BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

LARRY BAUER,

Appellant,

v.

CBJ BOARD OF ADJUSTMENT,

Appellee,

DIRK LOVIG,

Appellee-Intervenor.

Case No. 2002-03

DECISION

I. Background

The State of Alaska seeks a Juneau facility "of sound and substantial construction" (R105) to house the Bureau of Vital Statistics (BVS) and its important documents. The State proposes to lease a suitable facility and issued a request for proposals from developers willing to provide approximately 9,350 square feet of space. Three proposers responded, including appellee Dirk Lovig, whose proposal to construct the facility in the Lemon Creek industrial area was selected by the State.

On December 20, 2001, Larry Spencer, a proposer, asked the Community Development Department whether the proposed use would be allowed in an industrial zone, given that BVS storage facilities are not mentioned in the Table of Permissible Uses (TPU), CBJ 49.25.300. By letter dated December 21, 2001, CDD replied that the proposed use should be classified under TPU category 3.400 as a miscellaneous office use, which is not allowed in an industrial zone. The CDD letter provided no basis for the finding. (R7)

By letter dated January 7, 2002, Mr. Lovig asked the Planning Commission for an interpretation of the code that would allow the proposed use in an industrial zone. He argued that the BVS facility did not qualify as a Category 3.400 use or any other use listed in the TPU but would be of the same general character as a Category 4.000 manufacturing use. He also proposed Category 3.200, "storage of goods" or Category 3.200, "office use occupying less than 50% of a building otherwise in industrial use" as alternatives. (R11) The matter was scheduled for a hearing before the Planning Commission sitting as the Board of Adjustment (BOA) pursuant to CBJ 49.20.300.

On January 16, CDD issued its staff report for the upcoming hearing and proposed to the BOA that the BVS building would properly be classified under TPU section 3.400 as a miscellaneous office use. As an alternative finding in the event the BOA agreed with Mr. Lovig that the facility would be unique, CDD proposed that it be found most similar to the same Category 3.400 use. (R1)

Mr. Lovig submitted a January 18 letter in response to the staff recommendation. He reiterated his proposals for Category 4.000 and 3.200 designations, and added a third: Category 10.200, "storage and handling of goods not related to sale or use of those goods on the same lot."

The matter was taken up by the BOA at a regular Planning Commission meeting of January 22, 2002. The BOA heard testimony from the parties and several neighbors and construction professionals, after which Commissioner Bruce moved to reject the staff's proposed findings and find instead that the facility would be a "miscellaneous public facility" under Category 15 of the TPU. (R76) Although the motion did not refer to any specific subcategory, the ensuing discussion focused on Category 15.100, "post office", which is allowed as a conditional use in an industrial zone. The motion was adopted. Commissioner Bruce then commented (R79)

> I think the findings, in addition to what I said earlier, you change the use category of 3.400 of the Table of Permissible Uses to 15.000 and delete the second paragraph under No. 1 and go to No. 2, strike 3.400 and substitute 15.100.

The chair accepted this as a motion, which was adopted. The result was ambiguous given that the first motion explicitly rejected the staff findings while the second motion implicitly accepted them with amendments. The amendments, too, were ambiguous because they applied to both of the alternative and mutually exclusive findings drafted by the staff.

A Notice of Decision was filed with the City Clerk on February 1. (R95) The NOD made no mention of the ambiguities at the hearing and found only that the BVS facility "has a unique use given its function of storing, maintaining, and retrieval of vital statistics and therefore does not fit under any use specifically listed in the Table of Permissible Uses." The NOD found pursuant to CBJ 49.20.320 that this unique use is similar in use to a post office "because it is a public building" and "because of their like characteristics of sorting, storing, and transmitting documents and records." The quoted sections are the only explanation provided by the BOA in support of its decision.

This appeal was timely filed by Appellant Larry Bauer, the other bidder for the state lease. A prehearing conference was held on March 28 and oral argument was heard before the Assembly on July 9. Construction of the BVS has continued throughout the appeal process.

II. Analysis

This case demonstrates the procedural difficulties encountered when the Planning Commission, sitting as itself or the BOA, rejects a staff recommendation. The Commission, in the few minutes available during a hearing, must articulate both its preferred result and the basis for that result. Understandably, findings created in this manner will lack the depth and polish they would gain if the Commission, like the staff, had several days to prepare it. The problem is particularly acute in this case.

The issue before the BOA is stated in CBJ 49.20.320

> **49.20.320 Use not listed**. After public notice and a hearing, the board may permit in any district any use which is not specifically listed in the table of permissible uses but which is determined to be of the same general character as those which are listed as permitted in such district. Once such determination is made, the use will be deemed as listed in the table of permissible uses.

The usual term for this procedure is "similar use determination." It is widely used and some jurisdictions have developed standards for its use. The attached form from Clark County, Washington is an example. Even without forms, the rules are essentially the same as for any statutory construction. The court in *Coots v. J. A. Tobin Constr. Co.*, 634 S.W.2d 249, 251 (Mo. 1982) noted as much when it considered a case involving development of a rock quarry in an industrial zone under an ordinance which did not mention rock quarries.

> The determination of what uses are permitted under a zoning ordinance must be made on the basis of the wording of the particular ordinance and the context in which it occurs. Among the uses permitted by right in PI districts are industrial uses which may include manufacturing, fabrication, processing, converting, altering, assembling, testing or other handling of products, except those specifically prohibited in Sec. 5.1-6.
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> The basic rule of statutory construction is to seek the intention of the legislators and, if possible, to effectuate that intention. Since the ordinance does not offer a definition of "industrial uses", "products", or the processes described in the ordinance, legislative intent must be ascertained by giving the words an ordinary, plain, and natural meaning, by considering the entire act and its purposes, and by seeking to avoid an unjust, absurd, unreasonable, or oppressive result. [citation omitted]

CBJ 49.20.320 contains no guidelines to determine the Assembly intent, but the purposes of the land use code are set forth in CBJ 49.05.100. They are:

(1) To achieve the goals and objectives, and implement the policies, of the Juneau comprehensive plan, and coastal management program;

(2) To ensure that future growth and development in the City and Borough is in accord with the values of its residents;

(3) To identify and secure, for present and future residents, the beneficial impacts of growth while minimizing the negative impacts;

(4) To ensure that future growth is of the appropriate type, design and location, and is served by a proper range of public services and facilities such as water, sewage, and electrical distribution systems, transportation, schools, parks and other public requirements, and in general to promote public health, safety and general welfare;

(5) To provide adequate open space for light and air; and

(6) To recognize the economic value of land and encourage its proper and beneficial use.

These goals are necessarily general, but they provide some standards to guide the exercise of discretion by the staff and the BOA. More specific guidance is provided by the Comprehensive Plan, as noted by Mr. Bauer in his opening brief, p. 11. The plan recognizes the need to "designate sufficient vacant land to meet future demand for commercial/industrial activities".

We rely on the expertise of the BOA to apply these general rules in specific variances, similar use determinations, and similar proceedings. It is for the BOA to determine whether, as Appellant argues, allowance of a BVS facility would conflict with the municipal interest in "preserving industrial land for genuine industrial uses". This statement goes beyond the wording in the Land Use Code and the Comprehensive plan, but it is not an unreasonable extension of the planning values found in those documents. The BOA, with the assistance of the CDD staff, could provide its most valuable service to the community by coming to grips with issues such as this.

Certainly the staff and BOA should avoid the approach urged by Mr. Lovig in his January 18 letter that they "should be trying to help developers by making code interpretations that are most beneficial to them". (R84) This value is nowhere to be found in the CBJ Code or the Comprehensive Plan. The BOA, like the Assembly, should make decisions that are most beneficial to all the people of Juneau, not just those who appear before it. This is particularly appropriate in a similar use determination, which presents an opportunity to apply fundamental planning values to novel factual situations.Unfortunately, the record of proceedings before the BOA provides scant evidence of this priority. The staff report provides the factual background (R1), a procedural review (R2), a recommendation for Category 3.400 (R3), and refutations of each of the alternatives proposed by Mr. Lovig (R4-6). The analysis behind the recommendation is limited to the following:

> With regard to the operation, the primary activities listed were customer service, processing and researching records. These are all activities that are common to office type uses. The CDD processes permits and has major areas set aside for storage and related permit activities.

This is terse at best. The staff report goes on to refute the applicant's proposals for Category 4, 2.200, or 3.200, and in doing so provides considerable detail regarding the meaning of the terms "processing" and "outside merchandising", and storage as an industrial use. Taken as a whole, the staff report provides a good summary of the facts, procedural requirements, and technical arguments. However, it lacks any discussion of the planning fundamentals that could guide the BOA in its interpretation of the code.

The hearing provided an opportunity to supply the missing policy analysis, and it almost happened. Early in the discussion (R59) the following exchange took place:

> Gladziszewski: Could you explain the rationale for when the Code was tightened up in the mid 1980's. Why?
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> Maguire: Prior to that, the way the Code was written, is that an Industrial district would allow almost every use that was allowed in the previous zoning districts, or the less intense districts. There was quite a bit of complaints about the mix of uses in the Industrial zone districts. There were some conflicts with some office uses in an industrial area. The Commission decided to separate the uses a little more so they would avoid that. If an area were built up with a lot off office use and then you came in with an industrial-type activity that was more intense, like an asphalt plant. There may not be land available for that use which is more intense. I think we even see that now. When you try to locate those uses in an industrial area, there still are conflicts.
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> Sanford: That is because our industrial areas are so small and so close to the residential or mixed use areas, and such. We are so tight with everything that you can't get far enough away to do away with the smells or the stinks and the noise levels for the residential or office-type people.
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> Maguire: Yes, it is limited in terms of the area that we have available.
> Gladziszewski: So there are two reasons, one is that the office workers in an industrial zone might object to industrial activity in an industrial zone, which is of course, what it is zoned for. Then, if you only have a limited amount of industrially zoned land, you've just taken up that space with something that could have gone somewhere else.

Had the BOA persevered with this line of inquiry, it would have been able to discern and base its decision on the legislative intent and planning values necessary to properly interpret and apply CBJ 49.20.320. But the discussion went no further than the passage quoted above. Commissioner Vick then commented that he found protection of industrial land an unpersuasive criterion given that the Lemon Creek industrial zone "is nothing but garages as far as the eye can see". (R59) Even this might have been helpful were it an attempt to inquire whether prior similar use determinations had resulted in unlisted uses being

"deemed as listed in the table of permissible uses" as provided in the ordinance. But it appears that Commissioner Vick was citing the garages as precedent for disregarding the TPU altogether. It is hard to put any other gloss on his statement that "I don't see any connection between those rentals and industrial use whatsoever."

The analytical quality of the hearing deteriorated from this point on, rapidly becoming little more than a search for some way to rationalize a BVS building. Commissioner Bruce proposed Category 15.100, Post Office, because "A post office is handling lots of documents. They go in, they go out, people pay for what they get sometimes. And they don't pay for what they don't get, sometimes." (R66) The staff commented that when the BOA makes a similar use determination, it must pick the use it considers most similar, whereupon Commissioner Bruce said "I guess I kind of like post office." This analysis is casual at best. It was followed by several remarks (R67) about whether the post office category (which requires a conditional use permit) would inconvenience Mr. Lovig. This suggests that the BOA was more concerned with accommodating the applicant than interpreting the ordinance.

After public testimony was closed, the BOA debated the issue, with Commissioner Pusich arguing (R78) that the BVS facility would be harmonious with the development that has already occurred in the neighborhood, and Commissioner Bruce arguing (R79)that a BVS facility is like a post office because they each serve a "unique public function", which, he said, is the thrust of category 15.100. The Category 15.100 classification was approved on a 5-2 vote, Commissioners Gladziszewski and Kendziorek dissenting.

We find no basis in the ordinance for the argument that any public building which serves a "unique public function" is similar to a post office and should be allowed in an industrial zone. Elementary schools (Category 5.110) and mental institutions (Category 7.400) are public building serving unique purposes, but they are disallowed in industrial zones. Nor are we persuaded that a building is similar to a post office merely because it handles lots of documents while people go in and out.

The wide range of uses evident in the ten buildings included in the photographic survey (R88.5) is more troubling. We sympathize with the concerns voiced by Commissioner Pusich that the Lemon Creek Industrial Zone seems to be filled with non-industrial uses "as far as the eye can see". But whatever thinking, or lack of it, led to the current state of development in Lemon Creek, we cannot simply throw up our hands and walk away from required zoning decisions for future developments. Moreover, we do not have before us the facts or the law that allowed the development of those uses. As Commissioner Dybdahl noted (R74),

> For whatever specific reason those other referenced buildings, a different determination was made. A determination was made that a particular use was already allowed or permitted under the Table of Permissible Uses. So they don't have any real relevance right now.

III. Disposition

Based on the facts and reasoning stated above, the decision of the BOA is vacated because it is not supported by substantial evidence in light of the whole record. CBJ 01.50.070(a)(1). We select the "substantial evidence" standard even though Mr. Bauer did not argue it. He argued the related "inadequate written findings" standard, but we believe the written findings in this case, though quite brief, do inform us of the basis for the BOA's decision. Our concern is that this basis is not supported by substantial evidence about the similarity between a post office and a BVS facility. The only evidence in the record is the anecdotal observations of commissioners. Such observations, while often admissible as "official notice", are rarely enough by themselves to support a decision, especially where, as here, they appear to be too eager to accommodate the developer.

We are mindful of the problems associated with deciding a case on grounds not argued by the parties: we did not have the opportunity to hear arguments on the substantial evidence theory, and the parties were denied the opportunity to make them. However, this procedure is sometimes appropriate "when the new theory applies to the transaction in issue, is related to the theories presented by the parties, and is necessary for a proper and just disposition of the case." *City of Fairbanks v. Johnson*, 723 P.2d 79, n.5 (Alaska 1986)

IV. Remand

The case is remanded to the BOA for further proceedings. The BOA is not required to hold a new evidentiary hearing if it is able to articulate a similar use theory supported by substantial evidence in the existing record. The BOA may also rely on official notice of generally accepted technical or scientific matter within the BOA's expertise, or by official notice of a fact which is judicially noticed by the courts of the state.

We express no opinion whether the existing record when combined with official notice and adequate analysis by the BOA would support a finding that the BVS facility qualifies as a post office under Category 15.100. If it does not, the BOA is free – without holding another hearing– to articulate a different theory such as the Category 10.2 proposal made by Mr. Lovig, provided *that* theory is supported by substantial evidence in the record.

If the BOA is unable to find substantial evidence in the existing record, it may hold another full hearing, with or without public testimony, or it may limit its consideration to further documentary evidence from the parties.

V. Other Issues

Although not necessary to dispose of this case at this point, we note for any subsequent proceedings that we are not persuaded by Appellant's arguments on de facto amendments to the TPU and spot zoning. The first argument – that the BOA accomplished what amounts to an unauthorized amendment of the TPU – relies too heavily on an academic construction of the term "unique." It is true that commissioners many times described the BVS facility as "unique" but it is clear from the context that they meant "not mentioned expressly or implicitly in the TPU." Clearly, if a use were totally dissimilar to any other use – a nuclear power plant, for example – it would be unsuited to a similar use determination and must be added to the TPU by Assembly action. This is the dictionary meaning of "unique", but commissioners were using the term in the loose modern sense of "different" that is evident in the common habit of referring to something that is "very unique".

We also reject Appellant's argument regarding spot zoning because it simply begs the question of whether a BVS facility is a similar use. If it is not, it will be denied a similar use determination and no inconsistent use will occur. If it is a similar use then, *a priori*, no inconsistency – and no spot zoning – will result.

Finally we note that the construction on the BVS facility has proceeded during this appeal. CBJ 01.50.030 provides that "Unless ordered otherwise by the appeal agency, the decision being appealed shall not be stayed pending appeal but action by any person in reliance on the decision shall be at the risk that the decision may be set aside on appeal." No such stay was issued in this case.

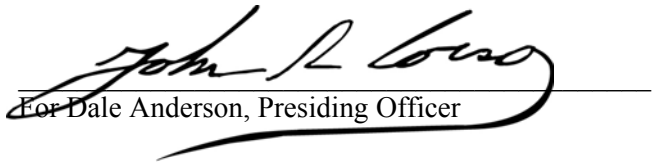
VI. Recommendations.

We urge the Commission to consider some procedure that would ease the continuing problem of how to replace rejected staff findings. The obvious solution is to return the case to the staff for presentation of replacement findings at the next meeting. If this would cause too much delay for some cases, perhaps some time could be set aside during a recess in the same meeting so that staff and commissioners could craft a cohesive and defensible set of findings.

IT IS SO ORDERED.

DATED this 5th day of August, 2002.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA



For Dale Anderson, Presiding Officer

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