

NOTES

PLANNING COMMISSION
City and Borough of Juneau

APPEAL HEARING
December 3, 2013
5:00 p.m.

HEARING OFFICER
Dennis Watson

APL2013 0003 Appeal of the director's determination to issue BLD2013 0302, a building permit to construct a detached garage with living space.

APPELLANT: Eric Twelker

INTERVENOR: Keith Comstock

Commissioners present: Dennis Watson, Appeal Hearing Officer; Nathan Bishop, Jerry Medina, Dan Miller, Nicole Grewe (telephonically); Karen Lawfer (telephonically)

Commissioners absent: Chairman Mike Satre, Ben Haight

A quorum was present

Staff present: Hal Hart, Planning Director; Travis Goddard, Planning Manager; Senior Planner, Teri Camery; Senior Planner, Ben Lyman; City Clerk, Laurie Sica; Assistant City Attorney, Chris Orman

Mr. Watson informed the parties that each side is allowed thirty minutes to present its case. Time not used during that period may be reserved and used for rebuttal. At the conclusion of the hearing the Commission will go into executive session to make its decision, which will be presented in writing after it reconvenes.

MR. TWELKER (APPELLANT)

Mr. Twelker opened his remarks by stating the underlying theme of his argument is that everything the City does must be in compliance with the land use code.

He showed the plat of Mr. Comstock's property. He said their issue is the determination of the department coming up with the setback for the property. Supposedly the front was

determined to be in the driveway panhandle, and then it was measured down 30 feet or 25 feet and then the width was determined to be 30 feet in the middle of the driveway. Mr. Twelker said from a commonsense perspective that is ridiculous; nobody builds their house in the middle of their driveway. The context implies that clearly shouldn't be the case, deduced Mr. Twelker.

Aside from the commonsense perspective, this determination has a problem legally, as well, said Mr. Twelker. That problem is that it is not in conformance with the code. The code says, read Mr. Twelker, that; "The minimum lot width in a D1 zone is 150 feet." That 30 feet is way less than 150 feet, said Mr. Twelker, so it is not in compliance with the code.

There are two ways that a substandard width can be can compliance with the code, said Mr. Twelker. One is grandfathered, said Mr. Twelker, and the other is with a variance. The lot was created long after zoning was established, so it wasn't grandfathered. There is a variance. Mr. Comstock had come to the Planning Department and asked for a setback determination, said Mr. Twelker. Ms. Camery told him it was 7.5 feet based upon the 30 foot width. About two weeks later, said Mr. Twelker, referring to a memo, he came in to the department and asked what was going on, since he had seen some stakes in the ground near his property. Mr. Twelker said at that point Ms. Camery drafted the memo, and apparently decided that it was time to go for the variance to make it valid.

The variance says the lot is 80 feet wide in the north-south direction with the front of the lot being on the east side. The confusion here, said Mr. Twelker, is that the variance was not determined with the proper code section.

So instead of changing her analysis, she challenged the variance. The variance is a product of the Commission, said Mr. Twelker. What should have happened, said Mr. Twelker, is that she should have looked at the variance and changed her analysis. Instead, he said, she is attempting to change the variance.

Comment [CL1]: Ms. Camery?

What was submitted with the (original) application, said Mr. Twelker, was a rectangular lot with an 80 foot width, with the sides being on the north and south.

He said he thinks it is undisputed that the setback determination made in June, 2013, interpreted the lot to be 30 feet wide. He said it is also undisputed that 30 feet wide is less than a code-compliant width, and thus requires a variance. He said he also thinks it is undisputed that there is no other variance than this 2006-18, and that it is undisputed that the written word of that variance is that it is for an 80 foot width based on the plat that demands that the front and back be as shown. *(Indicates plat on wall) (Mr. Twelker reserves 15 minutes of his time for rebuttal)*

Comment [CL2]: Mr. Twelker?

MS. CAMERY (CITY)

Ms. Camery read that the burden of proof in an appeal rests with the party challenging the director's decision. In a hearing de novo proof shall be established by establishing a preponderance of the evidence, she read. The Commission may confirm, reverse, or modify the

director's decision, read Ms. Camery, or change the conditions which the director placed on approval. The Commission shall support its action with written findings, she added.

Issues raised in the appeal are use of the final plat that is different from the draft plat presented with the variance, misinterpretation of setback definitions, and misapplication of an approved variance for lot width.

Ms. Camery said both the first and third appeal issues are outside the Community Development Department's (CDD) authority to revise during the review of the building permit. The first issue refers to the 2006 subdivision, and the appeal period for that plat expired on July 30, 2006. The third issue refers to a 2006 variance. The appeal period for the variance expired on May 15, 2006.

Neither case was appealed in a timely manner, said Ms. Camery. Review of the building permit does not give CDD the authority to retroactively re-review cases or vacate recorded plats. The department did look at the history of the variance to see how the lot was created, said Ms. Camery. They noted an error in the variance. But in no way were the plat or the variance considered invalid, she said.

Issue number two raises questions about CDD's interpretation of setbacks for the building permit. This issue is open for review because the decision was appealed in a timely manner, said Ms. Camery. She said that CBJ Land Use Code 49.80.120 defines front lot line as the property line separating the lot from a street right-of-way other than an alley. She said it is worth noting that there is no relationship in this definition to likely locations for construction of a home or a building. Ms. Camery said they do not evaluate building sites in determining what is a front lot line.

According to code, a rear lot line means the property line opposite and most distant from a front lot line, except in the case of a corner lot, read Ms. Camery. A side lot line means any property boundary line not a front or rear lot line, she added.

Using the property plat on display, Ms. Camery illustrated the definitions she had just read. She said that while Mr. Twelker had asserted that the opposite property line should be the rear setback, that would only be applying part of the definition, she said. Applying the entire definition, which says "opposite and most distant from the front lot line", that would be the western property line, she said.

Since side lot line means "any property boundary line not a front or rear lot line", the remaining property lines according to code definition are side lot lines, she interpreted.

The last and perhaps most critical issue in the setback determination goes back to the reduction of the D1 zoning district side yard setback of 15 feet with the 50 percent reduction of that side yard setback to 7.5 feet.

Ms. Camery referred to CBJ Land Use Code 49.25.434 (j) Substandard lots:

If the lot width, lot depth, or both are less than required, the corresponding side or rear setbacks may be reduced to the same percentage that the lot width, depth, or both, bear to the zoning district requirements, except that in no case shall the side and rear yard setbacks be less than half those required by this chapter, or five feet, whichever is greater.

The key point here is how does the code dictate how lot width should be measured, said Ms. Camery. She read that, "Lot width means the horizontal distance between the side lines of a lot measured at right angles to its depth along a straight line parallel to the front lot line at the minimum required building setback line". She said she wanted to emphasize how the department got to the substandard side lot reduction of 50 percent. According to that code definition, she said, lot width needs to be measured at the front setback line.

The front lot line established by code has to be adjacent to the right-of-way. Ms. Camery showed the front lot line, and that the front setback line is 25 feet from the right-of-way, according to D1 zoning requirements. She displayed the section where the lot is 30 feet wide. She said that means it is subject to the maximum setback reduction of 50 percent. Therefore, she said, they took the 15 foot side yard setback down to 7.5 feet.

Ms. Camery showed the location of Mr. Comstock's garage in relation to the property line on the approved building site planning that the garage is located 13 feet from the side property line, instead of 7.5 feet, and eight feet from the south property line, also a side yard setback, instead of 7.5 feet. Ms. Camery said this is significantly further away from the property lines than code requires.

Ms. Camery noted the handwritten note on the bottom of the approved building site plan, shown in her presentation. The note says "see Govern set setback determination comments."

Ms. Camery said when she and then CDD employee Greg Chaney reviewed the setbacks on August 30, 2012, they wrote an analysis of those setbacks, and placed that analysis in the Govern database with that parcel in the setback section. A number of months later when Mr. Comstock came to CDD with his final building plans, the plan review was sent to Jonathan Lange, one of the CDD planners. He found the information in the file, applied the setback determination made by Ms. Camery and Mr. Chaney many months before, and issued the building permit.

Ms. Camery said she made this determination after extensive consultation with former Planning Manager Greg Chaney. Ms. Camery said she now has the longest tenure of anyone in the Planning Department, with 13 years of experience, now that Mr. Chaney has left, and Mr. Chaney had 16 years experience at CDD before he left the department. She said she brings this up to note that these setback determinations have been made the same way they have been

made on hundreds of other parcels in the Borough. She said this lot does have a panhandle, but it was established legally through the subdivision process. Other than that, there is really nothing unusual about the situation, she said. They have applied the definitions the same way that they always have, she added.

Ms. Camery repeated what she had said in her opening statement; "In a hearing de novo proof shall be established by establishing a preponderance of the evidence", she read from the code. "The Commission may confirm, reverse, or modify the director's decision, or change the conditions which the director placed on approval. The Commission shall support its action with written findings", repeated Ms. Camery.

The CDD recommends that the Planning Commission deny appeal APL2013 0003 as the Appellant has not, "established by a preponderance of the evidence" that the building permit was issued in error, said Ms. Camery.

QUESTIONS

Ms. Lawfer asked if the City had agreed to maintain the right-of-way, and inquired what the record was regarding this.

Ms. Camery said she cannot recall exactly what is in the record regarding this. They have confirmed that the City maintains the right-of-way. She said it is worth noting that to what extent they choose to maintain the right-of way is up to them. She said she understands from Mr. Twelker and others that they may or may not maintain the whole thing.

Mr. Lyman said the right-of-way was accepted for maintenance by the City and Borough of Juneau through the platting process, which is the process for determining whether or not to accept something for maintenance. The improvements were bonded for but the code allows for that and whether maintenance means there is a grader that goes down the road once every two years or a snow plow that goes down twice a day; it is accepted for maintenance by the City and Borough of Juneau; otherwise a new lot could not have been created that relied on frontage through the subdivision process, explained Mr. Lyman.

Mr. Medina asked Ms. Camery based upon her tenure with the CBJ if that is why she made the determination on the setbacks on the variance other than Mr. Lyman, who was the planner at the time this project came before the Commission.

Ms. Camery responded that it was random; Mr. Comstock came to the counter the day that she was planner on call.

INTERVENOR (MR. COMSTOCK)

Attorney Robert Spitzfaden, representing Keith Comstock, the owner of the property which is at issue in this appeal, told the Commission that his clients oppose the appeal, as they want to preserve the building permit they have been given by the City to construct a garage on their property.

Mr. Spitzfaden said he wanted to make clear that the Intervenor in this case is on the side of the City.

He said he wanted to review the important facts in the case beginning with the variance process in 2006 which ended up doing two things: it granted a variance from 150 to 80 feet for the north – south property lines, and it authorized the subsequent modification of the subdivision plat as it existed at the time of the variance. The lot was modified to create the panhandle, said Mr. Spitzfaden, with the 30 foot east-west front yard lot line as shown on the various plats.

Comment [CL3]: Mr. Spitzfaden?

The problem, said Mr. Spitzfaden, is when the plat went from the way it was in the variance to the way it ended up in the final plat, and when they created the little panhandle and made the 30 foot front yard setback where Dock Street meets the property; that it is less than the 150 feet that is required, for what is in this case the east-west property line.

Mr. Spitzfaden said that Mr. Twelker is right to the extent that they could have requested a variance at that stage, and that was not done. However, said Mr. Spitzfaden, the plat got finalized, and the appeal time of 20 days ran.

Now, in 2013, the Twelkers come in and complain because the plat is invalid because there is no variance for the east-west setback that is 30 feet when it should be 150 feet, said Mr. Spitzfaden. Because of that, they say, the Commission could not have authorized the building permit because the plat does not conform to Title 49, because there was no variance, said Mr. Spitzfaden.

That is the issue here, he said. There is a final plat that everyone has relied on, including the Comstocks. The plat does not have the variance. The question is, said Mr. Spitzfaden, there is this final plat, without any variance which could have been obtained in 2006. Can you now, seven years after the fact, go back and change the rules. Our position, said Mr. Spitzfaden, is no, you cannot go back and change the rules. Once the appeal time ran, it is finalized, he said.

Whether the action in 2006 was correct or not, once the appeal time had run out, it needs to be finalized, said Mr. Spitzfaden. If it is not finalized, he said, the public records in this state will be destroyed, he maintained. If everyone were to look back at public records and has to identify every Planning Commission record since incorporation, there would be chaos, said Mr. Spitzfaden. That is what this appeal is really about, he said.

Mr. and Mrs. Twelker had brought up that one must conform to the code, said Mr. Spitzfaden. The Comstocks were not here in 2006, said Mr. Spitzfaden. They just bought the property and relied on the plat, he said. The effect is that their property has a cloud on it now. They can't really do anything with it, he said. It destroys the value of their lot.

Mr. Spitzfaden cited several Alaska Supreme Court cases stipulating that they would not give that dramatic loss of value because there may have been a procedural mishap in years previous. Mr. Spitzfaden said they maintain that the plat is final and binding. There is nothing

in the Land Use Code that would authorize the Commission seven years after the fact to undo what was done in 2006. That is essentially what the argument is, said Mr. Spitzfaden.

Mr. Comstock relied on the plat when he purchased the property in 2012. There is no way they could have known about this unless they had gone back and researched records going back years before.

Mr. Twelker disregarded the Alaska Supreme Court cases because the issues were different, said Mr. Spitzfaden. True, the issues were different, but the point is that the Supreme Court has announced a very clear public policy which is how these decisions should be reached. And those things are to foster reliance on record titles, enhance marketability, promote simplicity and certainty in title transactions, said Mr. Spitzfaden. In this case, that means to give the plat finality, said Mr. Spitzfaden, so that it can't be attacked seven years later.

Ms. Camery was entitled and required by law to follow that finalized plat, said Mr. Spitzfaden. To do otherwise would put us in "never-never land", he said.

Mr. Spitzfaden addressed Mr. Twelker's statement that the front of the property should be his property line. That is not what Title 49 means when it says "context", said Mr. Spitzfaden. It is not referring to the physical setting of the lot, but to the context of the Title 49 definitions, he said. Otherwise, it would lead back to the issue of no finality, he said.

The Commission needs to say that it has a final plat, with definitions and that they apply, said Mr. Spitzfaden. Once the plat has been accepted as final, then it is apparent that it has been calculated accurately, and according to code, he said. Where Dock Street meets the property line makes the front, and everything else except the rear is sides, and because this is a waterfront lot, no setback is required at the rear, since that is where the water is.

Mr. Spitzfaden commented that Mr. Twelker had said the only two solutions in the process were either that it be grandfathered which does not apply here or that a variance must be obtained. He took issue with that, stating that such as this case, if there is a final decision, that creates the finality and you live with that finality. He added that Mr. Twelker's slide of a Notice of Decision left out the conditions, which have been met.

Mr. Spitzfaden addressed Ms. Lawfer's question about the agreement to maintain the right-of-way. He said there is something in the record which indicates the dedication of this right-of-way to the public use. That is a legal dedication of the property that gives the ownership up to the City for maintenance, said Mr. Spitzfaden.

The question is the finality and validity of the plat and we think it trumps the argument on how we should go back and review and find out any problems that might have occurred in the process of the final plat that got recorded in July of 2006, said Mr. Spitzfaden.

MR. TWELKER (APPELLANT) REBUTTAL

Mr. Twelker said he wanted to clarify something that he felt was misrepresented in Mr. Spitzfaden's argument. He said they are not challenging the plat. He said they are talking

about a setback determination that was made in 2013. That setback determination refers to a plat but the plat is a separate issue. The validity of that plat is beyond question, said Mr. Twelker. There is a question as to whether the plat was created in conformance with the variance, and Mr. Twelker said he had hoped to have Mr. Lyman testify on this.

Looking at the current plat displayed with the panhandle on it, Mr. Twelker said it was interpreted by Ms. Camery to have a 30 foot lot width and the previous plat, with the variance, was clearly an 80 foot width. The 30 foot plat was approved in a non-public process. In theory there is an appeal, but you have to go to the Planning Office every day to see if they have violated the law and violated the orders of the Commission which they seem to have done here, said Mr. Twelker.

Mr. Twelker said he believes that Mr. Lyman is an honorable person, and that he did not intend to reduce the setback on this property, by reducing the width to 30 feet and the setback to 7.5 feet. When the changes were made, Mr. Lyman believed there were no differences in the plats, said Mr. Twelker. This is an interpretation of a plat, not whether the plat is valid, said Mr. Twelker.

In order to interpret the plat, the key issue is what is the front, asserted Mr. Twelker. He said that Ms. Camery based her interpretation of the front of the lot based on the definition section of the Land Use Code *49.80.120* where it states the definitions don't apply where the context clearly indicates a different meaning, said Mr. Twelker. It doesn't make sense to use Title 49 to determine the width of the panhandle, he said. If you have a 30 foot width, that is noncompliant with the code, as the code minimum is 150 feet. The code minimum is part of the context, he said.

Something that produces a noncompliant lot width cannot be used, said Mr. Twelker. That is the context. The rules of a court are never interpreted so hard and fast as to overrule the substance of a law, said Mr. Twelker. He said he is not attempting to undo the plat. He said there is no issue about property rights. It is an issue about what the zoning setback is on this piece of property. To think that it is 7.5 feet all the way around is asking a bit much, he said.

Mr. Twelker said that both Mr. Spitzfaden and Ms. Camery ignored the issue that he felt is paramount and that is that everything the City does has to be in compliance with all of the provisions of the code. There is a lot of wriggle room in the definition section, said Mr. Twelker, but there is no wriggle room at all, he claimed, in the dimension section, other than a valid variance, and that cannot be ignored, it has to be considered.

If the interpretation of the director is that the lot is 30 feet wide, said Mr. Twelker, then it cannot be used. It can be used if the director changes his interpretation, said Mr. Twelker. He said they are advocating that the director change his interpretation to match the variance. That has nothing to do with the plat, nothing to do with the title, said Mr. Twelker. Then everything would be legal, but unfortunately the building permit would not work, he added, because the setback would be 25 feet on the east property line, it would be ok on the south it would just be the north.

Mr. Twelker said that Ms. Camery had advocated that the Commission had misinterpreted the code when it passed the variance. That was clearly a mistake on her part, he said. That plat was passed in July of 2006. The Commission never saw it and the public never saw it, he said. When people come to the planning office and bring their maps and ask what setbacks are on the property, they count on the office to tell them what the setback is. Those are zoning questions that are relied upon, said Mr. Twelker.

The idea that the zoning that took place in 2006 was an accident makes a mockery of zoning, said Mr. Twelker. He said that his understanding is that there is a different process for the acceptance for maintenance. The driveway is not maintained. There has never been a snow plow down it, and Mr. Twelker said he thinks there is a different process, although he added he is not sure if it is here or there. He added from a commonsense perspective it is a driveway, not a road.

Mr. Twelker said before the variance the setback was 25 feet. They did not appeal the variance because they were not aware of the variance.

QUESTIONS

Ms. Lawfer asked if he was aware of any building going on with the property since 2007.

Mr. Twelker responded that the variance authorized the applicant, Mr. Foster, to subdivide the property into two pieces which he did. There was a house and driveway on the property which were already constructed. Mr. Foster put up a bond to realign Dock Street which would have been a disaster, he said.

Mr. Watson asked if any maintenance had ever be requested on Dock Street.

Mr. Twelker said they are not talking about Dock Street, just a small driveway area.

Mr. Watson said he could not determine what the tree line was in the area.

Mr. Twelker said the trees may be on city property. He said the trees may be along his woodshed and City property.

Mr. Twelker said he felt the appeal should be granted. He said the director needed to bring his interpretation in line with the variance.