

**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

**ORDER ON APPELLANT'S
MOTION TO SUPPLEMENT
ADMINISTRATIVE RECORD ON APPEAL**

THIS MATTER, having come before the Administrative Hearing Officer pursuant to Appellant's Motion to Supplement Administrative Record on Appeal, dated November 9, 2015, and having received and considered the City of Wasilla's Partial Opposition to Appellants' Motion to Supplement Administrative Record on Appeal, dated November 17, 2015, along with Applicant William Starn's response email dated November 17, 2015, and Appellants' Reply to City's Opposition to Supplementation dated November 24, 2015,

IT IS HEREBY ORDERED as follows:

Appellate review of administrative decisions generally precludes the introduction on appeal of any new evidence that was not made part of the record on appeal. Wasilla Municipal Code ("WMC") 16.34.050, "Preparation of record," provides in pertinent part in Paragraph A that, "The city planner shall forward all pertinent information related to the appeal to the planning commission for review." WMC 16.36.070(D) provides that the record on appeal before the Administrative Hearing Officer shall include: 1) the transcript of the proceedings before the commission; 2) copies of all documentary evidence; 3) memorandum and exhibits, correspondence and other written material

submitted to the planning commission; and 4) a copy of the final written decision of the planning commission.

Alaska Rule of Appellate Procedure 210(a) provides for the composition of the record on appeal in judicial proceedings. There, the record on appeal consists of: 1) the entire trial court file, including the original papers and exhibits filed in the trial court; and 2) the electronic record of proceedings before the trial court, and transcripts, if any, of the trial court proceedings. Appellate Rule 210(a) also designates documents and information that is not to be included in the record on appeal, stating:

Except as otherwise ordered by the appellate court, the record does not include documents or exhibits filed after, or electronic records or transcripts of proceedings occurring after, the filing date of the notice of appeal and does not include transcripts not designated under subsection (b)(1) of this rule unless those transcripts were filed with the trial court prior to the filing date of the notice of appeal. Filings, exhibits, electronic records, or transcripts presented to the trial court after the filing date of the notice of appeal may be added to the record on appeal only upon motion pursuant to subsection (i). Material never presented to the trial court may not be added to the record on appeal.

Part (i) of Appellate Rule 210 empowers the Court to correct, modify or supplement the record on appeal, stating in pertinent part:

... [I]f any difference arises whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to that court's decision. If anything material to either party is omitted from the record on appeal by error or accident by court personnel, or is misstated therein, the parties by stipulation, the trial court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected.

Recent Alaska case law appears to encourage allowing the supplementation of the record on appeal, especially involving claims asserting a violation of due process. In *Nash v. Matanuska-Susitna Borough*,¹ the Court held that Nash's due process rights were violated because he was not allowed to present his case at either the Administrative

¹ 239 P.3d 692 (Alaska 2010).

Hearing level or to the Superior Court acting as the Appellate Court. According to the Court:

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. A violation of due process should be alleged with particularity and a showing of prejudice. We stated in *Keiner v. City of Anchorage* that a party is ‘entitled to a trial de novo, in whole or in part, if he [has] been denied the opportunity to present to the [Board] relevant and material evidence supporting his claim. ...’²

Furthermore, in *Griswold v. Homer City Council*,³ the Supreme Court affirmed the Superior Court’s allowance of a partial trial de novo upon an argument by Mr. Griswold that he did not have an opportunity to present witnesses or present any evidence on his claim. The Superior Court allowed the parties to conduct limited discovery so that it could determine whether an evidentiary hearing was necessary. The City Council accordingly conducted a deposition, allowing Mr. Griswold the opportunity to cross-examine the witness. The Supreme Court concluded that Mr. Griswold was provided adequate opportunity to submit additional evidence.

Accordingly, the Record on Appeal is supplemented with those documents designated below as “Granted” with any limitations noted.

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² *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010) (footnotes and citations omitted).

³ 310 P.3d 938 (Alaska 2013).

<u>Appellants’ Group Identification</u>	<u>Document Description</u>	<u>Granted or Denied</u>	<u>Limitations</u>
A	Transcripts:		
	July 9, 2015 -- Planning Commission Meeting Excerpts (9 pages)	Granted	City and Applicant may offer counter-designations as appropriate no later than date of filing Response Brief
	July 14, 2015 – Planning Commission Meeting Excerpt (34 pages)	Granted	City and Applicant may offer counter-designations as appropriate no later than the date of filing Response Brief
	August 11, 2015 Planning Commission Meeting Excerpt (9 pages)	Denied	
B	Survey Drawings (3 pages): <ul style="list-style-type: none"> • 30 ft. Setback; • 42 ft. Setback; • 45 ft. Setback 	Granted	Demonstrative evidence.
C	“Area Letter,” Gary Lorusso, Keystone Surveying and Mapping, Re: Square footage of Parcel No. 3, Tract 1, Lakeshore Subdivision, Plat #63-10, 11-7-15 (2 pages)	Granted	Associated with Survey Drawings, Group B above; Demonstrative evidence.
Starns – 1	Letter from Denali North, Wayne Whaley, 11-17-15 ⁴	Granted	Rebuttal to “Area Letter,” Item C above

⁴ Although no specific request was made by Applicant William Starns to supplement the record, this letter was submitted in conjunction with Applicant’s response and comments to Appellant’s Motion to Supplement the Record by email to the City on November 17, 2015.

<u>Appellants' Group Identification</u>	<u>Document Description</u>	<u>Granted or Denied</u>	<u>Limitations</u>
D	Documents from Planning File Variance 15-01:		
	MSB Tax map with notes by City Planning staff (1 page);	Granted	
	"Residential" Comparative Table of Lots Fronting Wasilla Lake within City Limits and related list with notes (3 pages)	Granted	
	Email from Tina Crawford to Claudia Pinard, 7-14-15, with forwarded email from Tahirih Revet to T. Crawford, 7-13-15 re "question on sq. ft of homes" (1 page)	Granted	
	Email from T. Crawford to Mike Rager & Gene Belden, 8-7-15 re "Stop Work Order" (1 page)	Denied	
E	City Wasilla Lake Variance File Documents:		
	Map - Lot Survey, Lot 11, Block 2, Lakeshore Subd., 6-3-93 (1 page)	Granted	
	Letter from Mike Bronson to Wasilla Planning & Utilities Commission, 7-3-93 (1 page)	Granted	
	Proposed Plot Plan drawing, Lot 1 Block 1, 7-26-00 (1 page)	Granted	

<u>Appellants'</u> <u>Group</u> <u>Identification</u>	<u>Document Description</u>	<u>Granted or</u> <u>Denied</u>	<u>Limitations</u>
	Notices of Application for Variance by Linda Jensen, 9-13-00 with responses by Chapelle, Harren, Gentle (Received 9-20-00); Comiskey (Received 9-18-00); and Menard (Received 9-15-00)	Granted	
	Letter from Ak Dept Fish & Game, Dennis Gnath, 9-20-00 re Request for Variance Wasilla Lake (2 pages)	Granted	
	Cottonwood Creek Sockeye Counts 1998-1999 (1 page)	Granted	
	Wasilla Lake Sockeye Salmon shoreline spawning areas, 1998 (1 page)	Granted	
F	City and Borough Assessor Variance Parcel 3, Tract 1 File Documents:		
	Letter from City to Nussbaumer, undated, re Stop Work Order Tract 11 Parcel 3 Lakeshore Subd. (2 pages)	Granted	Rebuttal
	Handwritten note from Nussbaumer, -27-96	Granted	Rebuttal
	Letter from Kopperud to Dvorak, City of Wasilla, 5-23-96 re: Parcel 3, Tract 1, lakeshore Subd (Amended) (1 page)	Granted	Rebuttal

<u>Appellants' Group Identification</u>	<u>Document Description</u>	<u>Granted or Denied</u>	<u>Limitations</u>
	Agreement, 6-3-96 between Nussbaumer and Kopperud (2 pages)	Granted	Rebuttal
	MSB Tax Record, Land ID 63177, 9-9-15	Granted	Judicial Notice - Public record
G	Wasilla/MSB Management Agreement documents:		
	MSB Ordinance Ser. #092-079 (7 pages)	Granted	Judicial Notice
	City of Wasilla Resolution WR-90-01 (2 pages)	Granted	Judicial Notice
	MSB aerial Map (1 page)	Granted	Demonstrative
H	Excerpt from Decision on Appeal, <i>In the Matter of the Appeal of MEA</i> , No. 13-01, page 13, City Planner Testimony	Denied	
I	Map marked as "Exhibit 7" Showing Replats of nearby lakefront lots, (1 page)	Granted	No Opposition

All documents supplemented to the Record on Appeal and designated as "Granted" above, shall be afforded the proper weight after briefing and hearing. The documents identified above as "Granted" will be added to the Record on appeal pursuant to WMC § 16.36.090(D). The Clerk is directed to number those documents consistent with the Record on Appeal for ease of reference.

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DATED this 11th day of December, 2015.

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