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DATE: June 5, 2017

TO: Committee of the Whole of the Planning Commission

FROM: Laura A. Boyce, AICP, Senior Planner
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Community Development Department

SUBJECT: AME2016 0002
Update regarding proposed Title 49 Revisions to Variances

Attachments:

- Attachment A Existing Variance Code Requirements
- Attachment B Olmo, LLC. v. Board of Adjustment Appeal Assembly Decision
- Attachment C Variance Case History Types and Approvals Since 1987

Introduction

Staff recommends changes to Title 49 regarding variances. The intent of a variance is to provide relief from Title 49 Land Use Code requirements in cases of hardship when exact application of the Code requirement would place an unreasonable burden on the property owner. Over time, the variance has become a tool for flexibility instead, offering relief to property owners to relax Code requirements or even waiving requirements outright. Because it is the only tool available to modify Code requirements as they pertain to individual properties, the variance process has been used often and broadly and, in some cases, inappropriately.

Staff has been working with the Title 49 Committee over the past year to propose changes to the Land Use Code (“Code”) to provide clarity regarding variances, as well as to provide more flexibility in Code, since it is evident that this is a community desire. CDD would like feedback from the full Commission regarding proposed changes to variances. The proposed changes to Title 49 regarding variances are as follows:

- Amend the variance criteria to provide clarity and reduce any potential subjectivity,
- Make it clear what is and isn’t variable,
- Rename “de minimis variance” to “administrative variance” to provide clarity,
- Remove design standards as being variable, and
- Make code changes elsewhere in Title 49 to build in flexibility and reduce the need for variances.

Criteria Changes

Attachment A includes the current Title 49 variance requirements. The purpose of the proposed criteria amendments is to deter the inappropriate use of the variance process where no extraordinary situation exists.

Existing criteria

There are six primary criteria which must be met in order to approve a variance application, with criterion 5 having four sub-criteria. Only one of the sub-criteria must be met in order to meet criterion 5. A discussion of the current criteria is included below.

Criterion 1

The relaxation applied for or a lesser relaxation specified by the board of adjustment would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners;

Criterion 1 analyzes whether the applicant is requesting the minimum variance from the specific regulation that would allow them to develop their property similarly to other properties in the neighborhood and meet code requirements.

Criterion 2

Relief can be granted in such a fashion that the intent of this title will be observed and the public safety and welfare preserved;

Criterion 2 analyzes whether public safety and welfare requirements, which are fundamental to the Land Use Code, will still be met. These concepts are also addressed in CBJ 49.05.100, *Purpose and Intent*.

Criterion 3

The authorization of the variance will not injure nearby property;

This criterion addresses whether the requested variance will cause harm to nearby property.

Criterion 4

The variance does not authorize uses not allowed in the district involved;

This criterion addresses whether the granting of the variance will allow a prohibited use from being allowed in the district. Variances regarding use, density, lot coverage, and those establishing construction standards are not allowed.

Criterion 5

(5) *Compliance with the existing standards would:*

- (A) *Unreasonably prevent the owner from using the property for a permissible principal use;*
- (B) *Unreasonably prevent the owner from using the property in a manner which is consistent as to scale, amenities, appearance or features, with existing development in the neighborhood of the subject property;*
- (C) *Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive; or*
- (D) *Because of preexisting nonconforming conditions on the subject parcel, the grant of the variance would not result in a net decrease in overall compliance with the land use code, Title 49, or the building code, Title 19, or both;*

Sub-criterion A analyzes whether compliance would unreasonably prevent the owner from using the property for a permissible principle use. This is one of the more challenging criteria to meet since most lots can accommodate a permissible principle use that complies with the standards and regulations of Title 49 with the appropriate design choices. This concept is important because the city should ensure there is not a taking of property.

Sub-criterion B analyzes whether compliance would prevent the owner from developing their lot in a manner similar to existing development in the neighborhood. This criterion allows new development to take advantage of the preexisting nonconforming conditions of a neighborhood should there be any and also benefit from the conforming development on lots that do not have any hardship. This criterion is similar to the justice and equality concepts found in criterion 1, but from the perspective of the applicant.

Sub-criterion C analyzes any topographic constraints that may make development so expensive that a variance is warranted. This criterion is unique in that it is rare to allow pecuniary hardship as a reason to grant a variance. Alaska Statute Title 29 granting land use regulation powers to local municipalities specifically states that a variance may not be granted solely for pecuniary hardship. It is also difficult to objectively assess what is unreasonably expensive for a property owner.

Sub criterion D analyzes whether the variance would create a net decrease in overall compliance with both the land use code and the building code when taking into account preexisting nonconforming conditions. Therefore, if an owner wanted to reconstruct a dilapidated garage on a nonconforming footprint, there would be a net increase in compliance because Title 19, the building code, standards and regulations would be met while there would be a neutral effect on Title 49, the land use code. This criterion can allow for the continuation of nonconforming conditions.

The overall fundamental concept analyzed in criterion 5 is whether the regulations will result in a taking of the property.

Criterion 6

A grant of the variance would result in more benefits than detriments to the neighborhood.

This criterion is challenging for staff as it asks them to identify benefits and detriments supported by Title 49 that are not simply subjective.

Olmo, LLC. V. Board of Adjustment Assembly Appeal Decision

The recent Olmo, LLC. appeal resulted in a decision that affects all variances. The Assembly ruled that in a variance, the applicant must first show hardship and practical difficulties resulting from an extraordinary situation or unique physical feature affecting only a specific parcel of property prior to determining if a proposal meets the six criteria for granting a variance. (See Attachment B)

This decision affects CBJ 49.20.250(b), Variances other than de minimis. That section states the following:

Where hardship and practical difficulties result from an extraordinary situation or unique physical feature affecting only a specific parcel of property or structures lawfully existing thereon and render it difficult to carry out the provisions of this title, the board of adjustment may grant a variance in harmony with the general purpose and intent of this title....

Prior to this decision, variance decisions were generally made by evaluating the criteria only. Analysis regarding this "threshold," as determined by the Olmo decision, was not specifically made. Some variance cases over the years were analyzed with both the criteria and the hardship factor in the threshold, but this was not common practice or consistently done.

In light of this, the Planning Commission may wish to incorporate the threshold into a new criterion. The Title 49 Committee has not addressed this threshold finding as the Olmo decision is recent.

Proposed Changes

Staff met with the Title 49 Committee in 2016 and 2017 to discuss proposed changes to CBJ 49.20.250, *Grounds for variances*. In addition to changes in the criteria to be applied by the Board of Adjustment, the committee wanted a list of what code sections cannot be varied. The committee also wanted staff to propose what changes would be made to make the code more flexible to reduce the need for variances. The grounds for variances and variance criteria below reflect the changes requested by the committee. As stated above, these changes did not reflect the Olmo ruling as it was not yet decided.

Proposed variance grounds and criteria

CBJ 49.20.200 Variances other than administrative. Where hardship and practical difficulties result from an extraordinary situation or unique physical feature affecting only a specific parcel of property or structures lawfully existing thereon and render it difficult to carry out the provisions of this title, the board of adjustment may grant a variance in harmony with the general purpose and intent of this title. A variance may not be granted solely to prevent financial hardship or inconvenience. The granting of a variance shall not allow uses prohibited in the district.

A variance may not vary those standards concerning;

- *use of land or structures*
- *housing density*
- *lot coverage*

- *PUD standards*
- *cottage housing standards*
- *common wall standards*
- *construction standards as found in CBJ 49.35*
- *accessory apartment standards*
- *vegetative cover*
- *financial responsibility*
- *mobile home park standards*
- *Historic District standards and guidelines*

A variance may be granted after the prescribed hearing and after the board of adjustment has determined that:

- (1) Special conditions and circumstances exist that are peculiar to the land or structures or use involved and are not applicable to other lands and structures in the same district.*
- (2) That compliance with the existing standards would unreasonably limit the owner from using the property for a permissible principal use.*
- (3) The deviation from the requirement of this title is no more than is necessary to permit a reasonable use of the property.*
- (4) Relief can be granted in such a fashion that the intent of this title found in CBJ 49.05.100 will be observed.*
- (5) The authorization of the variance will not injure nearby property.*

Other Changes

The Land Use Code, Title 49, states that a variance is required to vary “*dimensions or designs standards (sic) of this title*” (CBJ 49.20.200). CBJ 49.20.250(b) further clarifies that:

A variance may vary any requirement or regulation of this title concerning dimensional and other design standards, but not those concerning the use of land or structures, housing density, lot coverage, or those establishing construction standards.

Lacking additional parameters regarding these categories, staff has applied these categories quite broadly since 1987. In fact, previous policy has been that almost any section of Code, other than a construction standard, use, or density, may be varied. The issue with varying design standards – those standards that result in how a project is designed – is that there usually is not a true hardship involved; the applicant usually wants greater flexibility than that allowed by Code. Allowing modifications during the project approval process might be a better way to provide greater flexibility.

Attachment C provides a summary of the types of variances applied for since 1987, as well as the Board of Adjustment decision results by type. Since the Land Use Code was updated in 1987

with the design and dimensional standard categories for variances, applying it broadly has resulted in the following approval of design standards:

- Parking Requirements -
 - allowing back out parking where it isn't allowed
 - modifying parking space sizes and drive aisle dimensions
 - allowing greater distance of off-site parking
 - reduction in the number of required parking spaces
- Access Requirements –
 - allowing subdivisions not fronting on a publicly maintained right-of-way
 - allowing lot access through private easement
 - allowing subdivision along an unbuilt platted right-of-way
 - reduction to minimum 30 feet of frontage requirement
 - allowing a common driveway rather than an interior access street for subdivisions along an arterial
 - allowing lots less than 36,000 sf (D-1 lot size requirement) when subdivision is proposed along an arterial
 - allowing subdivision for lots that won't have direct access to a publicly maintained right-of-way
- Panhandle Subdivision Requirements –
 - reduction in lot sizes
 - allowing separate driveways instead of a shared common driveway
 - allowing more than two changes in direction
 - allowing a reduction in the panhandle portion width
- Planned Unit Developments –
 - allowing encroachment into required perimeter buffer
- Canopies –
 - allowing increases in canopy height
 - approving a canopy waiver when one is required to be provided
- Mobile Home Parks –
 - reduction in size of minimum required playground area
 - allowing setback reductions
- Cottage Housing –
 - allowing different floor area ratios than code specifies
- Accessory Apartments -
 - allowing an increase in apartment size
- Common wall
 - allowing reduced lot sizes
- Vegetative cover –
 - allowing reductions to the minimum vegetative cover requirements

As outlined above, the variance has been used quite broadly to provide development flexibility. In many cases, making the case that there is a true hardship to justify many of these Code design standard relaxations or waivers is difficult to do.

No consensus has been reached from the Title 49 Committee whether design standards should remain variable or not. CDD recommends removing design standards as something that can be varied. Instead of using the variance as a flexibility tool, CDD would like to amend the Code to allow for more design flexibility. The following chart outlines proposed changes to Code to provide more flexibility. Since a number of recent development types, such as planned unit developments (PUDs) or mobile home parks, go through the conditional use permit review process for consideration and approval, staff recommends that this process and review also be used for consideration of design modifications as well.

Type	Variable?	Code Amendment
Setbacks	Yes	Add additional exceptions to allow such encroachments as ADA requirements as well as exterior energy efficiency additions
Lot width	Yes	
Lot depth	Yes	
Sign standards	No	
Parking	In some cases	A parking waiver process was also recently adopted into Code
Eagle nest buffer	?	Proposed code change to provide flexibility
Streamside buffer	?	Proposed code change to provide flexibility
PUD standards	No	Can use the existing Conditional Use process to modify design requirements
Cottage Housing standards	No	Can use the existing Conditional Use process to modify design requirements
Panhandles	Yes – lot width, depth, setbacks	Staff is currently working on Code changes to provide more flexibility regarding the panhandle option of lot design

Bungalow lot/housing standards	No	Cannot be varied – would no longer meet the intent or definition of the bungalow requirements
Common wall standards	No	Cannot be varied – would no longer meet the intent or definition of the common wall requirements
Accessory apartment standards	No	Cannot be varied
Vegetative Cover		Previous amendment to Code removed Mixed Use district from vegetative cover requirements. Future amendment to vegetative cover to provide clarity and potential reductions
Financial responsibility requirements – CBJ 49.55	No	
Public and Private Improvements – CBJ 49.35	No	In limited cases, the Planning Commission may waive certain requirements. The Code also gives discretion to the CBJ Public Works and Engineering Director to waive or modify limited requirements.
Mobile home park requirements	No	Can use the existing Conditional Use process to modify design standards
Historic District design standards and guidelines	No	

ARTICLE I. APPEALS

49.20.110 Appeals to the planning commission.

(a) Review by the commission of a decision of the director, may be requested by filing a notice of appeal stating with particularity the grounds therefor with the department within 20 days of the date of the decision appealed. The notice shall be considered by the commission at a regular scheduled meeting. The department and any aggrieved person, including the developer, may appear at that meeting and explain to the commission why it should hear the appeal. The appeal shall be heard unless it presents only minor or routine issues and is clear from the notice of appeal and any evidence offered at the consideration thereof, that the decision appealed was supported by substantial evidence and involved no policy error or abuse of discretion.

(b) If the commission decides to hear the appeal, it shall announce whether it intends to review the entire decision, or merely a portion thereof and whether review shall be de novo or on the record. If the commission decides to hear the appeal, it shall give public notice thereof in a newspaper of general circulation in the municipality. The department shall prepare the record on appeal, which shall consist of the original application and supporting materials, written public comment thereon, and all notes, memoranda, minutes and other department material in relation thereto. The burden of proof in the appeal shall be on the party challenging the decision of the director. In a hearing de novo, proof shall be established by a preponderance of the evidence. If the appeal is heard on the record, argument may be heard, but no evidence outside the record shall be admitted and the decision of the department shall be upheld if there is substantial evidence in support thereof and no policy error or abuse or discretion therein. 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.

(c) Upon its own motion, the commission may certify a case directly to the assembly without review, hearing or recommendation.

(Serial No. 87-49, § 2, 1987; Serial No. 92-10, § 3, 1992; Serial No. 95-35, § 4, 1995; Serial No. 97-01, § 6, 1997)

49.20.120 Appeal to the assembly.

Appeal to the assembly is a matter of right. Unless ordered otherwise by the commission or the assembly, a decision by the commission shall not be stayed pending appeal, but action by the appellee in reliance on the decision shall be at the risk that the decision may be reversed on appeal. The appeal of a commission decision not to hear a case shall be limited to that issue, the remedy for which shall be a remand to the commission for a hearing on the merits of the case. Appeals shall be conducted according to chapter 01.50 of this Code, except as provided in this section.

(Serial No. 87-49, § 2, 1987; Serial No. 91-41, § 2, 1991)

ARTICLE II. VARIANCES

49.20.200 Variance.

A variance is required to vary dimensions or designs standards of this title.

(Serial No. 87-49, § 2, 1987)

49.20.210 Submittal.

Except as provided in this article for de minimis variances, an application for a variance shall be submitted to the board of adjustment through the department.

(Serial No. 87-49, § 2, 1987; Serial No. 95-33, § 2, 1995)

49.20.220 Scheduling and fee.

(a) If the director determines that the variance applied for is de minimis, the application shall be administered by the department according to subsection 49.20.230(a) and subsection 49.20.250(a).

(b) If the director determines that the variance applied for is other than de minimis and the application is complete, it shall be scheduled for public hearing. If the application is filed in con-

junction with a major development permit, a separate public notice shall not be required and the variance fee shall be reduced by 20 percent. For separate variance applications, a fee and public notice according to section 49.20.230 shall be required.

(Serial No. 87-49, § 2, 1987; Serial No. 95-33, § 3, 1995; Serial No. 2010-15(c), § 2, 5-19-2010)

49.20.230 Public notice.

(a) Public notice according to subsection 49.20.250(a)(1)(C) shall be required for consideration or issuance of a de minimis variance.

(b) For variances other than de minimis, public notice according to section 49.15.230 shall be given prior to a hearing on the application by the board of adjustment, except that the placement of a sign on the subject lot is not required.

(Serial No. 87-49, § 2, 1987; Serial No. 95-33, § 4, 1995)

49.20.240 Board of adjustment action.

The board of adjustment shall hear all variance requests other than those administered by the director as de minimis and shall either approve, conditionally approve, modify or deny the request based on the criteria in section 49.20.250(b) of this chapter.

(Serial No. 87-49, § 2, 1987; Serial No. 95-33, § 5, 1995)

49.20.250 Grounds for variances.

(a) *De minimis variances.*

(1) Where a minor setback infraction could be corrected only at unreasonable expense or inconvenience the director may, after taking into account the views of the owners of adjoining property, and upon a finding that the infraction was not the result of a deliberate effort to evade the dimensional requirement, grant a de minimis variance in harmony with the general purpose and intent of this title. A de minimis variance may be granted after it is shown that all the following conditions have been met.

(A) The variance is for one or more projections into yard setbacks, none of which extend beyond 25 percent of required setback distance.

(B) The de minimis variance would not aggravate an infraction previously granted a variance.

(C) The applicant submits on forms provided by the department written statements from the owners of adjoining property, each acknowledging that the owner has been notified of the application. In lieu of statements provided by the applicant, the department will provide at least five days notice by mail to each such owner.

(D) The applicant submits a certified, as-built survey to scale, showing all lot line locations, building dimensions, orientations, setbacks, and other distances and features relevant to the requested relief.

(b) *Variances other than de minimis.* Where hardship and practical difficulties result from an extraordinary situation or unique physical feature affecting only a specific parcel of property or structures lawfully existing thereon and render it difficult to carry out the provisions of this title, the board of adjustment may grant a variance in harmony with the general purpose and intent of this title. A variance may vary any requirement or regulation of this title concerning dimensional and other design standards, but not those concerning the use of land or structures, housing density, lot coverage, or those establishing construction standards. A variance may be granted after the prescribed hearing and after the board of adjustment has determined that:

(1) The relaxation applied for or a lesser relaxation specified by the board of adjustment would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners;

(2) Relief can be granted in such a fashion that the intent of this title will be observed and the public safety and welfare preserved;

(3) The authorization of the variance will not injure nearby property;

- (4) The variance does not authorize uses not allowed in the district involved;
- (5) Compliance with the existing standards would:
 - (A) Unreasonably prevent the owner from using the property for a permissible principal use;
 - (B) Unreasonably prevent the owner from using the property in a manner which is consistent as to scale, amenities, appearance or features, with existing development in the neighborhood of the subject property;
 - (C) Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive; or
 - (D) Because of preexisting nonconforming conditions on the subject parcel, the grant of the variance would not result in a net decrease in overall compliance with the land use code, title 49, or the building code, title 19, or both; and
- (6) A grant of the variance would result in more benefits than detriments to the neighborhood.

(Serial No. 87-49, § 2, 1987; Serial No. 95-33, § 6, 1995)

49.20.260 Conditions of approval.

The board may attach to a variance conditions regarding the location, character and other features of the proposed structures or uses as it finds necessary to carry out the intent of this title and to protect the public interest.

(Serial No. 87-49, § 2, 1987)

49.20.270 Expiration and extensions of approval.

Expiration and extensions of variances shall be governed by the procedures and standards established for development permits in chapter 49.15, article II.

(Serial No. 87-49, § 2, 1987)

ARTICLE III. INTERPRETATIONS

49.20.300 Authorization to interpret.

The board of adjustment is authorized to interpret the zoning map and the text of this title and to pass upon questions of lot lines or district boundary lines and similar questions presented by the department or a property owner directly concerned.

(Serial No. 87-49, § 2, 1987)

49.20.310 Submittal.

An application for a map or text interpretation shall be submitted to the board of adjustment by filing a copy of the application with the director in the department of community development. The application shall contain information sufficient to enable the board to make the necessary interpretation. The interpretation shall be scheduled for consideration by the commission. Individual mailed notice of boundary line interpretations shall be provided to adjacent property owners.

(Serial No. 87-49, § 2, 1987)

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)

BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

OLMO, LLC,

Appellant,

vs.

CBJ BOARD OF ADJUSTMENT,

Appellee.

Appeal of:
Notice of Decision
CDD File No. VAR2015 0030

DECISION ON APPEAL

Appellant Olmo, LLC, filed an appeal of the Planning Commission sitting as the Board of Adjustment's (Board) decision to deny Olmo's application for a variance regarding frontage and access requirements for Olmo's proposed subdivision.

The record was prepared by the Community Development Department based upon the materials considered by the Board and application of CBJ 01.50.110.

The issues on appeal were as set forth in the presiding officer's July 25, 2016, Order re Joint Stipulation of Issues on Appeal and Briefing Schedule.

The parties filed briefs on the merits of the appeal. On December 14, 2016, the Assembly heard oral argument from the parties. The Assembly deliberated in closed session, and directed the Municipal Attorney to prepare a draft decision based on the Assembly's findings. As required by the CBJ Appeals Code, the draft decision was circulated to the parties for comment.

The Assembly, having been fully advised, denies the appeal for the reasons stated below.

I. Burden of Proof and Standard of Review.

Under CBJ Code, variance applications are decided by the Planning Commission sitting

as the Board of Adjustment. (CBJ 49.20.240.) The Board’s decision is appealable to the Assembly, and appeals are heard in accordance with CBJ Chapter 01.50. (CBJ 49.20.120.) The appellant bears the burden of proof. (CBJ 01.50.070(b).)

In this case, the parties stipulated to two issues on appeal:

1. Whether the Board’s interpretation of CBJ 49.20.250 was reasonable. The parties have agreed that the Assembly should apply the reasonable basis standard of review to this question.¹

2. Whether the Board’s decision to deny the variance was supported by substantial evidence. In this context, “substantial evidence” is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (CBJ 01.50.010.) The Alaska Supreme Court has held that with respect to decisions made within its “sphere of expertise,” a Planning Commission’s decisions are “entitled to considerable deference.”² In reviewing the Commission’s decisions (or the Commission sitting as the Board of Adjustment as is the case here), a “presumption of validity” must be applied.³ When a fact-finding agency such as the Board chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion, the Board’s findings should be affirmed on appeal.⁴ This direction, in conjunction with the standard of appeal articulated in CBJ 01.50, suggests that the role of the Assembly on appeal is limited. The Assembly does not re-weigh the evidence or second-guess the Board’s findings as long as there is evidence in the record to support those findings.

¹ See, *City of Kenai v. Friend of Recreation Ctr.*, 129 P.3d 452 (Alaska 2006).

² *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995).

³ *South Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993).

⁴ *Anderson v. State*, 26 P.3d 1106 (Alaska 2009).

II. Relevant Facts.

CBJ Code requires that lots have direct and practical access to a publicly maintained right-of way. CBJ 49.15.424. As explained in the March 3, 2016, staff report, Olmo filed a variance application in connection with a proposed three-lot subdivision (intended to be further subdivided into six common wall lots.) Although Olmo's parcel abuts North Douglas Highway, it does not have direct access to a right-of-way. The parcel is currently accessed via a shared driveway located within a 20 foot easement that travels over two neighboring lots.⁵ Thus, the only way for the proposed subdivision to meet the requirement for frontage and access called for by CBJ 49.15.424 would be for Olmo to create direct access from each lot to North Douglas Highway or to construct a public street dedicated to serve the subdivision. In support of the variance application, Olmo argued that neither option was practical due to the extreme steepness of the terrain leading to its parcel.

III. The Board's Interpretation of CBJ 49.15.424 Was Reasonable.

Though not specifically identified as an issue on appeal, Olmo argues that the only reason a variance was needed in this case was because of the Board's misinterpretation of CBJ 49.15.424. (Olmo Opening Brief at p. 28.)

CBJ 49.15.424, Access, provides in part:

(b) *Publicly maintained access within a subdivision.* Unless otherwise provided, all lots must either have direct and practical access to, and a minimum of 30 feet of frontage on, the right-of-way, or the minimum lot width for the zoning district or use as provided in CBJ 49.25.400. These requirements for frontage and access can be accomplished by:

⁵ One of the neighboring lots is owned by the only member of Olmo, LLC. The owners of the other parcel objected to Olmo's variance application. As noted in the Board's brief, the driveway used to access Olmo's parcel is located almost entirely on this third lot.

- (1) Dedication of a new right-of-way with construction of the street to public standards. This street must connect to an existing publicly maintained street;
- (2) Use of an existing publicly maintained street;
- (3) Upgrading the roadway within an existing right-of-way to public street standards. This existing right-of-way must be connected to another publically maintained street; or
- (4) A combination of the above.

We find the Board’s interpretation of CBJ 49.15.424(b), as articulated in its Opposition Brief, reasonable. (Opposition Brief at pp. 9 – 12.) CBJ 49.15.424(b) is properly read to apply to access *within* a subdivision (as opposed to access *to* a subdivision as provided by 49.15.424(a)). The code explicitly requires lots to have direct and practical access to a public right-of-way and either a minimum of 30 feet of frontage on the right-of-way or the minimum lot width provided for in CBJ 49.25.400, Minimum dimensional standards. We cannot find ambiguity in the ordinance as proposed by Olmo.⁶ We find the Board’s interpretation of 49.15.424(b) to require each lot of the subdivision to have direct and practical access to a public right-of-way reasonable in light of the plain language of the text, and, as argued by the Board in its Opposition, the legislative history and the general policy reasons justifying the imposition of frontage requirements.

IV. The Board’s Interpretation of CBJ 49.20.250 Was Reasonable.

We find the Board’s application of CBJ 49.20.250 reasonable in light of the plain language of the ordinance, and consistent with the Alaska Supreme Court’s analysis of the same code section in *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979).

The standards for granting a variance application are set forth in CBJ 49.20.250. First, an

⁶ See *Ward v. State, Dept. of Public Safety*, 288 P.2d 94 (Alaska 2012); *City of Homer v. Gangl*, 650 P.3d 396 (Alaska 1992); *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979).

applicant must show that "hardship and practical difficulties result[ing] from an extraordinary situation or unique physical feature" make it difficult for the owner to comply with the provisions of Title 49. Once the Board determines an applicant has made a sufficient showing that this threshold question has been met, a variance may be granted if the Board determines that:

- (1) The relaxation applied for or a lesser relaxation specified by the board of adjustment would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners;
- (2) Relief can be granted in such a fashion that the intent of this title will be observed and the public safety and welfare preserved;
- (3) The authorization of the variance will not injure nearby property;
- (4) The variance does not authorize uses not allowed in the district involved;
- (5) Compliance with the existing standards would:
 - (A) Unreasonably prevent the owner from using the property for a permissible principal use;
 - (B) Unreasonably prevent the owner from using the property in a manner which is consistent as to scale, amenities, appearance or features, with existing development in the neighborhood of the subject property;
 - (C) Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive; or
 - (D) Because of preexisting nonconforming conditions on the subject parcel, the grant of the variance would not result in a net decrease in overall compliance with the land use code, title 49, or the building code, title 19, or both; and
- (6) A grant of the variance would result in more benefits than detriments to the neighborhood.

(CBJ 49.20.250(b).)

Significantly, when asked what hardship would result if the variance were not granted, Olmo told the Board that it would be 'unable' to proceed with the subdivision because of "financial hardship" and that "constructing a public street to the lots is not financially feasible, and the street would have to pass through an adjacent lot that the developer does not own." In analyzing the CBJ's variance ordinance, the Alaska Supreme Court in *City & Borough of Juneau*

v. Thibodeau, 595 P.2d 626, 635-636 (Alaska 1979) stated:

Peculiarities of the specific property sufficient to warrant a grant of a variance must arise from the physical conditions of the land itself which distinguish it from other land in the general area. The assertion that the ordinance merely deprives the landowner of a more profitable operation where the premises have substantially the same value for permitted uses as other property within the zoning classification argues, in effect, for the grant of a special privilege to the selected landowner. We do not believe that the variance provision in the instant ordinance is intended to achieve such an inequitable result. Rather, where the ordinance equally affects all property in the same zoning classification, relief from the general conditions of the governing law properly must come from the assembly through an amendment to the zoning code.

It is undisputed that Olmo's lot presents a challenging topography, but we find it significant that Olmo has the ability to develop its property without the need to subdivide and thus, without requiring improved access

While it would have been helpful if the Board's finding on this threshold issue had been more clearly articulated, we nevertheless find that the Board's decision is supported by substantial evidence for the reasons explained below.

V. The Board's Decision to Deny the Variance Was Supported by Substantial Evidence.

The Board considered whether the variance should be granted by applying the criteria articulated in CBJ 49.20.250(b). After consideration of the issue at three separate hearings held on March 8, 2106, March 22, 2016, and April 12, 2016, the Board adopted the findings made in the March 3, 2016, staff report that the variance would not meet the standards in CBJ 49.20.250(b)(1), (2), (5) or (6). Olmo argues on appeal that the Assembly should reverse the Board's decision as not supported by substantial evidence.

A. CBJ 49.20.250(b)(1).

The Board determined that granting Olmo a variance to the direct and practical access requirement would be inconsistent with justice to other property owners. In reaching this

conclusion, the Board considered the history behind the approval of Olmo’s existing driveway easement in 1982 (both the fact that it was to serve only a single family dwelling and that it was approved with the intention that a public street would be built if future development were to occur), the policy considerations embodied in the comprehensive plan and code behind the requirement for direct and practical access, and the safety concerns that arise when lots do not meet Title 49’s access requirements. Based on these considerations, we find the Board’s determination with respect to CBJ 49.20.250(b)(1) was supported by substantial evidence.

B. CBJ 49.20.250(b)(2).

The Board determined that neither the intent behind Title 49, nor public safety and welfare, would be preserved if the variance were granted. The Board considered Olmo’s proposal – to allow what would eventually be a six lot subdivision use a steep, narrow driveway located in a narrow twenty foot easement – to be too far outside the minimum public health, safety, and welfare standards embodied in Title 49. The Board specifically noted that the narrowest roadway allowed by CBJ Code to serve subdivisions in the urban service area (where Olmo’s proposed subdivision is located) is a twenty-two feet wide paved roadway within a sixty foot right-of way, and also considered the International Fire Code’s requirement that travel ways be a minimum of twenty feet.

We conclude that the Board’s finding on this point was supported by substantial evidence.

C. CBJ 49.20.250(b)(5)(A – D)

1. CBJ 49.20.250(b)(5)(A). The Board determined that denying Olmo’s variance application would not unreasonably prevent Olmo from using its property for a permissible use. The Board considered that the only reason why Olmo needed to apply for a

variance was because of Olmo's decision to subdivide. As noted in the Board's opposition and as stated in the staff report, Olmo could have developed its property without subdividing, and therefore without triggering the requirement that the development comply with the access requirements in CBJ 49.15.424. The Board specifically considered that Olmo could have constructed up to fourteen multi-family units, or could have constructed up to three two-unit buildings as was being proposed, without subdividing the property.

We find the Board's conclusion supported by substantial evidence.

2. CBJ 49.20.250(b)(5)(B). Similarly, the Board found that denying the variance would not unreasonably prevent Olmo from using its property in a manner consistent with existing, neighboring development in the neighborhood. Noting the property was zoned D-18 and identified as Medium Density Residential, the Board again relied upon its finding that the property could be developed with up to fourteen multi-family units with a conditional use permit, or up to eight units with nothing more than a building permit, without the need to subdivide.

3. CBJ 49.20.250(b)(5)(C). In concluding that denying the variance would not be unnecessarily burdensome, the Board relied upon staff's assertion that other smaller, similar subdivisions had been required to comply with the access requirements in CBJ 49.15.424. Given that Olmo's request for a variance was not related to an inability to construct a road but rather the financial implication of doing so, and in light of the Supreme Court's holding in the *Thibodeau* case, *supra*, we find the Board's decision on this point supported by substantial evidence.

4. CBJ 49.20.250(b)(5)(D). The Board found that granting the variance would result in an overall net decrease in overall compliance with Title 49 based upon the fact that the requirements in CBJ 49.15.424 would not be met.

D. 49.20.250(b)(6).

With respect to CBJ 49.20.250(b)(6), the Board concluded that granting the variance would not result in more benefits than detriments to the surrounding neighborhood. The Board relied upon staff's finding that the proposed development would "increase the use of the existing substandard access" located in the easement, and that the increased development could "result in detriments to users of North Douglas Highway because the existing access may cause traffic impacts on North Douglas Highway." (Record at p. 27).

We disagree with the Board's finding. While there are significant policy and safety and welfare concerns to support denial of the variance, we cannot find the Board's conclusion regarding traffic impacts to be supported by substantial evidence. Additionally, we agree with Olmo's assertion that the Board failed to consider the benefits of Olmo's proposal. Given the significant need in the community for housing, we cannot find that the Board's decision on this issue was supported by substantial evidence.

VI. Conclusion

In light of the deferential standard of review the Assembly must apply to Board of Adjustment decisions and the applicable burden of proof, we must deny Olmo's appeal. We find the Board's decision to deny Olmo's variance was supported by substantial evidence. We agree with the Board's finding that Olmo can develop its property without subdividing and that granting the variance to allow for the creation of lots with such substandard access would result in a development that fails to meet the minimum health, safety and welfare considerations embodied in the CBJ's Land Use Code. We also agree with the Board's finding that approving the variance in order to allow Olmo more profitable development than presented by the other permissible development opportunities Olmo has available to it is not justified. For these

reasons, the Board of Adjustment's decision is affirmed.

DATED _____, 2017.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU,
ALASKA

By: _____
Maria Gladziszewski
Presiding Officer on Appeal

Variance Approval History 1987 - 2015

Total and
By Type

From 1987 through 2015 (2016 data is not included), 964 cases were decided by the Board of Adjustment. Of those:

856 approved – 88.8%

108 denied – 11.2%

Year	Total Cases Decided by BoA	Approved	Approval %	Denied	Denial %
1987	10	10	100.0%	0	0.0%
1988	14	11	78.6%	3	17.6%
1989	15	12	80.0%	3	16.7%
1990	28	19	67.9%	9	25.0%
1991	24	18	75.0%	6	25.0%
1992	41	35	85.4%	6	13.6%
1993	48	40	83.3%	8	14.0%
1994	50	39	78.0%	11	20.0%
1995*	48	41	85.4%	7	11.7%
1996	49	39	79.6%	10	14.9%
1997	43	38	88.4%	5	8.6%
1998	43	33	76.7%	10	17.5%
1999	43	39	90.7%	4	7.5%
2000	44	41	93.2%	3	6.1%
2001	26	26	100.0%	0	0.0%
2002	40	37	92.5%	3	6.0%
2003	37	35	94.6%	2	3.9%
2004	47	44	93.6%	3	5.4%
2005	45	44	97.8%	1	1.5%
2006	43	38	88.4%	5	9.8%
2007	33	33	100.0%	0	0.0%
2008	23	22	95.7%	1	3.1%
2009	31	29	93.5%	2	5.4%
2010	27	24	88.9%	3	7.5%
2011	22	22	100.0%	0	0.0%
2012	27	25	92.6%	2	5.7%
2013	23	23	100.0%	0	0.0%
2014	23	23	100.0%	0	0.0%
2015	17	16	94.1%	1	2.8%

* The variance criteria changed in 1995 making it less difficult to meet the criteria for approval

Variance Approval History 1987 - 2015

**Total and
By Type**

The following types of variances have been decided by the BoA since 1987:

Type	Total Decided by BoA	Approved	Approval %	Denied	Denial %
Access-related	49	40	81.6%	9	18.4%
Design Standards*	39	31	79.5%	8	20.5%
De Minimus	12	12	100.0%		0.0%
Density	0		0		0
DOA	0		0		0
Dimensional Standards (lot width, low depth)	65	57	87.7%	8	12.3%
Extensions	0		0		0
Fence-related	4	4	100.0%		0.0%
Flood Zone-related	4	3	75.0%	1	25.0%
Height	19	18	94.7%	1	5.3%
Lot Area	6	5	83.3%	1	16.7%
Lot Coverage	4	3	75.0%	1	25.0%
Other	1		0.0%	1	100.0%
Parking	114	92	80.7%	22	19.3%
Setbacks	492	451	91.7%	41	8.3%
Setback – Eagles	42	42	100.0%		0.0%
Sign-related	18	8	44.4%	10	55.6%
Setback Waterbody	70	66	94.3%	4	5.7%
Use	0		0.0%		0.0%
Vegetative Cover	25	24	96.0%	1	4.0%
TOTAL	964	856	88.8%	108	11.2%

*Design Standards-related variances are to the following standards: Accessory apartments, arterials, bungalows, canopies, common wall, conservation lots, cottage housing, historic district, minimum rectangle, mobile home, panhandle, and PUDs.