

MEMORANDUM 09-61

**TO:** Members of the City Council  
**FROM:** Tom Klinkner *TK*  
**DATE:** May 6, 2009  
**FILE NO.** 506,742.557  
**RE:** Ordinance 09-19

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The Council asked that I respond to Frank Griswold's comments on Ordinance 09-19, amending the zoning map to change the zoning of 30 lots on or near Ben Walters Lane from urban residential (UR) to residential office (RO). Mr. Griswold's principal concern is that the zoning map amendment in Ordinance 09-19 would be illegal "spot zoning." I will address that concern first, then respond to the other issues that Mr. Griswold has raised.

**1. Spot Zoning.**

The Alaska Supreme Court has defined spot zoning as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners."<sup>1</sup> The determination whether an ordinance is spot zoning is case-specific.<sup>2</sup> The Court described the most important issue in this determination as follows:

Perhaps the most important factor in determining whether a small-parcel zoning amendment will be upheld is whether the amendment provides a benefit to the public, rather than primarily a benefit to a private owner. Courts generally do not assume that a zoning amendment is primarily for the benefit of a landowner merely because the amendment was adopted at the request of the landowner. If the owner's benefit is merely incidental to the general community's benefit, the amendment will be upheld.<sup>3</sup>

As aids to weighing the relative benefits of a zoning amendment to the affected property owners and the public, the court also will consider the consistency of the amendment with the comprehensive plan, and the size of the rezoned area.<sup>4</sup>

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<sup>1</sup> *Griswold v. City of Homer*, 925 P.2d 1015, 1020 (Alaska 1996). As the discussion below will demonstrate, the Court's reference to a singular "parcel" and "owner" should not be taken literally. Multiple parcels may be included in an illegal "spot zoning." *Griswold*, 925 P.2d at 1024-1025.

<sup>2</sup> *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 264 (Alaska 2000).

<sup>3</sup> *Griswold*, 925 P.2d at 1022 (citations omitted).

<sup>4</sup> *Griswold*, 925 P.2d at 1020.

***Effect on owners of the rezoned property owner and on the community.*** Whether a small-parcel zoning amendment provides a benefit to the public, rather than primarily a benefit to a private owner is the most important factor in determining whether the amendment will be upheld.<sup>5</sup> The principal difference between the RO and UR zoning districts is that professional and general business offices are permitted in the RO district but not in the UR district. However, permitting office uses in the RO district is intended “to preserve and enhance the residential quality of the area while allowing certain services that typically have low traffic generation, similar scale and similar density.”<sup>6</sup>

The rezoning in Ordinance 09-19 was initiated by private property owners, particularly KBFPC, which wanted to secure the opportunity to expand at its existing location. If assisting KBFPC or any other property owner was the primary purpose of the rezoning, it would be invalid. However, courts generally do not assume that a zoning amendment is primarily for the benefit of a landowner merely because the amendment was adopted at the request of the landowner.<sup>7</sup>

The rezoning in Ordinance 09-19 will have the public benefits of (i) establishing a transition/buffer area between the CBD and residential areas to the east; (ii) recognizing the established office/residential character of the rezoned area; and (iii) allowing the continuation and expansion of the services to the community that the existing office uses in the rezoned area provide. The planning staff found that the rezoned area is served by sufficient infrastructure to support uses permitted in the RO district. The public benefits of the rezoning are significant, and no corresponding detriments to the public have been identified. The benefits to the affected landowners could be considered incidental to the public benefit of the rezoning.

***Consistency with the comprehensive plan.*** Consistency with a comprehensive plan is one indication that a rezoning is not spot zoning.<sup>8</sup> The 1999 Update of the Homer Comprehensive Plan designates the area subject to the rezoning as Residential. However, the area lies immediately adjacent to the area that the 1999 Update designates as CBD, and the 1999 Update lists as an action item, “Evaluate the neighborhood behind Lakeside Mall for similarities to Residential Office zoning.” The proposed rezoning is consistent with the recommendation in the 1999 Update that the area be considered for Residential Office zoning.

***Size of rezoned area.*** Both the relative and the absolute size of the affected area are considered in a spot zoning analysis, although the size of the affected area is not more significant than the other factors in that analysis.<sup>9</sup> The proposed rezoning affects about 13.4 acres, excluding rights-of-way. The affected area includes all lots served by the same principal street, Ben Walters Lane, that presently are zoned UR. It includes all lots between the CBD district and the UR-zoned area to the east. Thus, the size and configuration of the rezoned area are logically related to the public purpose of providing a transitional area between the CBD and residentially

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<sup>5</sup> *Griswold*, 925 P.2d at 1022.

<sup>6</sup> HCC 21.16.010.

<sup>7</sup> *Griswold*, 925 P.2d at 1022.

<sup>8</sup> *Griswold*, 925 P.2d at 1021.

<sup>9</sup> *Griswold*, 925 P.2d at 1024-1025.

developed areas to the east, and do not reflect the singling out of particular properties for favored treatment.

In conclusion, if the Council determines that the proposed rezoning serves a public purpose, and does not merely benefit the affected landowners, the factors discussed above indicate that the proposed rezoning would survive a "spot zoning" challenge.

## **2. Other Issues.**

Apart from the spot zoning issue, Mr. Griswold raises several other issues concerning Ordinance 09-19. I will address them in the order in which they appear in Mr. Griswold's April 27, 2009 email message.

1. The statement in Ordinance 09-19 that "the rezone meets the requirements of 21.95 as an extension of an existing boundary adjacent to an existing zoning district," is correct. HCC 21.95.020(b) provides, "Except for the extension of existing district boundaries, the City Council will not consider a citizen proposal to change the zoning map that contains an area less than one acre, including the half-width of any abutting street or alley rights-of-way." The proposed rezoning actually meets either requirement for Council consideration in HCC 21.95.020(b). Not only would the area proposed for rezoning extend the existing boundary of the contiguous RO district, but it also contains an area greater than one acre.

2. Ordinance 09-19 correctly states that "The Homer Advisory Planning Commission determined there is a public need and justification for the rezone." The minutes of the April 1, 2009 Homer Advisory Planning Commission meeting reflect that the Commission adopted the staff report recommending the rezoning, which includes the staff report's findings regarding the public need and justification for the rezoning. Those findings are as follows:

- The rezoning is consistent with the 1999 Comprehensive Plan Update, which includes an action item to "evaluate the neighborhood behind Lakeside Mall for similarities to Residential Office Zoning."
- The rezoning is a contiguous extension of the existing RO district and provides a logical transition between the more intensive uses in the Central Business District to the west and the less intensive uses found in the Urban Residential District to the east.
- The rezoning is consistent with the established office uses in the area.
- Existing roads and utilities are adequate to meet the needs of uses permitted in the RO district.

3. The statement in Ordinance 09-19 that "The Homer Advisory Planning Commission determined the rezone would not have a negative effect on the public health, safety and welfare," is debatable. As discussed above, the Commission found that the rezoning would confer public benefits. It did not determine explicitly that the rezoning would have no negative effects. Before adopting this statement, the Council, through testimony of City staff and members of the public who testify at the public hearing, should make a record regarding whether there are such negative effects, and make a finding on that issue based on the record.

4. The statement in Ordinance 09-19 that "The Homer Advisory Planning Commission considered the effect of the change on the district and surrounding properties," is correct to the extent reflected in the staff findings adopted by the Commission and discussed above. As discussed under the preceding point, further testimony regarding whether the rezoning may have negative effects would be helpful.

5. The statement in Ordinance 09-19 that "The Homer Advisory Planning Commission determined that the rezone was in compliance with the Homer Comprehensive Plan," is correct, as discussed above.

6. The proposed amendment is being requested by numerous people but the application only contains the signature and address of one applicant. HCC 21.95.030(a) requires that "The proposal shall include the signature and residence address of every person requesting the amendment." The application is accompanied by petitions bearing sufficient signatures of property owners who support the rezoning.

7. HCC 21.95.030(b) requires that the rezoning application include "a map showing the area that is included in the proposed zoning map amendment and all contiguous properties," and "the present zoning and proposed zoning of all properties shown on the map." This information appears at page 101 of the April 27, 2009 Council meeting packet. Borough tax parcel numbers are not provided for each lot included in the proposed amendment. While HCC 21.95.030(b) requires the inclusion of Borough tax parcel numbers in the rezoning application, each lot is sufficiently identified by legal description and street address, so that the omission of tax parcel numbers is not material.

8. HCC 21.95.020(a)(1) requires that the rezoning must be requested by a majority of the owners of the lots included in the proposed amendment. The only reasonable interpretation of this requirement is that the amendment must be requested by the owners of a majority of the lots included in the proposed amendment. Counting each owner of multiple lots only once would lead to an absurd result – for example, if the proposed amendment included ten lots, nine of which were owned by the same person, that person could not request a rezoning of the ten lots because that person would not constitute a majority of the lot owners.

In an April 29, 2009 email message to the Council, Mr. Griswold also raises the issue whether the rezoning in Ordinance 09-19 treats the affected area differently from other UR-zoned areas that are "similarly situated." While Mr. Griswold appears to assume that all UR-zoned areas in the City are similarly situated, this is not necessarily the case. At a minimum, two characteristics of the area affected by Ordinance 09-19 – its proximity to the CBD and the presence in it of several existing office uses – may not be present in other UR-zoned areas. Moreover, the fact that the Council relies upon these characteristics to justify the rezoning in Ordinance 09-19 does not mean that the Council may not adopt Ordinance 09-19 if some other UR-zoned area in the City has similar characteristics. A zoning ordinance is not invalid on equal protection grounds merely because it might have gone further than it did; the City need not

address all UR-zoned areas where rezoning is warranted at same time but may address them step-by-step, as the need to do so is identified.<sup>10</sup>

Please let me know if I may be of further assistance in this matter.

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<sup>10</sup> *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1040 (Alaska 1989).