**MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT**
**APPEAL FROM PLANNING & ZONING COMMISSION**
**RESOLUTION 2014-058**
**PLANNING & ZONING COMMISSION CASE 2014-0119**
**GCI *DBA* ALASKA WIRELESS NETWORK (AWN) CELL ANTENNA**
**INSTALLATION BOARD OF ADJUSTMENT APPEAL NO. 2014-5**

## FINDINGS AND DECISION

WHEREAS, in Case 2014-0119, the Planning and Zoning Commission approved a conditional use to allow General Communications Inc., *dba* Alaska Wireless Network (AWN), to extend the height of an existing +/-68′ tall Municipal Light and Power (ML&P) utility pole by 10 feet for a cellular communications antenna in the R-2M (multiple family) residential district;

WHEREAS, after approving the conditional use, the Planning and Zoning Commission did not grant an administrative waiver by separate action under AMC 21.45.265A.16;

WHEREAS, AWN appealed the decision of the Planning and Zoning Commission regarding applicability of the administrative waiver requirement in AMC 21.45.265A.16;

WHEREAS, the Board of Adjustment has deliberated and decided the appeal at a meeting open to the public on April 29, 2015;

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

## FINDINGS

### Preliminary Matters

1. General Communications Inc. (GCI) on behalf of the Alaska Wireless Network (AWN) filed an application for conditional use for a Type 1 local interest tower (cell antenna) in a residential R-2M district, proposing to install the cell antenna on an existing Municipal Light and Power (ML&P) utility pole. ML&P

approved the attachment application filed with ML&P, and agreed to perform the installation work, subject to reimbursement of ML&P costs. R. 88-89.

2. Conditional use standards under (old) Title 21 apply to this application. Type 1 local interest towers that do not meet the supplementary district regulations are subject to conditional use. AMC 21.40.045D.14. Conditional use standards for local interest Type 1 towers are listed in AMC 21.50.280.

3. In determining to issue a conditional use permit, the Planning and Zoning Commission may waive or reduce the burden on the applicant in terms of height of the proposed local interest tower; the proximity of the tower to residential structures; design of the tower structure. AMC 21.50.280C.

4. Notice of public hearing for the conditional use permit was posted; the application for conditional use was heard and granted by the Planning and Zoning Commission at a public hearing on October 13, 2014.

5. Planning Staff informed the Planning and Zoning Commission and AWN at the October 13, 2014 public hearing that in addition to the conditional use permit granted by the Planning and Zoning Commission, the Planning and Zoning Commission was both authorized and required by code to act as the administrative official for an administrative minimum separation distance ("fall zone") waiver under AMC 21.45.265A.16.c, and engage in an administrative process supplementary to the conditional use permit approval.

6. After granting the conditional use permit, the Planning and Zoning Commission failed to approve the administrative minimum separation distance waiver.

7. The decision of the Planning and Zoning Commission granting the conditional use application and failing to pass the motion for an administrative ("fall zone") waiver was confirmed in Planning and Zoning Commission Resolution No. 2014-058, adopted by the Commission on November 10, 2014.

8. Appeal was timely noticed and briefed by AWN alleging improper consideration and decision by the Planning and Zoning Commission as to the administrative waiver.

9. Appellee briefs were filed separately by Heather E. Knowlan; and Timothy and Racheali Feller.

10. No appeal was filed on the Planning and Zoning Commission's decision to grant the conditional use permit.

11. By memorandum dated April 1, 2015, Planning Staff advised the parties to the appeal and the Board of Adjustment that fourteen (14) written public comments were inadvertently omitted from the Planning Staff Report provided to the Planning and Zoning Commission at the hearing on October 13, 2014.

12. The briefing and hearing schedule before the Board of Adjustment was modified to allow the parties additional opportunity for briefing on the omitted written public comments. Appellant filed supplemental briefing stating its position that the omitted testimony was not material to the issue on appeal and the omission was overcome in the record below by other presentations included in the record. Appellees did not respond.

## ISSUES DECIDED BY THE BOARD OF ADJUSTMENT

13. The Board of Adjustment decided first to address the inadvertent omission of written public comments provided to the Planning and Zoning Commission at the October 13, 2014 hearing.

**Issue #1.** Is the inadvertent omission of fourteen (14) written public comments from the staff report provided to the Planning and Zoning Commission a substantial procedural error requiring remand to open the record for inclusion and consideration of the omitted comments by the Planning and Zoning Commission?

14. Planning Staff gave the parties and the Board of Adjustment notice dated April 1, 2015 that approximately 14 public comments were inadvertently omitted from the materials made available to the Planning and Zoning Commission at the hearing on October 13, 2014. The Board of Adjustment gave the parties an opportunity to submit a supplemental briefing on the issue of omitted written comments from the public.

15. Several dozen written public comments were included in the materials made available to the Planning and Zoning Commission at the hearing, and a dozen members of the public testified.

16. There is substantial evidence in the record both for and against the conditional use application, and there is no evidence or claim of prejudice.

17. By unanimous vote of 3-0, the Board of Adjustment determines the omission to be harmless error and concludes remand is unnecessary as a matter of law.

18. The Board of Adjustment decided to next consider taking official notice of Planning and Zoning Resolution No. 2010-033 (Planning and Zoning Case No. 2010-097), including the minutes of the Planning and Zoning Commission meetings of August 2, 2010 and September 13, 2010.

**Issue #2.** In its consideration of Appeal No. 2014-5, shall the Board of Adjustment take official notice of Planning and Zoning Resolution No. 2010-033, including the minutes of the Planning and Zoning Commission meetings of August 2, 2010 and September 13, 2010?

19. Analogous to judicial notice of law by an appellate court under Alaska Rule of Evidence 202 in *Varilek v. City of Houston*, 104 P.3d 849, 852 (Alaska, 2004), the Board of Adjustment may take official notice of case law, statute, ordinance, regulation, and examine legislative history, as necessary to the Board's exercise of independent judgment under AMC 21.30.090.

20. The issue on appeal is a legal issue over which the Board is called upon to exercise its independent judgment. Taking official notice of Planning and

Zoning Commission Resolution No. 2010-033, including the minutes of the Planning and Zoning Commission meetings of August 2, 2010 and September 13, 2010 relating to Planning and Zoning Commission Resolution No. 2010-033, could assist legal analysis by the Board of Adjustment.

21. By unanimous vote of 3-0, the Board of Adjustment determines to take official notice of Planning and Zoning Commission Resolution No. 2010-033, including the minutes of the Planning and Zoning Commission meetings of August 2, 2010 and September 13, 2010 relating to Planning and Zoning Commission Resolution No. 2010-033.

22. The Board of Adjustment next decided to consider the Planning and Zoning Commission's engagement as an administrative official under AMC 21.45.265A.16.c.

**Issue #3.** Did the Planning and Zoning Commission engage as an administrative official in an administrative process supplementary to the conditional use permit approval under a mistake of law regarding applicability of AMC 21.45.265A.16.c.?

23. By unanimous vote of 3-0, the Board of Adjustment determines that the Planning and Zoning Commission's engagement as an administrative official under AMC 21.45.265A.16.c in an administrative process supplementary to the Planning and Zoning Commission's approval of the conditional use permit is a mistake of law.

24. The Board of Adjustment next decided to consider the best procedural approach to correcting a mistake of law by the Planning and Zoning Commission in this case.

**Issue #4.** To correct a mistake of law on code interpretation evident in the record of this case, shall the Board of Adjustment 1) remand the case to the Planning and Zoning Commission for a full rehearing; 2) reverse the decision in whole; or substitute its independent judgment on a matter of law to modify the Planning and Zoning Commission decision and affirm the conditional use?

25. By unanimous vote of 3-0, the Board of Adjustment determines to substitute its independent judgment for that of the Planning and Zoning Commission on matters of code interpretation, modify the decision of the Planning and Zoning Commission in Case No. 2014-0119 on factual issues supported in the record by substantial evidence, and correct a mistake of law.

26. The record reflects substantial evidence on factual matters to support inclusion of these modifications:

- The South Addition Community Council voted against a resolution opposing the pole extension.

- The conditional use and site plan approval is for a Type 1 (Monopole) Local Interest Tower (cellular or wireless Communications), not to exceed 79 feet in height, and accessory equipment in the R-2M District in accordance with AMC 21.50.280.

- In the event the power line is undergrounded, the cell tower approval shall be considered void.

- The communications equipment box shall be painted to match the church.

- An identification placard shall be attached to the tower structure or the security fencing in a location clearly visible at eye level. The placard shall include the name and address of the tower structure owner, tower structure manager, date of erection of the tower structure and owner's name and address of each antenna on the tower structure.

- A Notice of Zoning Action shall be filed with the State of Alaska District Recorder's Office. Proof of such shall be submitted to the Planning Department.

- Tower construction shall be completed one year following issuance of a building permit.

- The conditional use approval is subject to all conditional use standards in accordance with 21.50.280, 21.50.020, 21.45.265,

the petitioner's application, narrative, and submittals, except as modified by these conditions of approval.

- The application for conditional use was heard by the Planning and Zoning Commission on October 13, 2014.

27. The additions and modifications adopted by the Board of Adjustment shall be those reflected in Planning and Zoning Commission Resolution No. 2014-058, ***As Amended*** *by Final Decision of the Board of Adjustment*, attached and incorporated herein as Attachment A.

28. As a matter of law, the Planning and Zoning Commission has the obligation and duty to consider each of the eight factors listed in AMC 21.50.280.C., including height of the proposed tower structure and proximity of the proposed tower to residential structures.

29. AMC 21.50.280C allows the Planning and Zoning Commission to waive or reduce the burden on the applicant of one or more of these criteria in granting a conditional use if the Planning and Zoning Commission finds the goals of land use regulation of cell towers are better served thereby.

30. There is substantial evidence in the record that the Planning and Zoning Commission considered all eight factors under AMC 21.50.280.C, including the issues of antenna height and proximity of the proposed tower structure to residential structures.

31. In considering the factors under AMC 21.50.280.C and approving the conditional use, the Planning and Zoning Commission waived or reduced the minimum separation distance by approving the proximity of the (antenna) tower to residential structures as allowed by AMC 21.50.280C.

32. There is substantial evidence in the record to support finding the goals of land use regulation of cell towers are better served by waiving or reducing the minimum separation distance and 200% "fall zone" described in AMC 21.45.265A.16.b, to allow by conditional use a 10-foot antenna extension to

the +/- 68' tall ML&P utility pole, currently existing and already in place within the "fall zone".

33. Administrative waiver by the administrative official under AMC Subsection 21.45.265A.16.c is outside the scope of conditional use review by the Planning and Zoning Commission and is unnecessary under the facts of this conditional use as a matter of law.

## CONCLUSIONS

1. This appeal was heard in accordance with AMC 21.30.090.

2. Failure to present fourteen (14) additional written public comments to the Planning and Zoning Commission was harmless error.

3. Analogous to judicial notice of legislative history by an appellate court and to assist the Board of Adjustment in the exercise of independent judgment in the interpretation of municipal code, the Board of Adjustment has taken official notice of Planning and Zoning Resolution No. 2010-033 in Planning and Zoning Case No. 2010-097, attached in Exhibit A to Appellant's Brief, and minutes of the Planning and Zoning Commission meetings of August 2, 2010 and September 13, 2010. These are added to appeal record.

4. The meeting at which the Board of Adjustment decided this appeal was open to the public and held in accordance with AMC 21.30.080.

5. The Board of Adjustment substitutes its independent judgment for the Planning & Zoning Commission and modifies Planning & Zoning Commission Resolution No. 2014-058, as indicated in the attachment and incorporates the revised Planning and Zoning Commission's decision in these findings of fact and conclusions of law adopted by the Board of Adjustment.

6. The appeal to the Board of Adjustment of Planning and Zoning Commission Case No. 2014-0119 is granted.

7. Planning and Zoning Commission Resolution No. 2014-058 is modified by this decision.

8. 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 by the Board of Adjustment this 1st day of June, 2015.

Bernd Guetschow, Chair
on his own behalf and on behalf of
Board of Adjustment Members
Robert Stewart and Dwayne Adams

# Attachment A

MUNICIPALITY OF ANCHORAGE
PLANNING AND ZONING COMMISSION RESOLUTION NO. 2014-058

***As Amended and Incorporated in the* Final Decision of the Board of Adjustment**
**BOARD OF ADJUSTMENT CASE 2014-5**

A RESOLUTION APPROVING A REQUEST FOR A CONDITIONAL USE TO ALLOW FOR A 10-FOOT EXTENSION TO AN EXISTING +/- 68' TALL UTILITY POLE FOR CELLULAR COMMUNICATIONS EQUIPMENT IN THE R-2M (MULTIPLE-FAMILY) DISTRICT, [~~AND DENYING A REQUEST TO REDUCE OR ELIMINATE THE MINIMUM SEPARATION DISTANCE REQUIRED BY AMC 21.45.156A.16. FOR A TOWER IN A RESIDENTIAL DISTRICT;~~] GENERALLY LOCATED WITHIN THE ALLEY RIGHT-OF-WAY AT THE NORTHWEST CORNER OF 13TH AVENUE AND E STREET, IN ANCHORAGE.

(Planning and Zoning Case 2014-0119; Parcel ID No. 002-144-51; Attachment to Board of Adjustment Final Decision 2014-5)

WHEREAS, a request was received from Alaska Wireless Network (AWN), for a conditional use to allow a 10-foot extension to an existing +/- 68' tall utility pole for cellular communications equipment in the R-2M district, generally located within the alley right-of-way at the Northwest corner of 13th Avenue and E Street, in Anchorage, and

[~~WHEREAS, AMC 21.45.265A.16.C. STATES THAT THE ADMINISTRATIVE OFFICIAL MAY REDUCE OR ELIMINATE THE MINIMUM SEPARATION DISTANCE REQUIRED FROM PRINCIPAL RESIDENTIAL STRUCTURES ON RESIDENTIALLY ZONED LANDS AFTER GIVING DUE CONSIDERATION TO THE COMMENTS OF THE APPLICANT, THE PROPERTY OWNER, AND THE LOCAL COMMUNITY COUNCIL; AND~~]

[~~WHEREAS, THE PLANNING AND ZONING COMMISSION WAS ACTING AS THE ADMINISTRATIVE OFFICIAL THROUGH THEIR ROLE IN REVIEWING AND DECIDING ON THE CONDITIONAL USE; AND~~]

WHEREAS, public hearing notices were published, posted, and mailed, and a public hearing was held before the Planning and Zoning Commission on October 13, 2014.

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

A. The Commission makes the following findings of fact:

1. **AWN has proposed to locate cellular antennas atop an existing Municipal Light & Power (ML&P) utility pole.**

2. **The request meets the general standards for conditional use approval, AMC 21.50.020, the conditional use standards for towers, AMC 21.50.280 (C), and the Supplemental District Regulations, AMC 21.45.265.**

3. The structural concerns have been identified and thoroughly explained through the staff packet and petitioner and are satisfied.

4. Some commissioners found that the applicant recognized the neighborhood concerns by collocating on the existing utility pole instead of building a new monopole that would have given them optimal performance. AWN looked at sacrificing performance for neighborhood concerns over view sheds and quality of life. AWN identified collocating in this community as an efficient way of development to provide the surrounding property with advanced wireless communication capability and adding to the utility pole is not going to substantially detract more from the view shed than the existing pole.

5. [~~SOME COMMISSIONERS EXPRESSED~~] **T**he following concerns **for** [~~OF~~] a waiver **of** [~~FOR~~] separation from protected land uses **under** [~~FOUND IN~~] AMC 21.45.265A.16 **were noted**:

   a. The proposed tower is in the backyard of residential structures in the alley.

   b. There is almost no separation distance from the tower to a protected land use. The separation distance is not anywhere near the two-hundred percent of tower height; almost no separation distance would exist. Essentially the Commission would be waiving the ordinance.

   c. The [~~PETITIONER DID NOT GAIN SUPPORT OF THE~~] community council **voted against opposing the pole extension**.

B. The Commission passed the motion to approve the conditional use by a vote of 6 ayes and 2 nays. [~~THE COMMISSION FAILED TO PASS THE MOTION TO APPROVE THE WAIVER FOR SEPARATION FROM PROTECTED LAND USES TO ALLOW A MONOPOLE OR WIRELESS COMMUNICATION TOWER. THE VOTE WAS 4 AYES AND 4 NAYS. THE~~

~~FAVORABLE VOTE OF FOUR AYES WAS NOT A MAJORITY OF THE FULL MEMBERSHIP REQUIRED BY AMCR 21.10.203B., AND THUS THE WAIVER OF SEPARATION FROM PROTECTED LAND USES IS DENIED.~~]

C. The conditional use is subject to the following conditions:

1. **This conditional use and site plan approval is for a Type 1 (Monopole) Local Interest Tower (cellular or wireless Communications), not to exceed 79 feet in height, and accessory equipment in the R-2M District in accordance with AMC 21.50.280.**

2. **In the event the power line is undergrounded, the cell tower approval shall be considered void.**

3. **The communications equipment box shall be painted to match the church.**

4. **An identification placard shall be attached to the tower structure or the security fencing in a location clearly visible at eye level. The placard shall include the name and address of the tower structure owner, tower structure manager, date of erection of the tower structure and owner's name and address of each antenna on the tower structure.**

5. **A Notice of Zoning Action shall be filed with the State of Alaska District Recorder's Office. Proof of such shall be submitted to the Planning Department.**

6. **Tower construction shall be completed one year following issuance of a building permit.**

7. **This approval is subject to all conditional use standards in accordance with 21.50.280, 21.50.020, 21.45.265, the petitioner's application, narrative, and submittals, except as modified by these conditions of approval.**

**HEARD** [~~DENIED~~] by the Anchorage Planning and Zoning Commission on the 13th day of October 2014.

ADOPTED by the Anchorage Planning and Zoning Commission this 10th day of November, 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.

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| Jerry T. Weaver, Jr.<br>Secretary | J.A. Fergusson<br>Chair |

(Case 2014-0119; Parcel ID No. 002-144-51)

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