

Session 11-01 a Special Meeting of the Homer City Council was called to order on January 4, 2011 at 5:42 p.m. by Mayor James C. Hornaday at the Homer City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

**PRESENT:** COUNCILMEMBERS: HOGAN, HOWARD, LEWIS, ROBERTS,  
ZAK  
(WYTHE arrived at 5:46 p.m.)

STAFF: CITY MANAGER WREDE  
CITY CLERK JOHNSON  
ATTORNEY LEVESQUE

### **AGENDA APPROVAL**

(Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 5)

The agenda was approved by consensus of the Council.

### **PRELIMINARY ISSUES**

Mayor Hornaday passed the gavel to Acting Mayor Pro Tempore Francie Roberts.

Mayor Hornaday disclosed he spent \$380 with Dave Becker's radio station in the last mayoral election. He has advertised with the radio station the last four terms, although he has no continuing business. Mayor Hornaday disclosed Dave Becker called him and they agreed they would not discuss any of the merits. Mr. Becker left a phone message stating he wanted to talk about procedure. Mayor Hornaday messaged him back that he could not talk about procedure since it sometimes gets involved in the appeals. Mayor Hornaday learned about the appeal when he read the documents the attorney filed. He stated it would not make a difference in his decision.

Acting Mayor Pro Tempore Roberts affirmed Mayor Hornaday spent \$380 at the radio station for the last mayoral election. She referred to Attorney Levesque who confirmed that conflict of interest has to do with substantial financial interest. Homer City Code allows \$1,000 per transaction or \$5,000 over the course of a year.

Acting Mayor Pro Tempore Roberts ruled Mayor Hornaday did not have a conflict of interest, based on the monetary disclosure. There was no objection from the Council.

Acting Mayor Pro Tempore Roberts affirmed Mayor Hornaday's disclosure of ex-parte comments, and referred to Attorney Levesque who advised if there was ex-parte communication that had to do with merits, it could take the Mayor out of the Chairman of the Board of Adjustment (BOA). The Mayor disclosed he had communication with Mr. Becker, but the parties agreed not to talk about the merits and the Mayor declined to talk about procedure.

Acting Mayor Pro Tempore Roberts ruled Mayor Hornaday did not have a conflict with ex-parte communication. There was no objection from the Council.

Acting Mayor Pro Tempore Francie Roberts returned the gavel to Mayor Hornaday.

Councilmember Lewis disclosed he knows Dan Westerburg. They have met socially as their boys have grown up together. Mayor Hornaday ruled there was no conflict of interest and there was no objection from the Council.

Councilmember Hogan disclosed Dan Westerburg has done legal work in the past, for the formation of a LLC five years ago. Asked by Attorney Levesque if it would affect his ability to be objectional in the appeal, Councilmember Hogan answered it would not. Mayor Hornaday ruled there was no conflict of interest and there was no objection from the Council.

Councilmember Howard disclosed Mr. Becker's daughter is a client at her business Curves with an annual transaction of \$550. Attorney Levesque advised the amount does not fall in the financial limitations for conflict of interest. Mayor Hornaday ruled there was no conflict of interest and there was no objection from the Council.

## **PUBLIC COMMENTS UPON MATTERS ALREADY ON THE AGENDA**

Bill Glynn, party of record and owner of the other portion of Lot 5 lying north of the road, commented it is interesting it was called a utility easement. Mr. Glynn has been in the two-way business for a long time. Dave Becker has a two-way business. It is not a utility easement. At the last public hearing Becker stated it was a private service for a single customer and does not constitute a utility. In the photographs Mr. Westerburg provided to Mr. Glynn (Appendix A-4) is a tower with a triangular structure which is a utility on Mr. Glynn's portion of the lot. The City required him to place that back from the road and meet the setback requirements. The City made Mr. Glynn correct his property encroachments, meet setback requirements, and put in a paved driveway. The City made him take down the 90 ft. tower which cost him a number of rent paying tenants and KMJG to be off the year for nearly a year. Mr. Glynn is President of Kasilof Public Broadcasting and the General Manager of those stations. KMJG lost listener base and revenue from being off the air for a year. He personally lost income from losing tenants. It is only right for the owner of the other portion of the lot to be held to the same standards. Mr. Glynn does not ask that all property encroachments be removed, only to meet the setback requirement and the driveway as was required of him.

## **NEW BUSINESS**

### **A. BOARD OF ADJUSTMENT APPEAL HEARING**

Mayor Hornaday identified the Appeal of Planning Commission Decisions of September 14, 2010 - David Becker Variance 10-01 Structure Within the Building Setback from Rights of Way and Conditional Use Permit 10-04 Public Utility Facilities and Structures in the Rural Residential District.

Appellant Dave Becker, Attorney Dan Westerburg, and City Planner Rick Abboud were present.

## ORAL ARGUMENTS

Mayor Hornaday recommended the Board hear oral arguments and grant each side a total 30 minutes. There was no objection from the Board. He reminded the parties that this is not the time to offer new evidence to the Board pursuant to Homer City Code 21.93.510. The case must be based on evidence in the record from the Planning Commission.

Dan Westerburg, Attorney for Appellant Dave Becker, commented the matter is whether the Planning Commission should have awarded a variance for a setback requirement for a small shed and two towers on the Skyline Drive property. An aerial photo depicts the general area where the apparatus was installed. As an appendix to Mr. Westerburg's brief, four photos were attached to show the shed and two towers in question. The aerial photo shows the site as level, while the photos attached to the brief show the steep grade.

The property has been used for several decades as an antennae farm for the city. A number of different antennas and related structures have been installed there over the years due to the property's unique topographical and geographical location. It is right behind the City of Homer, on a hill, and is easily serviceable by a maintained road. In addition to antennae, there are small sheds that shelter electronics from the weather. Up until the construction of the subject shelter, antennas and associated sheds were constructed prior to annexation, thus there was no need for conditional use permits (CUP) or setback variances.

In 2010 Police Chief Robl contacted Mr. Becker of his desire to have better communications for fire and police emergency radio traffic. He requested Mr. Becker construct a new facility at his site with an antennae that would be used by the City for fire and police. Mr. Becker reached an agreement with the City that he would construct the facility and lease it back to the City for its use. Police Chief Robl wanted it constructed before the July 4<sup>th</sup> weekend so Mr. Becker got a contractor, had it built, and the City started using it. Mr. Becker did not get approval from the Planning Department as he was under the impression approval was not needed.

After the fact the City was contacted by Mr. Glynn about Mr. Becker's failure to get a CUP. Mr. Becker applied for the CUP and was told he needed a setback variance also. Planning staff recommended both applications be granted with respect to the setback requirement. Staff came up with a detailed report addressing a number of different factors outlined on pages 3 to 4 of Mr. Westerburg's brief. The conclusions were:

- Structure supports and advances technological capabilities with the City of Homer by enhancing wireless communication thus forwarding the goals of the comprehensive plan.
- Locations for communication equipment providing optimal coverage for the entire City of Homer are very limited.
- The parcel has steep slopes of 38% to 42%. Parcels this steep are often considered "unfeasible" for typical residential development, Homer Comprehensive Plan, page 4-3. Disturbance of native vegetation for the creation of site development on steep slopes presents on site and off site hazards.

- The structure provides a beneficial service to the city which has specific site requirements for maximum effectiveness.
- The benefit to all the Citizens of Homer combined with the potential hazard of creating an unstable bluff justifies an exception to the setback requirement.
- Building outside the setback would require leveling the site to match the height of the setback or cutting and filling on a steep slope. Neither is conducive to slope stabilization and each presents a preventable hazard.

The need for the variance was a result of the steepness of the slope. In a hearing before the Planning Commission there was not a quorum present. Mr. Becker and the City Manager testified in support of the application. Mr. Abboud went through the conclusions in his report. Mr. Glynn also testified, not objecting per se, he just wanted Mr. Becker to follow the same procedural requirements as himself. No questioning from the Planning Commission indicated a problem with the application. They could not vote on it since there was no quorum. Weeks later at the next meeting a draft decision was prepared to grant the CUP and deny the variance. There was no debate or discussion in the minutes as to why the variance was denied. The only guidance is the decision that was adopted a couple weeks later. The Planning Commission concluded:

- Requiring a 20-ft. setback would not deprive the applicant of rights commonly enjoyed by other properties in the district. Structures on pilings can be built on slopes of 40%.
- Special conditions and circumstances do not exist on this parcel, any structures in addition to accepted nonconformities must not be located in designated setbacks.
- There is no special condition/circumstance, the placement of the structure was caused by the actions of the Applicant.
- Hardship and inconvenience is the reason for this variance request. A variance may not be granted to ease financial hardship or inconvenience.

Mr. Becker contacted Mr. Westerburg and an easement for utilities was prepared for the 20 ft. area in question. Mr. Westerburg maintained the BOA should consider remanding the matter back to the Planning Commission. When the commission heard the case the utility easement had not yet been adopted. The utility easement was prepared and recorded after the decision had been made. It is important the BOA have a record to determine what effect the utility easement has. Homer City Code states you cannot put a building in a setback; anything that touches the ground must be approved through the variance process. If the reasoning is applied to utility structures in a utility easement, any utility company wanting to install a device in the setback would have to go through the variance process. The object of the utility easement is to allow placement of structures without the application process.

The BOA can reverse the Planning Commission outright. The only substantive portion of the record that addresses the merits of why the variance should be granted is the Planning staff's report. It has a series of factors showing why the variance should be granted. There was no testimony offered rebutting the conclusions reached in the Planning report. There is no evidence in the record that supports the Planning Commission's decision.

Councilmember Roberts and Hogan inquired of Appendix "A" photos. Color photos were displayed by Mr. Westerburg. In the as-built it shows the entire structure of the storage shed with two antennas squarely within the setback. The nearest corner is two feet away from the right-of-way.

Councilmember Hogan asked about the lease agreement with the City. Mr. Westerburg answered the lease agreement was never signed. Once the Planning Commission refused to grant the variance, City Administration was reluctant to sign a lease. There is a month to month agreement for \$525 per month.

Mayor Hornaday ruled the color photos admitted as part of the record.

City Planner Rick Abboud stated he wrote a staff report with a recommendation and the Planning Commission overruled it. There is not as full of a record as we would like since there was a recording device malfunction. There was more said that is not part of the record. The supplemental record of appeal (September 2, 2010 letter of Attorney Dan Westerburg with the utility easement) was created after the Planning Commission decision was made. The information in Attorney Westerburg's brief contains new evidence as it refers to the recorded utility easement.

Attorney Levesque stated it is Mr. Westerburg's argument this is new evidence. Under the BOA rules there is a provision no new evidence be brought into the BOA appeal as normal procedure. The BOA can look at the new evidence and say it is changed circumstances, the Planning Commission never saw it and can remand it back to the commission to review. It is an argument Mr. Becker and his attorney are making. The City Planner is pointing out that it is new evidence.

Mayor Hornaday stated he will reserve an opinion until later on.

City Planner Abboud referenced page 33 of the record of appeal, Attorney Westerburg's claim that no evidence was presented to support the claim of error. Mr. Westerburg introduced new evidence of the granting of the utility easement. He sees no evidence of error. On page 39 Mr. Westerburg uses the same argument of changed circumstances. Per HCC 21.12.030(g) a CUP is required for a public utilities structure. No challenge is made to the requirement of providing a parking space and the DOT driveway permit. While the record did not contain all the statements and conversations of the two Planning Commission meetings due to technical difficulties of recording devices, the minutes on page 25 clearly reflect the statement of Mr. Becker that he would have considered another development on the property.

The Planning Commission confirms that special circumstances don't exist on the property. There may be other opportunities for development on the property other than in the setback. If aware of the rules, Mr. Becker would have considered moving the building further down the slope. There may be other reasonable uses of the structure. The structure is to be 4.9 ft. from the right-of-way.

It requires a rethought of the crafting of the findings based on the requirements in HCC 21.72.020, conditions precedent to granting a variance, pages 4 and 5. Again, the supplemental record of appeal is new evidence, was not part of this, and was not created until after the meetings. Pages 26 and 27 are transposed. Testimony regarding the consideration of other

development and consideration for moving the building further down the slope are a reasonable basis to refute the staff report.

City Planner Abboud noted the current standards refer to a steep grade as 38% to 42%. A new ordinance is being proposed that will allow for 10% of the grade to be developed in some fashion. It would not take all ability of future use of the land away.

Mayor Hornaday stated it is not contested by the City that Chief Robl requested the City to do this.

City Planner Abboud answered that has nothing to do with gaining the proper permits for a building. It does not matter who commissions it, the City or anyone else. It has no place for consideration of the BOA.

Mayor Hornaday stated he read the City Manager stated Mr. Becker did not have to have a permit.

City Planner Abboud answered it is talk that may or may not be hearsay. It has nothing to do with placing a building in the setback. It is a requirement of whomever develops the land and the owner to make sure that the requirements are followed.

Attorney Levesque interjected that he is hearing Mr. Abboud say that is not part of the record. It was not brought up in the record, it has only been brought up in the briefing.

City Planner Abboud stated it was brought up and is not a point to be considered on whether a variance is granted or not.

Attorney Levesque stated he hears the Mayor asking if that was evidence before the Planning Commission and went uncontested. The Mayor wants to know if it was uncontested at that time.

Mayor Hornaday asked if the Planning Commission was aware the Police Chief requested this and that the City Manager said it was not necessary.

City Planner Abboud stated it was brought up in conversation, but has nothing to do in the facts of determining the case.

## REBUTTAL

Attorney Westerburg referenced page 24 of the record when Dave Becker explained to the Planning Commission that before being annexed in 2003 they were outside city limits and the property and buildings were not out of compliance. After discussion with the Police Chief it was decided a repeater was needed to provide better reception for officers and improve public safety. At the first meeting before the Planning Commission, the City Manager offered similar testimony. The City was the impetus behind the erection of the facility in its optimum location, selected for height allowance, accessibility, and ease of maintenance.

Mr. Westerburg referenced City Planner Abboud's report where his personal conclusion was diametrically opposite of what he just said. He concluded every single requirement under the

variance ordinance was met. He is now offering the position of the commission; a position he was not in favor of when prepared his report.

As to Mr. Glynn's comments, Mr. Westerburg is not sure where he is getting the idea that a communications tower cannot be a utility structure installed in a utility easement. With respect to Mr. Glynn's requirements to meet the setback requirements, all is immaterial. His fence enclosure does not meet the setback requirements either. On his side of the road there is not the slope problem. The reason there is a problem is that squarely within the setback it is up on pilings at a steep angle. Now it will need to be dismantled and moved 20 ft. farther down the slope and the whole thing, including the ramp, must be outside the setback. By the time it is moved further down the slope to put the ramp outside the setback you are way down the slope. Is that where you want the key piece of communication equipment that the City relies on?

Mr. Westerburg noted this is a unique circumstance, unique topographical situation, combined together where a variance is appropriate. If not granted here, where would the appropriate place be? You don't want it in area that cannot be maintained or in an area of slope instability. With respect to the record, Mr. Westerburg saw that the letter written to Mr. Abboud with the utility easement was not part of the record. Mr. Westerburg requested that the Clerk prepare a supplemental record so those items would be before the BOA. He asked the BOA to remand the matter back to the Planning Commission because they had no opportunity to consider the evidence that surfaced after their decision. It is an option that the BOA can look at the supplemental evidence and based on the new circumstance remand it back to the Planning Commission for consideration.

Councilmember Wythe referenced the Planning Commission minutes pages 24 and 25, the statement from Mr. Becker that explained the property was surveyed in 1954 and there were no setbacks at that time. When the property was annexed in 2003 it was recognized the building in question was not in compliance.

Attorney Westerburg answered there is a GCI building two feet in the right-of-way that is not in compliance.

Councilmember Hogan asked if the discussion with the Chief of Police is part of record?

Mayor Hornaday asked why the utility easement is so important the BOA should consider it as a change of circumstance?

Attorney Westerburg answered if you have a utility easement in which you put a utility structure, presumably you do not need to get a variance to the setback requirement. If that was the rule, anytime a utility was put in the utility easement it would be a structure subject to the setback requirement. It seems there should be an implied exception for utility structures within a utility easement. The first body to consider that should be the Planning Commission to hear testimony from utility companies to see what the impact would be to other utilities to put something up in the utility easement.

Councilmember Roberts noted there was no information about the rules of utility easements in the supplemental packet. She asked Attorney Westerburg what he was basing the allowance of utility structures within utility easements upon.

Attorney Westerburg answered in Homer City Code definitions you reach the conclusion that any object that touches the ground cannot be put in a setback unless a variance is granted. There must be an implied exception for utility structures that have been installed in a utility easement. There is nothing in code that says that, but it is unlikely HEA goes through the Planning Commission for a variance each time. The idea of a utility easement is to provide a corridor for utilities to install an apparatus without all the rigmarole.

Mayor Hornaday stated he would follow Judge Moody's rule and allow the supplemental utility evidence into record. There was no objection from the Council.

City Planner Abboud rebutted that a utility company has rights in an easement to put up poles. HEA puts up a box with no foundation. Does that vary than putting up a structure building with pilings of a certain measurement? Can you have a very large utility structure anywhere in an easement?

City Planner Abboud referenced the location of the structure on the map that was displayed.

Mayor Hornaday stated oral arguments were concluded and deliberations of the Board will now commence and continue from time to time as necessary until completed.

Mayor Hornaday called for a motion to adjourn to Executive Session for the purpose of deliberating and deciding this appeal.

WYTHE/ROBERTS - SO MOVED.

There was no discussion.

VOTE: YES. ZAK, ROBERTS, WYTHE, HOWARD, HOGAN, LEWIS

Motion carried.

Council adjourned to Executive Session at 6:42 p.m. and reconvened the meeting at 7:32 p.m.

Mayor Pro Tempore Wythe stated the Board of Adjustment met with the attorney and provided him with direction and meet again from time to time until a final decision has been met.

#### **COMMENTS OF THE AUDIENCE**

There were no comments of the audience.

#### **COMMENTS OF THE CITY ATTORNEY**

Attorney Klinkner was not present.

#### **COMMENTS OF THE CITY CLERK**

City Clerk Johnson was no longer present.

#### **COMMENTS OF THE CITY MANAGER**

City Manager Wrede stated he wanted an opportunity to answer questions that were asked. They were matters that were discussed during the Planning Commission meeting.

Attorney Levesque stated it was inappropriate for the City Manager to comment. New evidence may not be brought in and he is about to tell us something of what happened or didn't happen at the Planning Commission without the parties here.

Mayor Hornaday denied City Manager Wrede's comments regarding the case.

### **COMMENTS OF THE MAYOR**

Mayor Hornaday had no comment.

### **COMMENTS OF THE CITY COUNCIL**

Councilmembers Hogan, Howard, Lewis, Roberts, Wythe, and Zak had no comments.

### **ADJOURNMENT**

There being no further business to come before the Council Mayor Hornaday adjourned the meeting at 7:34 p.m. The next Regular Meeting is scheduled for Monday, January 10, 2011 at 6:00 p.m. The next Committee of the Whole is scheduled for Monday, January 10, 2011 at 5:00 p.m. All meetings scheduled to be held in the Homer City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

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JO JOHNSON, CMC, CITY CLERK

Approved: \_\_\_\_\_