

Agenda

Committee of the Whole

City and Borough of Juneau

Ben Haight, Chair

May 24, 2016

Assembly Chambers

5:30 PM

- I. **ROLL CALL**
- II. **REGULAR AGENDA**
 - A. Planning Commissioner Training
- III. **OTHER BUSINESS**
- IV. **REPORT OF REGULAR AND SPECIAL COMMITTEES**
- V. **ADJOURNMENT**



Planning Commission Training

Rob Steedle, Director of Community Development

Beth McKibben, AICP, Planning Manager

Amy Mead, Municipal Attorney

Rob Palmer, Assistant Municipal Attorney

Open Meetings



Why should a community plan? It offers the benefits that free, many communities have limited land-use limits – only so much land can be settled, and only so much potential land is available for roads, utilities and other infrastructure. Also, all communities have limited financial resources. In order to be able to pay for the infrastructure that is needed, communities have to plan. Planning is also a way to make sure that the community is able to meet its needs in the future, as well as in the present. Planning is also a way to make sure that the community is able to meet its needs in the future, as well as in the present. Planning is also a way to make sure that the community is able to meet its needs in the future, as well as in the present.

- establish ground rules for development for the whole community
- protect a citizen by ensuring that all citizens are not put from one another;
- control development on land that is flood;
- use land to make land for important community uses such as landfills, giant pits, history and airport;
- prevent industrial uses from taking over residential areas; and
- prevent industrial uses from taking over residential areas; and

Alaska Statutes (AS) 29.35 and 29.40 define the authority of cities and boroughs to provide for planning, platting and land use regulation. The planning powers are either mandatory (indicated by the word "SHALL") or optional (indicated by the word "MAY"). Following is a summary of the municipal authorities:



AS 29.40.010 - 29.40.200 define and direct how planning, platting and land use regulation powers are to be exercised primarily for municipalities that are not home rule municipalities. Only a few of the provisions in AS 29.40 apply to home rule municipalities. The section headings for AS 29.40.010 - 29.40.200 highlight the subjects covered.

0100	Planning, planning and land use regulation	0100	Planning authority	1500	Recording
0200	Planning commission	0900	Abandoned plots and waters	1600	Title to vacated area*
0300	Comprehensive plan	1100	Information required	1700	Delegations
0400	Land-use regulation	1200	Not procedure	1800	Violations
0500	Appeals from administrative decisions	1300	Allocation or split petition	1900	Remedies
0600	Judicial review	1500	Notice of hearing	2000	Subdivision of State land*
0700	Hearing regulation	1600	Hearing and determination		* Applicant's home rule municipality

AS 39.05.02 allows a municipality to go beyond its boundary to provide parks, playgrounds, cemeteries, emergency medical services, solid and septic waste disposal, utility services, airports, streets (including for roads), trails, transportation facilities, wharves, harbors and other marine facilities and may regulate their use and operation to the extent that the jurisdiction in which they are located does not regulate them. A municipality may also adopt an ordinance to protect its water supply and watershed and enforce that ordinance outside its boundaries; but in order to exercise this power inside another municipality, approval by the other municipality must first be given by ordinance.

AS 29.35 © 20 applies to home rule and general law municipalities.

AS 29.40, as well as other sections of the Alaska Statutes, also address the relationship between State agency activities and local planning authority. A summary of these provisions follows. Please refer to the appropriate statute for more

AS 09.55.275 prohibits State acquisition of property which results in a boundary change in a municipality exercising planning authority pursuant to AS 09.15.010 or AS 26.15.060(c) without prior approval of the municipality.

1800

AS 35.15.01n establishes a procedure whereby municipalities may be able to assume planning and construction responsibilities for State public work projects.

AS 35.30.010 - 030 requires that, before commencing construction of a public project, the State Department of Transportation and Public Facilities and the University of Alaska shall submit the plan for the project to the municipal planning commission for review and approval. Approval by the planning commission may not be required before construction of a highway or local service road under certain circumstances. For example, where the plan for the project are consistent with prior municipal transportation planning. The State Department of Transportation and Public Facilities and the University of Alaska are required to submit the plan to the municipal planning commission for review and approval in the same manner and at the same time as any local law or ordinance that would affect the project. This chapter also provides, however, that the Governor may waive these requirements if the State Department of Transportation and Public Facilities and the University of Alaska demonstrate an overriding State interest.

AS 38.04.065 requires that local governments have the opportunity to participate in the State Department of Natural Resources planning process for State lands. Further, the State land plan shall be consistent with local government land plans to the maximum extent possible and still be consistent with State interests.

AS 40.15.010 - 020 requires that before lots of any subdivision or dedication may be sold or offered for sale, the subdivision or dedication shall be submitted for approval to the authority having jurisdiction. The recorder shall not accept a subdivision or dedication for filing unless it shows this approval. Also, a person filing a plat, map, subdivision or replat of property, or a petition to vacate any of these, shall also file a tax certificate showing that all taxes levied against the property at the date have been paid.

AS 40.15.075 states that the Division of Lands (within the State Department of Natural Resources) is the platting authority in areas outside organized boroughs and outside cities in the unorganized borough and in third class boroughs only for purposes of hearing and acting on petitions for the change or vacation of plats.

AS 46.40.100 provides that municipalities and State agencies shall administer land and water use regulations or controls in conformity with district coastal management programs that are in effect.

EXERCISING PLANNING POWERS

The council or assembly has the primary responsibility for implementing planning powers; however, the city council or borough assembly, the planning commission, and the planning authority must all work together to perform the functions of planning, planning and land use regulation. The council or assembly must first pass an ordinance to create the planning commission and the planning authority. AS 29.40.010 directs the formation of the planning commission and AS 29.40.020 directs the establishment of a planning authority.

The responsibilities of the council or assembly, planning commission and planning authority can be summarized as follows:

**City Council or
Borough
Assembly shall by
ordinance**

- Establish a planning commission which shall:
 - prepare and recommend a comprehensive plan to the council or assembly
 - review, recommend, and administer measures necessary to implement the comprehensive plan
- Adopt a comprehensive plan
 - periodically review/ update the comprehensive plan
- Adopt and amend local use regulations
- Adopt planning regulations
- Establish an advisory land plan procedure
- Adopt an appeal process
- Establish a planning act by law which shall:
 - administer subdivision regulations
 - perform other duties as required by the council or assembly

At 29-40, 270 authors in the planning committee and planning authority to delegate their powers to hear and decide cases to

Membership. The mayor appoints a minimum of five residents to serve as members of the planning commission for a term of three years, subject to confirmation by the assembly or city council. Membership appointed divides for one, two, and three year terms. In first days and hence rule cites the mayor appoints members of the planning commission from a list of candidates recommended by the city council. With a thorough commission membership that is appointed to the same number of members from first and second year rule cites reduces the proportion of the borough population that is represented in the second and first class cities. City council members of the planning commission are not eligible for the unexpired term. The compensation and expenses of the planning commission and its staff are paid as directed by the assembly or city council.

Duties
The duties of the planning commission are prescribed by the assembly or council by ordinance. In addition to the duties prescribed by ordinance, the planning commission shall prepare and submit to the assembly or council a comprehensive plan. The commission shall also review, recommend and administer measures to implement the plan (AS 29.40.030).

According to AIS 2004 (p. 93), a comprehensive plan is a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public... and may include, but is not limited to, the following:

- statements of policies, goals, and standards;
- land-use plan;
- a community facilities plan;
- a transportation plan; and
- recommendations for implementing the comprehensive plan.

The planning commission is responsible for preparing the comprehensive plan and recommending it to the assembly or council. In order for the plan to become an official policy statement, it shall be adopted by the assembly or council by ordinance. Also, after receiving the recommendations of the planning commission, the assembly or council shall perform a thorough review of the comprehensive plan and update the plan as necessary.

Land use regulations are measures used to implement the comprehensive plan. The regulations may be adopted by ordinance. According to AS 29-04-010, land use regulations, provisions governing the use and occupancy of land, may include but are not limited to: zoning regulations restricting the type of land and improvements by geographic districts; rules governing the use of land and improvements to encourage or discourage certain uses or measures to enhance or reduce effects of wind, and measures to further the goals and objectives of the comprehensive plan.

Membership. According to AS 39.40.060, the assembly or council shall establish a platting authority by ordinance. The platting authority may consist of all members of the planning commission, a portion of the members of the planning commission, or other municipal residents. The assembly or council may also provide for an administrative official to act as the platting authority for administrative plats.

Duties
The gaming authority administers subdivision regulations and performs other duties as required by the assembly or council.

This publication was developed by the State of Alaska, Department of Commerce, Community, and Economic Development. This publication is not and should not be construed to be an official or complete statement of State law governing exercise of municipal planning powers. For an official statement of law governing exercise of planning powers by municipalities, please consult the official published version of the Alaska Statutes.

According to AS 24-01-070, the assembly or council shall adopt platting requirements by ordinance that may include, but are not limited to, the control of:

- a. form, size, and other aspects of subdivision, dedications, and vacations of land;
- b. dimensions and design of lots;
- c. street width, arrangement, and right-of-way, including requirements for public access (parks and installation of street paving, curbs, gutters, sidewalks, sewers, water lines, drainage and other public utilities);
- d. dedication of streets, right-of-way, public utility easements and areas considered necessary by the platting authority for other public uses.



Nijali chik, Karnā, Panj rajā a Bero
Sham, samant, DCB

According to AS 29.40.010, the assembly or council shall, by ordinance, also establish an abbreviated or "short" plat procedure for plats that will:

- subdivide a single lot into not more than four lots;
- provide legal and physical access to a public highway or street for each lot created;
- not contain or require a dedication of a street, right-of-way (or other area); and
- not require a vacation of a public dedication of land or a variance from a subdivision regulation.

The platting authority shall waive the preparation, submission for approval, and recording of a plat if it meets the requirements listed above and each lot created by the subdivision is five acres or larger.

Once a plat is filed with the platting authority, the platting authority shall approve, or disapprove, the plat within 60 days or return it to the applicant for modification or correction. Unless the applicant consents to a time extension, the plat is considered approved if the platting authority fails to act within the 60 days. If the plat is approved, it shall be acknowledged and filed with the recorder in accordance with AS 40.15.010 - 020, which requires payment of the platting authority's approval and a certificate showing taxes have been paid. If such approval is not shown, the recorder will not file the plat. If the plat is disapproved, the platting authority shall state in writing its reasons for disapproval.

The platting authority may change a recorded plat if petitioned by either the state, a public utility, the borough, or the owners of a majority of the land affected by the alteration or replat. After the petition is filed, the platting authority has 60 days in which to publish it and hold a public hearing. Notice shall also be given to each affected property owner who did not sign the petition. The platting authority shall consider the alteration or replat petition at the hearing and make its decision on the merits of the proposal.

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graph TD
    A[Plan filed with planning authority] --> B[60 days to act]
    B --> C[NO ACTION  
Certificate of  
Approval issued]
    B --> D[DISAPPROVE  
Reasons must be  
given in writing]
    B --> E[RETURN to  
APPLICANT  
for modification and  
rejection]
    B --> F[APPROVE  
File with  
Recorder]
  
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The flowchart illustrates the process for a planning application. It begins with a box labeled "Plan filed with planning authority". An arrow points down to a box labeled "60 days to act". From this box, four arrows point down to four separate boxes: "NO ACTION Certificate of Approval issued", "DISAPPROVE Reasons must be given in writing", "RETURN to APPLICANT for modification and rejection", and "APPROVE File with Recorder". A small tree icon is located in the top right corner of the slide.

Vacations

According to A.S. 34.40.10, a platting may not be vacated except on petition of the State or the borough or city, a public utility, or owners of a majority of the land fronting the part of the street sought to be vacated. Vacation of a street in the borough area outside all cities may not be made without the consent of the assembly. Vacation of a city street may not be made without consent of the council. After the platting authority makes a decision to vacate a street, the assembly or council has 30 days in which to veto the action. Again, if a veto does not occur within the 30 days, the vacation is considered approved.

AS 39.40.150(d) allows the council of a second class city located outside a borough to vacate streets, alleys, crossings, sidewalks, or other public ways that may have been previously dedicated or established when the council finds that the public ways are no longer necessary for the public welfare, or when the public welfare will be enhanced by the vacation.

According to AS 34-40-010, the assembly or council shall provide by ordinance or resolution for an administrative decision of a municipal employee, board, or commission made in enforcement, administration, or application of a land-use regulation. The assembly or council may provide for an appeal to a court, hearing officer, board of adjustment, or other body. The assembly or council may also provide for appointment of a hearing officer for the commission, appointment, and terms of office of a board of adjustment, or other body or additional bodies hearing the appeals. The assembly or council may also provide for the appointment of a hearing officer, board of adjustment, or other body to hear appeals from the hearing officer, board of adjustment, or other body. Under AS 34-40-010, the hearing process adopted by the assembly or council may also provide for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer, board of adjustment, or other body to the superior court.

Assembly or council shall provide for this process.

[illegible]

for additional information, clarification, or assistance with community planning, please contact:

Department of Commerce, Community, and Economic Development
Division of Community and Regional Affairs
930 West 7th Avenue, Suite 770
Anchorage, Alaska 99501-5501
(907) 266-6161

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Police Powers

The Alaska Constitution and Alaska State Statutes provide maximum jurisdiction to municipalities to adopt and implement planning and zoning powers to protect public health, safety, and general welfare.

Police Powers:

- The right of government to regulate personal conduct and use of land in order to protect public “health, safety, and welfare”.
- Planning and land use regulation is the lawful exercise of police power.
- The use of police power must be reasonable and fair.

Planning Commission Role

- ***Advisory Role*** - Advises the Assembly on issues/activities related to planning, platting land use regulation and community development.
- ***Regulatory Role*** - Administers local land use regulations including zoning and subdivision ordinances.
- ***Procedural Role*** - Conducts fair meetings and makes fair decisions.



Planning Commission Duties

(49.10.170)

- Comprehensive Plan
- Capital Improvement Program
- City Land Acquisitions, Disposals and Projects
- Land Use Regulations
- Rezones
- Platting
- Conditional Use Permits
- Appeals of Administrative Decisions
- Variances -As Board of Adjustment

Common Good

A critical concept to understand is the protecting and promoting of the “common good” and what it means for the Planning Commission’s purpose, roles, and duties as articulated by the goals and policies of the Comprehensive Plan.

- Fair, even, and consistent application of the law.
- Contrast: Personal gain or benefit to a small number of people with no benefit for the community at large.
- Public Health, Safety and Welfare

Public

Public involvement gives the Commission opportunity to educate, build support, and encourage ownership.

- Improves trust in government.
- Taps local knowledge and talent.
- Creates sense of ownership in plan and regulations.
- Creates a constituency in planning.
- Ensures plan remains intact over time.

Planning Staff

Planning staff play a critical role in the planning process and effectiveness of the Planning Commission.

- Administers land use regulations
- Prepares reports and posts meeting notices
- Knows and interprets laws and ordinances
- Conducts community and capital projects planning
- Researches planning – agencies and land use issues
- Advises Commission
- Educates and assists the public
- Negotiates agencies, developers, and public
- Enforces code and conditions of approval
- Provides continuity

Planning Can...

- Maintain/enhance Quality of Life (public health, safety and welfare)
- Identify how a community wants to grow
- Be a device for problem solving
- Promote economic development
- Conserve resources
- Balance competing points of view
- Establish a degree of predictability & certainty over patterns and costs of development



Types of Community Plans

All plans serve as a guide for community decision-making and provide a blueprint for the future local development.

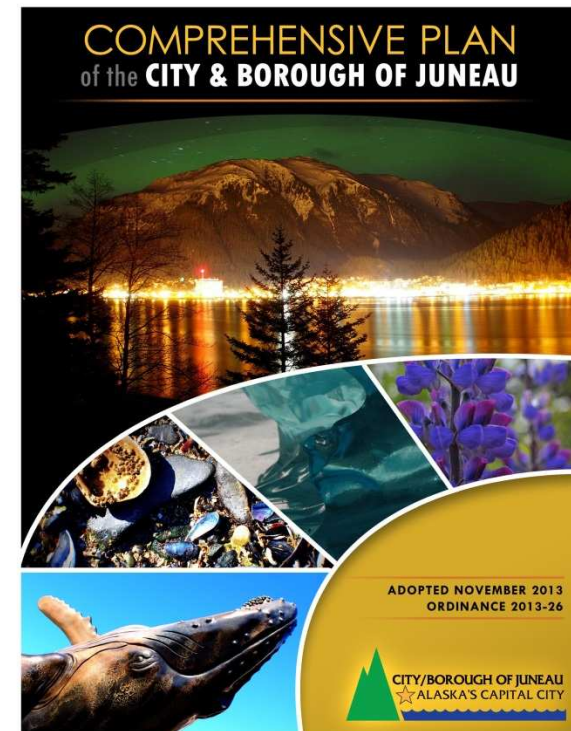
- Comprehensive Plans
- Land Use Plans
- Area Specific/ Neighborhood Plans
- Capital Improvement Plans
- Transportation Plans
- Economic Development Plans
- Community Action Plans



Comprehensive Plan

Provides the framework for decision-making in the form of policy statements, goals, and standards regarding the many facets of a community including:

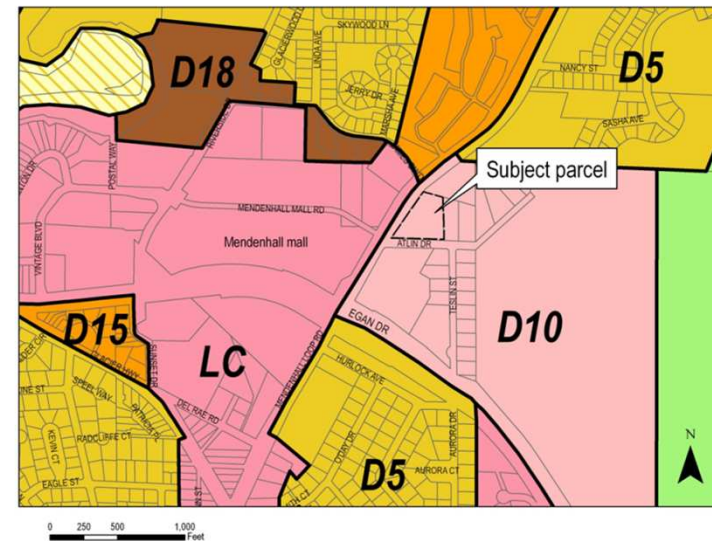
- Population/demographics
- Land use
- Environment
- Transportation
- Housing
- Public facilities
- Economic development



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- The Juneau Coastal Management Program, Volumes 1 and 2, dated February, 2008;
 - The Downtown Historic District Development Plan, dated December 1981; provided that the proposed district boundaries shall be those established by the assembly under a separate ordinance;
 - The Long Range Waterfront Plan for the City and Borough of Juneau, dated January 22, 2004, as amended;
 - The Last Chance Basin Land Management Plan, dated May 1978, updated November 1994;
 - Watershed Control Program - Salmon Creek Source, dated April 1992;
 - Watershed Control and Wellhead Protection Program - Gold Creek Source, dated November 1994;
 - Chapter 6 and Plate 1 of the West Douglas Conceptual Plan, dated May 1997;
 - Juneau Non-Motorized Transportation Plan, dated November 2009;
 - 2010 Downtown Parking Management Plan;
 - Chapter 5 of the Willoughby District Land Use Plan, dated March 2012;
 - Municipal Drinking Water Supply Plan, dated June 5, 2012;
 - Wireless Telecommunication Master Plan, dated May 2014;
 - Juneau Economic Development Plan, dated January 28, 2015; and
 - Auke Bay Area Plan, dated March 16, 2015.

Plan Implementation

- Zoning Regulations
- Subdivision Regulations
- Capital Improvement Program
- Water & Sewer Plan
- Floodplain Regulations
- Land Management Plan



Conditional uses

(49.15.330)

- A use that may or may not be appropriate in a particular zoning district according to the character, intensity, or size of that or surrounding uses.
- Procedure is intended to afford the Commission the flexibility necessary to make determinations appropriate to individual sites.
- The Commission may attach to the permit those conditions necessary to mitigate external adverse impacts.
- If the Commission determines that these impacts cannot be satisfactorily overcome, the permit shall be denied.

USE2013-0022 Conditional use to allow emergency generator for Centennial Hall.

CENTENNIAL HALL GENERATOR - PREFERRED LOCATION AS DESIGNED

Willoughby Avenue - Screening fence and landscaping will be installed to integrate into existing siding
- See plan drawing, attached.



Centennial Hall Emergency Generator. Preferred location for installation on Willoughby Ave. Existing AEL&P transformers at right to be renewed in Summer '13 during this project. Exist. bldg. electrical room directly behind new Gen-Set. *Advantages include easy maint. access, re-fueling accessibility, shortest power cable length, site and installation costs lowest due to proximity to existing building electrical systems. A decorative fence will be installed to reduce visual impacts and will be designed to harmonize with existing building siding. Because Bid plans and specs are complete; it can be installed in Fall 2013 to be ready for emergencies by Dec. 1, 2013. JCF

Identify the potential impacts

Traffic Impacts

- Congestion
- Safety loss or reduction
- Noise
- Glare from vehicles

Visual Impacts

- Viewshed obstruction
- Lack of/substandard landscaping
- Unattractive/noncontextual buildings

Environmental Impacts

- Air and water pollution
- Loss or reduction of habitat
- Loss or reduction of natural resources, including sensitive areas (e.g., wetlands)

Nuisance Impacts

- Noise
- Glare (vehicles, parking lots, building lights, parking lot security lights, etc.)
- Odor
- Vibration
- Electronic interference

Privacy Impacts

- Tall building encroachment
- Poorly placed buildings
- Poorly sited outdoor gathering places (especially associated with recreation)
- Density and intensity of use increases

Safety and Welfare Impacts

- Exposure to fire, flooding, or natural disasters

Then impose conditions to mitigate them

Conditions

Staff further recommends the following conditions:

1. Design of the fence will be as submitted.
2. CBJ will provide on-going maintenance of the fence, and if it is replaced the design of the replacement will be approved by CDD.

Ta-da!



Just be aware that at some point, enough is enough

WHEREAS, The Planning and Zoning Commission finds the following:

1. An expansion of the day care facility to 44 children is compatible with the residential character of the surrounding single-family homes;
2. The project meets State of Alaska licensing standards, and the outside play area is enclosed by a fence, as required by the Soldotna Municipal Code;
3. The project meets all six conditional use standards, as required by SMC 17.10.400.

WHEREAS, The approval is subject to the following conditions:

- A. The dumpster shall be screened from view on at least three sides, including the side facing Lord Baranof Street, or relocated on the property so that it is not visible from the right-of-way;
- B. Two water closets (toilets) shall be provided, one of which shall be of a size and height suitable for use by children under six years of age;
- C. The maximum building occupant load (children plus staff) shall be 49 or less, unless a fire-suppressing sprinkler system is installed and approved by the building official;
- D. The existing driveway shall be reduced to no more than 24 feet of unrestricted width, without sacrificing the required parking spaces for the property.
- E. Administration will work with the applicant to meet the general landscape requirements for a commercial landscape site plan for the front of the property and a fence buffer will be installed to the north of the property separating the access easement.
- F. The site plan will be amended to provide staff parking to the rear of the building for the required number of spaces.
- G. An as-built survey will be obtained and submitted with the site plan prior to making improvements.
- H. The Planning and Zoning Commission will review the daycare facility in 1 year to determine compliance with the conditions.

Variances

(49.20.250(b))

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.

CBJ 49.20 Article II

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.

49.20.250(b) Overarching Concepts

Variance=permission to violate the law (Title 49)

Variance is an extraordinary request

Variance necessary in only limited circumstances

- Property is physically unique/extraordinary
- Causes hardship and practical difficulties
- Minimum necessary for health/safety/welfare

Variance preserves constitutionality of Title 49

Options if Variance Denied

Applicant: comply with Title 49

CBJ: Should Title 49 be amended?

- Is Title 49 too restrictive?
- Title 49 substantive mitigation appropriate?
 - E.g., de minimis setback variance. 49.20.250(a)

Options of Variance Approvals

Precedent: Unless property is unique, then approval can erode Title 49 provision and constrain future legislation

CBJ: Consistent variance approval means Title 49 should be reviewed for deficiencies.

- De minimis variance. 49.20.250(a), *Thibodeau* (AK)
- Title 49 too restrictive? Substantive mitigation?
- E.g., 2015 Subdivision ordinance (Ord. 2015-03)

Variance Examples

Artificial or self-created hardship

- Bad measurement put addition into setback
- No basis for variance. *Place* (NJ), *E&F* (Conn.)

Equitable plea

- Ignorance of law, good faith, subsequent buyer
- No basis for variance. *Fields* (AK), *Barnes* (NJ)

More profitable use of land

- No basis for variance. *CBJ v Thibodeau* (AK)



Minor Subdivision

- Up to 13 lots
- Director approval
- Two-step process – preliminary & final plat
- Notice of Decision issued after preliminary plat
- Pre-application meeting required
- Public Notice required

Major Subdivision

- 14 or more lots
- Planning Commission approval
- Two-step process – preliminary and final plat
- Pre-application required
- Sketch plat required
- No longer reviewed like a conditional use permit
- Public notice required

Phased Permitting

General Rule: The cumulative impacts of an entire project need to be considered and not just impacts caused by individual phases.

Thane Neighborhood Association v. CBJ, 922 P.2d 901 (AK 1996) reversed PC decision on a mining permit because the PC did not adequately consider cumulative impacts of all phases

Example:

Developer proposes a 150 unit subdivision in phases

- PC needs to analyze impacts of entire project
- PC could then consider individual phases of subdivision

Conflict of Interest



Questions?





P R E S T O N G A T E S & E L L I S L L P
A T T O R N E Y S

VARIANCES TO LAND USE AND PLATTING REGULATIONS

Planning Commissioners Seminar
Anchorage, Alaska
February 1997

Presented by:
Lee Sharp

"Remember, my friend, a variance is a special dispensation to
violate a law that the rest of us must obey."

Anonymous

Extraordinary Remedy For An Extraordinary Situation.

Platting and zoning regulations apply to all property uniformly. Within a particular zone, zoning ordinances apply to all property uniformly. For a particular type of subdivision, the platting regulations apply to that subdivision and all similarly situated subdivisions in the same manner. There is a certain quid pro quo in platting and zoning regulations. A property owner who develops or subdivides his property is required to follow the applicable regulations. He does so knowing that everyone else similarly situated will also have to follow the same regulations. If the regulations were not uniformly applied and special favors were granted to those who applied for them, the regulation of the subdivision and use of land would become a sham.

However, it is also recognized that not every parcel is the same, and some property may be so unusual as to result in an undue substantial hardship on the owner of the property or a denial of all beneficial uses of the property if a uniform and strict application of the regulations is made. When a regulation makes property unusable for any purpose, courts will generally find that there has been a taking of the property. Thus, it is necessary to provide some flex in the joints of zoning and platting regulations to ensure that regulations that must be applied uniformly do not act as a taking of property because of some peculiarity of that property. As was noted by the Rhode Island Supreme Court in Reynolds v. Zoning Board of Review of Town of Lincoln, 191 A.2d 350 (R.I. 1963) at 352,

A variance . . . is designed to preserve the constitutionality of the legislation. It is invoked to avoid the confiscatory effect that would follow a literal enforcement of some term of a zoning ordinance operating to deprive an owner of all beneficial use of his land.

It has been described as an escape hatch.

A variance is designed as an escape hatch from the literal terms of an ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to a confiscation.

Lincourt v. Zoning Board of Review of the City of Warwick, 201 A.2d 482 (R.I., 1964) at 485-86. In Alaska, our Supreme Court has recognized that variances provide an escape hatch or safety valve for the individual landholder who would suffer special hardships from a literal application of a land use ordinance. City and Borough of Juneau v. Thibodeau, 595 P.2d 626 (Ak, 1979) at 632.

However, because the law should apply uniformly to everyone who falls within its scope, variances are granted sparingly and only under exceptional circumstances. Variances are the exception, rather than the rule. Ivanovich v. City of Tucson Board of Adjustment, 529 P.2d 242 (Ariz. 1975); Heady v. Zoning Board of Appeals for Town of Midford, 94 A.2d 789 (Conn., 1953); Lovely v. Zoning Board of Appeals of City of Presque Isle, 259 A.2d 666 (Me. 1969). The courts rule that variances should be granted sparingly not only because they are justified only in exceptional circumstance, but because they also amount to a special dispensation to violate the law. Board of Adjustment of City of Fort Lauderdale v. Kremer, 139 So.2d 448 (Fla., 1962); Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich, 102 A.2d 316 (Conn., 1953).

It can be seen that the granting of a variance is not an every day occurrence nor a matter that is to be handled lightly. Alaska Statutes Title 29, the Alaska municipal code, recognizes that the granting of variances is an integral part of land use regulations but it specifically prohibits use variances, variances based on self-imposed hardships and those sought solely to relieve pecuniary hardships or inconvenience. AS 29.40.040(b).

Included for your review as Attachment A are the variance provisions from Title 29.

Home rule municipalities are not bound by the above restrictions of Title 29 unless they are a home rule city within a general law borough (other than a third class borough). For example, although the City of Kenai is home rule, it is within the Kenai Peninsula Borough which is bound by the provisions of Title 29. Because a city within a borough may exercise only those planning and zoning powers delegated to it by the borough, its powers are limited to those possessed by the borough, even if the borough were to delegate its full zoning powers within the city to the city. The borough cannot delegate more power than it has.

If you examine the variance provisions of various home rule and general law municipalities within the state, you would find the following common threads running through these ordinances:

1. The property must be peculiar; that is, different from other property in the neighborhood or zoning district (not different from property in the municipality at-large); some ordinances address peculiarity of a building or structure.
2. The peculiarity arises out of natural conditions of the land or surrounding development.
3. Because of the peculiarity, a literal application of the zoning (or platting) regulation would work a hardship on the property owner, i.e., prevent reasonable use of the property or deny the owners rights or uses commonly enjoyed by others in the neighborhood.
4. The variance must be the minimum necessary and must be consistent with the comprehensive plan, safety, welfare, etc.

Peculiarity.

There are thus two main elements that must be considered before a property even qualifies for a variance. The first is the peculiarity element, and the second is the denial of reasonable use or undue substantial hardship element, often characterized as unnecessary hardship. The terms "undue hardship" and "unnecessary hardship" have been viewed as equivalent terms. Lively, supra. The peculiarity element has been viewed from two different aspects. Some courts have said that the regulation must have a peculiar impact on the property, that is, that the impact of the restriction on the applicant's property is different from the regulation's impact on other properties that are similarly situated. Township of West Deer v. Bowman, 333 A.2d 792 (Pa., 1975). Others have indicated that there must be a peculiarity of the property. In Ivanovich, supra, the Arizona Court of Appeals held that for a variance to be granted there must be a finding that the

. . . situation or condition of the property in question is extraordinary and exceptional and that the application of the zoning requirement would cause peculiar and exceptional practical difficulties or exceptional and undue hardship.

Ivanovich, supra at 248 (emphasis in original). Other courts have indicated that the need for the variance must arise out of unique circumstances without focusing upon either the property or the regulation. Taxpayer's Ass'n of South East Oceanside et al. v. Board of Zoning Appeals of Town of Hempstead, 93 N.E.2d 645 (N.Y. Ct. App. 1950). In Turner v. Richards, 366 A.2d 833 (Del., 1976) the Delaware court held that the hardship justifying a variance had to be inherent in the particular property.

The Alaska Supreme Court stated it this way:

Peculiarities of the specific property sufficient to warrant a grant of a variance must arise from the physical conditions of the land itself which distinguish it from other land in the general area.

Thibodeau, supra, at 635. Although AS 29.40.040 does not directly address the source of the peculiarity, it does prohibit variances where the "special conditions" are caused by the person seeking the variance, thus shifting the focus from the owner's situation to land.

Whether the analysis proceeds from the basis that there must be some peculiarity of the land or there must be some peculiar impact of the regulation seems immaterial as it is difficult to conceive of a situation where there would be a peculiar impact of a regulation where there was not some peculiarity of the property that caused the unusual impact. In any event, the physical peculiarity of the land approach has been recognized by the Alaska Supreme Court. Stated another way, a condition that is personal to the owner is not relevant. For example, a couple that owns a single family home in a single family zoned area desires to put on a 600 square foot addition that encroaches upon a setback requirement. The addition is needed to house the couple's aged mother because they cannot afford the cost of the necessary nursing home care for her. Their application for a variance should be denied for several reasons, one of which is that the "peculiarity" is not one that is physical or inherent in the land itself; instead, it arises out of the particular needs and desires of the couple. There is no physical feature of the lot to distinguish it from other lots in the area; the lot is not peculiar.

Hardship.

The other major element that must be present is that the peculiarity give rise to a substantial or undue hardship, or deny reasonable use of the property. Numerous courts have been faced with the question of what is meant by an undue or unnecessary hardship. Remembering that the purpose of a variance is to prevent a land use regulation from amounting to a confiscation of property where there is some peculiarity, it is not difficult to understand that undue and unnecessary are equated with what amounts to a taking. Courts require a showing that there is no possible beneficial use of property or that the strict application of the ordinance to that particular parcel would cause a loss of all beneficial use of the property. It has also been interpreted as meaning that there must be a showing that the land cannot yield a reasonable return. Taxpayer's Assn. of South East Oceanside et al., supra; Lincourt, supra; Board of Adjustment of New Castle County v. Henderson Union Association, 374 A.2d 3 (Del. 1977); Franco v. Zoning Board of Review of Town of Smithfield, 156 A.2d 914 (R.I. 1959).

A variance applicant must show that denial of the variance would leave them with no other reasonable use of the property or that no reasonable return could be made on the property. Courts reject the plea of variance applicants that they are unable to make as much money on their property if the variance is denied. In Pincus v. Power, 376 Pa. 175, 101 A.2d 913 (1954), the Pennsylvania Supreme Court held that where the only hardship shown by the applicants for a variance was that their property would be worth 400% more if the variance were granted was not the basis for granting a variance. In Broadway, Laguna Vallejo Association et al. v. Board of Permit Appeals of the City and County of San Francisco et al., 59 Cal. Rptr. 146, 427 P.2d 810 (1967) the California Supreme Court recognized that

virtually any circumstance that could be translated into economic terms would lead a developer to apply for a variance and that the mere desire to construct a more profitable project was not a basis for relief from land use regulations. The court noted at p. 819 that "variances were never meant to insure against financial disappointments." At p. 815, the court noted that if the desire to increase profits was sufficient to justify a variance, then almost all developers would qualify for variances and the public interest "would inevitably yield to the private interest and the maximization of profits." Similarly, the Arizona Court of Appeals in Ivanovich, supra, noted that there would be no occasion for land use regulation if variances were to be granted on the basis of apparent monetary distress of the property owner. In West Deer, supra, the Pennsylvania court held that unnecessary hardship was not demonstrated by evidence showing that the applicant would benefit if relieved of the land use restriction. The loss of economic benefit has been uniformly rejected as a basis for a variance. Cohen v. Zoning Board of Adjustment of the City of Philadelphia, 276 A.2d 352 (Pa., 1971); Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198 (Me. 1956). And in Alaska, the Supreme Court noted in Thibodeau, supra at 635;

The assertion that the ordinance merely deprives the landowner of a more profitable operation where the premises have substantially the same value for permitted uses as other property within the zoning classification argues, in effect, for the grant of a special privilege to the selected landowner. We do not believe that the variance provision in the instant ordinance is intended to achieve such an inequitable result.

Alaska Statute 29.40.040(b) dealing with the board of adjustment (zoning) makes this a statutory prohibition. That section provides in pertinent part:

A variance . . . may not be granted . . . solely to relieve pecuniary hardship or inconvenience.

Self-Imposed Hardships.

As was noted in the preceding discussion, the peculiarity of the lot generally must arise out of some natural condition of the lot. An artificial condition of the lot generally is not relevant. A structure placed on a lot is an artificial condition, not a natural one. Therefore, the existence or placement of the structure on the lot does not generate a peculiarity. As it is the natural condition of the lot that must lead to the hardship; a qualifying hardship generally cannot arise out of an artificial condition of the lot.

Courts have long recognized that self-imposed hardships do not qualify for a variance. In Alaska, this restriction on variances is reinforced in Alaska Statute 29.40.040(b) which provides, in part:

A variance . . . may not be granted if (1) special conditions that require the variance are caused by the person seeking the variance

Where the applicants are the ones who caused the nonconforming structure to be built or it was their agent who, for whatever reason, built the structure in violation of ordinance restrictions, it is clear that the "hardship" involved is "because of special conditions caused by actions of" the applicants. They may not point to their builder and cast the blame on him. Even if the builder is totally at fault, that has little or no relevance to the variance proceeding. What is before the board is a determination of whether the land itself meets the requirements of the conditions for granting a variance under the code, not whether the applicant is guilty or innocent or a third party is the direct cause of the violation.

If artificial or self-imposed hardships qualified for a variance, development restrictions on land would soon become a nullity. All one would have to do is build in violation of the regulation and hope that there is a substantial enough improvement in place by the time the administration discovers the violation that one will be able to show a self-imposed hardship of sufficient magnitude to qualify for a variance. If this is the standard adopted, the person who puts his life savings into a three story mini mansion would qualify for a variance while the wealthy person who built a 300 square foot summer cabin probably would not qualify. However, it should be obvious that the encroachment of the larger structure into a setback will have a far greater impact on the neighboring property or water body than would the same amount of encroachment by the smaller structure. Yet it is the larger structure that would be given a dispensation to continue its violation of the law while the smaller structure would not be given such a dispensation. This inconsistency should help bring home the fact that the regulation of the use of land is done independently of any characteristic of the owner. It makes no difference whether the owner is rich, poor, crippled or healthy, nor how "guilty" he or she is in causing the violation. The adverse impact on neighboring property of a nonconforming structure is the same without regard to any characteristic of the owner. It makes no difference whether the structure is the dream house the owners have planned for years and into which they have placed every penny of their assets or whether it is merely one of dozens of houses they might own. It makes no difference whether they ordered their contractor to place the structure in a violating location or to build it too large or too tall, or whether its placement and size were left totally to the discretion of their builder and they had nothing whatsoever to do with its placement or size. The impact on abutting property, the community (and in the case of shoreland property, the water body), will be the same.

The policymakers for the municipalities have determined that water bodies, streets and neighboring property should be protected and that one way to provide that protection is to prohibit any part of a building from being constructed within certain distances of water bodies, street lot lines and side or rear lot lines. There are also other density restrictions such as lot coverage, FARs, building heights, etc. Persons who own or build a structure in violation of these density requirements seek to justify a variance based on the hardship they would have to endure to bring their structure into compliance with the law. No one should be allowed to bootstrap themselves into such a dispensation and, indeed, the courts reject that approach. In Elwyn v. City of Miami, 113 S.2d 849 (1959) the Florida Third District Court of Appeal, at page 852, quoting from a Florida Supreme Court case said:

The authorities are generally in accord on the proposition that in seeking a variance on the ground of a unique or unnecessary hardship, a property owner cannot assert the benefit of a 'self-created' hardship.

Elwyn, *supra* at 852.

The New Jersey Supreme Court in Place v. Board of Adjustment of Saddle River, 200 A.2d 601 (1964) ruled that self-imposed hardships were irrelevant. There, a homeowner, after measuring from what he thought were the stakes for his property, commenced construction of a fallout shelter. However, a later survey of the property indicated that the stakes from which the homeowner had taken his measurements were incorrectly located. He had constructed his fall-out shelter 25 feet from a side lot line from which there was a 40 foot setback requirement. The New Jersey Supreme Court noted:

. . . the hardship to which . . . the statute refers must arise by reason of one of the specified conditions of the property. . . . hardship created by the owner which is unrelated to the physical characteristics of the land is not contemplated by [the statute] and accordingly is not sufficient grounds for the granting of a variance in this case.

Place, *supra* at 605.

In another New Jersey case, Deer-Glen Estates v. Board of Adjustment and Appeal of the Borough of Fort Lee, 39 N.J.Super. 380, 121 A.2d 26 (1956) the appellate division of the New Jersey Superior Court had before it the appeal of a variance granted where the owner had built a house encroaching eleven inches into a ten foot side yard setback. The court noted that the hardship of which the owner complained was one brought on by his own act or omission. Then, addressing the question of whether the eleven inch encroachment was significant enough for the municipality to require compliance, the court had the following to say:

If the latter violation is permitted, where will the line be drawn? A municipality need not overlook, nor will we require it to overlook, such a deficiency merely because it arose through the negligence or inattention of the owner and his employees. A builder may not, after his structure is partially completed, come into the building inspector's office with a new plan, and request, belatedly, that a certificate of occupancy be issued because of an alleged mistake by the surveyor, architect, contractor, or any of their employees. To permit him to do so would open the door to unconscionable, if not fraudulent, conduct on the part of builders. "Mistake" would then become nothing more than a guise for evading the legal requirements of a zoning ordinance. The citizens of Fort Lee have a right to rely on the valid provisions of their zoning ordinance, and have a right to demand its protection. (emphasis added)

Deer-Glen, supra at 29. It would be difficult to state more forcefully the case for denial of a variance involving a self-imposed hardship. Other property owners have submitted to the burden of complying with ordinance requirements. Should we expect less of someone who violates the requirement, even through the neglect or inadvertence of themselves or someone they have hired? The adverse impact of the violation is the same, whether the mistake was made in good faith or in bad faith.

The Connecticut Supreme Court in Highland Park, Inc. v. Zoning Board of Appeals of the Town of Newhaven, 229 A.2d 356 (CN 1967) rejected a variance where the hardship was due to either the property owner's own error or an error committed by someone employed by the owner. There, a corporate developer had constructed a house encroaching five feet into a ten foot side yard setback. The variance was sought on the basis that the location of the house was due to an error made either by the surveyor or by the foundation contractor employed by the corporation. They also claimed that the owner of the adjoining lot had demanded an exorbitant price for a strip of land necessary to relocate the dividing line between the lots and that the house could not be remodeled or moved and would have to be demolished unless the variance was granted. The variance request was denied by the board and the denial was appealed. The Connecticut Supreme Court disposed of the appeal in one paragraph. In denying the appeal (upholding the denial of the variance), the Court noted that the board had no power to grant a variance when the claimed hardship arose out of the property owner's own actions.

Owners will often seek to put as much distance between themselves and their contractor as possible and then to cast the blame upon the contractor. However, as noted in the cases above, the owner-builder is responsible for the acts of those whom he or she hires. Even where there is more distance between the applicant for the variance and the person who committed the error, the courts have refused to give such distance any weight. Pollard v. Zoning Bd. of Appeals of Norwalk, 186 Conn. 32, 438 A.2d 1186 (1982) is one such case. There the executrix of an estate hired a surveyor to divide a parcel into two parcels. Through a surveying error one lot was 5.6 feet short of the minimum 50 foot frontage required, although the plat produced by the surveyor showed the lot as meeting the minimum 50 foot requirement. The beneficiaries of the estate who had nothing to do with subdividing the property were denied a variance to the minimum frontage requirement. Even though the surveyor was hired by the executrix, and not the beneficiaries of the estate, the court ruled that the beneficiaries were to benefit from the subdivision of the lot and were suffering from a self-imposed hardship. The court overturned the grant of the variance, recognizing that the lot could not be lawfully used under the zoning ordinance. The court went on to note that the beneficiaries were not without remedy and, in fact, they were already involved in litigation with the errant surveyor. The court also addressed the public policy problem of letting the variance stand. The beneficiaries had claimed that the denial of a variance would have been unfair because they had no knowledge of the errors committed by the surveyor and because the hardship arose out of circumstances that were totally beyond their control. The court believed that in balancing the rights of the beneficiaries and those of the executrix who hired the surveyor against those of the municipality whose regulations had been violated the burden had to fall on the beneficiaries and the executrix. The court concluded:

The hardship, in this case, arose as the result of voluntary acts on behalf of one whom the variance would benefit and, therefore, was self-created.

Pollard, *supra* at 1191.

Where there is even more distance between the current owner and the person who actually created the nonconformity the courts have refused relief. Where the prior owner of a large parcel consisting of several undersized lots sold the undersized lots, the New Jersey court refused to reverse the denial of a variance to a subsequent owner stating that,

. . . the claimed hardship was self-created because the plaintiff's predecessor in title had created the nonconformity by selling the undersized lot . . . (emphasis added)

Barnes v. Wyckoff Tp. Bd. of Adjustment, 174 NJ Super. 301, 416 A.2d 431, 432 (1980).

Persons are presumed to have knowledge of ordinance requirements. Country Estates, Inc. v. Schermerhorn, 380 N.Y.S.2d 325, 326 (N.Y.App.Div. 1976). Further, the owner's lack of knowledge of a zoning violation when purchasing the property is not relevant. Camaron Apartments, Inc. v. Zoning Board of Adjustment of Philadelphia, 324 A.2d 805 (Pa.Comm. 1974).

It will be very tempting for a board to respond to the plea that a variance is the applicant's only hope and that they have no responsibility for the situation in which they now find themselves. The case law clearly runs against such applicants and any hardship arising out of their contractor's error is a self-imposed hardship that is not relevant to the grant of a variance. In fact, as noted by several of the courts, boards are not authorized to grant variances based on self-imposed hardships. The Connecticut Supreme Court in Pollard, *supra*, summed it up quite well at page 1192 as follows:

Personal hardships regardless of how compelling or how far beyond the control of the individual applicant do not provide sufficient grounds for the granting of a variance . . . It is not the function or responsibility of the Board of Appeals to seek ways to extricate [the applicant] from his self-created difficulties. (citations omitted) (emphasis added)

Knowledge of Law, Guilt, Innocence, and Good Faith Reliance Are Not Relevant.

As was noted above, the personal situation of the applicant is not relevant. For example, the applicant's health, age, wealth, family size or the number of cars or dogs in the household have no bearing on whether a variance applicant should be granted a dispensation to violate the law that his neighbor, who does not suffer from the same condition, cannot violate.

The focus is on an inherent peculiarity of the property that gives rise to an undue substantial hardship, not on the particular needs, desires or personal situation of the property owner.

Although the old saw "ignorance of the law is no excuse" is familiar to everyone, the argument is nevertheless often raised that the applicant did not know of the restriction and their innocence of any knowledge of the law should be taken into account in granting the variance. In other words, those who do not know of the law need not obey it while those who are aware of the law will be bound by it. As noted in the discussion above, this argument is generally rejected by courts. The court in Denton v. Zoning Board of Review of City of Warwick, 133 A.2d 718 (R.I. 1957) disposed of this assertion in the variance context when it stated that the hardship flowing from a literal application of a zoning ordinance is in no way dependent upon the applicant's knowledge or lack of knowledge of the existence of land use restrictions affecting his land. Further, as noted above, each person is presumed to know the law, Country Estates, supra and each purchaser is responsible for determining whether the property violates the law, Camaron Apartments, supra.

A more troublesome situation arises when the applicant for a variance asserts an equitable plea. The plea asserted in a variance case is sometimes referred to as good faith or detrimental reliance and may also involve a plea of "clean hands." The situation in which such an argument might arise would be as follows. The property owner applies for a building permit. He shows on his permit application an accurate drawing of a plot of his property and the location of the proposed structure. The application is reviewed by the building official and the zoning administrator. The latter notes on the application that all zoning requirements are met. After the house is built in accordance with the plot plan submitted, it is discovered that a setback violation exists and should have been evident from the plot plan. In such a case, the property owner will claim that he relied to his detriment on the issuance of the building permit with the specific notation relating to zoning compliance. He will claim that his hands are clean; that is, he did not mislead anyone, that he relied to his detriment on the permit and the municipality should be equitably estopped from denying a variance. In a few such situations, courts might prohibit a municipality from enforcing the ordinance against the owner. However, there is a vast difference between the ability of the municipality to enforce an ordinance and whether a property meets the requirements for a variance. Detrimental reliance is not one of the standards set out for the grant of a variance. A property is either qualified or not qualified for the variance depending on its peculiarity and the hardship that would be involved in making a reasonable use of the property. Equitable estoppel is a defense to be asserted by the property owner when the municipality attempts to enforce the ordinance. Fields v. Kodiak City Council, 628 P.2d 927 (Alaska 1981). In the case of a setback violation, that might be the demand that the owner move the structure or otherwise bring it into compliance. It could also involve, upon the owner's refusal, a subsequent civil or criminal action against the owner. However, it is up to the courts, and not boards of adjustment, to decide matters of equity such as detrimental reliance. The board decides only whether or not a variance should be granted based on the standards set out in the ordinance. If a variance is granted, no enforcement action could be taken. If a variance is not granted because the property does not qualify under the ordinance then the municipality is in a position to consider what enforcement action it might take. Only if the municipality attempts to

enforce the ordinance would the owner's equitable defenses come into play; and then, it would be up to the enforcing agency, or the courts to deal with the equitable defense.

Do not get the idea that detrimental reliance will usually work for a property owner. For example, such a defense can be defeated if the property owner could have discovered the potential violation by conducting his or her own investigation of the regulations. In New York, the owner of a 31 story building was required to remove the top 12 stores that exceeded the 19 story limit for the zoning district, even though the city had issued a building permit for a 31 story building and the building had been constructed before the error was discovered, Parkview Associates v. City of New York, 525 N.Y.S.2D 1976, 519 N.E.2d 1372 (1988). The building owners were unable to obtain a variance and were not able to assert detrimental reliance as a defense to enforcement.

Alaska has had one case before its supreme court where an equitable defense was asserted as a basis for the grant of a variance. This assertion was rejected by our court. In Fields, *supra*, our court stated:

In the zoning context, estoppel is a defensive claim raised to prevent enforcement of a zoning ordinance. . . . But "[i]t is not the function of . . . [the board of adjustment] to consider matters such as estoppel . . . in determining whether a variance should be granted." Nor is the board to decide equitable questions of "clean hands." Rather, the board's power is restricted to that provided by zoning ordinance and its enabling legislation. Thus the Kodiak board of adjustment's function was to determine whether the requirements for a variance were met and, if so, to grant the variance.
(citations omitted)

As tempting as it might be to take equitable considerations into account, they are not included in the statute nor local ordinances as a basis for granting a variance and are thus not relevant to a variance proceeding. If such considerations are relevant, they will be taken into account outside the variance proceeding.

However, one home rule city in Alaska has what it calls an "exception" it grants in the same manner as it grants variances. As long as the structure was erected in good faith and the violation is from an innocent error that does not violate the spirit or intent of the zoning code, the exception may be granted if not contrary to (but not necessarily consistent with) the comprehensive plan and would not be detrimental to the public health, safety and welfare, and would not result in material damage to other properties. The humanitarian policy that drives this exception approach is clearly at odds with the policy and law as it has developed relating to variances. This approach is not available to general law municipalities nor to any city (home rule or general law) within a borough.

Platting Variances.

Many municipalities have variance procedures for obtaining variances from the requirements of the platting regulations. The standards for granting platting variances are often more relaxed and more general. Because the variance restrictions found in Title 29 apply only to land use regulations, and not to platting regulations, general law municipalities have more leeway in dealing with variances from platting regulations; however, there does not appear to be any basis in policy for a more relaxed standard for granting platting variances than for land use variances.

Findings.

Turning now from some of the substantive elements involved in a variance to the procedural aspects it should be noticed first of all that the variance procedure is handled in two distinct phases. The first is a determination of whether the property qualifies for a variance; the second is a determination of what degree of variance from the regulations should be granted. The distinction between whether and what is often blurred or completely ignored in variance proceedings. Courts, on the other hand, clearly recognize the need for the variance applicant to meet the threshold requirement by showing both peculiarity and hardship. These showings are a condition precedent to the grant of a variance. Nash v. Zoning Board of Appeals of East Hartford, 345 A.2d 35 (Conn. 1973); Ivanovich, supra; BOA of Newcastle County, supra. Not only must the necessary showing be made before the board may even consider granting a variance, but the failure to show any one of the requirements is fatal to the applicant. Blackman, supra; Kunz v. Waterman, 283 N.E.2d 371 (Ind., 1972). Note also that many ordinances require the board to find all of several elements set out in the ordinance. After all the elements have been shown, then the board may decide how much of a variance it will grant. Within many ordinances, however, the elements that go to the extent and effect of the variance are often mingled with the elements that go to hardship and peculiarity.

Not only must all elements be shown to have been met before the board may grant a variance, but the board must make findings setting out the basis for the showing that all elements have been met. Broadway, Laguna, supra. In addition, there must be evidence supporting the findings of the board. Heath et al. v. Mayor and City Council of Baltimore, 49 A.2d 799 (Md. 1946); Broadway, Laguna, supra. In the Heath case, the Maryland Court of Appeals noted at 804 that the board had

. . . the duty of deciding in accordance with the evidence, and it is arbitrary and unlawful to make an essential finding without supporting evidence.

While it does not appear that the Alaska Supreme Court has gone quite this far, it has recognized that findings must be made. Findings serve at least two important functions. First, findings help the decision making body to focus on the statutory or ordinance elements that must be shown in the particular case before the body. Second, it gives the parties a clear statement of the board's decision so that they may analyze whether or not an appeal is

appropriate. In addition, it eliminates the need for an appellate body to speculate as to the basis for a decision that may be appealed to such appellate body. Mobile Oil Corp. v. Local Boundary Commission, 518 P.2d 92 (Alaska, 1974). See also Kunz, *supra*.

In Fields, *supra*, the Alaska Supreme Court had before it the appeal of a variance action. A major issue in that case was the existence and adequacy of the findings below. The Supreme Court discussion on this matter helps illuminate both the need for findings and the detail of such findings. The court noted:

The statute requires an aggrieved party seeking review to specify the grounds for the appeal. This requirement is also found in the governing local ordinance. A board's failure to provide findings, that is, to clearly articulate the basis of its decision, precludes an applicant from making the required specification and thus can deny meaningful judicial review. We believe that implicit in AS 29.33.130(b) is the requirement that the agency rendering the challenged decision set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order. Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the board's action is supported by substantial evidence. Thus we hold that regardless of whether a local ordinance requires findings, a board of adjustment ruling on a variance request must render findings "sufficient both to enable the parties to determine whether and on what basis they should seek review and, in event of review, to apprise a reviewing court of the basis for the board's action."....

Our ruling finds support in persuasive policy considerations and in other jurisdictions. As the court in Topanga Association noted, a findings requirement forces the administrative body to draw legally relevant subconclusions that are supportive of its ultimate decision. This facilitates orderly analysis on the part of the board and "minimize[s] the likelihood that the agency will randomly leap from evidence to conclusions."

More importantly, findings enable the reviewing court to meaningfully examine the agency's mode of analysis. Absent findings, a court is forced into "unguided and resource-consuming explorations," groping through the record to determine "whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order and decision" of the board. Finally, as previously noted, findings enable the parties to determine whether and on what basis they should seek review. (citations omitted)

Fields v. Kodiak City Council, 628 P.2d 927, 933-34 (Alaska, 1981) (citations omitted) (emphasis in original).

It stands to reason that if all elements required by the ordinance must be shown and that the board must render a decision containing its findings, the board must, as a minimum, address each of the minimum requirements set out in the ordinance and make findings as to each, if the board grants a variance. Of course, if it denies a variance, it could do so upon the mere finding that one element had not been met.

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ATTACHMENT A

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(2) land use permit requirements designed to encourage or discourage specified uses and construction of specified structures, or to minimize unfavorable effects of uses and the construction of structures;

(3) measures to further the goals and objectives of the comprehensive plan.

(b) A variance from a land use regulation adopted under this section may not be granted if

(1) special conditions that require the variance are caused by the person seeking the variance;

(2) the variance will permit a land use in a district in which that use is prohibited; or

(3) the variance is sought solely to relieve pecuniary hardship or inconvenience. (§ 11 ch 74 SLA 1985)

NOTES TO DECISIONS

Requirement for comprehensive plan. — A comprehensive zoning plan is required to be adopted prior to zoning regulations. *Lazy Mt. Land Club v. Matanuska-Susitna Borough Bd. of Adjustment &*

Appeals, 904 P.2d 373 (Alaska 1995).

Quoted in *Price v. Dahl*, 912 P.2d 541 (Alaska 1996).

Collateral references. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 140 et seq.; 82 Am. Jur. 2d, Zoning and Planning, § 1 et seq.

62 C.J.S., Municipal Corporations, § 224.

Constitutionality of zoning based on size of commercial or industrial enterprises or units. 7 ALR2d 1007.

Exclusion from municipality of industrial activity that is inconsistent with residential character. 9 ALR2d 683.

Zoning regulations applicable to tourist or trailer camps, motor courts or motels. 22 ALR2d 793.

Remedies to compel municipal officials to enforce zoning regulations. 35 ALR2d 1135.

Validity of zoning regulation prohibiting residential use of industrial district. 38 ALR2d 1141.

Spot zoning to permit neighborhood shopping centers. 51 ALR2d 298.

Zoning regulations as to business of selling motor vehicles. 57 ALR2d 1295; 7 ALR3d 1173; 82 ALR4th 624; 51 ALR Fed. 812.

Applicability of zoning regulations to governmental projects or activities. 61 ALR2d 970.

Inquiry, upon review of zoning regulation, into motive of members of municipal authority approving or adopting it. 71 ALR2d 568.

Standing of municipal corporation or other governmental body to attack zoning of land lying outside its borders. 49 ALR3d 1126.

What constitutes "school," "educational use," or the like within zoning ordinance. 64 ALR3d 1087.

Zoning regulations as applied to colleges, universities, or similar institutions for higher education. 64 ALR3d 1138.

Adoption of zoning ordinance or amendment thereto as subject of referendum. 72 ALR3d 1030.

Zoning regulations as applied to private and parochial schools below the college level. 74 ALR3d 14.

Zoning regulations as applied to public elementary and high schools. 74 ALR3d 136.

Sec. 29.40.050. Appeals from administrative decisions. (a) By ordinance the assembly shall provide for an appeal from an administrative decision of a municipal employee, board, or commission made in the enforcement, administration, or application of a land use regulation adopted under this chapter. The assembly may provide for an appeal to a court, hearing officer, board of adjustment, or other body. The assembly shall provide for an appeal from a decision on a request for a variance from the terms of a land use regulation when literal enforcement would deprive a property owner of rights commonly enjoyed by other properties in the district.

(b) By ordinance the assembly may provide for appointment of a hearing officer, or for the composition, appointment, and terms of office of a board of adjustment or other body established to hear appeals from administrative actions. The assembly may define proper parties and prescribe evidentiary rules, standards of review, and remedies available to the hearing officer, board of adjustment, or other body. (§ 11 ch 74 SLA 1985)

NOTES TO DECISIONS

Exhaustion of administrative remedies. — Plaintiff, who claimed that the state had violated his

due process rights by revoking his permits to renovate apartment buildings, waived his right to pursue that

COMPARISON OF VARIANCE AND CONDITIONAL USE

By Lee Sharp

Preston Gates & Ellis LLP

February 1997

Variance

1. Purpose is to ensure that the application of zoning regulations does not operate to deny all reasonable uses of a property that is peculiar when compared to other nearby property to which the same regulations apply.
2. To accommodate peculiarities of the land.
3. Exceptional hardship must be shown.
4. Deals with density restrictions (and not use restrictions in most places in Alaska).
5. Allows relaxation of density restrictions where peculiarity and undue hardships are shown. Relaxation not allowed for a trade off.
6. Allows a condition expressly prohibited by the regulations.
7. Is a dispensation to violate the law.

Conditional Use

1. Purpose is to deal with uses that have a particular, potentially adverse, impact on the surrounding area that cannot be predetermined and controlled by general regulations. Is used to ensure such uses will be compatible with surrounding development by placing conditions on the use to minimize or eliminate adverse impacts.
2. Not dependent upon peculiarity of the land, but triggered by the peculiar effect of the use on the neighborhood.
3. Hardship is not relevant.
4. Deals with use and with restrictions on use and density.
5. Not for the purpose of relaxing density restrictions but to permit additional restrictions to be placed on the use; however, relaxation of density restrictions may occur if the conditional use procedure is applied to planned unit developments where trade-offs are allowed.
6. Allows a use that is expressly permitted (but which requires special conditions).
7. Is a permitted use within the district.

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| <p>8. Very strict standards apply.</p> <p>9. Is a property owner right if property meets requirements; is not a flexible planning tool.</p> <p>10. Property owner is entitled to a variance if can show peculiarities of property leading to hardship under the regulations.</p> <p>11. Quasi judicial proceeding (little discretion involved in granting or denying).</p> | <p>8. More generalized standards apply, <u>e.g.</u>, consistency with the comprehensive plan and purpose for the zoning ordinance.</p> <p>9. Generally is not a right if use cannot be made compatible with neighborhood; is a flexible planning tool.</p> <p>10. Generally entitled to a permit if property owner can show use is compatible with neighboring property and other permitted uses within the district.</p> <p>11. Quasi legislative or quasi judicial proceeding depending on situation, but substantial discretion involved.</p> |
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MEMORANDUM

DATE: March 4, 2016
 TO: Board of Adjustment and Community Development Department
 FROM: Robert H. Palmer III, Assistant Municipal Attorney *RHP*
 SUBJECT: Overview of Variances, CBJ 49.20.200-270

The following guidance is offered as the Board of Adjustment considers VAR2015-0030.

Title 49 has two types of permits that may be confusing: the conditional use permit (49.15.330) and the variance (49.15.200-270). A conditional use permit is decided by the Planning Commission and authorizes—if appropriate—an applicant to have a use that is permitted by the Table of Permissible Uses (49.25.300). In contrast, the variance is decided by the Board of Adjustment and authorizes—if warranted—an applicant to violate a design or dimensional provision of Title 49 that applies to everybody else. Thus, a conditional use permit allows a use that is expressly permitted, but a variance allows a development that is expressly prohibited.

Although a variance allows a person to violate the law, variances are necessary in very limited circumstances. The variance tool is supposed to provide relief to a property owner only when Title 49 would otherwise result in an unreasonable regulatory burden because of unique physical characteristics of the property. So long as there is some opportunity for development of the property, there is generally no justification for a variance.

The staff report for VAR2015-0030 describes the variance criteria of CBJ 49.20.250. The Alaska Supreme Court, in a prior CBJ case affirming the denial of a variance, stated the regulatory burden the applicant sought relief from must result from a unique physical condition of the land that distinguishes it from other land in the general area. *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979); *E & F Associates, LLC v. Town of Fairfield*, 127 A.3d 986 (Conn. 2015); 3 Rathkopf's 58:20 (4th ed.); 8 McQuillin Mun. Corp. § 25:179.37 (3d ed.). CBJ 49.20.250(b) incorporates the *Thibodeau* uniqueness requirement.

The *Thibodeau* court further explained that a variance is not warranted when application of Title 49 deprives the applicant of a more profitable development because that would lead to an inequitable application of Title 49. Unless the applicant can show an extraordinary physical situation of the property to warrant the extraordinary variance remedy, the applicant's only recourse is for the Assembly to amend Title 49 or for the applicant to comply with Title 49 like other similarly situated people.

In summary, a variance is an extraordinary remedy to preserve the constitutionality of Title 49.