

Fairbanks North Star Borough
Department of Law
P.O. Box 71267
Fairbanks, Alaska 99707
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

PATRICK KALEN,

Appellant,

v.

FAIRBANKS NORTH STAR BOROUGH,

Appellee.

Case No. 4FA-13-01921 CI

MOTION TO DISMISS FOR LACK OF STANDING

Appellee Fairbanks North Star Borough, by and through its undersigned counsel, hereby moves this court for an order dismissing Patrick Kalen's appeal for lack of standing. This motion is supported by the attached memorandum of points and authorities and the Affidavit of Bernardo Hernandez submitted herewith.

DATED at Fairbanks, Alaska this _____ day of May, 2013.

FAIRBANKS NORTH STAR BOROUGH

CERTIFICATE OF SERVICE

This is to certify that on this date, a copy of the foregoing is being:
 mailed via first class mail, faxed
or hand delivered to the following attorney or parties of record:

Patrick Kalen
1041 Chena Ridge Road
Fairbanks, AK 99709

JILL S. DOLAN
Assistant Borough Attorney
ABA No. 0405035

FNSB Department of Law Date

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

PATRICK KALEN,

Appellant,

v.

FAIRBANKS NORTH STAR BOROUGH,

Appellee.

Case No. 4FA-06-1595 CI

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS FOR LACK OF STANDING**

Patrick Kalen (hereinafter “Kalen”) filed an appeal to this court on May 7, 2013 from a decision of the Fairbanks North Star Borough Planning Commission. Under the applicable statute and case law, Kalen does not have standing to bring this appeal.

FACTS

The Borough’s Department of Land Management submitted an application to the Fairbanks North Star Borough’s Platting Board for approval of a preliminary plat dividing two large parcels of land into three smaller parcels.¹ The subject property is located off Chena Hot Springs Road at mile 55.² Kalen owns property in the Fairbanks North Star Borough, but not in the vicinity of the subject property; his nearest parcel is 59 miles away.³

¹ Affidavit of Bernardo Hernandez at ¶2 (hereinafter “Hernandez Affidavit”).

² *Id.*

³ Hernandez Affidavit ¶7.

The preliminary plat was approved by the Platting Board on February 20, 2013 after a hearing.⁴ Kalen did not participate in that hearing.⁵ On February 27, 2013, Kalen filed an appeal to the Planning Commission from the Platting Board’s decision, asserting that, “17.60.070 Access (A) (1) calls for existing roads. Roads both north and south of the airstrip have existed for over 30 years. Adoption would permanently deny legal access upstream. The road is required, and the roads exist, for over 30 years. 17.60.070(B) requires dedication.”⁶

The Planning Commission is the body established to hear appeals of Platting Board decisions.⁷ At the Planning Commission hearing on April 2, 2013, Kalen testified that his objection to the Platting Board’s decision was access and asserted that the proposed subdivision was going to landlock property.⁸ Kalen stated that he did not own any of the land that he alleged would be landlocked.⁹

ARGUMENT

Kalen does not have standing to appeal the decision of the Planning Commission. In the area of land use law, the legislature has chosen to limit standing by statute; general Alaska standing law is not applicable.¹⁰ Here, the statutes, and the Fairbanks North Star Borough Code of Ordinances (“FNSBC”), provide for two levels of review: first to the

⁴ Hernandez Affidavit ¶3.

⁵ *Id.*

⁶ Hernandez Affidavit ¶5.

⁷ AS 29.40.050; FNSBC 17.80.010.

⁸ Hernandez Affidavit ¶6.

⁹ *Id.*

¹⁰ AS 29.40.050-060; *Griswold v. City of Homer*, 252 P.3d 1020, 1029 (Alaska 2011)(citing *Earth Movers of Fairbanks, Inc. v. Fairbanks North Star Borough*, 865 P.2d 741, 743 (Alaska 1993)).

Borough Planning Commission,¹¹ and then to the superior court.¹² This appeal concerns level two, to the superior court. With respect to this level of appeal, state law limits parties to a municipal officer or a person aggrieved¹³:

Judicial review. (a) The assembly shall provide by ordinance for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer, board of adjustment, or other body to the superior court.

The Alaska legislature eliminated taxpayer-citizen standing in land use cases by enacting AS 29.40.050-060.¹⁴ Therefore, in order to have standing to seek judicial review of the Planning Commission’s decision, Kalen must be a “person aggrieved.”

In determining whether Kalen is a “person aggrieved” he must “present proof of the adverse effect the changed status has or could have on the use, enjoyment or value of his or her property....[H]e or she must also be personally and specially affected in a way different from that suffered by the public generally.”¹⁵ The Alaska Supreme Court denied standing to a business competitor whose only alleged injury resulted from competition.¹⁶ The Alaska Supreme Court also denied standing to a city resident who participated in conditional use proceedings before the city’s planning commission, finding that his uses of public land near the subject property, attendance at a nearby theater, and concerns about parking and pedestrian safety did not “suggest a potential

¹¹ AS 29.40.050; FNSBC 17.80.010.

¹² AS 29.40.060; FNSBC 17.80.050.

¹³ AS 29.40.060(a).

¹⁴ *Griswold v. City of Homer*, 252 P.3d at 1029.

¹⁵ *Id.* at 1031, n. 62 (citing 83 AM.JUR.2D *Zoning and Planning* § 925 (2003)).

¹⁶ *Earth Movers*, 865 P.2d at 745 (Alaska 1993).

detrimental effect on any of *his* property.”¹⁷ Other examples of persons held not to have standing are a taxpayer living five miles from the property in question and civic associations, not owning land but merely representative of landowners in the community.¹⁸

In this case, Kalen does not own property in the vicinity of the proposed development; his nearest parcel is 59 miles away.¹⁹ At the hearing, his contention was that there was insufficient access provided on Borough property, and that a parcel may be landlocked if the subdivision was approved as proposed.²⁰ Even assuming this to be accurate, concerns about another property owner’s access do not confer standing on Kalen. In addition, no property owner in the vicinity testified against the proposed subdivision at the Platting Board or the Planning Commission.²¹

The limitation on standing in AS 29.40.060 to “persons aggrieved”, as explained by the Alaska Supreme Court, “signifies that *the legislature has chosen to limit standing in the area of land use law, primarily in order to prevent excessive litigation and undue delay of final dispositions*,...but also because an expansive rule of standing would potentially create a land use battleground that would unduly tax the resources of the municipality as well as impair the free enterprise system,...and unreasonably interfere with the use and development of private property.”²² Developers should not be subject to

¹⁷ *Griswold v. City of Homer*, 252 P.3d 1020, 1031-132 (Alaska 2011)(emphasis in original).

¹⁸ 3 Rathkopf’s *The Law of Zoning and Planning* § 57:38 (4th ed.).

¹⁹ Hernandez Affidavit ¶7.

²⁰ Hernandez Affidavit ¶6.

²¹ Hernandez Affidavit ¶8.

²² *Griswold*, 252 P.3d at 1031 (emphasis in original).

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appeals by persons with no property interest in the proposed development, and Kalen's appeal should be dismissed for lack of standing.

CONCLUSION

Based on the foregoing, the Borough respectfully requests that this court dismiss the action in its entirety.

DATED at Fairbanks, Alaska this ____ day of May, 2013.

FAIRBANKS NORTH STAR BOROUGH

JILL S. DOLAN
Assistant Borough Attorney
ABA No. 0405035

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Case No. 4FA-13-01921 CI

ORDER GRANTING MOTION TO DISMISS FOR LACK OF STANDING

The Appellee Fairbanks North Star Borough having filed a motion to dismiss for lack of standing, and the court having considered this motion and any opposition or reply thereto, and being fully advised in this matter;

IT IS HEREBY ORDERED that Appellee's motion is GRANTED and the appeal is DISMISSED.

Dated this _____ day of _____, 2013.

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Patrick Kalen
1041 Chena Ridge Road
Fairbanks, AK 99709

Hon. Michael A. MacDonald
Superior Court Judge

FNSB Department of Law Date