



Date: April 4, 2016

**Re: Administrative Hearing Officer | Appeal Case No. 15-01
Notice of Administrative Hearing Officer's Decision**

In accordance with WMC 16.36.090.C, please be advised that on April 4, 2016, the Administrative Hearing Officer issued a decision in regard to the following:

Appeal Case No. 15-01:

- Interested Persons Filing the Appeal: **Noel Kopperud and Alex Kopperud**
- Applicant: **William Starn**
- Decision appealed from: Planning Commission Resolution Serial No. 15-10(AM), **Variance #15-01 was approved by the Wasilla Planning Commission on July 14, 2015 (Resolution No. 15-10AM). The variance approval was for a 19.5 foot variance from the required 25 foot front yard setback and a 33 foot variance from the required 75 foot shoreline setback in order to construct a single-family dwelling on Tract 1, Parcel 3, Lakeshore 1963 Subdivision.**

Please find the decision enclosed. For all information pertaining to the appeal please visit www.cityofwasilla/appeal.

Feel free to contact my office with questions. We are available by email at clerk@ci.wasilla.ak.us or by phone at 907.373.9090.

CITY OF WASILLA
OFFICE OF THE CITY CLERK

JAMIE NEWMAN, MMC
City Clerk

Enclosure: Decision on Appeal Case No. 15-01

**BEFORE THE HEARING OFFICER OF THE
CITY OF WASILLA, ALASKA**

290 E. Herning Avenue
Wasilla, Alaska 99654

IN THE MATTER OF THE APPEAL OF
NOEL KOPPERUD AND ALEX KOPPERUD
OF CITY OF WASILLA PLANNING
COMMISSION RESOLUTION
SERIAL NO. 15-10(AM)

Appeal Case No. 15-01

DECISION ON APPEAL

I. INTRODUCTION

Noel Kopperud and Alex Kopperud (“Appellants”) have appealed the City of Wasilla (“City”) Planning Commission’s (“Commission”) Resolution Serial No. 15-10(AM) (“Resolution”), approved by the Commission on July 14, 2015, and subsequently issued on July 15, 2015. [R. 252-258] The Resolution addressed Application for Variance 15-01 (“Application”), which requested a variance from the City’s general front yard and shoreline setback requirements. [Id.] For the reasons set forth herein, the hearing officer AFFIRMS the Commission’s decision.

II. ISSUES PRESENTED FOR REVIEW

The Appellants argue that the Commission erred in approving Resolution Serial No. 15-10(AM) for two general reasons: First, that the variance granted by the Commission failed to meet the standards and requirements set forth at WMC 16.28.110.¹ Second, the Appellants argue that, in granting the variance, the City violated the Appellants’ constitutional rights to due process and equal protection.²

¹ Opening Brief of Appellants Noel Kopperud and Alex Kopperud, at 10-77 (hereinafter “Opening Brief”).

² *Id.*, at 78-93.

III. STANDARD OF REVIEW

Alaska law provides that the appellate review of municipal land use decisions is as a general matter “narrow and...a presumption of validity is accorded those decisions.”³ Thus, the review of a local zoning authority’s findings of fact is governed by the “substantial evidence” test, pursuant to which such findings will not be reversed so long as substantial evidence exists within the record to support them.⁴

Substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion.”⁵ As explained in *Matanuska-Susitna Borough v. Hammond*, the “substantial evidence” test does not permit a reviewing authority to “evaluate the strength of the evidence,” but instead requires that the authority “merely note its presence.”⁶ Under this standard, the reviewing authority “must uphold an administrative agency’s decision if it is supported by substantial evidence”⁷ and is only permitted to reverse it if it “cannot conscientiously find the evidence supporting [the agency’s decision] is substantial.”⁸

³ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993). See also *Luper v. City of Wasilla*, 215 P.3d 342, 345 (Alaska 2009); *Pruitt v. City of Seward*, 152 P.3d 1130, 1139 (Alaska 2007); *Griswold v. City of Homer*, 55 P.3d 64, 67-68 (Alaska 2002); *Village of Eklutna v. Bd. of Adjustment*, 995 P.2d 641, 643 (Alaska 2000).

⁴ *Luper*, 215 P.3d at 345; *Griswold*, 55 P.3d at 67; *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 254 (Alaska 1986); *Handley v. State Dept. of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

⁵ *Griswold*, 55 P.3d at 67-68 (quoting *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000) (internal citations omitted)).

⁶ 726 P.2d 166, 179 n. 26 (Alaska 1986).

⁷ *Williams v. Ketchikan Gateway Borough*, 295 P.3d 374, 375-76 (Alaska 2013).

⁸ *Id.* (internal quotations omitted).

Questions of law are granted broad deference when they involve the application of a local zoning authority's specialized expertise.⁹ This includes questions related to the interpretation and application of land use ordinances when it implicates complex matters, or signals the application or formulation of fundamental land use policy.¹⁰ Accordingly, such questions are subject to the "reasonable basis" standard, which requires the reviewing authority to "defer to the agency's interpretation unless it is 'plainly erroneous and inconsistent with the regulation.'"¹¹ In contrast, questions of law that do not involve such expertise, including questions related to statutory construction or constitutional questions, are reviewed *de novo* according to the "independent judgment" standard, under which the reviewing authority will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."¹²

Finally, Alaska law places upon parties the affirmative obligation to sufficiently develop their arguments to permit meaningful adjudication by a reviewing body.¹³ Many of the Appellants' arguments on appeal were only cursorily briefed, or presented as conclusory statements, and have therefore been deemed to be waived.¹⁴

⁹ *Balough*, 995 P.2d at 254.

¹⁰ *Id.*

¹¹ *Luper*, 215 P.3d at 345 (quoting *Pasternak v. State, Commercial Fisheries Entry Comm'n*, 166 P.3d 904, 907 (Alaska 2007)).

¹² *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 189 (Alaska 2007) (quoting *Alaska Gen. Alarm, Inc. v. Grinnell*, 1 P.2d 98, 100 (Alaska 2000)).

¹³ See, e.g., *Manning v. State, Dept. of Fish & Game*, 355 P.3d 530, 538 (Alaska 2015) (citing *Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n. 3 (Alaska 1991)). See also *Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397, 402 n. 7 (Alaska 1995); *Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990); *Wren v. State*, 577 P.2d 235, 237 n. 2 (Alaska 1978); *Kristich v. State*, 550 P.2d 796, 804 (Alaska 1976)

¹⁴ Although the hearing officer has attempted to address each of the plethora of arguments submitted in the Appellants' briefing with specificity, any arguments not addressed in this Decision fall within this category.

IV. AUTHORITY OF THE HEARING OFFICER

The Wasilla Municipal Code provides that all appeals from the Commission's land use decisions are reviewed by a hearing officer, who is required to decide the appeal based solely "upon the record and argument presented at the hearing."¹⁵ The hearing officer is granted the authority to "affirm, reverse, or modify the decision or order of the commission in whole or in part[,]"¹⁶ and must provide a written decision that includes findings of fact and conclusions of law.¹⁷ Although after the initiation of this appeal the WMC was amended to require that decisions be rendered within 45 days after the conclusion of the appeal hearing,¹⁸ the ordinance in effect at the time that this appeal was filed, and which is therefore applicable to this matter, did not specify any particular time period in which a final decision must be rendered.¹⁹

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. City Authority to Approve or Deny Variances from Its Setback Requirements.

The Alaska Legislature has vested the State's boroughs with not only the authority, but also the affirmative duty to "provide for planning, platting, and land use regulation."²⁰ In 1987, the Matanuska-Susitna Borough's ("Mat-Su Borough") voters approved a ballot initiative establishing a general 75-foot shoreline setback applicable to all structures built after January 1, 1987.²¹ Alaska law permits boroughs to delegate authority to regulate land uses to those cities that lie within them, so long as the city

¹⁵ WMC 16.36.090(A).

¹⁶ *Id.*

¹⁷ WMC 16.36.090(B).

¹⁸ *Id.*

¹⁹ See City of Wasilla Ordinance Serial No. 15-22.

²⁰ A.S. 29.40.010(a).

²¹ *Tweedy v. Matanuska-Susitna Borough Bd.*, 332 P.3d 12, 14 (Alaska 2014); MSBC 17.55.020.

consents to such delegation by ordinance.²² The Mat-Su Borough properly delegated land use regulatory authority to the City in 1992.²³ Subsequent to accepting that authority, the City enacted its own 75-foot shoreline setback requirement.²⁴

Alaska law requires municipalities to establish a planning commission charged with preparing and submitting a proposed comprehensive plan, as well as reviewing, recommending and administering those measures necessary to implement the comprehensive plan approved by the governing body.²⁵ In addition, planning commissions may be delegated additional responsibilities by ordinance.²⁶

Accordingly, the City has delegated the Commission numerous additional responsibilities with respect to the administration of the City's land use regulations, including the duty to "[h]ear and decide all permit applications that require a public hearing, including but not limited to applications for variances, rezones, and other procedures that may be required by the land development code[.]"²⁷

In determining whether an application for a variance should be granted, the Commission is authorized by ordinance to deny the application, approve it, or approve it subject to conditions.²⁸ The Commission's decision regarding an application for a variance is required to be issued in writing, and must set forth its findings and the reasoning for its decision.²⁹ The City Code prescribes five initial standards that must be

²² A.S. 29.40.010(b).

²³ See City of Wasilla Ordinance 91-37; MSB Ordinance Serial No. 92-079.

²⁴ WMC 16.24.030(C)(3).

²⁵ A.S. 29.40.020.

²⁶ *Id.*

²⁷ WMC 2.60.010(B)(6).

²⁸ WMC 16.16.040(A)(6).

²⁹ *Id.*

met in order for a property to qualify for a variance, and five additional mandatory conditions that apply to all variances.³⁰

B. Procedural History

The Glen Harding Starn Trust (“Trust”) owns the property located at 1245 E. Westpoint Drive, Wasilla, Alaska 99654, which is more properly described as: Parcel No. 3 of Tract 1, LAKESHORE SUBDIVISION, according to the official plat thereof filed under Plat No. 63-10, Records of the Palmer Recording District, Third Judicial District, State of Alaska (“Property”). [R. 92] The Property directly abuts Wasilla Lake, and is located within the City’s Residential Multifamily (“RM”) district. [R. 6, 17]

On May 12, 2015, William Starn (“Applicant”) submitted “Application for Variance No. 15-01” (“Application”) to the City Planning Department. [R.1] The Application requested approval for a 19.5-foot variance from the City’s general 25-foot front yard setback requirement, as well as a 45-foot variance from the 75-foot shoreline setback requirement, codified respectively at WMC 16.24.030(A)(1) and WMC 16.24.030(C)(3). [R. 1] The Application explained that the purpose for the variance was to permit the construction of a single-family dwelling upon the Property. [R. 3]

Upon determining that the Application included all documentation required by WMC 16.16.040(A)(1), the matter was scheduled for public hearing at the Commission’s next meeting on June 9, 2015, in accordance with WMC 16.16.040(A)(2)(a). [R. 17, 41] The Record reflects that the City mailed notice of the June 9, 2015 public hearing “to all properties within a 1,200’ radius” on May 22, 2015. [R. 19, 40-47] The Resolution also

³⁰ WMC 16.28.110(C)-(D).

explains that notice was published in the Mat-Su Valley Frontiersman newspaper on June 2, 2015. [R. 252].

The City Planner prepared a Staff Report (“Report”) to the Commission regarding the Application in preparation for the June 9, 2015 public hearing. [R. 17-21] In the Report, the City Planner stated her conclusion that the Application met each of the standards and conditions for variances set forth at WMC 16.28.110(C)-(D), and recommended that the “Commission approve the requested variance” subject to five additional conditions. [Id.] The City Planner also prepared and submitted Draft Resolution Serial No. 15-10 for the Commission’s review, which included proposed findings attached as Exhibit A. [R. 48-52]

The Commission held a public hearing regarding the Application at its June 9, 2015 meeting. [R. 17-92; Tr. 2-3 (June 9, 2015)] Several members of the public submitted written testimony to the Commission regarding the Application. [R. 22-39] Live testimony was submitted to the Commission at that meeting by the Applicant, the Applicant’s authorized representative Wayne Whaley, the Appellants, and several other members of the public. [R. 22-39; R. 54; Tr. 43 (June 9, 2015)]

The Commission did not reach any decision regarding the Application during the June 9, 2015 meeting. Instead, when it became apparent that the Application would not be approved as presented, due to the size of the proposed structure and the degree of variance requested, the Commission offered the Applicant an opportunity for a continuance in order to amend his request. [Tr. 83-97 (June 9, 2015)] The Applicant was informed during the public hearing that, if he wished to have the Commission take up the matter at its July 14, 2015 meeting, he was required to submit his proposed

revisions and any supporting information to the City by June 30, 2015 so that it could be accurately reflected in the public notice that would be required. [Tr. 83-89 (July 14, 2015)] Upon the Applicant's request, the Commission voted to continue the public hearing to its July 14, 2015 meeting. [Id.]

Following the close of the June 9, 2015 public hearing regarding the Application, the Commission subsequently took up another item on its agenda related to the keeping of farm animals in City limits. [Tr. 98 (June 9, 2015)] When the Commission opened public comment on that item, the Applicant's representative, Mr. Whaley, asked to submit testimony. [R. 261] After completing his testimony regarding that issue, Mr. Whaley submitted additional comments to the Commission relating to the Application. [R. 262-264]

On June 25, 2015, the City mailed notice of the July 14, 2015 public hearing on the Application to the owners of those properties located within a 1,200-foot radius of the Property, and also issued the notice to members of the Commission, members of the City Council, and to other review agencies. [R. 135-142] As before, notice of the public hearing was published in the Mat-Su Valley Frontiersman newspaper, on July 7, 2015. [R. 252]

The Commission reconvened its public hearing regarding the Application on July 14, 2015, during which time the Applicant presented his request and answered those questions posed by the Commissioners. [Tr. 113-121; 145-172 (July 14, 2015)] The Applicant submitted a revised version of his proposed building design that reduced its overall proposed "footprint" on the Property, but did not specifically alter his original variance request. [R. 123-126]

Several members of the public submitted written statements for the Commission's review. [R. 95-122; 167] In addition, several individuals submitted live testimony to the Commission. [Tr. 125-145 (July 14, 2015)] In addition, Appellant Noel Kopperud also appeared before the Commission and submitted testimony in opposition to the Application. [Tr. 121-125 (July 14, 2015)].

After determining that it was unwilling to grant the variance that the Applicant had requested, the Commission amended the original Draft Resolution Serial No. 15-10 to provide for a 42-foot shoreline setback for the Property, and the requested 19.5-foot front yard setback. [Tr. 217 (July 14, 2015)] The Commission subsequently adopted the Resolution by a vote of three to one. [Tr. 217-218 (July 14, 2015)] The Resolution includes two exhibits: (1) Exhibit A, which sets forth the Commission's findings of fact; and, (2) Exhibit B, which includes a plot plan for the Property. [R. 252-258]

The Appellants timely appealed the Commission's decision on July 29, 2015.³¹ A Pre-Hearing Conference was held on September 23, 2015, at which all parties of record were present.³² Although the Pre-Hearing Conference was initially intended to address the issuance of a Scheduling Order to govern the submission of briefs by parties and other administrative matters, the Appellants raised issues during the conference regarding the completeness of the Record on Appeal.³³ In light of the Appellants' concerns, the parties of record stipulated to a procedure and schedule by which any concerns regarding the Record on Appeal would be resolved.³⁴

³¹ See Application for Appeal of a Decision or Order Made by the City of Wasilla Planning Commission ("Notice of Appeal").

³² See Pre-Hearing Conference Order, dated September 24, 2015.

³³ *Id.* at 1.

³⁴ *Id.*

After it was determined at an October 16, 2015 Status Conference that the issues with respect to the Record on Appeal had been substantially addressed, the Hearing Officer issued a Scheduling Order that established briefing deadlines for the parties—including any other interested parties, hearing procedures, and other general requirements.³⁵ Both the Appellant and the City submitted briefing to the Hearing Officer as part of these proceedings, and the Applicant submitted his own written comments.

An appeal hearing was conducted on January 28, 2016, at which the parties and other interested persons were permitted an opportunity to present argument in support of their respective positions. The Appellants appeared on their own behalf. Attorney Matt Mead presented the City's argument. Three individuals presented public comments at the hearing in support of the Resolution, including: the Applicant, Joel Starn, and Nancy Starn. After hearing the arguments presented during the appeal hearing, and reviewing the parties' briefing as well as the complete record, the Hearing Officer hereby issues this Decision on Appeal.

C. The Appellants Were Not Deprived of Their Right to Procedural Due Process.

As the Alaska Supreme Court has explained:

Article I, section 7 of the Alaska Constitution guarantees the right of due process. Due process in the administrative context does not demand that every hearing comport to the standards a court would follow, but rather that the administrative process afford an impartial decision-maker, notice, and the opportunity to be heard, procedures consistent with the essentials of a fair trial, and a reviewable record.³⁶

³⁵ See Pre-Hearing Scheduling Order, at 1.

³⁶ *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010).

These administrative due process requirements extend to quasi-judicial administrative proceedings before municipal zoning authorities, such as the Commission.³⁷ Consequently, it was required to provide a process that did not deprive the Appellants of the rights that these requirements are designed to protect.

As a preliminary matter, the hearing officer finds that the Appellants have effectively waived many of their due process arguments by failing to raise them before the Commission. As the Alaska Supreme Court has consistently held, “Absent plain error, a party may waive due process objections by ‘consenting to certain procedures or by failing to object to others.’”³⁸ As is explained in greater detail below, although the Appellants knew of the facts giving rise to many of the due process claims they have raised on appeal, they did not ever seek to address issues of due process during either of the public hearings, despite ample opportunity to do so.

1. The City Provided Adequate Public Notice of the Hearings.

The Appellants argue that the City failed to provide them with adequate notice of the July 14, 2015 public hearing, in violation of their due process rights.³⁹ In support of that argument, the Appellants state that: (1) the City failed to follow the notice requirements of WMC 16.16.040(A)(2)(e)-(f); and, (2) they never received the City’s mailed notice of the public hearing.⁴⁰

³⁷ *Id.*

³⁸ *Griswold v. City of Homer City Council*, 310 P.3d 938, 942 (Alaska 2013) (quoting *Matter of C.L.T.*, 597 P.2d 518, 522 (Alaska 1979); see also *Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002) (determining that the appellant had not been improperly denied the opportunity to speak in part due to his failure to request to do so).

³⁹ Opening Brief, at 81-82.

⁴⁰ *Id.* at 81, 91.

The City Code directs that notice of a public hearing regarding a variance application “shall be posted in City Hall and on the site” of the requested variance,⁴¹ as well as that:

The applicant will post the notice on the site at least ten (10) days prior to the hearing. The notice shall be posted so that it may be easily seen from the public right-of-way. The applicant is responsible for maintaining this notice.⁴²

Other than their assertion, the Appellants have pointed to no evidence in the Record tending to show that notice was not posted on the Property. “Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers...”⁴³ In light of the absence of any evidence in the Record tending to show that City officials failed to mail notice of the July 14, 2015 public hearing to the Appellants, the hearing officer must “presume that they...properly discharged their official duties.”⁴⁴ Further, the Record does not show that the Appellants or any other person ever raised this particular issue before the Commission before it adopted the Resolution granting the variance.

WMC 16.16.040(A)(2)(e) also provides that, “The public hearing notice shall be sent to the owners of property, as listed on the Matanuska-Susitna Borough property tax rolls, located within a minimum of one thousand two hundred (1,200) feet of the lot lines of the development.” Although the Appellants argue that they never received any mailed notice of the July 14, 2015 meeting, the Record clearly demonstrates that the City mailed such notice on June 25, 2015. [R. 135] The Record also shows that both the

⁴¹ *Id.*

⁴² WMC 16.16.040(A)(2)(f).

⁴³ *Wallace v. State*, 933 P.2d 1157, 1162 (Alaska 1997).

⁴⁴ *Id.*

May 22, 2015 and June 25, 2015 mailings were sent to the same list of property owners. [R. 43-47; 212-216] That list includes an address in Palmer, Alaska that appears on both of the public comment forms that Noel Kopperud returned to the City prior to the public hearings. [R. 27; 111]

However, even if the City had in fact failed to mail the notice to the Appellants, the fact remains that they received actual notice by at least July 2, 2015, leaving them twelve days to prepare for it. [R. 112] This permitted Noel Kopperud to prepare and submit a seven-page written statement opposing the Application in time for it to be included in the Commission's meeting materials. [R. 112-118] Notwithstanding any irregularity of notice, that written statement, and Noel Kopperud's testimony to the Commission at the July 14, 2015 public hearing, show not only that the Appellants had a thorough understanding of the issues, but also an adequate opportunity to "prepare extensively to respond to" the Application.⁴⁵ For these reasons, the hearing officer finds no merit in the Appellants' due process claims concerning the adequacy of the City's public notice of the July 14, 2015 public hearing.

2. The Appellants Have Waived Their Right to Object to the Commission's Acceptance of the Applicant's Late-Filed Materials.

The Appellants argue next that the Commission denied them due process by accepting and considering a nine-page document summarizing the Applicant's arguments in support of the Application, as well as a letter from the daughter of the Property's previous owner, which were submitted on the day of the July 14, 2015 public

⁴⁵ See *Fairbanks North Star Borough v. Golden Heart Util.*, 13 P.3d 263, 274 (Alaska 2000).

hearing.⁴⁶ The Appellants argue that they were “unable to review any of the documents” before Noel Kopperud submitted his testimony to the Commission, and that due process required that they be permitted “a meaningful opportunity to review the materials...*before* the hearing started.”⁴⁷

The hearing officer finds that the Appellants have waived any due process argument with respect to the Commission’s acceptance and consideration of the Applicant’s late-filed documents. The Record shows that, during the City Planner’s introductory remarks at the public hearing, and prior to the opening of public testimony, she specifically noted that this set of additional documents had just been submitted to the Commission. [Tr. 101-102 (July 14, 2015)] Prior to the opening of public comments, the Commission Chairperson explained that the Applicant would be granted an additional five minutes to address the documents. [Tr. 112-113 (July 14, 2015)] The Applicant made his presentation immediately thereafter, during which he discussed the points set forth in his late-filed nine-page submission, and addressed why he believed that the documents were important. [Tr. 113-121 (July 14, 2015)]

The Commission opened public comments following the Applicant’s presentation. [Tr. 121 (July 14, 2015)] Appellant Noel Kopperud was the first of five individuals to offer public testimony. [R. 235; Tr. 121 (July 14, 2015)] Although by that time Mr. Kopperud had actual notice of the additional documents, and a summary of how the Applicant believed they supported his Application, he did not object to their receipt and consideration by the Commission—nor did the Appellants request that they be given an opportunity to review them and to provide further comments to the Commission. [Tr.

⁴⁶ Opening Brief, at 82.

⁴⁷ *Id.*

121-125 (July 14, 2015)] The Appellants elected to forego their right to object to or otherwise address the Commission regarding the documents even after the Chairperson indicated that individuals would be given an additional opportunity to speak, if they so desired. [Tr. 141 (July 14, 2015)] In doing so, they consented to the Commission's decision to consider the documents, and have "effectively waive[d] [the] right to raise such an objection on appeal."⁴⁸

3. **The Appellants' Arguments Regarding the Commission's Time Limitations for Public Comments Are Without Merit, and In Any Case Have Been Waived.**

The Appellants argue that they were deprived of due process when the Commission "strictly limited" public comments to five minutes at the hearings regarding the Application, but permitted the Applicant far greater time to present his case. [R. 79, 82] However, this argument is also without merit.

WMC 16.16.040(A)(5) establishes the Commission's general procedures for conducting hearings on applications. It provides that all individuals are generally allotted five minutes in which to present testimony to the Commission.⁴⁹ However, it also clearly explains that the Commission maintains discretion to modify those time limitations, or the order in which presentations are made, "for good cause shown[.]" Finally, the ordinance states that the "[f]ailure to observe the procedures in a hearing shall not affect the validity of the decision so long as the appellant has had a reasonable opportunity to be heard."⁵⁰

⁴⁸ *Balough*, 995 P.2d at 268. See also *Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002) (finding that the appellant's due process argument to be "without merit" due in part to his failure to raise it during Board of Adjustment proceedings).

⁴⁹ WMC 16.16.040(A)(5)(a)-(d).

⁵⁰ WMC 16.16.040(A)(5).

Although it is clear from the Record that the Appellants did not spend nearly as much time providing testimony to the Commission as the Applicant, that fact does not in any way amount to the Commission's denial of a full and fair opportunity to do so. Nothing in the Record even reasonably suggests that the Appellants ever indicated that they wished to be granted additional time to address the Commission. At the July 14, 2015 public hearing, the Chairperson specifically indicated that individuals who had already spoken would be given an additional opportunity to do so once all those who had not yet provided public comment had done so. [Tr. 141 (July 14, 2015)] Thus, it seems clear that the only reason that the Appellants—or any other person for that matter—spent less time addressing the Commission than the Applicant, it is simply because they failed to request it. In doing so, the Appellants consented to the Commission's public hearing process, and have waived the right to raise this argument for the first time on appeal.⁵¹

4. The Commission's Receipt and Consideration of Ex Parte Information Did Not Deprive the Appellants of Due Process.

The Appellants argue that their right to due process was also violated because commissioners performed independent ex parte site inspections of the property, with one commissioner coming into ex parte contact with the Applicant's mother during her site inspection.⁵² They assert that this violated due process because, "The record does not show whether the Commissioners obtained and relied on competent evidence from these site visits," because it does not exist within the Record.⁵³ In addition, the Appellants argue that they were denied due process when the Commission received

⁵¹ See *Griswold*, 310 P.3d at 942; *Griswold*, 55 P.3d at 73.

⁵² Opening Brief, at 89-90.

⁵³ *Id.*, at 90.

additional testimony from the Applicant's representative, Wayne Whaley, after the close of the June 9, 2015 public hearing on the Application.⁵⁴

The Alaska Supreme Court has not yet addressed the issue of ex parte communications within the context of quasi-judicial municipal land use determinations. However, in *Municipality of Anchorage v. Carter*, when considering whether the Alaska Workers' Compensation Board committed error when it considered an ex parte report addressing the Appellant, the Court indicated that:

In general, ex parte communications do not void an agency decision but instead render the decision voidable. Absent any indication that "the agency's decision making process was irrevocably tainted," we [will] conclude that any error was harmless.⁵⁵

Authorities seem in agreement that, within the zoning context, "Th[e] due process right to a 'fair hearing' on the issues clearly prohibits any use of secret evidence or secret reports that have the effect of denying the person involved a fair opportunity to proffer rebuttal testimony and evidence."⁵⁶ Thus, ex parte contacts and the receipt of ex parte information is typically considered "highly improper" and capable of prejudicing a party's right to a fair hearing sufficient to violate the right to due process; however, they do not in and of themselves automatically render a decision invalid.⁵⁷

Ex parte information within the land use context appears to be treated in much the same way as the "personal knowledge" of a member of a local land use authority.

⁵⁴ Opening Brief, at 90.

⁵⁵ *Municipality of Anchorage v. Carter*, 818 P.2d 661, 666 n. 13 (Alaska 1991) (citations omitted).

⁵⁶ 2 Rathkopf's *The Law of Zoning and Planning* § 32:13 (4th ed.).

⁵⁷ *Id.* ("However, courts generally hold that ex parte contacts will invalidate an administrative zoning decision only where the contacts or communications involved are such as to substantially prejudice the affected party's right to notice and a fair opportunity to be heard.")

Where that knowledge forms any basis for the member's decision, due process requires that it be revealed at the hearing, so that parties may be permitted an opportunity to refute that knowledge.⁵⁸ Thus, this issue would appear to turn upon whether: (1) the information was disclosed prior to rendering a decision; and, (2) the Appellants had a reasonable opportunity to address any ex parte information that the commissioners relied upon in rendering their decisions.

After reviewing the transcripts in light of the Appellants' arguments, it is the hearing officer's impression that both commissioners appear to have fully disclosed the nature of the ex parte information they received during the public hearings. The Record shows that two commissioners acknowledged visiting the Property prior to the July 14, 2015 public hearing. [Tr. 57-58 (June 9, 2015); Tr. 132-133, 139 (July 14, 2015)] Commissioner Means explained that he visited the Property for the purpose of gaining a better understanding of its characteristics, and to better visualize how the Applicant's proposed construction "could possibly fit there, how it could work." [Tr. 139-140 (July 14, 2015)] He also explained that he viewed "four or five vehicles parked" on the Property, as well as seagulls and magpies. [Tr. 140 (July 14, 2015)]

During the public hearings, Commissioner Pinard also disclosed both the fact that she performed independent ex parte site visits to the Property, as well as their purpose, and her observations. She stated that she "went all around the lake to double check all the information, the...setbacks." [Tr. 185 (July 14, 2015)] Her statements during the public hearing also demonstrate the ways in which she relied upon that ex parte information. When the Commission began discussing the various setbacks that it

⁵⁸ See 3 Rathkopf's The Law of Zoning and Planning § 57:62, 62:27 (4th ed.); 4 Am. Law. Zoning § 40:37 (5th ed.).

might deem acceptable under the circumstances, she explained that her observation of the shoreline setbacks on other properties around Wasilla Lake demonstrated that the average appeared to be 45 feet, which caused her to believe that any variance granted to the Applicant should be “comparable.” [Tr. 200 (July 14, 2015)]

Although the Appellants allege that Commissioner Pinard’s independent investigation involved “direct contact between the adjudicator and an owner of Starn Trust,⁵⁹ that assertion is not supported by the Record. Commissioner Pinard explained during the July 14, 2015 public hearing that she “saw...[the Applicant’s] mom” during her personal examination of shoreline setbacks in the area. [Tr. 185 (July 14, 2015)] There is no indication that there was any direct contact or discussion between the two.

The hearing officer further concludes that the Appellants did have a reasonable opportunity to address the ex parte information received by Commissioners Means and Pinard. The Appellants argue that they discovered the fact that these commissioners conducted the ex parte site visits only after “public comments were closed and the Commissioners began deliberating” at the July 14, 2015 public hearing.⁶⁰ However, the Record clearly shows that this was not the case. Commissioner Pinard first disclosed receiving ex parte information during the June 9, 2015 public hearing. [Tr. 57-59 (June 9, 2015)] There, she explained that she visited the Property, and described her observations regarding its topography. [Tr. 57-59 (June 9, 2015)]

Commissioners Means and Pinard also disclosed during the course of public comments at the July 14, 2015 hearing that they conducted ex parte site visits earlier

⁵⁹ Opening Brief, at 89-90.

⁶⁰ Reply Brief of Appellants Noel Kopperud and Alex Kopperud, at 28 (hereinafter “Reply Brief”).

that day. [Tr. 132-133; 139-140 (July 14, 2015)] Commissioner Means clearly explained the nature of his observations during his visit. [Tr. 139-140 (July 14, 2015)] After public comment had closed at the July 14, 2015 public hearing, Commissioner Pinard explained her observations regarding the average setbacks for other properties in the area that are situated upon Wasilla Lake. [Tr. 185 (July 14, 2015)]

Thus, the Appellants knew before the July 14, 2015 public hearing that Commissioner Pinard had already conducted one site visit. Neither appellant elected to address that fact, or object to it. Although Noel Kopperud had already addressed the Commission by the time that Commissioner Means disclosed his ex parte site visit and explained his observations, immediately following that disclosure the Chairperson explained that individuals who had already spoken would be given another opportunity if they requested it. [Tr. 141 (July 14, 2015)]

However, neither Appellant elected to avail themselves of the opportunity for additional time to speak in order to address the ex parte evidence that Commissioners Means and Pinard obtained and disclosed. In failing to do so, the Appellants, once again, have effectively waived any due process arguments related to the commissioners' obtainment and consideration of ex parte information.⁶¹

5. The Appellants Were Not Deprived of Their Due Process Right to an Impartial Tribunal.

Alaska law provides that those who serve on administrative bodies performing quasi-judicial functions “are presumed to be honest and impartial until a party shows

⁶¹ See *Griswold*, 310 P.3d at 942; *Griswold*, 55 P.3d at 73.

actual bias or prejudice.”⁶² To meet the burden of showing bias, a party must show that there existed some actual “predisposition to find against a party or” “interfere[ance] with the orderly presentation of evidence.”⁶³ In this instance, the Appellants have failed to meet this burden, as they have not identified facts in the record sufficient to “show[] that the [Commission] prejudged any facts in this case or was motivated by actual bias in ruling on procedural issues.”⁶⁴

The Appellants argue first that the Commission appeared to be predisposed to grant the variance in order to avoid costly litigation.⁶⁵ Specifically, the Appellants assert that certain comments made by “[t]he City Attorney sent the message that a vote on the variance as-is, which didn’t have the support to pass, could lead to denial and subsequent ‘lawsuits,’ which would expose the City...to payment of damages to Starn Trust...”⁶⁶ However, the Appellants do not identify any other evidence in the record. Furthermore, the record shows that the City Attorney’s comments indicated that, no matter the outcome, subsequent appeal proceedings would be likely. [Tr. 208, 212 (July 14, 2015)] This evidence is therefore insufficient to show that the Commission’s decision was in any way influenced by a predisposition to grant the variance.

Second, the Appellants argue that certain statements by Commissioners indicating their belief that property owners generally have a reasonable right to build upon their property, or put it to some use, show bias.⁶⁷ Again, these statements are not

⁶² *Button v. Haines Borough*, 208 P.3d 194, 208 (Alaska 2009) (quoting *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007)).

⁶³ *Id.*

⁶⁴ *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

⁶⁵ Opening Brief, at 84

⁶⁶ *Id.*

⁶⁷ *Id.*, at 85-87.

sufficient to show impermissible bias. In contrast, the record shows that the commissioners failed on several occasions during the course of the proceedings to agree upon what variance, if any, it would be willing to grant the Applicant. Regardless of any personal beliefs regarding property rights, this fact demonstrates that the Commission was not willing to grant any variance to the Applicant unless and until it concluded that the requirements of WMC 16.28.110 had been met.

Third, the Appellants argue that the Commission's decision to continue the June 9, 2015 hearing, and to permit the Applicant to submit a revised building plan prior to the continued hearing date, demonstrates its bias in favor of granting the variance.⁶⁸ The Appellants also argue that the Commission's decision to amend the Applicant's proposal, and the process by which it concluded that the variance it granted met the requirements of WMC 16.28.110, showed bias.⁶⁹ Again, in light of the weight of the evidence in the record, these assertions are insufficient to meet the burden of showing actual bias or prejudice. As the Alaska Supreme Court has explained with respect to the authority of local zoning bodies to grant permits:

Zoning authorities are bound by the terms and standards of the applicable zoning ordinance, and are not at liberty to either grant...permits in derogation of legislative standards. Within the boundaries of such standards, however, the local zoning authority is afforded a broad latitude of discretion.⁷⁰

Therefore, while it is true that “[t]he [City’s] ordinances do not place the burden on the commission to negotiate mutually acceptable” variances, it appears that

⁶⁸ *Id.*, at 88.

⁶⁹ *Id.*, at 88-89.

⁷⁰ *Coffey*, 862 P.2d at 175 (citations omitted).

they enjoy discretion as to whether they determine it is in the City's best interests to do so.⁷¹

6. The Commission Was Under No Obligation to Preserve the Information Sketch It Considered During Deliberations.

The Appellants assert that the Commission did not preserve an informal sketch prepared by the City Planner during its deliberations during the July 14, 2015 hearing, and that they have been deprived of due process because it does not exist within the Record.⁷² With respect to administrative proceedings, "the record on appeal in such cases properly consists of evidence that was either 'submitted to' or 'considered by' the administrative board."⁷³ The hearing officer finds that the Appellants' argument on this point fails for the reasons explained below.

Although the sketch itself does not appear within the record on appeal, a clear description of what it purported to illustrate is made clear by the transcript. It shows that, after public hearing had closed during the July 14, 2015 hearing, and the Commission began its deliberations, the City Planner apparently drew an informal sketch to assist the Commission in understanding the ways in which various setbacks might overlap with the configuration of the single-family dwelling proposed by the Applicant. [Tr. 198 (July 14, 2015)] It appears to have merely taken the Applicant's revised building plan—evidence that does exist within the record on appeal—and sketched reference marks to illustrate how the imposition of various setbacks would overlap that plan. [Tr. 198-99

⁷¹ *Luper*, 215 P.3d at 347.

⁷² *Id.*, at 92.

⁷³ *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 939 (Alaska 2001) (quoting *Oceanview Homeowners Ass'n v. Quadrant Constr. & Eng'g*, 680 P.2d 793, 798-99 (Alaska 1984)).

(July 14, 2015] Thus, it did not constitute any independent evidence “submitted to” or “considered by” the Commission.

Further, even if the Commission did have some obligation to include the sketch in the record on appeal, the Appellants have demonstrated that any failure to do so constituted harmless error, and was in any case cured on appeal. Despite the fact that the sketch may not have been preserved, the Appellants apparently had sufficient knowledge of what it conveyed to understand that they wished to commission a professional surveyor to recreate the scenarios presented in the sketch for their review and rebuttal. [R. 302-304] Although these commissioned survey documents were not themselves submitted to or considered by the Commission, the Appellants were permitted to supplement the record on appeal to include them.⁷⁴

D. The Appellants Were Not Deprived of their Rights to Equal Protection and Substantive Due Process Under the Alaska Constitution.

1. The Appellants Have Waived Their Equal Protection Arguments.

The Appellants attempt to advance a number arguments related to the Alaska Constitution’s guarantee of equal protection.⁷⁵ Each of these arguments is only cursorily addressed, and undeveloped. For example, although the Appellants’ Opening Brief indicates that their equal protection argument “is set-out in Argument 2, Section F,”⁷⁶ the corresponding section addresses only issues related to sufficiency of notice.⁷⁷ The Appellants do not argue that other individuals are or have been given more appropriate notice than what they received. “There is no ground on which to begin an equal

⁷⁴ See Order on Appellant’s Motion to Supplement Administrative Record on Appeal, at 4.

⁷⁵ See Alaska Const. art I, § 1.

⁷⁶ Opening Brief, at 78.

⁷⁷ *Id.* at 81-83.

protection analysis in the absence of some allegation of unequal treatment.”⁷⁸ As a result, one can only speculate what the Appellants’ equal protection claims may be with respect to the City’s notice; consequently, the hearing officer finds that the Appellants have waived this argument.⁷⁹

The Appellants submit three equal protection arguments in another section of the Opening Brief that addresses the Commission’s consideration of statistical evidence regarding other properties located on Wasilla Lake.⁸⁰ That evidence presented averages regarding the ratio of building sizes to property sizes, the setback of existing buildings from the shoreline, and the degree of variance from the shoreline setback requirements that have been granted in other instances.⁸¹ As the Appellants and the City explain in their respective briefing, the Commission considered this evidence in conjunction with its determination that the variance it approved complied with WMC 16.28.110(D)(1), which requires that they grant the least deviation necessary to permit a reasonable use of a property.⁸²

However, the Appellants do not develop these arguments, which are stated only as conclusory assertions. They argue first that, “Application by the City of the ‘average variance’ rule to shoreland setbacks and minimum reasonable house size treats similarly situated Wasilla Lake property owners differently.”⁸³ Next, they argue that, “Those who apply for a variance are treated differently from those who must obey the

⁷⁸ *Palmer v. Municipality of Anchorage*, 65 P.3d 832, 842 (Alaska 2003).

⁷⁹ See *Dominish v. State*, 907 P.2d 487, 494 (Alaska 1995) (citing *Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991)).

⁸⁰ Opening Brief, at 24.

⁸¹ *Id.*

⁸² See Opening Brief, at 24; Appellee City of Wasilla’s Response Brief, at 26 (hereinafter “Response Brief”).

⁸³ Opening Brief, at 24

law.”⁸⁴ Finally, they assert that, “Those who live on the Borough portion of Wasilla Lake are treated differently from those who live in the City.”⁸⁵ As a result, it is impossible to identify any reasonably specific theory of unequal or disparate treatment sufficient to support an equal protection analysis. Accordingly, the hearing officer concludes that the Appellants have also waived these arguments.⁸⁶

2. The Appellants’ Substantive Due Process Claim is Without Merit.

The Appellants also contend that the Commission’s consideration of the “average variance” evidence violated their right to substantive due process under the Alaska Constitution.⁸⁷ Citing *Tweedy v. Matanuska Susitna Borough Bd.*,⁸⁸ they argue that the Commission’s consideration of that evidence “establish[ed] dissimilar shoreland setback requirements for property owners on the same lake,” which violated their right to substantive due process because there “is no apparent rational basis or legitimate public policy advanced” by doing so.⁸⁹

The Appellants’ substantive due process argument fails from the outset, as it is based upon the faulty premise that the Commission’s consideration of average setbacks amounted to a legislative decision. However, Alaska law is clear that the Commission’s actions were wholly quasi-judicial in nature. As explained by the Alaska Supreme Court, “[w]henever an entity which normally acts as a legislative body applies general policy to

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *Dominish v. State*, 907 P.2d 487, 494 (Alaska 1995) (citing *Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991)).

⁸⁷ Opening Brief, at 25.

⁸⁸ 332 P.3d 12 (Alaska 2014).

⁸⁹ *Id.*

particular persons in their private capacities...it is functioning [in a quasi-judicial capacity].”⁹⁰

In this instance, the Commission's actions related only to the rights of this particular Applicant with respect to this particular Property. Because the Commission is free to deny variances even where it finds that an applicant has met its burden of demonstrating that it meets the requirements of WMC 16.28.110,⁹¹ its decision to consider average setbacks in this matter is not generally applicable to the owners of other properties who may at some future time apply for a variance. Therefore, it did not “pass[] on general policy or the rights of individuals in the abstract,” and its decision to consider evidence of average setbacks was not legislative in nature.⁹²

E. Substantial Evidence Supports the Commission’s Conclusion that the Property Meets Each of the City’s Five Variance Standards, and Therefore Qualifies for a Variance from the Applicable Setback Requirements.

WMC 16.28.110 explains that, “[a] variance is the relaxation of the density, setback, height, or sign standards” established in Title 16 of the City Code. The Commission may only deem a property eligible for a variance if it determines that it meets five specific standards:

1. The conditions upon which the variance application is based do not apply generally to properties in the district or vicinity other than the property for which the variance is sought;

⁹⁰ *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833, 835-36 (Alaska 2001) (*internal quotations omitted*).

⁹¹ *See South Anchorage Concerned Coalition v. Coffey*, 862 P.2d 168, 173 n. 13 (Alaska 1993) (noting that, “By its plain language, the ordinance requires that the Commission deny permit applications if it finds that any standard is not met. However, the use of the terms ‘may approve’ indicates that the Commission also has discretion to deny the permit even if it finds that the standards are met.”).

⁹² *Cabana*, 21 P.3d at 836.

2. Such conditions arise out of natural features inherent in the property such as shape or topographical conditions of the property or because of unusual physical surroundings, or such conditions arise out of surrounding development or conditions;
3. Because of such conditions the strict application to the property of the requirements of this chapter will result in an undue, substantial hardship to the owner of the property such that no reasonable use of the property could be made;
4. The special conditions that require the variance are not caused by the person seeking the variance, a predecessor in interest, or the agent of either;
5. The variance is not sought solely to relieve pecuniary hardship or inconvenience.⁹³

As is explained in greater detail below, the hearing officer concludes that substantial evidence supports the Commission's conclusion that the Applicant met his burden of demonstrating that the Property met each standard, and therefore qualified for a variance.

1. **Substantial Evidence Supports the Conclusion that the Property Has Qualities that Do Not Apply Generally to Other Properties Within the Vicinity.**

The Resolution incorporated the Commission's finding that the first variance standard had been met because, "The [Property's] small, triangular shape does not apply generally to properties in the district or vicinity." [R. 255] The Appellants argue that the Property' is not unique because "two other triangle-shape lots fronting Wasilla Lake" exist in the same neighborhood.⁹⁴ The Appellants point to parcels labeled "13" and "TR 3" on a map provided to the Commission by the City Planner. [R. 132] However, as the City correctly points out in its Response Brief, the standard does not

⁹³ WMC 16.28.110(C)(1)-(5).

⁹⁴ Opening Brief, at 51.

require that applicants for variances prove that their property is “the *only* property affected by” conditions; instead, it simply requires that such conditions cannot apply to other properties *generally*.⁹⁵

The Record contains expansive evidence showing that the Property’s combination of shape and size by no means applies generally to other properties in the vicinity. For example, the map cited by the Appellants shows forty-three properties that abut Wasilla Lake, [R. 132] most of which, as the City Planner explained to the Commission, “are fairly rectangular or square” in shape. [Tr. 5 (June 9, 2015)] Another map showing the properties within the public notice area is consistent with that observation. [R. 137] In addition, both the City Planner’s Report and her testimony illustrated the relative uniqueness of this feature among other properties in the vicinity. [R. 19; Tr. 4-5 (June 9, 2015)]

There is also substantial evidence in the Record regarding the Property’s topographical features, which are properly considered characteristics related to the overall shape of real property.⁹⁶ [R. 161; Tr. 2, 5, 15, 57 (June 9, 2015); Tr. 104, 118-119, 147, 151-152, 208, 219 (July 14, 2015)] The Commission’s findings “made it clear that [it] was rejecting” the Appellants’ contention that the Property’s topographical features were not unique.⁹⁷

⁹⁵ Response Brief, at 6.

⁹⁶ The Merriam-Webster Dictionary’s simple definition for the term “topography” as “the art or science of making maps that show the height, shape, etc., of the land in a particular area.” See “Topography.” Merriam-Webster.com, available at <http://www.merriam-webster.com/dictionary/topography> (last accessed March 19, 2016).

⁹⁷ *Jurgens v. City of North Pole*, 153 P.3d 321, 327 (Alaska 2007).

2. Substantial Evidence Supports the Conclusion that the Unique Conditions Result from Natural Features Inherent in the Property.

The City's second variance standard is directly related to the first in that, once a characteristic of a property is shown to be unique, that characteristic may justify a variance if it is (or arises from) a "natural feature[] inherent in the property *such as shape or topographical conditions...*"⁹⁸ The Commission found that the second standard was met because "[t]he parcel is in the original platted configuration from 1963." [R. 256] When viewed in isolation, the Commission's finding on this point may not be "a model of clarity."⁹⁹ However, when considered in light of the evidence before the Commission, as well as "the comments which the commissioners made on the record while they considered the [variance] application, their reasoning and conclusions become clear."¹⁰⁰

A great deal of documentary evidence submitted to the Commission supports the conclusion that the Property has existed in the same shape since it was platted. [R. 6, 19, 75, 80, 114] The City Planner affirmed this point in her testimony to the Commission. [Tr. 5 (June 9, 2015)] Appellant Noel Kopperud's written statements and testimony also indicated that the Property has remained unchanged since it was platted. [R. 75, 114; Tr. 15 (June 9, 2015); Tr. 123 (July 14, 2015)] It is clear that the Commission found that the Property met the second standard because of the substantial evidence in the Record showing that its unique shape and its topography has existed in its current form since being platted.

⁹⁸ WMC 16.28.110(C)(1)-(2) (emphasis added).

⁹⁹ *Coffey*, 862 P.2d 168, 175 (Alaska 1993).

¹⁰⁰ *Id.*

3. **Substantial Evidence Supports the Commission's Conclusion that the Strict Application of the Lakeshore Setback Requirement Would Prohibit Any Reasonable Use of the Property.**

The Appellants argue that the Commission erroneously concluded that the City's third variance standard had been met because it concluded that the Property was "unbuildable" and therefore could not be put to any reasonable use absent a variance. They cite to the Alaska Supreme Court's decision in *Pruitt v. City of Seward*, where the Alaska Supreme Court stated in dicta that the City could have properly denied the Appellant's application for a variance based solely upon its finding that a property was being put to reasonable use because it was being used to store the appellant's boats.¹⁰¹ The Appellants argue that, because the Property has been used for overflow parking, and to store snow removed from the adjoining right-of-way, that constitutes a "reasonable use" for the purposes of the City's variance ordinance.¹⁰²

It is obvious from the Record that the City has interpreted the "reasonable use" variance standard to require the Commission to consider whether the strict application of the City's regulations would prohibit a property from being put to a use generally permitted for all other properties within the same zone. Such an interpretation is entitled to significant deference not only because it is based upon the Commission's specialized expertise regarding the application of its land use regulations, but also because it signals the Commission's application of fundamental land use policy.¹⁰³ This is the same deference acknowledged by the Alaska Supreme Court in *Pruitt* toward the City of

¹⁰¹ *Pruitt*, 152 P.3d at 1138-39.

¹⁰² Opening Brief, at 13-14.

¹⁰³ *Balough*, 995 P.2d at 254.

Seward's authority to interpret its own variance standards in order to set into motion its unique land use policies.

There is substantial evidence in the Record to support the Commission's conclusion that, absent a variance, the Property would be incapable of being put to any reasonable use. Written evidence and testimony submitted to the Commission tended to show that the shoreline and front yard setbacks overlapped on the Property due to its small, triangular shape. [R. 258; Tr. 161 (July 14, 2015)] As a result, the Commission reasonably concluded that there was no buildable space on the Property when the setback requirements were strictly enforced. It is also uncontested that the Property is situated within a zone in which the construction of single-family dwellings is permitted. Based upon the City's policy that a "reasonable use" for the purposes of the variance requirements is a use that is otherwise permitted by a property's zoning, the Commission concluded that a variance was necessary in order to permit the Applicant to put it to the reasonable use of constructing a single-family dwelling. Not only is that inclusion entitled to deference, it is supported by substantial evidence.

4. Substantial Evidence Supports the Commission's Conclusion that the Special Characteristics Were Not Caused by the Applicant or a Predecessor in Interest.

WMC 16.28.110(C)(4) prohibits the Commission from granting a variance if the applicant, a predecessor in interest, or an agent for either party has created the special conditions that justify the variance. The Appellants argue that the Property's shape and size was created due to negligent surveying and platting, which caused it "to include a

portion of the waters of Wasilla Lake.¹⁰⁴ Thus, they argue, a predecessor in interest technically created the Property's unique shape and size.

The hearing officer finds this argument without merit. First, the evidence in the Record shows that, even if the Property's original surveying and platting had not erroneously included portions of land covered by Wasilla Lake, that would not have changed its current shape and size—both of which were deemed by the Commission to be unique characteristics. Second, it is unreasonable to consider a property's unique characteristics to have been caused by a predecessor in interest simply because it has been surveyed and platted in a unique configuration. Under that reasoning, any property that cannot be put to a reasonable use due to its platted shape and size would automatically be ineligible for a variance. Such a construction is in direct conflict with WMC 16.28.110(C)(2), which explicitly addresses shape as a condition warranting a variance. Alaska law disfavors interpretations of regulations that produce such absurd results.¹⁰⁵ Therefore, the Appellants' argument must be rejected.

The Appellants also argue that the Applicant is not entitled to a variance, because he knew or was charged with knowing that the Property was likely unbuildable when it was purchased.¹⁰⁶ However, as the City correctly notes in its Response Brief, notwithstanding the laws of other jurisdictions, "neither Alaska law nor the WMC provides that an applicant's awareness of an existing zoning restriction precludes a

¹⁰⁴ Opening Brief, at 54.

¹⁰⁵ *Premera Blue Cross v. State, Div. of Ins.*, 171 P.3d 1110, 1120 (Alaska 2007) ("We generally disfavor statutory constructions that reach absurd results. Therefore, we look for another construction that avoids the absurdity and is consistent with a reasonable interpretation of the terms of the statute.")

¹⁰⁶ Opening Brief, at 55-57.

variance *per se*.¹⁰⁷ At most, it may be considered a factor that the Commission may inform their decision as to whether a variance should be granted.¹⁰⁸

The Commission took into consideration whether the Applicant's knowledge of the setbacks and other restrictions on the Property when they purchased it. [Tr. 184, 205, 210 (July 14, 2015)] As explained in Section E(2), it also received a great deal of evidence tending to show that the Property's unique shape and size have existed since its original platting. This substantial evidence supports the Commission's conclusion that the Property met the fourth variance standard.

5. Substantial Evidence Supports the Commission's Conclusion that the Variance Was Not Sought Solely to Relieve Pecuniary Hardship and Inconvenience.

The Appellants contend that the Commission improperly concluded that the Applicant's proposed use met the fifth variance standard, because the evidence in the Record shows that the Applicant's motivation for seeking the variance was to relieve pecuniary hardship.¹⁰⁹ As the City correctly notes, the plain language of WMC 16.28.110(C)(5) only prohibits the Commission from granting a variance where relief from pecuniary hardship is the applicant's sole motivating factor.¹¹⁰ Thus, the Commission's conclusion must be upheld if there is substantial evidence in the Record indicating that other considerations motivated the Applicant.

Such evidence of alternative motives exists in the Record, and is substantial. For example, during the July 14, 2015 public hearing, the Applicant's mother, Nancy Starn, testified to the Commission that the single-family residence proposed for the Property

¹⁰⁷ Response Brief, at 21.

¹⁰⁸ *Id.*

¹⁰⁹ Opening Brief, at 35-41.

¹¹⁰ Response Brief, at 21.

was intended to be her permanent home. [Tr. 141 (July 14, 2015)] The Commission specifically asked her whether she believed that she required as large a house as was proposed. [Id.] She explained that she was currently residing in a 2,600-foot home, and that she believed she needed the room because, "...as a person ages, and, in Alaska, and, the long winters, they do need space to walk around." [Id.] She also indicated that a house of the size proposed was necessary so that she could keep her belongings. [Id.] It was also indicated that the Applicant and his wife might eventually move into the house constructed on the Property. [Tr. 53 (June 9, 2015)]

F. Substantial Evidence Supports the Commission's Conclusion that the Variance It Granted Met the City's Mandatory Conditions.

WMC 16.28.110(D) provides that, even where the Commission finds that a property meets the standards necessary for it to qualify for a variance, any variance that is granted must conform with five additional conditions. Those conditions are:

1. The deviation from the requirement of this title that is permitted by variance may be no more than is necessary to permit a reasonable use of the lot;
2. The variance will not permit a land use that is prohibited by this title;
3. The variance is in keeping with the spirit and intent of this chapter and the requirements from which relief is sought;
4. The variance will not be detrimental to the public health, safety or welfare; and
5. The variance will not significantly adversely affect other property.

As is explained in greater detail herein, the hearing officer concludes that the Commission properly determined that the variance it granted to the Applicant complied

with each of the five conditions, and its conclusions are supported by substantial evidence in the Record.

1. **Substantial Evidence Supports the Conclusion that the Deviation from the Setbacks Are No More Than is Necessary to Permit Reasonable Use of the Property.**

The Appellants lodge several arguments in support of their contention that the Commission erroneously found that the first variance condition had been met.¹¹¹ First, they assert that any comparisons drawn between the proposed use for the Property and nonconforming properties is “incompetent evidence.”¹¹² The Appellants cite to the Hawaii Supreme Court’s decision in *Surfrider Foundation v. Zoning Board of Appeals* in support of this proposition.¹¹³ However, that case is inapposite to the instant question.

Even if one were to accept the proposition that Alaska’s local zoning authorities may not consider evidence of other nonconformities to justify granting a new nonconformity, there exist other forms of substantial evidence in the Record to justify the Commission’s conclusion. As has been previously explained, with respect to its variance ordinance, the Commission has interpreted the term “reasonable use” to mean any use generally permitted in the zone within which a property is located, and that interpretation is entitled to deference. In this instance, the “reasonable use” that the Commission considered was the construction of a single-family dwelling comparable to others constructed in the zoning district on other properties that abut Wasilla Lake. To determine whether the variance it granted presented the least deviation necessary to

¹¹¹ The Appellants raise additional arguments related to equal protection and substantive due process, which are addressed herein at Section D. In addition, they argue generally that the Commission’s decision was inconsistent with the Wasilla Comprehensive Plan, which is discussed in Section F(5).

¹¹² Opening Brief, at 20.

¹¹³ 358 P.3d 664 (Hawaii 2015).

permit the construction of a single-family residence comparable to others within the district, the Commission considered evidence regarding variances granted to those comparable properties, as well as the average ratio of building size to property size. [R. 133; Tr. 68-74 (June 9, 2015); Tr. 102-107, 113-116, 123, 165, 200, 202, 213 (July 14, 2015)]

Second, the Appellants appear to argue that the Commission's reliance upon evidence of these averages served to unilaterally invalidate the requirements of the Mat-Su Borough ordinance establishing a shoreland setback requirement.¹¹⁴ This is not the case. The variance that the Commission approved does not purport to grant any relief from the requirements of MSBC 17.55.020; instead, it only authorizes relief from the requirements of WMC 16.24.030(C)(3). Whether and to what extent MSB 17.55.020 may apply to the Property is outside the scope of both the Record and this appeal, and the hearing officer will accordingly submit no opinion on that issue.

Third, the Appellants contend that considering the evidence of averages usurped the City Council's authority by effectively changing the requirements of the City's shoreline setback ordinance.¹¹⁵ Once again, this argument is unavailing. The City Council has delegated broad authority to the Commission to grant variances from its various land use ordinances, and has enacted WMC 16.28.110 to constrain that authority within specific bounds. The City Council has not mandated the types of evidence that the Commission may properly consider when determining whether a variance should be granted. Alaska's courts have consistently granted significant deference to the quasi-judicial decisions of local planning commissions, and recognized

¹¹⁴ Opening Brief, at 21-22.

¹¹⁵ *Id.*

the authority of such bodies to reasonably interpret the ordinances that they are called upon to apply. The Commission's decision to consider the evidence at issue was a proper exercise of that authority.

2. Substantial Evidence Supports the Conclusion that the Variance Will Not Permit a Land Use Prohibited by the City.

The Appellants argue that the Commission improperly concluded that the variance met the second condition because, although it was purportedly sought to permit the construction of a single-family dwelling, the Applicant's true purpose is to at some future time use the Property to operate a commercial bed and breakfast, or some other "intensive economic use."¹¹⁶ However, substantial evidence in the Record supports the Commission's conclusion that the variance would permit only a residential use of the Property, which is a permitted use within the RM zoning district.¹¹⁷

Questions regarding the Applicant's intended use for the Property were raised during both public hearings on the variance application. [Tr. 27, 29-31, 42, 53-57 (June 9, 2015); 136-37 (July 14, 2015)] During the first public hearing, both the City Planner and the Commission unequivocally explained to the Applicant that the only purpose for which the variance would apply would be a single-family residential use, and that another variance would have to be obtained before it could be put to any other use. [Tr. 53-55 (June 9, 2015)] The Applicant, Joel Starn, and Nancy Starn each explained to the Commission that the Property would be used as a single-family residence. [Tr. 52-53 (June 9, 2015); 137, 141-144 (July 14, 2015)] Based upon this substantial evidence, the Commission properly concluded that the variance met the second condition.

¹¹⁶ Opening Brief, at 63, 66.

¹¹⁷ See WMC 16.20.020.

3. **Substantial Evidence in the Record Demonstrates that the Variance is Consistent with the Spirit and Intent of the Applicable Ordinances.**

WMC 16.28.110(D)(3) provides that a variance may only be granted to qualified properties if the Commission finds that it “is in keeping with the spirit and intent of this chapter and the requirements from which relief is sought[.]” The Commission’s finding as to the third condition states simply that, “The variance is in keeping with the spirit and intent of the chapter.” [R. 256-257] The Appellants argue that the finding is insufficient because it failed to include a statement that the variance was also consistent with the spirit and intent of the shoreline setback requirement.¹¹⁸ They also argue that the Record contains no evidence that the Commission “carefully weighed” the variance’s congruity with the spirit and intent of the shoreline setback.¹¹⁹

The Appellants have submitted no evidence or argument concerning the spirit and intent of the City shoreline setback requirement, which is the only shoreline setback addressed by the variance granted by the Commission. [R. 252-257] Instead, they address only the purposes of the Mat-Su Borough’s shorelands setback, as stated by the Alaska Supreme Court in *Tweedy*.¹²⁰ However, even if one were to assume that both ordinances were enacted to address identical purposes, the Record does not support the Appellants’ argument on this point.

While it is true that the Commission’s finding is generally conclusory in nature, and does not contain an express finding that the variance is consistent with the spirit and intent of WMC 16.24.030(C)(3), Alaska law simply does not require that findings be as explicit as the Appellants would have it. Instead, findings are adequate so long as

¹¹⁸ Opening Brief, at 42.

¹¹⁹ *Id.*

¹²⁰ 332 P.3d 12 (Alaska 2014).

they are “sufficient to enable meaningful judicial review[.]”and will be upheld so long as they are supported by substantial evidence.¹²¹ The Commission’s finding met these standards, as it is clear from the Record that it considered substantial evidence directly relevant to this condition, and ultimately determined that it had been met.

The Appellants submitted significant evidence regarding the ways in which they believed that the variance would have negative effects upon Wasilla Lake, and the public. [R. 78, 86-87, 117-118; Tr. 19-20 (June 9, 2015)] Several other comments submitted to the Commission also addressed concerns regarding the potential for negative impacts upon Wasilla Lake. [R. 36, 97, 99, 119-120; Tr. 29, 33, 34-35 (June 9, 2015)] The Commission also heard evidence indicating that any effects contrary to the primary purposes of the City’s shoreline setback requirements would be adequately mitigated by the conditions attached to the variance. [R. 20-21; 253-54; Tr. 8, 38-39 (June 9, 2015); 170-72 (July 14, 2015)] Further, as explained in greater detail in Section F(5) of this decision, the Record shows that the conditions are directly related to Goal 4.3 of the Comprehensive Plan.

4. The Conclusion that the Variance Will Not Be Detrimental to the Public Health, Safety and Welfare is Supported by Substantial Evidence in the Record.

The Appellants argue that the variance does not meet the fourth condition because the proposed use will have detrimental effects upon Wasilla Lake, will prohibit the City from using the Property to store snow removed from the right-of-way during

¹²¹ See, e.g., *Jurgens*, 153 P.3d at 326-27 (citing *Faulk v. Board of Equalization*, 934 P.2d 750, 751 (Alaska 1997)).

Winter months, and will result in overflow parking within the right-of-way.¹²² However, substantial evidence in the Record justifies the Commission's conclusion.

As is explained in greater detail in Section F(5), the Record is filled with evidence submitted to the Commission by both the Appellants, and other members of the community, regarding the potential adverse effects that the proposed use would have on Wasilla Lake. The Resolution granting the variance imposes specific conditions upon the proposed use, each of which is directly related to the preservation of Wasilla Lake's water quality and aquaculture, and correspond with the protective goals embodied in Goal 4.3 of the Comprehensive Plan. [R. 253-54] This topic was addressed at length during the July 14, 2015 public hearing. [Tr. 116-17, 134-35, 167-72 (July 14, 2015)] The substantial evidence, and the Commission's ultimate decision, demonstrates that it reasonably concluded that a variance permitting a 42-foot setback adequately addressed any adverse effects upon Wasilla Lake.

During the June 9, 2015 public hearing, the Commission received and considered several comments addressing public concerns regarding the sufficiency of parking space, as well as snow storage and removal. [Tr. 3, 18-19, 23, 25, 55 (June 9, 2015)] As the City points out, the Applicant presented revised site plans at the July 14, 2015 meeting that, as he explained to the Commission, increased the space available for parking and the storage of snow. [R. 126; Tr. 113, 116-17, 146 (July 14, 2015)] Several individuals submitted evidence regarding the sufficiency of the revised plans to address these perceived issues. [Tr. 122-24, 126-27, 134-36 (July 14, 2015)] The Commission's conclusion that the variance satisfied the fourth condition, in the face of

¹²² Opening Brief, at 58-62.

this substantial evidence, again demonstrates that it concluded that permitting a 10-foot front yard setback for the proposed use satisfactorily addressed any public health, safety and welfare concerns related to parking and snow removal.

5. The Commission's Conclusion that the Variance Would Not Significantly Adversely Affect Other Property is Supported by Substantial Evidence in the Record.

The Commission found that, "With the amendment to a 42-foot setback, the requested variance will not significantly adversely affect other properties." [R. 257] The Appellants argue first that the Commission erred in finding that the fifth variance condition had been met because the proposed use of the Property will adversely affect the Appellants' property by obstructing its view of Wasilla Lake, but the Commission disregarded the possibility by improperly concluding that obstruction of view was not a valid basis for contesting the variance.¹²³ The Record shows that the Commission did consider an abundance of evidence submitted by the Appellants to show that the proposed use would adversely affect their lake view. [R. 33-34, 88-89, 117, 151-52; Tr. 19-20, 51 (June 9, 2015)] The Commission recognized and discussed at length those potential effects, as well as the ways in which it informed their decision. [Tr. 82-83 (June 9, 2015; Tr. 150, 175 (July 14, 2015))] In addition, the Commission had before it a rendering that showed the footprint for the proposed use. [R. 5, 126, 162-163]

The Appellants also argue that the Commission ignored the possibility that the proposed use would have significant adverse effects upon other properties in the area, and upon Wasilla Lake.¹²⁴ However, the Record shows otherwise. The Commission received numerous comments from members of the public that articulated concerns

¹²³ Opening Brief, at 67-71.

¹²⁴ *Id.*, at 71-72.

regarding a variety of potential adverse effects that might result from the Applicant's proposed use. Some of those comments specifically addressed aesthetics. [R. ; Tr. 21-23, 28-29, 31 (June 9, 2015)] Others related to public safety. [R. 28, 30-33, 36, 78, 117-121; Tr. 24, 26, 32-35 (June 9, 2015); Tr. 130-131, 133-139 (July 14, 2015)] And, as explained in the previous section, a great deal of evidence was submitted regarding the potential for adverse environmental impacts. The fact that the Commission ultimately determined that the fifth variance condition was met does not demonstrate that it disregarded or failed to meaningfully consider the fifth variance condition; instead, it makes it clear that it concluded any adverse impacts upon the Appellants' property would not be significant.

Finally, the Appellants argue that the variance is not consistent with certain provisions of the Wasilla Comprehensive Plan ("Comprehensive Plan").¹²⁵ The Appellants cite to Goals 4.2 and 4.3 of the Comprehensive Plan; however, of the two, only Goal 4.3 addresses Wasilla Lake in any explicit way.¹²⁶ It directs the City to:

- 4.3.1 Seek mitigation opportunities and design solutions to balance recreational use of lands and preservation goals, particularly with ORV crossings of wetlands and anadromous streams.
- 4.3.2 Consider ways to better protect waterways from neighborhood septic tanks, use of damaging chemicals and fertilizers, and clearing of natural vegetation along the shoreline which both filters chemicals and provides important habitat for young Salmon and other fish.
- 4.3.3. Establish programs to improve and maintain the water quality in both Lucille Lake and Wasilla Lake.

¹²⁵ *Id.*, at 72-73.

¹²⁶ *Id.*, at 73.

- 4.3.4 Require curbs, gutter, and stormwater runoff control measures that help collect, filter, and enhance the quality of water quality returning to natural waterways. [R. 121]

Contrary to the Appellants' assertions, the variance does not appear incompatible with these goals. The conditions that the Commission imposed upon the variance require the Applicant to: (1) implement of a City-approved landscaping plan to ensure that the lake and shoreline are protected; (2) implement a site design that prevents direct runoff from the property into the lake; (3) obtain permits and approvals for the construction of any water and sewer infrastructure; (4) install vegetation along the shoreline to prevent its erosion; and, (5) obtain specific approval prior to completing any work along the shoreline. [R. 253-54] It is thus clear that these conditions directly address the purposes of Goal 4.3.

VI. CONCLUSION

The Commission's process in determining that the Applicant met his burden of demonstrating that the Property qualified for a variance pursuant to WMC 16.28.110(C), and that the variance it granted met the conditions set forth at WMC 16.28.110(D) did not violate the Appellants' constitutional rights to due process and equal protection. Furthermore, the Commission's findings and decision is supported by substantial evidence in the record on appeal, and are not impermissibly deficient. Accordingly, the Commission's Decision as set forth in Resolution Serial No. 15-10(AM) is affirmed.

NOTICE OF RIGHT TO APPEAL

This Decision constitutes the final decision of the Hearing Officer of the City of Wasilla in this matter. This Decision may be appealed within 30 days of the date of the Certificate of Distribution of the Decision, in accordance with Wasilla Municipal Code

Section 16.36.100, A.S. 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

Dated this 4th day of April, 2016.

By: Joseph N. Levesque
Joseph N. Levesque
Administrative Hearing Officer

CERTIFICATE OF DISTRIBUTION

I certify that on April 4th, 2016 a copy of this Decision was posted on the website of the City of Wasilla, www.cityofwasilla.com/government/pending-appeals and distributed by electronic mail and first class mail to each of the following:

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