BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

THOMAS WILLIAMS,

Appellant,

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vs.

CBJ BOARD OF ADJUSTMENT,

Appellee.

Case No. 2005-01
VAR2004-00056

DECISION AND ORDER ON APPEAL

Introduction.

This is an appeal of a decision by the CBJ Planning Commission sitting as the Board of Adjustment ("Board"), denying an application for a variance regarding the maximum square footage allowed for an accessory apartment. The Assembly, having heard from the parties both in writing and orally, and being fully advised, denies the appeal for the reasons outlined below.

Mr. Williams sought a variance to allow him to construct an accessory apartment larger than the maximum of 600 square feet called out in the CBJ Land Use Code; his application was to build to 740 square feet. This application was denied by the Board, based in part on the Community Development Department’s staff recommendation. Mr. Williams filed a timely appeal of the Board’s decision. The Assembly accepted the appeal, Mayor Botelho was appointed presiding officer, and a pre-hearing conference was held at which Assemblymember Jeff Bush presided. Mr. Williams requested further information from the Community Development Department, (CDD), regarding the circumstances surrounding consideration of the variance application, which the department provided. Briefs were filed by Mr. Williams and the department, and oral argument was held before the Assembly. After deliberation, the Assembly reached its decision to deny the appeal.
Standard of Review.

The CBJ Appeals Code, at CBJ 01.50.070, sets the standard of review to be applied by the Assembly. It provides a deferential standard, limiting the circumstances in which a Board decision can be reversed. That deferential standard recognizes the expertise of the Board and the Assembly delegation of responsibility for making these determinations.

Specifically, CBJ 01.50.070 provides:

(a) The appeal agency or the hearing officer may set aside the decision being appealed only if:
   (1) The appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing;
   (2) The decision is not supported by adequate written findings or the findings fail to inform the appeal agency or the hearing officer of the basis upon which the decision appealed from was made; or
   (3) The appeal agency or the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.

(b) The burden of proof is on the appellant.

Discussion.

Mr. Williams offered several arguments in support of the appeal.

One of appellant’s main concerns is CDD’s handling of a three-page analysis which Mr. Williams provided to the department prior to the Board meeting, with his application materials. Unfortunately, due to a staff oversight, this document was not provided to the Board members in their pre-meeting packet.

When the packet omission came to light during Mr. Williams’ testimony, the Board took a ten minute recess, in order to give the members adequate time to review the three-page document. The Board discussion following the recess provides evidence that the Board adequately considered all the materials and testimony, including the three-page analysis. While this oversight did make handling the matter more time-consuming, errors like this are bound to occur at a certain rate, given the

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1 Mr. Williams would have been entitled to a continuance of the hearing had he asked for it, but he did not.
workload of the Board and CDD staff. There is no due process right to have a particular document in the pre-meeting packet. The Board handled the staff oversight adequately, in a reasonable, fair, and respectful manner. Mr. Williams’ document did get to the Board and was considered with the application. CDD staff’s oversight regarding preparation of the packet is not sufficient to overturn the Board’s considered decision.

The Board also considered the issue of hardship requiring a variance. The standards for granting a variance application are set forth in CBJ 49.20.250, which provides in part:

> 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.

The Board argues on appeal that Mr. Williams’ variance application does not meet the requirements of Section .250, above:

> Appellant fails to meet his burden of proof and demonstrate that the decision is not supported by substantial evidence. The BOA’s decision is based on there being nothing in the entire record showing hardship and practical difficulties resulting from an extraordinary situation or unique physical feature affecting the parcel of land. Appellant also fails to meet his burden of proof to demonstrate that the decision is not supported by adequate written findings or that the appeal agency failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.

BOA Opposition Brief at p. 9.

The Board further argues:

> There simply are no hardship and practical difficulties associated with Appellant’s property. Extraordinary situations and unique physical features typically justifying variances include, but are not limited to, features such as topography, wetlands, odd-shaped parcels of land, difficult access, safety issues, etc. Absent information demonstrating an extraordinary situation, the BOA was unable to make all the specific findings necessary for approval of a variance. Deficiencies were found by the BOA to all but one of the six criteria for approval. Appellant does not argue that the BOA erred by finding that he did not meet the criteria for granting a variance.

BOA Opposition Brief at p. 5-6, footnote citing to the record omitted.
The Assembly concurs with the Board's argument on this issue. The Land Use Code requirement of "hardship and practical difficulties result from an extraordinary situation or unique physical feature affecting only a specific parcel of property" is a threshold for granting a variance. Unless that Land Use Code requirement is met, the variance should not proceed.

Essentially, appellant argues that he is experiencing a hardship because a larger accessory apartment would be a substantial improvement to his property, and that it is a financial hardship to him to restrict the apartment size. Such a claim of "hardship" is not, however, unique to this particular parcel of land, is not an "extraordinary situation," nor does it arise from a unique physical feature of the parcel. Presumably, most parcels would be increased in value by adding larger dwellings; the restriction on apartment size does not create a hardship or practical difficulty as the Assembly understands the terms. Because Mr. Williams has not met his burden of proof on appeal to show that the Board was mistaken in failing to find this threshold variance requirement, the Board's decision will not be reversed.

Appellant also argues that, because the zoning designation of his parcel is a transition zone, i.e., D-1 (T[ransition]) D-3, Single-Family Residential, that certain aspects of the D-3 zoning designation – to which the area will transition when certain conditions are met – should be considered in deciding this appeal. That argument is not supported by the code on transition zoning. Under transition zoning, the zoning designation is D-1 (one dwelling unit per acre), until certain conditions are met (typically, installation of sewer lines). When the conditions are met, the zoning designation will transition to D-3. Until the transition requirements are met, however, the zoning remains D-1, not a hybrid of the two zoning designations. While the Assembly appreciates appellant's policy argument, it is not supported by the CBJ Land Use Code.

Conclusion.

For the reasons outlined above, and those in the brief and argument by the Board, the appeal is denied; appellant has not met the burden of proof on appeal.
Mr. Williams has also requested that the Assembly return his appeal fee. Because the appeal fee does not cover the costs to the CBJ of an appeal, typically, the Assembly’s longstanding policy has been to return appeal fees only when an appellant is successful in gaining reversal of the decision appealed. As that is not the circumstance in this case, the request to return the appeal fees is denied.

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

IT IS SO ORDERED
Dated this 20th day of September, 2005.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

[Signature]
Mayor Bruce Botelho
Presiding Officer on Appeal

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