

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

PUBLIC COMMENTS UPON MATTERS ALREADY ON THE AGENDA

Frank Griswold, city resident, addressed the last ruling, stating there was no provision of city code to allow partial participation of a member. He asked if there were limitations as to a member being gone for a partial or whole portion of the meeting and the allowance to just review the record. Mr. Griswold objected, calling it improper. He stated the Board only has the authority in code and cannot make up code. He questioned how an absent member can judge credibility. If they do not vote on a conflict of interest it creates a problem.

BOARD OF ADJUSTMENT APPEAL HEARING – APPEAL OF ACCEPTANCE OF A NONCONFORMING USE AT 1440 EAST END ROAD, BLACKWELL

Mayor Pro Tempore Wythe stated this is an appeal by Frank Griswold of a decision by the Homer Advisory Planning Commission accepting a nonconforming use at 1440 East End Road, Lot 5 Mutch-Gangl Tract Neptune Addition Subdivision. In addition to the Record on Appeal prepared by the City Clerk, we have received a written brief from Frank Griswold and a Statement Regarding Preliminary Matters from Frank Griswold.

Parties of the record Frank Griswold, Appellant, and Don Blackwell, Appellee, were present.

PRELIMINARY ISSUES

Mayor Pro Tempore Wythe addressed the following preliminary issues:

Mr. Griswold has objected to the participation of two board members due to partiality. Those members are Beth Wythe and Bryan Zak. For consideration of Mr. Griswold's objection to Mrs. Wythe's participation, the chairing of the meeting was passed to Francie Roberts, the next senior member.

Mayor Pro Tempore Wythe passed the gavel to Councilmember Roberts.

Councilmember Roberts stated that Mr. Griswold has asserted that Mrs. Wythe should not participate because her step-father-in-law, Ray Kranich, is a member of the Planning Commission who participated in the decision Mr. Griswold is appealing. Ms. Roberts asked Mr. Griswold if he had anything to add to his written presentation on the subject.

Frank Griswold said a reasonable, well informed member would question Beth Wythe's impartiality. Her participation would result in an appearance of bias and impropriety due to bias. Mr. Griswold referenced a 2005 legal opinion by Kenai Peninsula Borough Deputy Attorney Holly Montague that stated "The integrity required of public office holders demands that even an appearance of impropriety be avoided. Zoning decisions that are the result of prejudice will be invalidated." Ms. Montague cited 1996 Alaska Supreme Court case *Griswold vs. City of Homer*.

Mr. Griswold stated Mrs. Wythe was disqualified in the previous hearing on the Blackwell matter, and the City's Attorney Holly Suozzo advised it was important to be consistent in disqualifications. Mr. Griswold referenced the verbatim recording of Councilmember Wythe's comments when she voluntarily excluded herself from Resolution 09-107, Enstar and HEA. She said she would not feel bad being excluded. It indicated she didn't care if she participated or not.

In this case Mrs. Wythe is not indifferent. She wants to make sure the Blackwell application is approved and defend her step father-in-law's findings. She lives on the same property. They have some unwritten household rule between her husband and step father-in-law that they don't discuss matters. In 4 ½ years, who would believe somebody hasn't mentioned this matter? In the previous matter Mrs. Wythe mentioned her 15-year work relationship with Jill Blackwell, which was terminated. She now implies that five more years have gone by and they are still friends, the friendship is just not so close. Now it is a 20-year friendship. There are multiple conflicts between her friendship with Mrs. Blackwell and Planning Commissioner Ray Kranich, who lives at the same address. The Board needs her to disclose the facts and it is up to the Board to determine if there is impartiality.

Councilmember Roberts asked Mayor Pro Tempore Wythe for any comments in response to Mr. Griswold.

Mayor Pro Tempore Wythe stated as a councilmember when the Blackwell case came forward, she disclosed her 15-year working relationship with Jill Blackwell. When the Blackwell case came forward Mrs. Blackwell had very briefly left her employment at HEA. At that time Mrs. Wythe felt like she had much more of a vested interest. Mrs. Blackwell has now been absent from HEA for six years. They now have casual contact to include occasional conversations when they run into each other. The relationship is substantially different now. Her step father-in-law Ray Kranich and her mother-in-law live in another house on property. Her husband sees them regularly; Mrs. Wythe doesn't have a lot of interaction with them. They do have occasional weekends together across the bay. They go out of her way not to discuss issues of planning and zoning nature. She has never had a discussion about this topic outside of City Council.

Councilmember Roberts referenced HCC 18.18.048(c) that provides that the city official whose partiality is at issue may excuse herself; otherwise the body shall by majority vote rule on whether the member must be excused from participation. Mrs. Roberts asked Mrs. Wythe if she wished to excuse herself.

Mayor Pro Tempore Wythe did not wish to excuse herself.

ZAK/HOGAN - MOVED TO EXCUSE MRS. WYTHE FOR A CONFLICT OF INTEREST.

Councilmember Hogan commented it is a tough call with the relationship of Mrs. Wythe's step father-in-law. Mrs. Wythe explained the Kranich's live in a separate dwelling on the same 3 ½ acre parcel. Councilmember Roberts stated many people live in apartments at the same address. She believes Mrs. Wythe is conscious of the issue. Councilmember Howard commented in her years of observation of Beth Wythe she can't recall anyone who has more discipline about their behavioral situations in regards to conflict of interest or bias.

VOTE: NO. ROBERTS, ZAK, HOWARD, HOGAN

Motion failed.

Councilmember Roberts returned the gavel to Mayor Pro Tempore Wythe.

Mayor Pro Tempore Wythe stated Mr. Griswold has asserted that Mr. Zak should not participate because he participated as a member of the Planning Commission in the decision that Mr. Griswold is appealing. She asked Mr. Griswold if he had anything to add to his written presentation on the subject.

Frank Griswold stated he included the Kenai Peninsula Borough legal opinion by Deputy Attorney Holly Montague, as that situation is analogous to this. The Planning Commission issued a formal decision approving the Blackwell application. Once a judge makes a decision he cannot be impartial in deciding the case again. There is no difference from the instances discussed in the KPB case. Comments of Attorney Levesque were in this sort of situation it is clear there is a conflict of bias.

Councilmember Zak stated it would not impact him to be impartial to decide evidence. While on the Planning Commission he made the decision based on the information he knew then. If additional testimony is given and it changes his opinion he would not be impartial.

Mr. Griswold stated no additional information can be given.

Mr. Zak stated he did not wish to excuse himself.

ROBERTS/HOWARD - MOVED TO EXCUSE MR. ZAK FOR PARTIALITY.

Councilmember Roberts indicated she would vote to exclude Mr. Zak. There are some concerns when he has voted on previous information. He is an honest person and would do his very best, although given the facts she would need to vote to excuse him.

Councilmember Hogan asked if the City Attorney concurred with the opinion of the Borough Attorney.

City Attorney Klinkner commented it is a difficult issue that courts have wrestled with. Partiality as it applies to quasi judicial board is looked at it as partiality of a judge. There is not a strong and consistent position by courts on whether a judge who hears a case at a lower level and participates at a later stage. It is situation dependent. Homer City Code states whether the ability of a quasi judicial board to make an impartial decision is impaired. It is subjective. Homer City Code states that the circumstances are such that a decision would be impaired. In the abundance of caution, Attorney Klinkner advised to excuse Mr. Zak, as there is a stronger argument that partiality may be present because of past participation.

VOTE: YES. HOGAN, ROBERTS, WYTHER, HOWARD

Motion carried.

Councilmember Zak was excused from the present and further proceedings relating to the case.

Mayor Pro Tempore Wythe stated that although Mr. Griswold did not raise the issue, Mrs. Howard also participated as a member of the Commission in the decision that Mr. Griswold is appealing.

Councilmember Howard stated although she is confident she could fairly and equitably participate, upon the advice of the attorney she would request excusal.

With no objection from the Council, Mrs. Howard excused herself.

Attorney Klinkner stated in Board of Adjustment appeals, in order to reverse a decision fully a vote of the majority of a constituted board is required. Membership of the three seated at the table and Mr. Lewis are empowered to decide the case by majority vote. Mr. Lewis has not been disqualified. Majority vote will require three votes of the four remaining members.

Mayor Pro Tempore Wythe asked if any remaining Board members had any matter to disclose for the record, such as a potential conflict of interest or ex parte contact with a party to the appeal.

Councilmember Hogan stated he wished he could think of something.

Mayor Pro Tempore Wythe stated as a result of the preceding rulings, Board members Zak and Howard will not participate in the decision of this appeal. Under HCC 21.93.550(a) a majority vote of the fully constituted Board is required to reverse or modify the decision of the Commission, and for this purpose the fully constituted board shall not include those members who do not participate in the proceedings due to a conflict of interest or disqualifying ex parte contacts, disqualifying partiality, or other disqualification for cause. Therefore, the fully constituted Board consists of Councilmembers Roberts, Wythe, Hogan, and Lewis as qualified members, and a vote of at least three will be required to reverse or modify the decision of the Commission.

Mayor Pro Tempore Wythe further stated Mr. Griswold has objected to Mr. Blackwell's presenting oral argument because he did not file an entry of appearance or a brief as required by HCC 21.93.500(b). The notice of appearance contains that party's name and address, and proof that the person would be qualified under HCC 21.93.060 to have filed an appeal. Mr. Blackwell was the applicant before the Commission and the owner of the property that is the subject of the Commission's decision. Therefore, he clearly has standing to participate under HCC 21.93.060(1). Since the purpose of filing a notice of appearance is to identify a party and establish the party's standing, and since that purpose has been served regarding Mr. Blackwell without his having filed a notice of appearance, she ruled that in the interest of fairness Mr. Blackwell should be allowed to present oral argument if he wishes to do so. Mayor Pro Tempore Wythe asked if any member of the Board wished to appeal her ruling. There was no objection from the Board as to the ruling.

ORAL ARGUMENT

Mayor Pro Tempore Wythe asked if there were any other preliminary matters. There were none stated.

Mayor Pro Tempore Wythe recommended that the Board hear oral argument and grant each side a total of 30 minutes, if needed. There was no objection from the Board. She reminded both parties that the Board is not authorized to take any additional evidence at this hearing. The Board decides the appeal solely on the evidence in the appeal record that the Clerk has prepared. The purpose of argument is for each party to present that party's position on the issues in this appeal. The Board will disregard assertions of fact by a party in oral argument unless they are supported by evidence in the appeal record.

Oral argument will proceed as follows. Mr. Griswold, as the appellant, will go first. He will have a total of 30 minutes. If wanted, he may reserve some of that time for rebuttal after Mr. Blackwell speaks. After Mr. Griswold has completed his presentation, Mr. Blackwell will have 30 minutes to argue as the Appellee, and if Mr. Griswold has reserved time for rebuttal, he will present his rebuttal after Mr. Blackwell completes his presentation.

After each party completes his presentation, there will be an opportunity for members of the Board to ask questions.

There were no questions about the procedure for oral argument.

ORAL ARGUMENT

Appellant Frank Griswold stated the Board was inconsistent in dealing with preliminary matters. He was allowed to speak about bias and disqualifications and on other preliminary matters he was not allowed to speak. The Board did not address matters brought up in written materials, specifically whether City Planner Rick Abboud may provide testimony. He was not an employee of the City when the decision was made, is not an attorney, and is here representing the Planning Commission. He never entered an appearance or filed a brief. It is unusual when a party does not brief and participates in an oral argument. Mr. Griswold has briefed and has all his cards on the table. The other parties had a chance to rebut. Mr. Griswold stated now he is ambushed with no opportunity to research law or chase down facts. It is very prejudicial. The Board did not address the portion of city code that the parties shall file a brief.

Mr. Griswold questioned the Board's authority for taking oral argument as the Board is supposed to base their decision solely on the record. The rules are arbitrary.

Mr. Griswold stated the Planning Commission's decision to approve Blackwell's non conforming status is outrageous and totally indefensible. Those that voted for it deliberately violated their oaths of office. In 2005 when some Planning Commissioners realized that he had standing to appeal their approval of the nonconforming status, they voted in opposition to approval finding the original use and condition had been changed. "Commissioner Kranich concurred the building stood vacant a long time after Bob Rinehart moved out." "The requested

nonconforming use is not of the same commercial nature as the original uses per HCC 21.64.030(b)” (record 87). In 2008 when the planning commissioners thought Mr. Griswold’s standing on the appeal of their decision had been neutralized legislatively, they voted unanimously to approve Blackwell’s application, ignoring the facts that the property had stood vacant from 1989 to 1994 and that the original lot had been subdivided out of existence. They found that “commercial and business constituted grandfather uses” (record 37).

Mr. Griswold said it demonstrates how crucial the appeal process is in restraining governmental bodies from acting arbitrarily or inappropriately and why appeal processes need to be construed broadly. Contrary to Bill Smith’s testimony at the February 27, 2006 council meeting, the City of Homer has no obligation to “help out Mr. Blackwell” or “find a way to keep him in business where he is and allow him to work there.” A landowner has a duty to inquire of zoning officials regarding uses permitted on his land (*Utah County vs. Young*, 1980, cited in *Jackson vs. KPB*). It is the case former City Attorney Tans referred to in a 1991 Planning Commission meeting. “The burden of locating the business in an appropriately zoned site must fall on the business person” (*My Sister’s Place vs. City of Burlington*, 1981, cited in *Jackson vs. KPB*). “A city’s inactivity is not necessarily wrong. It may be the result of a reasonable decision to use limited enforcement resources for other matters” (*Jackson vs. KPB*). Mr. Griswold referenced the Jackson court decision, stating it holds for Blackwell who has been in violation of Homer zoning code since 1994. It is time for the Board to overturn the decision of the Planning Commission. He requested that all materials submitted be included in the record.

22.30 remain for rebuttal.

Councilmember Roberts reassured Mr. Griswold they have received a large amount of paperwork in the last month and a half. She believes Council has everything submitted.

Councilmember Hogan asked Mr. Griswold where the 1989-1994 vacancy information was obtained.

Frank Griswold answered he obtained it in the record. Per record 43, paragraph 4, from the Planning Commission minutes of February 20, 2008, Mr. Blackwell stated the DEC cleanup was to clean up the toxic soils from oil spills on the property. He started the paperwork to purchase in 1992, but didn’t buy until 1994 because it took a few years to clean up. Mr. Griswold testified at the hearings that the auto shop terminated in 1986 to 1994 as the place looked like a toxic waste site (per record 87). Commissioner Kranich concurred the building stood vacant a long time after Rinehart moved out. He added that Don Blackwell had done an exemplary job of cleaning up the premises and building, but it was a definite change of use. Mr. Griswold testified he has personal knowledge of the property being vacant. Mr. Blackwell also admitted it was vacant. There was some discussion at record 43 where Commission Foster noted he heard if a business is closed because of EPA or DEC it does not count as a discontinued use or an abandoned use. Nothing in Homer City Code says discontinuation of a use for toxic cleanup stays a discontinue. It was idle speculation on the part of Commissioner Foster.

Appellee Don Blackwell stated the original decision was based on misinformation and lies. He presented evidence to show he started renting the property in 1988. HEA’s power bills from

when Bob Rinehart turned it off and he turned it on were three months separation. He has been operating the business since then. The property was not vacant. He bought the property in 1994 until he could get clear title after DEC clean up. He got clear title. Nick Gangle took care of the cleanup. The Board of Adjustment has all the evidence presented that shows the building was definitely not vacant. Prior to Bob Rinehart turning off the power and Mr. Blackwell turning it on, Rinehart used it as a warehouse to store auto parts before moving out farther on East End Road.

REBUTTAL

Mr. Griswold stated the applicant has the burden of proof of the use. Just because someone leases property does not mean the use has been discontinued. In the record there was an attempt to make automotive use the same use as domestic well pump repair. Bob Rinehart repaired automotive pumps and valves; Blackwell repaired domestic water pumps and valves. Automotive use is one use and domestic pump repair is another use. In order to accommodate Mr. Blackwell, the Planning Commission lumped commercial use, forgetting about the inactivity between.

Mr. Griswold stated even if the lot was not subdivided and there was no period of vacancy during cleanup, the fact the previous use was automotive and that it is not now automotive is a changed use. The only possible use that could be grandfathered is automotive use. Until recently, automotive uses were more specific, but recently all automotive uses have been combined into one. Auto use will not be the same as uses currently taking place there. Mr. Griswold stated he requested a legal opinion Attorney Gordon Tans wrote, but it was not to be found. The original lot is no longer in existence and the use has been changed. All uses were terminated for a period of several years while the property was cleaned up.

City Attorney Klinkner advised that Mr. Lewis needs to review the record before the Board goes into deliberations. An executive session for deliberations will be at a later date.

ROBERTS/HOGAN - MOVED THAT WE TRY TO RECONVENE THE BOARD OF ADJUSTMENT FOR DELIBERATIONS WEDNESDAY, JANUARY 13TH AFTER THE BOARD OF ETHICS AT APPROXIMATELY 7:00 P.M. WITH ATTORNEY KLINKNER IN PARTICPATION.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

COMMENTS OF THE AUDIENCE

There was none.

COMMENTS OF THE CITY ATTORNEY

City Attorney Klinkner had no comment.

COMMENTS OF THE CITY CLERK

City Clerk Johnson had no comment.

COMMENTS OF THE CITY MANAGER

City Manager Wrede was no longer present.

COMMENTS OF THE MAYOR

Mayor Pro Tempore Wythe had no comment.

COMMENTS OF THE CITY COUNCIL

Councilmembers Roberts and Hogan had no comment.

ADJOURNMENT

Mayor Pro Tempore Wythe called for a motion to adjourn the meeting.

HOGAN/ROBERTS – MOVED TO ADJOURN.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

There being no further business to come before the Council the meeting was adjourned at 4:38 p.m. by Mayor Pro Tempore Wythe. The next Regular Meeting is scheduled for Monday, January 25, 2010 at 6:00 p.m. The Next Committee of the Whole is scheduled for Monday, January 25, 2010 at 5:00 p.m. A Special Meeting is scheduled for Monday, January 25, 2010 at 4:00 p.m. All meetings scheduled to be held in the Homer City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

JO JOHNSON, CMC, CITY CLERK

Approved: _____