

MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT
APPEAL FROM PLANNING & ZONING COMMISSION RESOLUTION No. 2016-029
PLANNING & ZONING COMMISSION CASE No. 2016-0023
BOARD OF ADJUSTMENT APPEAL No. 2016-1

FINDINGS, CONCLUSIONS, AND DECISION
OF THE BOARD OF ADJUSTMENT

WHEREAS, the Mall at Sears is a large retail establishment (LRE) in existence prior to May 8, 2001, and generally located in Anchorage midtown, north of Benson Boulevard, south of Northern Lights Boulevard, east of Denali Street, and west of the Seward Highway; and

WHEREAS, on May 12, 2014, an application for limited site plan review under Anchorage Municipal Code (AMC) 21.55.130 ("old Title 21") was filed with appendices A-E on behalf of Sears Roebuck and Company (Sears) to amend the existing site plan with the addition of an exterior loading dock, screened trash receptacle, and renovation of the building facade to accommodate additional entranceways for Nordstrom Rack and three additional future interior tenant spaces within the store space occupied by Sears (R. 47 – 87)¹; and

WHEREAS, by *Order Reversing the Decision of the Board of Adjustment* dated December 2, 2015, the Superior Court remanded the application for limited site plan approval to the Planning & Zoning Commission for public hearing and proceedings consistent with the Court's order (R. 9 – 20); and

WHEREAS, the Planning & Zoning Commission (P&Z) held a public hearing and heard the case on remand as P&Z Case 2016 – 0023 on June 13, 2016 and July 11, 2016; and

WHEREAS, P&Z Resolution 2016-029 was issued, dated the 8th day of August 2016 (R. 6 – 8); and

WHEREAS, Notice of Appeal to the Board of Adjustment was accepted by the Municipal Clerk (AMC 21.30.030) as timely filed on August 24, 2016; and

WHEREAS, among issues before the Board of Adjustment on appeal is Appellant's assertion that Planning & Zoning Commission Resolution 2016-029, adopted after public hearing, is substantively and procedurally deficient, requiring

¹ Seritage SRC Finance LLC is the current owner of the property under review. By letter dated May 12, 2016, Seritage notified the Planning Department that Seritage, as proper owner, is the applicant in this case. (R. 185).

remand to the Planning & Zoning Commission; and

WHEREAS, the Board of Adjustment has deliberated the appeal at Board of Adjustment meetings open to the public on April 26, 2017; April 27, 2017; April 28, 2017; and May 2, 2017;

NOW, THEREFORE, BE IT RESOLVED, the Board of Adjustment adopts the following decision with findings and conclusions:

I.
INTRODUCTION

The Board of Adjustment is aided in this new appeal by the Superior Court's detailed review of municipal code and Alaska case law included in the Court's order for remand dated December 2, 2015, case No. 3AN-15-06026 CI (Remand Order), reversing the Board of Adjustment's prior decision dated February 26, 2015. The Board of Adjustment begins its review of the current appeal mindful of the standards and rationale applied by the Court in the context of public hearing:

[T]he only way to preserve a meaningful right to judicial review . . . is to provide aggrieved parties with an opportunity to articulate their objections and build a record for appeal. *** [A]ny right of appeal is meaningless without an opportunity to build an evidentiary record at the level of the initial decision. *** [A]n appellant [is placed] at an unfair disadvantage, as the application [for limited site plan approval] will likely highlight a proposal's economic benefits and minimize potential drawbacks and complications. *Remand Order* at 9--11, R. 17-19.

The Board of Adjustment notes that at the close of the public hearing on June 13, 2016, the Planning & Zoning Commission found itself facing two alternative routes in its implementation of the Remand Order: Following the public hearing on remand, should the Commission: 1) Start over and make findings on all of the conditions relating to the requirements in code ("old" title 21), in light of public hearing evidence; or 2) not start over anew? (T. 78-81) When the Planning & Zoning Commission reconvened on July 11, 2016, Planning Staff stated that the Commission was directed by the Court to review the petitioner's amended site plan application in its entirety for compliance with code ("old" title 21). (T. 88, lines 16-19).

The Board of Adjustment has compared Planning & Zoning Commission (P&Z) Resolution 2016-029 with P&Z Resolution 2014-040. In reviewing P&Z Resolution

No. 2016-029 following public testimony on June 13, 2016 and July 11, 2016, the Board of Adjustment is struck by the similarity between the 2016 post-public hearing P&Z Resolution 2016-029 (R.6-8) and the earlier P&Z Resolution 2014-040, adopted without the opportunity for aggrieved parties to articulate their objections and to build a record for appeal, prior to amendments by the Board of Adjustment on February 26, 2015 (R. 25-28).² Despite lengthy public testimony, all findings remained virtually the same. The first finding in P&Z Resolution 2016-029 remained unchanged and states that the site plan complies with the standards found in AMC 21.55.130 and 21.50.320.³ One finding and two conditions relating to sidewalk and signage were added.

In reviewing P&Z Commission Resolution 2016-029, the Board of Adjustment is guided by Anchorage Municipal Code (AMC) 3.60.055, Anchorage Municipal Code of Regulation (AMCR) 21.10.304, and Alaska case law:

AMCR 21.10.304 - Decision.

- A. Every decision made by the commission shall be based on and include findings of fact and conclusions. Every finding of fact shall be supported in the record of the proceedings. The findings shall be sufficient to provide a reasonable basis for understanding the reasons for the decision. In considering and applying any applicable approval criteria, the commission shall make specific findings as to why the criteria have or have not been met.

*** *** ***

Fields v. Kodiak City Council, 628 P.2d 927, 933 (Alaska 1981):

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. * * * Only by focusing on the relationship between evidence and findings, and between findings and ultimate action,

² Board of Adjustment amendments added to P&Z Resolution 2014-040 during the prior 2015 appeal hearing are **in bold and underscored**. R. 25-28.

³ The term "site plan" in this finding presumably refers to the large retail establishment site plan: The limited site plan review application is filed to request Planning & Zoning Commission approval of a proposed expansion, reconstruction, renovation, or remodeling, which would change or amend an existing site plan deemed approved as of May 8, 2001. AMC 21.55.130.

can we determine whether the board's action is supported by substantial evidence (*citations omitted*).

In the context of the record now on appeal before the Board of Adjustment, the Board is unable to understand 1) the intended meaning of some of the findings; 2) the relationship between evidence and findings; and 3) the relationship between findings and the ultimate action of the Planning & Zoning Commission in approving the proposed site plan amendment.

Of further concern to the Board of Adjustment is the Planning Department Memorandum dated September 2, 2009 (R. 41-42), treated by the Planning & Zoning Commission as a rule of law applicable to the case. This 2009 Memorandum should not have provided guidance because it was not adopted as a regulation by either the Planning Department or the Planning & Zoning Commission, as required by AMC Chapter 3.40 and, in any event, it misinterpreted and misapplied the requirements of AMC 21.55.130.

II FINDINGS

After reviewing the record before the Board of Adjustment in this appeal following Superior Court remand to the Planning & Zoning Commission, the Board of Adjustment finds by unanimous vote (3-0):

1. The Planning and Zoning Commission conducted a public hearing on June 13, 2016 and July 11, 2016.
2. The Planning & Zoning Commission provided an opportunity to articulate support and objections to the application for limited site plan review and to build a record for appeal through the public hearing.
3. At the conclusion of the public hearing and after deliberation, the Planning and Zoning Commission did not provide findings of fact and conclusions sufficient to document that the proposed changes in the limited site plan review application were in compliance with AMC 21.55.130 and AMC 21.50.320.
4. To the extent findings were provided in Planning & Zoning Commission Resolution 2016-029, some were offered and added after the motion approving the limited site plan review application was complete. This procedure runs the risk of creating an appearance of after-the-fact justification.

5. During deliberation by the Planning & Zoning Commission, conclusions were drawn by comparing proposals in the limited site plan review application to large retail establishments in other locations, instead of applying the standards in AMC sections 21.50.200; 21.50.320; and 21.55.130 (T. 131).

6. The Planning Department Memorandum dated September 2, 2009 (R. 41-42) was not adopted as a regulation.

7. The Planning Department's erroneous interpretation of applicable code sections limited productive dialogue among all concerned, prior to and during the public hearing process.

8. The application for limited site plan review in this case includes both interior and exterior renovations and alterations.

III CONCLUSIONS

1. This appeal was heard by the Board of Adjustment in accordance with AMC 21.30.090.

2. The meeting at which the Board of Adjustment decided this appeal was held in accordance with AMC 21.30.080.

3. The Planning & Zoning Commission's Resolution No. 2016-029 is insufficient to establish the relationship between evidence and findings, and between findings and ultimate action, as required by code and Alaska case law.

4. Planning & Zoning Commission members were misinformed on certain legal standards material to the case.

5. The Planning Department Memorandum dated September 2, 2009 (R. 41-42) does not have the force of law and is in conflict with the Board of Adjustment's interpretation of AMC 21.55.130A. Furthermore, in reliance on that Memorandum, the Planning & Zoning Commission has misapplied material provisions of the code.

6. The deficiency in the record regarding the relationship between evidence and findings and between findings and ultimate action pertains to issues material to the decision in the case. The Board of Adjustment is not in a position to remedy the deficiency.

IV DECISION

1. By unanimous vote (3-0), the Board of Adjustment REVERSES Planning & Zoning Commission Resolution No. 2016-029 in its entirety and REMANDS the case to the Planning & Zoning Commission for a decision in compliance with code, and the direction provided in Findings, Conclusions, and Decision.

2. Pursuant to AMC 21.30.090B, the Board of Adjustment exercises its independent judgment on legal issues raised in this Planning & Zoning Commission Case 2016-0023, and provides direction pursuant to AMC 21.30.100. The Board's interpretation and construction of ordinances and other provision of law address several issues raised on appeal:

A. The exemption from limited site plan review contained in the 4th sentence of AMC 21.55.130A. applies to interior-only projects. However, the exemption for interior work does not apply where an application for limited site plan review is required. The exemption for interior work in the 4th sentence of 21.55.130 does not serve as a prohibition against Planning & Zoning Commission consideration of interior solutions where the Planning & Zoning Commission is reviewing a remodel/renovation project for compliance with AMC 21.50.320 per AMC 21.55.130.

B. The Planning & Zoning Commission is not limited by the 10% cost limitation in its review of the renovation/remodel application for limited site plan review.⁴

1) The renovation/remodel project is required to maintain conformity with code under AMC 21.50.320; AMC 21.50.200, and as provided in the other provisions of AMC 21.55.130.

2) The 10% cost limitation for code compliance contained in AMC 21.55.130 applies to the whole "grandfathered"⁵ LRE site plan.

3) The 10% cost limitation for code compliance is applied only to the noncompliant issues in existence prior to the date of the limited site plan review

⁴ The Board is persuaded by written testimony in the record that "[i]t is unreasonable to interpret the Code's 10%-of-project-costs provisions as a limit on the Commission's power to enforce standards that apply to all site plan approvals by Code. That interpretation would mean that the property owner could be allowed to modify the LRE in a way that severely increased the degree of its nonconformity with the Code's standards so long as the property owner spent a small amount of money mitigating that problem to some small degree." (R. 120)

⁵ See term "grandfather" in AMC 21.55.130A.5.

application, to allow new remodel/renovation without the potential financial burden of resolving all pre-existing site plan issues.⁶

4) The 10% calculation is to be based upon the cost of the entire remodel/renovation project, including the interior work.⁷

C. The intent of the last sentence in AMC 21.55.130 and the 5 enumerated considerations is to provide a flexible framework for Planning & Zoning Commission review, but the flexible framework does not allow the “grandfathered” LRE to move further from compliance than it was on May 8, 2001. (This is what has been referred to in the record as “no backsliding”. See Appellant’s Br. 5; 14; Appellee’s Br. 14-15; Reply 2-4; Tr. 61-62.)

D. The pending litigation between the applicant and others in federal court (i.e. the assertion that proposed site plan changes violate restrictive covenants among the parties and others), does not empower the Planning & Zoning Commission or the Board of Adjustment to opine on the merits or to render any decision regarding the litigation. A dispute over restrictive covenants is non-jurisdictional to the Planning & Zoning Commission and shall not be considered.

3. The decision of the Board of Adjustment to reverse and remand the case to the Planning & Zoning Commission is issued pursuant to AMC 21.30.095D. and AMC 21.30.100.

PASSED AND APPROVED by the Board of Adjustment this 2nd day of May, 2017.



Bernd C. Guetschow, Chair
on his own behalf and on behalf of
Board of Adjustment Members
Robert B. Stewart and
Wm. Dwayne Adams, Jr.

⁶ An example of a requirement that might come within the 10% cost limitation rule may be found in the record addressing existing landscaping that must be removed for traffic safety compliance under Alaska Department of Transportation and Public Facilities (ADOT&PF) standards. R. 38-39.

⁷ There is no mention in AMC 21.55.130 of cost exclusion based on the project’s exterior “foot-print”.