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,	)	'15 DEC -4 A9:27
v.	)	
MUNICIPALITY OF ANCHORAGE and SEARS ROEBUCK & CO.,	)	RECEIVED MUNICIPAL ATTORNEY
Appellees.	)	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 statue, 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.

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[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

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. Broadwell / S. Severin
J. Reece / J. Reeves

Jackie Kapper, Judicial Assistant