Appeal to the Zoning Board of Examiners and Appeals (ZBEA)

Municipality of Anchorage
Planning Division
Community Development Department
PO Box 196650
Anchorage, AK 99519-6650

APPELLANT*		APPELLANT REPRESENTATIVE (if any)	
Name (last name first) June, Marc		Name (last name first)	
Mailing Address 8801 Upper Dearmoun Rd., Anchorage, AK 99		Mailing Address	
Contact Phone – Day: 277-5234	Evening: 345-2726	Contact Phone – Day:	Evening:
Fax: 277-9120		Fax:	
E-mail: Junelawyer@cs.com		E-mail:	

*Report additional appellants on supplemental form.

RECEIVED
OFFICE OF THE
JUN 21 2018
MUNICIPAL CLERK

APPEAL INFORMATION

Decision Being Appealed (include case or permit number if applicable):

See attached June 11, 2018 memorandum/email/correspondence in Case 2018-0052

Date of Action: June11, 2018

Legal Description of Property Involved:

N 1/2, SE 1/4, Sec. 25, Township 12 N, Range 3 West

Relationship of Appellant to Action: ☐ Petitioner ☐ Government Agency ■ Other Party of Interest (see AMC 21.14.040)

Detailed and Specific Allegation(s) of Error: (use additional sheet(s) if necessary)

See Attached Statement of Error
Note: Planning Director Decision substantially affects other interested parties and potentially other rezoning applicants.

I hereby certify that (I am)(I have been authorized to act for) a party of interest in the decision being appealed in accordance with the definition in Title 21 of the Anchorage Municipal Code of Ordinances. I understand that the assigned hearing date is tentative and may have to be postponed by Planning Division staff or the Zoning Board of Examiners and Appeals for administrative reasons.

Marc June — 6/21/18

Signature ■ Appellant ☐ Representative (Representatives must provide written proof of authorization) Date

MARC JUNE

Print Name

Accepted by:	Poster & Affidavit:	Fee:	Case Number:
Cassie Marbutts		1,080.00	2018-0085

ZBEA Appeal (Rev. 01/15) Front – "NEW" CODE

STATEMENT OF ERROR

1. Knowing that Parties of Interest had taken the position that AMC 21.3.160.D.10 required rejection of the Case 2018-0052 rezoning application because of previous denials of the Case 2017-0072 rezoning application seeking substantially the same rezoning, the Planning Director committed error in interpreting AMC 21.3.160.D.10, including but not limited to the term, "denial," without notice to Parties of Interest or allowing an opportunity to be heard. Failure to do so was an abuse of discretion.

2. The Director of Planning committed error in determining that the "plain meaning" of the term, "denial," for purposes of AMC 21.3.160.D.10's waiting period for reconsideration did not include the Planning and Zoning Commission's recommended denial of Case 2017-0072 on July 10, 2017, the Planning and Zoning Commission's denial of Petitioner's Request for Rehearing on October 2, 2017, applicant's failure to request Assembly action, and disapproval of the application pursuant to AMC 21.3.160.D.7.

3. The Director of Planning committed error in determining that the term "denial" for purposes of AMC 21.3.160.D.10's waiting period for reconsideration required specific Assembly action denying a rezoning application by failing to consider that AMC 21.20.080, the equivalent code section under "old" Title 21, did not require specific Assembly action for purposes of imposing a waiting period for reconsideration on subsequent rezoning applications.

4. The Director of Planning committed error in determining that a rezoning applicant's failure to request specific Assembly action following Planning and Zoning Commission denials of the rezoning application did not constitute "denial" for purposes of AMC 21.3.160.D.10's waiting period for reconsideration.

5. The Director of Planning committed error in determining that a rezoning application "deemed disapproved" due to the applicant's failure to request action by the Assembly as required by AMC 21.3.160.D.7, was not "denial of a rezoning request" for purposes of AMC 21.3.160.D.10's waiting period for reconsideration.

6. The Director of Planning committed error in determining that AMC 21.3.160.D.10 did not bar acceptance of the rezoning application in Case No. 2018-0052.

7. The Director of Planning committed error in determining that prior rezone applications for the purpose of allowing less than the 4 acre minimum lot size under existing R8 zoning and permitting of 32, 30, and 26 lots were not

substantially the same rezoning as the rezoning application in Case No. 2018-0052 seeking permission for up to 45 lots of 1.25 and 2.5 acres in size, later reduced to a special limitation of 25 lots.

MUNICIPALITY OF ANCHORAGE
MEMORANDUM

DATE: June 11, 2018

RECEIVED
MAY 30 2018
PLANNING DEPARTMENT

TO: Planning and Zoning Commission

THRU: Michelle McNulty, Director, Planning Department

FROM: Francis McLaughlin, Senior Planner

SUBJECT: Case 2018-0052, Supplemental Information

The purpose of this memo is to confirm that Case 2018-0052 does not violate AMC 21.03.160, *Waiting Period for Reconsiderations*, which states:

> Following denial of a rezoning request, no new applications for the same or substantially the same rezoning shall be accepted within two years of the date of denial, unless denial is made without prejudice.

There have been two previous rezoning applications of the property, but neither of the applications was denied. In 2016, the Assembly postponed indefinitely Case 2014-0219. In 2017, the Commission recommended denial of Case 2017-0072, and the case went no further. Note that the Commission makes recommendations to the Assembly regarding rezoning cases, but does not have authority to decide them. Therefore, Case 2018-0052 may proceed as scheduled.

From: "McLaughlin, Francis D." <McLaughlinFD@ci.anchorage.ak.us>
To: "'Donald W. McClintock'" <don@anchorlaw.com>, "'Heidi A. Wyckoff'" <heidi@anchorlaw.com>
Cc: "'Becky Lipson'" <becky@anchorlaw.com>
Bcc:
Date: Thu, 31 May 2018 17:35:25 +0000
Subject: RE: Lewis & Clark Proposed R-10 Rezone Subdivision

Heidi, Don, and Becky,

Attached is a short memo from the Planning Dept to the Planning and Zoning Commission clarifying that previous rezones at the Lewis and Clark site were not denied. Therefore, the new rezone case may proceed.

It's easy to get the old code and new code confused. The first rezone case was submitted under the old code. The last rezone and the latest one were submitted under the new code.

Francis

Francis McLaughlin

Planning Department

343-8003.

. . . .

From: "Donald W. McClintock" <don@anchorlaw.com>
To: "McLaughlin, Francis D." <McLaughlinFD@ci.anchorage.ak.us>, "Heidi A. Wyckoff" <heidi@anchorlaw.com>
Cc: Becky Lipson <becky@anchorlaw.com>
Bcc:
Date: Fri, 25 May 2018 22:19:18 +0000
Subject: RE: Lewis & Clark Proposed R-10 Rezone Subdivision

Thank-you for your quick attention.

Have a great weekend.

Don

Donald W. McClintock

Ashburn & Mason, P.C.

1227 W. 9th Ave. Ste. 200

Anchorage, AK 99501

(907) 276-4331 (voice)

(907) 277-8235 (fax)

www.ashburnandmason.com

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. . . .

From: McLaughlin, Francis D. [mailto:McLaughlinFD@ci.anchorage.ak.us]
Sent: Friday, May 25, 2018 1:52 PM
To: Heidi A. Wyckoff
Cc: Donald W. McClintock; Becky Lipson
Subject: RE: Lewis & Clark Proposed R-10 Rezone Subdivision

Thank you for this. I'll have the director sign a memo defining that this application is substantially different from previous application to put this question to rest. Also, the PZC meeting will be on June 11, not what I said in my previous email.

Francis

Francis McLaughlin

Planning Department

343-8003

. . . .

From: "McLaughlin, Francis D." <McLaughlinFD@ci.anchorage.ak.us>
To: "'Heidi A. Wyckoff" <heidi@anchorlaw.com>
Cc:
Bcc:
Date: Fri, 25 May 2018 19:31:19 +0000
Subject: RE: Lewis & Clark Proposed R-10 Rezone Subdivision

Hi Heidi,

Planning agrees that the R-10 is a different rezone application than previous ones. Many of Mr. June's statements are misinterpretations of municipal code, not just this one. Planning would not have accepted and processed the latest rezone application if it was substantially the same as the previous ones. I will make this clear to PZC at the June 4th meeting. In short, this is a "no brainer", but thank you for the well written explanation and articulation of the correct interpretation of code. I will include your comments in the rezone packet for PZC.

Thank you,

Francis

Francis McLaughlin

Planning Department

343-8003

From: Heidi A. Wyckoff [mailto:heidi@anchorlaw.com]
Sent: Friday, May 25, 2018 11:20 AM
To: McLaughlin, Francis D.
Cc: Donald W. McClintock ; Becky Lipson
Subject: Lewis & Clark Proposed R-10 Rezone Subdivision

Mr. McLaughlin: Please find attached correspondence from Donald McClintock. The original follows via U.S. mail.

Heidi Wyckoff

Ashburn & Mason, P.C.

1227 W. 9th Ave. Ste. 200

Anchorage, AK 99501

(907) 276-4331 (voice)

(907) 277-8235 (fax)

www.ashburnandmason.com

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ASHBURN & MASON P.C.

LAWYERS

LAURA C. DULIC • MATTHEW T. FINDLEY • EVA R. GARDNER • REBECCA E. LIPSON
DONALD W. MCCLINTOCK III • JEFFREY W. ROBINSON • THOMAS V. WANG
OF COUNSEL JULIAN L. MASON III • A. WILLIAM SAUPE

May 25, 2018

RECEIVED
MAY 25 2018
PLANNING DEPARTMENT

Via U.S. and Electronic Mail:

Francis McLaughlin
Municipality of Anchorage
Planning Department
4700 Elmore Road
Anchorage, Alaska 99507
McLaughlinFD@ci.anchorage.ak.us

Re: Lewis and Clark Proposed R-10 Rezone Subdivision
Case No. 2018-0052

Dear Mr. McLaughlin:

Our firm represents the petitioner in this matter. In his letter of May 14, 2018 to you, Marc June raises a legal question that should be addressed by the director in advance of the scheduled public hearing scheduled for June 11, 2018. Below, I outline the reasons I believe his legal objections are misplaced, but note that the issue for interpretation is for the director to decide. It will lead to a far better and more focused hearing on the 11th if this interpretation is provided to the Commission, rather than have it as a matter of debate at the hearing itself.

AMC 21.14.010.A provides:

> A. *General.* The director has final authority to determine the interpretation or usage of terms used in this title, pursuant to this section. Any person may request an interpretation of any term by submitting a written request to the director, who shall

> respond in writing within 30 days. The director's interpretation shall be binding on all officers and departments of the municipality.

Mr. June suggests that AMC 21.03.160.D.10 precludes this application for a rezone to R-10 from being considered. That provision provides:

> *Waiting period for reconsideration.* Following denial of a rezoning request, no new application for the same or substantially the same rezoning shall be accepted within two years of the date of denial, unless denial is made without prejudice.

Mr. June argues that because the Commission recommended against granting the application in the rezone to R-6 S, that the petitioner should be barred from applying for a R-10 rezone. However, Mr. June is wrong for 2 reasons: (i) the prior application was never denied as the petitioner never advanced the request to the Assembly, which is the entity with legal authority to approve and deny the rezone application; and (ii) the R-10 zone is not the "same or substantially the same" zoning as the R-6 zone.

As an initial matter, the interpretation that the denial refers to the action by the Assembly is consistent with the prior provision under the "Old Code." AMC 21.20.080 – provided:

> **Waiting period for reconsideration.** Neither the planning and zoning commission nor the assembly may consider or approve a zoning map amendment if it is substantially the same as any other zoning map amendment initiated within the past 12 months and not approved by the assembly. (Emphasis added).

Clearly under the Old Code a petitioner who received a negative recommendation from the Commission could elect not to advance the request to the Assembly and educated by the proceeding below, submit a new application. That application would not be barred by the waiting period by the clear language of the Old Code. The new language, although worded more simply, does not reflect the intent to depart from this practice, although the waiting period was extended to 2 years.

The language of AMC 21.03.160.D.10, fairly read, addresses the time as running from the "date of denial." The action of the commission is not a denial. The Planning Commission can *recommend* "denial" but only the Assembly has "denial as one of its options for resolution. [1] So that interpretation is the better one both as a matter of precedent and interpretation.

As a matter of this particular application, the R-10 zone is not "the same or substantially the same" rezoning and this determination is within the discretion afforded the Department. The only arguable similarity is both are rural zones. But that is not the litmus test applied by the ordinance, which requires zones be "substantially the same." The R-6 SL applied for in the prior 2017 rezone attempt relied upon the R-6 minimum lot size of one acre per du and provided specific proposed lot layouts for a 30 lot subdivision. The R-6 zone allows single and two family housing.[2] By contrast the R-10 zone is specifically intended to address the "natural physical features and environmental factors such as slopes, alpine and forest vegetation, soils, slope stability, and geologic hazards require unique and creative design for development."[3] Table 21.04-2 dictates a range of lot sizes from 1.25 acres to 7.5 acres depending on the average slope and specific lot coverage and lot width requirements. The R-10 district only allows single family housing. [4]

These are distinct and significant differences that merit an interpretation that an R-6 SL rezone is not the same as an R-10 rezone.

---

[1] AMC 21.03.160.D.7.c ("If the commission recommends denial ...) and under AMC 21.03.160.D.8.c, "denial" is one of the three options available to the Assembly. Although an application that is not appealed to the Assembly is deemed" disapproved," it is significant, that that "denial" and not "disapproval" is the operative language at issue here. If disapproval was intended to be the operative word, it would have been a simple matter to use the same word choice in making the start of the waiting period, such as the "later date of disapproval or denial".

[2] AMC 21.40.020.L

[3] AMC 21.40.020.P

[4] Table 21.05-1

Although AMC 21.14.010 allows up to 30 days for an interpretation, it is requested that this interpretation be submitted in advance of the hearing so the Commission can focus on the pertinent matters before it and not be distracted by this issue. I apologize that we have not made this request earlier, but I only recently became aware of Mr. June's letter. Our assumption is that staff had already made this determination as the pre-application conference would have typically flagged these issues if there was any controversy.

We appreciate your time and request this question be forwarded to the director for resolution.

Sincerely,

ASHBURN & MASON, P.C.

Donald McClintock

June 11, 2018

Municipality of Anchorage, Planning Department
Attention: Francis McClaughlin,
4700 Elmore Road
Anchorage, AK 99507

Re: Lewis and Clark Proposed R-10 Subdivision
Case No. 2018-0052

Dear Mr. McLaughlin:

On Friday, June 8, (possibly over the weekend) you provided additional materials to the Planning and Zoning Commission: previously undisclosed May 25 Developer lawyer correspondence requesting Planning Director agreement that their rezoning application not be barred by AMC 21.03.160.D.10's mandatory 2 year Waiting Period and your June 11 memo initialed by the newly-hired Planning Director granting the request. This last minute filing with no notice highlights the Developer's noncompliance with Title 21's community meeting requirements, the Planning Department's bias/lack of objectivity re the rezoning application, and AMC 21.03.160.D.3's mandatory 2 year Waiting Period barring the rezone application.

Failing to disclose the May 25 correspondence prejudices the public in violation of Due Process rights and, based on past history, appears intentional. Since the original Planning Staff was reassigned, there has been a pattern of Staff not being neutral professionals and, instead, advocating the Developer's position.

This letter is my attempt to respond. The Developer's arguments are belied by the history of rezoning rejections, the history of Title 21, the language of AMC 21.03.160.D.10, and applicable law.

Denial of Rezoning Due to Non-Compliance with Title 21 Procedures

AMC 21.03.160.D.3 requires a Community Meeting before filing a rezoning application. In this case, the "meeting" lasted 12 minutes before terminated by the Developers acting as Hillside Community Council officers.

I have repeatedly raised the issue of the prior Denial, not just in the 12 minutes Community Meeting but also in February 26 and March 1 emails to the Developer before and after the meeting. The Developer chose not to respond. See attached meeting minutes and emails. My May 14 correspondence raised the Denial issue a 4th time. Despite doing

so, the May 25 Staff Report, filed on the same date as the Developer's undisclosed correspondence was received, ignores the issue.

As conceded by the Developer, the 2 year Waiting Period as well as the number of estimated lots should have been addressed in the mandatory Title 21 Pre-Application Conference. However, Staff provides no materials indicating whether the conference even occurred, let alone whether the 2 year Waiting Period was discussed, or subsequent communications between Planning Department Staff and the Developer on the issue.

With the mandatory Community Meeting lasting only 12 minutes and issues as to whether there was compliance with Title 21's mandatory Pre-Application Conference, the rezoning application must be denied.

Rezoning Barred by AMC 21.03.160.D.10's Mandatory 2 Year Waiting Period Following Denial

The Developer's lawyer is correct that whether AMC 21.03.160.D.10's mandatory 2 year Waiting Period following Denial is purely a legal question. Just because the question can only be definitively answered by a court does not mean that the Commission should not make best efforts to answer the question correctly.

This is the Developer's 4th rezone request, with the most recent request denied in July, 2017. Each rezone request raised the identical issue: Will zoning be changed to allow lot sizes less than R8 zoning's required minimum 4 acre lots, an increased number of lots, and greater density. Lawyer arguments cannot change this conclusion that, if not literally identical, this application is, at a minimum, "substantially the same."

The Developer also cannot change this conclusion by not providing a preliminary plat or being specific about plans for size and number of lots. At the 12 minute Community Meeting, the Developer stated that lots would be 1.25 -2.5 acres depending on slope with as many as 45 lots. Relabelling the rezone request as an R-10 rezone subject to later platting does not change these facts, something emphasized by your emails stating there to have been no R-10 rezones or applications where the developer did not disclose the anticipated number of lots, whether by preliminary plat or otherwise. See attached e-mails.

Beyond the rezoning issue being identical, there is no legal basis for arguing that the AMC 21.03.160.D.10 Waiting Period can only be triggered by Assembly action. Ordinances are construed according to reason, practicality, and common sense. Unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, terms are construed according to their plain meaning and purpose. See Young v. Embley, 143 P.3d 936, 939 (Alaska 2006). The plainer the language, the more convincing contrary legislative history must be. In adopting new Title 21, the Assembly was fully aware of the procedures of the existing Title 21. Burke v. Raven Elec., Inc., 2018 WL 2173938 (June 6, 2018).

By eliminating the Waiting Period's reference to Assembly action, the Assembly intended to eliminate past abuses by Developers who, after testing the waters on an initial rezone application, would not appeal to the Assembly and, after the membership of the Commission or Assembly had changed, resubmit the same applications with different labels.[1] The Assembly corrected this abuse by deleting references to the Waiting Period only being triggered by Assembly action.

To the extent that the Developer chooses to rely on the newly hired Planning Director initialing Staff's memo, no deference is given to administrative interpretations conflicting with the plain meaning of an ordinance. Muller v. BP Expl. (Alaska) Inc., 923 P.2d 783 (Alaska 1996). To the contrary, courts presume that amendments to unambiguous laws indicate a substantive change. Kodiak Island Borough v. Exxon Corp., 991 P.2d 757 (Alaska 1999). Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 761 (Alaska 1999). The Developer's admission that AMC 21.03.160.D.10 was amended to omit reference to the Assembly demonstrates that the application is barred by the 2 year mandatory waiting period.

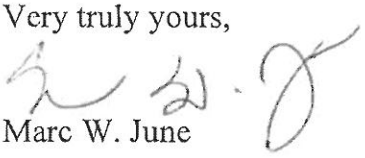
If the Developers wanted to repackage their previously rejected application again, the Developer should have asked that the July, 2017 denial be specifically "without prejudice" as allowed by AMC 21.03.160.D.10. Because they did not do so, the 2 year Waiting Period bars rezoning.

Please make certain Planning Director and the Planning and Zoning Commission is made aware of this response before tonight's hearing.

---

[1] Avoiding the mandatory Waiting Period under old Title 21 was the reason that the Developer did not oppose its being indefinitely tabled so that its second, unsuccessful rezone application would not be barred by the prior version of the Waiting Period, something that was explained to both parties at the time.

Very truly yours,



Marc W. June

cc: Michelle McNulty; Don McClintock

S4 Group
Land Surveying
Land Development Consultants
Subdivision Specialists
Construction Surveying

124 E 7th Avenue, Anchorage, Alaska 99501 www.S4AK.com 907-306-8104

Summary of Community Meeting

Date: 2/28/2018 at the HCC meeting.
Location: O'Malley Elementary School
Subject: Proposed Lewis & Clark R-10 Subdivision

251 mailers were mailed out on 1/31/2018 by first class mail. Presentation provided by S4 Group to provide information and take questions and comments from meeting attendees. There were approximately 30 attendees. Presentation began at approximately 8:43 PM and questioning was completed at approximately 8:55 PM. An invitation was extended for any additional questions to be sent to the S4 Group, LLC. The following is a brief summary of the questioning and discussion:

1) Steve MacDonald – 13130 Jeanne Road (1.03 Acre Lot – R-9 Zoning)
    a. Question: What is the slope of the property?
    b. Response: Slopes of the property vary from approximately 8% to 30%, with the majority of the property being between 9 – 10% to 15%.
2) Unknown Neighbor –
    a. Question: Was this issue brought before this Community Council before?
    b. Response: No. This particular piece of property has been brought before this Community Council, but this is a completely different application for a completely different request.
3) Marc June – 8801 Upper DeArmoun Road (1.14 Acre Lot – R-8 Zoning)
    a. Question: Was the R-6 rezone denied?
    b. Response: It was not approved
4) Tom Dreyer provides contact information for additional questions / comments that might arise.
5) Joan Priestley – 13101 Jeanne Road (1.13 Acre Lot – R-6 Zoning)
    a. Question: You have an R-8 Plat. Has that been abandoned?
    b. Response: The Plat and the Rezone Application are separate paths.
    c. Question: You had 20+ acres of open space set aside in R-8 Plat. Will you have that in the R-10?
    d. Response: This application is for a rezone to R-10. Those types of questions would be addressed at the platting level.
6) Bruce Vergason (HCCC Chair) indicates 2-minute warning because of time limit strictly enforced by O'Malley Elementary School.
7) Joan Priestley – 13101 Jeanne Road (1.13 Acre Lot – R-6 Zoning)
    a. Question: How many lots are you contemplating?
    b. Response: The number of lots would be judged by the slope of the lot. It could be between 5 and 45 depending on several factors.
8) Mark Morrison – 8600 Spendlove Drive (1.03 Acre Lot – R-6 Zoning)
    a. Question: Can you change the grade with a bulldozer to make it flatter?
    b. Response: No. There are several requirements for slope basis determination as well as requirements for clearing.
9) Bruce Vergason indicates that meeting has to be closed. He says that HCCC can invite S4 Group back to a future meeting and reminds that additional questions that may arise can be directed to the S4 Group. Meeting adjourned at 8:55 PM.

Thank you,
Tom Dreyer, PLS, S4 Group

Marc June

From: Marc June <junelawyer@cs.com>
Sent: Thursday, March 01, 2018 9:30 AM
To: tom@s4ak.com
Cc: Marc June
Subject: FW: Lewis and Clark Subdivision

Hello Mr. Dreyer,

Am resending this because of no response to my last email.

Wanted to ask you last night about whether, practically speaking, the same number of lots is ultimately being envisioned or a different number.

Also wanted to ask why you believe the Rezone Application is not precluded by Ordinance 21.03.160.D.10

Would appreciate your response to the above questions as well.

Thanks.

Marc June

From: Marc June [mailto:junelawyer@cs.com]
Sent: Monday, February 26, 2018 9:28 AM
To: 'tom@s4ak.com' <tom@s4ak.com>
Cc: Marc June (Junelawyer@cs.com) <Junelawyer@cs.com>
Subject: Lewis and Clark Subdivision

Hello Mr. Dreyer:

Am not understanding reasoning behind most recent rezone application as I believed you were proceeding forward with Plat as approved by Platting Board and further rezone application precluded by Title 21 for 2 years from date of denial.

Could you please send the proposed R10 rezone and any supporting materials for review prior to 2/28 Community Council meeting?

Has R-10 Rezone application been filed?

Has Pre-Application meeting been held?

Thank you for consideration.

Marc June

Marc June

From: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Sent: Monday, May 07, 2018 9:21 AM
To: 'Marc June'
Subject: RE: Lewis and Clark Subdivision

Hi Marc,

Thanks for your email. I could not find any cases that involved an R-8 rezone.

Francis

Francis McLaughlin
Planning Department
343-8003

From: Marc June [mailto:junelawyer@cs.com]
Sent: Friday, May 4, 2018 9:28 AM
To: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Cc: Marc June <Junelawyer@cs.com>
Subject: RE: Lewis and Clark Subdivision

Francis,

You have been good on responding to all of my emails which have gone on longer than I had hoped.

I understand:

1. The number of lots is necessary to calculate density.
2. Density is measured by DUA (Dwelling Unit per Acre).
3. R-8 requires a 4 acre minimum lot size which is a DUA of 0-.25.
4. The HDP Land Use Map identifies the Upper Dearmoun Neighborhood as "Limited intensity, 0-1 DUA" without reference to underlying zoning

Other than the Lewis and Clark Subdivision, are you able to provide another example in which the Planning Department recommended against a rezone from R-8?

Thanks.

Marc June

From: McLaughlin, Francis D. [mailto:McLaughlinFD@ci.anchorage.ak.us]
Sent: Thursday, May 03, 2018 3:29 PM
To: 'Marc June' <junelawyer@cs.com>
Subject: RE: Lewis and Clark Subdivision

Hi Marc,

The residential density is, of course, important in evaluating the approval criteria for a rezone. In this case, the Hillside District Plan identifies the petition site as "Limited intensity, 0-1 dua." Topography, streams, drainageways, wetlands,

roads, availability of water, soils for on-site septic systems, and the zoning district minimum lot size requirement will all ensure that development of the property will have less than one dwelling unit per acre gross residential density.

Francis

Francis McLaughlin
Planning Department
343-8003

From: Marc June [mailto:junelawyer@cs.com]
Sent: Thursday, May 3, 2018 9:57 AM
To: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Subject: RE: Lewis and Clark Subdivision

No worries. This is not an ASAP
Thank you for acknowledging
Marc June

From: McLaughlin, Francis D. [mailto:McLaughlinFD@ci.anchorage.ak.us]
Sent: Thursday, May 03, 2018 9:19 AM
To: 'Marc June' <junelawyer@cs.com>
Subject: RE: Lewis and Clark Subdivision

Marc – I got your email and I will respond. I'm just very busy today – Assembly committee meeting this morning and meetings at City Hall this afternoon. I will respond asap.

Thank you,
Francis

Francis McLaughlin
Planning Department
343-8003

From: Marc June [mailto:junelawyer@cs.com]
Sent: Wednesday, May 2, 2018 2:50 PM
To: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Subject: RE: Lewis and Clark Subdivision

Francis,

Understood re absence of preliminary plat or draft/concept subdivision.
Are you saying the anticipated number of lots is not relevant?

Marc June

From: McLaughlin, Francis D. [mailto:McLaughlinFD@ci.anchorage.ak.us]
Sent: Wednesday, May 02, 2018 2:28 PM
To: 'Marc June' <junelawyer@cs.com>
Subject: RE: Lewis and Clark Subdivision

Hi Marc,

I too am sorry that I am not able to give you the answer that you want. I wish that I could. I did looked at rezones from the last couple years and I didn't see any that included a draft/concept subdivision. Usually, they won't go through the work of designing a subdivision until after the rezone is adopted. It is atypical for a rezone application to include a draft subdivision. It is a distraction from the merits of the rezone because the developer is under no obligation to follow the drawing as shown. It would have marginally usefulness even if the developer intended to submit that exact drawing because plats usually go through changes before they are finally approved. In the case of the R-10, it is very difficult to design a subdivision because the lot sizes are based on the average slope of each lot.

Francis

Francis McLaughlin
Planning Department
343-8003

From: Marc June [mailto:junelawyer@cs.com]
Sent: Wednesday, May 2, 2018 2:17 PM
To: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Subject: RE: Lewis and Clark Subdivision

Francis,

Thanks again.

My apologies for repeated requests but are you able to say how many times a rezone application has been submitted without a preliminary plat or without representation the anticipated number of lots, lets say within the last 2 years.
(I realize a preliminary plat is not required. I am trying to understand how often this happens). If there have been times, I would appreciate the project number/name.

Marc June

From: McLaughlin, Francis D. [mailto:McLaughlinFD@ci.anchorage.ak.us]
Sent: Wednesday, May 02, 2018 11:15 AM
To: 'Marc June' <junelawyer@cs.com>
Subject: RE: Lewis and Clark Subdivision

Hi Marc,

I looked back 9 years and did not find any cases involving a rezone to R-10.

Francis

Francis McLaughlin
Planning Department
343-8003

From: Marc June [mailto:junelawyer@cs.com]
Sent: Wednesday, May 2, 2018 10:56 AM
To: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Subject: RE: Lewis and Clark Subdivision

Francis,

Thanks.

Understand that rezone applications might not include a draft/concept preliminary plat. My question was more specific.

How common is this in R-10 rezone applications? (Over last 2 years, how many R-10 rezone applications have there been and how many have not included a draft/concept preliminary plat)

Of those R-10 rezone applications that do not include a draft/concept preliminary plat, how many include the anticipated number of lots?

If you have examples of other R-10 applications that do not include draft/concept preliminary plats or anticipated number of lots, I would appreciate your sharing this information.

Marc June

From: McLaughlin, Francis D. [mailto:McLaughlinFD@ci.anchorage.ak.us]
Sent: Wednesday, May 02, 2018 10:15 AM
To: 'Marc June' <junelawyer@cs.com>
Subject: RE: Lewis and Clark Subdivision

Hi Marc,

There are no policies/procedures regarding the R-10. Yes, it is common for rezoning applications to not include a draft/concept preliminary plat.

Francis

Francis McLaughlin
Planning Department
343-8003

From: Marc June [mailto:junelawyer@cs.com]
Sent: Wednesday, May 2, 2018 10:24 AM
To: McLaughlin, Francis D. <McLaughlinFD@ci.anchorage.ak.us>
Subject: RE: Lewis and Clark Subdivision

Hello Francis,

Can you advise whether there are any written policies/procedures re R-10 approval beyond Title 21?
Have other rezone applications been granted where the applicant does not disclose the number of lots?
Thanks.

Marc June

May 14, 2018

Municipality of Anchorage, Planning Department
Attention: Francis McClaughlin,
4700 Elmore Road
Anchorage, AK 99507

Re: Lewis and Clark Proposed R-10 Subdivision
Case No. 2018-0052

Dear Mr. McLaughlin:

I am a homeowner at 8801 Upper Dearmoun, land directly across from the proposed Lewis and Clark Subdivision.

This is Petitioners' third rezone application. Like the others, it seeks rezoning to avoid the 4 acre minimum lot requirements of the existing R-8 zoning and create 1.25 and 2.5 acre lots. Because Petitioners' last rezone application was denied in July, 2017, Ordinance 21.3.160.D.10 bars rezoning for 2 years as a matter of law. Because Petitioners have failed to establish that R10 rezoning is necessary to make development feasible and failed to provide the information necessary to meet the criteria required by Ordinance 21.03.160, the application must be denied.

Three Previous Rezoning Rejections

Beginning shortly after their purchase of the land at a price reflecting the minimum 4 acre lot requirements of the existing R-8 zoning, Petitioners over the last 4 years have been repackaging their same development plan. Each application seeks permission for smaller lots substantially less than 4 acres, an increased number of lots, and envisions stacking the smallest lots along Upper Dearmoun Road. Proposed lots have been as small as an acre in size.

In 2014, Petitioner applied for R-6 rezoning with 32 lots. Planning Department Staff recommended that the application be denied and the application did not gain a single supporting vote from the Planning and Zoning Commission. Specific factual findings included the fact that increased housing density on this site was unnecessary, (Finding of Fact 1), most of the property has marginal to impermeable soils (Finding of Fact 2), and the rezoning request was inconsistent with the Hillside District Plan requirement that current zoning to be maintained (Finding of Fact 5). Because there was no support at the Assembly level for the rezone application, Petitioners' appeal to the Assembly appeal was denied by being tabled indefinitely.

In 2017, Petitioners filed a second rezoning application under New Title 21 from R-8 to R-6SL, this time with 30 lots. Without explanation, the Planning Department assigned a new staff member who, since that time, has championed every proposal submitted by Petitioners and never acknowledged, or attempted to reconcile prior staff's negative recommendation. When this second application was denied by the Planning and Zoning Commission, new staff filed a request for rehearing to permit 24 lots. In July, 2017, the application was denied by the Planning and Zoning Commission for the third time.

Most recently, the Petitioners, with the support of the same Planning Department staff member, obtained Platting Board approval of an Ordinance 21.08.070 Conservation Subdivision plat for 16 lots, with the median average size of 2.16 acres and the smallest lot 1.16 acres. Another adjoining landowner has appealed this approval and, through the grapevine, the word is that this rezone application is in response to this exercise of Municipal Code due process rights.

R-10 Rezoning Application

Permitting rezoning this fourth time requires finding that the Planning and Zoning Commission was wrong by a lot-- not just once, but 3 separate times. Just like the past applications, this R-10 rezoning application is for the purpose of allowing smaller lots of 1.25 and 2.5 acres below the 4 acre minimum size required by existing R8 zoning depending on slope. If a Construction Subdivision is again proposed, lot sizes could potentially be even much smaller.

Unlike the 3 previously occasions when rezoning was denied, this rezoning application, itself, provides no indication as to the number of lots. In a 12 minute community meeting, the Petitioners represented this number to be between 5 and 45 lots with no response to subsequent emails. Without this information, the Commission cannot make the necessary findings for rezoning.

Finally, this 4th request for rezoning makes no reference to the Platting Board's approval of a 16 lot subdivision, whether Petitioners intend to continue proceeding with this approved plat, or the reasons for proceeding with 2 simultaneous development projects. Without this important information, the Commission cannot make the necessary findings for rezoning.

One would normally expect this information to be provided through the Community Council process, in this case the Hillside Community Council. In this case, however, Petitioners Bruce Vergason and Todd Brownson serve on the Hillside Community Council Board and their presentation was scheduled for the end of the March meeting. The presentation ended at Mr. Vergason's direction after 12 minutes. Followup emails to Petitioners' representative, Tom Dreyer at the S4 group were not returned. The

following meeting of the Hillside Community Council was cancelled. Petitioners never advised as to how their conflict of interest between being Petitioners and being Board members would be addressed.

Requests for further information from Planning Department Staff also did not provide further information. While Staff was unable to provide an example of another rezoning application in which a preliminary plat setting forth the number of lots was not provided, it is Staff's position that this is not required. According to Staff, there have been no prior R10 rezone applications, at least within the last 2 years. Staff also could not provide an example of another instance in which the Planning Department recommended denial of an R8 rezone application. With the history of 3 previous denials of rezoning, the Commission cannot make necessary findings to support rezoning with this history.

The R10 rezone application continues the previously rejected argument that rezoning is justified because some adjoining landowners occupy 1 acre lots. In doing so, Petitioners continue to ignore the fact that these lots were subdivided in the 1970's before there was meaningful zoning, that R8 zoning was adopted in recognition that these smaller lot sizes were a mistake, and that they were aware of these facts when they purchased the land.

Petitioners also argue that rezoning is somehow suggested by the Anchorage 2040 Land Use Plan. The 2040 Land Use Plan makes clear on page 32 that the Hillside District Plan controls. Page 36 further states that the requirements of the 2040 Land Use Plan are "subject to the Hillside District Plan."

Similarly, the R10 rezone application continues Petitioners' practice of relying on maps within the Hillside District Plan to argue that, notwithstanding R8 zoning, densities shown are 0-1 Dwelling Units per Acre (DUA). Once again, this is not the case and the maps do not even reference R8 zoning. Instead, HDP Policy 1-A states that it is intended to:

> Encourage a greater proportion of future Hillside growth to occur in the lower Hillside, in areas located closer to existing services and infrastructure; to a limited degree reduce the amount of future development in the southeast Hillside.

HDP Policy 1-B also specifically establishes that the Policy is to:

> Maintain policies for the amount of development as allowed under current land use designations.

In short, per the Hillside District Plan, existing R8 zoning is to be maintained.

Reasons for Denial

Objections to the past rezoning applications consistently focused on the smallest lots being stacked along the Upper Dearmoun Road boundary, the substandard condition of Upper Dearmoun Road with an absence of adequate shoulders for a collector road, the dangers resulting from increased traffic, the unsuitability of large areas of the tract for development, and the specific statements within the 2010 Hillside District Plan that existing zoning was to be maintained with larger lot zoning in the areas closest to Chugach Park. With these conditions remaining, the R10 rezoning applications does not address these objections.

1. Ordinance 21.3.160.D.10 requires denial.

After a rezone application is denied, Ordinance 21.03.160.D.10 imposes a 2 year waiting period on new applications for substantially the same rezoning. Attempts to suggest that R-10 rezoning is different from rejected past R-6 rezoning application fail because the purpose of each application has been to achieve the identical goal of lot sizes below 4 acres with lot sizes of 2.5 acres, 1.25 acres and even smaller if a Construction Subdivision is attempted.

With Petitioners' most recent denial occurring in July, 2017, no further rezone application can be considered until July 2019 as a matter of law. To the extent that Petitioner disagrees, this pure question of law can only be resolved by court decision.

2. Per Ordinance 21.04.020.P, R10 zoning is inappropriate.

Ordinance 21.04.020.P states that R10 zoning is intended only for "those areas where natural physical features and environmental factors such as slopes, alpine and forest vegetation, soils, slope stability, and geologic hazards require unique and creative design for development.

The rezone application makes no attempt to argue why R10 zoning is required. When the Platting Board has approved a plat under existing zoning, R10 zoning is not necessary for development a conclusion not changed by another landowner exercising appellate rights under the Municipal Code.

3. Petitioner has not established each Approval Criteria required by Ordinance 21.3.160.E.

In order to grant the application for R-10 rezoning, the Commission is required to find that the Application satisfies all approval criteria set forth in Ordinance 21.3.160.E. Because the application does not address the number of lots or provide other necessary information, this cannot be done.

Ordinance 21.03.160.E.1 requires a finding that rezoning be in the best interests of Anchorage and promote the public health safety, and general welfare. The representation that Petitioners have suggested there could be as many as 45 lots provides further proof that this criterion has not been met. Together with the history of 3 rezoning denials based on the number of lots, this cannot be done.

Ordinance 21.03.160.E.2 requires a finding of compliance with the comprehensive plan. In that regard, the 2040 Land Use Plan specifically identifies this neighborhood on Map 1-2 as an area of little housing growth. The Land Use Plan has a specific Goal 7 of making any rezoning compatible with existing zoning, i.e., R-8, and expressly states on page 75 that it is not a recommendation for rezoning. If Petitioners believed that R10 rezoning complied with the 2040 Land Use Plan and could truly justify R-10 rezoning, Petitioners would be addressing how 1.25 acre lots are compatible with the existing R8 zoning requirements of 4 acre lots, how storm water evaluation is being conducted (as required by Goal 5-6 at page 88), and how the necessary Upper Dearmoun Road infrastructure will be provided, as required on page 72 of the 2040 Land Use Plan. Because the application makes no attempt to address these issues, it is not possible to find that these criteria have been met, and the application must be denied. If seriously considered, the proposed rezoning would require amendment of the Hillside District Plan, iteself.

Ordinance 21.03.160.E.3 requires that rezoning be consistent with the purpose of existing R8 zoning. With the purpose of the rezone being to change minimum 4 acre minimum lot sizes down to 2.5 acres, 1.25 acres, and possibly even smaller lots, this criterion has not been met.

Ordinance 21.03.160.E.5 requires that roads be capable of supporting the new uses while maintaining adequate levels of service to existing development. With all parties recognizing the substandard condition of Upper Dearmoun Road and Petitioners seeking as many as 45 individual lots, this criterion has not been met.

Ordinance 21.03.160.E.7 requires that rezoning not result in adverse impacts upon adjacent land uses. With Petitioners not identifying the number of lots they seek, but representing that it may be as many as 45, this criterion has not been met. 45 new homes relying upon an existing substandard road is absolutely an adverse impact.

Ordinance 21.03.160.E.8 requires that the rezone not extend or exacerbate a land use pattern that is inconsistent with the comprehensive plan. With the purpose of R8 zoning in the first place being recognition of that 1 acre lots were unreasonable, this cannot be done. If anything, rezoning this parcel will lead to rezoning of other uphill parcels in the neighborhood, creating a domino effect. With Petitioners making no effort

to distinguish the effect of their rezone application on future rezone applications of these parcels, this criterion has not been met.

Conclusion

The Landowner simultaneously pursuing Platting Approval and Rezoning is inappropriate. This R10 Rezone application should be denied as barred by 21.3.160.D, unnecessary for feasibility of development as required by Ordinance 21.04.020.P, and for failing to establish compliance with each of the necessary criteria required by Ordinance 21.3.160.E. Ultimately, the application simply rehashes previously rejected arguments, with no attempt to address the status of the currently pending Conservation Subdivision Plat.

Very truly yours,

Marc W. June

MWJ/wws
cc: David Whitfield