

Session 14-12 a Special Meeting of the Homer City Council was called to order on April 15, 2014 at 6:01 p.m. by Board Chair Mary E. Wythe at the Homer City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: BOARD MEMBERS: BURGESS, HOWARD, LEWIS, ROBERTS,
VAN DYKE, ZAK

STAFF: CITY ATTORNEY KLINKNER
CITY CLERK JOHNSON
DEPUTY CITY PLANNER ENGBRETSSEN

AGENDA APPROVAL

(Only those matters on the noticed agenda may be considered, and HCC 2.08.040(c); 2.08.040(e)(3)).

The agenda was approved by consensus of the Council

NEW BUSINESS

APPEAL TO THE BOARD OF ADJUSTMENT

- A. Appeal to the Board of Adjustment of the Homer Advisory Planning Commission Decision of December 4, 2013 for Approval of Conditional Use Permit 13-12 for a Communication Tower on a Lot at 5700 Easy Street, Homer, Alaska.

Notices of appeal were received from Appellants Joe Louis Carter, Jr., Ageya Wilderness Education, and Kevin and Kathleen Fay. Opening briefs were received from the City of Homer and Applicant Kodiak Microwave Systems, LLC and a rebuttal brief was received from Kevin M. Dee, Ageya Wilderness Education. All parties have standing pursuant to HCC 21.93.060. On April 14, 2014, Appellants Kevin and Kathleen Fay notified the City Clerk that they would be unable to attend the appeal hearing.

Appellants Kevin Dee and Joe Carter and Deputy City Planner Julie Engebretsen were present and identified themselves for the Board.

A. PRELIMINARY ISSUES

- (1) Conflicts of interest

Board Member Burgess disclosed a potential conflict as he has a previous working relationship with Mr. Dee with financial interests over \$1,000. At this time he is not engaged in any business activity with Mr. Dee.

Chair Wythe ruled Board Member Burgess had no conflict of interest and there was no objection from the Board.

- (b) Declaration of partiality
- (c) Ex Parte communications

Chair Wythe passed the gavel to Board Member Roberts and disclosed she works at Homer Electric Association as the Human Resources Manager. Mr. Dee contacted an employee at HEA and the employee approached her to seek advice on who to refer the inquiry to. Chair Wythe told the employee not to talk to her.

Board Member Roberts called for a motion to disqualify Chair Wythe. In the absence of a motion from the Board, Board Member Roberts passed the gavel back to Chair Wythe.

Board Member Roberts disclosed she attended the Planning Commission meeting on December 3, 2013. She arrived as the Planning Commission was deliberating this conditional use permit (CUP). She did not hear public testimony or the testimony of the party that applied for the CUP. She did hear deliberation and after the Planning Commission voted there was a person in the audience who asked her to go into the hallway to talk to them. They were upset about the ruling of the Planning Commission and asked Board Member Roberts what they could do to change the ruling. She told the person they could appeal and that she could not talk anymore as the appeal could come before the City Council.

Chair Wythe called for a motion to disqualify Board Member Roberts. In the absence of a motion from the Board, Chair Wythe ruled there was no disqualifying ex parte communication.

Board Member Burgess disclosed either as the Planning Commission was deliberating or after the CUP was approved, he was contacted by Mr. Dee who voiced his objection to the tower. Either Mr. Dee or Board Member Burgess realized an appeal was going to come before the Board of Adjustment and had no further contact. He also had contact with Dorothy Melambianakis, but did not communicate about this issue.

Chair Wythe called for a motion to disqualify Board Member Burgess. In the absence of a motion from the Board, Chair Wythe ruled there was no disqualifying ex parte communication.

Board Member Zak disclosed prior to the Planning Commission's ruling he received and read emails from Joe Carter on the covenants of the homeowner's association and his concern over the tower.

Chair Wythe called for a motion to disqualify Board Member Zak. In the absence of a motion from the Board, Chair Wythe ruled there was no disqualifying ex parte communication.

- (d) Other preliminary issues

Attorney Christopher Slottee with Atkinson, Conway and Gagnon, represents Kodiak Microwave System. At 4:00 p.m. today he was emailed a 56-page rebuttal brief from Mr. Carter. He is not prepared to exhaustively address the issues and objected to having the Board consider the late filed brief.

B. NEW EVIDENCE

Appellants Ageya Wilderness Education and Mr. Carter and Applicant Kodiak Microwave Systems submitted material in support of their arguments that was not in the record before the Planning Commission. **Only the Record of Appeal should be considered.** If new evidence or changed circumstances are alleged, the Board may, in its discretion, either hear the appeal without considering the allegations or may remand the matter to the Planning Commission to rehear the matter. Chair Wythe advised the Board if we are to proceed to oral argument this is not the time for offering new evidence to the Board. Anyone speaking to the Board would have to base their conversations strictly upon the record provided from the Planning Commission.

Chair Wythe advised either party that submitted material that was not in the record before the Planning Commission if they prefer that this matter be remanded to the Planning Commission for consideration of that material, to indicate that.

Kevin Dee indicated when his notice of appeal was submitted there were three attachments that were not included in the record: photograph in a much clearer format, full report from Mr. Monroe, and the scaled drawing of the proposed tower. Comments from Mr. Monroe were submitted to City Clerk Johnson yesterday. Mr. Dee indicated the material was refutation of what was presented at the Planning Commission hearing. It contained comments from Mr. Kincaid.

Chair Wythe ruled it was new information from what the Planning Commission originally heard. The Board can only move forward with items that were before the Planning Commission.

Kevin Dee requested that the matter be remanded to the Planning Commission.

Joe Carter requested that the matter be remanded to the Planning Commission since his letter was sent to the Planning Department for the hearing. He asserted it was not included in the Planning Commission's packet. Additionally, Mr. Carter noted the attachments to his notice of appeal were excluded.

Appellee Attorney Slottee indicated additional information was included in the appeal brief. It was to confirm the information testified to by Brian Kincaid and others at the hearing. He prefers to go forward since the CUP was noticed extensively and everyone had the opportunity to get information before the Planning Commission.

City Attorney Klinkner advised despite the parties preferences, it is the Board's decision whether to proceed or not.

ZAK/LEWIS – MOVED TO REMAND TO THE PLANNING COMMISSION.

Board Member Burgess inquired if items were received timely and not included in the record could they be considered by the Board.

City Attorney Klinkner referenced HCC 21.93.520(a)(1), the contents of the appeal record. If something was submitted and erroneously excluded from the Planning Commission it would not have been considered in making the original decision.

City Attorney Klinkner advised remanding to the Planning Commission is for the purpose of the commission to rehear the matter. The hearing before the Planning Commission is reopened where they will take additional evidence that is presented before them to decide the CUP.

The Board discussed setting a reasonable amount of time for the Planning Commission to hear the matter. Deputy City Planner Engebretsen indicated the agenda cutoff is tomorrow for the commission's May 7th meeting. The commission would have 49 days to make a decision. Depending on the other items on the agenda, Ms. Engebretsen cannot guarantee it would be on the May 7th agenda.

City Attorney Klinkner advised the meeting would need to be noticed in the usual manner. Given the issues raised about assembling the materials timely for the Planning Commission to hear, a date to approximate the regular packet assembly schedule would ensure the information is before the commission when it considers the matter again.

The Board discussed the need to remand it back to the Planning Commission for expediency due to the delays encountered thus far.

City Attorney advised the Board could remand back to the Planning Commission and direct the meeting schedule as long as the notice period and reasonable time to assemble the packet is allowed.

VOTE: YES. LEWIS, ROBERTS, ZAK

VOTE: NO. BURGESS, HOWARD, VAN DYKE

Chair Wythe broke the tie vote with a NO vote.

Motion failed.

Asked by the Board what date the Planning Department could have property owners noticed and proceed with the CUP before the Planning Commission, Ms. Engebretsen answered it is not realistic to meet the May 7th hearing date.

If the Board remanded to the Planning Commission for a special meeting on May 14th, the packet cutoff date would be Wednesday, April 23rd. The Board could remand the matter back to the Planning Commission for additional review and a public hearing.

City Attorney Klinkner advised only one public hearing is required for a CUP to be granted by the Planning Commission. Whether that occurs in a compressed time frame or a longer one is up to the commission. If the Board remands it directing a specific date it would go to the commission by that date. With the benefit of the additional material will the quality of the decision be enhanced, or does the Board feel that what is in the record covers everything? The purpose of a remand is for something new or different that needs to be considered that was not in the original proceeding.

Deputy City Planner Engebretsen is not sure if Mr. Carter's letter is part of the record of appeal. Reading his brief this afternoon was the first she has heard of something that might not be in the record. Both appeal parties and Kodiak Microwave have submitted new evidence; there are many new things for the Planning Commission to think about.

The Board asked for clarification on how the record of appeal is assembled. City Clerk Johnson explained the appeal record is made by the Clerk's office. It includes all the information that was submitted to the Planning Commission. The information comes directly from the Planning Department. It should include everything that the commission used to make their decision.

City Attorney Klinkner advised the argument in the briefs is what the Board is considering in the appeal. The additional evidence attached to the briefs, ie. photographs, sketches and drawings, and reports by experts that weren't before the Planning Commission are at issue.

Board Member Van Dyke asked Appellant Carter about the missing parts of the appeal record that were sent to Mr. Wrede and the clerk. He asked if those were original exhibits before the Planning Commission.

Joe Carter answered the piece he was looking for is what was sent as an appeal. There was also the problem for getting anything from 4:00 p.m. before the Planning Commission. He could depose the Planning Commission and find out that they did not regard his letter of opposition. It was not mentioned by Rick Abboud.

The Board noted on page 129 Mr. Carter's letter was received on December 4th. They questioned if the letter went before the Planning Commission.

Joe Carter complained about the record of appeal he received that was dated January 27th. It shows his appeal and Exhibit A, not Exhibit B.

Chair Wythe called for a recess at 6:52 p.m. and reconvened the meeting at 6:59 p.m.

Chair Wythe advised the Board the packet from the Planning Commission meeting of December 4, 2013 was retrieved. The letter in question from Joe Carter was included in the information and was available to the commission when they were reviewing the information. The letter was presented as a laydown.

ROBERTS/LEWIS - MOVED TO REMAND THE CUP BACK TO THE PLANNING COMMISSION AND HAVE THE PLANNING COMMISSION HEAR THIS BY MAY 25.

The Board noted there is evidence all the information that was submitted timely was provided to the Planning Commission as a laydown or in the packet.

VOTE: YES. ROBERTS, LEWIS, VAN DYKE

VOTE: NO. HOWARD, ZAK, BURGESS

Chair Wythe broke the tie with a NO vote.

Motion failed.

City Attorney Klinkner outlined the items to be considered:

- Record of Appeal
- Ageya Opening Brief – 13 pages (attachments cannot be considered)
- Kodiak Microwave Systems (Attorney Slottee) Opening Brief – pages 1-27 (Exhibits 1-5 cannot be considered)
- City of Homer Opening Brief by Mr. Abboud
- Rebuttal Brief by Appellant Joe Carter – (some material will have to be excluded upon deliberations)
- Rebuttal Brief by Kevin Dee, Ageya Wilderness Education, pages 1-11 (Exhibits A–E cannot be considered)
- PowerPoint by Kevin Dee (cannot be considered)
- Memo of objection by Kevin and Kathleen Fay

C. Oral Argument

The Board decided that it will consider only material that was in the record before the Planning Commission, and the Board will disregard any allegations of new evidence or changed circumstances. Chair Wythe recommended the Board hear oral arguments and grant each party participating in the hearing a total of 30 minutes, if they need it. There was no objection from the Board.

Kevin Dee asked that he be allowed to present on behalf of Kevin and Kathleen Fay.

Chair Wythe denied Mr. Dee's request since he is not an attorney to represent another party.

Chair Wythe outlined oral argument procedure with Mr. Carter as the first Appellant going first, followed by Ageya Wilderness Education. If desired, they may reserve some of the 30

minutes to respond to the Deputy City Planner and the Applicant. After Appellants present their arguments, then Julie Engebretsen, Deputy City Planner, will have 30 minutes to make her argument. Next, Applicant Kodiak Microwave Systems will have 30 minutes to make its argument. If either Appellant has reserved any time, he will be allowed to respond to the Deputy City Planner and the Applicant, up to the limit of his remaining time.

Joe Carter requested the evidentiary transcript of the December 4th hearing and the Homer City Code be considered.

Chair Wythe confirmed those items would be included.

Joe Carter requested Mr. Dee go first. There was no objection from the Board.

Kevin Dee asked that numerous photos in Attorney Slottee's rebuttal brief be removed.

Chair Wythe confirmed those photos will be removed as we move through the hearing. Parties may object if documents not in the record are referenced.

Kevin Dee presented his argument based on:

- an incomplete application
- Bridge Creek Watershed interpretation was in error
- Burden of proof switched to the appellants
- Applicant made misleading inaccurate statements
- Requested remedy is a need for a moratorium

Kevin Dee referenced page 94, the application that asked if there were any nonconforming use structures on the property. It was left blank. On page 100 a cartoonish drawing was presented to the Planning Commission. It is not of scale and showed a variety of things not considered in the Bridge Creek Watershed. There has been a shifting of what will go in the ground. It requires a fence and gravel driveway. Mr. Dee referenced Mr. Slottee's appeal brief on page 9 of a parking area large enough for one vehicle and four concrete pilings, the only areas that constitute impervious coverage. The Planner used a drawing with two satellite dishes, but they talked about serving Halibut Cove, Nanwalek, Port Graham, East End Road, and Nikolaevsk. The tower will have numerous 8-foot dishes and they are inviting more applicants to use their tower.

Mr. Dee was not allowed to show a larger drawing that was not in the record.

Kevin Dee was told by Mr. Kincaid that it would be at the 40 foot level in order to see the tower. The visual impact is severe and was minimized in his testimony. Mr. Dee was not noticed properly; he was only given four hours' notice of the hearing. When he asked for more time the City Planner said the meeting was noticed twice and it would set a precedent. None of the information from the tower company has been verified. Experts said there is a lot that wasn't put in the record. They will place the tower in the tree line, yet Mr. Abboud said it was

on a hardened trail. He walked the area in January and refutes it will be on impervious coverage. The City Planner is working off a 2003 map.

Mr. Dee asserted Kodiak Microwave Systems speculatively proposed to serve numerous locations, offered to locate other antennas, and locate other co-locators on the tower. They said if they don't put the tower in it could cost lives, yet they do not have a telemedicine contract. Citizens should not be harmed without a necessity.

Mr. Dee noted impervious calculations were inadequate. His own yurts and decks are considered impervious. In the drawing (page 100) the communication building and deck were not taken into effect as impervious coverage. Homer City Code says there shall be no increase in nonconforming use. The City Planner used the "there must have no researched based evidence." Mr. Dee questioned if it is up to the citizens to have research based evidence in place. The comparison of harm that was used was dog kennels. HCC 21.40.050 references no dog lots in the Bridge Creek Watershed. The comparisons of negative impact were inappropriate and contained lots of errors.

Kevin Dee agrees with some assertions by Kodiak Microwave. He likes the project and wants it to happen. They don't want it to happen unless it's absolutely necessary to harm neighbors in this location. Increased broadband across the bay is good. KMS has only one contract with ACS to deliver broadband to the school in Port Graham. It will increase their costs by more than 200%. Microwave antennas deliver broadband over distances. The tower proposes very little health hazard. The assertion is that they need a 160 ft. tower when the HEA tower shoots all the way to Bradley Lake and the ACS tower that shoots directly to Seldovia. It is inaccurate that they have to be set back from the bluff. Mr. Dee is familiar with telecom and microwave shots. Mr. Monroe, the hired expert, said there is no verified need to locate the tower in this area. He said it is specious to assert that the tower has to be set back and the applicant has overstated the public benefit while understating the harm to the neighboring properties.

Attorney Slottee voiced objection to the expert report from Mr. Monroe that was not part of the appeal record.

Kevin Dee noted page 42 of the appeal record states the technical aspects that he contests.

Chair Wythe ruled the documents from Mr. Monroe would be removed since it was new information not provided to the Planning Commission. Mr. Dee can refute but is not allowed to bring in new information.

Kevin Dee refuted the assertion the tower has to be set back. Towers along Girdwood are not set back. Mr. Slottee in his rebuttal indicated the FAA would not require lighting and indicated he received notice of no obstructions. Mr. Dee asked for a 90-day moratorium on towers to establish a task force to review and recommend more appropriate processes and that the Planning Commission decision be reversed.

11 minutes and 1 second remain for rebuttal.

Chair Wythe advised Mr. Carter only information that was provided to the Planning Commission can be presented.

Joe Carter stipulated his intent to stay with a limited amount of information and city code. He agreed with Mr. Dee on many items. His close friend with MIT and Harvard degrees referred him to his contemporaries and verified the same thing as Kevin Dee on RTs. No property owner is safe here and the remedy is to find a tower zone and a residents' zone. He agrees with Mr. Dee about the application being incomplete. The Planner presented it as complete when it was lacking. It was not just the lack of a scale drawing; it was more things in the description of Level 1 site plan (HCC 21.73.020). Mr. Carter thinks the CUP should be reversed. The scale drawing indicated the tower would have a dimension of 57 ft. It is misleading to the Planning Commission.

Joe Carter referenced page r-50, page 7, where Mr. Abboud says the proposal does little to impact drainage. He reiterated what Mr. Dee has said, that there should be a level playing field. If a rooftop, grate, catwalk, or gravel drive will count towards impervious coverage at his or Mr. Dee's house it should count here. A Level 1 site plan requires that the driveways be platted, and that the existing and changed vegetation be mapped and drawn to scale. Mr. Carter referenced line 14 that indicated it would not change drainage. HCC 21.40.135 and 21.61.040 both deal with nonconforming. HCC 21.61.040(a) says that no nonconforming use shall be enlarged to a greater extent than it was when it became nonconforming. HCC 21.61.040(c) says any new structure built in connection with the nonconforming use must be in full compliance with all applicable provisions of the zoning codes and other laws. If you need a variance you would not be in full compliance. There is argument from Kodiak Microwave Systems that this is a structure in place of a building. Anything tied to the ground is a building or a structure; if over 35 ft. it will require a variance.

Joe Carter referenced page r-50, page 9, line 15, that property value would be negatively impacted more than multi-family dwellings or kennels. Mr. Abboud stipulated this is an area in the rural residential area and also in Bridge Creek. To pass the muster you would have to comply with the codes related to rural residential and Bridge Creek. Mr. Carter referenced page 89, finding 4, that the value of adjoining property will not be negatively affected more than any other use including multi-family dwellings and kennels. HCC 21.40.055(c) prohibits dog lots or other aggregations of more than six dogs over the age of 5 months. Mr. Abboud has made repeated statements to influence the decision of the Planning Commission that do not agree with the four corners of the applicable ordinances of the City of Homer.

Joe Carter referenced page 59, subheading 43, where Mr. Abboud says we still have a heliport as a conditional use option. Commissioner Sonneborn asked if that was a threat and Mr. Abboud said he just thought he'd bring it to her attention. HCC 21.40 on the Bridge Creek Watershed Protection District lists permitted, prohibited, and conditionally permitted uses. Nowhere in there does the word *heliport* exist. Mr. Abboud made a statement in the open testimony of the hearing that does not agree with the clear meaning of the four corners of the applicable ordinances of the City of Homer. He gave it with the clear intent of influencing the decision of the Planning Commission. Line 21, page 44, references the CUP was noticed three

times and it has been since October. They are running out of time to make a decision and if they set a precedence to delay to opposition to garnish support that would be an unusual precedence. Mr. Abboud is hazing Commissioner Roberta Highland who is less tall than anyone; she is more likely to be intimidated. He is saying we need to vote; we are out of time. Mr. Carter referenced HCC 21.71.050 for public hearings. The first hearing was scheduled October 16th and was postponed due to an early winter storm, a force majeure act. It was still heard by December 4. The commission shall within 45 days of the close of the public hearing approve or disapprove the application. Mr. Abboud is supposed to support the commission with facts.

Joe Carter referenced page 61, page 50, line 20, where the vote had gone 4-2 and had not carried. There was confusion and someone said they could vote to reconsider. The four voted to reconsider and the other two had to think about it some more. The commission asked questions and the City Planner said they could put a heliport there if they didn't think the dog lot was bad enough. Mr. Abboud told Roberta Highland she needed to vote right now as they had to get this done. Commissioner Sonneborn said we can vote to pass this; there is no good evidence that it will affect the property values. An unidentified male speaker said it would affect property values. Since the commission had been told wrong what was allowed in the district how could they know they had made an accurate decision since they were looking at dog lots and heliports? Commissioner Highland's objection was hearing from other people and thinking if she was in the situation. Roberta Highland knows it is wrong. The commission was told false statements; it was fraud in the inducement.

Joe Carter referenced page 134, paragraph 3, regarding easements, restrictions, and covenants to protect the value of the real property. Mr. Carter doesn't know if it was an oversight on who was bird dogging the property, but on December 3rd he asked Mr. Kincaid if he or anyone from his company read the covenants. Mr. Kincaid did not answer the question. It may have been an oversight or the ethic of that company to move in and trespass on somebody and co-op the City to join in. The City doesn't want to enforce covenants. Mr. Carter is asking that the City not destroy covenants. Notice was sent December 4th at 4:00 p.m. They don't have plausible deniability. The violation took place in that they persisted in acquiring the CUP. Mr. Carter noted we cannot let the building type restrictions or enforcement provisions be waived or abandoned. The Planning Commission was operating with false and misleading testimony designed to influence their decision. They also had some motivation. Page 59 subpage 42, Commissioner Slone questioned our social obligation to the communities across the bay. Page 61, line 20, Commissioner Stroozas wants to help our fellow citizens across the bay since we are blessed to have this spot for a tower. Page 62, subpage 55, line 19, speaks of the greater good and improvement to the quality of life for the citizens across the bay. Page 6, line 16, speaks to the rebound back to Homer.

No reserve time remained for rebuttal.

Chair Wythe called for a recess at 8:20 p.m. and reconvened the meeting at 8:25 p.m.

Deputy City Planner Engebretsen commented the Board has three options: uphold the Planning Commission decision with findings, deny the CUP which reverses the decision, or remand to the Planning Commission to fix the deficiencies. Staff and the Planning Commission reviewed the application in relation to Homer City Code and the Planning Commission arrived at a decision. If new information or circumstances are founded it should be remanded. The two appellants have requested remand. City Planner Abboud provided a brief that she hopes the Board reviews in relation to the comments of the appellants. People have said the public notice was inadequate. The notice met the requirements of Homer City Code and questions about sufficient notification are not relevant to this application.

Attorney Christopher Slottee represents Kodiak Microwave Systems who is owned by Old Harbor Native Corporation and Ouzinkie Native Corporation. Its business is operating microwave towers to provide broadband internet service to underserved populations in Kenai and Kodiak. KMS is trying to expand their systems to provide service to Port Graham, Nanwalek, Akiak, Anchor Point, and other communities surrounding Homer. Often the communities are physically difficult to get to as they are remote, not on the road system, or there are mountains in the way. You need to find a way to shoot a microwave beam to the village for the service. KMS sells capacity on its microwave systems to other companies, ie. ACS. ACS will then provide real time broadband capacity to schools for education and to health clinics for telemedicine. It is a lot easier to get a doctor on a video conference than getting a patient out of the village to the hospital. These issues were addressed by Mr. Kincaid, the KMS representative. Mr. White from the Kenai Peninsula Borough School District testified at the Planning Commission meeting on the benefits to schools in Nanwalek, Port Graham, and other communities that KMS will be able to serve. A person from ACS also testified as to the benefit this will provide.

The tower location spot was not just picked out of random. It involves a sophisticated process that analyses the sight system. It does not make economic sense for KMS to build a single tower to provide capacity to a single village. If one tower can provide multiple services it becomes economically viable. KMS conducted a study with RF radios, blimps, and path studies and determined the Clapp parcel lets them provide access to Port Graham, Nanwalek, and the other communities. The line of sight is to Dangerous Cape where they will build an active repeater, then to Port Graham and Nanwalek. Neither Mr. Dee nor Mr. Carter provided any other viable alternative to locate the tower. The Clapp parcel is close to the fiber optic line that will funnel the internet to the microwave to beam across the water and it is close to utilities. Other locations will require more construction and are in less desirable locations to getting the system to the communities where it is needed. The appeal record contains letters of support from Port Graham and Nanwalek. Mr. Dee's assertion that it is speculative benefit is false; there has been specific evidence as to who it will benefit and why it is important. Mr. Slottee referenced Mr. Carter's reference to the commissioner's comments about the greater good. The Planning Commission was correct in their decision to benefit other communities with minimal impact on a couple Homer residents. The appellants have presented no actual evidence there will be a significant impact on them. The project is needed to benefit the public with minimal impact on the surrounding properties. All the evidence supports that.

Mr. Slottee referenced Mr. Dee's complaint of the number of dishes on the tower. There is no evidence to support that because Mr. Kincaid did not address it because it was never asked. The current design requires one dish; there is the option that one or two more dishes may be attached. There is no evidence of plans of a tower festooned with dishes.

Attorney Slottee addressed the appellants' questions of impervious coverage and nonconforming use. The CUP application specifically describes that the property is being used for storage of equipment and connex with no existing permanent structures. There was no deception and no attempt to fraudulently induce the Planning Commission to make a decision. There is currently 30% impervious coverage. The CUP can be approved as long as the impervious coverage is not increased. Based on testimony from Mr. Kincaid and staff, there will be no increase in impervious coverage. The tower will be on four pilings; the communications hut is elevated. There has been no contrary evidence produced.

Attorney Slottee addressed the appellants' questions about setback requirements. The proposed location is a 50 ft. x 50 ft. lot that is being leased by Kelly Clapp. The tower will be placed in the center with more than 800 ft. setback from the lot line. There is no evidence microwave beams will impact anybody. It is a single focused microwave beam and you would need to stand 160 ft. in the air to be affected. It is not a health issue. There were questions if the tower were to fall down and land on someone. There is nothing within 160 ft. of the tower except connexes. It is rated up to 130 mph wind speed and has survived 150 mph winds. The towers do not fall down; they will survive storms. There were questions about the requirements of FAA. Not known at the time the Planning Commission approved the CUP, the FAA will require a medium intensity strobe light during the day and a red strobe at night.

Attorney Slottee addressed the questions about KMS meeting the burden of proof. The Board reviews the staff report and minutes that reflect the evidence that was presented. Mr. Brian Kincaid testified as to why the location was selected and why it would serve multiple communities. Mr. Carter talked about subdivision covenants. It is not an issue for the Board to consider as it is a private legal matter. It is not a basis to reject the CUP. KMS is going to try to work with the surrounding land owners. Per the transcript of the hearing r53, page 18, Mr. White testified to the benefits. Safety is referenced on r55, page 29. Impervious coverage questions are addressed on r50, pages 6, 7, 8, and 9. There was and still is no evidence of the tower impacting drainage. The location is discussed on r52, pages 16 and 17, and also on r54, page 25, with testimony from Mr. Kincaid and Randy Dobbs of ACS. As to radiation issues, both appellants agree there are no health and safety issues; Mr. Kincaid testified r37, page 36. As to the 160 ft. height, it was the lowest possible height per r58, page 39. Uses allowed in the rural residential and Bridge Creek Watershed Protection District are public use facilities, including telecommunications towers. Although people disagree, they provide no actual evidence to rely on. Mr. Slottee asked the Board to look at the evidence that was presented to the Planning Commission. The CUP should be affirmed and allowed to go forward so that Port Graham and Nanwalek can get the broadband communication that they need.

D. REBUTTAL

Chair Wythe advised Mr. Dee of his 11 minutes 1 second time remaining for response.

Kevin Dee came to Homer in 1979 and his wife established a kayaking company in 1984. They have been operating a business and have invested very heavily. Ray Clapp bought land and operated his business on it. They were in support of the Bridge Creek Watershed Protection District as a way to save the water. They have always tried to build sustainably. They wanted to build a dining hall right near their house but were told by Dottie in the Planning Department that the building would exceed the impervious coverage. It was located away from the driveway and works out fine. They started building yurts that are 4 ft. off the ground due to snow melt. Mr. Slottee said the tower buildings were lifted off the ground and should not be counted. Mr. Dee questioned if he can say their yurts are no longer impervious. The calculation to Mr. Dee should be applied to KMS too. There has not been a demonstrated need other than for the school district. There has not been a demonstrated need for telemedicine or increased broadband in any of the places mentioned by Mr. Kincaid in his testimony. Mr. Kincaid buzzed Mr. Dee's place and then called him to ask how tall his tower was; he never disclosed what they would like to do. Mr. Dee would like to work with KMS. There is no verified need. Mr. Kincaid said the expert opinion was not true, although everyone will take a sending and receiving satellite dish.

Attorney Slottee objected as there was no expert testimony to the Planning Commission.

Kevin Dee noted microwave towers can beam long distances at not high off the water and it does not need to be set back off the bluff. Attorney Slottee testified that it was tested to 130 mph wind, but it was not tested with all the things hanging off it. There is no final design required or a restriction to all the things that could be put on the tower.

Chair Wythe questioned if the details provided were included in the record. Chair Wythe advised in the rebuttal new information cannot be introduced.

Kevin Dee asserted the FAA determined lighting could have been done before the hearing before the Planning Commission. It would have determined a higher level of nuisance. Mr. Kincaid was given 20 minutes at the hearing while the citizens were only given 3 minutes. He would have provided more information if he were given more time. He was only provided four hours prior notice of the commission hearing. The tower will harm his business. Their board has discussions if they should continue their business if the tower goes up. They are a longtime Homer resident and this has no benefit to Homer. It hurts them. KMS testified this is the only place for the tower and the Planning Commission took them at their word. No one in this room has technical expertise to understand where and how towers need to be placed. He requested remand or overturn to apply expertise to the project. None of KMS claims have been verified. They are a for profit company that are biased to create as much profit as possible. As to the burden of proof, KMS was taken at its word while the appellants have been tasked with the burden of proving that microwave towers can be located near water, etc. It is the applicants' burden to prove the need for a CUP.

Chair Wythe asked for questions from the Board.

Board Member Burgess asked the Planning Department if the CUP increases impervious surface at all.

Deputy City Planner Engebretsen referenced Mr. Abboud's brief (page 3, item 5) in which this application does not increase impervious surface any more than a wind generation system with windmills is increasing impervious surface.

Board Member Burgess asked if there will be new disturbed areas on the lot to complete the project.

Deputy City Planner Engebretsen answered there is a trail to the area and it is using area that is already disturbed.

Board Member Zak asked if the lot was nonconforming when it applied for the CUP.

Deputy City Planner Engebretsen answered yes, the nonconforming use has not been recognized but it has more than 4.2% of impervious coverage. It existed when it became part of the watershed district in 2003.

Board Member Roberts asked Mr. Dee to describe the foundation of the yurts.

Kevin Dee answered they put 6x6 posts down through the ground. They bored them out with an auger and raised them up 4 feet; it is all wood. Each yurt is set 8 ft. to 10 ft. They have 16 ft. and 20 ft. yurts and one 40 ft. yurt. Very little is stuck in the ground so they can pull posts if needed. The yurts are circular and a deck with 2 ft. on either side all the way around. Up front there is a sitting area with a bench. The entire area of the deck is considered impervious coverage even though it has spacing to allow the water to go through. They didn't put permanent foundations in as that changes the degree of impervious.

Board Member Roberts asked Mr. Dee about the four-hour notification.

Kevin Dee lives six months in Anchorage and six month in Homer. Joe Carter called him within 4 hours of the hearing. He immediately got on the phone and asked for more time. He is beyond the 300 ft. radius, but is affected by the visual impact.

Board Member Lewis asked what people mean by the minimal effect on property values.

Kevin Dee answered if he were given notice he would have supplied more evidence to show the harm. Dave Derry says view lots demand more price and when the view is affected it will harm the price. It will harm their business and the value of their property.

Joe Carter answered In Eker Estates there are 22 lots, but less than 22 owners. Four owners were noticed. It will affect that community immediately. People who buy view properties also choose where they will not have trespass. There will be a depreciation in value and a much longer time for a sale. There is four years of supply at that level. Time is money. When you add

that to the depreciating of the sales price it is real. Once the City decides they can take without compensation there is nothing to protect that. There will be a cascading set of circumstances and this is the beginning of it. On Kachemak Drive they put a sewer and water line in and compensated people for it because it was for the greater good. They don't want it to be taken from them separately. The consequences of this will affect the budget.

Attorney Slottee answered the location of the tower is on the back side of the subdivision. Mr. Carter's property is not between the view of the water. Mr. Dee has his own windmill and 100 ft. tower on his property. We are pretty far away, a mile or more. He objected to the blatant attempt to mislead the Board. It is an inaccurate depiction of the tower. Any type of conditional use will have some impact; this issue is if the impact is commensurate of the need to grant the CUP.

Board Member Burgess disclosed the evidence that came to light from the permittee that applied for the CUP that makes him think he may have a larger conflict.

Chair Wythe called for a recess at 9:08 p.m. to confer with the attorney and reconvened the meeting at 9:10 p.m.

Board Member Burgess asked if the line of sight denotes advantageous cause. His experience is unless you are hitting specific points there is not much need for a tower in excess of 65 ft. He asked if that data was presented.

Attorney Slottee answered they have that data. There was a specific path analysis.

Kevin Dee objected as there were no maps provided to the Planning Commission and it is new evidence.

Attorney Slottee clarified the path analysis was discussed by Mr. Kincaid. A specific path analysis was not provided as it was not requested.

Joe Carter commented all testimony is non-sworn testimony.

Chair Wythe advised this is not testimony it is inquiry of the Board and part of the Board's deliberation.

Board Member Burgess asked Deputy City Planner Engebretsen if a level one site plan is required by code.

City Planner Engebretsen answered she believes that is correct and staff accepted the application as complete.

Board Member Burgess asked if there were other structures over 36 ft. in the Bridge Creek Watershed that are noncompliant.

Deputy City Planner Engebretsen answered planning staff does not consider this a variance situation. They have issued multiple other CUPs for towers over 35 ft. Public utility facilities and structures are a conditional use in the Bridge Creek Watershed. There is no precedent for the City authorizing or enforcing covenants; easements between private parties is a different question.

Chair Wythe advised deliberation of the Board will now commence and continue from time to time as necessary until completed. Chair Wythe called for a motion from the Board to go into executive session for the purpose of deliberating and deciding this appeal.

BURGESS/LEWIS - MOVED THAT WE ADJOURN TO EXECUTIVE SESSION AND THAT OUR ATTORNEY BE ALLOWED TO BE PRESENT.

There was no discussion.

VOTE: YES. HOWARD, ROBERTS, VAN DYKE, ZAK, BURGESS, LEWIS

Motion carried.

Chair Wythe advised a written decision will be prepared and issued to the parties at a later date after deliberations are completed. Copies of the written decision of the Board will be mailed to the appellant and all other parties who entered an appearance in the appeal pursuant to Homer City Code 21.93.110(c). Once a final decision has been entered by the Board, an appeal from that decision may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the Board of Adjustment or by the City Manager or City Planner or any governmental official, agency, or unit. That appeal must be filed within 30 days of the date of distribution of the final decision. HCC 21.91.130(a)(b).

ADJOURNMENT

There being no further business to come before the Board, the public portion of the Board of Adjustment meeting adjourned at 9:18 p.m. Board deliberations will commence and continue in executive session as needed until completion.

JO JOHNSON, MMC, CITY CLERK

Approved: _____