

MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT
FINDINGS OF FACT AND DECISION
CONDITIONAL USE PERMIT FOR MEA UTILITY SUBSTATION
CASE 2013-159; RESOLUTION 2014-001
APPEAL FROM THE PLANNING AND ZONING COMMISSION TO THE
MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT

M.O.A.
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PLANNING AND ZONING COMMISSION OFFICE

WHEREAS, the parties used the terms “upgrade” and “expansion” of an existing facility interchangeably throughout the record on appeal and the Board of Adjustment will therefore treat the terms synonymously for purposes of this appeal;

WHEREAS, in Case 2013-159, the Planning and Zoning Commission denied Matanuska Electric Association’s conditional use application to expand the Justine Parks Substation ;

WHEREAS, Matanuska Electric Association (MEA) timely appealed the decision of the Planning and Zoning Commission;

WHEREAS, the Board of Adjustment heard Matanuska Electric Association’s (Appellant) appeal solely on the basis of the record established before the Planning and Zoning Commission, the Notice of Appeal and the written briefs submitted;

WHEREAS, the Board of Adjustment deliberated and decided the appeal at a meeting open to the public held on July 17, 2014;

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

FINDINGS

Issue No. 1. Did the Planning and Zoning Commission err by not considering the necessary and essential services that the proposed substation expansion would provide to the community?

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1. Appellant asserted that MEA's proposed substation expansion will provide safe, efficient, reliable and necessary services to the community in compliance with its statutory obligations and that the Planning and Zoning Commission did not consider these necessary and essential services when it denied the conditional use application.

2. The Board of Adjustment finds that the record reflects that the Planning and Zoning Commission did consider the essential services that the substation would provide. The references to the record include the following: Transcript page 116--testimony by Mr. Adams; Transcript page 130—discussion by Commissioner Spring; Transcript page 132---discussion by Commissioner Robinson; Transcript page 136—discussion by Commissioner Mulcahy

3. The Board of Adjustment finds that Finding of Fact Number 4 in Resolution 2014-1 indicates that the Planning and Zoning Commission recognized that electricity is an essential public service.

4. The Board of Adjustment finds, by a vote of three to zero, that the Planning and Zoning Commission did not err by not considering the necessary and essential services that the proposed substation expansion would provide to the community.

Issue No. 2. Did the Planning and Zoning Commission err by subjecting MEA's conditional use application to standards beyond those required under the Municipal Code?

5. Appellant asserted that the Planning and Zoning Commission imposed standards beyond those authorized in the Municipal Code by requiring larger yard requirements, by questioning whether retaining walls, landscaping and fences could be within the yard allotment, by implying that MEA's drainage plan must remedy the adjacent property's naturally wet ground, by suggesting that an escrow account be established to address unforeseen impacts on

adjacent septic systems, and by implying and stating that the MEA failed to follow procedural requirements.

6. The Board of Adjustment finds that Appellant's allegations relate to the Planning and Zoning Commission's Finding of Fact Number 5 in Resolution 2014-1.

7. The Board of Adjustment finds that Finding of Fact Number 5 does not impose conditions or require new standards beyond those in the Municipal Code, but rather Finding of Fact Number 5 is an expression of the Planning and Zoning Commission's concerns that the Planning and Zoning Commission felt were not adequately addressed by MEA in its application.

8. The Board of Adjustment finds, by a vote of two to one that the Planning and Zoning Commission did not err by subjecting MEA's conditional use application to standards beyond those required by Municipal Code.

Issue No. 3. Was the Planning and Zoning Commission's finding that MEA's mitigation measures were insufficient supported in the record by substantial evidence?

9. Appellant asserted that substantial evidence illustrates that MEA addressed the property's lighting, noise, drainage and landscaping to sufficiently buffer the surrounding area from any impact and that the Planning and Zoning Commission's finding that MEA's mitigation measures were insufficient was not supported in the record by substantial evidence.

10. The Board of Adjustment finds that MEA's light plan is low impact; that the security lighting illuminates the front entrance on the east side; and that the maintenance lighting will only be used when maintenance occurs which will be primarily in the summer months when it will not be noticeable.

11. The Board of Adjustment finds that transformers were placed by MEA on the east side of the site to keep them away from the closest residence and that the new transformer is quieter than the existing one.

12. The Board of Adjustment finds that the drainage plan that MEA submitted was prepared by a certified professional engineer, was engineered to direct surface water away from the west side of the property, and ensures that even during a 100- year, 24-hour storm the precipitation will be contained on site.

13. The Board of Adjustment finds that MEA's landscaping plan exceeds that required by Municipal Code because it calls for more trees than required and it calls for the trees to be ten feet in height along the boundary adjacent to the west residential use area.

14. The Board of Adjustment finds, by a vote of two to one, that the Planning and Zoning Commission's finding that MEA's mitigation measures were insufficient was not supported in the record by substantial evidence.

15. The Board of Adjustment decides, by a vote of two to one, to substitute its independent judgment to find that MEA's mitigation measures with respect to lighting, noise, drainage and landscaping were sufficient to adequately buffer the surrounding residential uses.

Issue No. 4. Was the Planning and Zoning Commission's finding that the scale of the proposed substation expansion was too large for the petition site supported in the record by substantial evidence?

16. The Appellant asserted that the petition site contains adequate square footage for the proposed substation expansion and that the record lacks facts to support the Planning and Zoning Commission's finding.

17. The Board of Adjustment finds that the record contains numerous references to the concern that the expansion was too large for the site. This evidence in the record includes the following: Transcript page 68—testimony of Mr. Starr; Transcript page 88—testimony of Debbie Ossiander; Transcript page 95—testimony of Amy Demboski; Transcript page 121---testimony of Mr. Adams; Transcript page 129---discussion by Commissioner Spring; Transcript page 131-

132—discussion by Commissioner Robinson; Transcript page 135—discussion by Commissioner Strike.

18. The Board of Adjustment finds that Mr. Adams, Appellant's representative, testified (at Transcript page 121) that there was not a lot of flexibility with respect to what could be done at the site because it was a very small site and one of the smallest sites Appellant has for a substation like this.

19. The Board of Adjustment finds that the Planning and Zoning Commission's finding that the scale of the proposed substation expansion was too large for the petition site relates to more than just the physical size of the substation expansion in relation to the site; the size of the substation expansion needs to be considered in the context of the requirement that a conditional use be compatible with existing and planned land uses in the surrounding neighborhood.

20. The Board of Adjustment finds, by a vote of two to one, that the Planning and Zoning Commission's finding that the scale of the proposed substation expansion was too large for the size of the petition site was supported in the record by substantial evidence.

Issue No. 5. Was MEA denied equal protection by the Planning and Zoning Commission applying requirements to MEA's conditional use permit application that aren't required by Code or applied to other similarly situated entities?

21. The Appellant asserted that MEA was denied equal protection based on two related theories: 1) MEA was treated differently from Chugach Electric who received a conditional use permit for a substation on a parcel of property located within an R-6 zone; and 2) MEA was treated differently than others similarly situated because the Planning and Zoning Commission imposed a larger yard requirement and suggested that MEA establish an escrow fund.

22. With respect to the Appellant's first argument, the Board of Adjustment finds that a comparison of MEA's application for a conditional use

permit to Chugach Electric's application is not appropriate because each parcel of property is unique and the conditional use standards have different effects on different properties. Additionally, the complete record relating to Chugach Electric's conditional use application was not part of the record on appeal and because the Board can only consider the materials in the appeal packet (AMC 21.30.080), it cannot determine the merits of Appellant's argument.

23. With respect to Appellant's second argument, the Board of Adjustment finds that the Planning and Zoning Commission did not impose a larger yard requirement or require the establishment of an escrow fund, and therefore MEA was not treated differently than others similarly situated.

24. The Board of Adjustment finds, by a vote of two to one, that MEA was not denied equal protection by the Planning and Zoning Commission applying requirements to MEA's conditional use permit application that aren't required by Code or applied to other similarly situated entities.

Issue No. 6. Was MEA denied due process a) by the Planning and Zoning Commission providing the public with extended time to testify and failing to offer the same opportunity to MEA or b) by not having its case heard by a fair tribunal.

25. The Appellant asserts that MEA was denied due process because it was deprived of a full and fair opportunity to be heard and because the Planning and Zoning Commission expressed disdain and ill will towards MEA depriving it of being heard by a fair tribunal.

26. The Board of Adjustment finds that just because there were a large number of persons from the public who testified against MEA's application doesn't mean that MEA was denied due process.

27. The Board of Adjustment finds that MEA was given ample time to be heard and did not request any additional time. The record, at Transcript pages 105-115, reflects that while Mr. Adams, MEA's representative, reserved one minute for rebuttal, he was given a longer time and completed his comments.

28. The Board of Adjustment finds that the Planning and Zoning Commission discussed its concerns with MEA, explored alternatives, and offered MEA the opportunity to postpone and come back to the Planning and Zoning Commission at a later date but MEA chose not to do so. (See Transcript pages 116-7; 136.)

29. The Board of Adjustment finds that there was a sense of frustration by the Planning and Zoning Commission that arose out of MEA's unwillingness to deal with the concerns raised by the Planning and Zoning Commission, but MEA was not treated unfairly by the Planning and Zoning Commission.

30. The Board of Adjustment finds, by a vote of three to zero, that MEA was not denied due process by the Planning and Zoning Commission providing the public with extended time to testify and failing to offer the same opportunity to MEA.

31. The Board of Adjustment finds, by a vote of two to one, that MEA was not denied due process by not having the case heard by a fair tribunal.

Issue No. 7. In light of the Board of Adjustment's findings on the issues raised by the appeal, should the Planning and Zoning Commission's decision to deny MEA a conditional use permit to upgrade the substation be affirmed?

32. The Board of Adjustment finds that the fundamental nature of the Planning and Zoning Commission's decision to deny MEA's conditional use application has not changed. While the Board of Adjustment substituted its judgment on the issue of mitigation, the conditional use permit application does not fulfill the criteria set forth in AMC 21.50.020 because, due to the size of the proposed substation in relation to the size of the petition site, the use is not compatible with existing and planned uses in the surrounding neighborhood.

33. The Board of Adjustment finds, by a vote of two to one, that in light of the findings on the issues raised by the appeal, the decision of Planning and

Zoning Commission to deny MEA a conditional use permit to upgrade the substation is affirmed.

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 substituted its independent judgment to find that MEA's mitigation measures with respect to lighting, noise, drainage and landscaping were sufficient to adequately buffer the surrounding residential uses.
4. In all other respects, the decision and findings of the Planning and Zoning Commission are affirmed, including the denial of MEA's conditional use permit application to upgrade the Justine Parks Substation.
5. 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.

Adopted this 31st day of July, 2014.



Bernd C. Guetschow, Chair
on behalf of Board of Adjustment
hearing panel:
Bernd C. Guetschow, Chair
John Haxby, Member
Robert Stewart, Member