

Session 10-32 a Special Meeting of the Homer City Council was called to order on October 26, 2010 at 6:00 p.m. by Mayor Pro Tempore Beth 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:** COUNCILMEMBERS: HOGAN, LEWIS, ROBERTS, WYTHER, ZAK,  
HOWARD (arrived at 6:02 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)

Mayor Pro Tempore Wythe called for a motion for approval of the agenda.

LEWIS/ROBERTS - SO MOVED.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

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

There were no public comments.

#### **NEW BUSINESS**

- A. City Council Appeal Hearing – City Manager's Decision Denying Public Records Request of Frank Griswold

Mayor Pro Tempore Wythe identified the case and acknowledged receipt of written correspondence from both parties.

Parties present were Frank Griswold, Appellant, and City Manager Walt Wrede, Appellee, both representing themselves.

#### **PRELIMINARY ISSUES**

Mayor Pro Tempore Wythe noted:

- (1) Part of this appeal concerns public records denial to Mr. Griswold because they were deemed to be attorney/client privileged.

- (2) Both parties agree that the city council will review these records during an in-camera inspection and determine whether or not the documents are privileged attorney/client documents.
- (3) Mr. Griswold has submitted additional supplemental evidence that he desires to become part of the Record on Appeal and that Mr. Levesque recommends that the evidence be made part of the Record.
  - a. October 5<sup>th</sup> document – records request w/copy of appeal
  - b. October 11<sup>th</sup> document – letter to Attorney Klinkner
  - c. October 19<sup>th</sup> document – reply to City Manager Wrede’s response brief

Mayor Pro Tempore Wythe indicated the Clerk notified Mr. Griswold of the record being prepared on September 29. She ruled the item received last night (October 25) was not submitted timely for consideration. There was no objection from the Council.

Mayor Pro Tempore Wythe noted the appeal record contains four items, the record of appeal and items a-c. Mr. Griswold had requested questioning employees. That would be considered new evidence. Past practices have set a precedent; those include the Vaughn case and a prior case Griswold appealed where he was only allowed to cross examine Mr. Wrede. Mayor Pro Tempore Wythe ruled based on past precedent no new evidence will be accepted.

Councilmember Roberts asked if there was a request to speak to other employees at the previous hearing. Attorney Levesque answered the June 9, 2008 minutes from the Griswold appeal indicate a request was made to specifically cross exam only the other party. Mr. Griswold was allowed to do so, but had to use his 30 minutes allotted for oral argument. Mr. Wrede did not examine any witnesses in that case.

Mr. Griswold requested to interject to raise important issues. He questioned the conflict of interest of Mary E. (Beth) Wythe. She is making all these decisions and it will be cumbersome if it is determined she has a conflict of interest and everything has to be undone.

Mayor Pro Tempore Wythe attested she does not have a conflict of interest and passed the gavel to Councilmember Roberts.

Councilmember Roberts asked Mr. Griswold for a brief explanation why Mrs. Wythe has a conflict of interest.

Mr. Griswold stated all the issues are inextricably related. There is Wythe’s potential conflict of interest, the attorney’s potential financial conflict of interest, and the issuance of the procedural order.

Councilmember Roberts related the Board has never had to decide two people’s conflicts simultaneously. Attorney Levesque advised to listen to what Mr. Griswold has to say and then make a decision.

Frank Griswold outlined HCC 1.32.010 the City Attorney duties. City Attorney Gordon Tans represented Council at the previous appeal hearing of the City Manager's denial of his April 16, 2008 public records request. Attorney Tom Klinkner represented Council in the ensuing Superior Court appeal. The City Manager should not have sought advice from Attorney Klinkner and forced the Council to hire Mr. Levesque. Mr. Griswold referenced HCC 1.18.020 and a personal bias or prejudice for or against a party, including the party's lawyer. Attorney Levesque would like to continue his professional relationship with the City Manager and the City, but would jeopardize future employment if he acted in a manner contrary to the City Manager's interests.

Mr. Griswold added Attorney Levesque and Mayor Pro Tempore Wythe have conspired to scuttle his appeal by denying him the right to present evidence and question witnesses. They collaborated on the Procedural Notice. Attorney Levesque did not have the authority to set hearing procedures, excuse witnesses, rule that no new evidence or testimony would be allowed, or alter the procedures adopted by Council on Memorandum 10-118.

Mr. Griswold cited *State v. Lundgren Pacific Construction Company Inc.*, 603 P.2d 889, 895 (Alaska 1979) and *In re Robsen*, 575 P.2d 771, 774 (Alaska 1978) in regard to impartiality by a personal bias or personal prejudice. Mr. Griswold related Mayor Pro Tempore Wythe's long-standing animosity towards him and her long-standing close and friendly relationship with City Manager Wrede. He asserted Mrs. Wythe traveled to Washington, DC with City Manager Wrede to meet Congressman Don Young and lobby for city projects. She worked closely with the City Manager promoting the Town Square/City Hall project in the media and at public forums. Mr. Griswold asserted Mayor Pro Tempore Wythe's animosity stemmed from his challenge of friends and family including her step-father-in-law Ray Kranich's residency as a planning commissioner and a zoning decision granted to the Blackwells for a nonconforming use status. Additionally Mr. Griswold filed a complaint against Ray Kranich challenging the validity of signatures he had collected on an initiative petition for size limits for retail and wholesale stores in Homer.

Mr. Griswold referenced Kenneth C. Davis & Richard J. Pierce, Jr., *ADMINISTRATIVE LAW TREATISE*, §9.5 (3D ED. 1994) as to the Procedural Notice. He noted that HCC 1.80.070 does not prohibit or limit the taking of new evidence or prohibit or limit the questioning of witnesses. Mr. Griswold referenced the Vaughn appeal and her being denied due process.

Mr. Griswold noted the importance of sworn testimony from the City Manager and several city employees to determine what role they played, if any, in destroying public records. Mr. Griswold asserted City Manager Wrede and others may have deliberately destroyed e-mails and/or authorized their destruction to keep him from inspecting them. Mr. Griswold noted the Council should be able to impose sanctions for the illegal destruction of public records.

Mr. Griswold referenced the City Manager's undated and unsigned response brief he received and noted the index should be corrected to reflect the correct date of the response brief instead of September 1, 2010. He noted it was prejudicial for the Record of Appeal to state Griswold vs. City of Homer when it is Griswold vs. Wrede. Default judgment should be awarded to him because his appeal was not decided in the 30-day deadline per HCC 1.80.070(b).

Councilmember Roberts noted the three concerns brought up by Mr. Griswold: Attorney Levesque bias, Ms. Wythe bias, and concern about how we introduce evidence in the hearing. She does not find Mr. Levesque has bias in this situation; the ethics ordinance does not apply to him because he is not a city employee or elected person.

Attorney Levesque stated he does not have bias. The ordinances as cited by Mr. Griswold do not apply to him as a contract person with the City. Attorney Levesque stated he does sue municipalities when the municipality he is employed by has a dispute with another municipality. He does not represent parties in actions against municipalities.

Councilmember Roberts ruled Attorney Levesque does not have a bias.

Asked by Councilmember Hogan if he had ever represented Mr. Wrede, Attorney Levesque answered he had not. Mr. Wrede is part of the City and he has represented the City. Most of the work he does is with Jo Johnson, City Clerk, or he works for the City Council or the Planning Commission. Asked by Councilmember Hogan how he had been selected to the case, Attorney Levesque answered he received a phone call from Jo Johnson. Someone instructed her to call him; he has not talked to Walt Wrede about the case. He had a teleconference with the City Attorney and Frank Griswold regarding the case. Mr. Levesque explained he had done eight or nine cases with the City and applied as the City Attorney. He thinks he is on a short list and since he is familiar with the City and city code he is on the list.

Councilmember Lewis recalled discussing hiring of the attorney in an Executive Session.

There was no objection from Council on Councilmember Robert's ruling on Attorney Levesque's lack of bias.

Councilmember Roberts asked Mayor Pro Tempore Wythe if she had a bias. Mayor Pro Tempore Wythe stated she can attest each of the items Mr. Griswold brought forward happened. Mrs. Wythe stated she does not have a bias and is certain she can hear the information and make a decision. She added that she personally does not decide the case.

Councilmember Roberts ruled Mayor Pro Tempore Wythe does not have a bias and should remain.

There was no objection from Council.

Councilmember Roberts passed the gavel back to Mayor Pro Tempore Wythe.

Mayor Pro Tempore Wythe stated Mr. Levesque and her discussed the past practice and continuous statement that we do not accept new information at these hearings. Interviewing other parties that were not brought into the appeal records would constitute additional information. The recommendation is that we do not hear additional questions from the employees. Mayor Pro Tempore Wythe asked if there was a motion to hear additional information from the employees.

Attorney Levesque stated Mr. Griswold had talked about the series of cases that allowed him procedural due process. The cases cited talk about bias about issues of law or powers of policy are not grounds for disqualification. The memorandum Mr. Griswold referred to talks about how tribunals have to be careful in understanding they don't have to investigate cases that should be heard below. Appeal hearings are not a place where new evidence can be brought in, but it did happen at a previous hearing. The issue before Council is if Mr. Griswold is entitled to further documents that were not provided.

ZAK/LEWIS – MOVED TO DISMISS, IF THERE ARE ANY CITY EMPLOYEES HERE, WE ACTUALLY DISMISS THEM AND ALLOW THEM TO GO HOME BECAUSE I DON'T THINK THEY SHOULD BE QUESTIONED AT THIS HEARING.

Discussion ensued on the reason for the appeal. Per page 78 the appeal is based on Mr. Griswold's assertion the City has not released the correct emails to him.

Attorney Levesque clarified Mr. Griswold believes he did not get emails from the people he thought they would be from.

Councilmember Hogan expressed confusion on how Council was operating since they were not a Board of Adjustment or a Board of Ethics. His understanding is Council is limited to the ordinance that talks about records.

Mayor Pro Tempore Wythe identified the two requests Council should respond to: the City should make every effort to recover and produce all documents that were deliberately or inadvertently deleted from the City data base. The Council should review all alleged confidential emails to show if they were truly exempt from disclosure.

Councilmember Hogan enounced he is trying to grasp what the authority is under Title 29.

Attorney Levesque stated he has reviewed Title 29 many times and has found no part of it that talks about public records retention or the Council being part of an appeal review if public records are deemed not turned over to a requestor. Council has an ordinance that is pretty clear. HCC 1.80.060 defines how responses to public records are handled. All requests shall be approved or denied by the City Manager. A good faith effort will be made to locate records and if the request is denied the City Manager will make an explanation as to why. HCC 1.80.070 defines appeals: Any denial of a request for inspection of records may be appealed to the City Council by the person making the request. The City Council will hear and decide the appeal. An appeal to the Council's decision may be made to the Superior Court within 30 days. If appealed to the trial court they would decide if there would be new evidence. If the trial court allows discovery Mr. Griswold would have the chance to take depositions.

Councilmember Howard referenced the email dated October 12<sup>th</sup> about money to get rid of the appeal. Mr. Levesque acknowledged the email communication between Mr. Griswold and the City Clerk, but advised it is not part of the record.

Attorney Levesque stated Mr. Griswold had brought it up that Administration, Attorney Klinkner, and City Clerk Jo Johnson had discussed with him whether he would have witnesses at the hearing. It was discussed at the teleconference in between Mr. Griswold, Attorney Klinkner, and himself if witnesses would be allowed. Mr. Levesque said his response was the appeal was up to the Council and they would decide if they would allow this type of testimony at the appeal hearing.

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

VOTE: NO. HOGAN

Motion carried.

The five employees were released at 7:00 p.m.

Mayor Pro Tempore Wythe asked Council if there were any matters they wished to disclose. There were no matters from the Council.

Mr. Griswold referenced Section 7 of the procedural notice that copies of the written decision will be mailed to all parties of the appeal per HCC 1.80.070. HCC 1.80.070(c) states an appeal may be made to the Superior Court. HCC 1.80.070(b) states the City Council will consider and decide the appeal within 30 days. Mr. Griswold said Attorney Levesque left out the part about the appeal being decided within 30 days.

Mr. Griswold referenced City Manager Wrede's undated and unsigned response brief that was submitted to the City Clerk as a draft on September 1, 2010. It was retroactively hand stamped by the City Clerk and was not stamped by the automatic time stamp. The copy provided to Mr. Griswold had no time stamp. The response brief was electronically delivered to Mr. Griswold on September 8, 2010, three days after the time for deciding the appeal had lapsed. The record should be corrected. It is also prejudicial for the cover on the appeal to state Griswold vs. City of Homer. It should state Griswold vs. Wrede.

Mr. Griswold asserted default judgment should be awarded to him because his appeal was not decided within 30 days. He filed the appeal on August 6, 2010. The appeal hearing was originally scheduled for September 13, 2010, eight days after the 30-day deadline for deciding the appeal. On September 9<sup>th</sup> Mr. Griswold suggested a continuance to allow time for the record on appeal to be prepared. It was four days after the September 5, 2010 deadline for deciding the appeal.

Mayor Pro Tempore Wythe stated on August 23<sup>rd</sup> Mr. Griswold was notified the original hearing was scheduled for September 13<sup>th</sup>, and he accepted that deferred date on September 7<sup>th</sup>. In accepting the deferred date he effectively deferred the 30 days himself. He was notified well enough in advance. Mrs. Wythe had nothing to address with the time stamp on the City Manager's response brief.

Mayor Pro Tempore Wythe asked Attorney Levesque if the date stamp on the response brief was a concern. Attorney Levesque stated the Clerk is the official who attests the legality of documents in the city. If the Clerk says the document was received on September 1, 2010, unless it is proved otherwise that is the date it was received. On page 84 there is a certification by the City Clerk that the document was delivered on Sept. 8<sup>th</sup>. Mr. Griswold is complaining about it taking seven days to be distributed.

Mayor Pro Tempore called for a recess at 7:08 p.m. and reconvened the meeting at 7:10 p.m.

Mayor Pro Tempore Wythe stated September 13<sup>th</sup> was to be the regular date of this hearing. Frequently Mr. Wrede dates the documents the date he is going to present them to us.

Mr. Griswold objected that this is presenting new heresay evidence.

#### ORAL ARGUMENT

Mayor Pro Tempore Wythe recommended Council hear oral arguments and grant each side a total 30 minutes, if they need it. There was no objection from the Council. Mayor Pro Tempore Wythe reminded both parties that the only issue before the Council is whether the City Manager properly denied Mr. Griswold's public records request. The only issue before the Council is whether the City Manager properly withheld documents under the exception that the documents are privileged. Argument should be confined to whether the requested records come within this exception to disclosure. There is no reason for either party to address the reasons for Mr. Griswold's request for the records, as they are not relevant to the appeal.

Appellant Frank Griswold stated Council has essentially bound and gagged him by not allowing him to present relevant evidence or question witnesses. There is no provision in Homer City Code to prohibit it. In the past Council has allowed it. In the previous proceeding Walt Wrede had the opportunity to cross examine Mr. Griswold but declined to do so. In the Board of Adjustment code there is a remand for the taking of new evidence, and he believes it should be allowed. If witnesses don't want to appear in person they could provide an affidavit. At the least Mr. Griswold needs to hear from the IT person if additional recovery software could be obtained to recover the documents.

Mr. Griswold stated there is no provision in code that provides for oral argument. All issues and positions of the parties have been thoroughly briefed. No party requested oral argument. Wrede argues he is not able to disclose all the records requested because Mr. Griswold is on a fishing expedition and by denying them it will save taxpayer's money (per response brief R84). Council has no authority to impose sanctions so the issue of wrongdoing is moot. At the November 24, 2008 Vaughn appeal, Mayor Hornaday stated "there is no reason for either party to address the reasons for Ms. Vaughn's request for the records as they are not relevant to the appeal." Likewise there is no reason to question Mr. Griswold's reasons for the public records in this appeal. Council has the authority and the duty to impose sanctions against Wrede and anyone else responsible for illegally destroying public records. The only reason any issue of the appeal is moot is because it was not decided within 30 days per HCC 1.80.70(b). Mr. Griswold asked how

Council would feel if they came to the City and asked for a document and they saw it was embarrassing, ran it through the shredder and said there is not such a document. There is no reason Council cannot accept evidence now. There is nothing magical about the arbitrary date that was set. He would like Council to accept all the written evidence, even that which Council received at the council meeting, and preliminary matters into evidence.

In Mr. Griswold's previous appeal he asked the City Manager for the procedures for destruction of electronic records. The City Manager said they were not different from other records and that the City has a records retention schedule in the code. The City does not, nor does Anchorage have a written policy of emails. It is up to each department to decide what is relevant, what should be in project files, which have historic or legal values, and which ones are just chitchat. If emails are treated like every other document they are subject to the City's records retention schedule. Emails that are requested as a public records request instantly take on legal significance and therefore must be retained until they are disclosed or determined to be confidential. City Attorney Klinkner admitted some of the documents were deleted after Mr. Griswold's April 16, 2008 request. There is no excuse for deleting them after they were requested and had to be retained until the matter was resolved.

Mr. Griswold cited AS 44.62.312(a)(1-5) as the State's strong interest of disclosure of public documents. The Alaska Supreme Court has stressed the importance of broad public access to public records. Mr. Griswold cited Jones vs. Jennings 1990: "the cornerstone of a democracy is the ability of its people to question, investigate, and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic." Mr. Griswold cited Fuller vs. City of Homer 2003 regarding access of public records and the Anchorage Daily News 1990.

Mr. Griswold stated when he made the request for public records on April 16, 2008 HCC 1.80 that allowed broad access to public records was in effect. He cited HCC 1.80.010 that provides full and free access to the public for records upon request. Council changed the provisions as a result of Mr. Griswold's request. Alaska Statutes do not permit the withholding of documents if they are attorney client privilege. Mr. Griswold cited Norwood vs. FAA 1983 and City of Kenai vs. Kenai Peninsula Newspapers and Anchorage Daily News 1982 referring to attorney client documents. Mr. Griswold concluded the knowledge that communication might become public helps ensure that the city attorney provides high quality legal advice.

Mr. Griswold provided written testimony on preliminary matters to the Clerk.

There were no questions from the Council.

Mayor Pro Tempore advised Mr. Griswold he had 18:05 minutes remaining for rebuttal.

City Manager Walt Wrede stated the instructions are not to introduce any new evidence. According to the agenda he does not have a chance to rebut Mr. Griswold's rebuttal, so will rebut some things now. With respect to the record there was not a lot of discussion about the emails withheld. There was a list of the emails withheld. He used the standards that are usually



used based on guidance from the City Attorney. Most were attorney client privilege. Some had to do with litigation, legal advice for enforcement matters, and personnel issues. There may be a mistake or two.

Mayor Pro Tempore Wythe asked Attorney Levesque if rebuttal was allowed at this time. Attorney Levesque advised Mr. Griswold, as the Appellant, is allowed to reserve some of his time for rebuttal. This is Mr. Wrede's time to speak and he has 30 minutes.

Mr. Wrede stated we made a good faith effort to comply with what the Board of Adjustment and the court asked us to do. There has been reference several times to the last BOA hearing. References were made that cross examination was allowed. The Mayor was presiding and did not want to allow cross examination as he did not think it was appropriate. Mr. Wrede interjected himself that he was fine with it and was happy to take questions. Mr. Tans jumped in and said it was okay to do so for the reasons cited. It happened differently than Mr. Griswold would lead Council to believe. Mr. Griswold said Council had no ability to sanction the City Manager, but he does not know where Mr. Griswold got that.

Mr. Wrede stated he never said we should treat emails any differently than any other documents. Emails are subject to the records retention schedule. Under the city code if it is of historical, legal, or financial value it is to be kept. Mr. Wrede does not remember Mr. Klinkner admitting that documents were destroyed after the date of the public records request. He may have said they may have been or could have been, but to say he admitted documents were destroyed is not the case. The record shows we did the best we could to follow the instructions of the Board of Adjustment and the court. Mr. Wrede's written report will testify to that.

There were no questions from the Council.

## REBUTTAL

Mr. Griswold stated Attorney Klinkner did say the records were deleted or destroyed after April 16. Mr. Griswold cited that in his brief and is now confused since some supplemental evidence was accepted and not others. There is question over what was said at the previous hearing. Mr. Griswold stated he submitted the entire transcript of that hearing. It is all verbatim. If Council is not going to accept it, that is their fault. He keeps hearing about the BOA. In Mr. Griswold's response brief he pointed out appeal hearings are not Board of Adjustment hearings. All these rules that pertain to BOAs do not pertain here. Rules here are only ten lines long. If Council is going to apply the BOA hearing procedures they do allow for a remand to present additional evidence. Even though there is no restriction in the code for presenting evidence at an appeal hearing Council does not want to hear it. This sounds like a kangaroo court. It just pushes the City into more prolonged litigation where you have to get a court to say you will follow state and federal laws and you will take the evidence. Mr. Griswold has asked repeatedly for Council's reconsideration. Council should accept all the evidence Mr. Griswold presented, including Mr. Klinkner's letter stating evidence was destroyed before and after the April 16<sup>th</sup> request.

Mr. Griswold claimed it was inappropriate for the City Clerk to hire the attorney to represent Council to decide issues that affect her boss. Council had the opportunity to ask who directed the Clerk to call Mr. Levesque. Council should be represented by the city attorney they hired, not by the attorney Walt Wrede hired. This appeal was not unforeseeable. When the City Manager had legal questions he should have hired Mr. Levesque; Council should stick with their city attorney. When a problem comes up, Council should hire their own attorney. Council should not take advice from the party who is being challenged. Mr. Griswold stated if he had known the hearing would go like this he would have filed a doctrine of futility. It is used when there is no hope for a fair hearing and someone can skip the administrative process and go to court. It is Council's job to hear evidence.

Attorney Levesque advised Council it would be appropriate to take Mr. Griswold's request to enter new evidence and new points under advisement. Council can address it in deliberations.

Councilmember Hogan commented we all have the documents and have read them. He doesn't know how Council can effectively exclude them.

Mayor Pro Tempore Wythe thanked Mr. Griswold and Mr. Wrede.

Mayor Pro Tempore Wythe called for a motion to move the Council into Executive Session to deliberate and decide the appeal.

ZAK/LEWIS - SO MOVED.

There was no discussion.

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

Motion carried.

Council adjourned to Executive Session at 7:38 p.m. and reconvened the meeting at 7:47 p.m.

Councilmember Roberts stated Council met in Executive Session and spoke with the attorney and have not made a decision yet, but will meeting from time to time to finalize the decision.

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

There were no comments of the audience.

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

City Attorney Klinkner was not present.

#### **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 Hogan, Howard, Lewis, Roberts, and Zak had no comment.

### **ADJOURNMENT**

There being no further business to come before the Council Mayor Pro Tempore Wythe adjourned the meeting at 7:50 p.m. The next Regular Meeting is scheduled for Monday, November 22, 2010 at 6:00 p.m. The next Committee of the Whole is scheduled for Monday, November 22, 2010 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: \_\_\_\_\_