BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

LARRY BAUER,

Appellant,

vs.

CBJ BOARD OF ADJUSTMENT,

Appellee,

DIRK LOVIG,

Appellee-Intervenor.

Case No. 2002-03

OPPOSITION BRIEF OF THE CBJ BOARD OF ADJUSTMENT

COMES NOW APPELLEE, the CBJ Board of Adjustment, through counsel, Deputy City and Borough Attorney John W. Hartle, and offers this brief in opposition to the appeal filed by Appellant Bauer. The appeal is from a decision made by the CBJ Planning Commission convened as the “Board of Adjustment.” The Board of Adjustment, (“BOA” or “Board”), respectfully asks the Assembly to deny the appeal and affirm the decision.

Standard of Review.

The standard of review in an appeal to the Assembly is set forth in the CBJ Appeals Code, CBJ 01.50.070. The Code provides a deferential standard. The burden of proof is on the appellant. CBJ 10.50.070(b).

Under the Appeals Code, the Assembly does not decide a matter on appeal as if presented with it in the first instance; rather, it applies the standard of review set forth in CBJ 01.50.070, which only allows reversal under certain specified circumstances. In essence, the Assembly has delegated to the Planning Commission, convened as the Board of Adjustment, the responsibility for first hearing certain land use issues, including similar use determinations like the present case. The Board takes testimony, reviews the facts, and applies its expertise to reach a decision under the CBJ Land Use Code. The Appeals Code provides, for
example, that if the evidence would persuade a reasonable mind – any reasonable mind – the Board decision should be upheld on appeal.¹

Legal Background.

Land development in the CBJ is governed by the “CBJ Table of Permissible Uses,” (“TPU” or “Table”), CBJ 49.25.300. The CBJ Table of Permissible Uses lists categories of land uses (developments), and designates whether, and under what conditions, those land uses are allowed in each zoning district. The Table indicates the type of permit required for each type of development in each type of zoning district. Rows in the Table comprise the list of types of development, and columns in the Table represent the different zoning districts. At the intersection of each row and column is a digit which indicates the type of development permit required for that type of development in that zoning district. The types of developments (land uses) are grouped into general categories, and the categories are broken down into narrow, specific rows for particular types of land uses. In the Table, if there is no digit at the intersection of a particular row and column, the type of development listed in the row is not allowed in the zoning district represented by that column. The Table also includes footnotes to add depth and detail, conditioning specific types of development in certain zoning districts.

¹ CBJ 01.50.070 provides:

01.50.070 Standard of review and burden of proof.

(a) The appeal agency or the hearing officer may set aside the decision being appealed only if:

(1) The appellant establishes that the decision is not supported by substantial evidence in light of the whole record, as supplemented at the hearing;

(2) The decision is not supported by adequate written findings or the findings fail to inform the appeal agency or the hearing officer of the basis upon which the decision appealed from was made; or

(3) The appeal agency or the hearing officer failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties.

(b) The burden of proof is on the appellant.

(Serial No. 92-36, § 2, 1992)
Overall, the Table of Permissible Uses, adopted by ordinance, details a comprehensive set of development policies regulating all land use throughout the city and borough. Administration of the Table, however, is not without difficulties.

The Table of Permissible Use cannot, of course, list all possible land uses. Those land uses it does list are written in terse, one-line descriptions without elaboration. Because all types of development cannot be listed in the Table, the Code provides authority to the Planning Commission, (convened as the Board of Adjustment), to make a “similar use determination” in cases which don’t exactly fit the listed land uses. CBJ 49.20.320. When a development is unique, and doesn’t fall easily within the listed uses in the Table, the Board is called upon to make a similar use determination.

Under a similar use determination, the Code requires the Board to determine from the evidence before it whether a developer’s proposed land use – a land use not listed in the TPU – is of the “same general character” as a development which is listed in the Table. When the Board finds that a proposed land use which is not listed in the Table is of the “same general character” as a listed land use, the Code treats that proposed use as if it were the use listed in the Table and selected by the Board.

Facts.

A similar use determination made in the present case regarding the new Bureau of Vital Statistics building is the subject of this appeal; the developer requested a similar use determination from the Board, to find where the proposed new State Bureau of Vital Statistics (“BVS”) building would properly fit into the Table. R. 1-6. CDD staff recommended that the proposed BVS building be determined a similar use to office building uses in the Table under “Category 3.000 Office, Clerical, Research and Services Not Primarily Related to Goods or Merchandise.” R. 6; R. 23. Within general TPU Category 3.000, CDD staff

---

2 The Table of Permissible Uses appears in the Record at R. 20-35.

3 CBJ 49.20.320 provides:

**49.20.320 Use not listed.**

After public notice and a hearing, the board may permit in any district any use which is not specifically listed in the table of permissible uses but which is determined to be of the same general character as those which are listed as permitted in such district. Once such determination is made, the use will be deemed as listed in the table of permissible uses. (Serial No. 87-49, § 2, 1987).
recommended that the BVS building be found a similar use to TPU Row 3.400 “All Remaining Category 3.000 Uses.” R. 6.

As can be seen from the Table, at R. 23, there is no digit at the intersection of Row 3.400 and the column representing the Industrial zoning district. Accordingly, land uses found to be similar to use 3.400 are not allowed in the Industrial zoning district. Presumably, disallowing this particular land use in the Industrial zone represents a land use policy, embedded in the Table, of separating dissimilar uses – general office developments from heavy industrial uses. The CDD staff recommendation would have meant the Vital Statistics building could not have been built in an Industrial zoning district.

The Board heard substantial testimony on this issue: The CDD staff report, the applicant in great detail on the proposed building, neighbors of the proposed development site (who testified in support of the project), and from the (later to be) appellant (Mr. Bauer), the competing third-place bidder on the State RFP for the Vital Statistics building. R. 71. The Board also reviewed the written materials that now comprise the record on appeal: The CDD written staff report, materials from the applicant, Alaska Stone and Concrete, detailing the building construction and use, letters of support from neighboring property owners, and the letters exchanged between the various parties and the Community Development Department. R. 1-94. After reviewing this mass of testimony and materials, the Board deliberated, and decided to reject the CDD staff recommendation as to where to place the proposed development in the Table. R. 55.

At the end of the hearing, the Board found that the proposed development was of the “same general character” as a Post Office, a use allowed in the Industrial zoning district under TPU general Category 15.000 “Miscellaneous Public and Semipublic Facilities.” R. 55. TPU 15.100 is “post office.” Under this Board finding, the BVS building project was allowed to go ahead.

The Board of Adjustment Notice of Decision making the similar use determination is found at pages 95 and 96 of the Record. The Notice of Decision provides, in part:

... the Board made a determination according to Section §49.20.320 of the Land Use Code that the Bureau of Vital Statistics facility is similar in use to category 15.100, Post Office, of the Table of Permissible Uses. The Board found that the Bureau of Vital Statistics facility was similar to this use category because it is [a] public building, which falls under the general heading of Category 15.000 Miscellaneous Public and Semipublic Facilities. Further, the Board found that the facility is most similar to the specific Use Category 15.100, Post Office, because of their like characteristics of sorting, storing, and transmitting of documents and records.

R. 95.
Mr. Bauer, a competing bidder on the State RFP for the Bureau of Vital Statistics building, has appealed the similar use determination made by the Board, arguing that construction of the BVS building should not be allowed in an Industrial zone.

**Argument.**

The fact is, it's a close call whether the proposed Vital Statistics building is most similar to a post office, or closer to "All Remaining Category 3.000 Uses" of TPU 3.400. The proposed building could reasonably fall into either category. However, the Code standard is limited to whether the proposed development is of the "same general character" as a land use listed in the Table. The Code does not require that the Board find the most similar use, only that the use found be of the "same general character." CBJ 49.20.320.

The Board decided the Vital Statistics building was more like a post office, due to the storage and handling of records done in both types of buildings. R. 56. The Board finding that the BVS building is "same general character" as a Post Office "because of their like characteristics of sorting, storing, and transmitting of documents and records" is reasonable, and supported by the substantial record generated in making this decision. R. 95.

Under the Appeals Code, the decision of the Board should be treated with deference. The Assembly could make these similar use determinations itself, rather than defer to the Board, e.g., take the testimony, review the materials, and decide. That would require a Code change, however. The Code creates the Planning Commission and the requirement that the Assembly defer to it on appeal, within limits. This a proper case, the Board submits, for deference: A close question, turning on facts, testimony, and generalizations about what properly fits in the Industrial zoning district, an area in which the Planning Commission has a particular expertise.

The neighborhood surrounding this proposed use is properly characterized as "light industrial." As can be seen from R. 89, every one of the properties surrounding this proposed building are developed with a mixture of retail, storage, and processing. There are no incompatible uses like asphalt plants and rock crushers. R. 89-90.
Appellant argues that the Board’s findings are inadequate. (Appellant’s Opening Brief at p. 4). In essence, appellant argues that the Board’s decision was made on an ad hoc basis, without adequate support. The fact is, however, that, prior to making its decision, the Board had received substantial quantities of information and analysis regarding the BVS building, its components and functionality, through detailed testimony and written materials. The Board’s written findings are, it argues, adequate to meet the standard required by CBJ 01.50.070(a)(2) (“The decision is not supported by adequate written findings or the findings fail to inform the appeal agency or the hearing officer of the basis upon which the decision appealed from was made . . .”). The findings are written. The entire record on appeal clearly shows the Assembly on appeal the basis for the Board’s decision, and the written findings are adequate for the type of decision involved, to fit the proposed building into a TPU category of the same general character.

The Board does not disagree with appellant’s citations regarding the purpose of making findings. (e.g., At. Br. p. 7). The Board does disagree, however, with appellant’s claim that the findings in the present case are inadequate to serve their purpose. As appellant notes, there is no legal requirement that findings undergo extensive CDD staff analysis, or any particular analysis. The project, however, clearly has undergone extensive analysis.

Appellant argues that, by making this similar use determination, the Board has, in effect, amended the Table of Permissible Uses, something that only the Assembly is empowered to do. This argument, however, could be made each and every time the Board makes a similar use determination as the Land Use Code allows – indeed requires – the Board to do. By definition, the Board makes a similar use determination when the proposed development is unique, when it doesn’t properly fit into an existing category. Making the call, the similar use determination as to where a proposed development properly fits into the Table is exactly what is authorized by the Land Use Code, CBJ 49.20.320 Uses Not Listed (“Once such determination is made, the use will be deemed as listed in the table of permissible uses.”) The Board’s action will, in effect, amend the Table regarding this type of development, as the Land Use Code provides that it should.

Similarly, appellant argues that the Board has engaged in “spot zoning” by allowing a land use not provided in the Table of Permissible Uses. This argument, too, could be made each and every time the Board is called upon under the provisions of CBJ 49.20.320, “Use Not Listed.” One look at the neighborhood, as pictured at R. 89, will show that the proposed BVS building is completely compatible with the neighboring
properties. Testimony and letters from its neighbors support its construction in this location. Those neighboring properties all appear to include retail and storage uses, as will the BVS building. The BVS building will not be incongruous in that location, and this similar use determination does not violate the CBJ Comprehensive Plan; nor is it "spot zoning."

Conclusion.

This appeal can be resolved on the standard of review alone. The Board has made a judgment call in an area of its expertise: working with the Table of Permissible Uses to make a determination of the proper categorization of a proposed development in the Industrial zoning district. Alternately, the Board’s decision can be upheld because its written findings are adequate to support its decision and the decision is supported by substantial evidence. The appellant has not met his burden.

The CBJ Board of Adjustment respectfully requests that the Assembly uphold its decision and deny the appeal.

DATED this 15th day of May, 2002.

THE CITY & BOROUGH OF JUNEAU

By: [Signature]

John W. Hartle
Deputy City & Borough Attorney
Alaska Bar No. 9112116
Attorney for Appellee CBJ