

2020 ALASKA PLANNING CONFERENCE ATTORNEY PRESENTATION

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John Aschenbrenner, Deputy Borough Attorney

Matanuska-Susitna Borough



AGENDA

- I. Zoning – The beginning
- II. Title 29 and the role of the Planning Commission
- III. Planning Commission – Legislative Role
- IV. Planning Commission – Quasi Judicial Role

THE ORIGINS OF ZONING IN THE LAW

- Private Nuisance litigation
 - Restrictive covenants
 - Special-Purpose Laws
 - Building Codes
 - The Dawn of Zoning

PRIVATE NUISANCE

RESTRICTIVE COVENANTS

SPECIAL PURPOSE LAWS

BUILDING CODES

THE DAWN OF ZONING

Village of Euclid v. Ambler Realty

PLANNING COMMISSIONS

- HOW DO PLANNING COMMISSIONS FIT INTO LAND USE REGULATION IN ALASKA?

TITLE 29 AND LAND USE REGULATION IN ALASKA

- AS 29.40.010 Planning, platting and land use regulation
- (a) A first and second class borough shall provide for planning, platting, and land use regulation on an areawide basis.
- (b) If a city in a borough consents by ordinance, the assembly may by ordinance delegate any of its powers and duties under this chapter to the city. The assembly may by ordinance, without first obtaining the consent of the city, revoke any power or duty delegated under this section.

TITLE 29 AND THE ROLE OF THE PLANNING COMMISSION

AS 29.40.020 Planning Commission

- (a) Each first and second class borough shall establish a planning commission consisting of five residents unless a greater number is required by ordinance. . . .
- (b) In addition to the duties prescribed by ordinance, the planning commission shall
 - (1) prepare and submit to the assembly a proposed comprehensive plan in accordance with AS 29.40.030 for the systematic and organized development of the borough;
 - (2) review, recommend, and administer measures necessary to implement the comprehensive plan, including measures provided under AS 29.40.040.

Alaska Stat. Ann. § 29.40.020 (West)

COMPREHENSIVE PLAN

A.S. 29.40.030 Comprehensive Plan.

(a) The Comprehensive Plan is a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public, of the first or second class borough, and may include, but is not limited to, the following:

- (1) statements of policies, goals, and standards;
- (2) a land use plan;
- (3) a community facilities plan;
- (4) a transportation plan; and
- (5) recommendations for implementation of the comprehensive plan.

(b) With the recommendations of the planning commission, the Assembly shall adopt by ordinance a comprehensive plan. The assembly shall, after receiving the recommendations of the planning commission, periodically undertake an overall review of the comprehensive plan and update the plan as necessary.

TYPES OF PLANNING COMMISSION DECISIONS

➤ Quasi-judicial

- A term applied to the action of public administrative officers or bodies, who are required to determine facts, hold hearings, and draw conclusions from them, as part of the basis for a official action acting in a judicial nature.
- Examples include: applications for variances, conditional use permits, subdivision plats (if there is not a separate platting board).

TYPES OF PLANNING COMMISSION DECISIONS

➤ Legislative

- The Planning Commission acts in an advisory legislative capacity to the local legislative body: (1) for a Borough it is the Assembly; (2) for a city it is the Council
- PC recommendations on land use matters like zoning regulations must be based on and be consistent with the local comprehensive plan of the municipality*
- Final actions are adopted by elected officials ie. the Assembly or Council
- Decisions make law or establish community goals, policies, and standards
- Rules of *ex parte* communication do not generally apply
- Examples include: making recommendations to the Assembly or Council on proposed land use ordinances, highway projects, plans, etc.

LEGISLATIVE DECISIONS

- **The Planning Commission advises the Assembly on legislative matters. Under state law these include adoption of the comprehensive plan and amendments to that plan, as well as advice on proposed measures necessary to implement the comprehensive plan which include zoning regulations, land use permit requirements, etc. . . .”**

AS 29.40.020 Planning Commission, AS 29.40.040 Land use regulation.

PLANNING COMMISSION – QUASI-JUDICIAL ROLE

- **“Quasi-judicial Action – a judicial action taken by a public person [an official] or body (i.e., the planning commission) who is not a judge. It involves an official decision on the respective rights or claims of parties appearing before the body making the decision.”**

From the Alaska Planning Commission Handbook, at p. 70, formerly found on the State of Alaska website at <http://www.commerce.state.ak.us>.

QUASI-JUDICIAL

Planning commissions conduct administrative hearings on applications for variances from land use regulations, and applications for conditional use permits, the subdivision of real property where the planning commission acts as the platting authority, etc..

Due process must be provided for the participants in administrative hearings, including the applicant, citizens, and other private entities, if they are parties.

Process that is due:

- 1) Adequate notice,
- 2) Opportunity to be heard,
- 3) Impartial decision maker,
- 4) Opportunity to appeal (preserve the record).

DUE PROCESS

"No person shall... be deprived of life, liberty, or property, without due process of law;..." Fifth Amendment to the US Constitution

"No person shall be deprived of life, liberty, or property, without due process of law."
Art. 1, § 7 of Alaska Constitution

Due process rules are those that the courts have found necessary to ensure that a person whose rights are at stake in a governmental proceeding receives the process or procedures that are due them.

What does this mean in the context of planning?

- Land use affects private property rights
- Right to notice, a meaningful opportunity to be heard, and a fair decision maker are at the heart of due process before an administrative tribunal.

COMPONENTS OF DUE PROCESS

1. *Procedural Due Process*: Before any person is deprived of life, liberty, or property, they must be given due process.

What due process means depends of a balancing approach of the property interest at stake, the risk of deprivation, and the burden on the public entity to afford the various processes which could be provided. Due process rights are designed to ensure that individuals are treated with fundamental fairness in light of the given situation and the interests at stake.

Before the Planning Commission this usually entails having a public hearing, providing an opportunity to be heard before a impartial body of commissioners, retaining an accurate record of the proceedings, and affording parties the right to appeal the final decision.

- Recurring principle of fairness
- Public notice must be provided well in advance of the meeting and notice be sufficient that:
 - All interested persons are aware of the matter
 - Location where additional information may be obtained is identified
 - Information about when and where to participate is provided
- Receive a fair hearing before an impartial tribunal
 - Orderly, well-run hearing at a reasonable time and at a reasonable location.
 - Interested persons must be given a reasonable opportunity to present their case
- A record of the public process must be kept
 - Including all information/evidence used in the decision (staff reports, minutes, testimony, referenced documents)
 - Actual decision made (motions, votes, amendments, reconsiderations)

Variations

➤ Generally means a departure from the standards of a zoning ordinance or land use regulation
Alaska Statute 29.40.040 Land Use Regulation prohibits granting a variance where:

- The special conditions that require the variance are caused by the person seeking the variance (in other words a self-created hardship like building in violation of a set-back where there is more than adequate space on a parcel to have complied with the setback requirement).
- The variance will permit a land use in a district in which that use is prohibited (in other words allowing say an industrial operation and a residential land use district).
- The variance is sought solely to relieve pecuniary hardship or inconvenience (in other words the only reason the variance is sought is because complying with the zoning regulation will cost additional money again think of the structure built too close to a lot line and the variance is sought to obviate the financial hardship of either moving the structure and remodeling it to comport with the setback).

Local Code

- Special conditions exist which are peculiar to the land involved and which are not applicable to other land in the same zoning district
- Strict interpretation of the provisions of the zoning ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the zoning ordinance

ETHICS

[O]ne of the fundamental premises inherent in the concept of an adversarial hearing ... is that neither adversary be permitted to engage in an *ex parte* communication concerning the merits of the case with those responsible for the decision. It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers.... We are of the opinion that due process forbids it. (Citations omitted.)⁴

The Alaska Administrative Procedure Act, AS 44.62.630, states:

The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties.... These officers ... may not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present.

Louisiana Pac. Corp. v. Koons, 816 P.2d 1379, 1382–83 (Alaska 1991)

ETHICS

- **Ex parte . . . [Latin “from the part”]**
On or from one party only, usually without notice to or argument from the adverse party <the judge conducted the hearing ex parte>.

Black's Law Dictionary, Eighth Edition

ETHICS

- **“Commission members shall be impartial in all administrative decisions, both in fact and in appearance. . . .”**
 - MSB 15.08.150(B).
- **“[A]dministrative hearings must not only be fairly conducted, but must also give the appearance of complete fairness.”** *State v. Lundgren*, 603 P.2d 889, 895-96 (Alaska 1979).
- **“No member may receive or engage in ex parte contact with the applicant or appellant, or other parties interested in the application or appeal, or members of the public, concerning the application or appeal or issues presented in the application or notice of appeal, . . .”**
 - MSB 15.08.150(B).

**OK, so I had an ex parte
communication. What now?**

Answer: It depends.

ETHICS

You encounter a neighbor in the supermarket, and he or she asks about a quasi-judicial matter presently before the board.

You say to the person: “I cannot talk about that, I am on the Planning Commission.” There is no more conversation and no specific information was exchanged.

- Should this ex parte contact be disclosed?
- Can it be addressed?
- How?

ETHICS

You received your packet and there is a CUP on the agenda for the next meeting. You then receive an e-mail from a member of the public about the CUP, with some data or other information in it.

- **Should this ex parte contact be disclosed?**
- **Can it be addressed?**
- **How?**

ETHICS

You were a seated commissioner who heard all of the public testimony on a matter. One of the parties calls you at home to argue points in the case you heard. You and this party talk for an hour about the case and the hearing. The next meeting is planned for the board to deliberate.

- **Should this ex parte contact be disclosed?**
- **Can it be addressed?**
- **How?**

ETHICS

SITE VISITS

- **When a commissioner sitting on a quasi-judicial matter conducts research or fact gathering on his or her own, that is “independent investigation.”**
- **Is this O.K. as long as the commissioner shares the information learned with the other commissioners at the next meeting and in public?**
- **Why not?**

ETHICS

- **What if I live next to the site, and regularly pass it on my nightly walks?**
- **What if I want to do a drive by?**
- **What if I want to set up a meeting with the owner for a special viewing?**

DECISION-MAKING AND FINDINGS OF FACT

The Planning Commission must “set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order.”

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

WHAT ARE FINDINGS?

- Findings of fact are statements of fact that a commission believes are true and that provides a basis for granting, denying or adding conditions to a permit.
- They are the roadmap that shows the reasoning process that got the commission from the evidence presented to its final conclusion to grant or deny the applicant's request.

(Alaska Planning Commission Handbook at p. 27, available at www.commerce.state.ak.us)

AGENCY RECORD

Evidence/Record

The record to be considered by the commission is the collection of all the evidence presented to or considered by the administrative board. [Alvarez v. Ketchikan Gateway Borough, 28 P.3d 935 \(Alaska 2001\).](#)

It includes the application, staff report, public and agency comments, public testimony

FINDINGS OF FACT

- Substantial Evidence

MSB Code 15.39.210 provides:

...

(B) The BOAA shall defer to the judgment of the decision maker regarding findings of fact if they are supported by substantial evidence.

(C) Where the BOAA decides that a finding of fact made by the decision maker is not supported by substantial evidence, the BOAA shall make its own finding on the factual issue, based upon the following:

(1) The evidence in the record developed before the decision maker; or

(2) The record developed at a de novo hearing before the BOAA; or

(3) A combination of the record developed in paragraphs (1) and (2).

LEGAL CONCLUSIONS

Weighing Public Comment

- Relevance

- Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Opinion – admissibility and when to consider
- Personal knowledge.
- Opinion is admissible when it is “rationally based on the perception of the witness and helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”

- Speculation

- General public opposition.

South Anchorage Concerned Coalition, Inc. v. Coffey, 862 P.2d 168 (Alaska 1993).

What should be in findings? (cont.)

- ⦿ Whether the standard has been met by the facts,
 - if there was no evidence on one or more of the elements the lack should be stated ;
 - if certain evidence was rejected because it was believed to be unreliable or unbelievable it should be so stated;
- ⦿ Whether the entitlement or permit is granted or denied;
- ⦿ If there are special conditions or limitations to be imposed on the permit, the facts that support those conditions
- ⦿ Also – organize findings in a logical and comprehensive way so that it helps the reviewer to better understand your work.

TRY TO AVOID

- Try to avoid simply reciting who said what or what an exhibit is suppose to establish unless it is a critical part of the analysis (Instead of the findings stating that Mr. Blue testified that the development will cause chemical z to drain into the river – a proper finding is that if constructed the development will cause chemical z to drain into the river).
- Try to avoid simply mimicking statutory language.
- Try to avoid unnecessary findings.
- Try to avoid findings that are inconsistent with one another.

POINTER

- Bring a list of the elements of the code that are at issue for the CUP etc.
- Leave plenty of space between each element to take notes
- Divide the space between each element into two categories
- Take notes during the testimony in the pertinent section
- Refer to your notes when the commission discusses whether to grant or deny the request

EXAMPLE

- Variance Request Elements:
 - (1) There are unusual conditions or circumstances that apply to the property.
 - (2) The strict application would deprive of rights commonly enjoyed by other properties.
 - (3) It will not be injurious to nearby property, not harmful to the public welfare.
 - (4) It will be in harmony with the objectives of the title and any comp plan.
 - (5) The deviation will be no more than is necessary to permit reasonable use of the property.

EXAMPLE-VARIANCE REQUEST

Testimony that supports unusual circumstances

- -Applicant testified there is a large rock outcropping that limits the applicant's developable area of the lot to the northern 1/3 of the lot.

Testimony that does not Support unusual circumstances

- Neighbor Mr. B testified that the rock outcroppings are typical in the lots throughout the subdivision, and is only .001 of an acre larger than the one that exists on the neighboring property.

HOW ARE FINDINGS ADOPTED?

- By motion

- When?

- (1) The night of the initial public hearing

Benefits

- the evidence has just been heard and is fresh
- efficiency-will assist meeting certain deadlines

Potential Downfalls

- may only have one set of findings
- it may be time consuming if commissioners have to redraft all new findings (i.e. if different from draft provided by staff)
- may lack organization and clarity since drafted impromptu
- may be incomplete or not as comprehensive

How are findings adopted? (cont.)

(2) At the subsequent proceeding after a continuation

Benefits

- can request staff and or the applicant to draft findings and provide them to use to consider
- more time to organize thoughts and prepare findings

Potential Downfalls

- days or weeks have lapsed since evidence was presented and no longer fresh in commissioners' memories
- may have timeframes for decisions that need to be met and may be challenging if continued

WHAT IS A CONCLUSION OF LAW?

- The statement of the commission as to the law applicable based on the facts.

EXAMPLE

Variance:

- (1) The fact that the property is half the size of any other parcel in the subdivision is an unusual condition.
- (2) The strict application of this title would deprive the applicant of rights commonly enjoyed by other properties because the applicant would be unable to place a habitable structure on the property.
- (3) It will not be injurious to nearby property, nor harmful to the public welfare because there will still be a setback from the property line.
- (4) It will be in harmony with the objectives of the title and any comp plan because there will still be a setback from the property line.
- (5) The deviation will be no more than is necessary to permit reasonable use of the property because the variance will only allow the applicant to encroach upon 2 feet of the 10 foot setback.

FINDINGS

Examples

- Yang v. County of Carver
 - Slaughter house as farm-related business.
 - Public comments that CUP will generate noise and traffic or have detrimental effect on property values - "Speculative comments do not provide a factual basis for the findings." Also, "neighbors' general objections to [CUP] are not competent evidence to support denial." Conjecture and speculation are not enough to deny.
- Innovative 55, LLC. v. Robeson County
 - Solar farm to operate in farm community.
 - Applicant presented experts as to safety, design, landscaping.
 - Neighbors testified – unattractive, unsafe, near historic church, and provided petition.
 - Speculative and general lay opinions do not constitute competent evidence.

CONDITIONS OF APPROVAL

- “Generally, a board of adjustment or similar body can impose appropriate conditions and safeguards in accordance with zoning ordinances relative to permits, variances, non-conforming uses or other matters subject to the board’s jurisdiction.” 8 A McQuillin Mun. Corp. § 25.271 (3rd Ed. 2009).

CONDITIONS OF APPROVAL

- The conditions must be reasonable and not arbitrary, unnecessary or oppressive; they must not be indefinite, they must be directly related to and incidental to the proposed use of the property, and they must be within the legal authority of the board to impose. Nor does the discretion vested in a board to vary the application of the regulations of a zoning ordinance authorize the board to make restrictions on the use of the specific property more severe than those imposed by the ordinance itself. 8 A McQuillin Mun. Corp. § 25.271 (3rd Ed. 2009).

THINGS TO THINK ABOUT IN DRAFTING CONDITIONS OF APPROVAL

- Is the condition directly associated with the criteria at issue?
- Relevant to planning?
- Relevant to the particular development permitted?
- Result from issues associated with impacts that the ordinance was meant to address?
- Based on evidence presented (testimony from applicant and neighboring property owners etc.)
- Enforceable?
- Precise? Vague expressions which lack an objective standard may not provide enough guidance about what must be done to comply.

Things to Think About in Drafting Conditions of Approval (cont.)

- For example conditions like “keep the buildings in a tidy state” or to allow certain conduct “so as not to cause annoyance to nearby residents.”
- Reasonable in all other respects? Is it unduly restrictive? Is it possible for the applicant to comply with? Does the applicant need the consent of a third party?



QUESTIONS?

John Aschenbrenner

Deputy Borough Attorney, Mat-Su Borough

(907) 861-8677

