



THE STATE
of ALASKA
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Department of Natural Resources

Division of Mining, Land & Water
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January 2, 2014

Gary Gillette
City and Borough of Juneau
Docks and Harbors
155 S. Seward, Juneau 99801

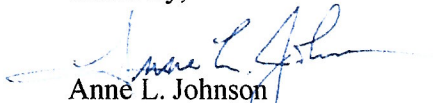
Re: ADL 108124; Tidelands Conveyance Juneau Harbor Final Finding and Decision

Greetings:

Enclosed please find the Final Finding and Decision and attachments thereto, including appeal rights, in the City and Borough of Juneau's request for a tidelands conveyance under AS 38.05.825. A copy of the Preliminary Decision and attachments is also included. A copy of this correspondence and all enclosures is being provided to the one party that commented during the thirty day public notice period: Bruce Weyhrauch in his capacity as the President of the Alaska Commercial Fishermen's Memorial in Juneau.

If you have any questions please contact me at 907-465-3405.

Sincerely,


Anne L. Johnson
Natural Resources Manager

Enc.

cc. Bruce Weyhrauch

**ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER
SOUTHEAST REGIONAL OFFICE**

**Final Finding and Decision
ADL 108124**

**Conveyance to the City and Borough of Juneau
Pertaining to Submerged Land in Gastineau Channel
For the Development of Two Offshore Cruise Ship Berths
In Accordance with AS 38.05.825**

This Final Finding and Decision, and all attachments hereto, supplement the Preliminary Decision dated November 7, 2013, and comprise the record of decision for this submerged land conveyance under AS 38.05.825.

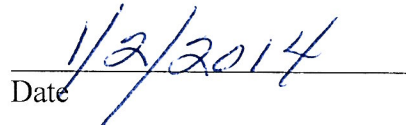
A Summary of Agency and Public Comments:

- One letter that presented numerous concerns regarding the proposed conveyance was received during the comment period. Those concerns have been reviewed, considered and addressed in Attachment 1.

DMLW has re-affirmed that the case file is complete and the requirements of all applicable statutes and regulations have been satisfied. Issues and concerns received during the public comment period were considered and did not result in any modifications of the Preliminary Decision. It is the finding of the Commissioner of the Department of Natural Resources that it is in the best interest of the State to proceed with this conveyance under the authority of AS 38.05.825.



David L. Kelley
Southeast Regional Manager



Date

A person affected by this decision who provided timely written comment or public hearing testimony on this decision may appeal it, in accordance with 11 AAC 02. Any appeal must be made within twenty days of issuance of the Final Finding and Decision and may be mailed or delivered to Daniel S. Sullivan, Commissioner, Department of Natural Resources, 550 W. 7th Avenue, Suite 1400, Anchorage, Alaska 99501-3561; faxed to 1-907-269-8918; or sent by electronic mail to *dnr.appeals@alaska.gov*. If no appeal is filed by that date, this decision goes into effect as a final order and decision within thirty-one days of issued of the Final Finding and Decision. An eligible person must first appeal this decision in accordance with 11 AAC 02 before appealing this decision to Superior Court. A copy of 11 AAC 02 is attached hereto as Attachment 2.

Attachment 1, Summary of Public Comment and Response

Attachment 2, Appeal References

FINAL FINDING AND DECISION
ADL 108124
Attachment 1
Summary of Comment and Response

Public Comment:

DMLW received one public comment in the form of a seventeen page letter with nine attachments dated December 3, 2013, from Juneau attorney, Bruce Weyhrauch, in his capacity as President of the Alaska Commercial Fishermen's Memorial (hereinafter "the Fishermen's Memorial"). A complete copy of the correspondence is attached to this document and labeled "Attachment 1A".

The Fishermen's Memorial raises eleven arguments characterized as either legal and/or policy failures by DMLW in its Preliminary Decision where it proposes to convey 17.87 acres of submerged tidelands in the Juneau Harbor to the City and Borough of Juneau ("CBJ") for the development of two offshore cruise ship berths needed to accommodate newer and larger cruise ships. The submerged land if conveyed will underlie a portion of CBJ's project.¹ Following a brief summary of the Memorial itself², DMLW will summarize each of the Fishermen's Memorial's eleven arguments opposing the conveyance and provide a response. Please see Attachment 1A for a *verbatim* recitation of the Fishermen's Memorial's statements.

The Fishermen's Memorial begins its correspondence by describing the Memorial.³ To summarize, the Memorial is located on the Juneau waterfront near Taku Fisheries. The Memorial was constructed in the mid-1990s to remember and honor fishermen and women (many of whom are deceased) and commemorate Juneau's historic fishing activities. The Memorial is accessible by the pedestrian public daily and CBJ's proposed berthing project will not impact pedestrian access. The Memorial is also the location of the annual Dedication of Names and Blessing of the Fleet on the first Saturday morning of each May when boats "parade" past the Memorial afloat within the Juneau Harbor.⁴ The Blessing and Dedication is a well-known annual event. Families and friends of the fishermen and women from around the country have paid to engrave names on the granite Memorial and participate in the annual Blessing and Dedication of Names. A community event occurs around the annual Blessing. The Twisted Fish restaurant adjacent to the Memorial hosts a free brunch after the Blessing is completed. The Memorial contains a plaque facing the uplands and visible for the pedestrian visitors demonstrating support for commercial fishermen and women.⁵

¹ Preliminary Decision, p. 7, footnote 17.

² The Fishermen's Memorial actual memorial site will be referenced throughout as "the Memorial".

³ The Fishermen's Memorial, pp. 2-5.

⁴ The Fishermen's Memorial, p. 3.

⁵ The Fishermen's Memorial, pp. 3-4 (a complete recitation of the Memorial's plaque is identified here).



Memorial Photo



Memorial Photo

1. The Fishermen’s Memorial states that DMLW’s proposed decision violates Alaska law.⁶

The Fishermen’s Memorial argues that the conveyance of the submerged land in the Juneau Harbor to CBJ to accommodate its ship berthing project will unreasonably interfere with navigation or public access to the Fishermen’s Memorial in violation of Alaska law. For support, it cites to AS 38.05.825(a)(2) which requires that the use of the submerged land “not unreasonably interfere with navigation or public access.”

The Fishermen’s Memorial contends that DMLW wrongly determined that CBJ modified its project to accommodate vessels needing access to the Taku Fisheries Dock or to the Fishermen’s Memorial during the Blessing of the Fleet, and that the “City’s dock project directly blocks access to the Memorial during the [annual] Blessing.” The Fishermen’s Memorial notes that DMLW does not understand that “a stream of fishing boats participate” in the annual Blessing and that more often than not this includes the Alaska Marine Highway Ferry, coast guard vessels, sailboats, and recreational craft. It also states that the Memorial was constructed from imported granite and after extensive polling among fishermen and women and working with private property owners, and that it is located on the last piece of open land along the downtown Juneau waterfront with “an unobstructed waterfront view and access to the marine waters of Gastineau Channel.”⁷

DMLW’s Response:

DMLW has determined that the conveyance of the submerged parcel to accommodate CBJ’s ship berthing project does not “unreasonably interfere with navigation or public access.”⁸ This is one requirement of several under the Alaska statute, AS 38.05.825, governing “[c]onveyance of tide and

⁶ The Fishermen’s Memorial, Attachment 1A, pp. 5-6. Also, the Fishermen’s Memorial in its letter refers to the Department of Natural Resources or DNR. The Division of Mining Land and Water (DMLW) is a Division of DNR and either term could be used but for consistency with the Preliminary Decision this document continues to reference DMLW.

⁷ The Fishermen’s Memorial, p. 6.

⁸ AS 38.05.825(a)(2).

submerged land to municipalities.” As discussed further below, AS 38.05.825 and each of its subdivisions, including subdivision 2(a) which requires that the proposed use of the submerged land not unreasonably interfere with navigation or public access, was considered by DMLW in the Preliminary Decision.⁹

The Fishermen’s Memorial objection to CBJ’s cruise ship berthing project centers on the impact the project will have on the annual Blessing of the Fleet parade. The vessels that participate in the parade will have to navigate past the proposed southern berth in order to drop a wreath near the Memorial. Certain vessels will be too large to navigate past the end of the dock and will have to remain further out in the Juneau Harbor. The Blessing, however, in the more limited space, will be able to continue to be held the first Saturday of May each year. Pedestrians will still have continuous access to the Memorial. Those visiting the Memorial, as they look out across the Juneau Harbor will now see a berthing station instead of open water between October and April. During the tourism season from May through September, on almost all days, visitors currently looking out from the Memorial view a busy harbor with several cruise ships, including one or two cruise ships docked immediately adjacent to the Memorial.

In response to the Fishermen’s Memorial’s contention that the cruise ship berthing project interferes with the annual Blessing, CBJ responds that it expanded the project’s development plan by increasing the fairway providing access to the Taku Fisheries Dock and the Memorial from approximately 135 feet to approximately 211 feet.¹⁰ Again, CBJ’s project does not appear to impinge on pedestrian access to the Memorial and visitors walking along the Juneau Harbor continue to have access to the Memorial continuously throughout the year. DMLW received no other comments indicating that CBJ’s cruise ship berthing project would unreasonably interfere with navigation or public access.

DMLW has assessed the Fishermen’s Memorial’s position that CBJ’s project unreasonably interferes with navigation or public access based on the anticipated changes to the annual Blessing and the obstructed view of the open waters that will result from two new berthing stations. For the reasons stated above, despite the unfortunate modifications that will need to occur with the annual Blessing and the more restricted view of the open waters of the Juneau Harbor, DMLW finds that the conveyance of submerged land to CBJ in furtherance of its proposed project is not an unreasonable interference with navigation or public access and that the requirements of AS 38.05.825(a)(2) are met.

⁹ Preliminary Decision, pp. 6, 8-9.

¹⁰ Correspondence from CBJ to Bruce Weyhrauch dated November 19, 2013 CBJ’s which includes a modified diagram of the cruise ship berths and is attached as Attachment 1B.

2. The Fishermen's Memorial states that DMLW's proposed decision fails to identify the negative impacts that transferring submerged lands to CBJ will have on the Memorial.¹¹

The Fishermen's Memorial contends that the dock will block the passage of boats participating in the Blessing and that there are safety hazards presented by the proposed project that CBJ has not analyzed and DMLW did not discuss in the Preliminary Decision.

DMLW's Response:

DMLW is obligated to act within a specific statutory framework in conveying tidal or submerged land. The statute governing the conveyance is AS 38.05.825. As set forth in the Preliminary Decision, unless it is found that the public interest in retaining the submerged land in State ownership clearly outweighs CBJ's interest in expanding the docking facilities to accommodate the newer and larger cruise ships, AS 38.05.825(a) requires that DMLW convey to CBJ submerged lands suitable for occupation and development when CBJ meets the six statutory requirements.¹² The Preliminary Decision, on page eight, stated as follows:

Compliance with Qualifications under AS 38.05.825:

Unless it is found that the public interest in retaining the land in State ownership clearly outweighs CBJ's interest, AS 38.05.825(a) requires DMLW to convey to CBJ tide and submerged lands suitable for occupation and development when requested by CBJ providing that the following requirements are met:

- (1) the land is within or contiguous to CBJ boundaries;
- (2) the use would not unreasonably interfere with navigation or public access;
- (3) CBJ has applied for conveyance;
- (4) the land is not subject to a shore fisheries lease under AS 38.05.082;
- (5) the land is classified for waterfront development or another use consistent or compatible with a land use plan adopted by CBJ, or the proposed use of the land is consistent or compatible with a land use plan adopted by CBJ or DMLW; and
- (6) the land is required for a public or private development approved by the municipality.¹³

¹¹ The Fishermen's Memorial, p. 6.

¹² Preliminary Decision, pp. 8-9.

¹³ CBJ's initial Conditional Use Permit was approved by the CBJ Planning Commission in June 2012, and this was appealed to the Assembly. The Fishermen's Memorial intervened in the appeal. On January 7, 2013, the Assembly upheld the Commission. The Fishermen's Memorial could have appealed the Assembly's decision to the Superior Court but did not.

The Preliminary Decision next assessed each of the six statutory requirements individually and determined that CBJ's proposal fulfilled each of those requirements. DMLW received one adverse comment during the thirty day notice period; that of the Fishermen's Memorial. In assessing the statutory requirements and the facts presented by CBJ and the Fishermen's Memorial, DMLW determined that the public interest in retaining the land (essentially the disruption of and forced modification to the annual Blessing) did not clearly outweigh CBJ's interest in expanding the cruise ship docks.

In particular, the sixth statutory requirement is pertinent to the Fishermen's Memorial concerns that the project will negatively impact the Memorial. Subdivision (a)(6) of AS 38.05.825 requires that submerged land needed for a public development project "be approved by the municipality." Working within the statute, as DMLW is obligated to do in assessing any request for conveyance, DMLW determines whether a project is "approved by the municipality." DMLW does not engage in the municipal approval process, or become involved in a municipality's development plans, or otherwise take part in a municipality's project. DMLW confirms, under the statute, whether the land required for the public development has been approved by the municipality.

Here, DMLW determined in the Preliminary Decision that CBJ's cruise ship berthing project was approved by CBJ.¹⁴ Concerns regarding negative impacts on the Memorial resulting from CBJ's project are concerns that should have been raised to CBJ during the project's approval process not at this juncture.

Indeed, it appears that the Fishermen's Memorial fully participated in the public process before CBJ. When the CBJ Planning Commission approved the Conditional Use Permit ("CUP") for the project, the Fishermen's Memorial intervened in an appeal brought by two members of the public.¹⁵ The Fishermen's Memorial could have pursued its own appeal at this time but chose not to. In any event, the appeal brought by the two individuals, and intervened in by the Fishermen's Memorial, was heard and denied, and the CBJ Assembly upheld the CUP on January 7, 2013. At that time, the Fishermen's Memorial could have appealed its concerns raised as an intervening party to the Superior Court, but the Fishermen's Memorial chose not to appeal. There were no appeals to the Superior Court by any party and, thus, the challenges to CBJ's approval of the project ended at that time.

The fully-vetted process before CBJ was the appropriate forum to raise concerns about the cruise ship berthing project, including negative impacts on the Memorial and any related concerns. Here, before

¹⁴ Preliminary Decision, p. 9.

¹⁵ See A. and L. Osborne (Appellants) and Alaska Commercial Fishermen's Memorial in Juneau, and D. Hood (Appellant/Intervenors) v. CBJ Planning Commission (Appellee) and City and Borough of Juneau Docks and Harbors Department (Appellee/Intervenor), Decision on Appeal, Appeal of Planning Commission, Notice of Decision USE2011-0030.

DMLW, the issue is whether CBJ, as the municipal applicant, meets the requirements for the transfer of submerged lands under AS 38.05.825, and DMLW believes that it does.

3. The Fishermen's Memorial states that transferring submerged lands in Gastineau Channel to the City for a dock in front of the Memorial will result in dangerous conditions and safety risks to the public.¹⁶

According to the Fishermen's Memorial, during the annual Blessing of the Fleet the new dock configuration could pose a safety problem. Specifically, it cites to a Juneau commercial fishermen and states that "there is an open cul de sac area of water in front of the Memorial between the new proposed dock and shore, the entire dock configuration poses hazards to navigation to boats like his that have participated in the Blessing."¹⁷ Also, the Fishermen's Memorial references possible fast moving current in the harbor.

DMLW's Response:

Similar to the last comment, DMLW's response is that it is bound by a statutory framework in assessing applications for the conveyance of tidal and submerged land. The concern of the Fishermen's Memorial regarding a safety risk posed during the annual Blessing in May is one that should have been presented to CBJ, the project developer, at the time that CBJ was seeking project approval. Indeed the Fishermen's Memorial did present its concerns to CBJ, participated in CBJ's appeal process and ultimately chose not to appeal the Assembly's affirmation of the project to the Superior Court. DMLW received no other comments regarding the project posing dangerous conditions.

4. The Fishermen's Memorial states that a transfer of the submerged lands to CBJ for docks in front of the Memorial violates Article VIII, Section 14 of the Alaska Constitution.¹⁸

Article VIII, section 14 of Alaska's Constitution provides that "free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes." The provisions in Article VIII were intended to permit the broadest possible access to and use of state waters by the general public.¹⁹ The Alaska legislature defines the navigable and public waters available for public use in AS 38.05.965 and AS 38.05.965(18) defines "public water" to mean:

¹⁶ The Fishermen's Memorial, p. 7.

¹⁷ The Fishermen's Memorial, p. 7, citing Attachment 2.

¹⁸ The Fishermen's Memorial, p. 8.

¹⁹ *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973).

Navigable water and all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest.

The Fishermen's Memorial cites to the foregoing law and states that the "Memorial has a public interest in open, safe waters of Gastineau Channel in front of the Memorial for its Blessing and for its purposes of reflection and dedication of names."²⁰ It contends that the public interest is impaired by CBJ's proposed cruise ship berths in violation of the Alaska Constitution.

DMLW's Response:

DMLW agrees that the Alaska Constitution does provide for free access to navigable or public waters as defined by the legislature and the legislature *may regulate or limit that access for other beneficial uses or public purposes*. Indeed, the operative statute here, AS 38.05.825, is an example of the legislature regulating or limiting the public's free access to the navigable or public waters for other beneficial uses or public purposes. The statute obligates DMLW to convey submerged land to a municipality which has met the six requirements for conveyance if DMLW finds that the public interest in retaining the land in State ownership does not clearly outweigh CBJ's interest.

As noted above in response to the prior comments of the Fishermen's Memorial and as set forth in the twelve page Preliminary Decision, DMLW assessed AS 38.05.825 and determined that conveyance to CBJ met the six statutory requirements. DMLW also determined that the public's interest in retaining the land (the limitations to the annual Blessing and obstructed view of the Juneau Harbor waters posed by the shipping berths) did not clearly outweigh CBJ's interest in expanding the existing Juneau Harbor facilities to meet the larger space needs of the newer cruise ships.²¹

5. The Fishermen's Memorial states that transferring submerged land to CBJ for docks in front of the Memorial violates Alaska law.²²

The Fishermen's Memorial makes two arguments regarding Alaska law. First, it contends that the conveyance would violate the Public Trust Doctrine, and second, it argues that the conveyance is contrary to AS 38.05.825(a)(2) and (a)(5).

Regarding the Public Trust Doctrine, the Fishermen's Memorial quotes AS 38.05.126 which provides in part that ownership of land bordering navigable or public waters does not grant an exclusive right to use of the water and that any rights of title to the submerged land are subject to the rights of the people of

²⁰ The Fishermen's Memorial, p. 8.

²¹ Preliminary Decision, pp. 3-4, 8-12.

²² The Fishermen's Memorial, pp. 9 & 10.

the State for any public purposes for which the water is used or capable of being used consistent with the public trust. It is the position of the Fishermen's Memorial that transferring ownership of the navigable and public waters in front of the Memorial to CBJ is contrary to the Public Trust Doctrine.²³

Pertaining to AS 38.05.825(a)(2) and (a)(5), the Fishermen's Memorial contends that the use of the land would unreasonably interfere with navigation or public access and is inconsistent and incompatible with important uses already identified by CBJ to promote the Memorial.²⁴

DMLW's Response:

Regarding the Public Trust Doctrine, DMLW agrees with the Fishermen's Memorial that ownership of the uplands bordering navigable and public waters such as the Juneau Harbor does not grant CBJ an exclusive right of use of the water and is subject to the rights of the public for any public purpose for which the water is capable of being used.²⁵ However, there are Alaska laws in addition to AS 38.05.126 that must be considered in analyzing the public's rights and limitations under the Public Trust Doctrine. For instance, AS 38.05.127, specifically governs "[a]ccess to navigable or public water," and subsection (a) of the statute states as follows:

(a) Before the sale, lease, grant or other disposal of any interest in state land adjacent to a body of water or waterway, the commissioner shall,

(1) determine if the body of water or waterway is navigable water, public water, or neither;

(2) upon finding that the body of water or waterway is navigable or public water provide for the specific easements or rights-of-way necessary to ensure free access to and along the body of water, unless the commissioner finds that regulating or limiting access is necessary for other beneficial uses or public purposes.²⁶

The Preliminary Decision addressed the issue of whether to restrict public access to the submerged lands beneath the proposed dock expansion.²⁷ DMLW, in noting that the Juneau Harbor is navigable, determined that there are site-specific conditions making it unreasonable to reserve a public access easement. Specifically, the Preliminary Decision stated:

²³ The Fishermen's Memorial, p. 9.

²⁴ The Fishermen's Memorial, p.10.

²⁵ See AS 38.05.126.

²⁶ AS 38.05.127(a)(1) & (2).

²⁷ Preliminary Decision, pp. 6 & 8.

Here, there are site-specific conditions that make it unreasonable to reserve a public access easement. The parcel proposed to be conveyed is primarily situated adjacent to and seaward of ATS 3, a tidelands parcel that was conveyed to CBJ several decades ago. CBJ's requested parcel is submerged water and is not adjacent to any uplands. There is no platted public access easement extending from ATS 3 to this parcel. Additionally, CBJ's project will encourage to some extent public access in that the project allows for float planes and lightering vessels to continue to use the Juneau Harbor, and there will be more pedestrian access to the public space known as the Seawalk.²⁸

DMLW believes that its proposed decision to not reserve a public access easement and thus limit public access to the submerged waters being conveyed to CBJ is reasonable.

Another Alaska law implicating the State's authority to regulate public and navigable water is AS 38.05.128. This provision allows obstruction or interference with the free passage or use of navigable water²⁹ if the obstruction or interference is authorized by a "state agency" or by a "state law or permit."³⁰

As discussed above and in the Preliminary Decision, AS 38.05.825, specifically authorizes the "[c]onveyance of submerged land to municipalities" such as CBJ. It is the operative statute governing the conveyance. Fishermen's Memorial accuses DMLW of violating two subsections of the statute, subpart (a)(2) and subpart (a)(5). DMLW addressed AS 38.05.825(a)(2) & (5) in detail in the Preliminary Decision.³¹ Subsection (a)(2) of the statute requires that use of conveyed submerged land not unreasonably interfere with navigation or public access. This argument was already raised by Fishermen's Memorial in its first comment and has already been addressed by DMLW in its response (*Supra*, page 2) and will not be restated here.

The Fishermen's Memorial next contends that DMLW violated subsection (a)(5) which addresses land classification and land use plans. Subsection (a)(5) requires the following:

(5) land is classified for waterfront development or for another use that is consistent or compatible with the use proposed by the municipality, or the proposed use of the land is consistent or compatible with a land use plan adopted by the municipality or the department;³²

²⁸ Preliminary Decision, p. 6.

²⁹ Navigable water is defined as any water of the state forming a...sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for public boating...fishing, or other public recreational purposes. (AS 39.05.965 (13)) The Juneau Harbor is navigable water.

³⁰ AS 38.05.128(a)(1) & (2).

³¹ Preliminary Decision, pp. 8-9.

³² As 38.05.825(a)(5)(emphasis added).

The Fishermen's Memorial states that the conveyance "is inconsistent and incompatible with the important uses already identified by the City to promote the memorial for several reasons." The Fishermen's Memorial does not elaborate further on how AS 38.05.825(a)(5) is violated.³³ As discussed in the Preliminary Decision, DMLW is amending the land classification to include waterfront development to reflect the on-going commercial activities that dominate the Juneau Harbor from May through September. Specifically, the Preliminary Decision stated:

Land Classification: The land classification is in the process of being amended via a plan amendment and land classification order to add the classification of "Waterfront development land" to the JSLP as required by number five above. Adding this classification is necessary for conveyance under AS 38.05.825 (see the "Planning and Classification" section for additional details).³⁴

With this, the statutory requisite of AS 38.05.825(a)(5) is met because the submerged land will be classified for waterfront development.³⁵ Thus, DMLW finds that any interference with the public's rights to the submerged parcel are authorized by AS 38.05.825 and that the statutory subsections (a)(2) and (a)(5) were met by CBJ.

6. The Fishermen's Memorial states that transferring submerged land to CBJ for docks in front of the Memorial violates the Juneau state land plan.³⁶

The Fishermen's Memorial contends that conveyance of the submerged parcel to CBJ violates the Juneau State Land Plan (JSLP). The Fishermen's Memorial quotes only a portion of the JSLP's discussion of management intent relating to the Juneau Harbor and excludes the JSLP's specific reference to "cruise ships". The full provision was set forth in the Preliminary Decision and is restated here:

[T]o provide both land and water space for uses and activities which are directly related to maritime activities while minimizing significant adverse impacts on habitat and harvest for which these subunits are co-designated. Maritime activities include private boating of all types, tourism (including cruise ships, transient pleasure vessels, and floatplanes), commercial fishing, use by charter boat, floatplane activity, and any other activities involving the human use of waterbodies for sport, recreation, or commerce.³⁷

³³ The Fishermen's Memorial, p. 10.

³⁴ Preliminary Decision, pp. 5-6, 9, and Land Classification Order No. SE-93-00-004A07, Juneau State Land Plan Amendment, Management Subunit 6a8.

³⁵ Even without amending the JSLP to include a Waterfront Development classification, CBJ's proposed project likely fulfills AS 38.05.825(a)(5) because the proposed use of the land is consistent and compatible with the JSLP's specified intent to provide water space for maritime uses, specifically including cruise ships (see JSLP, p. 3-116).

³⁶ The Fishermen's Memorial, pp. 10-11.

³⁷ JSLP 3-116.

The Fishermen's Memorial states that CBJ's proposed cruise ship berthing project will seriously and negatively affect the Memorial and the Blessing and existing, historic maritime activities on CBJ's waterfront and have the opposite impact on the harbor as that intended by the JSLP.³⁸

DMLW's Response:

DMLW reviewed and referenced the JSLP in its Preliminary Decision, under the heading entitled, "Planning, Classification."³⁹ The JSLP specifically intends to provide for water spaces for uses related to maritime activities, including private boating, tourism, including cruise ships, commercial fishing and other activity. DMLW consults the JSLP in conveying land under AS 38.05.825(a)(5) which requires that the conveyance be consistent with a land use plan adopted by CBJ or DMLW.⁴⁰

DMLW finds that the conveyance of the submerged parcel to CBJ is consistent with the JSLP's intent which is in part to provide water space for uses directly related to maritime activities, including cruise ships.⁴¹ Also, it is not clear what the Fishermen's Memorial means by its statement that the CBJ project will seriously and negatively impact historic maritime activities on CBJ's waterfront outside of the modifications that will be necessary to the annual Blessing of the Fleet and the fact that pedestrians will now view expanded docking facilities in the Juneau Harbor. In reality, at this time visitors to the Fishermen's Memorial between May and September almost daily view large cruise ships docked along the existing harbor and anchored in the waters in close proximity to the Fishermen's Memorial.

In sum, as written the JSLP's intent supports cruise ship activity in the Juneau Harbor. The JSLP is being amended to provide for the classification of waterfront development. DMLW finds CBJ's proposal is consistent with the JSLP.

7. The Fishermen's Memorial states that transferring submerged lands to CBJ for docks in front of the Memorial violates CBJ's waterfront plan.⁴²

The Fishermen's Memorial contends that the proposed submerged lands conveyance would violate CBJ's waterfront plan because the 2003 Waterfront Plan identifies the Memorial as important public art and a "cultural icon."⁴³

DMLW's Response:

This argument should have been raised by the Fishermen's Memorial before CBJ. DMLW does not have the authority to modify CBJ's waterfront plan, development plan, or any other CBJ plan. Moreover, it is outside of the scope of the statutory framework (AS 38.05.825) for DMLW to opine on a municipal

³⁸ The Fishermen's Memorial, p. 11.

³⁹ Preliminary Decision, pp. 5-6.

⁴⁰ See Preliminary Decision, pp. 5-6 for full discussion of the JSLP, its intent, and land classifications.

⁴¹ JSLP 3-116.

⁴² The Fishermen's Memorial, p. 11.

⁴³ The Fishermen's Memorial, p. 11.

decision regarding a memorial, or other public art, on municipal land. As discussed above, the Fishermen's Memorial participated in CBJ's notice process, it intervened in an appeal contesting the Assembly's approval of the dock expansion project, and it decided not to appeal to the Superior Court.

8. The Fishermen's Memorial states that transferring submerged lands to CBJ for docks in front of the Memorial violates long-standing CBJ policies supporting the Fishermen's Memorial.⁴⁴

The Fishermen's Memorial contends that the proposed submerged lands conveyance would violate long-standing CBJ policies supporting the Fishermen's Memorial and quotes a 1993 unanimous resolution resolving that the Assembly strongly supports the Fishermen's Memorial's efforts to design, construct and dedicate the Memorial.⁴⁵

DMLW's Response:

Again, DMLW does not have the authority to impact a municipality's policies. This is an argument that should have been raised by the Fishermen's Memorial before CBJ because it pertains solely to interpretation and implementation of CBJ policy. As already discussed, the Fishermen's Memorial participated in CBJ's notice process, it intervened in an appeal of the Assembly's approved of the docking project, and it decided not to appeal to the Superior Court.

9. The Fishermen's Memorial states that CBJ failed to provide the public with notice of its need to obtain a transfer of the submerged lands for docks in front of the Memorial.⁴⁶

In two pages, the Fishermen's Memorial contends that CBJ is pressuring DMLW to convey the submerged harbor land to CBJ; that DMLW did not issue its Preliminary Decision publicly until November 7, 2013; that the Fishermen's Memorial did not realize that CBJ sought a conveyance of State land until it was reported by the radio on November 12, 2013; and that what is critical is the nature and substance of comments received during the notice period of November 7 through December 9, 2013.

DMLW's Response:

DMLW received one response (the Fishermen Memorial's) during its notice period. As explained above, DMLW must analyze all applications received for a conveyance of tidal and submerged land under state law, AS 38.05.825. In the Preliminary Decision, DMLW fully considered CBJ's application and related materials, including the permits it obtained, and the JSLP. Now with the conclusion of the public notice period, DMLW has reviewed the eleven objections raised by the Fishermen's Memorial. DMLW continues to believe that CBJ met the statutory requirements for conveyance, and that the public interest in retaining the submerged land in State ownership does not clearly outweigh CBJ's interest in expanding the cruise ship docks to provide for the larger, newer cruise ships.

⁴⁴ The Fishermen's Memorial, pp. 11-13.

⁴⁵ The Fishermen's Memorial, pp. 11-12.

⁴⁶ The Fishermen's Memorial, pp. 13-15.

10. The Fishermen's Memorial states that neither CBJ nor DMLW assessed the dangers of the new docks to small fishing boats participating in the Blessing of the Fleet or the impact of the new docks on the Blessing.⁴⁷

The Fishermen's Memorial, without any explanatory documents or statements, contends that CBJ did not modify its project to accommodate vessels needing access to the Fishermen's Memorial during the Blessing as stated by DMLW in its Preliminary Decision.

DMLW's Response:

To clarify, DMLW actually stated that CBJ modified its project "to accommodate vessels needing access to the Taku Fisheries Dock or to the Fishermen's Memorial during the Blessing of the Fleet."⁴⁸ In any event, there is no indication other than Fishermen's Memorial's bare statement that CBJ did not expand its project to accommodate vessels needing access. CBJ provided documentation showing that the fairway providing access to the Taku Fisheries dock and the Memorial was increased from approximately 135 feet to approximately 211 feet.⁴⁹ Finally, the Fishermen's Memorial's position regarding its overall concern regarding the project and its impact on the Memorial should have been addressed to CBJ. And, again, it appears that the Fishermen's Memorial did partake in CBJ's administrative process, intervened in the appeal of the Assembly's affirmation of the project, and chose not to appeal to the Superior Court.

11. The Fishermen's Memorial failed to identify a reasonable range of alternates in its proposed decision.⁵⁰

The Fishermen's Memorial states that DMLW in considering only two options, to accept or reject CBJ's application, lacked thoughtfulness. It contends that DMLW at least should have considered moving one of the docks that CBJ proposes away from the Memorial, "remanding" CBJ's application back to CBJ for a fuller public process regarding the project, moving the Memorial, or investing in improvements to CBJ's dock structures.

DMLW's Response:

DMLW appreciates that in some instances there may be multiple alternatives to be considered prior to conveying a parcel of tidal or submerged land. Here, DMLW is satisfied with its Preliminary Decision as written.⁵¹ In addressing the four options put forth by the Fishermen's Memorial, three of them are simply not within the purview of DMLW but involve the intricacies of the underlying municipal project and are arguments that should have been raised before CBJ. Specifically, it is CBJ's role as the municipality in its efforts to expand its docks to consider "moving one of the docks," or moving the

⁴⁷ The Fishermen's Memorial, p. 15.

⁴⁸ Preliminary Decision, p. 8

⁴⁹ See Attachment A.

⁵⁰ The Fishermen's Memorial, pp. 15 & 16.

⁵¹ Preliminary Decision, pp. 9 & 10.

Memorial, or financially investing in alternative upgrades to the existing CBJ docks. Finally, the suggestion of sending the application back to CBJ to re-engage in the municipal vetting and approval process is misplaced where the Fishermen's Memorial participated in CBJ's public process, intervened in the appeal of the Assembly's decision, and chose not to appeal the administrative affirmation to the Superior Court. DMLW believes that CBJ's administrative process was complete.