SPECIAL ASSEMBLY MEETING
THE CITY AND BOROUGH OF JUNEAU, ALASKA

September 30, 2020 5:30 PM

Zoom Webinar & FB Live Stream
Special Assembly Meeting, Meeting No. 2020-42 Immediately Followed by Assembly Finance Committee, same webinar link for both meetings Join the zoom webinar at: https://juneau.zoom.us/j/93069987906 or call: 1-346-248-7799 Webinar ID: 930 6998 7906

I. CALL TO ORDER / ROLL CALL

II. APPROVAL OF AGENDA

III. AGENDA TOPICS

A. **Tyson Lee v. Vertical Bridge LLC and Planning Commission**

IV. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS

V. ADJOURNMENT

ADA accommodations available upon request: Please contact the Clerk's office 36 hours prior to any meeting so arrangements can be made for closed captioning or sign language interpreter services depending on the meeting format. The Clerk's office telephone number is 586-5278, TDD 586-5351, e-mail: city.clerk@juneau.org

ASSEMBLY AGENDA/MANAGER'S REPORT
THE CITY AND BOROUGH OF JUNEAU, ALASKA

Tyson Lee v. Vertical Bridge LLC and Planning Commission

ATTACHMENTS:

	Description	Upload Date	Type
	Draft Decision Appeal 2020-01 Lee v. PC and Vertical Bridge-corrected	9/30/2020	Appeal

BEFORE THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU

TYSON LEE, Appellant, vs. CBJ PLANNING COMMISSION, and VERTICAL BRIDGE, Appellees,	Appeal of: Notice of Decision CDD File No. WCF2019-0009

DECISION ON APPEAL

Appellant Tyson Lee (hereinafter "Mr. Lee") filed an appeal of the Planning Commission's decision to grant a wireless communication facility permit to Vertical Bridge, LLC for new, unlit, 150-foot communication tower in an area zoned residential D-3. The applicant, Vertical Bridge, LLC, intervened in the appeal.

The Assembly accepted the appeal and appointed Assemblymember Loren Jones as the Presiding Officer. Consistent with CBJC 01.50.050, a prehearing conference was held on June 18, 2020. Mr. Lee, counsel for the Planning Commission (Ms. Wright), and counsel for Vertical Bridge, LLC (Mr. London) attended. Subsequently, a Pre-Hearing Order was issued.

The record was prepared by the Community Development Department based upon the materials considered by the Planning Commission and application of CBJC 01.50.110. The record was supplemented with the recording and a verbatim transcript of the April 14, 2020, Planning Commission hearing upon stipulation by the parties. The Planning Commission also filed a motion to supplement the record with a signed copy of the Planning Commission

Suspension of Rules of Procedure and public notice in the Juneau Empire dated April 12, 2020. No party objected and that motion was granted.

During the prehearing conference, the parties discussed the issues on appeal and the Planning Commission subsequently filed a motion to simplify the issues, which Mr. Lee objected to. The Presiding Officer concluded that Mr. Lee was the only appellant and that Mr. Lee had freedom to frame this appeal how he saw fit consistent with CBJC 01.50.

The parties filed briefs on the merits of the appeal. On September 2, 2020, 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.

I. Burden of Proof and Standard of Review.

Applications for a wireless communication facility permit (special use permit) are decided by the Planning Commission. CBJ 49.65.970(f). The Planning Commission's decision is appealable to the Assembly, and is heard in accordance with CBJ Chapter 01.50. CBJ 49.20.120. The appellant bears the burden of proof. CBJ 01.50.070(b).

Mr. Lee's Notice of Appeal challenges the Commission's decision on one ground, CBJC 01.50.070(a)(3): Whether the Planning Commission failed to follow its own procedures or otherwise denied procedural due process to Mr. Lee with regard to WCF2019-0009. Mr. Lee supports that issue with the following subissues:

1. The Planning Commission failed to follow its own procedures or otherwise denied procedural due process to Community of Juneau and the residents of the Lena area showing favor the Applicant in the process.
2. The application was removed twice from the prior scheduled meetings when the public had shown a strong objection

through email. Those emails were never mentioned during the Planning Commission hearing.

3. The Planning commission meeting was not held in Public arena as it normally would have been. The only way for the community to participation was by phone and was limited by presenting any visual evidence or testifying in person.
4. The City Planner Amy was not at the meeting and Laurel was not able to show that the City had done its due diligence when it came to the application.
5. The notice to the neighborhood about the rescheduled meeting information was also missing prior to the meeting.

In Mr. Lee's 2-page Opening Brief, it deviates from the Notice of Appeal and challenges the visual impact of the new tower and then states two "grounds for appeal"—with little to no analysis:

> 1. The planning department for CBJ was unable to show they had taken the proper steps to verify the contents of the application or visual impact prior to the hearing.
> 2. The planning commission meeting was changed to a non-public location by only allowing members of the public to participate by phone limiting the resources and their responsibility to the public.

At oral argument, Mr. Lee primarily focused on the visual impact of the tower, which the Planning Commission responded to, and then focused on the procedural issues during rebuttal.

In light of CBJC 01.50.070, there are—at most—three broad issues:

1. The Planning Commission failed to follow its own procedures or denied procedural due process to Mr. Lee.
2. The Commission's decision is not supported by substantial evidence in light of the whole record.
3. The Planning Commission's decision is not supported by adequate written findings.

II. Discussion

The Assembly appreciates that Mr. Lee is engaged and closely followed the Planning Commission related to this wireless communication tower.

For many in the community that receive a notice about a new wireless tower permit, the

Planning Commission process is foreign and daunting. The process is even more challenging—and important—during a pandemic. The Assembly recognizes that the planner who drafts a staff report may not be able to present to the Planning Commission for a variety of reasons, but the Assembly expects the substitute staff member is as knowledgeable as the planner who drafted the staff report because the community demands it. Similarly, the Assembly encourages Commissioners not to feel rushed if Commissioners have unanswered questions because the Planning Commission hearing is the forum in which the applicant has the burden and the forum for Commissioners to get answers to their questions. On appeal, the burden shifts to Mr. Lee.

We conclude that Mr. Lee failed to meet his burden. Mr. Lee's 2-page Opening Brief was scant of analysis and the 3-page Reply Brief potentially expanded on issues not raised in the Opening Brief or the Notice of Appeal.[1] Recognizing that Mr. Lee is unrepresented—and chose to be unrepresented—the Assembly will relax the appellate rules as necessary to resolve this appeal. CBJC 01.50.260.

A. The Planning Commission followed its procedures and did not deny procedural due process to Mr. Lee.

If the Assembly finds the Planning Commission "failed to follow its own procedures or otherwise denied procedural due process to one or more of the parties," the Assembly may set aside the decision being appealed. CBJC 01.50.070(a)(3).

The thrust of Mr. Lee's appeal originated by challenging the procedural aspects of this

[1] *Martinez v. GEICO*, No. S-17041, 2020 WL 5269204, at *8 (Alaska Sept. 4, 2020) (stating that an argument is waived for lack of briefing); Alaska R. App. P. 602 ("The grounds for appeal stated in the statement of points on appeal constitute the sole basis for review by the superior court. On motion in the superior court, and for cause, the statement of points may be supplemented;"); Pre-Hearing Order, Section 6 ("No new issues may be raised in the reply brief.").

Planning Commission hearing. The touchstone of the Planning Commission Rules of Order, like that of traditional due process standards, are reasonable notice, opportunity to be heard, before a neutral body.[2] The record shows that Mr. Lee attended the April 14, 2020, Planning Commission hearing, actually provided comments before and during the hearing, and the Planning Commission thoroughly considered the comments raised by staff, the applicant, and members of the public like Mr. Lee. There is no evidence that the Planning Commission was biased. Subsequently, Mr. Lee has had an opportunity to appeal that decision with the full panoply of appellate procedures. Thus, Mr. Lee has sufficient notice and was provided a reasonable opportunity to be heard before a neutral Planning Commission.

We address each of Mr. Lee's subarguments.

1. A Planning Commission hearing for a wireless application can be rescheduled even if members of the public have shown a strong objection by email.

Title 49 provides some helpful guidance. CBJC 49.65.970(d) provides the Community Development Department Director shall review applications for completeness, reject incomplete applications within 30 days of receipt, and then schedule the application for a Planning Commission hearing when the application is deemed complete. To the extent this application was improperly scheduled for a hearing prior to April 14 and the application was incomplete—due to the tower not being designed to accommodate five arrays or otherwise—that is a violation without a remedy, which has been cured by the April 14 hearing because the tower at that point had been redesigned to accommodate five arrays. In addition, because the Community Development Department Director is not empowered to decide this type of application and only

[2] *Copeland v. Ballard*, 210 P.3d 1197, 1201 (Alaska 2009).

the Planning Commission is, CBJC 49.65.970(f), the Director was required to schedule the application hearing even with public comments (emails) opposing the project. Thus, by the time the April 14 hearing was scheduled, the application complied with the procedural requirements of CBJC 49.65.970(d), so the Planning Commission could decide the project pursuant to CBJC 49.65.970(f).

2. **The Planning Commission meeting was not held in Assembly Chambers like it had been prior to COVID-19, and the Planning Commission ensured the public had meaningful opportunities to be heard.**

As the United States, State of Alaska, and City & Borough of Juneau were adapting to the early days of COVID-19, so was the Planning Commission. Just as the Alaska Court System and the Assembly changed where and how public hearings occurred, the Planning Commission appropriately followed suit. The Planning Commission adjusted its Rules of Procedure to ensure members of the public continued to have opportunities to locate application material prior to meetings, members of the public had opportunities to submit written or photographic comments prior to a meeting, members of the public had opportunities to listen to the meetings, members of the public had opportunities to orally comment at a hearing, and members of the public had last minute opportunities to submit written comments by email. Mr. Lee—like the other six members of the public that also testified—had those opportunities, was not precluded from submitting comments, and meaningfully participated even though he participated via telephone—like the other members of the public. Thus, the Planning Commission's hearing procedures provided Mr. Lee with meaningful opportunities to be heard.

3. **The notice of the April 14, 2020, Planning Commission meeting was sufficient, especially regarding Mr. Lee.**

Mr. Lee asserts that the notice to the neighborhood about the rescheduled meeting

information was also missing prior to the meeting. The staff report summarizes the notices of the April 14 meeting, which are also found in the record. For example, R. 235-242 includes Mr. Lee as a neighbor within 1500 that received individual notice of the hearings, including the one on April 14. Moreover, Mr. Lee had notice of the April 14 meeting because he actually testified, and Mr. Lee had sufficient notice of the meeting because provided substantive testimony. Thus, any minor defects in one form of notice, if any, did not affect Mr. Lee's notice of the April 14 Planning Commission meeting or his ability to participate meaningfully.

B. **The Planning Commission's Decision 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." CBJC 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."[3] In reviewing the Planning Commission's decisions, a "presumption of validity" must be applied.[4] When a fact-finding agency, such as the Planning Commission, chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion, the Planning Commission's findings should be affirmed on appeal. This direction, in conjunction with the standard of appeal articulated in CBJ 01.50.070(a)(1), suggests the role of the Assembly on appeal is limited. The Assembly does not re-weigh the evidence or second-guess the Commission's findings as long as there is evidence in the record to support those findings. Thus, the question is not what would the Assembly do if it was hearing the original WCF2019-

[3] *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 386 (Alaska 1995).
[4] *South Anchorage Concerned Citizens, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993).

0009 application. Instead, the question is whether there is substantial evidence in the record for the Planning Commission's decision.

To the extent Mr. Lee challenges the visual impact of the Planning Commission's decision, that argument is most properly analyzed as a challenge to whether the Planning Commission's decision—regarding visual impact—is supported by substantial evidence.[5]

Visual impact is not one feature, but instead, a multi-factor analysis that goes to the heart of what the Planning Commission analyzed on April 14. The following visual factors were specifically evaluated by the Planning Commission: height, number and location of arrays, type of tower, color of tower, hazards to aviation, presence of lighting, vegetation, distance to nearest private property, viewsheds, onsite renderings, typographic concerns, and features of nearby wireless towers. CBJC 49.65.930(i). The Planning Commission provided reasoned analysis why it approved the tower the way it did. For example, a lattice style matched the other two towers, basic grey color matched the sky more than green for trees yet also gave aviation users a reasonable opportunity to see the tower instead of a green monopole, the lack of a light on the tower, and the presence of significant trees near the tower. In addition, the Planning Commission ensured the 150 foot tower could accommodate the code required five arrays, even if the last array may be limited by trees, and the Planning Commission specifically explained why the five-foot lighting rod does not count towards the tower's 150 foot limit. In light of the record as a whole, the Planning Commission's decision—regarding visual impacts—is supported by

[5] In Mr. Lee's Reply Brief, he also asserts a setback violation. Setback are governed by CBJC 49.65.930(f) and there is substantial evidence in the record and in Mr. Lee's Reply Brief that this tower is more than 77 feet to the nearest property. *E.g.*, R. 252. The 1,000 foot distance reference in Table 1 of CBJC 49.65.950 is for when the Community Development Department Director can issue a wireless permit administratively.

substantial evidence.

C. **The Planning Commission's Decision Was Supported by Adequate Written Findings.**

The Assembly may set aside an agency decision "if the decision is not supported by adequate written findings or the findings fail to inform [the Assembly] of the basis upon which the decision appealed from was made." CBJC 01.50.070.

Because we find the notice of decision and the record as a whole—which includes the application, the staff report, the written public comments, and the transcript of the hearing—sufficient to provide us with a clear understanding of the basis of the Planning Commission's decision, we find the Planning Commission's findings sufficient under CBJ 01.50.070(a)(2).

III. Conclusion

We find the reasoning set forth in the Planning Commission and Vertical Bridge's briefing persuasive. For the reasons relied upon by the Planning Commission, Vertical Bridge, and as stated above, the Planning Commission's decision is affirmed. Mr. Lee's appeal is denied.

This is a final administrative decision of the City & Borough of Juneau. It may be appealed pursuant to the Alaska Rules of Court. Appeals should be filed with the Juneau Superior Court within 30 days from the date this decision is distributed to the parties.

DATED this _____ day of _____, 2020.

ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

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By: Loren Jones
Presiding Officer