

Municipality of Anchorage

MEMORANDUM

DATE: June 13, 2016

TO: Planning and Zoning Commission

THRU: Hal H. Hart, AICP, Director
Planning Department

FROM: Shawn Odell, Current Planning Section

SUBJECT: Case 2016-0023 Nordstrom Rack remand from Superior Court to the Planning and Zoning Commission to hold a public hearing.

Background

The Planning and Zoning Commission received a request from Sears Roebuck and Company to amend a large retail establishment site plan in the B-3 (general business) district in accordance with AMC 21.55.130 and AMC 21.50.320. The Planning and Zoning Commission reviewed and approved this request on the consent agenda on July 14, 2014 subject to eight (8) conditions. The Planning and Zoning Commission adopted resolution 2014-040 on August 4, 2014.

Six retail merchants timely filed an appeal of this decision to the Board of Adjustment. The Board of Adjustment held a meeting open to the public on February 18, 2015 as Appeal No. 2014-4. By unanimous vote (3-0), the Board of Adjustment exercised its independent judgement in the interpretation of municipal code and concludes a public hearing on a limited site plan review amendment filed under AMC 21.55.130 is not required as a matter of law.

The appeal of the Board of Adjustments decision was further appealed to the Superior Court of Alaska on December 2, 2015. Superior Court Judge Andrew Guidi ruled that based on consideration of public policy, that the Commission must hold a public hearing on an application to modify a large retail establishment. This reversed the decision of the Board of Adjustment in the case and remanded the case back to the Planning and Zoning Commission to hold a public hearing.

Discussion

The decision by the Superior Court has sent the case back to the Planning and Zoning Commission to hold a public hearing for the case. The petitioner has completed all of the eight conditions as recommended by the Commission in the resolution (2014-040) which granted them approval for construction per the site plan. The Nordstrom Rack has been completed and is currently open as a retail establishment.

346 public hearing notices were mailed on January 21, 2016 and again on May 17, 2016, two comments were received. One comment was delivered by hand June 6, 2016. The Planning Department has not received a response from the Midtown Community Council at the time of this writing.

Public phone comments have been received in regards to interior access from the mall and it has been stated by the Planning Department that interior remodeling is exempted by AMC 21.55.130, and the use internal to the structure is not included in any type of review standards.

Recommendation

The Department recommends APPROVAL of the amended site plan review for the Sears store tenant improvements for Nordstrom Rack located on the north side of the Sears Mall, subject to the following conditions:

1. All construction and improvements related to this approval shall be substantially in compliance with the application, narrative, and with the following plans on file with the Planning Division, except as modified by conditions of this approval:

700 E. Northern Lights Blvd. Renovation, prepared by RIM architects/DowlHKM; sheets D201, A101, A201, A202, C101, C102, C103, L101, L501, and L502 dated 4/07/2014.
2. A notice of zoning action, including a copy of the approved Commission resolution for this case, shall be filed with the State Recorder's Office and proof of such shall be submitted to the Department of Planning.
3. Submit a copy of the updated site plan that shows the required sight distance triangles per ADOT&PF standards. Verify the removed trees are replaced on a one-to-one basis.

4. Amend the site plan to show pedestrian walkway striping for pedestrian access to the east entry doors from the sidewalk along Northern Lights Boulevard.
5. Submit a copy of the updated elevation plan to show an overhang awning along at least sixty (60) percent of the east elevation building length.
6. Submit a landscape plan to include the landscape budget required by AMC 21.55.130 towards improving landscaping along Northern Lights Boulevard.
7. A lighting plan shall be submitted for review and approval.

Reviewed by:

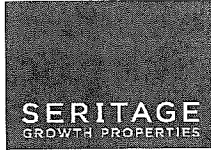


Hal H. Hart, AICP
Director

Prepared by:



Shawn Odell
Senior Planner



Seritage SRC Finance LLC
489 Fifth Avenue, 18th Floor
New York, New York 10017

May 12, 2016

Shawn M. Odell
Senior Planner
Municipality of Anchorage
Planning Division
PO Box 196650
Anchorage, AK 99519-6650

Re: *Case 2014-0094, Nordstrom Rack, Limited Large Retail Establishment
Site Plan Review*

Dear Mr. Odell,

This is to provide the Planning Department and Planning and Zoning Commission notice of and information related to the current owner of the property under review in the above mentioned Case, and to provide authorization for DOWL HKM, RIM Architects and Davis Wright Tremaine LLP to act as petitioner representatives.

As you know, on May 12, 2014, Sears, Roebuck and Co. ("Sears") filed its Application for Site Plan Review in the above referenced case, to be considered at a public hearing before the Planning and Zoning Commission on June 13, 2016. On July 7, 2015, Seritage SRC Finance LLC ("Seritage") purchased the subject property, and was further assigned and assumed "all of [Sears'] right, title and interest in and to any and all agreements, documents, and other instruments not otherwise assigned by [Sears] to [Seritage]...affecting or related to the real property...." Copies of the Warranty Deed and Assignment and Assumption of Recorded Agreements and Documents are attached hereto respectively as Exhibits A and B. As a result of the July 7, 2015 sale and assumption, Seritage is the proper owner and applicant in Case 2014-0094.

This letter further services as authorization for DOWL HKM and Davis Wright Tremaine LLP to act as petitioner's representative in Case 2014-0094. Seritage will appear and be available for the Commission at the June 13, 2016 public hearing, but further authorizes DOWL HKM, RIM Architects and Davis Wright Tremaine LLP to respectively address any technical or legal issues that may come up.

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Please feel free to contact me via e-mail mfernand@seritage.com or telephone at if you have any questions about any of the foregoing.

Very truly yours,

Seritage SRC Finance LLC

A handwritten signature in dark ink, appearing to read 'Matthew Fernand', is written over a horizontal line.

Matthew Fernand, Vice President

cc: James E. Bry
Timothy Potter, DOWL HKM
Timothy Ridenour, RIM Architects
Joseph Reece, Davis Wright Tremaine LLP

MUNICIPALITY OF ANCHORAGE
PLANNING AND ZONING COMMISSION RESOLUTION NO. 2014-040

A RESOLUTION APPROVING AN AMENDMENT TO A LARGE RETAIL ESTABLISHMENT SITE PLAN IN THE B-3 (GENERAL BUSINESS) DISTRICT, IN ACCORDANCE WITH AMC 21.55.130 AND AMC 21.50.320; WITHIN N1/2, NE ¼, NE ¼, SECTION 30, T13N, R3W, S.M., ALASKA; GENERALLY LOCATED SOUTH OF NORTHERN LIGHTS BOULEVARD AND WEST OF THE SEWARD HIGHWAY, IN ANCHORAGE.

(Case 2014-0094; Parcel ID No. 009-042-01)

WHEREAS, a request was received from Sears Roebuck and Company, to amend a large retail establishment site plan in the B-3 (general business) district, in accordance with AMC 21.55.130 and AMC 21.50.320; within N1/2, NE1/4, NE1/4, Section 30, T13N, R3W, S.M.; generally located south of Northern Lights Boulevard and west of the Seward Highway, in Anchorage; and

WHEREAS, the Planning and Zoning Commission reviewed this request on the consent agenda on July 14, 2014.

NOW, THEREFORE, BE IT RESOLVED by the Anchorage Planning and Zoning Commission that:

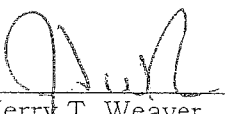
- A. The Commission makes the following findings of fact:
1. The site plan complies with the standards found in AMC 21.55.130 and AMC 21.50.320, with the conditions of approval.
 2. A pedestrian access connection is an important safety and economic benefit between the Nordstrom Rack entrance and the main entrance to the mall through the Sears store.
 3. Northern design elements should be implemented where possible; the covered walkway between entrances is important.
 4. The loading dock addition while necessary for the use, does not promote the balance of the existing building that is without a prominent front side and divides the pedestrian access.
- B. The Commission approves the large retail establishment site plan, subject to the following conditions:
1. All construction and improvements related to this approval shall be substantially in compliance with the application, narrative, and with the following plans on file with the Planning Division, except as modified by conditions of this approval:

700 E. Northern Lights Blvd. Renovation, prepared by RIM architects/DOWL HKM; sheets D201, A101, A201, A202, C101, C102, C103, L101, L501, and L502 dated 4/07/2014.

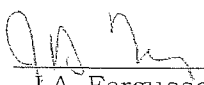
2. A notice of zoning action, including a copy of the approved Commission resolution for this case, shall be filed with the State Recorder's Office and proof of such shall be submitted to the Department of Planning.
3. Submit a copy of the updated site plan that shows the required sight distance triangles per ADOT&PF standards. Verify the removed trees are replaced on a one-to-one basis.
4. Amend the site plan to show pedestrian walkway striping for pedestrian access to the east entry doors from the sidewalk along Northern Lights Boulevard.
5. Submit a copy of the updated elevation plan to show an overhang awning along at least sixty (60) percent of the east elevation building length.
6. Submit a landscape plan to include the landscape budget required by AMC 21.55.130 towards improving landscaping along Northern Lights Boulevard.
7. A lighting plan shall be submitted for review and approval.
8. Amend the plan to include signage, or otherwise to SIGNIFICANTLY promote access to the common areas of the mall through the Sears store.

PASSED AND APPROVED by the Anchorage Planning and Zoning Commission this 14th day of July, 2014.

ADOPTED by the Anchorage Municipal Planning and Zoning Commission this 4th day of August, 2014. This written decision/resolution of the Planning and Zoning Commission is final and any party may appeal it within twenty (20) days to the Board of Adjustment pursuant to Anchorage Municipal Code 21.30.030.



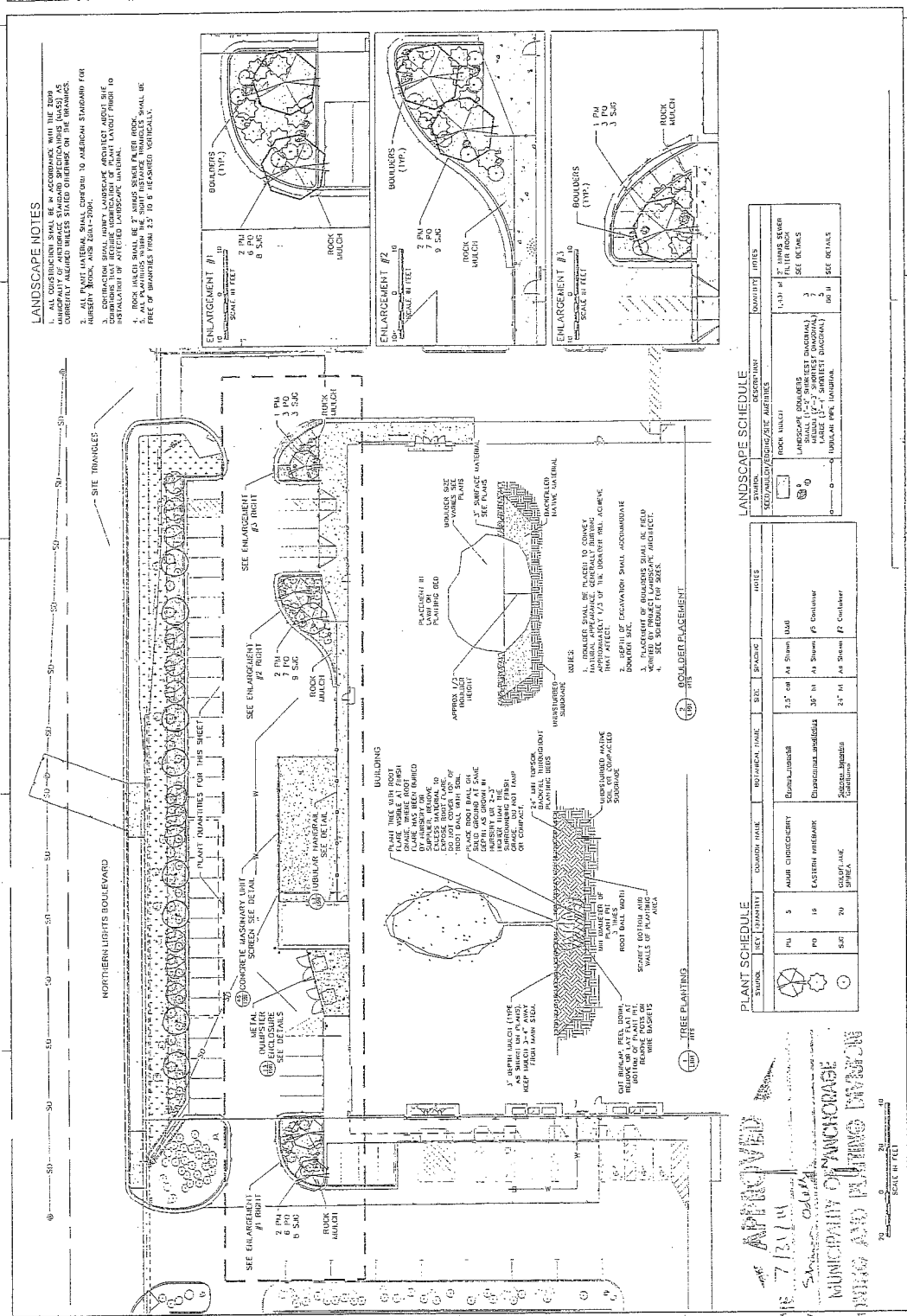
Jerry T. Weaver, Jr.
Secretary



J.A. Fergusson
Chair

(Case 2014-0094; Parcel ID No. 009-042-01)

so



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA CORN COMPANY, HOPS)
HALLMARK, LEMON TREE GIFTS,)
NEUERBURG ENTERPRISES, LLC)
REGIS, and STALLONE'S MEN'S)
STORE,)

Appellants,)

v.)

MUNICIPALITY OF ANCHORAGE)
and SEARS ROEBUCK & CO.,)

Appellees.)

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CLERK OF COURT

Case No. 3AN-15-06026 CI

**ORDER REVERSING THE DECISION OF THE BOARD OF
ADJUSTMENT**

This appeal from Board of Adjustment of the Municipality of Anchorage ("Board") presents one question of law—whether the Anchorage Planning and Zoning Commission ("Commission") must hold a public hearing on an application to modify a large retail establishment. Based on considerations of public policy, the court concludes that the Commission must hold a public hearing in such cases. The decision of the Board of Adjustment is therefore REVERSED and this case is REMANDED back to the Commission for further proceedings consistent with this Order.

I. BACKGROUND

Appellant Sears Roebuck & Company ("Sears") owns a retail store and other real property located in The Mall at Sears ("Sears Mall"), a retail complex at 660 E. Northern Lights Boulevard in Anchorage, Alaska. In 2014, Sears reduced

the size of its retail store and leased the vacated space to Nordstrom Rack and three smaller tenants. The addition of Nordstrom Rack to the Sears Mall required changes to the exterior of the shopping complex, including a new loading dock and trash receptacle. As modifications to an existing large retail establishment, these changes triggered administrative review under the Anchorage Municipal Code. *See* AMC 21.55.130.

On May 12, 2014, Sears applied for “limited site plan approval” from the Anchorage Planning and Zoning Commission. The Municipal Planning Department reviewed Sears’s application and placed it on the Commission’s consent agenda. However, on July 14, 2014, the Commission decided to review the application as part of its regular agenda. The Commission heard testimony from Sears representatives and approved the application with conditions.

On August 20, 2014, Appellants, a group of retailers within the Sears Mall, appealed the Commission’s decision to the Board. Their appeal raised several substantive and procedural issues. Appellants argued, among other things, that the Anchorage Municipal Code required the Commission to hold a public hearing before approving the application, and that the loading dock would cause an unacceptable safety hazard for pedestrians. The Board upheld the Commission’s approval in its entirety. In making its decision, the Board observed that the application proposed a “minor modification” to the Sears Mall, which would increase the building’s footprint by only 0.2 percent. The Board also noted that the Commission had approved the application with conditions designed to reduce pedestrian safety hazards.

Now, on appeal from the Board’s decision, Appellants have dropped their substantive claims and argue, as they did before the Board, that the Anchorage Municipal Code requires the Commission to hold a public hearing whenever it receives an application to modify a large retail establishment.

II. DISCUSSION

A. The “independent judgment” standard of review applies.

As a preliminary matter, the parties disagree about the proper standard of review. Appellees claim the court owes the Commission “considerable deference” and should therefore apply “a presumption of validity.” See Brief of Appellee Municipality of Anchorage at 4 (citing *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993)); see also Brief of Appellee Sears Roebuck & Co. at 5-6 (citing *Native Village of Eklutna v. Board of Adjustment for the Municipality of Anchorage*, 995 P.2d 641, 643 (Alaska 2000)). Appellants, on the other hand, argue the court should apply its “independent judgment” because this appeal involves questions of statutory interpretation and procedure. See Appellee’s Opening Brief at 11 (citing *State v. Gross*, 347 P.3d 116, 118 (Alaska 2015)). Appellants are correct; the “independent judgment” standard applies.

When this court reviews the final decision of an administrative agency, it generally gives the agency no deference in matters of statutory interpretation. Rather, the court must apply its “independent judgment” and “adopt the rule of law that is most persuasive in light of precedent, reason, and policy.” *Harrod v. State, Dep’t of Revenue*, 255 P.3d 991, 995 (Alaska 2011). However, the court affords “considerable deference” to decisions that fall within the Commission’s area of expertise. *Anchorage Concerned Coalition v. Coffey*, 862 P.2d 168, 173 (Alaska 1993). Deferential review generally applies to decisions which involve complex regulatory schemes and technical statutory terms. *N. Alaska Envtl. Ctr. v. State, Dep’t of Natural Res.*, 2 P.3d 629, 634 (Alaska 2000); *Earth Res. Co. of Alaska v. State, Dep’t of Revenue*, 665 P.2d 960, 965 (Alaska 1983). The court also defers to agency decisions that resolve policy questions within the agency’s area of expertise, or determine rules of decision for future cases. *Earth Res. Co. of Alaska*, 665 P.2d at 965.

For example, when faced with the question of whether AS 38.05.180(aa) permitted the Department of Natural Resources (“DNR”) to retroactively apply a particular pricing scheme to oil and gas royalties, the Alaska Supreme Court applied a deferential standard. *Marathon Oil Co. v. State, Dep’t of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011). The Court noted that “the state royalty and audit system is complicated, and DNR has expertise in deciding when retroactive application makes sense within that system.” *Id.* However, the Court elsewhere applied the “independent judgment” standard to DNR’s interpretation of “non-technical” statutory terms such as “disposal,” “interest in land,” and “revocable.” *N. Alaska Envtl. Ctr.*, 2 P.3d at 634.

In the present case, the record shows that—with respect to Appellants’ claims now before the court—the Commissions’ initial decision, as well as the Board’s decision on appeal, involved minimal agency expertise and no inherently complex issues. The Commission never discussed whether it needed to hold a public hearing. At its July 14, 2014 meeting, the Commission noted that AMC 22.55.130 requires it to “apply the standards set out in 21.53.020 in a manner proportionate to the extent of the expansion, reconstruction, renovation, or remodeling proposed.” R. 6. The Commission then applied the factors in 21.53.020 to the Nordstrom Rack proposal. R. 6-9.

The public hearing issue first surfaced with Appellants’ initial appeal to the Board of Adjustment. At the Board’s regular meeting on February 18, 2015, it considered whether the Municipal Code required the Commission to hold a public hearing. Board Member Stewart first stated that AMC 21.40.180—which requires a public hearing for new large retail establishments—“d[id] not apply.” Transcript of the Municipality of Anchorage Board of Adjustment Regular Meeting, Feb. 18 2015, at 16. In response to Mr. Stewart’s comment, Chair Guetschow reasoned that, while a new large retail establishment would require a public hearing, the Assembly did not intend AMC 21.55.130 to apply to “minor changes to the

exterior” of a preexisting establishment. *Id.* at 18-21. Finally, the Chair observed that the Assembly voted to add the words “public hearing” to the caption of 12.55.130 so the commission would understand that approval of new site plans for large retail establishments would require a public hearing. *Id.* at 20-21. According to Chair Guetschow, the words do not refer to “minor changes” to approved site plans. *Id.* at 21. The Chair arrived at this conclusion based largely on the legislative history of AMC 21.55.130. In the end, the Board decided that “a public hearing on a limited site plan review amendment filed under AMC 21.55.130 is not required as a matter of law.” R. 350. Thus, the Board held that the Nordstrom Rack proposal was “not subject to a public hearing requirement.” R. 350.

As the record shows, the Board engaged in basic statutory interpretation. The Board members’ comments on the public hearing issue refer to the plain meaning of the statutory terms, the structure of the Municipal Code, and the legislative history of the provisions at issue. As discussed above, the Commission did not address the public hearing question. Thus, the record lacks any indication that the Commission’s decision involved issues of agency expertise. The terms at issue are not technical and the question before the court is not complex. Moreover, the Commission did not articulate a coherent policy or rule of decision. In sum, the question on appeal—whether the Anchorage Municipal Code required a public hearing on the Nordstrom Rack proposal—turns on basic statutory interpretation, not issues of agency expertise. The court must therefore “consider the statute independently.” *Union Oil of California v. Department of Revenue*, 560 P.2d 21, 23 n. 5 (Alaska 1977).

B. The Anchorage Municipal Code requires a public hearing.

Appellants and Appellees have each presented a plausible interpretation of the Anchorage Municipal Code. Appellees believe the Code does not require a public hearing unless the Commission finds that a proposed modification will

significantly affect neighboring properties. In other words, Appellees argue that the Board may—but is not required to—hold a public hearing. Appellants counter that the Code requires a public hearing on all proposals to modify large retail establishments. Considerations of public policy—including due process and the right to meaningful judicial review—favor Appellants’ reading. The court therefore concludes that AMC 21.55.130 requires the Commission to hold a public hearing on all applications to modify existing large retail establishments in zoning designations which require a public hearing for new establishments.

This court interprets the law “according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.” *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999). The court’s interpretation should “give effect to the legislature’s intent, with due regard for the meaning the statutory language conveys to others.” *State v. Alex*, 646 P.2d 203, 208 n.4 (Alaska 1982). Generally, the court will look first to the language of the statute, then, if necessary, to the legislative history. *See State v. Alex*, 646 P.2d 203, 208 n.4 (Alaska 1982). In addition, the Alaska Supreme Court has held that “in every instance where the legislature does not speak cogently,” the court must “discover that interpretation which best fits with the ordered concepts of justice and equity in the jurisdiction.” *Rogers & Babler, Div. of MAPCO ALASKA, Inc. v. State*, 713 P.2d 795, 798 n.3 (Alaska 1986) (quoting *Blackard v. City Nat Bank*, 142 F. Supp. 753, 757 (D. Alaska 1956)).

1. *The Code provisions governing modification of large retail establishments are ambiguous.*

Statutory interpretation begins with the language of the statute. *Alex*, 646 at 208 n.4 (Alaska 1982). AMC 21.15.030 establishes the general procedure for site plan modification. When the Commission receives an application for modification, it must put the item on its consent agenda. AMC 21.15.030(G)(2). If the Commission finds that “the proposed modifications will have a significant impact”

on neighboring properties, it “may determine that a public hearing is necessary.” Thus, AMC 21.15.030 allows for, but does not require, a public hearing. *Id.* § (G)(2)(a).

However, Appellants argue that AMC 21.55.130 mandates a different procedure for modifications to large retail establishments such as the Sears Mall. AMC 21.55.130 grandfathers into compliance large retail facilities existing on or before May 8, 2001. It requires a “limited site plan approval” for modifications to such facilities. In addition, it states that “applications for limited site plan review under this subsection shall be processed in the same manner” as applications for new large retail establishments. Appellants argue that this language mandates a public hearing on all proposed modifications to large retail establishments existing on or before May 8, 2001.

Appellants’ argument on this point depends on another section of the Anchorage Municipal Code—AMC 21.40.180, which specifies standards and procedures applicable to zoning designation B-3. The Sears Mall is designated B-3, and AMC 21.40.180 permits new large retail establishments in B-3 “subject to public hearing site plan review.” In other words, a proposal for a new large retail establishment in the same area as the Sears mall would require a public hearing before approval. Thus, Appellants argue that, because AMC 21.55.130 requires the Commission to process an application for modification “in the same manner” as an application for a new facility, the Commission was required to hold a public hearing on the Nordstrom Rack proposal.

Appellants counter that AMC 21.55.130—the provision that governs modifications to grandfathered large retail establishments—refers only to the substantive standards listed in AMC 21.50.320. Under the heading “Public hearing site plan review-Large retail establishment,” AMC 21.50.320 lists several factors for the Commission to consider in evaluating a proposal for a new large retail establishment. These include vehicular access, traffic impacts, drainage,

aesthetics, noise buffers, trash collection, and pedestrian access. AMC 21.50.320(B)-(P). In spite of the title, AMC 21.50.320 does not expressly require a public hearing. Thus, the court must determine whether AMC 21.55.130—which requires the Commission to process an application for modification in “the same manner” as a proposal for a new facility—incorporates the public hearing requirement of AMC 21.40.180 in addition to the substantive standards of AMC 21.50.320.

Unfortunately, the language of the Code admits to two equally valid interpretations. Webster’s New World Dictionary of the English Language defines “manner” as “a way or method in which something is done or happens; mode or fashion of procedure.” One could therefore read the Code to require a public hearing on all proposed modifications to large retail facilities. If the Commission must hold a public hearing before approving a new large retail establishment, and if the Commission must process modifications to such establishments in the same way as it would a new establishment, then logically, the Code requires the Commission to hold a public hearing on proposed modifications like the one at issue in this case. However, one could argue just as persuasively that the word “manner” as it is used in the Code does not encompass all of the procedural requirements that apply to new establishments. After all, one can drive a car in a careful manner without strictly adhering to all of the rules of the road. Likewise, the Commission may process applications for modification in the same manner as applications for new establishments without strictly observing all of the procedural requirements that would normally apply to the latter.

2. The legislative history of AMC 21.55.130 does not reveal the Assembly’s intent.

Having found that the statutory language is unclear, the court turns now to the legislative history. *Alex*, 646 P.2d at 208 n.4. The Assembly adopted AMC 21.55.130, as well as the requirement that the Commission hold a public hearing

on proposals for new large retail establishments, at a May 8, 2001 meeting. The minutes of that meeting show that Assembly member Tesche introduced both provisions simultaneously as “Ordinance No. AO 2001-80.” Mr. Tesche then remarked that “it was not his intent, in preparing [the] ordinance, that minor changes to the exterior of an establishment that were associated with an interior remodel would trigger application of the ordinance.” Municipality of Anchorage Assembly, Regular Meeting Minutes, May 8, 2001, at 18. At this point, “the ordinance” had not been codified into AMC 21.55.130 and 21.40.180. Mr. Tesche’s comment therefore refers both to the substantive standards of AMC 21.50.320 and the hearing requirement of AMC 21.40.180.

The minutes contain no evidence that Assembly, by enacting AO 2001-80, intended to extend the public hearing requirement to minor modifications of existing establishments. On the other hand, Mr. Tesche’s comment that the ordinance should not apply to minor modifications appears to cover the entire ordinance, not just the public hearing requirement. Accordingly, the comment may suggest that if the substantive standards apply, so does the requirement for a public hearing. In any event, the legislative history does not provide a clear indication of the Assembly’s intent.

3. *Public Policy favors Appellees’ interpretation of the Code.*

Since neither the plain language of the statute nor the legislative history definitively resolves the issue, the court must “discover [the] interpretation which best fits with . . . concepts of justice and equity.” *Rogers & Babler*, 713 P.2d at 798. In situations like the present case, where a planning decision may negatively affect neighboring homes and businesses, principles of due process favor public input. Moreover, the only way to preserve a meaningful right to judicial review in such cases is to provide aggrieved parties with an opportunity to articulate their objections and build a record for appeal. Because the Code provides only one

mechanism for public input—a public hearing before the Commission—the court concludes that the Commission must hold a public hearing on all proposals to modify large retail establishments.

Other than a public hearing before the Commission, the Code provides no mechanism for public input on applications like the one at issue here. Applications not subject to public hearing site plan review go on the Commission’s consent agenda, which the Commission summarily approves without discussion and without input from potentially affected parties. Of course, the Code provides the Commission with discretion to hold a public hearing if it finds that a proposal will significantly affect neighboring properties. AMC 21.15.030(G)(2). Additionally, the Commission may pull an item from the consent agenda and discuss it at a regular meeting, as it did in the present case. Nonetheless, only one of these procedures—a public hearing—allows for input from parties other than the applicant. Even though the Commission chose to address the Nordstrom Rack proposal at its regular meeting, it heard from only one party—Sears—before voting to approve. Moreover, the decision to hold a public hearing is entirely within the discretion of the Commission. *See id.* The Commission need only decide that a proposal will not have a significant impact—a term without a readily apparent definition in the Code—in order to deny any opportunity for public input.

Of course, someone adversely affected by a proposed modification may appeal the Commission’s decision to the Board. But, any right of appeal is meaningless without an opportunity to build an evidentiary record at the level of the initial decision. Under the default procedure of consent agenda approval, the Commission hears no evidence and holds no discussion before approving an application for modification. Consequently, neighbors and nearby businesses negatively affected by a modification are left with nothing on which to base an appeal except the application itself. Any such appeal will place an appellant at an unfair disadvantage, as the application will likely highlight a proposal’s economic

benefits and minimize any potential drawbacks and complications. Thus, the ability to appeal, without a meaningful opportunity for public input, does not adequately protect affected parties' interests.

Due process and judicial review do not require a formal hearing. In many cases, informal procedures—such as notice and comment rulemaking at the federal level—satisfy the basic requirements of notice and an opportunity to be heard. In the present case, however, the language and structure of the Code present the court with an inflexible dichotomy. The court may adopt Appellants' reading and hold that the Code requires a public hearing in all cases. Or, the court may adopt Appellees' interpretation and declare that the decision to hold a public hearing is solely within the Board's discretion. Neither option presents the optimal balance between public involvement and administrative efficiency. For example, if the court adopts Appellees' position, the Commission will have to expend limited time and resources holding public hearings on inconsequential and uncontroversial proposals. On the other hand, administrative convenience does not outweigh affected parties' right to be heard. Where the Code is ambiguous and no intermediate alternative exists, the court must choose the interpretation that best conforms with "concepts of justice and equity." *Rogers & Babler*, 713 P.2d at 798. Therefore, the court concludes that AMC 21.55.130—which requires the Commission to process an application for modification in "the same manner" as a proposal for a new facility—requires a public hearing.¹

III. CONCLUSION & ORDER

For the reasons stated above, the decision of the Board of Adjustment is REVERSED. This case is REMANDED back to the Planning and Zoning Commission for further proceedings consistent with this Order.

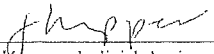
¹ The court's conclusion in this case applies only to applications to modify large retail establishments which are processed under AMC 21.55.130. It does *not* create a general right to a public hearing on all applications for limited site plan review.

ORDERED this 2nd day of December, 2015, at Anchorage, Alaska.


ANDREW GUIDI
Superior Court Judge

I certify that on 12-3-15
a copy of the above was mailed to
each of the following at their
addresses of record:

M. Broadman / S. Severin
J. Becca / J. Reeves


Jackie Rapper, Judicial Assistant

MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT
APPEAL FROM PLANNING & ZONING COMMISSION RESOLUTION NO. 2014-040
PLANNING & ZONING COMMISSION CASE NO. 2014-0094
BOARD OF ADJUSTMENT APPEAL NO. 2014-4

FINDINGS AND DECISION OF THE BOARD OF ADJUSTMENT

WHEREAS, a limited site plan review application was filed on behalf of Sears Roebuck and Company (Sears) on May 12, 2014 for a large retail establishment site plan amendment for the addition of an exterior loading dock, screened trash receptacle, and renovation of the building façade to accommodate additional entranceways for Nordstrom Rack and three additional future interior tenant spaces within the present Sears store space; and

WHEREAS, the Mall at Sears is a large retail establishment owned by Carr Gottstein Properties, 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, the application was filed and accepted for limited site plan review under the provisions of “old” Title 21; and

WHEREAS, on July 14, 2014, the Planning & Zoning Commission conducted a limited site plan review without public hearing and approved the application during the Regular Agenda portion of the meeting, after the item was pulled from the Consent Agenda at the request of Commission Member Spoerhase; and

WHEREAS, six retail merchants (Alaska Corn Company, Hops Hallmark, Lemon Tree Gifts, Nueurburg Enterprises LLC – dba GNC, Regis, and Stallone’s Men’s Store (Appellants) timely filed an appeal of the decision of the Planning & Zoning Commission; and

WHEREAS, the Board of Adjustment has deliberated and decided the appeal at a meeting open to the public on February 18, 2015;

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

I.
FINDINGS BY THE BOARD OF ADJUSTMENT

RECORD ON APPEAL

As a preliminary matter and by unanimous vote (3-0), the Board of Adjustment makes these findings concerning the record on appeal:

1. The Board of Adjustment does not conduct evidentiary hearings. AMC 21.30.080. Any party may file a timely application for rehearing by the Planning & Zoning Commission based on the new evidence as provided in AMCR 21.10.503. Allegations of new evidence shall not be considered or decided by the Board of Adjustment. AMC 21.30.040.

2. No application for rehearing was filed in Planning & Zoning Case 2014-0094. The parties have filed voluminous exhibits outside the record on appeal. Unless the Board of Adjustment specifically takes official notice of an exhibit, the parties' supplemental documents are hereby rejected as outside the record on appeal, per AMC 21.30.080.

3. To assist the Board of Adjustment in its exercise of independent judgment on the interpretation of municipal code, the Board takes official notice of the legislative history of AO 2001-80, to include the minutes of the Regular Assembly Meeting of May 8, 2001, attached as Exhibit B to Appellants' Reply Brief.

ISSUES ON APPEAL

Issue No. 1: Is a Public Hearing on a limited site plan amendment filed under AMC 21.55.130 required as a matter of law? By unanimous vote (3-0), the Board of Adjustment exercises its independent judgment in the interpretation of municipal code and concludes a public hearing on a limited site plan review amendment filed under AMC 21.55.130 is not required as a matter of law.

4. Review of the legislative history of AO 2001-80 (including the minutes of the Regular Assembly Meeting of May 8, 2001); AMC 21.15.030F.3.b.; AMC 21.15.030G.3; the definition of large retail establishment under AMC 21.35.020B; AMC 21.55.130; and AMC 21.50.320 do not support Appellants' position.

5. Appellee's limited site plan review application is for a large retail establishment in existence on or before May 8, 2001, and is not subject to a public hearing requirement under the facts presented in this appeal.

Issue No. 2: Is Planning & Zoning Commission Resolution No. 2014-040 invalid because the modifications it authorizes will increase, rather than decrease, the degree of nonconformity? By unanimous vote (3-0), the Board of Adjustment decides Planning & Zoning Commission Resolution No. 2014-040 is valid. This issue is further addressed in conjunction with related Issues No. 5 and No. 6.

Issue No. 3: Does failure to comply with AMCR 21.10.209, governing items decided on the consent agenda, invalidate Planning & Zoning Commission Resolution No. 2014-040? By unanimous vote (3-0), the Board of Adjustment decides that AMCR 21.10.209 does not invalidate Planning & Zoning Commission Resolution No. 2014-040.

6. Although the second recital in Planning & Zoning Resolution No. 2014-040 references the consent agenda, the record clearly reflects this item was pulled from the consent agenda by Planning & Zoning Commission Member Spoerhase and decided as a regular agenda item with the applicant present. As a matter of law, AMCR 21.10.209 is not applicable.

7. Modification of Planning & Zoning Resolution No. 2014-040 is appropriate for clarification.

Issue No. 4: Is Planning & Zoning Commission condition #8 (to “amend the plan to include signage, or otherwise to SIGNIFICANTLY promote access to the common areas of the mall through the Sears store”) vague and illusory rendering Resolution 2014-040 invalid? By unanimous vote (3-0), the Board of Adjustment decides Planning & Zoning Commission Resolution 2014-040, Condition #8 under Part B. is reasonably stated and requires no amendment. On the related issue of direct access from leased retail space to the interior common area generally, the Board of Adjustment makes these additional findings by unanimous vote (3-0):

8. Site plan review standards for large retail establishments do not mandate direct access from leased retail space to the interior common area of the Sears Mall.

9. Internal configuration of tenant space within a large retail establishment is non-jurisdictional to site plan review. Appellants are seeking relief neither the Planning & Zoning Commission nor the Board of Adjustment may provide.

Issue No. 5: Did the Planning & Zoning Commission err by not including findings of fact on requirements listed in AMC 21.50.320, specifically subsections J. *Pedestrian access*; K. *Community spaces*; O. *Northern design elements*; and P. *Aesthetic characteristics* ? By unanimous vote (3-0), the Board of Adjustment decides that the Planning & Zoning Commission did not err by not including findings

of fact in Resolution 2014-040 on requirements listed in AMC 21.50.320. Along with conformity under Issue No. 3, requirements listed in AMC 21.50.320 are further addressed under Issue No. 6.

Issue No. 6: Does the record support the findings on all material requirements of approval? In recognition of the relationship and restatement among Issues No. 3, No. 5, and No. 6, the Board of Adjustment by unanimous vote (3-0), makes the following findings concerning standards, material requirements of approval, and provisions applicable to limited site plan review for a large retail establishment in existence on or before May 8, 2001:

10. The Planning & Zoning Commission's review of the limited site plan review under the standards and provisions in AMC 21.55.130, including consideration of AMC 21.50.320, is supported by substantial evidence in the record.

11. The Planning & Zoning Commission has applied the standards set out in AMC 21.50.320 in a manner proportionate to the extent of the proposed limited site plan amendment, and determined the conditions of approval.

12. The limited site plan review amendment, together with the conditions of approval, complies with the standards in AMC 21.55.130 and AMC 21.50.320 appropriate to the large retail establishment existing on or before May 8, 2001.

13. Large retail establishment is a defined term under AMC 21.35.020B:

Large retail establishment means one or more buildings located on a single lot that are used or intended for use principally for the retail sale of merchandise, and whose total floor area exceeds 20,000 square feet. Large retail establishment includes without limitation general merchandise retailers, warehouse and club retailers, superstores, discount stores, outlet stores, second-hand stores, and thrift stores.

14. A large retail establishment is a single integrated property. In AMC 21.55.130, reference to "surrounding property" does not include merchants and retailers occupying adjoining spaces within a large retail establishment.

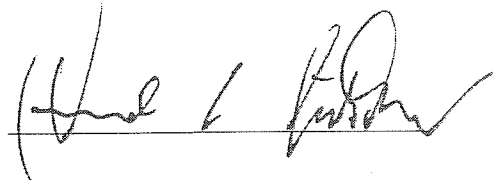
15. The Board of Adjustment finds modification of Planning & Zoning Resolution No. 2014-040, Finding No. A.1., is appropriate for clarification.

II.

CONCLUSIONS

1. This appeal was heard 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 Board of Adjustment takes official notice of the legislative history of AO 2001-80, to include the minutes of the Regular Assembly Meeting of May 8, 2001, attached as Exhibit B to Appellants' Reply Brief. The parties' other supplemental documents are rejected as outside the record on appeal, per AMC 21.30.080, and are not considered by the Board of Adjustment in deciding this appeal.
4. The Board of Adjustment substitutes its independent judgment for the Planning & Zoning Commission and modifies Planning & Zoning Commission Resolution No. 2014-040, as indicated in the attachment.
5. In all other respects Planning & Zoning Commission Resolution No. 2014-040 is affirmed and the appeal to the Board of Adjustment in Planning & Zoning Commission Case No. 2014-0094 is denied.
6. This is a final decision of the Board of Adjustment with respect to all issues involved in this case. The parties have 30 days from the date of mailing or other distribution of this decision to file an appeal to the Superior Court.

PASSED AND APPROVED by the Board of Adjustment this 26th day of February 2015.



Bernd Guetschow, Chair
on his own behalf and on behalf of
Board of Adjustment Members
John Haxby and Robert Stewart

MUNICIPALITY OF ANCHORAGE
PLANNING AND ZONING COMMISSION RESOLUTION NO. 2014-040

A RESOLUTION APPROVING AN AMENDMENT TO A LARGE RETAIL ESTABLISHMENT SITE PLAN IN THE B-3 (GENERAL BUSINESS) DISTRICT, IN ACCORDANCE WITH AMC 21.55.130 AND AMC 21.50.320; WITHIN N1/2, NE ¼, NE ¼, SECTION 30, T13N, R3W, S.M., ALASKA; GENERALLY LOCATED SOUTH OF NORTHERN LIGHTS BOULEVARD AND WEST OF THE SEWARD HIGHWAY, IN ANCHORAGE.

(Case 2014-0094; Parcel ID No. 009-042-01)

WHEREAS, a request was received from Sears Roebuck and Company, to amend a large retail establishment site plan in the B-3 (general business) district, in accordance with AMC 21.55.130 and AMC 21.50.320; within N1/2, NE1/4, NE1/4, Section 30, T13N, R3W, S.M.; generally located south of Northern Lights Boulevard and west of the Seward Highway, in Anchorage; and

WHEREAS, the Planning and Zoning Commission reviewed this request on the consent agenda on July 14, 2014.

NOW, THEREFORE, BE IT RESOLVED by the Anchorage Planning and Zoning Commission that:

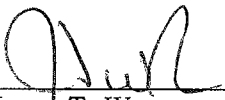
- A. The Commission makes the following findings of fact:
1. The site plan complies with the standards found in AMC 21.55.130 and AMC 21.50.320, with the conditions of approval.
 2. A pedestrian access connection is an important safety and economic benefit between the Nordstrom Rack entrance and the main entrance to the mall through the Sears store.
 3. Northern design elements should be implemented where possible; the covered walkway between entrances is important.
 4. The loading dock addition while necessary for the use, does not promote the balance of the existing building that is without a prominent front side and divides the pedestrian access.
- B. The Commission approves the large retail establishment site plan, subject to the following conditions:
1. All construction and improvements related to this approval shall be substantially in compliance with the application, narrative, and with the following plans on file with the Planning Division, except as modified by conditions of this approval:

700 E. Northern Lights Blvd. Renovation, prepared by RIM architects/DOWL HKM; sheets D201, A101, A201, A202, C101, C102, C103, L101, L501, and L502 dated 4/07/2014.

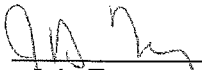
2. A notice of zoning action, including a copy of the approved Commission resolution for this case, shall be filed with the State Recorder's Office and proof of such shall be submitted to the Department of Planning.
3. Submit a copy of the updated site plan that shows the required sight distance triangles per ADOT&PF standards. Verify the removed trees are replaced on a one-to-one basis.
4. Amend the site plan to show pedestrian walkway striping for pedestrian access to the east entry doors from the sidewalk along Northern Lights Boulevard.
5. Submit a copy of the updated elevation plan to show an overhang awning along at least sixty (60) percent of the east elevation building length.
6. Submit a landscape plan to include the landscape budget required by AMC 21.55.130 towards improving landscaping along Northern Lights Boulevard.
7. A lighting plan shall be submitted for review and approval.
8. Amend the plan to include signage, or otherwise to SIGNIFICANTLY promote access to the common areas of the mall through the Sears store.

PASSED AND APPROVED by the Anchorage Planning and Zoning Commission this 14th day of July, 2014.

ADOPTED by the Anchorage Municipal Planning and Zoning Commission this 4th day of August, 2014. This written decision/resolution of the Planning and Zoning Commission is final and any party may appeal it within twenty (20) days to the Board of Adjustment pursuant to Anchorage Municipal Code 21.30.030.



Jerry T. Weaver, Jr.
Secretary

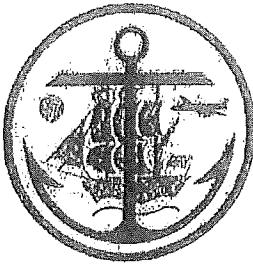


J.A. Fergusson
Chair

(Case 2014-0094; Parcel ID No. 009-042-01)

so

POSTING AFFIDAVIT

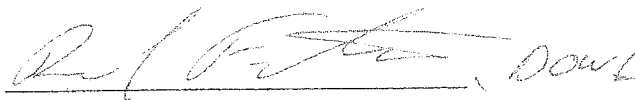


AFFIDAVIT OF POSTING

Case Number: 2016-0023

I, David Funatake, hereby certify that I have posted a **Notice of Public Hearing** as prescribed by Anchorage Municipal Code 21.15.005 on the property that I have petitioned for Major Site Plan Review. The notice was posted on May 10th, 2016 which is at least 21 days prior to the public hearing on this petition. I acknowledge this Notice(s) must be posted in plain sight and displayed until all public hearings have been completed.

Affirmed and signed this 10th day of May, 2016.


Signature

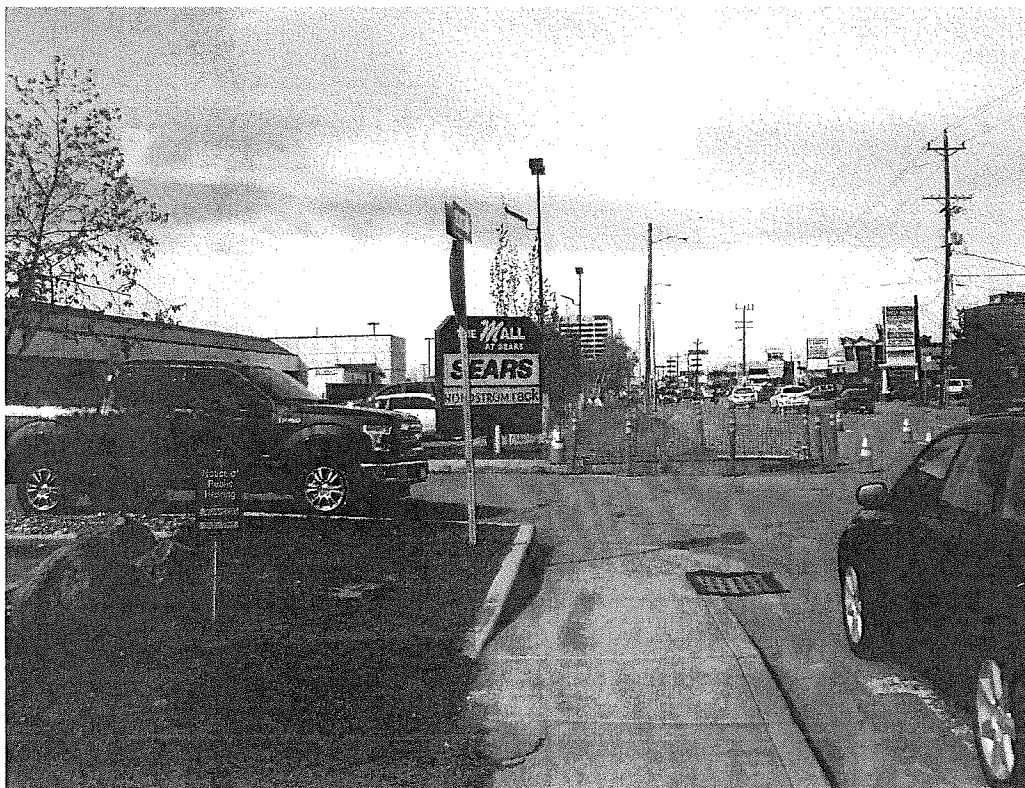
LEGAL DESCRIPTION

Tract or Lot _____
Block _____
Subdivision _____

T13N R3W SEC 30
N2NE4NE4 PTN
PARCEL 1 (SEARS MALL)



Posting Along Northern Lights Boulevard



Northern Lights Boulevard (Second View)



Posting Along the Seward Highway



Seward Highway (Second View)



Posting Along Benson Boulevard



Benson Boulevard (Second View)

**DEPARTMENT AND
PUBLIC
COMMENTS**

P & Z Commission/Nordstrom Rack Case 2016-0023
Planning Division/MOA Community Development Dept.
PO Box 196650
Anchorage, AK 99519-6650

RECEIVED

JUN 06 2016

PLANNING DEPARTMENT

June 6, 2016

Dear Commissioners,

The Code is clear that the Commission can only approve a site plan that will not have a permanent negative impact on pedestrian and vehicular traffic circulation and safety (AMC 21.50.200 B.1). It is also clear that Sears' plan does have such a "permanent negative impact."¹

These excerpts from the meeting transcripts of the July 14, 2014 discussion show that the Commissioners were aware of this:

MR. STRIKE: I mean this is a safety issue, I tell you.

VICE CHAIR DEAN: I just wanted to clarify that, that this is not the best situation for people to walk around.

MR. WALKER: ...in this case, clearly, there is a pedestrian access issue.

MR ROBINSON: ...the addition itself, is in fact, making things worse than what exists today.

(Transcript of PZC Meeting Case 2014-0094, Pages 18, 21, 31 & 34)

The Code also states that no change shall be made to a site that moves it away from conformity, and that change can only be permitted in the direction of conformity (AMC 21.55.100).

Staff's memo on case 2014-0094 brought this requirement to the Commission's attention on page 9, Section P.1: "The code does not allow developments to move out of conformity." There is also no provision in the large retail establishment sections of the Code that allows these sites to become less conforming (AMC 21.50.320 & 21.55.130). In fact, the Intent of the Non-Conforming Uses section of the Code (which the Large Retail Establishment section is part of) states that "It is the intent of this chapter to permit these nonconformities to continue until they are removed, *but not to encourage their perpetuation*. It is further the intent of this chapter that nonconformities shall not be enlarged upon, expanded or extended, or be used as grounds for adding other structures or uses prohibited elsewhere in the same district." (AMC 21.55.010, emphasis added).

At the hearing, staff also pointed out that the proposed site plan amendment does indeed move the site away from conformity with the LRE standards:

MR. ODELL: ...otherwise the changes to the building and the site either move away from compliance...or make no significant change toward compliance. (Transcript, Page 7).

And no one disagreed with him.

¹ Photos showing pedestrian use of the driveway where sidewalk was removed are included in this document.

It is unclear why the site plan was approved even though it moved away from conformity. However, it is clear the Commission acted on incomplete information.

The staff memo setting forth the Code requirements accurately quoted and addressed all of the relevant Code standards—except one critical to the Commission’s decision making: The staff memo omitted the sentence from the Pedestrian Access standard stating: “Sidewalks shall also be provided along the full length of any building where it adjoins a parking lot.” (AMC 21.50.320 J.).² Regardless of why, the critical sentence was omitted and not addressed – and in this case, it matters.

The staff report in 2014 also introduced confusion into the discussion about the Sears proposal's illegal move away from conformity with the LRE standards, by bringing up the separate issue of the Code's 10%-of-project-costs limitation. That limitation has nothing to do with the problem of a proposed modification that would move the property further away from conformity with the Code's LRE standards than the property is before the modification. This 10% limitation applies to conditions of approval imposed by the commission to try to move a "grandfathered" (and thus noncomplying) LRE property in the direction of greater conformity.

It is unreasonable to interpret the Code's 10%-of-project-costs provision 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.

Robert Mintz’ letter to the Commission dated February 19, 2016 shows that, before this proposed site plan was submitted, Sears was involved in developing alternative designs that would not have moved the site away from conformity or jeopardize public safety. Those plans also included ways for the Rack to have its single entrance.

There are ways for this to work for the shoppers, the Rack and the site in general. If the Staff or the Commission are uncomfortable with requiring interior access from the Rack to the rest of the Mall, then we encourage you to simply deny this amendment based on safety and conformity flaws and let Sears bring back a plan that satisfies the requirements of the Code.

Sincerely,



Dick Stallone
Owner, Stallone’s Menswear
Representing Sears Mall Merchant Appellants

² A copy of the Staff report with the missing sentence is attached.

Standards where the Proposed Site Plan Amendment moves away from Conformity

Standards are from AMC 21.50.320

Pedestrian Access. Addressed sentence by sentence

The establishment shall provide sufficient accessibility, safety and convenience to pedestrians, customers and employees.

Any reasonable person will view a change from convenient interior pedestrian access to exterior circuitous access—where they must travel 7-times the distance to reach the same space—insufficiently convenient. A substantial portion of the public could reasonably view it is insufficiently accessible. And, without even bare minimum standards to ensure separation of pedestrians and traffic, safety is undeniably in question as well.

Unobstructed sidewalks shall link the site to existing public sidewalks, its entrances, adjacent transit stops, and abutting residential and commercial areas.

Does not allow for the removal of the sidewalk linking the Rack from the other new spaces Sears is proposing and the rest of the Mall.

Sidewalks shall also be provided along the full length of any building where it adjoins a parking lot.

The sentence that was missing from the original Staff Memo to the Commission. Clearly it shows removing the sidewalk next to the building goes totally against the pedestrian access standard.

Sufficient sidewalks or barriers shall be provided between parked cars and buildings to prevent vehicles from protruding into reasonable pedestrian passage. Sidewalks shall be separated from adjacent streets by an area sufficient for snow storage and to provide a buffer for pedestrians from vehicular traffic.

The solution Staff has proposed, sending pedestrians to Northern Lights is directly opposite of what the standard calls for. Here it specifically states that sidewalks need to be separated from adjacent streets. Also the Northern Lights sidewalk doesn't appear to be maintained in winter.¹

Northern design elements. *The commission may require the provision of design elements that address Anchorage's distinct geography, low light angles, length of days, cold temperatures, wind, snow and ice.*

Before Sears remodeled, the Sears Mall provided near-ideal characteristics in terms of keeping customers out of the weather and off of ice and snow. A change that forces the public out of that comfortable and protected environment to reach any part of the Mall clearly moves the site away from conformity with this standard.

Community spaces. *Appropriate interior and exterior public areas shall be provided and maintained for customers and visitors to the site to congregate and relax.*

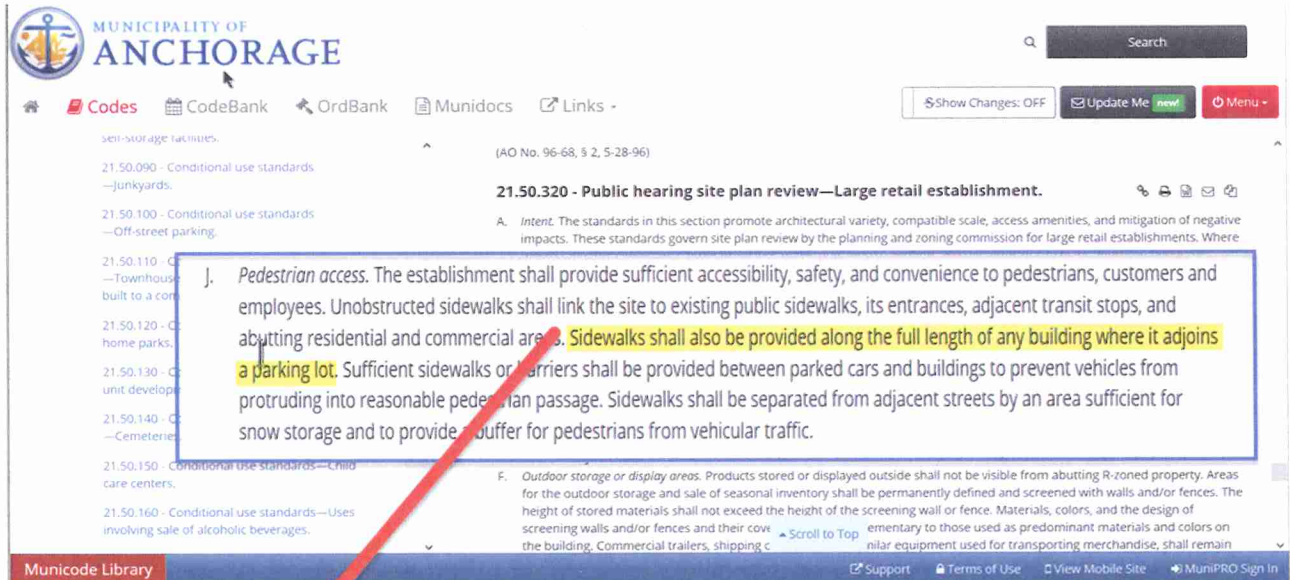
There are no Community spaces in the Nordstrom Rack. A plan cuts a space off from the rest of the mall cannot reasonably claim that the mall's seating and gathering areas satisfy this requirement.

Given the actual distance between the Rack and the Community spaces, it would be roughly equivalent to the downtown Nordstrom store counting the seating in the Museum as their Community space.

¹ Photo of winter condition of sidewalk attached to this document

Making people walk outdoors and travel a block and a half to reach the community spaces when they used to be able to access them directly through a climate controlled environment is clearly moving the site away from conformity with this standard.

Sentence from Code that requires sidewalks next to the building where it adjoins a parking lot was omitted from Staff's report to the Commission



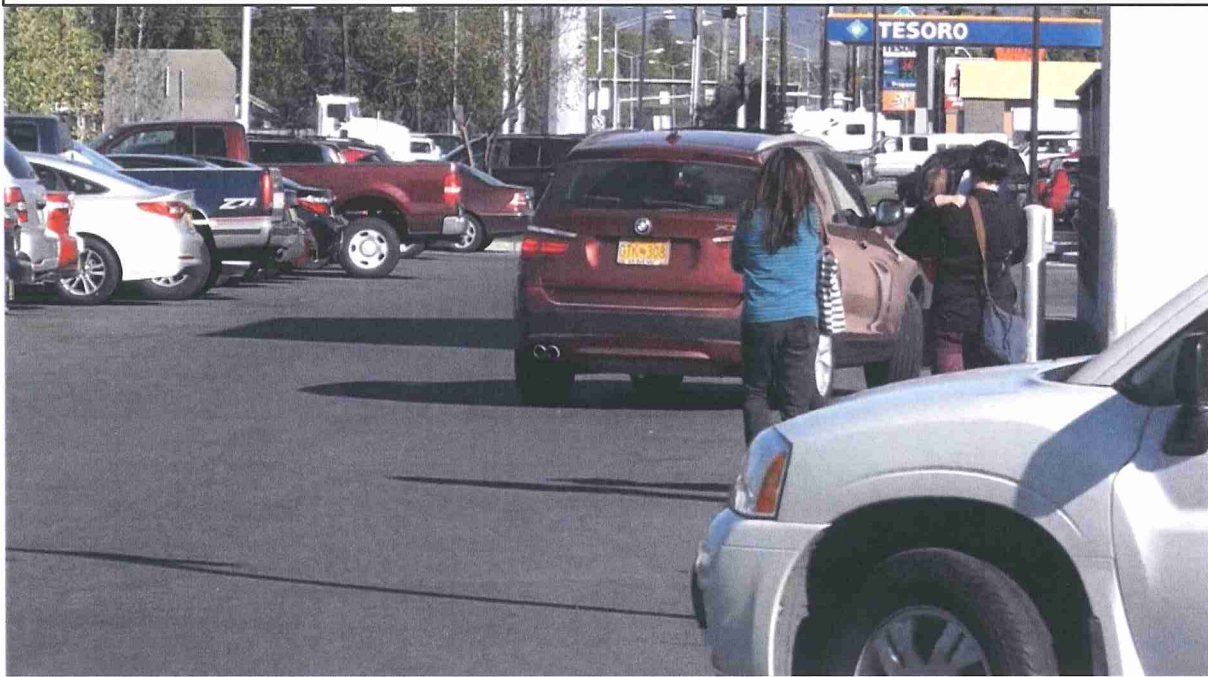
Pedestrian access. The establishment shall provide sufficient accessibility, safety, and convenience to pedestrians, customers and employees. Unobstructed sidewalks shall link the site to existing public sidewalks, its entrances, adjacent transit stops, and abutting residential and commercial areas. Sidewalks shall also be provided or barriers shall be provided between parked cars and buildings to prevent vehicles from protruding into reasonable pedestrian passage. Sidewalks shall be separated from adjacent streets by an area sufficient for snow storage to provide a buffer for pedestrians from vehicular traffic.

Sears is not planning to make any pedestrian improvements from existing public sidewalks or transit stops. Landscaping and curbing are provided to the north building elevation which provides a more defined vehicle circulation route and provides a barrier between pedestrians and vehicles. The northeast corner of the sidewalk wrapping the building will be removed and replaced with new concrete. A tubular handrail will be installed between the sidewalk and the loading bay pit.

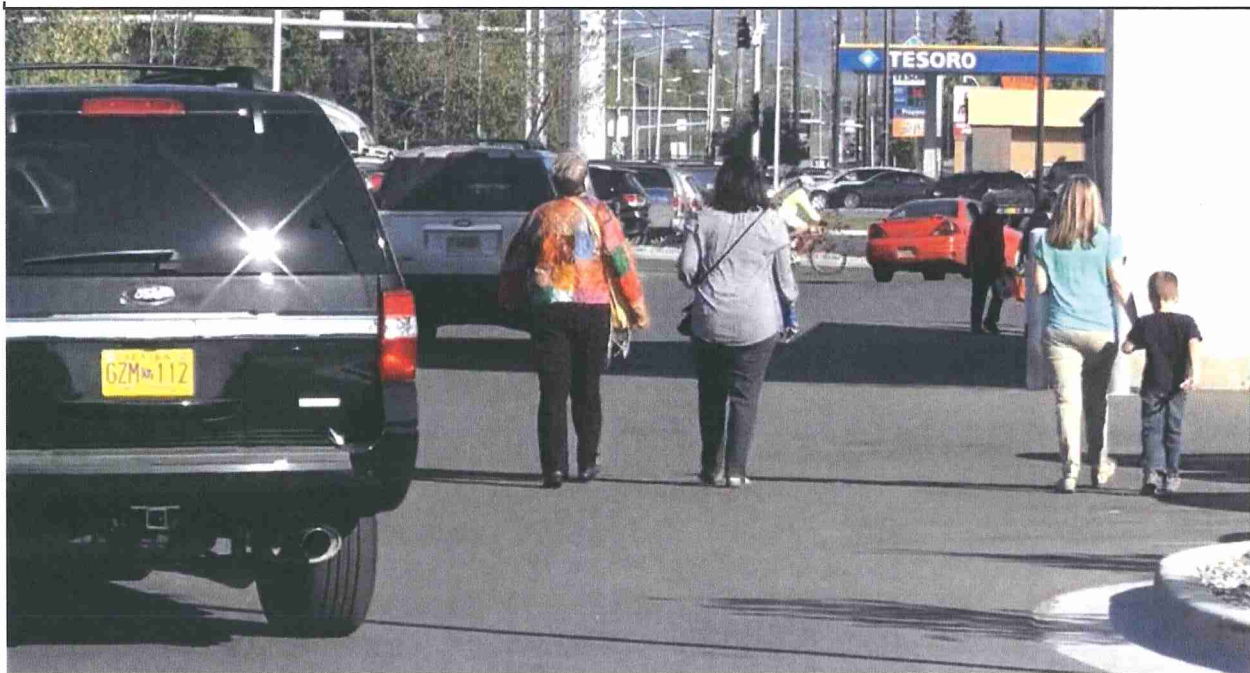
The Sears Mall has a lack of pedestrian access from the Northern Lights Boulevard sidewalk to the west and east entry doors where improvements are being made. The non-motorized transportation coordinator has requested that a walkway from the sidewalk on Northern Lights Boulevard thru the planting beds to the doorways on the west and east side be constructed. Given the competing priorities of improved pedestrian access and improved landscaping, and the pedestrian connection at the easterly driveway, staff recommends landscaping improvements take precedence over a second pedestrian connection.

Photos Showing Impact to Public Safety: Pedestrians and Traffic

The following screenshots are from videos taken over several days at different times of year, showing unsafe mingling of pedestrian and vehicle traffic to the north of the Rack.



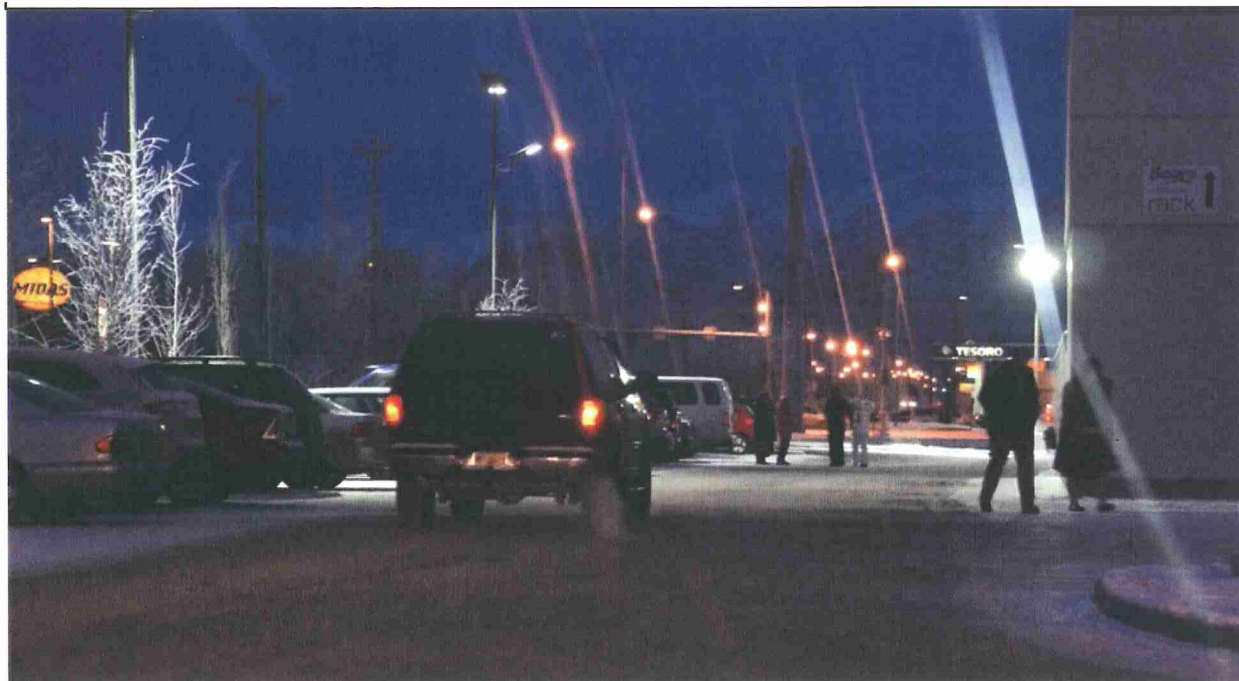
Above, north of the Rack looking east, a car drives around pedestrians who have just crossed the loading dock entry, as another vehicle approaches from behind.



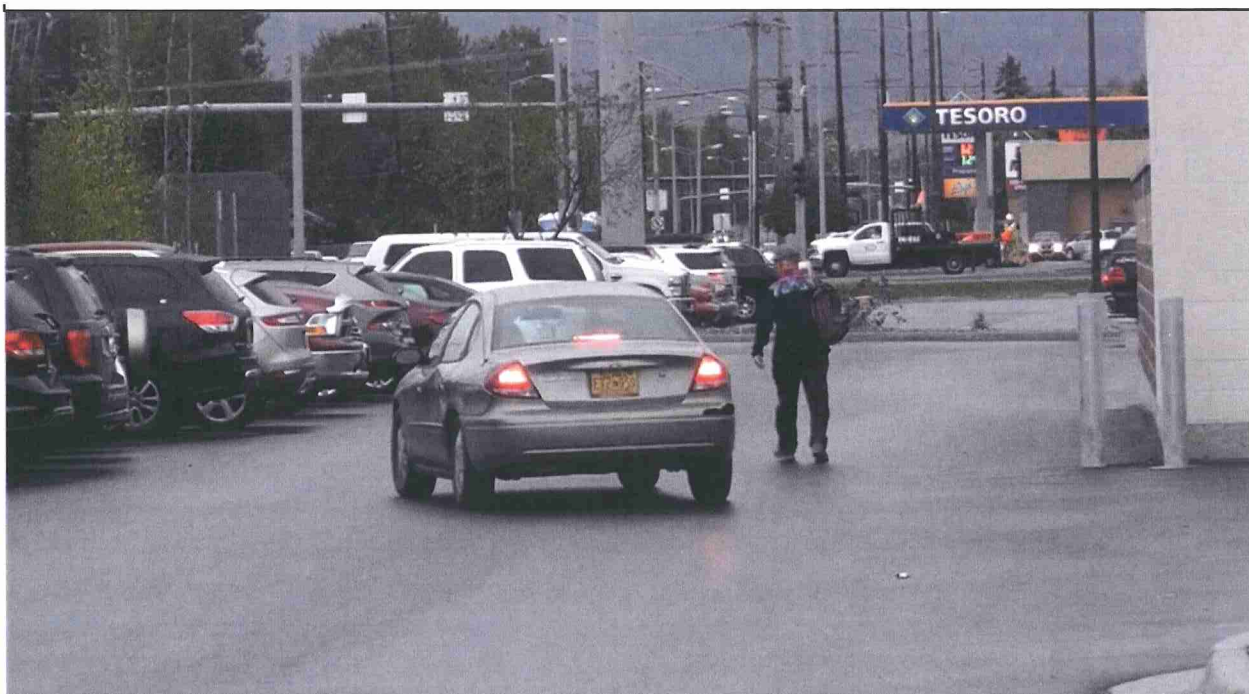
Pedestrians do not consistently stay to the far right as they walk, so drivers either wait or go around, while also having to watch for cars backing out of spaces or coming in from the adjacent busy street.



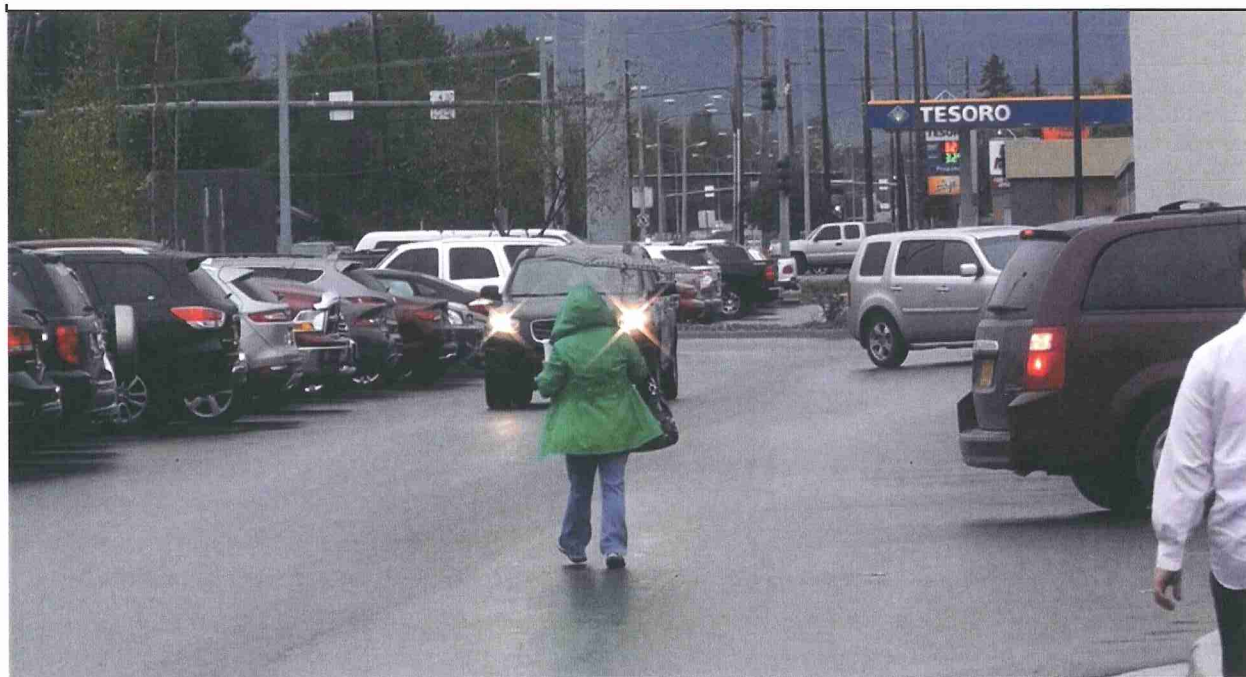
The situation persists in winter conditions, as people find walking outside provides more convenient access, closer to their vehicles, if they also wish to shop in other Mall stores.



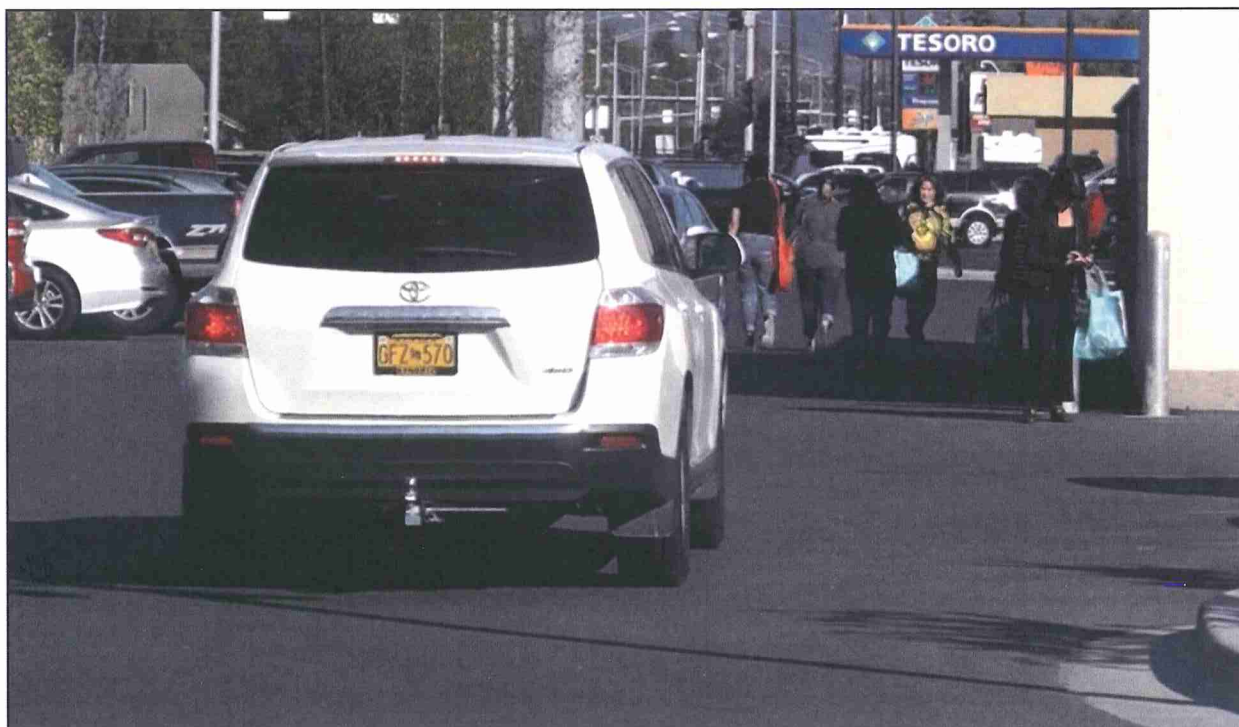
Shoppers will opt for the extra walking outside even if not dressed for the weather.



Above, a car that had been trying to go around a pedestrian brakes after the man continued to walk even more in the vehicle's path.



This woman walks even farther in the roadway due to vehicles on both sides. The silver car at far right is dropping off a passenger, while the dark red van at right is backing up.



Of course, pedestrians often walk slowly and can be distracted or inattentive to vehicle traffic. (Note the woman on her cell phone, top right.)



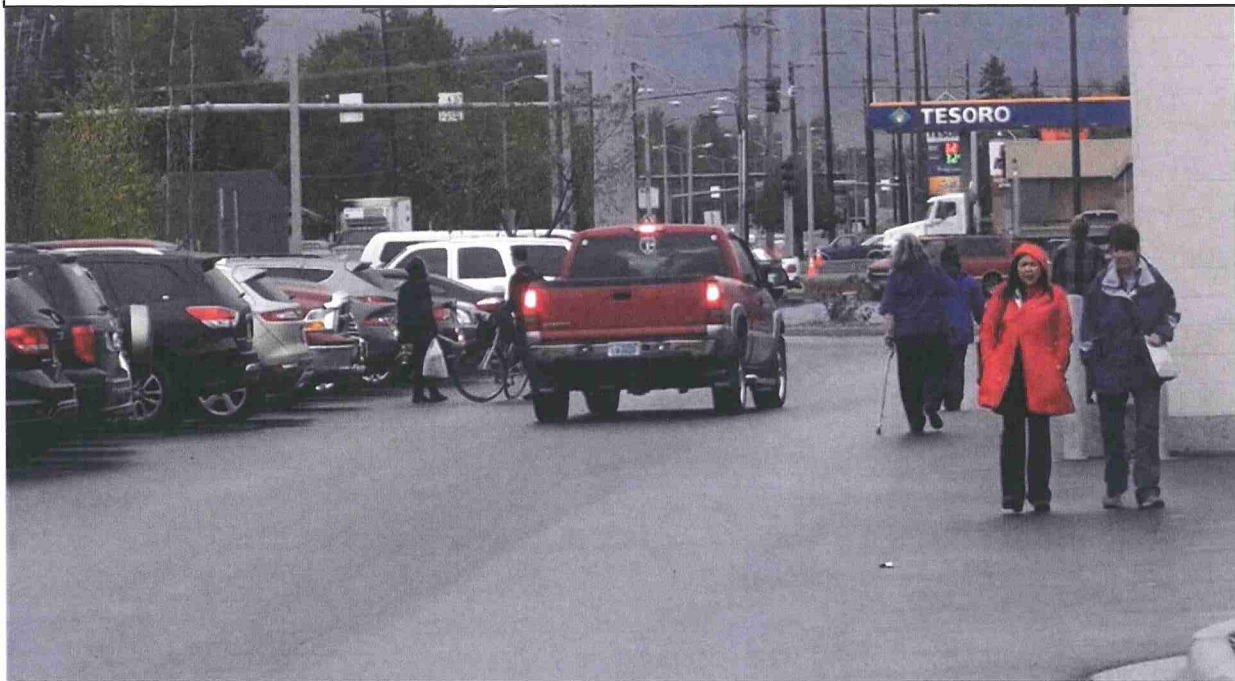
When more people are walking, as may happen during sales, holidays or special events, the impromptu walking path easily extends into parking lot traffic with no buffer, as seen in both photos above.



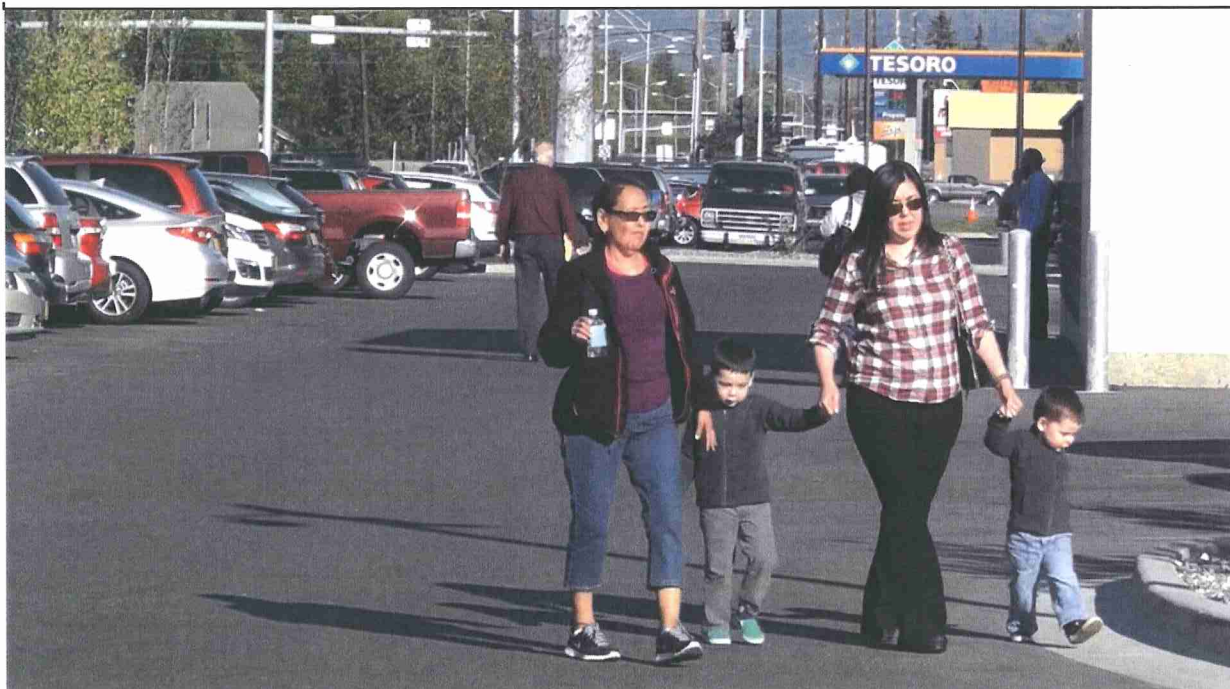
Above, one woman carries a child, as she and others use the drive to the north of the Rack as a walkway. Among the pedestrians is a woman using a walker (shown in the screenshot detail at right).

In the video, as this scene plays out, cars are seen turning from Northern Lights Boulevard and driving in close proximity to all pedestrians pictured.





Above, pedestrians mix on the roadway with vehicles and a cyclist.



From young children to seniors, all age groups are at greater risk without a safe way between the Rack and the rest of the Mall at Sears.

Photos Showing Impact to Public Safety & Accessibility: Obstructed Sidewalks



The only official pedestrian access between the Rack and the rest of the Mall currently involves using a sidewalk to access the Mall through the doorway to Sears, at left.



Summer sidewalk sales are shown here from the Sears entrance looking toward the Rack.

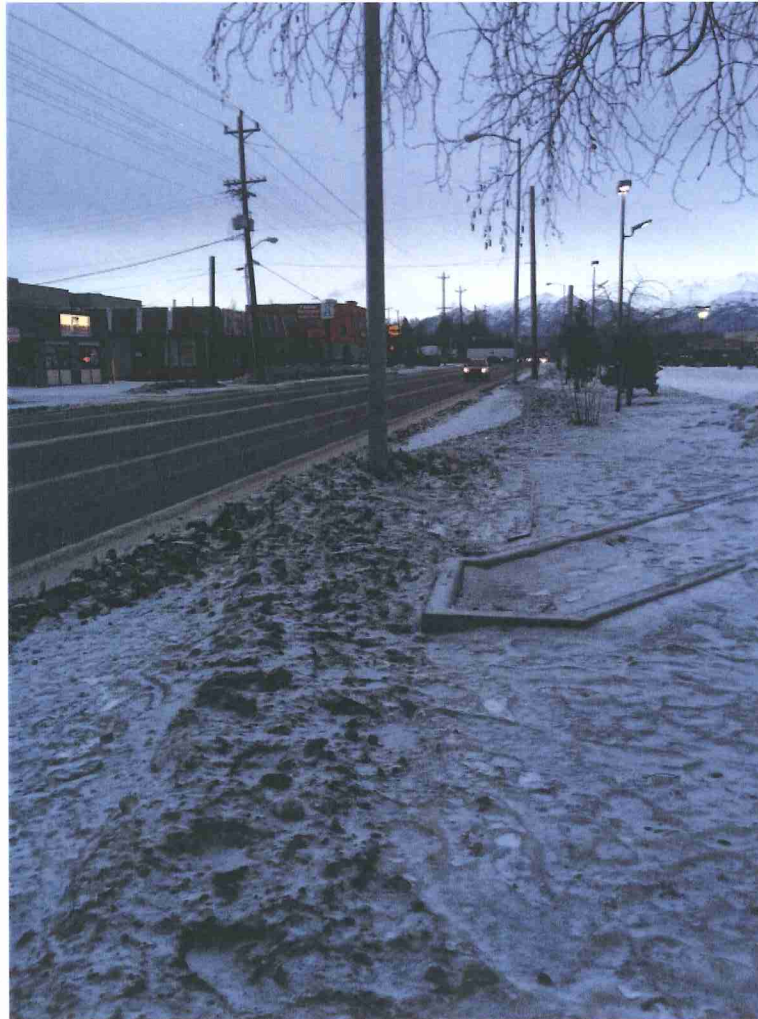


Note how the column barely allows access for more than one person at a time—and definitely would block wheelchair or walker access. Once again, pedestrians are forced into traffic.



This is the other side of the Sears store entrance.

Winter Sidewalk along Northern Lights Blvd.



The Northern Lights sidewalk along the north side of the Rack (where the new pedestrian striping leads). It is not maintained in winter.

2016-0023	A corridor framed in by glass could easily connect the Rack with the mall entrance. The best shopping experience would allow for all stores be accessible from the common areas already established as a in-door shopping center. Removing the pedestrian walk way around the front of the Rack was a poor design choice and is now a safety concern for shoppers.	Raymond	Rouse
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RECEIVED

FEB 23 2016

PLANNING DEPARTMENT

February 19, 2016

Hand Delivered

2016-0023

RECEIVED

FEB 19 2016

Planning and Zoning Commission
4700 Elmore Road
Anchorage, AK 99507

PLANNING DEPARTMENT

Dear Sirs,

This letter addresses three points which concern the March 7th public hearing on the pending Sears site plan approval application.

I. Under the guise of a big box "limited site plan review," Sears is asking you to sanction violations of both the non-conforming and "big box" sections of the applicable (old) code. Sears is attempting to make its existing site plan less, not more, conforming to the requirements of the zoning code.

The existing site plan conforms with AMC 21.50.320(J) because it has sidewalks adjacent to the entire length of the portion of the building where it abuts a parking lot on Northern Lights Boulevard. Sears is asking you to approve removal of the sidewalk, which makes the proposed site plan less, not more, conforming.

The existing site plan conforms with AMC 21.50.320(K) because it provides and maintains an appropriate interior place for customers and visitors to the site to congregate and relax. Sears is asking you to approve elimination of access to such interior common areas, which makes its proposed site plan less, not more, conforming.

When the big box ordinance was enacted in 2011, none of the then existing big boxes (retail premises over 20,000 sq. ft.) were in compliance with the new standards of AMC 21.50.320. At the time, the intent of the Code was that nonconformities "shall not be enlarged upon, expanded or extended" (AMC 21.55.010). Rather than apply the existing non-conforming standards in their entirety, the new ordinance "deemed conforming" existing big boxes and established a new approval requirement (limited site plan approval) for any "expansion, reconstruction, renovation, or remodeling of a large retail establishment" to ensure that the premises became more conforming over time.

No provision of the big box ordinance allows existing big boxes to become less conforming. In particular, Chapter 50 prescribes that an authority reviewing a site plan shall approve the site plan only if it finds that the site plan will not have a permanent negative impact on pedestrian and vehicular traffic circulation and safety or the maintenance of compatible and efficient development patterns substantially greater than that anticipated from permitted development. AMC 21.50.200(B)(1) and (4).

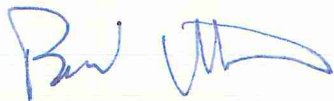


Any changes to Sears must move in the direction of greater conformity to existing standards and cannot result in less conformity.

II. Sears was well aware of its proposed site plan's problems and elected to proceed with its building plans despite the risks. See enclosed letters from me to Sears dated November 11, 2013 and June 2, 2014. Also see enclosed correspondence between Jim Reeves and the MOA between July 16 and August 26, 2015.

III. Sears knew about the availability of alternate designs that would mitigate the problems with its proposed site plan, but elected to proceed with its building plans despite the risks. Note especially the email from Brian Walsh (Sears) to Adam Grutz and Trace Blethen (Rack), July 2, 2014 at 10:31 a.m., which is contained in the enclosed email between Brian Walsh (Sears), Adam Grutz and Trace Blethen (Rack), and Carr-Gottstein between June 27, 2014 and July 3, 2014. Also see, Graphite concept designs dated February 11, 2014.

Very Truly Yours,



Robert A. Mintz

Enclosures as noted



Brian Walsh
Director of Development
Sears Holdings Corporation
200 Greenwich Avenue-floor 3
Greenwich, CT 06830

VIA FEDEX
TRACKING NUMBER 7971 2779 2891

November 11, 2013

Dear Brian,

Thank you for your October 30 letter and copy of the proposed elevation drawing for Nordstrom Rack and three additional commercial tenants. We like the idea of having a Nordstrom Rack at the Mall and look forward to working with you to make that happen.

Your letter requests consent, in part, under paragraph 17 of the declaration, which applies to exterior signs, signs within a mall area and exterior surfaces. This section of the Declaration requires the submission of plans of the exterior design, color, finish and signing of signs and buildings, for the purpose of achieving a harmonious relationship between the various buildings and facilities that comprise the shopping center, and establishes a 20 day review process. Note that the paragraph 17 review and consent process is limited to only the signs and finishes depicted in the elevation and does not apply to other elements depicted that fall outside the scope of paragraph 17.

The proposed surface treatment of the existing building area in the elevation looks fine. We object to the signage pending the outcome of a code study of the proposed



signage under the Municipality's sign ordinance. The code study is underway and we will let you know the outcome. We object to the exterior design to the extent the elevation drawing attached to the consent request reflects alterations that are outside the scope of paragraph 17 of the Declaration.

The proposed changes to the common area depicted on the elevation require further consideration due to the impairment of vehicular and pedestrian access arising from the loss of parking against the building and the loss of pedestrian access along the side of the building, the impediment to vehicular access resulting from conflicting delivery truck movements, the addition of enclosed commercial area in common area, the loss of direct access into anchor tenant premises from the West, and the conversion of space such that it no longer has access from the Mall. In the past, many of these types of changes were accomplished by a written amendment to the Declaration. In particular, we wish to maintain direct access from the Mall into Nordstrom Rack and any additional tenant space. In Anchorage's climate, an interior connection between the Nordstrom Rack, Sears, your additional tenant space and the Mall will benefit everyone.

We look forward to discussing these issues with you and are confident they can be resolved to our mutual benefit expeditiously.

Very Truly,



Robert A. Mintz



Brian T. Walsh
Developing Director
Seritage Realty Trust
200 Greenwich Avenue, Floor 3
Greenwich, CT 06830

via FedEx overnight

June 2, 2014

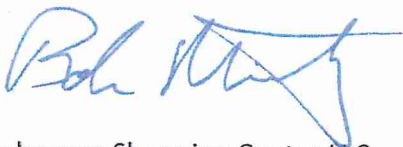
Re: Anchorage Shopping Center

Dear Brian,

We became aware last Friday that a building permit application has been submitted for the Nordstrom Rack. It appears that the plans still entail changes to common areas which, in our opinion, conflict with the letter and intent of the recorded Declaration of Establishment of Restrictions and Covenants Affecting Land, which is designed to protect the interests of both Sears and the owners of the adjacent mall. Carr-Gottstein raised concerns with the prospective common area alterations in our letter to you dated November 11, 2013 and at our meeting with you and David Lukes on January 27, 2014. Since that meeting we have been working diligently on "plan B", providing the impetus (that being interest by Whole Foods) Mr. Lukes said he needed to bring the "mall extension through Sears plan" back to Mr. Lampert for reconsideration. We have made substantial progress on that front.

While we want the Nordstrom Rack to be located at the Sears mall as much as you do, the current plan converts common areas, as well as interior space, in a manner that adversely affects the mall in terms of traffic, parking, visibility, as well as interior and exterior pedestrian access. Consequently, in accordance with paragraph 28 of the Declaration, Carr-Gottstein requests a meeting attended by all parties on Thursday June 12 in Seattle, WA at 10am for the purpose of resolving this dispute.

Sincerely,



Anchorage Shopping Center LLC
By Carr-Gottstein Properties, LP
Its sole member
By Carr-Gottstein Properties GP, LLC
Its managing partner
By Robert Mintz, authorized agent

From: Arms, Quincy H. [<mailto:ArmsQ@ci.anchorage.ak.us>]
Sent: Wednesday, August 26, 2015 10:31 AM
To: Jim Reeves
Cc: Weaver Jr., Jerry T.
Subject: RE: Sears - Nordstrom Rack

Jim,

I apologize that no one got back to you sooner on this. To my knowledge, the Municipality does not have a policy of withholding permits while litigation is pending. In our opinion, the limited site plan approval was issued in accordance with code. Absent a court order preventing us from issuing a certificate of occupancy, it will be issued when the inspections are complete.

Quincy Hansell Arms
Assistant Municipal Attorney
Municipality of Anchorage
ArmsQ@muni.org
(907) 343-4574

-----Original Message-----

From: Jim Reeves [<mailto:jreeves@hwb-law.com>]
Sent: Wednesday, August 26, 2015 10:18 AM
To: Arms, Quincy H.
Cc: josephreece@DWT.com
Subject: FW: Sears - Nordstrom Rack

We did not receive a response from anyone to this 7/16/15 email, below. We also raised this question directly with Jerry Weaver in a voicemail message and a follow-up email last fall (November 18, 2014), but he did not respond. Nordstrom Rack has announced that it plans to open for business next week. Since the limited site plan approval is in litigation, it is not yet final -- so commencing operations would be a violation of the Code. In addition, as

pointed out below, issuance of a building permit and subsequent approvals such as issuance of a certificate of occupancy are also illegal.

Can you please tell me whether the MOA intends to enforce the law in this case?

-----Original Message-----

From: Jim Reeves
Sent: Thursday, July 16, 2015 5:07 PM
To: HansellQ@ci.anchorage.ak.us
Subject: Sears - Nordstrom Rack

Since you asked, here is the question: Does the MOA intend to issue a certificate of occupancy before the Superior Court decides the pending appeal?

The Code says that a building permit does not excuse the property owner from its obligation to comply with other laws including land use regulations -- in this specific case, the limited site plan review and approval requirement. The guidance document issued by the MOA Building Official (AG.06) says that the application for a building permit must include (if applicable) the PZC resolution approving the project. It appears that the building permit was issued in ignorance of the fact that the limited site plan approval was under appeal. Failing to disclose that the PZC resolution is in dispute in a pending appeal would be a misrepresentation. AMC 23.10.106 authorizes suspension or revocation of a permit if it has been issued in error or on the basis of incorrect information. We don't believe it is the policy of the MOA to issue a building permit for a project when its legality under the land use regulations is in dispute.

The link below is to a record indicating that on 1/23/15 someone named "S.Calhoun" erroneously recorded that the limited site plan approval has been obtained, even though it was at that time on appeal to the BOA. We assume that S.Calhoun was not told that there is a pending appeal; and we wonder why that information was withheld.

<http://bsd.muni.org/Inspandreview/ViewReviewComments.aspx?apbldgreviewkey=345987>

A sign has appeared on the property announcing the opening of the new Nordstrom Rack in September. We would like to confirm that this will not happen unless Sears has obtained a certificate of occupancy, and that a certificate of occupancy will not be issued until the dispute as to the legality of the PZC action on the limited site plan review has been resolved by the Court. Issuance of a certificate of occupancy while the appeal is pending would be illegal. And, whatever someone's personal opinion might be concerning this particular project or about the pending appeal, it would be an extremely bad precedent that could seriously impair the MOA's ability to enforce the law in other cases.

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Katie Blake

From: Walsh, Brian T <Brian.Walsh@searshc.com>
Sent: Thursday, July 03, 2014 4:42 AM
To: Bob Mintz
Subject: FW: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches
Attachments: BW Pages from Pages from Nordstrom Rack Alternative East Entrances.pdf; 201407020914.pdf

Bob,

See the email chain below regarding the alternate Rack floor plans and their ultimate decision/response. I've attached the plan that Adam sent in his 12:44 pm email (below) as well as the plan that I sent Adam at 10:31 am (below). I'm getting beat up pretty bad here and we need to move forward. Can you please call me at your earliest convenience. Thanks

From: Grutz, Adam [<mailto:Adam.J.Grutz@nordstrom.com>]
Sent: Wednesday, July 02, 2014 6:01 PM
To: Walsh, Brian T; Blethen, Trace
Cc: 'Randy Cantrell'; Grutz, Adam
Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Hi Brian – I just spoke to our VP and was given a polite but absolute “NO” – we want to maintain singular control of our entry and we do not want to share it. If Sears and the Mall LL can agree upon a means to provide access from the front parking lot into the mall, we would absolutely not object but it cannot encroach upon our space or our entry – sorry to have to deliver bad news but this is final – thanks, Adam

Adam J Grutz
NORDSTROM | STORE DESIGN
1700 7TH Ave Suite 700
Seattle, WA 98101
P: 206.303.4385 | Cell: 206.851.1105
adam.j.grutz@nordstrom.com

From: Walsh, Brian T [<mailto:Brian.Walsh@searshc.com>]
Sent: Wednesday, July 02, 2014 12:10 PM
To: Grutz, Adam; Blethen, Trace
Cc: 'Randy Cantrell'; Grutz, Adam
Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

No problem. Sorry that you even have to deal with this. Thanks

From: Grutz, Adam [<mailto:Adam.J.Grutz@nordstrom.com>]
Sent: Wednesday, July 02, 2014 2:24 PM
To: Walsh, Brian T; Blethen, Trace
Cc: 'Randy Cantrell'; Grutz, Adam
Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Ok – thanks for the quick reply – I will ask the exec team ASAP and let you know – please note that it is pretty quiet around here due to the holiday so this may not be addressed until next week – thanks, Adam

Adam J Grutz

NORDSTROM | STORE DESIGN

1700 7TH Ave Suite 700

Seattle, WA 98101

P: 206.303.4385 | Cell: 206.851.1105

adam.j.grutz@nordstrom.com

From: Walsh, Brian T [<mailto:Brian.Walsh@searshc.com>]

Sent: Wednesday, July 02, 2014 10:31 AM

To: Grutz, Adam; Blethen, Trace

Cc: 'Randy Cantrell'; Grutz, Adam

Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Adam,

Thanks for your response. See attached. I thought we were talking about floor plan A-3 per Bob's email yesterday. I will agree to the below points which are applicable to the attached but we will not be creating a new entrance on the Sears façade or carving out a corridor leading to the mall. The elevations would stay exactly as they are today as would your fit plan (pretty sure). Let me know. Thanks again

From: Grutz, Adam [<mailto:Adam.J.Grutz@nordstrom.com>]

Sent: Wednesday, July 02, 2014 12:44 PM

To: Walsh, Brian T; Blethen, Trace

Cc: 'Randy Cantrell'; Grutz, Adam

Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Hi Brian – I am willing to run one additional option thru Exec review but before I do that, I would like to confirm a few things – see attached and below:

1. Rack would receive an enlarged vestibule and would not pay rent on the additional space
2. Rack would maintain our exterior presence, branding and storefront
3. Rack would maintain our interior entry doors (whether vestibule or just single set of doors – our option)
4. Rack would maintain control of the 'free space' and would be allowed to close it off when the store closes
5. LL would add 'decorative' entrance to the mall – not simply doors in a block wall – similar to proposal received from Graphite design
6. Rack would maintain approval rights for any kiosk – or permanent retailer/vendor presence within the 'new enclosed area'
7. LL and Sears would cover all the costs to redemise the space – RACK would bear no additional costs or CAM charges
8. Layout would be shifted one complete column bay in order to accommodate the already completed RACK fit plan....any impact to approved RACK layout which requires redesign would be reimbursed by the LL.

Please review and let me know if these items are acceptable to you. I am proceeding in good faith but I cannot guarantee that we will accept this even if all of the conditions are agreed upon. Therefore, I do not want this shared with the Mall LL until AFTER I receive your acceptance and then review with the RACK Execs and gain their approval.

Please let me know if this is acceptable to you and we will proceed accordingly – thanks, Adam

Adam J Grutz

NORDSTROM | STORE DESIGN

1700 7TH Ave Suite 700

Seattle, WA 98101

P: 206.303.4385 | Cell: 206.851.1105

adam.j.grutz@nordstrom.com

From: Walsh, Brian T [<mailto:Brian.Walsh@searshc.com>]

Sent: Wednesday, July 02, 2014 8:52 AM

To: Blethen, Trace; Grutz, Adam

Cc: 'Randy Cantrell'

Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

No doubt he's busy and I'm trying very hard to get it wrapped up. Below are a couple of thoughts/comments I have on the proposed.

1. The proposed vestibule area would be free SF for you to use as you would like (promotions, advertising, café, etc.)?
2. Could help with direct energy loss from your space.
3. Could help reduce the amount of salt, snow, mud, etc. tracked into your store from the parking lot.

From: Blethen, Trace [<mailto:Trace.K.Blethen@nordstrom.com>]

Sent: Wednesday, July 02, 2014 11:35 AM

To: Walsh, Brian T; Grutz, Adam

Cc: 'Randy Cantrell'

Subject: FW: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

I know that corridors of the type he is proposing are fairly common in AK but agree with Adam that this would not be ideal.

Brian, Adam is a busy guy. When are you going to get this wrapped up?

Trace Blethen | Nordstrom Real Estate

206.303.4417 phone | 206.303.4419 fax

1700 Seventh Avenue, Suite 1000, Seattle, WA 98101

trace.blethen@nordstrom.com

From: Grutz, Adam

Sent: Tuesday, July 01, 2014 3:58 PM

To: 'Bob Mintz'

Cc: Brian Walsh; Blethen, Trace; 'Randy Cantrell'; Grutz, Adam

Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Hi Bob – Replies to your questions below and attached:

1. Are you agreeable to creation of an interior corridor that enters into Sears as shown so long as:
 - a. The exterior elevation of the Rack does not change from the way it is currently designed (YES)
 - b. The entry into the Rack store is in the same place as currently designed (YES)
 - c. The currently designed Rack layout remains unchanged? (YES)
 - i. (Essentially we are creating a corridor between the exterior and interior Rack entrances by making the lease spaces behind the Rack shallower.) Brian Walsh has indicated that Sears is agreeable to this plan. Bob – Not sure I understand – we only have one customer entrance – it includes a vestibule within our store. Our customers should enter and exit from our vestibule directly to the sidewalk – not into another corridor. Please see attached redlines for further clarification

Adam J Grutz
NORDSTROM | STORE DESIGN
1700 7TH Ave Suite 700
Seattle, WA 98101
P: 206.303.4385 | Cell: 206.851.1105
adam.j.grutz@nordstrom.com

From: Bob Mintz [<mailto:bob@carrgottstein.com>]
Sent: Tuesday, July 01, 2014 2:30 PM
To: Grutz, Adam
Cc: Brian Walsh
Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Hi Adam, I think we can work this out. Please take a look at sketch A-3 (June 27). Are you agreeable to creation of an interior corridor that enters into Sears as shown so long as: 1) The exterior elevation of the Rack does not change from the way it is currently designed, 2) the entry into the Rack store is in the same place as currently designed, and 3) the currently designed Rack layout remains unchanged? (Essentially we are creating a corridor between the exterior and interior Rack entrances by making the lease spaces behind the Rack shallower.) Brian Walsh has indicated that Sears is agreeable to this plan. Bob

From: Grutz, Adam [<mailto:Adam.J.Grutz@nordstrom.com>]
Sent: Monday, June 30, 2014 6:50 AM
To: Linda Boggs Forward
Cc: Bob Mintz; Scott Harris; 'Walsh, Brian T'; Blethen, Trace; 'Randy Cantrell'; Grutz, Adam
Subject: RE: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Hi Linda – sketches received – I will forward to Brian Walsh and Real Estate for discussion. From store planning's point of view, we would not consider the alternate exterior cladding – our prototype storefront is key to the brand and needs to be visible. As for the planning layouts, for reasons discussed with Bob, we are not interested in adding a second entry or relocating our primary entry – while we are not opposed to a mall connection adjacent to Sears, that has to be coordinated and agreed upon with Sears – thanks, Adam

Adam J Grutz
NORDSTROM | STORE DESIGN
1700 7TH Ave Suite 700
Seattle, WA 98101
P: 206.303.4385 | Cell: 206.851.1105
adam.j.grutz@nordstrom.com

From: Linda Boggs [<mailto:linda@highvalleyranch.com>]
Sent: Friday, June 27, 2014 7:26 PM
To: Grutz, Adam
Cc: 'Bob Mintz'; Scott Harris
Subject: The Mall at Sears - Nordstrom Rack Second Entrance Concept Sketches

Mr. Grutz,

Attached are some drawings showing concepts for incorporating a Mall corridor to the east side of your new Anchorage store. Bob Mintz will be back in the Anchorage office on Monday, so this will give you something to consider and discuss to next week. He wasn't where he could send this when we last spoke, so he asked me to forward it along to you.

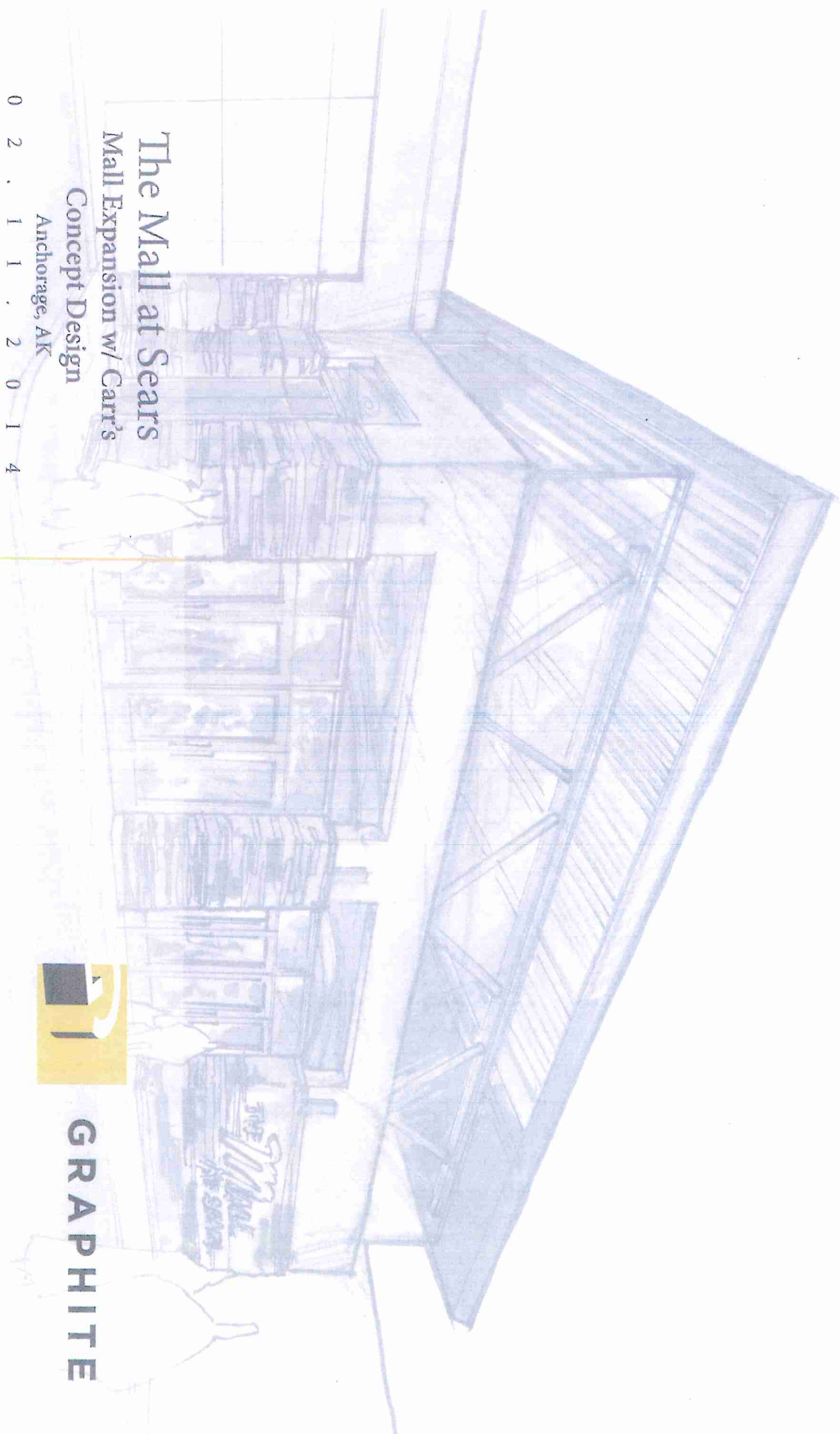
Linda Boggs
Associate Broker
Carr Gottstein Properties

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The Mall at Sears Mall Expansion w/ Carr's

Concept Design

Anchorage, AK

0 2 . 1 1 . 2 0 1 4



GRAPHITE



SEARS MALL SHOPPING CENTER SITE PLAN
Scale: 1"=40'

