

BEFORE THE MUNICIPALITY OF ANCHORAGE
BOARD OF ADJUSTMENT

In Re:)
)
Planning & Zoning Commission Resolution. No.)
2015-041, a resolution approving the Draft Design)
Study Report, reviewed through the Context)
Sensitive Solutions Process, for the Northern Access)
To the University and Medical District, connecting)
Bragaw Street to Elmore Road, in Anchorage)
)
CITIZENS FOR RESPONSIBLE DEVELOPMENT,)
)
Appellant,)
)
v.)
)
STATE OF ALASKA DEPARTMENT OF)
TRANSPORTATION & PUBLIC FACILITIES,)
)
Appellee.)
_____)

P&Z Commission Resolution No. 2015-041
Case No. 2015-0057

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MOTION FOR RECONSIDERATION

Appellant, Citizens for Responsible Development (CRD), moves this Board to reconsider its decision dismissing this appeal without also vacating the PZC decision and ordering that fees and costs incurred by the appellant in bringing this appeal be returned to CRD. CRD does not object to the dismissal, but it requests that the Board reconsider the conditions not imposed as part of the dismissal.

With all respect to the thoughtful consideration by the Board, CRD believes that the Board misconceived the scope of its authority to do more than simply dismiss the appeal. The Board believed

it had no jurisdiction to impose conditions or issue orders related to the dismissal. For the reasons set forth below, this is incorrect.¹

The Board correctly reads AMC 21.03.050(A) to confer it with jurisdiction to decide only a case or controversy, and not to authorize purely advisory opinions. But the Board erred in assuming that the unilateral action of an appellee can deprive the Board of jurisdiction in the middle of an appeal. Without accusing DOT&PF of bad faith, CRD notes that giving an appellee the ability to deprive the Board of jurisdiction at any point in an appeal rewards gamesmanship and can thwart the ability of an appellant to obtain review of a controversy that have been fully briefed once and is likely to recur.²

Since there is no guidance in the Municipal code or past precedent from this Board, Alaska state court cases offer the best guidance for understanding the implications of jurisdiction based on having a “case or controversy.” The courts, like this Board, have jurisdiction to decide a case only in the event of a genuine a case or controversy. But it is clear in the courts that jurisdiction is established at the *start* of a case, and the unilateral actions of one party do not deprive the appellate court of jurisdiction thereafter. Courts can and frequently do decide appeals after the merits of the case have become moot.³

¹ CRD apologizes for presenting these requests as a motion for reconsideration, rather than as a pleading submitted before the Board’s hearing on May 18. From conversations with the Municipal clerk before the meeting, CRD representatives understood they would have an opportunity to address the Board on the legal issues related to the motion to dismiss, and so they kept their pre-hearing filing short and without legal argument. Evidently, they misunderstood how the hearing would be conducted, and they do not mean to blame the clerk in any way. They offer these comments only by way of explanation.

² To give an extreme example: An appellee could brief an appeal and then, after seeing that the appeal hearing seemed to go badly for its position, announce that it is withdrawing its application. Then, once the appeal was dismissed for lack of jurisdiction, the appellee could refile the same application, trust that the PZC would issue the same decision, and hope that a different panel of the Board would be assigned to hear the new appeal.

³ Compare, e.g., *Ulmer v. Alaska Restaurant & Beverage Ass’n*, 33 P.3d 773 (Alaska 2001) (declining to decide moot issues) with, e.g., *Fairbanks Fire Fighters Ass’n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167-70 (Alaska 2002) (deciding mooted questions under public interest exception); *Bruner v. Petersen*, 944 P.2d 43, 47 n.4 (Alaska 1997) (deciding merits of moot appeal simply to reach issue of award of attorney fees); *Kodiak Seafood Processors Ass’n v. State*, 900 P.2d

Mostly they do not – but that is a matter of policy and not of jurisdiction.⁴ Further, whether or not the court addresses the merits of a moot appeal, the court clearly may issue other orders related to the appeal.⁵

Applying these principles to the Municipal Code establishes that this Board’s jurisdiction was established when this appeal was filed. Then, there was a clear case or controversy: when the appeal was filed, CRD objected to the PZC’s decision, and DOT&PF wanted the approval of the site plan upheld. In December, DOT&PF filed a notice of intent to file an appellee brief in this matter. The fact that the appellee’s position now has changed – that, for the moment, it does not desire to pursue the project for which it sought approval of its site plan – does not divest this Board of jurisdiction to decide the appeal or to decide collateral issues related to the appeal.

Having jurisdiction to decide the appeal, the Board may – as a matter of policy – choose to dismiss the appeal rather than decide the merits, now that the appellee’s actions have mooted the controversy. Appellant concurs that this is a very sensible resolution. It makes little sense to devote time and resources to deciding whether to uphold or reverse PZC’s approval of a site plan when the applicant does not intend to go forward with the project.

Because the Board has jurisdiction to decide whether to decide the appeal or whether to dismiss the appeal as moot, the Board also has jurisdiction to decide whether to take other actions along with the order of dismissal.

1159, 1195-98 (Alaska 1995) (deciding *some* issues in moot appeal); *Taylor v. Gill Street Investments*, 743 P.2d 345, 347-50 (Alaska 1987) (deciding moot questions under public interest exception).

⁴ See, e.g., *Ahtna Tene Dene v. State, Dep’t of Fish & Game*, 288 P.3d 452, 459 (Alaska 2012) (“Even where an appeal is moot, we retain the discretion to address an issue.”); *Hayes v. Charn*, 693 P.2d 831, 834 (Alaska 1985) (“Ultimately, the question whether to review a moot question is left to the discretion of the court.”).

⁵ See, e.g., *O’Callaghan v. State*, 920 P.2d 1387, 1390 (Alaska 1996) (deciding attorney fee issue even after holding that the appeal on its merits was moot).

The Alaska Supreme Court established its rule for dealing with moot appeals in 1984 in a case called *City of Valdez v. Gavora*.⁶ In order to ensure that a judgment that was appealed and then was mooted would have no future effect between the parties, as part of dismissing the appeal, the Supreme Court will reverse or vacate the decision that was appealed and remand to the lower court with directions to dismiss the complaint that initiated the case.⁷ “This practice is intended to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.”⁸

In a 2006 case called *Peter A. v. Department of Health & Social Services*,⁹ the Court reiterated its holding in *Gavora* and added further discussion of how to achieve fairness to an appellant when an appeal is mooted by the actions of the appellee. The Court observed, first, that if a technically mooted issue has collateral consequences – that is, some ongoing effect – then the Court may decide the moot issues.¹⁰ Alternatively, the Court may issue orders to ensure that the unreviewed decision has no ongoing or future collateral consequence.¹¹ A typical such order is to vacate the judgment below. Quoting the United States Supreme Court, the Alaska Supreme Court said that vacatur is “especially appropriate ‘when mootness results from unilateral action of the party who prevailed below.’”¹² In pertinent part, the Alaska Court wrote:

[W]hen a prevailing party voluntarily moots a case, without the appellant’s acquiescence, the appellant, through no fault of his own, is prevented from obtaining appellate review of his claim. We agree with the United States Supreme Court that principles of equity require vacatur of the challenged order in such a case.¹³

⁶ 692 P.2d 959 (Alaska 1984).

⁷ *See id.* at 960 (noting that the practice it adopted follows the practice of the U.S. Supreme Court).

⁸ *Id.* at 961 (internal quotes omitted).

⁹ 146 P.3d 991 (Alaska 2006).

¹⁰ *See id.* at 994-95.

¹¹ *See id.* at 995.

¹² *Id.*, quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994).

¹³ *Id.*

For the reasons expressed by the Alaska Supreme Court, this Board should take the same approach: When this Board elects to dismiss an appeal that has become moot because of a unilateral action of the appellee, fairness to the appellant requires vacating the decision that was appealed.

In the current case, it is not fair to dismiss this appeal after CRD has completed the briefing on what is wrong with the PZC decision, but leave standing the PZC standing so that, if DOT&PF changes its mind in a year or two or five and wants to pursue the road project, DOT&PF then can start up again, treating the PZC as having approved its application – forcing CRD to scramble to react and redo the appeal. Hence, the order of dismissal should state explicitly that the decision of the PZC that was appealed is vacated. That does not preclude DOT&PF from resubmitting its application or a modified application and does not preclude PZC from reaching the same result as before, after affording all interested parties the process that the PZC determines is due in that situation.

If the PZC decision is vacated, then the Board also has clear authority to award costs and fees to the appellant. AMC 21.03.050(4)(C) provides that all costs and fees shall be returned to the appellant if the decision of the lower body is reversed in whole or part. If this Board vacates the PZC decision, that is a reversal of the decision. It is a clear win for the CRD, whose goal with this appeal has been to defeat PZC's approval of the site plan. Thus, the order of dismissal should also order that the costs and fees incurred in bringing the appeal should be returned to CRD.¹⁴

DATED this 23rd day of May, 2016.

CITIZENS FOR RESPONSIBLE DEVELOPMENT



Barbara Karl, with assistance of
Counsel, Susan Orlansky

¹⁴ To be clear, CRD has not asked that DOT&PF pay its costs and appeal fees, and it has not asked anyone to pay its attorney fees. The Code does not discuss that kind of fee-shifting among parties; it only provides for return of the appellate filing fee and costs incurred for the record and transcript.