



| | | |
|--------------------|---------------------|--------|
| | Presented | |
| | Approved | Denied |
| Date Action Taken: | 9/14/09 | |
| Other: | | |
| Verified by: | <i>A Charles</i> | |

WASILLA CITY COUNCIL INFORMATIONAL MEMORANDUM

IM No. 09-16

TITLE: PROVIDING THE FINAL ORDER AND NOTICE OF RIGHT TO APPEAL FOR APPEAL TO A HEARING OFFICER, CASE NO. 09-02, AND PROVIDING INFORMATION ON THE ASSOCIATED COSTS.

Agenda of: September 14, 2009

Date: August 20, 2009

Originator: Amanda E. Charles, Deputy City Clerk

| Route to: | Department | Signature/Date |
|-----------|----------------------|---------------------------|
| X | Director of Finance | <i>[Signature]</i> 9.8.09 |
| X | Deputy Administrator | <i>[Signature]</i> |
| X | City Clerk | <i>[Signature]</i> 8/20 |

REVIEWED BY MAYOR VERNE E. RUPRIGHT: *[Signature]*

FISCAL IMPACT: yes *or* no Funds Available yes no

Account name/number:

Attachments: Final Order and Notice of Right to Appeal (10 pp)

SUMMARY STATEMENT: On August 3, 2009, a hearing was held regarding Appeal to a Hearing Officer, Case No. 09-02. This appeal was regarding Planning Commission Resolution Serial No. 09-13(AM): Approving The City Of Wasilla Request To Site An Outdoor Firing Range On 59.96 Acres In The Industrial Zoning District; Lot 001, New Wasilla Airport Addition No. 1.

On August 14, 2009, the hearing officer, Eric Jensen, rendered his decision remanding the appeal back to the Planning Commission. The Final Order and Notice of Right to Appeal is attached for your review.

Per WMC 16.36.060.D, the \$500 filing fee and the \$500 deposit are being refunded to the appellant.

Associated Costs:

| | |
|-----------------|-------------------|
| Transcript: | \$ 580.00 |
| Advertising: | \$ 183.75 |
| Mailing: | \$ 9.68 |
| Hearing Officer | <u>\$3,350.00</u> |
| Total: | <u>\$4,123.43</u> |

CITY OF WASILLA
APPEAL FROM PLANNING COMMISSION DECISION

COPY

IN THE MATTER OF:)
)
Brad Laybourn, Appellant)
City of Wasilla, Appellee)
)Appeal Case No. 09-02
)
_____)

Introduction

This is an appeal from the Planning Commission approval of a conditional use permit issued to the City of Wasilla for the operation of an outdoor firing range at the Wasilla Sports Complex property. The appellant, Brad Laybourn, is an adjacent property owner. An appeal hearing was held August 3, 2009, where the parties to the appeal and other interested parties, as defined by applicable WMC provisions, were heard.

Standard of Review

This appeal decision is made pursuant to WMC 16.36.090. WMC 16.36.090(B) provides that the hearing officer's decision shall include the officer's findings of fact and conclusions of law. This raises the question of what standard of review is applicable to this appeal. Usually, a judicial appeal is decided on the record and factual conclusions are not examined unless there is a claim that there is no evidence to support the findings.

The provisions of WMC 16.36.090 give the appeal hearing officer the authority to affirm, reverse, or modify the Planning Commission's decision. This combination fact finding authority and review of prior factual determinations is similar to the powers of the Superior Court when it hears an appeal from

an administrative agency pursuant to AS 44.62.570. Its applicable provisions read as follow:

(b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by

- (1) the weight of the evidence; or
- (2) substantial evidence in the light of the whole record.

Finding no other direction, these standards will be applied to this appeal.

Findings of Fact

There is substantial evidence in the record to support the Planning Commission's finding of fact 1 through 39 except for Findings No. 19, 20 and 30. These findings will be discussed below.

Discussion

Appellant, Brad Laybourn, has raised six issues on appeal. They will be addressed in turn.

(1) WMC 16.16.050(A)(2), Failure to consider City Plans

Appellant contends that the Planning Commission failed to consider the "other City adopted plans" referenced in WMC 16.16.050(A)(2). He argues that the sports complex includes a hockey rink, basketball courts, volleyball courts, indoor soccer fields, outdoor baseball fields, a race staging area, a football field and areas for other activities. At the time of

argument on August 3, 2009 the City Planner, Jim Holycross, stated that the only adopted plan was the comprehensive plan and that no other plans existed. While this answer makes one wonder what a City Planner does, if not make plans, it does highlight the vagueness of the phrase "other City adopted plans". As a practical matter there are multiple plans made and executed on a daily to yearly basis in the operation of any organization, including the City. Which of these plans must be considered by the Planning Commission is the question.

The Planning Commission specifically found that the Comprehensive Plan was considered in their adoption of Finding No.19. If there are no other adopted plans then the Planning Commission has fulfilled this requirement.

(2) WMC 16.16.060(K), Safety Features

The safety issue associated with a firing range is the containment of bullets within the range after firing. The physical description provided to the Planning Commission of the berms and firing line roof adequately support a finding that the range will contain the fired rounds. The possibility of overhead misfires was discussed and the design supports a finding that this possibility was considered. The firing line roof is bulletproof. (Tr., p. 54)

Appellant contends that no parking lot firearms safety was discussed. The transport of firearms is not inherently dangerous. There is no reason to believe that moving firearms from a parking lot to a range poses any particular danger requiring a separate finding. Firearms are endemic in Alaska. A range user is not likely to load a weapon in the parking lot or before it was on the firing line. Thousands travel with firearms daily without mishap.

(3) WMC 16.16.050(A)(4), Reviewing Parties

Appellant's position is that since four of the nearby property owners opposed the firing range and only one spoke in favor that the Planning Commission did not give due deference to those who spoke against. If the Planning Commission only acted on a majority vote there would be no need for such a body. The record clearly shows that the remarks of those who spoke were considered and, in fact, influenced the decision. This is evidenced by the special conditions that ultimately modified the applicant's proposed use. The Planning Commission must be allowed to perform its discretionary functions in a manner that considers the City as a whole. The Commission's decisions will protect the whole from a few and the few from the whole, depending on their combined judgment. Numbers alone, while a consideration, are not determinative.

(4) WMC 16.16.050(A)(7), Traffic

Appellant's fourth point on appeal is not well taken. There is no reason to believe that the transport of firearms to a rifle range increases the dangers on our streets or to pedestrians. The language of section (A)(7) clearly shows that it relates to traffic engineering questions and not activities other than driving.

(5) WMC 16.16.050(A)(14), Off Site Impacts

Appellant's fifth point on appeal contends that offsite impacts of the firing range were not adequately considered. He again cites failure to adequately deal with firearm safety and the noise issue. The firing safety was discussed at point (2) above. The record supports the conclusion that the firing safety issue was considered and found to be resolved by the design features presented.

The appellant further argues that the offsite impacts of noise, noxious odors or lead pollution were not discussed or

considered. There is no reason to consider noxious odors as gun fire is not generally connected with noxious odors. While gun powder has a distinctive odor, it is not noxious in the limited amounts burned at a public, outdoor firing range.

Gunfire noise is another issue. Almost all those who spoke at the Planning Commission hearing spoke about gunfire noise. The Commission recognized that this was the primary concern with the operation of a firing range in the City. The record describes a proposed range with high earth walls and a baffling system that is designed to reduce noise outside the range. The record does not contain any specifications, drawings, or narrative from the *NRA Range Book: A Guide to Planning and Construction* that was discussed and, apparently, examined by the Planning Commission. This publication may have more detailed information on how to handle gunfire noise. The publication may contain information about desired lot sizes, surrounding natural sound suppressors such as forests or other structures, caliber considerations, mode of operation on the firing line, recommendations on proximity to other land uses or actual scientific sound measuring information under varying physical conditions and these sound's affects at varying distances. We don't know because it is not in the record.

The Planning Commission heard oral testimony from people who have experience in running firing ranges similar to that proposed. The record has testimony about the inverse square rule of sound dissipation over distance. There was testimony about how the outside sound volume would be similar to a lawn mower or gunshots on television. All this testimony is extremely vague. The gist of the record is that sound dissipates the farther we are from the source and that physical barriers help deaden sounds. These are conclusions we all know from our common experience.

The Planning Commission recognized that gun fire is loud, can be disturbing and its questions and comments concentrated on how the sound's affects could be reduced. They inquired about the vegetation because it has sound deadening effect and were told that the surrounding area is wooded and would act as a sound dampener. They imposed restrictions on the caliber size, limited automatic fire, restricted the hours of operation and directed the City to consider turning the range 180 degrees if this would further reduce the noise to the south and east. There was discussion about whether actual decibel levels could be evaluated. Ultimately, the Commission relied on what testimony it had and approved the conditional use application.

Based on the record, it is a close call whether the City has met its burden with respect to the noise issue. I find that there has been no abuse of discretion in the Commission's findings regarding the noise. The noise question is particularly vexing in that the surrounding property owners will certainly hear something. This was acknowledged by all those who testified. The large caliber gunfire concussion we feel from shooting will likely be contained but the gunfire will be recognized at some distance nonetheless. The effect on the Katkus and Laybourn property is hard to accurately determine. Whether the forested area between the range and the Katkus property is maintained is an important consideration in determining what effect the noise will have at such close range. The Commission rightly inquired about the surrounding forest and seemed encouraged that this would be an additional consideration in the noise attenuation. The Commission cited the "vegetative buffer of trees" in its Finding 19 that dealt with the noise impact. However, no restriction on the future removal of the trees was included in the conditions to the permit. At the time of argument, the City stated that it was free to cut the trees

as it wished. This leads one to consider the interpretation of WMC 16.16.060(K).

WMC 16.16.060(K) reads in part, "An outdoor firing range shall conform to the following standards. (1) Minimum Lot Area. The lot on which an outdoor firing range is located shall have a minimum area of twenty (20) acres." At the time of argument two statements about this regulation were made by the City. First, the language was taken from the Anchorage Municipal Code and no consideration was given to the minimum lot size requirement at the time of adoption by the City of Wasilla. Second, the City perceives no limitations on the use of the balance of the sports complex property. Also, the footprint of the proposed firing range is approximately 2.5 acres. The City of Anchorage did not require a 20 acre minimum lot size for no reason. Noise remediation may well be one of these reasons. While the actual "lot" size of the sports complex is 60 acres the actual property set aside for this particular facility is 2.5 acres, not 20 acres. A casual estimate of the property used by the sports complex is roughly 30 to 35 of the 60 acres. If the City can put another 20 acres into other uses then does the firing range still meet the requirements of WMC 16.16.060(K)? The Planning Commission did not address the lot size requirement, but it should, and, particularly as it impacts the removal of the surrounding trees.

While I have authority to change the requirement regarding the area set aside for the firing range, and restrict the deforestation of the surrounding property as a noise remediation consideration, I believe the Planning Commission is best suited to consider these issues. Maybe something less than 20 acres is appropriate since the sports complex has some range benefits such as parking that would normally be associated with a firing range and be part of the 20 acre minimum..

(6) WMC 16.16.050, General Approval

Appellant contends that the Planning Commission has failed to include in its findings of fact that the proposed use can occur harmoniously with other activities allowed in the district and will not disrupt the character of the neighborhood. Such findings of fact are specifically required by WMC 16.16.050(A) and the Commission has failed to so find. The City will argue that I put to fine a point on the requirement because it is implied in the grant of the conditional use permit and otherwise stated in broader terms in Finding of Fact No. 19. But Finding of Fact No. 19 is conspicuous in what is not included and for its error in the description of the surrounding land uses. Finding No. 19 describes the property as surrounded by vacant undeveloped property and that a firing range will fit well with other industrial uses in close proximity. This finding is disingenuous. In close proximity to this proposed range is the sports center and rural residential property, not industrial property and uses as stated in the finding. In fact, the range is bordered on the south and east by rural residential property. While the Katcus property is not fully developed it has residences and multiple other residences are in existence not much farther down Bailey Lane. These residences are closer to the shooting range than any industrial use property and the finding should accurately reflect the conditions on the ground. This finding, as written, is not supported by the record. The Commission likely made such a finding because the City representatives at times referred to the industrial nature of the area.

The Commission is directed to accurately describe the surrounding property if it feels such a description is necessary. Such a description is not required by the WMC. WMC 16.16.050(A) requires that the Commissions findings shall

include a written finding that the proposed use can occur harmoniously with other activities allowed in the district and will not disrupt the character of the neighborhood. The conditional use permit primary consideration is its effects on other properties. The Commission should make a direct finding, as required, if the permit is granted. Certainly, an accurate description of the surrounding property would be an appropriate adjunct to such a finding.

Conclusion

The appeal is granted in part as set forth above. The application is remanded to the Planning Commission to consider the following:

1. What is the reason that WMC 16.16.060(K) requires 20 acres for a firing range, and is this requirement met if the property is additionally used for other purposes? This is a direction to reconsider Finding No. 20.

2. Should a particular amount of surrounding property be restricted in use, to insure adequate sound dampening, as an additional condition to the conditional use permit. This inquiry is to address Finding No. 30 that found a vegetative buffer was important to mitigate off-site impacts.

3. The Commission is directed to make a determination pursuant to WMC 16.16.050(A) as to whether the proposed use can occur harmoniously with other activities allowed in the district and whether it will disrupt the character of the neighborhood. If the conditional use is approved then such findings will be in writing.

4. There is no requirement that the balance of the findings previously made be revisited unless the Commission so desires at its discretion.

Notice of Right to Appeal

This Order constitutes the final decision of the City of Wasilla in this matter. This Order may be appealed within 30 days of the date of this Order in accordance with Wasilla Municipal Code 16.36.100, AS 22.10.020(d) and Alaska Rule of Appellate Procedure 602(a)(2).

Done this 14 day of August 2009.



Eric Jensen, Appeal Hearing Officer