BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

DIXIE A. HOOD,

Appellant,

vs.

CBJ BOARD OF ADJUSTMENT,

Appellee,

and

SECON, INC.,

Appellee/Intervenor.

VAR2007-00010

DECISION ON APPEAL

This is the Assembly's decision in an appeal brought by Ms. Dixie Hood. Ms. Hood appealed a decision by the CBJ Board of Adjustment to grant a variance allowing Secon, Inc., to locate a truck scale extending into the 50-foot no-development setback of Lemon Creek. The appeal was timely filed, Secon was allowed to intervene, all parties filed briefs, and the parties presented oral arguments before the Assembly on November 26, 2007. The Assembly deliberated on the matter and directed the City Attorney to provide a draft decision, which was circulated to the parties for comment. Ms. Hood and CDD submitted comments that are addressed herein.

Background.

The CBJ Land Use Code establishes a 50-foot no-development setback from the ordinary high water mark of streams that are designated by the Alaska Department of Fish and Game as anadromous; Lemon Creek is such a stream. The

Code allows intrusions into the setback to be approved by the Board of Adjustment through the variance process. The Code provides the grounds for variances in CBJ 49.20.250.

The Board of Adjustment approved Secon's application for a variance to allow the edge of its truck scale to extend six feet into the Lemon Creek setback, and to allow the edge of the gravel berm between the scale and the creek to extend 21 feet into the setback. The scale is located in an area zoned for industrial use, near the CBJ gravel pit and CBJ truck scale.

The lot on which the truck scale was constructed is quite narrow, located between the ordinary high water mark of Lemon Creek and the right-of-way for Anka Street. The scale, as constructed, would not fit on the lot without extending into either the stream setback on one side or the Anka Street right-of-way on the other.

To construct a truck scale at that location, the Land Use Code requires the developer to have obtained both a grading permit and a setback variance.[1] Secon constructed the scale before it obtained a CBJ permit for the project. In constructing the scale before securing a permit, Secon violated the Land Use Code. CBJ took no enforcement action against Secon except to give Secon notice that it would need to apply for a permit, which Secon did almost immediately. In that notice, CBJ expressed only one safety concern, the need for a stop sign, and this was addressed by Secon within a matter of hours.

Secon's variance application was reviewed by the Wetlands Review Board and the Board of Adjustment, both of which granted approval. At its hearing on May

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[1] Only the setback variance is at issue in this appeal. For ease of reference in this Decision, the setback variance will be referred to interchangeably as the "permit" or the "variance."

22, 2007, the Board granted Secon the variance "after the fact," *i.e.*, the variance was issued after the truck scale was in use. The variance allowed an intrusion into the setback as the scale had been constructed, and specified a number of conditions to be met by the applicant. These conditions directed Secon to implement mitigation measures to reduce the project's impact on Lemon Creek. Secon accepted the mitigation requirements and modified its project accordingly. The mitigation requirements included a berm directing runoff away from the creek, silt fencing, paving, and grass and tree plantings.

On June 12, 2007, Ms. Hood filed an appeal to the Assembly on the Board's decision to issue the setback variance. The timing of the variance and the enforcement issue – that the scale was constructed prior to obtaining a permit – was a focus of Ms. Hood's appeal. However, the Presiding Officer on appeal issued an order on July 30, 2007, which pointed out that, under the CBJ Appeals Code, enforcement matters are not appealable to the Assembly. Ms. Hood's appeal also challenged the merits of the variance, arguing that the variance criteria in the Land Use Code were not met, and that the Board lacked substantial evidence to find that those criteria were met.

In August 2007, after the Planning Commission had approved a permit to another applicant for a gravel mining operation in Lemon Creek, which will use a part of the same lot for access, the Board modified the Secon variance to accommodate the neighboring gravel operation. That Board decision was not separately appealed but was consolidated into the present appeal without objection by the parties.

Standard of Review; Burden of Proof.

Under the CBJ Appeals Code, the standard by which the Assembly reviews decisions of the Board of Adjustment is deferential. This deferential standard is set forth in the Appeals Code in the "substantial evidence" test, which provides that a Board decision will be upheld if it is supported by "substantial evidence," defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." CBJ 01.50.010. This means that the Assembly does not re-decide the question that was before the Board; rather, the Assembly determines whether the Board had adequate evidence before it to support its decision. Even if the Assembly, on reviewing the same evidence that was presented to the Board, might have reached a different conclusion than the Board in the first instance, the standard of review on appeal requires the Assembly to affirm a decision that is supported by substantial evidence.

The standard of review is an expression of the basic structure of the CBJ to allocate decisions on permits to the Board of Adjustment; the Board has ~~developed considerable~~ expertise in these matters, and it has the opportunity to observe and question witnesses, unlike the Assembly which must work from a record on appeal. In this case, for example, Board Chair Dan Bruce noted specifically that the Board members were "all familiar with the strip of land under discussion because various portions of it had previously been before the Planning Commission on innumerable occasions." Record at p. 48. Similarly, Board member Maria Gladziszewski stated that "the properties located near the streamside setback of Lemon Creek were problematic," and the Planning Commission had spent "many hours reviewing numerous setback variances for this particular subdivision." Record at p. 45.

The appellant bears the burden of proof. CBJ 01.50.070(b).

Discussion.

Enforcement.

Staff recommendations, and the City Manager's decisions regarding enforcement actions, are not appealable to the Assembly. There are two reasons for this. First, the Appeals Code does not provide that such decisions may be appealed. The Board of Adjustment is a creation of ordinance, limited to the powers set forth in the Land Use Code, and those Board powers do not include enforcement. These policies are reflected in the CBJ Appeals Code, under which there is no provision for appealing to the Assembly a decision made by the City Manager.

The second reason is based on the doctrine of separation of powers. Under the separation of powers doctrine, a court will not second-guess the decision-making of a prosecutor. Similarly, the Assembly sitting as an appellate body will not second-guess the enforcement and administrative decision-making of CBJ management; that is simply not the Assembly's role in the appeal context.

In her appeal, Ms. Hood expressed concern that the CBJ did not take enforcement action against Secon for having built the truck scale prior to securing a permit. She introduced an email from the City Manager to CDD staff regarding Secon's application and Code violation. In the email, the Manager stated, "if they [Secon] refuse [to get a permit] or if it [the permit] is denied, [by the Board] then we shut them down." This email contemplates the possibility that the variance application could be denied, and it gives no direction to staff on the merits of the variance decision. It says to hold off on enforcement so long as Secon cooperates in getting into compliance. And, in fact, the record indicates that that is what happened.

There is no provision of the CBJ Code that makes a developer ineligible for a permit because he or she is out of compliance with the Code. If a development meets the Code criteria, it may be issued the permit. The fact that the development was constructed prior to the developer applying for the permit, while poor practice and one which could possibly subject the developer to an enforcement action, is not controlling in the decision whether or not to grant the permit.

Further, CDD cannot simply "shut down" a business that is out of compliance with the Code. What the municipality does have authority to do is charge a business with an infraction which carries a fine, issue a stop work order under appropriate circumstances, or to bring other forms of court action like injunctions and misdemeanor charges. Such enforcement action requires a substantial investment of public resources, and because it threatens livelihoods, also requires observance of due process protocols. In this case, the record shows that Secon took steps to come into compliance with the Code directly on being contacted by CBJ staff. The required stop sign, for example, was up within a matter of hours.

It is the Manager's responsibility to allocate limited public enforcement resources. In this case, he chose not to allocate those limited resources to punishing a business that was working to comply, albeit late, with the Code. His email indicated that if Secon should chose not to cooperate, or if the Board were not to grant the permit, then further enforcement action should be taken. It has long been the CBJ policy to work with citizens who are trying to comply, and bring enforcement actions against those who are not.

The Variance.

The relevant standards for a variance are set out in the CBJ Land Use Code at CBJ 49.20.250(b), as follows:

> (b) Variances other than de minimis. Where hardship and practical difficulties result from an extraordinary situation or unique physical feature affecting only a specific parcel of property or structures lawfully existing thereon and render it difficult to carry out the provisions of this title, the board of adjustment may grant a variance in harmony with the general purpose and intent of this title. A variance may vary any requirement or regulation of this title concerning dimensional and other design standards, but not those concerning the use of land or structures, housing density, lot coverage, or those establishing construction standards. A variance may be granted after the prescribed hearing and after the board of adjustment has determined that:
>
> (1) The relaxation applied for or a lesser relaxation specified by the board of adjustment would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners;
>
> (2) Relief can be granted in such a fashion that the intent of this title will be observed and the public safety and welfare preserved;
>
> (3) The authorization of the variance will not injure nearby property;
>
> (4) The variance does not authorize uses not allowed in the district involved;
>
> (5) Compliance with the existing standards would:
>
> (A) Unreasonably prevent the owner from using the property for a permissible principal use;
>
> (B) Unreasonably prevent the owner from using the property in a manner which is consistent as to scale, amenities, appearance or features, with existing development in the neighborhood of the subject property;
>
> (C) Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive; or

(D) Because of preexisting nonconforming conditions on the subject parcel, the grant of the variance would not result in a net decrease in overall compliance with the land use code, title 49, or the building code, title 19, or both; and

(6) A grant of the variance would result in more benefits than detriments to the neighborhood.

The main issue in deciding the merits of the variance at issue in this appeal is the application of CBJ 49.20.250(b)(5) of the variance requirements, and in particular, subsection (5)(C).

Regarding the application of CBJ 49.20.250(b)(5)(A) through (D) (above), Ms. Hood argues that an applicant for a variance must meet the requirements of all of the subsections: (A), (B), (C), and (D). This argument is erroneous. Because of the "or" at the end of subsection (C), a variance application need meet only one of the subsections to be valid.

The testimony before the Board indicated that, because the lot was so narrow, the truck scale, as designed, would not fit between the edge of the setback and the right-of-way. The CDD staff report indicated that "special engineering and construction techniques" would have been required to design and construct the scale narrowly enough to fit on the lot without requiring a variance:

> Most of the lot is impossible to develop without encroaching into the 50 foot habitat setback. Although the project could have been installed on the narrow strip of land outside the setback, special engineering and construction techniques would have been required.

Record at p. 11.

Secon's testimony (John Logsdon), without going into great detail, outlined what those special techniques would entail, and that it would have cost Secon considerably more to build the scale in that manner. Unfortunately, Mr. Logsdon did not provide detailed information that would have facilitated a deeper analysis,

nor did the staff report. Board Chair Dan Bruce, however, pointed out that in other instances where the cost of the project was driven by the unique nature of the land on which the project was located, the Board had found that subsection (5)(C) was met. Record at p. 48. Further, as discussed above, the Board members were familiar with the nature of the land on which this project was located. Decision on Appeal, page 4, lines 18-25. The Assembly finds that consideration of these types of factors – engineering and construction techniques, project costs, the nature of the land involved, the permit sought, etc. – is within the Board's expertise in making permitting decisions.

To require Secon to use the more-expensive engineering and construction methodology when Lemon Creek could be adequately protected with the berming, settling pond, silt fencing, *etc.*, would have been unnecessary. Requiring Secon to squeeze the scale between the setback and the right-of-way would have cost Secon additional time and money, and would have resulted in a narrower truck scale (although, the berm probably could not have been constructed entirely outside the setback in any event, given how narrow the lot is) located closer to the truck traffic line of sight,[2] and with no greater mitigation or protection for the creek. This is particularly apparent in light of the fact that a gravel mining operation in Lemon Creek, adjacent to Secon's truck scale, has now been approved by the Planning Commission. Accordingly, such extra time and expenditures were not necessary to protect the creek, and the Board had substantial evidence ("such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"), to

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[2] As discussed in the staff report, safety was enhanced by allowing the scale to be off-set from the right-of-way. "By granting the variance, truck drivers are able to have more clearance and better sight distance when pulling back into the right-of-way." Record at p. 11.

support its conclusion that the "unnecessarily burdensome" criterion of subsection (5)(C) was met, and the variance should be granted.

As an alternative basis for affirming the Board's decision, the record would support a decision by the Board to grant the variance under subsection (5)(A). That subsection provides: "Compliance with existing standards would... unreasonably prevent the owner from using the property for a permissable principal use. ..." In this case, because the mitigation measures adequately protect the values underlying the code provisions, i.e., habitat protection for Lemon Creek, it would be unreasonable to disallow use of the property, including an intrusion into the setback, to build a truck scale, a permissible use in an industrial zoning district. This subsection requires less analysis than does (5)(C); it simply asks whether it would be unreasonable to deny the development under the circumstances. The Assembly finds that the evidence would support such a decision.

Ms. Hood argues that Secon had an alternative to its need for a variance, namely to use CBJ's truck scale instead of building its own. This was not, and is not now, the question presented. The question before the Board of Adjustment was whether the scale project met the requirements for a setback variance. It is not up to the CBJ to decide which scale Secon uses; that is Secon's business decision to make. The question before the Assembly on appeal is whether the Board had substantial evidence to support its decision to grant a variance.

Conclusion.

The decision of the Board of Adjustment is supported by substantial evidence and is therefore ***affirmed.***

The Assembly requests that the Manager and City Attorney look into two ideas to prevent the problems that led to this appeal from recurring. First, the language of the subsections of the variance requirements is somewhat confusing. If an ordinance can be drafted to clarify this area, it might save time and effort for developers, the Planning Commission, and the Assembly. Second, an ordinance requiring payment of double fees for all permits applied for "after the fact" would provide a financial incentive for developers to apply for CBJ permits in a timely manner.

This is a final administrative decision of the Assembly of the City and Borough of Juneau, Alaska. It may be appealed to the Juneau Superior Court if such appeal is brought pursuant to the Alaska Rules of Court within 30 days of the date indicated below.

IT IS SO ORDERED.

Dated this 7th day of January, 2008.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

By: Bruce Botelho, Presiding Officer on Appeal

Laurie Sica

From: Bob Doll [robertjdoll@yahoo.com]
Sent: Sunday, January 06, 2008 6:38 PM
To: John Hartle; Laurie Sica
Subject: Dissenting Opinion

Attachments: DISSENTING OPINION 2.doc

DISSENTING
PINION 2.doc (27 K

Laurie & John,
Attached is my dissent. Please make it available to the Assembly, etc. Thanks, Bob

Bob Doll
12175 Glacier Highway, A204
Juneau, AK 99801
907-723-2124

DISSENTING OPINION

At a minimum, I would remand this case to the Board of Adjustment for further evidence on the issue of the cost of compliance per subsection (5) (C). The opinion cites subsection (5) (C) as the "main issue" and then argues that the evidence in support of the Board's decision on that issue was adequate. I disagree. Remand would, at the least, avoid endorsement by the Assembly of the Board's failure to insist on adequate evidentiary support of its decision regarding subsection (5) (C). It would also place in the record vital information without which the Assembly can not perform its duty in hearing an appeal.

The decision in this appeal is achieved by accepting as fact mere speculation and assertion by the staff, and by SECON, that adherence to the Code would have been "unreasonably expensive." No engineer's or architect's estimate of the cost of compliance was entered into an otherwise substantial record. No evidence of the dollar value of the contract that SECON held with DOT/PF was offered; such evidence might have allowed the Board (and the Assembly) to evaluate compliance costs versus potential profit. Reference is made to "comments" by members of the Board of Adjustment that "indicated that the Board understood" what the costs might be. Acceptance of such a relaxed standard of evidence as "substantial" is in sharp contrast to an otherwise strict adherence to the most limited view of the Assembly's role in reviewing Board of Adjustment decisions.

In fact, I have determined that SECON's winning bid, as the prime contractor for the Sunny Point project, was $27 million. The total of the bid items related to the truck scale was $6.665 million. These data were readily obtainable. They could have provided the Commission, and the public, with some basis for comparing its "intuitive" understanding of the costs of moving the scale, or otherwise making it compliant with the code, with the potential profit to be expected on the project. On remand they could still perform that function, without necessarily altering the ultimate decision.

So much for the legal issues in this appeal. There are public policy issues that may not be central to our "quasi-legal" concerns but which may, if not addressed here, escape adequate attention.

If allowed to go unchallenged, the outcome of this variance application threatens to turn the Land Use Code and the Comprehensive Plan on their heads. It says, in effect, that "These are the rules, but if you choose to avoid them, you may achieve your objective by offering minimal evidence of your good faith and by complying to an extent you deem will not be too expensive." In so doing, the decision vitiates the Land Use Code, embarrasses those who have to enforce the Code, and invites repetition.

The fact is that the CBJ does not currently have adequate tools to deal with this apparently deliberate violation of the Code. A fine is the only possible response and/or deterrent. But even if one had been imposed, its value would be a trifle in the context of a multi-million dollar contract.

Bob Doll, 1/4/08

Laurie Sica

From: Jonathan Anderson [jonathan.f.anderson@gmail.com]
Sent: Thursday, January 03, 2008 11:45 AM
To: Laurie Sica
Cc: John Hartle
Subject: Hood Appeal
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Hood appeal jfa.doc

Laurie,

Could you please forward the attached draft to the other Assembly members. I have talked with John Hartle and he agreed this would be appropriate. It is a summation of my position in the Hood appeal. I will circulate hard copies Monday night.

Thank you,

Jonathan

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JONATHAN ANDERSON
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9162 Jerry Drive
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789-6883

Hood Vs. Planning Commission

Jonathan Anderson

SUMMARY

1) To be upheld, the record must show evidence that compliance with the Code would be "unreasonably expensive."
2) The record presents no evidence of expense
3) Under CBJ 01.50.070 (a) (2) *The decision is not supported by adequate written findings*

Ms. Dixie Hood appealed the May 23, 2007 Planning Commission decision to grant Variance 2007-00010 to Secon, reducing the 20 foot habitat setback from an anadromous stream to 28 feet for a truck scale.

Under the Land Use Code CBJ 49.70.310, development is prohibited within 50 feet of the Ordinary High Water mark of listed anadromous streams. The Alaska Department of Fish and Game has listed Lemon Creek as an anadromous stream 111-40-10100.

Under CBJ 49.20.250 (b) the Planning Commission may grant variances if certain criteria are met. As staff notes, at least one of the sub-criterion under Criterion 5 must be met to grant the variance. The Planning Commission ruled that sub-criteria A and B were not met and that sub-criterion D was not applicable. Their decision to grant the variance was based on the conclusion that sub-criterion C was applicable -- judging that compliance with the Code would:

> *Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive*

Under CBJ 01.50.070 (a) reasons for Assembly overruling the Planning Commission include:

The Assembly should overrule the Planning Commission if: CBJ 01.50.070 (a) (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;*

In other words- the ruling should be overruled if the record does not provide sufficient evidence that compliance with the Code would be "unreasonably expensive."

The May 16 2007 staff report states that

> *Although the project could have been installed on the narrow strip of land outside the setback, special engineering and construction techniques would have been required. This would have resulted in a significantly more expensive and time consuming project.*

A conclusion of "unreasonably expensive" must be based on the cost of complying with the code. Staff states that "special engineering and construction techniques would have been required" but offers no evidence to support that claim. Nowhere in the report, the staff findings, the hearings, nor in response to direct questioning at the appeal do the appelees provide any cost estimates of compliance.

In fact, in the May 22 meeting of the Board of Adjustment (page 37 of the record) Mr. Rue asked staff about the costs and the record notes that "Mr. Chaney deferred to the applicant, stating that he did not previously request the dollar amount to do so, although he believed it would be very expensive." Thus, staff admits that they had no knowledge or evidence of costs. Despite Mr. Chaney's reference, Mr. Logsdon's testimony beginning on page 38 does not address costs of compliance. In fact, since, as Mr. Logsdon states on page 39, SECON was unaware of the need of a variance, they logically would not have entered into any such calculations.

The sole additional reference to technical issues is found in Secon's November 16 brief that "Modifying the design to build a thinner wall for the pit would, at the very least, require engineering a cast concrete wall with reinforcing bar." Again, no cost estimates are provided. Without cost estimates there is no way "unreasonable" expense can be evaluated.

It may well be that the cost of compliance is unreasonably expensive, but the record provides no evidence of compliance costs or what would be considered "unreasonable." Therefore under CBJ 01.50.070 (a) (2) :

The decision is not supported by adequate written findings

I recommend this decision be remanded to the Board of Adjustment to consider the facts surrounding cost of compliance and the satisfaction of sub criterion C.