going to have conflicts more than others, but if they do so all the time then maybe they should not be serving in the PC because there are 29,991 other residents that could serve. Chair Satre said the greatest conflicts are generally when Commissioners are employed by engineering or construction firms, or if they are an attorney because they do so much work on major projects in the community. Mr. Hartle said at times he feels that the Assembly takes the wrong approach, e.g., appointing someone from Goldbelt to the PC, which meant that the Commissioner had to step down when any Goldbelt projects were heard by the PC, which basically ended up being "no" votes so Goldbelt ended up having to obtain five affirmative votes from a pool of eight Commissioners if all of the were in attendance. Even so, Goldbelt's way of thinking was that they wanted a representative on the PC, but doing so ends up being counterintuitive because it achieved the opposite of what they expected.

#### Rules of Order

Mr. Hartle referred to Rules of Order (attachment B) on page 7, specifically Rule 12. Reconsideration, stating that he highly recommends that the Commissioner read, understand, and use it because this is what makes for better decisions by the PC. When a case needs to be held over, or it is moving along too fast, or if a Commissioner has particular questions they want answered, they are able to provide Notice of Reconsideration. He explained that any member after a vote at the same meeting could provide Notice of Reconsideration, which will serve to bring the case back at the next meeting. At the next meeting when that case comes back up, the PC will vote as to whether to reconsider it, which takes five affirmative votes. If this is achieved, the case is back before the PC exactly as it was right before the vote at the last PC meeting, so they are able to do anything at that time that they could have done at the previous PC meeting, i.e., continue their deliberations, re-open public testimony, hold it over, amend it, defeat it, pass it, send it to committee, and so on. Only one Notice of Reconsideration can be applied per case. Chair Satre said this issue has been key, as there was a time after a case was voted on, and then later on in the meeting during a break a Commissioner stated that they did not feel right about what took place, which is when that Commissioner provided Notice of Reconsideration. Therefore, if a Commissioner ever has questions about a vote or deliberation process, he encourages them to provide Notice of Reconsideration in order to give proper consideration to such cases that should be brought forward to the next PC meeting. Mr. Hartle said doing so potentially saves appeals, but even if such cases ends up being appealed it makes that process go much better.

Mr. Medina said it is somewhat foreign to him that seconds are not required to motions. Mr. Hartle said it makes for a quicker and smoother process at PC meetings. He explained that he worked for the legislature for many years and they use Mason's Manual instead of Robert's Rules of Order, and seconds to motions are not required under Mason's Manual, including that many PC motions are concluded under unanimous consent. The decision not to require seconds to motions was made when the rules were adopted, and the Assembly has the same rules as well. Mr. Medina said when the eagle nest ordinance was up for a vote the motion was made in the affirmative, and then the Commissioners voted to deny it, but he thought that the maker of the motion had to vote in favor of it. Mr. Hartle said that is not the case, and the same is true for

Notice of Reconsideration. He explained that in the old days they were required to vote the opposite way of what was decided in order to provide for Notice of Reconsideration, which lead to strategy voting, but now any Commissioner can provide for Notice of Reconsideration whether they are on the winning or losing side. The Assembly currently provides a motion to move case "X", which is made in the affirmative, and then they ask for a "no" vote. The Assembly used to sit as the Board of Equalization on property value appeals, so on an appeal, which is a lot like a permit, they would make a motion to grant the permit, and then state that they were not convinced so they are able to ask for a "no" vote. He explained that if they make a motion to deny a permit with only eight members present and end up with a 4:4 vote, they would have backed themselves into approving that permit. Therefore, motions need to be made in the affirmative meaning that if the PC garners a sufficient number of votes they have changed the status quo, but if the motion fails then they are in the same status quo as before the motion. Therefore, when they make a motion in the affirmative with only eight members present and they end up with a 4:4 vote, the applicant would have no permit because the motion would fail because in order to grant the permit there has to be five affirmative votes. Mr. Medina stated that if Commissioners making the motion in the affirmative asks for a "no" vote it would be more helpful to ensure that all the Commissioners know what they are voting on. Mr. Hartle said he heard Chair Satre restate the motion prior to calling for the vote on a previous case, which is helpful for clarification purposes and is one of the jobs of the Chair. Chair Satre commented that if any Commissioner feels as though they do not understand the motion or are somewhat confused, they should bring this to his attention so he can clarify such matters.

Mr. Chaney said there have been requests by members of the public to participate telephonically in PC meetings, although Rule 13M states that they have to be present with a Commissioner while participating telephonically. He asked if it is possible for the PC to make that determination, or whether doing so is out of the question. He explained that when the PC heard a previous case a member of the public was disabled so attending in person would have placed a huge burden on them. Mr. Hartle said staff can make such recommendations to the PC, and the body might decide to suspend Rule 13M when they believe it would be appropriate in certain situations. Chair Satre said there were instances when applicants requested to participate telephonically, i.e., when flights weren't flying, etc., and the PC used their discretion in those instances, although he was unaware that a member was required to be present with a Commissioner while doing so per Rule 13M.

#### Making a record

Mr. Hartle stated that in making a record from time to time somebody will appeal a case, and the CDD will get the record together, and sometimes they will have a transcript. A long time ago it was really painful to go through transcripts word-by-word to view what was or was not said, and at times there were portions they were unable to understand at all. He said the real record is being recorded, so when they are referring to exhibits and attachments the Commissioners and staff should do so by page number, including calling out the names of them, not "see this" because that provides no information should the case be appealed. The CDD staff almost always knows which cases are going to be appealed beforehand so they allocate extra resources for such applications, and he is requesting the PC to do the same by stating their views and asking questions of the applicant to ensure all the facts are clearly stated on the record. This includes when the PC is asking questions of people providing public testimony on cases to ensure the facts are clearly provided on the record as well. If the PC does this, it will make the decision of the PC stand up on appeals because it is a "substantial evidence" test that will take place by the Assembly.



Chair Satre said he finds it to be very helpful for the record when an applicant is asked if they agree to all of the conditions of the permit, and after that question is answered is when the PC is able to build a case for their decision. If he feels a case is going to be appealed, he provides every Commissioner a chance to elucidate their reasons why they might be making certain decisions. In doing so, it makes it easier for Mr. Hartle to build an appeal case to defend the PC's decision before presenting it to the Assembly. However, if the PC simply takes testimony and makes a motion and there is no objection to it, then they provide very little on the record other than the information in the packet on such cases to defend the PC's decision.

Mr. Hartle said it was great, such as tonight, when a motion was made and each Commissioner stated their reason for either supporting it or not for the record before a final vote was taken.

Mr. Watson stated that after he started serving on the PC a decision on a case was appealed, so he attended the appeal process by the Assembly and has not missed any appeal cases since. During those appeals, he noticed that what ends up being provided to the Assembly during appeal processes is sometimes decidedly different than what he thought he said during the actual PC meeting, so it is interesting to hear his own words coming back at him. The Assembly never quotes any of the Commissioners directly, but he was able to pick out his statements from the record.

Chair Satre said when the PC meeting packets are rather large it is easy to ignore reading the minutes and he is guilty of not doing so at times, but on cases that could be contentious he requests that the Commissioners review what they said to ensure it is accurately reflected before the minutes are approved. Mr. Hartle added that even if the Commissioners choose to review only their comments and not the entire set of minutes, it would still make for a better record.

#### Open Meetings Act

He said the Open Meetings Act applies to the PC, its committees, and subcommittees. The Commissioners are not to talk about cases when they are not convened in a PC meeting. If there is no quorum the Commissioners are unable to talk about issues, hear staff reports, or informational items, and they can only reschedule the PC meeting date or try to obtain a quorum.

Mr. Bishop asked what determines a quorum of a subcommittee. Mr. Hartle said a quorum would be the majority of the subcommittee unless the rules say otherwise.

Mr. Medina asked what constitutes a quorum of the PC. Ms. Lawfer said five Commissioners. Mr. Medina stated that if five Commissioners attended an Assembly meeting, he asked if that constituted a quorum of the PC because he has thought about attending Assembly meetings although he knew there would be other Commissioners in attendance as well. Mr. Hartle said the Open Meetings Act states that they are unable to make a prearranged meeting and talk about business. Chair Satre stated it is possible that five or more Commissioners will attend large public events, e.g., at Centennial Hall where they are scattered throughout the crowd, which would not be considered as constituting a quorum of the PC. Mr. Hartle commented that this is true if those Commissioners are not talking about PC business while grouped together at such events.

#### Ex parte communication

Chair Satre requested Mr. Hartle to discuss ex parte communication. Mr. Hartle said when the PC is sitting in a quasi-judicial mode they are applying the law to a set of facts in considering permits, so they are unable to have ex parte contact outside the record of PC meetings. This is unlike when the PC is sitting in a legislative mode, such as they were tonight while they were making a recommendation on a proposed ordinance when the Commissioners could have talked to anybody they wanted to. He realizes this is a small town and the Commissioners are going to run into people who do not know these rules, which is when they are to simply state that their lawyer says they are unable to do so. He said this often comes up in relation to conducting site visits of proposed projects, which he has mixed feelings about. He explained that the Commissioners gain quite a bit of insight while viewing a site in regards to traffic, height, noise, light, drainage, and so on, but they are not to talk to the property owner in such instances.

Ms. Grewe said she has driven on public roads conducting site drive bys and she does not talk to anybody, but it is amazing because no matter how well she thinks she knows a neighborhood she still tends to gain additional insight. Even so, she was talking to a Fairbanks North Star Borough Commissioner who said they were unanimously advised not to do so. Their reasoning was because they felt that Commissioners who viewed certain sites had access to information the other Commissioners did not. Mr. Hartle said he has also heard this before, and there is something to be said for it, and therefore if certain Commissioners conduct site visits they should share what they viewed with the PC so it is made part of the record.

Chair Satre said at a previous American Planning Association convention there was a discussion by many Commissioners present that they had legal folks that advised them not to conduct site visits. Even so, he believes that if the Commissioners consider conducting site visits by not talking to the owner or neighbors to view a property in the same manner as any other member of the public could also do, it would be to the advantage of the PC when dealing with certain permits.

#### The Thane Neighborhood Association vs. CBJ

He recommends the Commissioners read this case law (attachment C). He explained that this was a PC case for a large mine permit that was granted, which was appealed to the Assembly and they approved it. It was appealed to the Superior Court who approved it. It was appealed to the Supreme Court, and this document is the opinion they provided on this appeal case. It is still a good case law for the State of Alaska, which they have cited a few times, and everybody has to take this case law into account and follow it. The main aspect that took place that caused the problem was based on strategic decisions that were made. The PC approved the mine permit, and did not approve the tailings dam. The opinion states, "The proposed dam will be 332 feet high and 750 feet long. If the mine goes into production 100 million tons of tailings are expected to be produced and pumped into the pond," but the tailings dam was left out of the permit. Knowing what they know today, he does not think this will happen again. The Supreme Court stated that if the PC segments the decision by phasing it and approves it in pieces they are not going to obtain a full view of the cumulative impacts of the whole project. If the mine had that permit in hand they would have been able to go to the bank to obtain money to start to develop the mine, and then if they were to come back and apply for a permit for the tailings dam it would be a lot harder for the PC to deny such a permit because they would already have momentum, and in this case they already spent hundreds of millions of dollars. That was even when the evidence stated that the water coming out of the dam would not meet state water quality standards. Another aspect the PC did was to place as a condition on the mining permit that they had to meet state and federal water quality standards, but the Supreme Court said they cannot

substitute conditions for proper analysis if the information is available even if at times it is going to cost money to obtain it. Chair Satre commented that when the PC is permitting a project they are unable to leave out an integral portion of it.

Mr. Pernula said based on that decision, when the Juneau Assess Road was presented to the PC they denied that application stating that they only analyzed a portion of it to Slate Creek Cove. When that permit was later presented to the Assembly, they took the opposite view stating that the road has always been built in segments so the entire portion to Slate Creek Cove could stand on its own. He asked if this would be considered as neglecting the analysis of the entire cumulative impact of the entire road, or were they to view it as a stand-alone project. Mr. Hartle said he found case law in relation to that application that states that they can look at that as a stand-alone project because roads are inherently phased because you start at one end and build them. Today that road goes a certain distance, and if they built the project it would go further, and then if they added onto the project after that it would go even further. If they look at I-5, there is no way they were going to build that entire highway at once, which was built in segments that they analyzed as a phased or segmented type of project.

Ms. Grewe said there was a time when the PC made a single decision on a permit, but she knew a larger project was involved so the applicant was going to reappear before the PC later on. Even so, former Chair Gladziszewski informed the Commissioners that they were unable to talk about the larger project because they had to focus on the permit at hand. Doing so somewhat bothered her because she felt that the PC should also be taking into consideration the larger project for the community at large, so she believes that to be part of the phasing problem. For instance, former Commissioner Waterman was the only no vote on a case regarding increasing the height of the Alaska Mental Health Trust Authority (AMHTA) building, but she voted yes even though she did not understand the whole plan for the Capitol Complex and what the AMHTA had in mind for their adjacent properties. She feels it might be negligent to always say that an application is only about a particular issue when they know it's connected to a larger project, which might not provide due justice for the community. Mr. Hartle said he does not know the facts of that particular case. As an example, if the PC were to approve a building and not parking lot, it would be phasing if the PC were to approve them separately, but approving a height variance to the AMHTA was not granting a permit for the whole building. This case law concludes that phasing a project by permitting it in stages is disfavored, as the PC must consider the probable cumulative impacts of all anticipated activities that would be an integral part of it. The Commissioners have to look at how linked together the parts are of a case, i.e., they cannot have a dam that is going to process 30,000 tons per day without a tailings facility because the tailings dam is an integral part of that project. Chair Satre stated that if Ms. Grewe or other Commissioners have questions along these lines, they should contact staff as soon as possible prior to PC meetings to address phasing issues for certain cases so staff would be prepared to speak about them to the PC. He explained that this is so the Commissioners do not have to go back to the "drawing board" or possibly continue cases, such as when these types of instance occurred late at night during previous PC meetings.

Mr. Watson said the longer he serves on the PC he recognizes more folks. Therefore, he knows that certain projects are developed in the manner that they were permitted, but not so at other times. Even so, it has been his practice to disregard that in the process of evaluating new applications, so the questions of the applicant should be restricted to the application in front of the PC. However, the Atlin Drive case is when both the PC and the Assembly consistently asked the applicant what his intentions were for the property, but the applicant did not answer, which

left doubt in their minds. For that purpose, he tries to remain focused on each individual application, and if he finds that something isn't right he might probe further at that point. Mr. Hartle the Commissioners have elements in the code for what each applicant has to meet, and if they do so the PC has to grant the permit, and at the CDD staff level they can be more skeptical and request additional information, proof, or evidence to back up their case if an applicant has a specific history. He has been asked before if the PC is able to deny a permit based upon a violation of a past permit, and the answer is generally that the Commission cannot. In addition, the PC can ask if a particular proposal is a phase of a larger project. However, e.g., a subdivision might have a Phase I and Phase II that might not necessarily be integrally linked, as Phase II is not required by Phase I, which was not the case with having a mine without a tailings dam because you cannot have one without the other.

Mr. Miller said one of the rulings was due to the fact that a reasonable analysis could have been completed ahead of time, so if such analysis is done for other projects it might be determined that certain parts are not integral, which could be permitted as separate components of a whole project. Mr. Hartle said this is right, as the case law states, "allowing consideration of cumulative impacts after a portion of [a] project is already approved" swings the balancing in favor of a project approval. He explained that if the developer is required to spend money to conduct an analysis upfront then portions of the project could be built in phases, including being approved in phases if they have looked ahead as to how they are related. In addition, the case law speaks to three different guiding principles, as follows: "First, unless a specific statute or regulation allows phasing, phasing is disfavored. Where a statute is silent or ambiguous phasing should generally not be allowed. Second, phasing is prohibited if it can result in disregard of the cumulative potential environmental impacts of a project. The more interlinked the components of a project are and the greater danger the danger that phasing will lead to insufficient consideration of cumulative impacts, the greater the need to bar phasing. Third, conditions and stipulations may be used to address unforeseen occurrences...but permit conditions may not serve as a substitute for an initial pre-permitting analysis that can be conducted with reasonably obtainable information." Therefore, for the PC to place a condition on the mining permit stating that they must meet the state water quality standards was a substitute for the initial pre-permitting analysis, including not determining whether there were integral components significantly interlinked to other parts of the project.

Ms. Lawfer said the PC recently reviewed a case where the CBJ Engineering presented an application to install road improvements to Berners Avenue, and the Professional Plaza access was discussed. However, the initial permits approved for the Professional Plaza has a condition that states that they are not permitted to have access onto Berners Avenue, but they have now doubled in size and wish to do so. Mr. Hartle said quite sometime ago an access was provided from the Professional Plaza area onto Berners Avenue, which ended up being bermed over. Ms. Lawfer said the Professional Plaza applicant intends to propose for that access to be provided once again, but at some point in the record that applicant was informed that they were only going to have one access point, which is not via Berners Avenue. Mr. Hartle said applicants are allowed to amend permits, and if they meet requirements of the code conditions could change. Ms. Lawfer commented that she understands, but legitimate questions such as these have to be asked regarding that case.

Chair Satre stressed that especially in relation to potential conflict of interest and ex parte communication issues, the Commissioners should telephone Mr. Hartle with their questions in order to obtain the right answers.

## **XII. DIRECTOR'S REPORT**

### **Comp Plan update**

Mr. Pernula said the CDD planners reviewed the Comp Plan and prepared reports on the recommended updates that should be done within a week or two. He asked how the PC intends to review the Comp Plan update, i.e., provide it for review by the Committee of the Whole (COW), subcommittee of the PC, or at regular PC meetings because he intends to provide three or four chapters at a time. Chair Satre asked if the Commissioner's preference is via COW meetings, to which they agreed. Mr. Miller requested staff to provide all the material related to the update of the Comp Plan to the Commissioners ahead of time as soon as it is ready, not directly before those scheduled COW meetings; Mr. Pernula offered to do so. Mr. Bishop asked if staff provided a peer review of all their recommended changes of the Comp Plan. Mr. Pernula said pretty much, but there are a few remaining clean-up items in relation to transit oriented development, immediate changes to densities, and so on, which are taking a bit of extra time.

### **Avalanche Mitigation Study & AJ Mine Related Water Study**

He said these new studies were provided to the Assembly yesterday and both of them are very important documents, but he only has one copy of each. The Avalanche Mitigation Study refers to the 1972 and 1992 studies, and the new study states that the 1972 study is better than the 1992 study because it cuts way back on some of the avalanche hazard areas, which the new study states is inaccurate. The new study also provides quite a bit of additional information in relation to mitigation, and so on. The Director of CBJ Engineering Rorie Watt presented the AJ Mine Related Water Study to the Assembly/COW. Ms. Lawfer said links to those studies can be found on the on the City's website, and Mr. Watt intends to provide a public review of them on March 7, 2012, but she will not be in town at that time, which is why she attended that Assembly/COW meeting when they were presented. Also, the Assembly/COW will be further reviewing those studies on April 9, 2012, with a public comment period on either March 28 or 29, 2012, although she does not recall which of those two dates it actually is. Ms. Bennett commented that she intends to attend the March 7, 2012 meeting.

### **Strategic Plan for the CDD**

Mr. Pernula said the plan consists of about 15 pages, which is a summary of all the projects staff is working on, including mission and vision statements. A summary table provides a list of the projects as well, which he handed out to the PC. He said the plan is about 99% complete, but he wants the PC to review it now because it contains their list of the goals as well in relation to how they are being addressed by staff's projects. He noted that the column to the left provides a list of various projects and the "P" stands for the Planning Division, "B" is the Building Division, and "A" is the Administrative Division of the CDD. The planners do most of the long-term projects, and the building inspectors and administrative staff do more of the short-term and day-to-day projects. The first column after the listing of the projects state the primary staff responsible for each project, and many lists secondary staff who are working on some of them as well. The CDD has seven strategic goals being accomplished by the projects, which includes a second page. The third page lists the PC goals, which the Commissioners reviewed earlier this year, e.g., the Subdivision Ordinance review, the North Douglas and Pederson Hill rezoning, and other long-term goals. The next column he is reserving for multi-year projects, which will reoccur every 2, 3, or 4 years. The next column lists the priority levels, which are all high, but he had to show that some are higher than others. The next column lists the completion dates he reviewed with all the planners, and he noticed that July and August 2012 have many of them so

they are going to be very busy. He noted that the upcoming area plan for Auke Bay has not yet started. He believes many projects can be completed this summer, and then as the construction season begins to wind down he would like to incorporate addition work on the plan around October 2012.

Mr. Bishop said a while ago Ms. Grewe requested to include an online communication aspect that dictates active permits and information related to them on the website, which he strongly feels is necessary. Mr. Pernula referred to the Administrative Division, A-2 Project, Interactive Map in the Strategic Plan, so that project is currently being worked on by Mr. Chaney, the cartographer, and MIS staff who believes it will be completed by April 2012, but he provided a completion date a bit beyond that of May 2012 in the plan. He thinks this is a great project, and he viewed similar websites of other cities, which he found to be very good. Chair Satre requested the Commissioners to provide any questions or further comments they may have directly to Mr. Pernula on the Strategic Plan for the CDD.

### **XIII. REPORT OF REGULAR AND SPECIAL COMMITTEES**

Mr. Bishop said the Lands Committee met yesterday to review Title 53, and ended up forwarding it to the Assembly for approval. Chair Satre asked if it remained relatively in the same format the PC recommended to that committee. Mr. Bishop said it was fairly consistent, including that the committee requested a few policies be further clarified. In addition, the Lands and Resources staff made it clear to the committee that the intention is to review the policies more in depth later on so this particular review was more process related.

Mr. Watson said the Public Works & Facilities Committee met yesterday to review the Berners Avenue application by CBJ Engineering. The PC recommended approval of that application to the Assembly subject to the conditions, which were also approved by the committee. CBJ Engineering believes they would have funds to install lighting for that project, and that case was not necessarily the most popular decision by engineering, but they conceded that they could do the project and make it work. In addition, the topic mentioned about the Professional Plaza proposing access onto Berners Avenue will be presented to the PC before too long, which was included in the committee meeting packet and the applicant spoke about the importance of doing so. Further, John Kern, the Capital Transit Superintendent, provided a presentation stating that there would be no changes made to the bus routes. Mr. Kern asked for funds to be allocated to conduct a study, and Mr. Wanamaker requested Mr. Kern to re-appear before the committee with a scaled-down request because Capital Transit already spent a great amount of money in 2008 on a transit plan. He noted that certain members of the Assembly are interested in adding a transit route on Riverside Drive because of the high school, swimming pool, grade school, and the indoor activities building at the back of the Dimond Park, but for some reason Mr. Kern is reluctant to make such a change. Chair Satre said he also serves on this committee and he requested Mr. Kern to provide that same transit update to the PC because this body is contemplating transient oriented development, and Capital Transit is a key aspect of that. He requested staff to follow up on this request, and schedule that transit presentation on the PC Agenda as a future informational item. He stressed that if true concerns are taking place with transit operations while the PC is reviewing density of certain areas in terms of transit oriented development, the Commissioners need to know. The Commissioners also have to know what type of transit challenges exist while they review the Comp Plan, especially if there are recommended updates to the transit system. Ms. Bennett commented that it is possible the PC might be able to encourage Capital Transit to expand their operations somewhat.

[The February 6, 2012 Lands Committee meeting minutes were provided by staff to the PC for their perusal.]

**XIV. PLANNING COMMISSION COMMENTS AND QUESTIONS - None**

**XV. ADJOURNMENT**

**MOTION:** *By Mr. Watson, to adjourn the PC meeting.*

There being no objection, it was so ordered and the PC meeting adjourned at 10:00 p.m.