

1 BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

2
3 BILL AND RUTH NEWMAN, TIM STRAND,
4 AND GEORGE DANNER,

5 Appellants,

6 vs.

7 CBJ PLANNING COMMISSION,

8 Appellee,

9 and

10 ALASCOM, INC. D/B/A AT&T ALASCOM,

11 Appellee/Intervenor.

USE2008-00026

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13 **DECISION ON APPEAL**

14 **I. Introduction**

15 Appellants Bill and Ruth Newman, Tim Strand, and George Danner filed a timely appeal of
16 the decision of the City and Borough Planning Commission to approve a conditional use permit
17 (USE2008-00026) for applicant Alascom, Inc. d/b/a AT&T Alascom (AT&T). The conditional
18 use permit allows the placement of a 150 foot monopole for a new telecommunication facility at
19 3921 Mendenhall Loop Road, to be located within a 1,250 square foot area leased by AT&T from
20 property owner Glacier Valley Baptist Church. AT&T intervened as an Appellee.

21 The record was prepared and the parties were given time to file motions to supplement or
22 object to the proposed record. Appellants filed several motions to supplement the record, which
23 were ruled on by the Presiding Officer in the first instance, and by the Assembly on Appellants'
24 interlocutory appeal of those rulings. Some of the motions to supplement were granted and some
25 were denied. The Assembly affirmed the rulings by the Presiding Officer. See Order on Pending
26 Motions dated April 2, 2009; Order on Appeal of Motions Regarding the Record on Appeal dated
27 April 10, 2009.

1 The parties filed comprehensive briefs on the issues on appeal. On April 14, 2009, the
2 Assembly held a hearing at which it heard oral argument by each of the parties. Assemblymembers
3 asked questions of the parties, and the parties were allowed to ask questions of each other.

4 The Assembly deliberated in closed session, and the City Attorney was directed to prepare a
5 draft decision. As required by the Appeals Code, the draft decision was circulated to the parties
6 and an opportunity to comment on the draft was provided. Appellants did submit objections to the
7 draft. AT&T Alascom subsequently filed a motion to file supplemental authority focused on the
8 issue of its objections to any moratorium on new tower permits as proposed by Appellants in their
9 objections to the proposed decision. AT&T Alascom's motion to file supplemental authority was
10 granted, and the Assembly deliberated in closed session July 13 regarding the draft decision, the
11 objections of Appellants, and the additional briefing by AT&T Alascom. This final decision is the
12 product of that deliberation.

13 14 **II. Burden of Proof and Standard of Review**

15 Under the CBJ Land Use Code, decisions concerning an application for a conditional use
16 permit are made in the first instance by the Planning Commission. CBJ 49.15.330. A final
17 decision of the Planning Commission may be appealed to the Assembly under the provisions of
18 CBJ Chapter 01.50, the Administrative Appeal Procedures Code. Under CBJ 01.50.070(b),
19 Appellants bear the burden of proof. In this case, Appellants have the burden to show that the
20 Commission's decision is "not supported by substantial evidence in light of the whole record, as
21 supplemented at the hearing;" or that the Commission failed to follow its own procedures. CBJ
22 01.50.070(a)(1) and (3). "Substantial evidence" is defined to mean "such relevant evidence as a
23 reasonable mind might accept as adequate to support a conclusion." CBJ 01.50.010. Specifically,
24 Appellants have the burden to prove that:

1 1. The Planning Commission lacked substantial evidence to find that the permit
2 application was complete, in that it lacked sufficient detail and failed to address the
3 long-term ramifications of the action.

4 *See* First Pre-Hearing Order, March 16, 2009, paragraph 3, statement of issues on appeal.

5 Alaska case law also provides that a decision “within the sphere of expertise of the Planning
6 Commission . . . is entitled to considerable deference.” *Lazy Mountain Land Club v. Matanuska-*
7 *Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995), citing *South*
8 *Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993) (“The majority
9 rule, and the one we adopt, is that judicial review of zoning board decisions is narrow and that a
10 presumption of validity is accorded those decisions.”)

11 **III. Findings and Conclusions Regarding Issues on Appeal**

12 Appellants allege the following points, in their Notice of Appeal as revised; however, the
13 discussion and analysis by all parties is not necessarily broken out by the individual points on
14 appeal.

- 15 1. The Planning Commission lacked substantial evidence to find that the permit
16 application was complete, in that it lacked sufficient detail and failed to address the
17 long-term ramifications of the action.
- 18 2. The Planning Commission lacked substantial evidence to grant the permit in
19 that the staff evaluation and Director’s review contained errors and
20 omissions and failed to show conformity with the Land Use Code.
- 21 3. The Planning Commission lacked substantial evidence to find that the
22 permit would comply with the requirements of the CBJ Land Use Code and
23 Comprehensive Plan.
- 24 4. The Planning Commission applied an incorrect legal standard regarding the
25 authority of local government review.
- 26 5. The Planning Commission failed to follow its own procedures and
27 deadlines.

1 A number of Appellants' arguments are grouped, properly, under the general category of
2 completeness. In general, Appellants allege that the application was incomplete because the issues
3 they raise were not properly addressed.

4 CBJ 49.15.130(b) provides:

5 An application is complete when it contains all of the information
6 necessary to determine if the development will comply with all of the
requirements of the permit applied for.

7 Appellants argue the AT&T application did not adequately address the issues of the project
8 driveway, platform size, tower height, parking, co-locators, and the 25-foot setback.

9 Appellants point to the fact that the permit application (letter) suggests that a new driveway
10 will be required, but, by the time the hearing was held months later, it had been determined that the
11 existing access would be adequate. This is a minor issue, typical of the way development plans
12 evolve over time; no new driveway will mean *less* impact on the neighborhood, not more. No
13 application process is perfect, and this issue appears to be immaterial.

14 The development itself will require minimal parking as it will have no staff on duty; the
15 focus of the parking issue has been the impact of this project on the parking requirement of the
16 church property on which the tower is to be located. That permit (the church's), however, was not
17 before the Commission; nor is it before this body, and accordingly, the Assembly lacks jurisdiction
18 to make rulings on it. In any event, it appears from the record that the tower can be located so as to
19 have very little impact on the church parking.

20 With respect to the height of the proposed tower, Appellants misconstrue the role of the
21 Commission; indeed, of the municipality. Appellants argue that AT&T has not adequately
22 justified the need for a tower of the height proposed. ("the Planning Commission fails to require
23 justification for the additional 20'." Appellants' Opening Brief at p. 4) It is not the role of the
24 Commission to determine what height is best. Rather, the Commission's role is only to determine
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1 whether the development as proposed, with appropriate conditions, meets the requirements of the
2 Land Use Code.

3 Appellants argue that, “the Planning Commission failed to require that all co-locators or
4 additional appliances of the applicant pass through the permit applications process.” Appellants’
5 Opening Brief at p. 6. There is no code or other requirement for “co-locators” (additional users of
6 the tower) to be identified at this time. Co-locators will simply have to meet the code requirements
7 in effect at the time they apply for a permit.

8 With respect to the 25-foot setback, the permit requires that the project be built in
9 accordance with the project drawing, and accordingly, a 25-foot setback will be required.
10 Appellants point out, accurately, that the project changed with respect to the (unnecessary)
11 driveway but is being held to the 25-foot setback. This is true, but it is not fatal to the permit.

12 Appellants argue that the noise issue was not adequately addressed. However, as noted by
13 Appellee/Intervenor, there is sufficient evidence in the record for the Commission to conclude that
14 noise will not be a problem in light of the setback and screening requirements.

15 Regarding public health and safety, Appellants raise several issues. First, all parties appear
16 to agree that the Planning Commission lacks authority under Federal law to restrict the location of
17 a “wireless service facility on the basis of the environmental effects of radio frequency emissions
18 to the extent that such facilities comply with the Commission’s regulations concerning such
19 emissions.” Telecommunications Act of 1996, Sec. 704. Thus, the issue of radio frequency
20 emissions is not before the Assembly at this time.

21 Other health and safety issues, however, are properly addressed by the Planning
22 Commission, and the Community Development Department in reviewing a Building Permit
23 application. Appellants are correct that toppling risk is not a trivial matter. However, the proper
24 process to address this issue is in the Building Permit review. The Conditional Use Permit
25 authorized by the Commission does not authorize construction; the applicant will be subject to
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1 further permit requirements in applying for a Building Permit. Toppling risk, ice and snow loads,
2 and so forth, will be properly addressed at that time, and the Planning Commission properly relied
3 upon assurances that that would be the case. No performance bond will be required; the Code
4 provision on performance bonds is generally directed at improvements required by the
5 Commission such as street lighting, curbs and gutters, and the like.

6 Appellants also raise the issue of the proposed tower's impact on property values. The
7 Land Use Code provides that the CDD director can recommend denial of a permit if it would
8 "substantially decrease the value of, or be out of harmony with, property in the neighboring area."
9 The director did not recommend denial. For this permit, the applicant was required to get an
10 appraisal of the impact of the proposed tower on property values; then in addition, the Commission
11 had the appraisal reviewed in turn by an independent appraiser, a former CBJ Assessor. Appellants
12 have pointed to numerous typographical and other errors in these two documents. Notwithstanding
13 those errors, however, the essential point is that the question of value was reviewed independently,
14 twice, and no "substantial decrease" in value was found. Appellants may disagree with these
15 findings, and argue that the errors in the appraisals indicate an inadequate review was performed,
16 but the Assembly finds that the Commission's decision that there would be no substantial decrease
17 in value is supported by substantial evidence ("such relevant evidence as a reasonable mind might
18 accept as adequate to support a conclusion").

19 The neighborhood harmony question is similar; CDD staff, to a degree it seems, conflated
20 together the two considerations, valuation and harmony, an issue which is addressed below, but,
21 notwithstanding some evidence to the contrary, after substantial deliberation by the Commission,
22 substantial evidence supports its conclusion.
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1 Appellants allege that the proposed tower is not in conformance with the CBJ
2 Comprehensive Plan, particularly emphasizing provisions regarding preserving the scenic beauty.
3 The Assembly finds that the Appellee/Intervenor's argument is more convincing, that the
4 Comprehensive Plan is to be viewed as a whole, that reliance on a single provision regarding
5 scenic beauty is too narrow an approach. The staff report found the proposed development to be in
6 compliance with the Comprehensive Plan, and the Commission's decision is supported by
7 substantial evidence.

8 No permit review is perfect, and certainly Appellants are correct that the review at issue in
9 this appeal had problems; however, the Assembly finds that such issues as the timing of the staff
10 acceptance of public comments do not rise to the level of a due process violation. Due process
11 comprises notice and opportunity to be heard; Appellants were not denied due process in this
12 matter.

13 14 **IV. Additional Directives**

15 The Assembly further enters the following directives in this case:

- 16 1. In future Community Development Department staff reports on conditional use
17 permit applications, and in the Commission's determinations on those applications,
18 the staff and Commission are directed to more specifically address the question of
19 whether a development will more probably than not be out of harmony with
20 property in the neighboring area, and to do so as a separate determination from that
21 of whether the development will more probably than not substantially decrease the
22 value of property in the neighboring area. CBJ 49.15.330(f)(2).

1 2. The building permit application and review stage is the point at which the issues of
2 safety concerning AT&T's proposed development permitted in USE2008-00026,
3 must be addressed in detail. The safety issues will include structural integrity and
4 stability of the monopole, including wind, ice, and other conditions, and any similar
5 issues identified by the CBJ Building Official. The conditional use permit phase is
6 not the stage at which these safety issues are addressed in detail because the
7 expertise and responsibility for these matters is with the Building Official, applying
8 the applicable building and other codes.

9 3. The Assembly requests that the Commission consider and provide the Assembly
10 with its recommendations on whether the CBJ should undertake to develop an
11 ordinance to specifically regulate telecommunication towers, including matters such
12 as height restrictions in the various zoning districts, lighting, mitigation measures
13 such as screening and placement options, and other related issues. The Assembly is
14 seeking the Commission's recommendations on the advisability of such an
15 undertaking, as well as the Commission's general views on recommended content
16 and process including time frame and stakeholders. If the outcome is that the
17 Commission and the Assembly concur that it would be in the best interests of the
18 CBJ to develop such an ordinance, the Assembly will provide the necessary
19 resources to help facilitate the process.

21 **V. Conclusion**

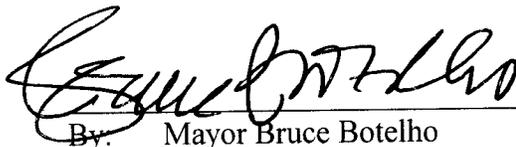
22 The Planning Commission's decision in this matter is affirmed; Appellants have failed to
23 meet their burden of proof in light of the standard of review set forth in the CBJ Appeals Code.
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This is a final, administrative decision of the Assembly of the City and Borough of Juneau; it may be appealed to the Juneau Superior Court pursuant to the Alaska Rules of Court, if such appeal is filed within 30 days of the distribution of this decision to the parties.

DATED this 15th day of July, 2009.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA



By: Mayor Bruce Botelho
Presiding Officer on Appeal