BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

MARCIANO DURAN
D/B/A DURAN CONSTRUCTION,

Appellant,

v.

CBJ PLANNING COMMISSION,

Appellee,

and

SHAWN WILLE,

Appellee-Intervenor.

Case No. 2003-01

FINDINGS AND CONCLUSION

I. Background.

Appellant Marciano Duran DBA Duran Construction ("Duran") operates a commercial storage and topsoil processing business at the Duran Construction site located at 6225 Alaway Avenue ("the Site"). A sand and gravel extraction permit has been in effect for the Site since 1969. (R 7). In July 1999, Laurie Sica, Environmental Zoning Inspector for the Community Development Department (CDD), conducted site visits and made unsuccessful attempts to contact Duran. (R2) On September 8, 1999, the CDD issued a Notice of Violation to Duran Construction for processing topsoil in a zoning district where processing is not allowed and for operating a storage yard without a conditional use permit. CBJ 49.25.300, §10.400. (R8) No response to the Notice was received from Duran Construction, and a phone call to the company on October 5, 1999 was not returned. On October 7, 1999, the Community Development Department followed up by issuing a Compliance Order. (R10)

On October 29, 1999, Duran appealed the compliance order to the Planning Commission. (R12). The appeal was scheduled for December 14. (R104)

On December 3, 1999, Duran met to discuss the pending appeal with Sica and CDD Director Cheryl Easterwood. At the meeting, Duran described his use of the property since 1989, claimed that topsoil machinery was used approximately 2 weeks out of the year and described prior commercial and industrial uses of the land since 1971. According to Sica's contemporaneous handwritten notes, (R13):

> → Cheryl determines that topsoil screening could be considered accessory to the storage yard activity.
>
> → Need to determine of storage area is grandfathered. Pre-1987 when zoning changed to GC. If not, needs CUP for storage area.
>
> → Duran will get more info.

Duran's wife Josette has testified (R169) that at the close of the meeting, Easterwood and Sica requested further information about historical uses at the site and that Sica thereafter left a message on Duran's telephone answering machine stating that "our activities were considered 'grandfathered'". On January 31, 2000, Sica hand wrote an additional note to the CDD file (R14):

> Duran has not brought us any more information. Cheryl determined that topsoil screening is accessory to contractors's storage. Aerial photos found since meeting with Duran show continued commercial use of the property. →
>
> Since there are no public complaints rec'd about this site – I will close case @ this time and consider their operation "grandfathered" – however –
>
> no junkyard allowed.
>
> ↓
> Mostly
> so it doesn't
> just hang
> out there.

Sica also entered notes into the CDD computer permit system, (R106-107) saying:

> Case is not clear enough to continue with compliance order - historic aerial photos show continued commercial use - much of it contractor storage and quarry use. No public complaints rec'd-close.

According to CDD records, the published agenda for the December 14 Planning Commission meeting did not include the Duran appeal. (R140).

During 2000, 2001, and 2002, Duran continued to use the Site as a storage yard and to process and store topsoil. (R169). Early in 2000, residents near the Site complained to CDD that Duran's activities were generating noise and vibration. Environmental Zoning Inspector Dan Garcia went to the Site and spoke to the equipment operator, who said that operations would cease within a few days. (R2) In 2002, CDD and JPD received numerous complaints of noise, exhaust fumes, and vibration caused by a topsoil screener and an excavator used to drop large rocks. (R2; R15-45)

On June 20, 2002, Garcia issued a "compliance advisory letter" to Duran advising him that CDD regulations imposed various limitations on noise from industrial activities, particularly those adjoining a residential district. (R58).

On July 12 Garcia issued a Notice of Violation noting the Site beginning in 1987 was zoned General Commercial and that applicable zoning standards for that period at CBJ 49.25.300 §10.220, §10.300, or both allowed storage of equipment or materials only pursuant to a conditional use permit, and at CBJ 49.25.300 §4.100 prohibited processing of topsoil. Garcia ordered Duran to immediately cease processing topsoil at the Site and, if he wished to use the Site for storage, to apply within two weeks for a conditional use permit. The Notice acknowledged that Duran considered his activities to be grandfathered, but noted that neither Duran's current nor previous sand and gravel extraction permit authorized storage, processing, or sales. The Notice also stated that the Site had been zoned Residential-Reserve from 1964 to 1987 and that zoning laws in effect during that period allowed storage yards only pursuant to a conditional use permit. (R62) The notice was sent by certified mail

but despite three delivery attempts, Duran did not claim the letter and it was returned to CDD. Garcia sent copies of the Notice by regular mail and facsimile. He spoke with Duran three times by telephone to explain the Notice. (R 6)

On August 28, Garcia and CDD Director Dale Pernula issued Duran a Compliance Order which restated the substance of the Notice of Violation, and ordered immediate compliance upon pain of criminal prosecution. On September 16, 2002 Duran appealed to the Planning Commission pursuant to CBJ 49.10.620.

The Planning Commission hearing began on December 10, 2002 and was continued to January 14, 2003. The Commission's packet included a staff report by Garcia (R 1). In the report, Garcia noted that during the period 1964-1987, the Site had been zoned Agricultural-Farming rather than Residential Reserve as stated in the July 12 Notice of Violation, but that this error made no difference because a storage yard was not allowed in either zone. The Commission by later delivery received an October 22 letter from Duran's counsel to the Commission (R 95), arguing that CDD was bound by Easterwood's statements to Duran during their meeting of December 3, 1999, as shown by Sica's notes, that the Site was qualified by historical use for contractor storage, and that topsoil was an accessory use. The letter cited *res judicata*, collateral estoppel, CDD'S lack of authority to set aside a prior decision, estoppel, and laches as legal theories in support of Duran's position.

At the December 10 hearing, the Commission took testimony from Garcia, who said that he regarded the Sica notes as evidence that the case had not been resolved. (R157) The Commission also heard ten witnesses, all of whom complained about noise and vibration from the Site. (R158-160) The testimony stated that Duran's processing included "dropping Volkswagon-sized boulders from thirty feet in the air," R. 193-94. The photo at R 203 show the proximity of Duran's processing to residential areas. R. 203. The photos at R. 46-57 show the relationship of the operation to the neighborhood. R. 46 shows a boulder being dropped.

At the January 14 continuation of the hearing, counsel for Duran argued that "a deal is a deal" and Sica's voice mail message after the December 3 meeting and her January, 31, 2000 notes to the file constituted a deal that remained binding on CDD. (R 189) Counsel for the Planning Commission disputed Duran's legal theories and argued that prior to 1969, storage was not allowed at the Site, was allowed thereafter only by a conditional use permit for which Duran never applied, had thus never been legal and therefore could not be grandfathered. ® 189). After considerable discussion about whether and what sort of deal had been struck in 1999, the Commission voted to deny the appeal. This appeal followed.

After oral argument and deliberation on April 21, 2003 the Assembly voted to deny this appeal. By order dated May 1, the Assembly granted Appellant's request for an immediate written decision for appeal purposes pending issuance of this opinion. The appeal was denied on the grounds that the 1999 compliance order and subsequent staff action did not amount to a decision sufficient to invoke the doctrines of res judicata, collateral estoppel, waiver, or other impediments to enforcement of the 2002 compliance order, and that there was substantial evidence in support of the commission to this effect.

II. Discussion

Our decision in this matter is guided by the municipal appellate code:

> **01.50.070 Standard of review and burden of proof**
>
> (a) The appeal agency or the hearing officer may set aside the decision being appealed only if:
>
> (1) The appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing;
>
> (2) The decision is not supported by adequate written findings or the findings fail to inform the appeal agency or the hearing officer of the basis upon which the decision appealed from was made; or

> (3) The appeal agency or the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.
>
> (b) The burden of proof is on the appellant.

Duran contends that the Planning Commission's decision should be set aside because it is not supported by substantial evidence and because it failed to follow its own procedures, thereby denying him due process. Notice of Appeal, Attachment A. We deal with each of these claims in turn.

A. Substantial Evidence

Duran's briefing does not identify the manner in which he believes the Commission's decision is unsupported by substantial evidence. Indeed, the term "substantial evidence" does not appear in Duran's opening or rebuttal briefs, except for a quotation of CBJ 01.50.070. We will frame this issue as best we can.

There are few disputed facts in this case other than the historical use of the Site, and even those facts are relevant mostly to the extent they inform what Duran sees as the overriding issue: "the binding nature of the 1999 CDD resolution". Duran argues that "a deal is a deal" and the 1999 deal may not be terminated by one party. Duran offers a variety of legal theories in support of his theory. Central to all of them, and to the Planning Commission decision, is the history of the 1999 compliance order.

A compliance order is one of several enforcement device authorized by Article VI of Title 49, the CBJ Land Use Code. Others include an injunction, a civil action for damages, and criminal charges. Compliance orders are governed by CBJ 49.10.620, which provides that an order may be issued after notice and an opportunity to respond when "in the opinion of the department, a person is violating or is about to violate" Title 49 or a permit or order issued under Title 49.No hearing is required but review by the Planning Commission is available upon request of the respondent.

In this case, Duran exercised his right to review, but before the Planning Commission took up his case, he discussed it with Zoning Inspector Laurie Sica and CDD Director Cheryl Easterwood and the matter went no further. This is the "deal" at issue in this case. In his briefing Duran refers to it as the 1999 "resolution", a generic term ("disposition" would be another) that encompasses what we see as the most accurate term to describe of the events of December, 1999. In our view, Easterwood "dismissed" the enforcement action. Moreover, the dismissal was without prejudice and CDD is now free to bring the same or similar charges.

Our conclusion is based in part upon the nature of a compliance order. It is an order, not an offer. It must be preceded by notice to the respondent, but no further discussion is required. It is a tool for enforcement to be used at the discretion of CDD with due regard for the procedural rights of the respondent, but with no obligation to secure his agreement.

In this case, Easterwood afforded Duran an opportunity to discuss the case, but the discussion produced no conclusion except that occasional topsoil screening would be an accessory use for a storage yard. (R169). At the close of the discussion, Easterwood asked Duran to provide evidence of historical use of the Site, but he never did. (R14) Instead, Easterwood, Sica, or both determined a month later on their own that CDD records indicated "continued commercial use of the property" and that no complaints had been received from the public. The language used by Sica in her handwritten note is revealing. She says "Since there are no public complaints about this site, I will close the case @ this time and consider this case "grandfathered" ... mostly so it doesn't just hang out there." Her computer notes provided a rationale for this action: that the case was "not clear enough". It is significant that the only decision attributed to Easterwood in Sica's handwritten note and computer entries is that topsoil screening is accessory to storage. Sica also noted that photos show continued commercial use of the property, but she did not record any conclusion about how long the use

continued and whether it was sufficient to constitute a nonconforming use. Taken as a whole the notes say only these things about CDD actions:

1. Easterwood determined that topsoil screening is accessory to storage.
2. Easterwood proposed to determine whether the storage use was grandfathered but needed more information from Duran.
3. Arial photos showed continued commercial use of the property.
4. There were no public complaints about the site.
5. Sica thought the case was unclear, and for that reason closed it.
6. Sica considered the Duran operation to be grandfathered, mostly so it didn't just hang out there.

These events and comments are more consistent with the dismissal of an enforcement action than they are with a deal, a settlement, or a meeting of the minds. A deal supposes some exchange of value, but there is no evidence in the record that Duran gave or Easterwood expected anything in exchange for her action on the case. The only thing she expected from Duran was more information, and she didn't get it.

Instead, the record shows that CDD, lacking complaints from the neighbors and facing some evidence of historical use of the property, concluded that the case was "not clear enough" to prosecute and decided to allocate its limited enforcement resources to other cases. We agree with Wille's view that Sica's note to the file was an internal memorandum for purposes of recording her decision to dismiss rather than an official decision on the merits. Her voice mail message to Duran (R169) that the storage use would be "considered" grandfathered is consistent with this view, although it could also be consistent with a decision on the merits. However, the Planning Commission chose not to regard it as binding, and we defer to its interpretation of the facts.

We find no reason to disagree with Commissioner Gladziszewski who noted that a deal is a deal, but she did "not believe that the deal has been made. It is not clear to her, and it certainly does not

seem to serve the interest of justice so as to limit public injury. This issue seems to have just faded away because no one was complaining." (R 198)

It is sound case management to prioritize – or dismiss – enforcement actions according to the quality of the evidence available and the number of people injured by the activity at issue. Zoning officials cannot police every possible violation. *Jackson v. Kenai Peninsula Borough* 722 P.2d 1038 (Alaska 1987) It is equally good practice to reassess and recharge cases if the evidence and public interest warrant. Such is the meaning of the term "dismiss without prejudice". It would be better practice for CDD to take these actions in writing so that a dismissal is as clear as a compliance order. Cases should not just "fade away", a practice which can create confusion even if, as here, the respondent is content to see the matter fade away.

B. Due Process

Once again, Duran's briefing neglects his Points on Appeal, which claim that the Planning Commission "failed to follow its own procedures and denied due process by failing to abide by the 1999 resolution." This contention reflects CBJ 01.50.070, which says that the Commission's decision may be overturned if the Commission "failed to follow its own procedures or otherwise denied procedural due process". Duran does not identify which of its own procedures the Commission violated, nor does he explain how a failure to abide by a staff decision violates procedural due process. However, he does offer arguments about estoppel, laches, and related notions based on fairness and equity. These are probably affirmative defenses for which Duran has the burden of going forward with the evidence, but they are sufficiently procedural for us to go to the effort of fitting them within the issues framed by his Notice of Appeal.

Given our view of the 1999 disposition as a dismissal without prejudice rather than a settlement agreement or decision on the merits, we find no merit in Duran's arguments based on res judicata,

collateral estoppel, lack of staff authority, estoppel, or policies in favor of settlements. These arguments all presume some substantive on the merits and, as noted above, the only decision on the merits made by Easterwood or Sica was that topsoil processing is an accessory use to a storage yard.

Moreover, both res judicata and collateral estoppel are designed to avoid relitigation of settled issues: until the 2002 Planning Commission hearing, the Duran case had never been litigated, either judicially or administratively. It had been the subject of several letters and meetings between CDD staff and Duran, but nothing more.

Duran also claims protection from the doctrine of estoppel, which a person may apply against a governmental body when:

1. The governmental body asserts a position by conduct or words;
2. the person acts in reasonable reliance thereon;
3. the person suffers resulting prejudice;
4. the estoppel serves the interest of justice so as to limit public injury.

McConnel v. State DHSS, 991 P.2d 178, 185 (Alaska 1999)

As previously noted, we think there is evidence sufficient for the Planning Commission to conclude, as Commissioner Gladziszewski did, that CDD did not assert to Duran that they had a deal. Even if the Sica voice mail message that construction storage would be "considered" to be grandfathered, was an assertion, it is at best arguable that it was reasonable for Duran to rely on so informal and ambiguous a communication, or to rely on subsequent government inaction as anything other than government inaction. *Jackson, supra.* The parties have not briefed the extent to which Duran has suffered prejudice as a result of the 1999 dismissal. Arguably he has suffered no prejudice at all: he has enjoyed several more years of business before neighborhood complaints and CDD resources are sufficient to justify an enforcement action.

Duran argues that the fourth element necessary to invoke estoppel against a government – that it limit public injury – should not be applied to protect his neighbors since their interests are not the

public interest. The real public interest, argues Duran, is in the interest in finality of judgments. This argument is notably unconvincing. It conflates collateral estoppel (finality of judgments) with equitable estoppel (reasonable reliance). It is tautological insofar as it proposes that the government should not be allowed to change its position because there is a public interest in the government not changing its position. It confuses "public injury", with "public interest". Most notably of all, it asserts that there is no public interest in applying zoning laws to protect neighborhoods: Duran argues that they are just a collection of private interests. Of course it might be said that any group of people – the United States, for example – is just a collection of private interests and there is no public interest in protecting them. This is nonsense. The purpose of zoning laws is to protect neighborhoods from injury. In *Municipality of Anchorage V. Schneider* 685 P.2d 94 (Alaska, 1984) the supreme court considered the application of estoppel to prevent the city from revoking a settlement agreement allowing a developer to increase density on a lot.

> Finally, we conclude that enforcement of the settlement agreement is necessary in the interest of justice. Of primary importance to this determination is the fact that any public injury which may arise from applying the doctrine of estoppel to the Municipality in this case is quite limited. The proposed structure will not violate health or safety codes. Further, the proposed structure would have satisfied the terms of the zoning ordinance then in effect had the settlement been reached a month earlier. Finally, the record contains no evidence that the Schneiders' proposed construction will be seriously out of character with the present structures in the area. Thus the case at hand does not present a situation where a building permit has been issued in violation of a long-standing zoning ordinance, for example, where a builder obtains a permit to construct a high-rise apartment or factory in an otherwise residential neighborhood. In such a case, the balance of the equities might be struck differently.

Clearly, neighborhood injury and public injury can be the same thing. The record in this case contains information sufficient for the Planning Commission to conclude that the neighborhood would be injured by continuation of the Duran operation. (R15-45; R 158-160) and the balance of equities should not be applied against the government – and the public – in this case.

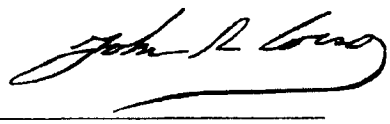
III. Conclusion

For the reasons set out above, we find that the Planning Commission had substantial evidence to support its decision upholding the 2001 compliance order. Duran has asserted but not argued that the Commission failed to follow its own procedures or otherwise denied him procedural due process. Duran has argued but failed to prove several affirmative defenses related to finality of judgements and estoppel. The decision of the Commission is affirmed.

IT IS SO ORDERED.

DATED this 4th day of June, 2003.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA



John Corso for
Presiding Officer Jeannie Johnson

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