

**BEFORE THE BOARD OF ADJUSTMENT FOR THE
CITY OF KENAI, ALASKA**

210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF THOMAS WAGONER RE:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
GRANTING A VARIANCE FOR THE
CONSTRUCTION OF FOUR-FAMILY
DWELLING ON A
NON-CONFORMING LOT WITHIN
A RURAL RESIDENTIAL ZONE**

Case No. BA-16-01

DECISION ON APPEAL

I. INTRODUCTION

Thomas Wagoner appealed the decision of the City of Kenai Planning and Zoning Commission ("Commission") approving a variance for Kevin and Jessica Stearns ("Stearns") to construct a four-family dwelling on a non-conforming lot located at 240 Fern Street in Kenai ("the Lot") zoned Rural Residential. For the reasons set forth below, Mr. Wagoner's appeal is granted and the City of Kenai Board of Adjustment ("Board") denies the requested variance.

II. PROCEDURAL HISTORY

On February 24, 2016, the City of Kenai Planning Department received an application from the Stearns requesting a variance to construct a four-family dwelling on the Lot. [R. 37-44] The Stearns are the current owners of the Lot, legally described as Lot 4, Block 2, Thompson Park Subd. Addn. No. 1. [R. 31] The Stearns' application provides that the lot was subdivided in 1965 prior to the implementation by the City of minimum lot requirements. [R. 38] They assert that the Lot is only 9.25% under the minimum lot size required to develop a four-family dwelling without

a variance. [R. 38] The application states that many lots in the subdivision do not meet minimum lot size requirements and that without a variance the lots are essentially useless. [R. 38] The application explains that there are other multi-family dwellings in the neighborhood and that the Rural Residential zoning permits uses up to a four-family dwelling. [R. 38] The Stearns' building design meets all other zoning requirements and fits on the lot, promoting growth and development of the area, according to their application. [R. 39]

On March 23, 2016, the Commission held a public hearing on the variance. [R. 45-48] At that public hearing, the City Planner presented a Staff Report supporting the variance. [R. 31-33] Numerous neighbors spoke against the variance citing concerns regarding increased traffic, road sufficiency, decrease in adjacent property values, character of the neighborhood, objection to transient neighbors and lot size. [R.46-47] Ms. Stearns and Arnold Wagaman spoke in favor of the variance, noting that the Lot was only slightly too small to allow for a four-family dwelling without a variance. [R. 47] Written comment against the variance was also submitted. [R. 26] After the public hearing, the Commission passed Resolution No. PZ16-09 approving the variance by a four to two vote. [R. 48 and R. 53-55]

Thomas Wagoner, a City of Kenai resident, who asserts he is an owner of real property adversely affected by the decision, timely appealed the Commission's grant of the variance. [R. 9] The Board scheduled a hearing for the appeal on May 16, 2016. [R. 15] The record before the Commission was submitted for the Board's consideration. [R. 25-88]

On May 16, 2016, Board Members Pat Porter, Brian Gabriel, Robert Molloy, Henry Knackstedt, Tim Navarre and Mike Boyle were present for the hearing. At the hearing, public comment was allowed and Dorothy Ayer, Claudia Lemey, Rosie Thompson, Luke Dubber, Sid Ayre, Blane Elder and Polly Lipinski provided public comment against approval of the variance appealed. Appellant, Thomas Wagoner and Appellees, Mr. and Mrs. Stearns, as well as the City Planner, provided argument and testimony.

III. STANDARD OF REVIEW

Kenai Municipal Code provides that “the Board of Adjustment may reverse, remand or affirm, wholly or partly, or may modify the order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the body from whom the appeal is taken.”¹ The Board reviews the appeal *de novo*.² Therefore, no deference is giving to the decision by the Commission. While public testimony does hold evidentiary weight, the Board cannot base its decision solely on support or opposition by the public.³

The function of the Board is to determine whether the requirements for a variance have been met and grant or deny the variance on the conditions supported by the substantial evidence before it.⁴ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁵ The Board must make specific findings supporting its conclusions.⁶

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Requirement to Obtain a Variance.

The Stearns Lot on which they applied for the variance to construct a four-family dwelling is located in a Rural Residential (RR) Zone. [R. 31] Kenai Municipal Code states:

The RR zone is intended to provide for low density residential development in outlying and rural areas in a form which creates a stable and attractive residential environment. The specific intent in establishing this zone is:

- (1) To separate residential structures to an extent which will:
 - (A) Preserve the rural, open quality of the environment;
 - (B) Prevent health hazards in areas not served by public water and sewer.
- (2) To prohibit uses which would:
 - (A) Violate the residential character of the environment;
 - (B) Generate heavy traffic in predominantly residential areas.⁷

¹ KMC 14.20.290(f)(2).

² *Id.*

³ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

⁴ *Id.* At 931-932.

⁵ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

⁶ *Fields*, at 932. And KMC 14.20.180(c).

⁷ KMC 14.20.080.

Four-family dwellings are a permitted use in the RR Zone.⁸ However, the Lot is approximately 18,295 square feet [R. 31] and lots in the RR Zone are required to be a minimum of 20,000 square feet.⁹ Thompson Park Subdivision, Addition No. 1, in which the Lot is located, was developed prior to the minimum lot size requirement. [R. 32] The Lot is considered to be a nonconforming lot.¹⁰ Kenai Municipal Code 14.20.050-Nonconforming Lots, Structures and Uses, provides in relevant part:

(a) Explanation. When a lot, structure, or use legally exists prior to the adoption of the ordinance codified in this section but does not meet the requirements of this chapter, it shall be permitted to continue within the limits set forth in this section. Under such circumstances it is said to have “nonconforming” status. There are three (3) types of nonconforming status:

(1) Nonconforming Lots. The lot, width, or acreage is smaller than the minimum permitted in the zone in which it is located;

(2) Nonconforming Structures. The structure is designed to accommodate a nonconforming use or fails to meet yard, coverage, height, or other development requirements established for the zone in which it is located;

(3) Nonconforming Uses of Land and/or Structures. The use to which land and/or structures is being put is not a principal, accessory, or conditional use permitted in the zone in which it is located, and is not otherwise permitted in this chapter.

(b) Intent. There are lots, structures, and uses that exist and were lawful prior to the adoption of the ordinance codified in this section which would be prohibited under the terms of this chapter or future amendments. It is the intent of this chapter to permit these nonconformities to continue until they are removed. Such uses are declared by this chapter to be incompatible with permitted uses in the zones involved. It is further the intent of this chapter that nonconformities shall not be enlarged upon, expanded, nor extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same zone.

(c) Nonconforming Lots of Record. In any zone in which single-family dwellings are permitted, notwithstanding limitations imposed by other provisions of this chapter, a single-family dwelling and accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of the ordinance codified in this section. Such lot must be in separate ownership and not of continuous frontage with other lots in the same ownership. This provision shall apply even though such lot fails to meet the requirements for area or width, or both,

⁸ KMC 14.22.010.

⁹ KMC 14.24.010.

¹⁰ KMC 14.20.050(a)(1).

if the lot conforms to the regulation for the zone in which such lot is located. Exception to development requirements shall be obtained only through the variance procedures established in this chapter.

Because the development requirements require 20,000 square foot minimum lots to construct anything more than a single family residence, the Stearns must obtain a variance to construct a four-family dwelling.

B. Standards for Granting a Variance.

The intent of the City's variance process is to relax the development requirements "...to provide relief when literal enforcement would deprive a property owner of reasonable use of his [or her] real property."¹¹ The Alaska Supreme Court has summarized the purpose of variances as follows:

It is established in zoning law that general zoning ordinances, while designed to encourage the best overall use of land in a city or borough, may not be well adapted to deal with unusual individualized situations which sometimes occur and result in more stringent burdens being placed on some parcels of land than on others. Variance provisions thus fulfill a sort of "escape hatch" or "safety valve" function for the individual landholder who would suffer special hardships from the literal application of the terms of a particular zoning ordinance.¹²

The burden is on the applicant to show that the requirements for a variance are met.¹³ Kenai Municipal Code provides in relevant part that approval of a variance requires that all of the following conditions be met:

- (1) Special conditions or circumstances are present which are peculiar to the land or structures involved which are not applicable to other lands or structures in the same land use or zoning district.
- (2) The special conditions or circumstances have not been caused by actions of the applicant and such conditions and circumstances do not merely constitute pecuniary hardship or inconvenience.
- (3) The granting of the variance shall not authorize a use that is not a permitted principal use in the zoning district in which the property is located.
- (4) The granting of a variance shall be the minimum variance that will provide for the reasonable use of the land and/or structure.

¹¹ KMC 14.20.180(a).

¹² *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 631 (Alaska 1979) overturned on other grounds (internal citations omitted).

¹³ *Fields v. Kodiak City Council*, 628 P.2d 927, 931 (Alaska 1981).

- (5) The granting of a variance shall not be based upon other nonconforming land uses or structures within the same land use or zoning district.¹⁴

C. The Board Will Not Relieve the Stearns Burden to Prove that all Requirements of a Variance are Met Based on a City Employee's Alleged Statement about the Lot.

One issue that the Stearns raised is that they had been told by an employee in the Planning Department that they could build a four-family dwelling on the Lot. There was no written documentation presented to support their testimony and argument on this point. Mr. Wagoner argued that it was the applicant's duty to check the City ordinances themselves to see what was allowed or not allowed. The City Planner did not address this issue.

The Stearns' argument on this point is essentially equitable estoppel: that it would not be fair for the Board of Adjustment to make the Stearns prove that all requirements for a variance are met because a City employee told them that they could build a four-family dwelling on the Lot. However, the City employee's alleged statement made to the Stearns does not bar the City and its Board of Adjustment from applying the City's ordinances. The Board's function is not to consider equitable doctrines of estoppel, but instead the Board is limited in its decision to considering the City's zoning ordinances and enabling legislation.¹⁵ The City employee's alleged statement does not relieve the Stearns from their burden to prove that all of the requirements for a variance in KMC 14.20.180 are met.

D. Special Conditions or Circumstances are Present which are Peculiar to the Land or Structures Involved which are not applicable to other Lands or Structures in the same Land Use or Zoning District.

As provided above, the City code requires that all five conditions in KMC 14.20.180(c) must be met to grant a variance. The first condition requires that "special conditions or circumstances are present which are peculiar to the land or structures involved which are not applicable to other lands or structures in the same land use or zoning district."¹⁶ The Stearns

¹⁴ KMC 14.20.180(c).

¹⁵ *Fields*, at 931, citing *Carni v. Zoning Board of Appeals*, 164 Conn. 169, 319 A.2d 390, 393 (1972, cert denied 414 U.S. 831, 94 S.Ct. 64, 38 L.Ed.2d 66 (1973) and *City and Borough of Juneau*, at 631 (Alaska 1979) overturned on other grounds.

¹⁶ KMC 14.20.180(c)(1).

argued that special conditions are present that are peculiar to the land because the Lot is less than the required minimum lot size as subdivided in 1965. [R.38] The City Planner's Staff Report also supports this condition, noting that of the 35 lots in the subdivision, twelve others are classified as legal non-conforming based on their small size. [R.62] Mr. Wagoner did not directly address this particular issue, but stated his general opposition to the City Planner's recommendations.

The Board finds that this condition is met.¹⁷ While other lots in the subdivision are also legal non-conforming, the specific size of this lot creates a special or peculiar circumstance compared to other lots in the subdivision and Rural Residential Zoning District. Additionally, the Lot has City water and sewer which is uncommon in the RR zone also making the condition peculiar.

E. The Special Conditions or Circumstances have not been caused by Actions of the Applicant, however such Conditions and Circumstances do Merely Constitute Pecuniary Hardship or Inconvenience.

The second condition that must be met is that "[t]he special conditions or circumstances have not been caused by actions of the applicant and such conditions and circumstances do not merely constitute pecuniary hardship or inconvenience."¹⁸ There is no evidence or argument that the Stearns, the applicant for the variance, caused the special conditions or circumstances. The Lot was subdivided by another party in the 1960's, prior to the Stearns purchase. [R. 62] It is a more difficult determination however, whether the circumstances constitute merely a pecuniary hardship or inconvenience. The testimony from the Stearns indicate that commercial development of the Lot, as a four-family dwelling, was an economic decision and a part of their retirement plan. They argue that without the variance, the Lot is essentially useless. [R. 38] The Staff Report of the City Planner does not directly address whether the conditions or circumstances merely constitute and pecuniary hardship or inconvenience. [R. 61-63]

¹⁷ A finding to the contrary would prohibit granting any variance on the Lot, which would appear to contradict the intent of the City's code related to variances.

¹⁸ KMC 14.20.180(c)(2).

The majority of the Board does not agree with the conclusion of the Stearns that without a variance the Lot is essentially useless. Even without a variance, the code allows for development of a single family residence, which is consistent with the intent of the zoning district. Also, a lesser variance could be applied for, that could generate economic benefit.¹⁹ While the issue is more directly addressed in subsection G below, the Board finds that the Stearns have not met their burden of showing that the conditions and circumstances do not merely constitute pecuniary hardships. Other reasonable uses of the lot are available without a variance or with a more minimal variance.

F. The Granting of the Variance does not authorize a Use that is not a Permitted Principal Use in the Zoning District in which the Property is Located.

The third condition required by code is met.²⁰ A four-family dwelling is a permitted use in the zone. [R. 61]²¹ The granting of the variance does not authorize a use that is not a permitted principal use in the zoning district in which the property is located.

G. The Granting of a Variance would not be the Minimum Variance that will Provide for the Reasonable Use of the Land.

The majority of the Board finds that the variance applied for by the Stearns is not the minimum variance that would provide for the reasonable use of the land. The City's code requires that "[t]he granting of a variance shall be the minimum variance that will provide for the reasonable use of the land and/or structure."²² The minimum variance that would provide for the reasonable use of the land would be a two-family dwelling. A four-family dwelling is the maximum variance.²³

¹⁹ KMC 14.20.080(a) and 14.20.050(c).

²⁰ KMC 14.20.180(c)(3).

²¹ KMC 14.22.010.

²² KMC 14.20.180 (c)(4).

²³ The Land Use Table in KMC 14.22.010 allows for three permitted uses, a single-family, two- or three-family or four-family dwellings.

The Stearns testified and noted in their application that the proposed development fits well on the land and meets all other zoning requirements. [R. 39] The City Planner, in his Staff Report, noted that the Lot is (only) 1,705 square feet less than the minimum lot size requirement. [R. 62] However, neither the Stearns, nor the City Planner addressed the issue that the variance requested is to allow a four-family dwelling while the minimum variance that would allow a reasonable use of the land would be a two-family dwelling. Mr. Wagoner, as well as the Stearns testified that other Lots in the area contained two-family dwellings, but that there were no other four-family dwellings in the area. The fact that other lots in the subdivision contain single-family and two-family dwellings supports the conclusion that the minimum variance would be a two-family dwelling to allow a reasonable use of the land.

This finding is supported by the Alaska Supreme Court's Decision in *Pruitt v. City of Seward*,²⁴ in which a land owner applied for a variance for a canopy that extended into a setback. The Court in that case noted that the Board of Adjustment was required to find that a requested variance is "the minimum variance necessary to permit reasonable use of the land or structure."²⁵ The Board of Adjustment in the case found that a variance was not required because there was already reasonable use of the property as a boat yard and another structure was not needed on the property.²⁶ The Court stated that this alone was enough for the Board to deny a variance.²⁷ Similarly in this case, reasonable use of the Lot could be an allowed single-family dwelling or a variance for a two-family dwelling. Denial of a variance for a four-family dwelling on this lot does not deprive the Stearns of the reasonable use of their property.²⁸

H. The Granting of a Variance is not based upon other Nonconforming Land Uses or Structures within the Same Land Use or Zoning District.

Because the Board does not find that the conditions support the granting of the variance requested, the Board is not granting a variance based upon other non-conforming land uses or

²⁴ 152 P.3d 1130 (Alaska 2007)

²⁵ *Pruitt*, at 1138.

²⁶ *Id.* at 1139.

²⁷ *Id.*

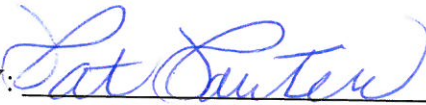
²⁸ KMC 14.20.180(a)

structures within the same land use or zoning district as prohibited by City code.²⁹ However, it is recognized by the Board that no other four-family dwellings are in the same subdivision, but that there are several other two-family dwellings.

V. CONCLUSION

City code requires that five conditions all be met in order to support the granting of a variance. Because the majority of the Board³⁰ finds primarily that the variance requested is not the minimum variance needed to provide for reasonable use of the land, and secondarily, that the conditions and circumstances merely constitute pecuniary hardship, the variance applied for is DENIED and the decision of the Commission is REVERSED.

DATED this 15th day of June, 2016.

BY: 
Pat Porter, Chair

Robert J. Molloy, Board Member
Tim Navarre, Board Member
Brian G. Gabriel, Board Member
Pat Porter, Mayor

Notice of Right to Appeal

This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty (30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

²⁹ KMC 14.20.180 (c)(5).

³⁰ This decision is not supported by Board Members Knackstedt or Boyle.

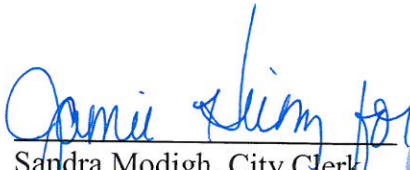
CERTIFICATE OF DISTRIBUTION

I certify that on 15 day of June, 2016, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

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