BEFORE THE MUNICIPALITY OF ANCHORAGE
BOARD OF ADJUSTMENT

In Re:	)	
Spruce Terrace Subdivision	)	
	)	
	)	**Board of Adjustment Case No. 2021-2**
	)	
	)	**Platting Board Case No. S12599**
	)	

FINDINGS AND DECISION OF THE BOARD OF ADJUSTMENT AFFIRMING PLATTING BOARD DECISION

This matter is before the Board of Adjustment (BOA) on an appeal of the Platting Board's May 19, 2021, approval of an amended preliminary plat. The primary change in the amendment removed a phased development requirement tied to the existence of a secondary access for the subdivision, along with removing requirements for home sprinkler systems, and Firewise construction and landscaping, in exchange for an internal community water system with fire hydrants to be accessible by the fire department. Appellants Birnbaum and Dukoff ("Birnbaum", "Appellant") timely appealed the decision. Appellee Andre Spinelli ("Spinelli"), by and through counsel, opposes the appeal.

I. Findings[1]

A. Preliminary Matters

1. A page of the Staff Analysis, which is not part of the record, is not material to this appeal.

The Staff Analysis at R-316-R-325 is missing page 5. The Municipal Clerk's Office sent the question to the Planning Department. In a memo back, Planning said the page was not part of the public record or presented to the Platting Board during its deliberations. Planning also said the content of the page, but not the page itself, is in the record, as part of the comments from Private Development, at R-358 to R-360. We find the content missing from the Staff Analysis document is available at R-358 to R-359 (not R-360). The area in the Staff Analysis that is missing this page is a "cut and paste" of various municipal department comments that can be found attached to the Staff Analysis. Private Development's recommendations that would have been in page 5 and are at the bottom of R-358 and into R-359 are:

1. Dedication of the northern 30 feet of lot 1 as ROW for 156th Ave.
2. Dedication of the eastern 30 feet of Far View Place ROW peripheral to the subdivision.
3. Dedication of 60-foot ROW for Far View Place, Alaska Terraces Lane, and Spruce Terraces Circle, with a 50ft cul-de-sac bulb at the terminus of Spruce Terraces Circle.
4. Improvement of East 156th as a 20ft wide paved street from Alaska Terraces Lane to the

[1] We have attempted to largely follow the same organization of issues and argues as was used by the parties in their briefing, although the headings and numbering may not be the same.

west property line of lot 1.

5. Improvement of Far View Place as a 20ft wide paved street from Sandpiper Drive to the proposed Far View Place internal to the subdivision.

The dedications were recommended in the original platting action and remain in effect. R-474, 475. The improvement requirements are in the Department Recommendation at the end of the Staff Analysis for the current case, at R-324. The Improvement requirements are part of the Platting Board's approval in the Summary of Action at R-301.

There is nothing in the briefing from either party raising an issue related to the dedications or improvements that were within that missing page. Birnbaum was aware of the missing page at the time of filing the Notice of Appeal.[2]

2. Exhibits.

Birnbaum attached Exhibits 1-35 to its Notice of Appeal. Spinelli objected to the inclusion of exhibits not already in the Record and, in the alternative, that only some could be included under the concept of Judicial Notice,[3] and thus, more specifically, argued that Exhibits 1, 6, 7, 10, 11, 12, 21, 25, 26, 27, 28, 29, 30, 31, 34, and 35 should be excluded. Birnbaum argues that in the Reply, that since the Exhibits were attached to the Notice of Appeal, they are part of the record and, alternatively, the Board can take judicial notice of the Exhibits.[4]

The Code does not support Birnbaum's position that the Exhibits become part of the record by mere attachment to the Notice of Appeal. The Notice of Appeal is to have detailed and specific allegations.[5] Exhibits are not expected or required, given that the record has not yet been prepared. The Municipal Clerk prepares the record, which is to contain "copies from the department of all documentary evidence, memoranda, exhibits, correspondence, and other written material *submitted to the administrative body prior to the decision from which the appeal is taken*."[6] It is that record which is provided to this Board and only that record.[7] "The board of adjustment shall consider an appeal solely on the basis of the record established before the lower administrative

[2] Notice of Appeal, R004, footnote 9 "The Planning Department omitted the fifth page of its report from the report's online version."

[3] "Judicial Notice" is the name given to a judicial body's authority to recognize a universal fact without having received that fact through the development of evidence. For example, that the sun came up yesterday is a universal fact, no submittal of evidence is required to know it is true. See, e.g., Alaska Rules of Evidence, Rule 201(b) "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

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[5] AMC 21.03.050A.4.b.

[6] AMC 21.03.050A.6.b.iii.

[7] AMC 21.03.050A.8. "…the municipal clerk shall prepare and distribute to the members of the board of adjustment an appeal packet containing *only the appeal record assembled by the clerk* and any briefs filed in accordance with subsection A.7. above."

body, the notice of appeal, the briefs, and the law."[8]

Allowing an appellant or appellee to supplement the record by attaching any evidence they wish, including evidence never presented to or considered by the Platting Board, appears to be an end run around the rule that the appeal is to be based on the evidence as presented to the Platting Board. If Birnbaum thought this evidence relevant to the case, it should have been submitted to the Platting Board. Birnbaum could have moved to supplement the record, just as was done by Birnbaum earlier in this matter, and subsequently approved by this Board. Birnbaum also had the opportunity, now since passed, to attempt to submit the evidence under AMC 21.03.050A.5. *New evidence or changed circumstances*. We find that all Exhibits attached to the Notice of Appeal will not be considered as part of the Record. We decline to take judicial notice of any of them. We do not consider them for purposes of our decision in this appeal.

3. Spinelli's authority to file application to amend the preliminary plat.

Birnbaum argues that Andre Spinelli does not own the entirety of the subject property or is not an authorized agent for the property owner(s), citing to AMC 21.03.020D.1: "When an authorized agent files an application under this title on behalf of a property owner, the agent shall provide the municipality with written documentation that the owner of the property has authorized the filing of the application." Birnbaum alleges that the application is incomplete and is false or misleading.[9]

Appeal from the Director's determination that an application is complete is not within the listed items for appeal to this Board.[10] The Code does call out many ways to appeal decisions of the Planning Director.[11] None was cited to us or specifically found in Code regarding the Director's acceptance or denial of a preliminary plat application. It appears in this situation, under AMC 21.03.050C, the path to appeal regarding the Director's decision to accept the preliminary plat amendment application is to appeal to the Platting Board.[12]
A review of the record indicates that this issue was not raised in Birnbaum's submitted written

[8] AMC 21.03.050A.11.a.
[9] Notice of Appeal, R-024-026; Reply Brief, page 6. Citing AMC 21.03.020F. *Verification of application completeness.*
1.The director shall only initiate the review and processing of an application if such application is complete. The director shall make a determination of application completeness and notify the applicant in writing within 15 days of application filing. If the application is determined to be complete, the application shall then be processed according to this title. If an application is determined to be incomplete, the director shall provide an explanation of the application's deficiencies. No further processing of an incomplete application shall occur until the deficiencies are corrected.
2.An application shall be considered complete if it is submitted in the required form, includes all mandatory information, including all supporting materials specified in the Title 21 User's Guide, and is accompanied by the applicable fee. A pre-application conference shall have been held, if required, pursuant to subsection 21.03.020B., pre-application conferences.
3.As a consequence for any false or misleading information submitted or supplied by an applicant on an application, that application shall be deemed incomplete.
[10] AMC 21.03.050A.1.
[11] See, e.g., AMC 21.10.040G.3.g.vii. An applicant may appeal the director's decision to the planning and zoning commission. An applicant shall file an appeal within 30 days of the director's decision.
[12] *Appeal of director's decision.* If the right to appeal the director's decision is not otherwise provided in this code, the decision of the director may be appealed to the board or commission that has decision-making and/or review authority over the type of issue being appealed as set forth in Table 21.02-1.

comments to the Platting Board.[13] It was also not raised in Birnbaum's testimony before the Platting Board.[14]

Since the issue was not raised at the Platting Board, Spinelli has had no opportunity to introduce evidence to respond to the claim of a lack of authority. The Platting Board itself has had no opportunity to inquire of Planning or cross-examine Spinelli, or any other party, as to the veracity of Birnbaum's allegations.

On the issue of whether the application is defective, for any of the reasons raised by Birnbaum in this appeal, we find it is not within the purview of this Board, either because we do not have the authority to hear the matter, or it was not properly raised before the Platting Board and therefore cannot be heard on appeal.

4. Conflicts of interest of Platting Board members are not justiciable by this Board or not properly before this Board.

Birnbaum argues the Platting Board violated AMCR 21.11.306C.[15] Spinelli notes that the only evidence in the Record, regarding member McGillivary, was resolved by the Platting Board, as required by Code and was too speculative to be disqualifying.[16] Spinelli argues the speculative nature of Birnbaum's arguments as to the other members is also mere speculation, and not disqualifying.[17]

Similar to the issue of Spinelli's authority to file the application, we see no evidence in the record and testimony that Birnbaum raised possible conflicts of interest of Platting Board members with the Platting Board.

Adjudicating the Platting Board members' conflicts, if any, is not expressly within the listed jurisdictional issues appealable to this Board. The Platting Board itself adjudicates any conflicts of its members.

To underscore this Board's authority regarding a lower board's conflicts, we look at the Code structure of how possible conflicts are handled. Platting Board members may not vote on any question in violation of AMC Chapter 1.15 (Code of Ethics).[18] It is incumbent on board members,

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[13] R-399-409
[14] T-016-023.
[15] The board shall find a conflict of interest and refuse to approve the participation of a board member if:1.The board member or a member of his/her immediate family has a measurable financial interest in any property affected by the matter to be decided; or 2.The board member or a member of his/her immediate family could foreseeably profit in any material way because of the matter to be decided; or 3.If the board member would be faced with a violation of the code of ethics of the municipality by participating in the matter to be decided. The board shall also consider whether the personal interest or involvement of the board member in the matter to be decided would prevent that member from fairly evaluating the evidence or that, based on all the surrounding circumstances, participation by the board member would create the appearance of impropriety in the proceedings. No member shall be excused from participation solely on the basis of personal familiarity with the case or the parties involved.
[16] Spinelli Brief, page 14.
[17] Id., page 15.
[18] AMC 4.05.110.

including Platting Board members, to disclose any possible conflict.[19] The Platting Board itself is charged with determining whether the Platting Board member can participate.[20] With one exception, nothing in the record indicates a disclosure was made by a Platting Board member or considered by the Platting Board.

This does not prevent a private citizen from raising the issue in public testimony before the Platting Board. Nothing in the record indicates this was done. Alternatively, a person could have filed a complaint with the Ethics Board.[21] Assuming this Board does not have jurisdiction, we would assume that objection to a Platting Board member's failure to disclose or a Platting Board's decision on a disclosure, would need to be raised with the Ethics Board in a complaint. Nothing in the record indicates any complaint was filed with the Ethics Board. Nor has Birnbaum asked us to consider any new evidence in this regard.

The one exception to the absence of disclosures in the record is the disclosure made by Board Member McGillivray at the April 7, 2021, Platting Board meeting wherein this matter was heard, deliberated, and decided upon by the Platting Board.[22] The Platting Board directed her to participate.[23] The transcript of the meeting in our record does not contain this portion of the meeting. Given the absence of a transcription of the discussion, and the apparent lack of evidence from Birnbaum presented at the Platting Board, this Board is not in a position to judge the Platting Board's determination, even if this Board had jurisdiction to do so. Exhibit 21, pertaining to Board Member McGillivray, if accepted as a fact, only demonstrates she works for Michael Baker International. It does not demonstrate or contain evidence of a conflict, let alone a disqualifying conflict. As noted above, being in the real estate business is not a disqualifying condition. A person must have a "substantial" financial or private interest in the matter, which is determined on a case-by-case basis.[24] Birnbaum argues that prior conflicts disclosed by McGillivray and for which she was disqualified in those matters should have disqualified her in this case.[25] That does not meet the "case by case" standard applicable for determining conflicts.[26]

For these reasons, we find this Board does not have jurisdiction and, even if it did, the issue is not properly before this Board because it was not raised below.

5. Birnbaum's allegation of a violation of procedural due process under AMCR 21.11.302C is without merit.

Birnbaum argues the Platting Board did not give interested parties an opportunity to ask questions, in violation of AMCR 21.11.302C. The regulation provides:

[19] AMCR 21.11.306B.
[20] AMCR 21.11.306A.
[21] AMC 1.15.160A
[22] Minutes of April 7, 2021, R-308. This portion of the meeting is not in the Transcription. Birnbaum is responsible for the preparation of the Transcript. AMC 21.03.050A.6.a.
[23] Id.
[24] AMC 1.15.060E.
[25] Notice of Appeal, R-022, R-040.
[26] AMC 1.15.060E "Substantial financial or private interest: Whether the financial or private interest disclosed is substantial shall be determined on a case-by-case basis"

> Any interested party may direct questions to the staff or any person testifying by submitting the question to the chairman. The chairman shall redirect the question to the appropriate person unless he determines it to be irrelevant or that presenting the question will unreasonably disrupt or delay the proceeding.

We found no instance in the record where an interested party asked the chair to direct a question on their behalf to the applicant or to any other person, as required and expected by the above Code. This includes both Appellants Birnbaum and Dukoff, who both testified at the public hearing.

Birnbaum asserts that the Notice of Public Hearing failed to specifically carve out time for questions and therefore precluded parties from doing so. Under the Code, the Notice is not required to separately identify when persons may ask questions. Instead, parties may use their allotted time for testimony to present questions. Or, questions could have been presented in writing, either in advance of or at the meeting. Birnbaum did submit to the Platting Board an 11-page letter outlining concerns.[27] There are no questions presented in the 11 pages.

We find Birnbaum has waived this argument because no attempt was made to follow the Code and ask questions.

6. The allegation regarding the violation of AMC 21.07.060.D.3.d., regarding multiple accesses for vehicles, is untimely.

Birnbaum asserts the approval violates AMC 21.07.060D.3.d.[28], which requires larger developments to provide vehicular access from the development to at least four public streets.[29] This Code section is mentioned in the Staff Analysis for the prior case, S12420, at page 8:

> There are 4 separate subdivisions that are served with Sandpiper Drive which includes Golden View Heights, Ptarmigan Roost, Shangri-La and Shangri-La East which is approximately 78 existing lots. These 27 additional lots would increase [the] potential number of lots served to 105.
>
> In addition, most of the homes along Windsong only have access to Golden View Drive via E. 172nd Ave because, although the right-of-way for E. 156th Avenue exists, the road itself has not been constructed that far east and it does not appear to be feasible to do so. This adds more lots to this single point of access, bringing the total number of lots above the intersection of E 172nd Avenue/Windsong Drive to 99 lots.
>
> AMC 21.07.060D.3.d. requires any development of more than 100 units or

[27] R-399-R-409.

[28] "Vehicular access to public streets. Unless the decision-making body determines otherwise, and except for in the DT districts, any development of more than 100 residential units or additions to existing developments such that the total number of units exceeds 100 shall be required to provide vehicular access to at least four public streets to the extent reasonably feasible, due to topography, natural features, or the configuration of existing adjacent developments. These connections (if possible) shall be made to foster and accommodate connectivity into, out of, and within the new development, regardless of the macro-level access to and connectivity of the general area."

[29] Notice of Appeal, R-016.

> additions to existing developments such that the total number of units exceeds 100 shall be required to provide vehicular access to at least four public streets to the extent reasonable feasible. We know that the Mountain Air Drive connection is feasible as the design was previously progressed to a 65% design and only stopped due to the removal of State funding.[30]

It is unclear in the current record what the boundaries of the "development" are for purposes of counting 100 or more units and what the 4 vehicular access points are. Presumably, this information would be in the record of S12420.

The present case does not alter the number of lots available for development in the original preliminary plat approval. Nor does it alter the number of platted access points. Whatever decision was made about compliance with AMC 21.07.060 was made in the prior case and was not required to be revisited in this case. We find that any appeal regarding compliance with AMC 21.07.060 should have been filed within the time for appeal from the Platting Board's approval of S12420.

7. The issue of the cul-de-sac variance is not properly before this Board.

Birnbaum argues that the variance allowing a 1,250-foot cul-de-sac violates AMC 21.08.030F.6.a. and AMC 21.03.240G.3.b. Spinelli requested the variance in S12420. Within that matter, Planning Staff discussed the request and recommended it be granted for the reasons stated in its analysis.[31] Staff determined that to "connect the proposed Spruce Terraces Circle to connect to Lost Horizons Drive, the grade would exceed 20%. This would exceed the maximum grade allowed in the Design Criteria Manual (DCM) of 10%."[32] "The safest road design for development is the proposed design which requires the variance."[33] Staff did also state that, when looking at whether the variance would be detrimental to the public welfare, that "the cul-de-sac seeking the variance will not be constructed until secondary access is funded and approved for construction."[34]

Birnbaum argues "In approving S 12420, the Platting Board implicitly relied on the phased construction condition as a basis for granting the variance to the length of the cul-de-sac. But in approving S 12599, the Platting Board ignored the effect of removing this condition on its approval of the variance."[35]

Spinelli argues that the variance cannot be challenged now.[36] The time to appeal decisions in S12420 has expired and the variance remains undisturbed in this case.[37]

Under AMC 21.03.240, *variances,* the Platting Board must ensure the variance "substantially" meets the approval criteria.[38] That means there is some discretion as to what constitutes

[30] R-385.
[31] R-390-392.
[32] R-390.
[33] Id.
[34] R-391.
[35] Notice of Appeal, R-021.
[36] Spinelli Brief, pages 12-13.
[37] Id.
[38] AMC 21.03.240G.

"substantial." It is not an absolute requirement.

We find the predominate reason the variance was granted was due to topographical features, in accordance with AMC 21.08.030F.6.a: "The platting authority may approve longer cul-de-sacs when necessary to accommodate natural features." Therefore, the removal of the phasing restriction does not disturb the variance approval in S12420. We find the appeal of the grant of variance is untimely.

B. Issues on Appeal

1. The Platting Board approval does not violate AMC 21.01.030B., G., K., and L.

AMC 21.01.030 provides:

> The purpose of this title [Title 21] is to implement the comprehensive plan in a manner which protects the public health, safety, welfare, and economic vitality by:
>
> ***
> B. Encouraging a diverse supply of quality housing located in safe and livable neighborhoods;
>
> ***
> G. Protecting development and residents of the municipality from flooding, wildfires, seismic risks, and other hazards;
>
> ***
> K. Promoting a pattern of land use and development upon which to provide for adequate transportation, water supply, sewerage, and other public facilities; and
>
> L. Encouraging land and transportation development patterns that promote public health and safety and offer transportation choices.

These criteria are incorporated into the approval requirements for a preliminary plat via AMC 21.03.200C.9., *approval criteria*, which includes the Platting Board must find, "to the maximum extent feasible," the plat:

> k. Furthers the goals and policies of the comprehensive plan and conforms to the comprehensive plan in the manner required by section 21.01.080, Comprehensive Plan.

The Platting Board found "With respect to public safety, the findings are that the development being put in with this fire system is in the balance of safety and is a safer solution than what was previously heard."[39]

Birnbaum asserts "the Platting Board should not have treated Mr. Spinelli's representation that he

[39] R-298.

would provide a private water system as a substitute for the requirements of a secondary access road, automatic sprinkler systems, or Firewise construction and landscaping."[40]

We exercise our independent judgment on legal issues raised by the appellant. The term "legal issues" means those matters that relate to the interpretation or construction of ordinances or other provisions of law. Unless we substitute our independent judgment, we defer to the judgment of the Platting Board regarding factual issues. Findings of fact adopted expressly or by necessary implication by the Platting Board may be considered as true if they are supported in the record by substantial evidence. The term "substantial evidence," for the purpose of this section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the record affords a substantial basis of fact from which the fact in issue may be reasonably inferred, it shall be considered that the fact is supported by substantial evidence.[41]

We may, by unanimous vote, substitute our independent judgment for that of the Platting Board on any disputed issues or findings of fact. Such judgment must be supported on the record by substantial evidence.[42]

We find the Platting Board's decision has substantial factual support in the record[43], as does Birnbaum's reasons for challenging that decision.[44] Spinelli lists out the factual elements relied upon by the Platting Board.[45] We note that the task of the Platting Board under these Code provisions is to grant approvals which advance the goals of the Comprehensive Plan to the "maximum extent possible." Here, where the applicant has presented a compelling benefit to amending the plat, and the Platting Board is faced with this as an alternative both supported and opposed by municipal staff, but where the municipal staff ultimately support the request, we will not disturb the Platting Board's decision. The Platting Board's decision that that the requirements to encourage a safe neighborhood (B.), protect residents from wildfire (G.), provide adequate transportation and water supply (K.), and encourage development promoting public safety (L.) are better met with a community water system with fire hydrants, with the construction of Mountain Air Drive in the future, is reasonable. It is reasonable, compared to building 11 houses now (phase 1), and then another 16 sometime in the future, but with no hydrants. We find Birnbaum did not prove the amended plat fails to meet the requirements.

2. The Platting Board's decision does not violate AMCR 21.90.

In Birnbaum's "Second Set of Errors,"[46] "Third Set of Errors"[47], and Fourth Set of Errors"[48], Birnbaum alleges various violations of AMCR Chapter 21.90. Spinelli argues this chapter does not apply to the matter before the Board.[49]

[40] Notice of Appeal, R-007.
[41] AMC 21.03.050A.11.c.
[42] AMC 21.03.050A.11.d.
[43] See, Spinelli Brief, pages 4-8 and citations to the transcript and record therein.
[44] R-007-R-012.
[45] Spinelli Brief, pages 4-5.
[46] Starting at R-012.
[47] Starting at R-016.
[48] Starting at R-020.
[49] E.g., Spinelli Brief, pages 8 and 12.

The regulations in AMCR 21.90 apply to any development defined as "a residential development *ultimately consisting of more than two dwellings per lot or tract*."[50] (emphasis added) The development at issue consists of 27 lots, none of which are proposed for multiple dwellings on a lot. The property is zoned R-10, low density residential.[51] Multiple dwellings on an R-10 lot are not allowed under AMC 21.05.010. The Code section specifies only the allowed residential use of the property as *dwelling, single-family, detached*. This is defined in AMC 21.05.030 as "one detached building on its own lot, erected on a permanent foundation, designed for long-term human habitation exclusively by one household, having complete living facilities, and constituting one dwelling unit." We find no support in the Code for Birnbaum's assertion that AMCR 21.90 applies to this matter.

3. The Platting Board's decision does not violate AMC 23.45.D107.1.

AMC 23.45 contains local exceptions to the International Fire Code, 2018 Edition. There is no current code provision AMC 23.45.D107.1. However, the 2018 International Fire Code is incorporated into Code by reference[52], including Appendix D Fire Apparatus Access Roads, which provides at D107.1:

> One-or two-family dwelling residential developments. Developments of one- or two-family dwellings where the number of dwelling units exceeds 30 shall be provided with two separate and approved fire apparatus access roads.
>
> **Exceptions:**
> 1. Where there are more than 30 dwelling units on a single public or private fire apparatus access road and all dwelling units are equipped throughout with an approved automatic sprinkler system in accordance with Section 903.3.1.1, 903.3.1.2 or 903.3.1.3, access from two directions shall not be required.
>
> 2. The number of dwelling units on a single fire apparatus access road shall not be increased unless fire apparatus access roads will connect with future development, as determined by the fire code official.[53]

In S12420, the original conditions for allowing development with only a single fire access roadway are premised on D107.1, Exception 1 – requiring sprinklers.[54]

The Platting Board, at the urging of Spinelli and with the support of the Anchorage Fire Department[55], approved removal of the sprinkler, phasing, Firewise construction and landscaping requirements. The Fire Department indicated it is relying on Exception 2 as the legal basis for this

[50] AMCR 21.90.001 Definitions.
[51] R-013.
[52] AMC 23.05.010.
[53] The fire code official is defined as the fire chief or other designated authority charged with the administration and enforcement of the code, or a duly authorized representative.

[54] R-380.
[55] R-357.

purpose.

In reviewing the briefing, it appears Birnbaum is asserting, or at least agrees with, the application of D107.1. What Birnbaum is arguing, however, is that the anticipated development of Mountain Air Drive is too speculative for the fire official to have determined Mountain Air Drive "will connect with future development."[56]

The parties disagree about how speculative the road building will be, but both would seem to agree that neither the entire right of way nor the entire funding is secured or guaranteed as of yet. The outcome of the argument may turn on the meaning of "will" in D107.1. The term is not defined in the Code. According to Merriam-Webster's online dictionary, "will" can mean:

1. to express futurity;
2. to express probability; or
3. to express inevitability.

The amount of certainty to give the word "will" is dependent on the reasonable discretion of the fire official to determine whether the evidence indicates a secondary access "will" be built, according to Alaska legal decisions:

> An agency's interpretation of its own regulation presents a question of law. We have oftentimes noted that the deferential "reasonable basis" standard of review is appropriate where a question of law implicates the agency's expertise as to complex matters or as to the formulation of fundamental policy. In addition, where an agency interprets its own regulation, as in the present case, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue**.**
> * * *
> As the superior court observed, this process "will not lightly be interfered with by this court." Accordingly, our inquiry is limited to determining whether there is a reasonable basis to the Commission's interpretation of the regulations.[57]

We find that the meaning of "will" is dependent on agency expertise and determine there is a reasonable basis for the Fire Department's position that Mountain Air Dr. will be built. In addition, the Code section leaves the determination to the discretion of the fire official. We find the fire official has not abused this discretion.

4. The Platting Board's decision does not violate AMCR 21.11.304.

Birnbaum asserts the Platting Board failed to comply with AMCR 21.11.304A., alleging the Platting Board failed make findings supported by the evidence and reasonably sufficient to understand the reasons for the decision.[58]

[56] Birnbaum Reply Brief, page 2-3.
[57] *Rose v. Com. Fisheries Entry Comm'n*. 647 P.2d 154 (Alaska 1982) (Emphasis added.)
[58] Notice of Appeal, R-032.

Spinelli responds that the Platting Board's findings are sufficient to understand the reasons for the decision and sufficiently supported by the record.[59]

AMCR 21.11.304A provides:

> Every decision made by the board shall be based on and include findings of fact and conclusions. Every finding of fact shall be supported in the record of the proceedings. The findings shall be sufficient to provide a reasonable basis for understanding the reasons for the decision. In considering and applying any applicable approval criteria, the board shall make specific findings as to why the criteria have or have not been met.

Alaska case law has similar standards of review for factual issues. In a case where a preliminary plat approval was appealed up to the Alaska Supreme Court, the court stated reversing an agency's factual findings should only occur "if we 'cannot conscientiously find that the evidence supporting [the agency's decision] is substantial.' Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[60] When substantial evidence both supporting and opposing the Platting Board's conclusions exist and were considered in its decision-making process, in light of the deferential standard of review the Board's finding must be upheld. As succinctly stated by the court in a later case: "We will not reweigh evidence or choose between competing inferences reasonably drawn from evidence."[61]

As discussed above, the Platting Board's core decision removes three requirements and adds one:

1. Delete the phasing requirement.
2. Delete the sprinkler requirement.
3. Delete the Firewise construction and landscaping techniques.
4. Require development of a community water system, with fire hydrants available to the Fire Department for use.

The Platting Board's findings are at R-297-298. We find the Platting Board's findings are sufficient to understand the decision.

The Staff Recommendation includes the following:

> The traffic analysis is projected out to 2021 with and without the Spruce Terraces development. The analysis shows that 27 lots increase vehicle delay for northbound vehicles by less than 1 second while maintaining the same level of service. The petitioner has stated the project will have effectively no impact on traffic operations at the Goldenview Drive and Rabbit Creek Road intersection.
>
> There currently exists within the AMATS Transportation Improvement Program, a

[59] Spinelli Brief, pages 17-20.
[60] South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Bd. of Adjustment, 172 P.3d 774, 780 (Alaska 2007) (additional citations omitted).
[61] Id. At 781.

> project that will ultimately connect Mountain Air Drive to Rabbit Creek Road, which would provide secondary access to this portion of the Anchorage Hillside. While funding is secured for design only at this time, Planning believes this secondary access connection will be made a priority and that funding will be achieved for construction.
>
> Fire Plan Review supports the removal of the original conditions and states that the firewise construction and landscaping techniques were originally intended to be in lieu of providing water supply for firefighting purposes. Additionally, Fire Plan Review has determined that the Mountain Air Drive connection will provide an access road connection with future development.
>
> The Traffic Department is opposed to the removal of the secondary access and has stated that secondary access is critical from both life and traffic safety viewpoints for emergency service access and the reduction in volume of daily traffic on the existing rights-of-way.
>
> While Planning agrees that secondary access is a public benefit, staff has reviewed Fire Plan Review comments and Kittleson Engineering's traffic analysis that reported almost no delay in providing the same level of service. It is because of these findings and the addition of the Mountain Air Drive to Rabbit Creek Road connection to the AMATS Transportation Improvement Program that the Planning Department supports that the conditions be revised subject to the stated conditions below.

The Platting Board understood the importance of the issue, and the tradeoffs involved. For example, as stated by Platting Board member Cross:

> What we're talking about here is a -- really, an alteration of the phasing plan and, ultimately, when we originally had this conversation, we all understood how important it was that the secondary access was in there.
>
> Well, although we don't get that secondary access, what we are allowing them to do by removing this phasing plan is, essentially, add seven fire hydrants and add a way for fire trucks to refuel which is the reason for the access.
>
> We've added -- we're allowing them to add the fire -- a fire grid and public water system which resolves also the issues the neighbors had about water use in their neighborhood and all these wells being drilled. I guess I just see this as resolving a lot of those concerns and as well as adding a massive layer of safety to it which is why the fire department is so supportive of it.
>
> We all understand at least that it is believed that the secondary access is going to go in. It's going to go off Mountain Air but we also understand that that is not guaranteed to happen in the immediate future but, in the meantime, until that's done, I think adding the fire hydrants and allowing this to go through is a fantastic way

to resolve some of the fire concerns in this area until that road is in.[62]

Further findings within the Transcript include Chair Walker's findings:

> I would like to make findings that the fire hazard severity form that was provided and was discussed with the fire department does more strongly weight the access to water than it does the ingress and egress, that there's been absolutely no complaint with the fire department with respect to their ingress or egress to the area and that the roadway that is going to be constructed is going to increase that capacity and also the likelihood that Luna Drive currently is gated, may, in fact, be removed so that those homes would have closer access to the fire department -- fire hydrants.
>
> I also find that the likelihood that Mountain Air will, in fact, be developed by the Municipality and/or the State of Alaska is very high and that, based on that, we are entitled to rely on the existence or the expectation that that road will be put in as giving additional access.
>
> And with respect to public safety, I think the findings are that the development being put in with this fire system is in the weight and the balance of safety a safer solution than previously. [63]

We find the Platting Board's findings are supported by the record. The issue of swapping the prior requirements for the new water system with hydrants is discussed throughout the record, including in the opposing opinions of the Fire Department and the Traffic Department, and the final Staff Recommendation.

5. Does the approval violate Birnbaum's due process or equal protection rights?

Birnbaum asserts a variety of issues result in a violation of its due process or equal protection rights.[64]

a. Birnbaum asserts the approval "adversely affects" its interests, including risk to their lives, risk of wildfire, and the ability to sell their home.[65]

The Birnbaum\Dukoff property is at 15830 Far View Place.[66] The property appears to have legal access to both Far View Place and West Cir, although Far View Place may be the primary access.[67] In the original preliminary plat, all the traffic from the new subdivision will exit along Far View Place.[68] The development of Mountain Air Dr. does not change this. The revised preliminary plat does not change this.

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[62] T-049.
[63] T-051-053.
[64] R-040-43.
[65] R-040.
[66] T-002.
[67] R-329.
[68] See, e.g., R-329; R-339; R-430.

Spinelli argues Birnbaum has failed to demonstrate any "vested" property rights.[69] Spinelli also argues Birnbaum offers only speculation that such rights, if they exist, would be harmed.[70]

We find, even assuming the described property interests exist and are constitutionally protected, Birnbaum has waived objection to any harm to these interests by not appealing the original approval of the preliminary plat in S12420. We also find, if such interests exist and are protected, that the allegations of harm are speculative at best. Birnbaum has failed to prove harm to the interests is factually present in this case.

b. Birnbaum asserts Platting Board members have private interests in the outcome and are biased.[71]

Birnbaum states: "As explained above, the livelihoods of the Platting Board members depend on real estate development, meaning they are- because of their financial and professional interests- biased in favor of Mr. Spinelli."

As discussed above, conflicts of interest of Platting Board members are not justiciable by this Board or not properly before this Board. Even if properly before this Board, Birnbaum's allegations are not themselves proof. The fact that the Platting Board unanimously approved the application does not itself demonstrate an undue bias by any single member.[72]

We find the Board does not have the authority to redress Birnbaum's complaints about bias. As such, the Board cannot grant relief. Even if it could, the Board finds there is no evidence of bias in the record.

c. Birnbaum argues Spinelli had undue advantages under the Code and the Code is unfair to the public and appellants.[73]

Birnbaum believes the timeframes for public review are too short, the amount of time to testify is too short, Birnbaum was not able to ask questions, the appeal Code is biased against appellants, and appeal fees should not be assessed.[74] For example, Birnbaum asserts that "the costs that the Municipality imposes on Appellants…constitute bias in favor or Mr. Spinelli and other developers."

Spinelli argues that Birnbaum had adequate time and opportunity, meeting any due process requirements.[75]

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[69] Spinelli Brief, page 21.
[70] Id.
[71] R-040-041.
[72] *Griswold v. City of Homer*,55 P.3d 64,72 (Alaska 2002) (Discussing that even if a member of the board of adjustment reviewing approval of a specific nonconforming use was biased in favor of approval, that bias did not invalidate the board's decision where the member did not stand to gain personally from the approval).
[73] R-041-042.
[74] Id.
[75] Spinelli Brief, pages 21-23.

We do not have Code authority to determine whether Code or Regulations, as written, violate constitutional protections. The issue regarding Birnbaum's ability to ask questions is addressed above. In all other respects, we find this Board does not have authority to adjudicate the Code or Regulations as to general fairness or legal impact on due process rights.

d. Birnbaum argues its right to equal protection under the law has been violated because the Platting Board is biased, as is the appeal process.[76]

Birnbaum argues, for example, that "[t]hrough the Platting Board's pro-developer bias and the entrenchment of that bias in the appeal process, the Municipality better treats developers than residents; i.e., matters before the Platting Board where the interests of developers and residents conflict are more likely to be decided in favor of developers than residents."[77] Birnbaum also argues "[t]he preferential treatment the Platting Board gives developers adversely affects residents' fundamental rights: to reside in their homes without risk to their lives or fear of dying, such as in an evacuation."[78]

Spinelli argues there is no recognized fundamental right of persons to "reside in their homes without risk."[79]

We do not have Code authority to determine whether Code or Regulations, as written, violate constitutional protections. The issue regarding Platting Board conflicts of interest is addressed above. In all other respects, we find this Board does not have authority to adjudicate the Code or Regulations as to general fairness or legal impact on due process rights.

II. Decision

1. We disregard missing page 5 of the Staff Analysis.

2. Exhibits 1-35 attached to Birnbaum's Notice of Appeal are not included as part of the Record. We do not take judicial notice of them and do not consider them as evidence for purposes of our decision. Code requires us to rely only on the record on appeal.

3. We make no determination on Spinelli's authority to file the plat application. It is not within our jurisdiction to do so. Even if it were, Birnbaum failed to raise the issue before the Platting Board, and it is therefore waived.

4. We conclude the allegations regarding conflicts of interest of Platting Board members are not within our jurisdiction. Even if they were, the allegations are purely speculative and not supported by the record.
5. The allegation of a violation of procedural due process under AMCR 21.11.302C for failing to allow interested persons to ask questions is without merit.

[76] R-043.
[77] Id.
[78] Id.
[79] Spinelli Brief, page 24.

6. The allegation regarding the violation of AMC 21.07.060.D.3.d., regarding multiple accesses for vehicles, is untimely.

7. The allegation regarding the granting of the cul-de-sac variance is untimely, and even if was timely, the predominate reason the variance was granted was due to topographical features in accordance with AMC 21.08.030F.6.a., and the removal of the phasing restriction does not disturb the variance approval in S12420.

8. The decision of the Platting Board meets the requirements of AMC 21.01.030.

9. AMCR 21.90 does not apply to this appeal.

10. The Platting Board's decision does not violate AMC 23.45's Exception 2 under Appendix D107. The fire official has discretion to determine when access will connect to future development and the determination is supported by the record.

11. The Platting Board's findings are sufficient to understand the decision, are supported by the record, and meet the requirements of AMCR 21.11.304.

12. We find, even assuming property interests alleged by Birnbaum exist and are constitutionally protected, Birnbaum has waived objection to any harm to these interests by not appealing the original approval of the preliminary plat in S12420. We also find, if such interests exist and are protected, the allegations of harm are speculative at best. Evidence of harm to the interests is not in the record.

13. Allegations of procedural due process violations due to the alleged bias of the Platting Board members cannot be adjudicated by this Board.

14. Allegations of due process violations due to the structure or content of the Code or Regulations cannot be adjudicated by this Board.

15. Allegations of equal protection violations due to the structure or content of the Code or Regulations cannot be adjudicated by this Board.

16. We recognize that the public may have some legitimate concerns about the process as it occurred in this case and the outcome, although not sufficiently addressed by or perhaps protected in the current Code, or justiciable by us for the reasons stated herein. We recommend policy-makers seriously consider the concerns and how best to address those concerns, perhaps through future Code changes.

17. We affirm the decision of the Platting Board.

18. This is the final decision with respect to all issues involved in the appeal, and the parties have 30 days from the date of service of this decision to appeal to the superior court.

IT IS SO ORDERED.

Dated this 14th day of December 2021 at Anchorage, Alaska.

By:

Bernd Guetschow, Chair
Board of Adjustment
Municipality of Anchorage

Certificate of Service:

I hereby certify that on the 14th day of December, 2021 a true and correct copy of the foregoing document was served by electronic mail upon each of the following:

Appellants:
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Ruth Dukoff
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