

See AO 98-141(S)

Submitted by: Assembly Member Wohlforth

Prepared by: Department of Law

For reading: January 12, 1999

ANCHORAGE, ALASKA

AO NO. 98-141(S-1)

AN ORDINANCE OF THE MUNICIPALITY OF ANCHORAGE CREATING A BOARD OF ADJUSTMENT PANEL SEPARATE FROM THE ASSEMBLY, RETAINING THE ASSEMBLY AS A BOARD OF ADJUSTMENT PANEL WITH LIMITED JURISDICTION AND DELINEATING THE RESPECTIVE DUTIES, RESPONSIBILITIES, POWERS AND JURISDICTION WITH RESPECT TO APPEALS TO THE BOARD OF ADJUSTMENT.

THE ANCHORAGE ASSEMBLY ORDAINS:

Section 1: Anchorage Municipal Code Section 21.10.030 is hereby amended as follows:

**21.10.030 Board of Adjustment**

A. There [IS] shall be a Board of Adjustment consisting of two panels one of which shall be the Assembly and referred to herein as the Assembly Board of Adjustment. The panels of the Board of Adjustment [WHICH] shall hear and decide appeals[:]~~from the Platting Board and the Planning and Zoning Commission as specified in Chapter 21.30, provided, however, appeals from the decision of a hearing officer under Sections 21.10.015 B. and 21.10.027 shall be heard by the Planning and Zoning Commission.~~

[1 FROM DECISIONS REGARDING THE APPROVAL OR DISAPPROVAL OF A PLAT OR VARIANCE FROM THE PROVISIONS OF CHAPTERS 21.80 THROUGH 21.85;

[2. FROM DECISIONS REGARDING THE APPROVAL OR DISAPPROVAL OF APPLICATIONS FOR CONCEPT OR FINAL APPROVAL OF CONDITIONAL USES;

[IN ACCORDANCE WITH CHAPTER 21.30.

B. Both Board of Adjustment panels are quasi-judicial, adjudicatory boards which are subject to the provisions of the Municipal Code of Ethics in Chapter 1.15. In addition, both Board of Adjustment panels and their members shall:

1. Make their decisions solely on the applicable law and the evidence in the record presented to the panel through the Municipal Clerk or, when permitted, submitted to the panel in an open hearing on the record;

2. Be impartial in fact and in appearance which means that the panel and its members shall make their decisions without any actual or seemingly apparent personal or financial bias, prejudice, prejudgment or partiality with respect any

person, party, or principle of law;

3. Conduct their proceedings according to the applicable procedures provided by law; and

4. Refrain from and not permit any *ex parte* contact or communication with any person regarding any matter pending before or which may be reasonably expected to be pending before the panel and report unavoidable *ex parte* contacts and communications to the full panel in open hearing on the record.

*Ex parte* contacts or communications are the receipt, either directly or indirectly, of verbal, visual or written communications outside a duly noticed, open hearing on the record at which all parties and all panel members have an opportunity to be present.

[THE BOARD OF ADJUSTMENT SHALL BE:

[1 THE ASSEMBLY FOR APPEALS FROM THE PLATTING BOARD AND THE PLANNING AND ZONING COMMISSION;

[2. THE PLANNING AND ZONING COMMISSION FOR APPEALS FROM THE HEARING OFFICER.]

**Section 2:** Anchorage Municipal Code Section 21.10.035 is hereby amended as follows:

**21.10.035 Boards and Commissions - Composition and Organization.**

A. *Composition.* The Planning and Zoning Commission, Urban Design Commission, Platting Board, [AND] Zoning Board of Examiners and Appeals and the non-Assembly panel of the Board of Adjustment shall each consist of nine members.

1. Seats on the non-Assembly panel of the Board of Adjustment are hereby designated as Seat 1. through Seat 9. Except for Seat 9., appointments to the Board of Adjustment shall be based on professional qualifications with significant experience in the practice of either real estate law or land use law, land use planning and regulation or real estate sales or development as follows:

a. Board of Adjustment Seats number 1. through 4. shall be qualified attorneys licensed in Alaska, Seats 5. and 6. shall be persons qualified with at least technical degrees in land use planning and regulation, Seats 7. and 8. shall have degrees or professional certificates in real estate sales or development and Seat 9. shall be a member of the public not engaged in or associated with the real estate industry.

B. The Director of the Department of Economic Development and Planning or a designee shall act as secretary to the Planning and Zoning Commission, Platting Board, Zoning Board of Examiners and Appeals, and Urban Design Commission. The Municipal Clerk or the Clerk's designee shall act as clerk to the Board of Adjustment.

- 1  
2  
3 C. *Rules of procedure.* The planning and zoning commission, platting board, zoning board of  
4 examiners and appeals, Board of Adjustment and urban design commission may each  
5 promulgate regulations to establish rules of procedure for the conduct of its business, in  
6 accordance with the provisions of chapter 3.40. If rules of procedure adopted under this  
7 subsection conflict with chapter 3.60, the rules of procedure shall govern.  
8

9 **Section 3:** Anchorage Municipal Code section 21.30.090 is hereby amended to read as follows:  
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11 **21.30.090** **Scope of review.**  
12

- 13 A. The Board of Adjustment shall hear an appeal solely on the basis of the record established  
14 before the lower administrative body, the notice of appeal, and the parties' written  
15 arguments.  
16  
17 B. The ~~Assembly~~ Board of Adjustment may exercise its independent judgment on legal issues  
18 raised by the appellant. The term "legal issues," as used in this section, means those matters  
19 that relate to the interpretation or construction of ordinances or other provisions of law.  
20  
21 C. The Board of Adjustment shall [, UNLESS IT SUBSTITUTES ITS INDEPENDENT  
22 JUDGMENT PURSUANT TO SUBSECTION D OF THIS SECTION,] defer to the  
23 judgment of the lower administrative body regarding disputed issues or findings of fact.  
24 Findings of fact adopted expressly or by necessary implication by the lower administrative  
25 body may be considered as true if they are supported in the record by substantial evidence.  
26 The term "substantial evidence," for the purpose of this section, means such relevant  
27 evidence as a reasonable mind might accept as adequate to support a conclusion. If the record  
28 affords a substantial basis of fact from which the fact in issue may be reasonably inferred,  
29 it shall be considered that the fact is supported by substantial evidence.  
30  
31 [D. NOTWITHSTANDING THE PROVISIONS OF SUBSECTION C OF THIS SECTION,  
32 THE BOARD OF ADJUSTMENT MAY, BY AN AFFIRMATIVE VOTE OF TWO-  
33 THIRDS OF THE FULLY CONSTITUTED BOARD, SUBSTITUTE ITS INDEPENDENT  
34 JUDGMENT FOR THAT OF THE LOWER ADMINISTRATIVE BODY ON ANY  
35 DISPUTED ISSUES OR FINDINGS OF FACT. SUCH JUDGMENT MUST BE  
36 SUPPORTED ON THE RECORD BY SUBSTANTIAL EVIDENCE. FOR THE PURPOSE  
37 OF THIS SUBSECTION, THE FULLY CONSTITUTED BOARD OF ADJUSTMENT  
38 SHALL NOT INCLUDE THOSE MEMBERS WHO DO NOT PARTICIPATE IN THE  
39 APPEAL IN ACCORDANCE WITH THE PROVISIONS OF SECTION 21.30.170.]  
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41 (AO No. 73-76; AO No. 88-29)  
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Section 4. Anchorage Municipal Code chapter 21.30 is hereby amended by adding a new section 21.30.110 to read as follows:

**21.30.110      Assembly Board of Adjustment**

A. *Scope of Review and Jurisdiction.* Notwithstanding other provisions of this chapter, the Assembly, sitting as a panel of the Board of Adjustment, upon application of a party to an appeal to the Board of Adjustment, may substitute its independent judgment for that of the lower administrative body on any disputed issues or findings of fact and decision. Such judgment must be supported on the record by substantial evidence.

The Assembly Board of Adjustment shall not hear, consider or decide an appeal to substitute its judgment until a final, written decision has been rendered by the non-Assembly Board of Adjustment or all parties have waived, in a signed writing filed with the Municipal Clerk dated not earlier than the notice of appeal, all legal, constitutional and procedural allegations of error by the lower body.

2. 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.

a. Subject to subsection B. of this section, the Assembly Board of Adjustment may, upon application of any appellant or appellee, grant an evidentiary hearing before the Assembly Board of Adjustment solely to present new evidence which supplements the record.

i. Application for a new evidentiary hearing to supplement the record shall be made concurrently with the filing of the specification of reasons for a substitution of judgment required by subsection B.1.a. of this section. Failure to make application in accordance with this subsection A.2.a.i. shall constitute a waiver of the right to request a new evidentiary hearing before the Assembly Board of Adjustment.

3. The Assembly shall not exercise any powers or authority or have any other jurisdiction of the Board of Adjustment except as provided in this subsection A. and such powers and authority as are necessary and directly incident to the exercise thereof.

4. All references in this Code, the Anchorage Municipal Code of Regulations and all documents and briefs filed by in an appeal under this chapter to the Assembly sitting as a Board of Adjustment panel shall always refer to such panel as the Assembly Board of Adjustment. References just to the Board of Adjustment shall mean the non-Assembly Board of Adjustment.

**Section 4.** Anchorage Municipal Code chapter 21.30 is hereby amended by adding a new section 21.30.110 to read as follows:

**21.30.110      Assembly Board of Adjustment**

**A**      *Scope of Review and Jurisdiction.* Notwithstanding other provisions of this chapter, the Assembly, sitting as a panel of the Board of Adjustment, upon application of a party to an appeal to the Board of Adjustment, may substitute its independent judgment for that of the lower administrative body on any disputed issues or findings of fact and decision. Such judgment must be supported on the record by substantial evidence.

The Assembly Board of Adjustment shall not hear, consider or decide an appeal to substitute its judgment until a final, written decision has been rendered by the non-Assembly Board of Adjustment or all parties have waived, in a signed writing filed with the Municipal Clerk dated not earlier than the notice of appeal, all legal, constitutional and procedural allegations of error by the lower body.

**2**      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.

**a.**      Subject to subsection B. of this section, the Assembly Board of Adjustment may, upon application of any appellant or appellee, grant an evidentiary hearing before the Assembly Board of Adjustment solely to present new evidence which supplements the record.

**i.**      Application for a new evidentiary hearing to supplement the record shall be made concurrently with the filing of the specification of reasons for a substitution of judgment required by subsection B.1.a. of this section. Failure to make application in accordance with this subsection A.2.a.i. shall constitute a waiver of the right to request a new evidentiary hearing before the Assembly Board of Adjustment.

**3**      The Assembly shall not exercise any powers or authority or have any other jurisdiction of the Board of Adjustment except as provided in this subsection A. and such powers and authority as are necessary and directly incident to the exercise thereof.

**4**      All references in this Code, the Anchorage Municipal Code of Regulations and all documents and briefs filed by in an appeal under this chapter to the Assembly sitting as a Board of Adjustment panel shall always refer to such panel as the Assembly Board of Adjustment. References just to the Board of Adjustment shall mean the non-Assembly Board of Adjustment.

2 B All provisions of this chapter applicable to Board of Adjustment appeals, procedures,  
3 decisions, and judicial appeals, except sections 21.30.090 through 21.30.100 inclusive, shall  
4 apply to appeals to the Assembly Board of Adjustment, provided however, that

5 Parties to an appeal seeking a substitution of judgment by the Assembly Board of  
6 Adjustment under the authority of this section shall:

7  
8 a. Separately identify and specify with particularity the reasons and legal basis  
9 for seeking a substitution of judgment by the Assembly Board of Adjustment;  
10 and

11  
12 b. File under separate cover, briefs and other documents relevant to substitution  
13 of judgment which shall be restricted solely to a substitution of judgment  
14 under this section without reference to or argument concerning alleged errors  
15 in the lower body's or the non-Assembly Board of Adjustment's decision;  
16 and

17  
18 2. The scope of review, decision and remedies applicable to the Assembly Board of  
19 Adjustment shall be governed by this section.  
20

21 C. *Decision.* The Assembly Board of Adjustment may substitute its judgment for the lower  
22 body solely on the basis of the record on appeal **including evidence admitted at any new**  
23 **evidentiary hearing granted by the Assembly Board of Adjustment, if any,** and the briefs  
24 of the parties to the appeal, in accordance with the standards of section 21.30.090.  
25

26 1 The decision to substitute its judgment shall be by an affirmative vote of two-thirds  
27 of the fully constituted Assembly. The Assembly Board of Adjustment may, in its  
28 sole discretion, decline to exercise its authority with or without a statement of  
29 reasons.  
30

31 a. For the purpose of this section the fully constituted Assembly shall be the  
32 total number of assembly members authorized by the Charter, but shall not  
33 include those members who do not participate in the proceedings in  
34 accordance with section 21.30.170.  
35

36 2. The decision of the Assembly Board of Adjustment substituting its judgment for the  
37 decision appealed from shall be in a form which finally disposes of the case on  
38 appeal and shall be based upon findings and conclusions adopted by the Assembly  
39 Board of Adjustment.  
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41 3. Such findings must be reasonably specific so as to provide the community, and,  
42 where appropriate, reviewing authorities, a clear and precise understanding of the  
43 reason for the Assembly Board of Adjustment's decision.  
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45 a. The Assembly Board of Adjustment may seek the assistance of the municipal  
46 staff in the preparation of findings.  
47

1 **Section 5.** This ordinance shall become **effective** immediately after passage and approval by the Assembly,  
2 provided however, that all appeals filed with the Board of Adjustment prior to the effective date of this  
3 ordinance shall be heard by the Boards of Adjustment as constituted and according to the ordinances in  
4 effect prior to the effective date of this ordinance. All other appeals filed with the Board of Adjustment  
5 shall comply with the provisions of this ordinance.  
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7 PASSED AND APPROVED by the Anchorage Assembly this \_\_\_\_ day of \_\_\_\_\_, 1999.  
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10 \_\_\_\_\_  
11 Chair of the Assembly  
12  
13

14 ATTEST:  
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17 \_\_\_\_\_  
Municipal Clerk