

1 ***Standard of Review.***

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

6 Specifically, CBJ 01.50.070 provides:

7 (a) The appeal agency or the hearing officer may set aside the decision
8 being appealed only if:

9 (1) The appellant establishes that the decision is not supported by
10 substantial evidence in light of the whole record, as supplemented at the hearing;

11 (2) The decision is not supported by adequate written findings or the
12 findings fail to inform the appeal agency or the hearing officer of the basis upon
13 which the decision appealed from was made; or

14 (3) The appeal agency or the hearing officer failed to follow its own
15 procedures or otherwise denied procedural due process to one or more of the
16 parties.

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

18 ***Discussion.***

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

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

24 When the packet omission came to light during Mr. Williams' testimony, the Board took a ten
25 minute recess, in order to give the members adequate time to review the three-page document.¹ The
26 Board discussion following the recess provides evidence that the Board adequately considered all the
27 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

¹ Mr. Williams would have been entitled to a continuance of the hearing had he asked for it, but he did not.

1 workload of the Board and CDD staff. There is no due process right to have a particular document
2 in the pre-meeting packet. The Board handled the staff oversight adequately, in a reasonable, fair, and
3 respectful manner. Mr. Williams' document did get to the Board and was considered with the
4 application. CDD staff's oversight regarding preparation of the packet is not sufficient to overturn
5 the Board's considered decision.

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

8 Where hardship and practical difficulties result from an extraordinary
9 situation or unique physical feature affecting only a specific parcel of
10 property or structures lawfully existing thereon and render it difficult
11 to carry out the provisions of this title, the board of adjustment may
12 grant a variance in harmony with the general purpose and intent of
13 this title.

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

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

24 BOA Opposition Brief at p. 9.

25 The Board further argues:

26 There simply are no hardship and practical difficulties associated with
27 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.

1 The Assembly concurs with the Board’s argument on this issue. The Land Use Code
2 requirement of “hardship and practical difficulties result from an extraordinary situation or unique
3 physical feature affecting only a specific parcel of property” is a threshold for granting a variance.
4 Unless that Land Use Code requirement is met, the variance should not proceed.

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

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

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24 ***Conclusion.***

25 For the reasons outlined above, and those in the brief and argument by the Board, the appeal
26 is denied; appellant has not met the burden of proof on appeal.


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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


By: Mayor Bruce Botelho
Presiding Officer on Appeal

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