

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

**FINDINGS, CONCLUSIONS AND DECISION ON
MOTION FOR RECONSIDERATION**

WHEREAS, on June 2, 2015, the Board of Adjustment issued its decision dated June 1, 2015 on the appeal filed by General Communication, Inc. (GCI), *dba* Alaska Wireless Network (AWN), regarding applicability of the administrative waiver requirement in AMC 21.45.265A.16 to conditional use approval by the Planning and Zoning Commission and GCI's application to extend the height of an existing utility pole for a cellular communications antenna; and

WHEREAS, the Municipal Attorney timely filed a Motion for Reconsideration dated June 17, 2015; and Appellant General Communication, Inc. *dba* the Alaska Wireless Network filed an opposition to reconsideration; and

WHEREAS, two additional petitions were received from appellees Feller and Knowlan by the Municipal Clerk on July 8, 2015 and July 9, 2015, respectively; each claims Board of Adjustment error, objects to the Board of Adjustment Findings and Decision dated June 1, 2015, and requests the Board of Adjustment to change its decision. Both are rejected as untimely filed motions for reconsideration and shall not be included in the record on this case; and

WHEREAS, the Board of Adjustment has deliberated and decided the motion for reconsideration at a meeting open to the public on July 9, 2015,

NOW THEREFORE BE IT RESOLVED that the Board of Adjustment adopts the following:

FINDINGS AND CONCLUSIONS

Preliminary Matters

1. Title 21 does not require that reconsideration be filed by a party. AMC 21.30.170C refers to "any person seeking reconsideration". In reference to judicial review, AMC 21.30.180 states that "a municipal officer, a taxpayer or a

person jointly or severally aggrieved “may appeal the Board of Adjustment Decision to the superior court. A fair reading of AMC chapter 21.30 will not preclude the Municipal Attorney from filing a request for reconsideration.

2. AMC 21.30.170C (and not AMC 3.60.060 cited in the Municipal Attorney’s motion) governs reconsideration or rehearing of Board of Adjustment decisions. The Municipal Clerk must receive the filing within 15 days of the original decision, issued June 2, 2015. June 17, 2015 is the 15th day in computation of time under AMC 1.05.020; the motion for reconsideration was timely filed.

3. Reconsideration and rehearing are used together but not interchangeably in AMC 21.30.170C. A decision of the Board of Adjustment may be brought up for reconsideration or rehearing under AMC 21.30.170C only if:

- a. There was substantial procedural error in the original proceeding;
- b. The board acted without jurisdiction in the original proceeding; or
- c. The original decision was based upon fraud or misrepresentation.

The Municipal Attorney alleges substantial procedural error by the Board of Adjustment. The Board of Adjustment, by majority vote, may schedule a rehearing only if it finds the allegations supporting rehearing to be correct.

4. The remedy requested by the Municipal Attorney is for the Board of Adjustment to affirm the Planning and Zoning Commission’s approval of the conditional use permit and remand the application to the Planning Department for a decision on the administrative waiver under AMC 21.45.265A.16.c. This means the Board must also find remand from the Board of Adjustment directly to the Planning Department is an appropriate remedial action available and necessary to final disposition of the matter by the Board of Adjustment. The Board of Adjustment does not find remand from the Board directly to the Planning Department an appropriate remedial action available and necessary to final disposition of this matter by the Board of Adjustment.

ISSUES DECIDED BY THE BOARD OF ADJUSTMENT

5. The Board of Adjustment determined whether the Municipal Attorney identified a substantial procedural error by the Board of Adjustment.

Issue #1. Does the motion for Reconsideration identify substantial procedural error?

6. The Municipal Attorney concedes error in Planning Staff's analysis requiring the Planning and Zoning Commission to act as the administrative official. The Municipal Attorney intends in this case for the administrative waiver process to take place subsequent to grant of the conditional use permit.

7. The Motion for Reconsideration does not identify substantial procedural error by the Board of Adjustment within the meaning of AMC 21.30.170C.

8. The Municipal Attorney does not correctly understand the Board of Adjustment's Findings and Decision dated June 1, 2015.

The Board next reviewed substitution of its independent judgment on factual matters supported by substantial evidence in the record.

Issue #2. Did the Board of Adjustment confirm substitution of its independent judgment by majority vote on factual matters supported by substantial evidence in the record as required by AMC 21.30.090D?

9. By making Decision Findings 30—32, and coupling Conclusion No. 5 with the Board's amendments to Planning and Zoning Commission's Resolution 2014-58, the Board of Adjustment intended its substitution of independent judgement on factual issues supported by substantial evidence in the record to be clear and in procedural compliance with AMC 21.30.090D.

10. The motions to support Decision Findings 30 and 32, acknowledging substantial evidence in the record, are included in the approved Minutes of the April 29, 2015 Meeting at page 8. The approved minutes do not indicate a

follow-up motion to formally substitute the Board's independent judgment for that of the Planning and Zoning Commission to approve reduction of the minimum separation distance to waive the 200% "fall zone".

The Board next determined if failure to formally substitute the Board's independent judgment for that of the Planning and Zoning Commission to approve reduction of the minimum separation distance and waive the 200% "fall zone" was a substantial procedural error.

Issue #3. Does the Board of Adjustment find substantial procedural error in the failure to formally substitute the Board's independent judgment for that of the Planning and Zoning Commission, to approve reduction of the minimum separation distance and waive the 200% "fall zone"?

11. AMC 21.30.090D requires an affirmative vote of at least two-thirds of the Board to perfect the substitution of judgment. Given the confusion evidenced by the Municipal Attorney's Motion for Reconsideration, it is likely reviewing authorities, the Planning Department, the Planning and Zoning Commission, and others in the community also may have difficulty following the Board of Adjustment's Findings and Decision dated June 1, 2015, unless clarified.

12. The Board of Adjustment's obligation is to issue its decision in writing and base it upon findings and conclusions that are reasonably specific so as to provide the community, and, where appropriate, reviewing authorities, a clear and precise understanding of the reason for the Board's decision.

13. The Board finds its procedural error sufficiently substantial to warrant clarification so that the Municipal Attorney, the Planning Department, the parties, the community and any reviewing authorities will be provided a more precise explanation of the Board of Adjustment's reasoning. The Findings and Decision of the Board of Adjustment dated June 1, 2015 shall be amended to confirm the Board's determination to substitute its independent judgment on factual matters supported by substantial evidence in the record, in procedural compliance with AMC 21.30.090C-D, without rehearing.

14. The Board's Decision and Findings dated June 1, 2015 shall be amended and restated to include confirmation of the Board of Adjustment's reasoning:

*** *** ***

33. The Board of Adjustment determines to substitute its independent judgment for that of the Planning and Zoning Commission on disputed issues and findings of fact under AMC 21.50.280C – D. The Board of Adjustment finds the goals of land use regulation of cell towers are better served by waiving and reducing the burden on the applicant with respect to the proximity of the tower structure to residential structures and residential district boundaries (the minimum separation distance and 200% “fall zone” described in AMC 21.45.265A.16.b.) Reduction of the minimum separation distance and waiver of the 200% “fall zone” are approved and incorporated in granting the appeal and confirming the conditional use permit as stated herein, with these findings by the Board of Adjustment:

- a. The location is an actively used utility transmission corridor featuring tall utility poles, alley access to trash receptacles, church parking, and requires no tree removal.
- b. Title 21 encourages collocation to reduce clutter.
- c. Collocating this communications antenna with the existing ML&P utility pole meets this intent and avoids the need for a new tower construction.
- d. Design of the structure does not substantially detract from the aesthetics of the existing structure.
- e. The addition of the antenna is a relatively small incremental increase to the height of the existing pole.
- f. Ingress and egress is from an existing public right-of-way requiring no new allocation of land for service, nor does it impose servicing on adjacent properties. The church has voluntarily leased accommodating space.
- g. The topography of the site at this location lends itself to this use and the topography at alternate sites would require new construction of a taller tower with adverse aesthetic impacts.
- h. Application of the 200% “fall zone” described in AMC 21.45.265A.16.b. to the antenna addition on the existing tall pole merits reduction and waiver of the burden to the applicant.

*** *** ***

The Board next reviewed its Conclusions to determine if any additional clarification should be provided.

Issue #4. Does the Board of Adjustment determine to provide additional clarification under its obligation under AMC 21.30.095B to include findings and conclusions that are reasonably specific so as to provide the community, and, where appropriate, reviewing authorities, a clear and precise understanding of the reason for the Board's decision?

15. In review and deliberation of this appeal, the Board of Adjustment scrutinized the interrelationship among the operative code sections, including site plan review with administrative waiver under AMC 21.45.265A.16.c and Planning and Zoning Commission waiver under AMC 21.50.280C for conditional use.

16. Remand was not overlooked during hearing. The Board of Adjustment duly considered the example provided by Planning and Zoning Resolution No. 2010-03 in the Board's decision not to remand.

17. The Board's obligation under AMC 21.30.100 is to finally dispose of the matter on appeal unless the Board of Adjustment determines either that:

- (a) There is insufficient evidence in the record on an issue material to the decision of the case; or
- (b) There has been a substantial procedural error which requires further public hearing.

18. In this appeal, there is sufficient evidence in the record on all issues material to the decision, and the procedural error on the part of the Planning and Zoning Commission does not require further public hearing. Remand to the Planning and Zoning Commission is neither required under AMC 21.30.100, nor necessary to final disposition of the matter on appeal by the Board of Adjustment.

19. The Municipal Attorney's request for the Board of Adjustment to affirm the Planning and Zoning Commission's approval of the conditional use permit but remand the application to the Planning Department for a decision on

the administrative waiver under AMC 21.45.265A.16.c would feed, not solve, the very conundrum identified by the Board of Adjustment during deliberation: Decisions of the Administrative Official are appealable to the Planning and Zoning Commission – not the reverse.

20. The Board of Adjustment, in the exercise of independent judgment on matters of law, interprets Title 21 neither to require the concurrence of the Administrative Official on an element of the conditional use permit review, nor to empower the Administrative Official to “trump” the Planning and Zoning Commission level of review on a conditional use permit.

21. The Board determines to amend and restate its Findings and Decision dated June 1, 2015, without rehearing, to express the Board of Adjustment’s views and deliberations during the April 29, 2015 hearing, in exercising its independent judgment to interpret differing sections of municipal code, with a new Conclusion No. 6:

CONCLUSIONS

*** *** ***

6. There is sufficient evidence in record on all issues material to the decision, and the procedural error on the part of the Planning and Zoning Commission does not require further public hearing. Remand to the Planning and Zoning Commission is neither required under AMC 21.30.100, nor necessary to finally dispose of the matter on appeal.
- a. By operation of law, structures qualifying for administrative site plan review do not require a conditional use permit from the Planning and Zoning Commission. AMC 21.50.280A.1.
- b. AMC 21.45.265A.16.c offers an administrative avenue for reduction or elimination of the minimum separation distance of 200 percent of the allowable tower height (the 200% “fall zone”) within supplementary district regulations for tower structures provided that the site plan application otherwise meets the supplementary district regulations for administrative site plan review and approval.
- c. The administrative official is authorized to administratively grant site plan approval. AMC 21.45.265A.14.d.2. The administrative official has no authority to grant a conditional use permit.

- d. AMC 21.50.280C allows the Planning and Zoning Commission to waive or reduce the burden of the applicant on height and proximity standards. The supplemental district regulations for site plan review do not require both a conditional use permit and an administrative waiver of the minimum separation distance under AMC 21.45.265A.16.c, nor is an administrative waiver a mandatory condition precedent to conditional use waiver or reduction of the height and proximity standards.
- e. A decision of the administrative official on administrative site plan review is appealable to the Planning and Zoning Commission. AMC 21.45.265A.14.h.
- f. Under the facts in the present case, referral to the administrative official for an administrative waiver of the minimum separation distance under AMC 21.45.265A.16.b (relief from the 200% fall zone distance) after the conditional use permit is granted would be tantamount to giving the administrative official after-the-fact control over the conditional use approval. The Board of Adjustment concludes this to be inappropriate as a matter of law.
- g. There is no authority in code for an administrative waiver application to be granted or denied by the administrative official after the conditional use has been approved.

*** *** ***

22. The Board of Adjustment next reviewed Board of Adjustment Finding No. 31 to ensure it unequivocally reflects the Board's reasoning.

Issue #5. Does Board of Adjustment determine to amend and restate Finding No. 31 to provide additional clarification in meeting the Board's obligations under AMC 21.30.095B?

23. Action by the Planning and Zoning Commission as the administrative official on October 13, 2014 is null and void for lack of jurisdiction.

24. The foundational Planning and Zoning Commission record supporting conditional use approval is intact.

25. From the Board's perspective, the Planning and Zoning Commission's approval of the conditional use permit waived or reduced, by

operation of law, the minimum separation distance by approving the proximity of the (antenna) tower to residential structures as allowed by AMC 21.50.280C.

26. Given the confusion over Finding No. 31, the Board of Adjustment determines to amend and restate its Finding No. 31 for clarification, without rehearing:

*** *** ***

31. Action by the Planning and Zoning Commission as the administrative official is null and void for lack of jurisdiction. The foundational Planning and Zoning Commission record supporting conditional use approval is intact. In considering the factors under AMC 21.50.280.C and approving the conditional use, the Planning and Zoning Commission **by operation of law** 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. **Irrespective of the Planning and Zoning Commission's actions and inactions, the Board of Adjustment may decide this case independently on the record before the Board. Remand is neither required under AMC 21.30.100, nor necessary to final disposition of the matter on appeal by the Board of Adjustment.**

*** *** ***

27. Having inadvertently omitted a "Decision" subheading in the Findings and Decision dated June 1, 2015, the Board of Adjustment determines to restate and renumber former Conclusion paragraphs 6--8 as DECISION paragraphs 1 – 3 for clarity, without rehearing:

1. The appeal to the Board of Adjustment of Planning and Zoning Commission Case No. 2014-0119 is granted. **The Board of Adjustment has substituted its independent judgment on the interpretation of law and on factual issues supported in the record by substantial evidence. Approval of the conditional use permit is confirmed by the Board of Adjustment as set out herein and reflected in Attachment A, without remand. An administrative waiver under AMC 21.45.265A.16.c is unnecessary to final disposition of this matter by the Board of Adjustment.**

2. Planning and Zoning Commission Resolution No. 2014-058 is modified by this Decision.
3. The AMENDED AND RESTATED FINDINGS, CONCLUSIONS, AND DECISION 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 the AMENDED AND RESTATED FINDINGS, CONCLUSIONS, AND DECISION to file an appeal to the Superior Court.

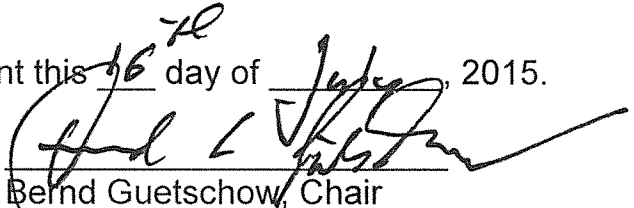
DECISION

1. Having reviewed the Motion for Reconsideration at a meeting open to the public on June 9, 2015, rehearing shall not be conducted by the Board of Adjustment in this matter. The Board finds no substantial procedural error by the Board of Adjustment in its decision not to remand the application to the Planning Department for a decision on the administrative waiver under AMC 21.45.265A.16.c.
2. The Board of Adjustment recognizes substantial procedural error in the Board not perfecting substitution of its independent judgment on factual issues by an affirmative vote of two-thirds as required by AMC 21.30.090D. This is corrected by the Board of Adjustment; rehearing is unnecessary.
3. In review of its Findings and Decision dated June 1, 2015, the Board of Adjustment exercises its authority and obligation under AMC 21.30.095B to provide the community, and where appropriate, reviewing authorities, the Board's reasoning for its decision.
4. The modifications addressed herein do not change the intent and reasoning by the Board of Adjustment in the April 29, 2015 hearing. The modifications are made to correct a procedural error by the Board in not formally substituting its independent judgment by motion on a factual matter supported by substantial evidence in the record, and to better meet the Board's obligation under AMC 21.30.095B.
5. The Board of Adjustment adopts the modifications addressed herein to be incorporated within the Board's Findings and Decision dated June 1, 2015, and reissued as the Amended and Restated Findings, Conclusions, and Decision. The Amended and Restated Findings, Conclusions, and

Decision shall supplant the Board of Adjustment's Findings and Decision dated June 1, 2015.

6. The Amended and Restated Findings, Conclusions, and Decision shall be the final decision of the Board of Adjustment with respect to all issues involved in this case. The parties will have 30 days from the date of mailing or other distribution of the amended and restated decision to file an appeal to the Superior Court.

ADOPTED by the Board of Adjustment this 16th day of July, 2015.



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