

Session 14-09 a Special Meeting of the Homer City Council was called to order on April 9, 2014 at 6:00 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

ABSENT: ZAK (excused)

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

City Clerk Johnson related Board Member Zak requested a timely excusal that was not noticed on the agenda.

Chair Wythe ruled Board Member Zak's absence as excused. There was no objection from the Council.

AGENDA APPROVAL

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

Chair Wythe called for a motion for the approval of the agenda.

LEWIS/ROBERTS – SO MOVED.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

APPEAL TO THE BOARD OF ADJUSTMENT

- A. Appeal of the Homer Advisory Planning Commission Decision of December 4, 2013 for Conditional Use Permit 13-13 for More Than One Building Containing a Permitted Principal Use on a Lot at 3850 Heath Street. Frank Griswold, Appellant.

Opening briefs were received from the Planning Department and Appellant Frank Griswold. A reply brief was received from Mr. Griswold. The applicant substantively participated in the commission hearing but did not file any briefing. All parties have standing pursuant to HCC 21.93.060.

Appellant Frank Griswold and Deputy City Planner Julie Engebretsen were present and were identified for the Board.

A. PRELIMINARY ISSUES

(1) Conflicts of interest

Frank Griswold addressed a conflict of interest of the City Attorney. He cited Alaska Bar Rule 1.7(a) and 1.7(b), paragraph (b)(3) in which a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. The bar rule was submitted into Mr. Griswold's supplemental evidence for the hearing. He asked for determination whether City Attorneys Holly Wells or Thomas Klinkner or any other member of Birch Horton Bittner and Cherot wrote or assisted City Planner Rick Abboud in writing the opening brief of the City of Homer or advised the Planning Commission.

Chair Wythe asked City Attorney Holly Wells to state the associations between Birch Horton and the services to the Board and the City Planner.

City Attorney Wells related to the Board since March 2011 the City of Homer adopted a policy that follows several ethical opinions and court cases in which the State of Alaska through the Attorney General and the Municipality of Anchorage with its municipal attorney's office, took the approach where a single attorney from a law firm or an in-house legal department would represent the planning department or administrative body. A separate attorney would then represent the board or the decision making body with a few limitations. Those limitations include not entering into deliberations and providing guidance and advice on procedural matters only. That is the position Birch Horton has taken. It was March 22, 2011 when the city administration asked for guidance on the topic. They have maintained those rules, including a Chinese wall erected between the attorneys so no conversations and ex-parte communications occur between lawyers. They have abided and complied by those limitations in this proceeding. Reasons for this option are for cost effectiveness and the ability to avoid finding outside counsel. It can be costly and difficult to find an outside attorney for a municipality.

Chair Wythe ruled there was no violation.

Frank Griswold called for a point of order that this was a decision of the Board and not the Chair. The City Attorney did not answer the question if she assisted in writing the City's brief.

Attorney Wells stated she did not assist in any way in writing the brief or consult with the Planning Department in any way. Attorney Wells answered she believes Tom Klinkner did

provide assistance. She is not sure that he did. Because of the Chinese wall she has no knowledge of the level of interactions he has had with the Planning Department.

Mayor Wythe does not perceive a conflict of interest and called for a motion from the Board.

BURGESS/LEWIS – MOVED THAT PROVIDED AS LONG AS THE CHINESE WALL IS MAINTAINED AND ATTORNEY WELLS IS HERE ON AN ADVISORY CAPACITY ON MATTERS OF PROCEDURE AND OF CODE THAT THERE IS NO CONFLICT.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Chair Wythe asked if there were any conflicts of the Board.

Board Member Roberts disclosed that she attended the December 3, 2013 Planning Commission meeting. She doesn't remember this being discussed, but she was there.

Board Member Lewis disclosed he has known Kenton Bloom for a number of years although he has never done any business with him.

Board Member Burgess disclosed he sometimes works on projects that require Kenton Bloom's expertise. In the past he has been involved with businesses that Mr. Ramos is also involved with. Neither of those interactions has resulted in the amount of \$5,000 direct benefit to him or the corporation he works with.

Chair Wythe asked if that would influence Board Member Burgess' decision and he answered it would not.

Board Member Van Dyke disclosed his business has repaired many of Jose Ramos' vehicles.

Mayor Wythe sees no concerns of conflicts.

Frank Griswold called for a point of order as after disclosure there needs to be a vote.

Chair Wythe had allowed the Board opportunity to make a motion to consider someone in conflict and there were no motions made. She does not see any conflicts.

BURGESS/HOWARD - MOVED THAT BARRING ANY OBJECTION BY THE OTHER COUNCIL WE RULE THAT NO COUNCILMEMBER HAS A CONFLICT THAT WOULD MAKE IT UNNECESSARY FOR THEM TO PARTICIPATE IN THESE PROCEEDINGS.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Chair Wythe announced the Board has clearly vetted their potential issues and none have been identified to be in conflict. She asked for the declaration of any partiality issues.

(2) Partiality

Frank Griswold cited HCC 1.18.048(a) and (c), and 1.18.020 relating to partiality matters. Mayor Wythe is a consulting member of the Planning Commission as provided under HCC 2.72.010(d). She nominated many of the people appointed to the Planning Commission and could look bad if her nominations were ruled to have made a bad decision. Mr. Griswold believes she has a bias in favor of the commissioners and a long-standing animosity towards him and actively sought to thwart his previous appeal involving the City Manager's denial of a public records request by excluding witnesses and preventing him from questioning them. If she declined to participate in the discussions and did not vote, her participation as chair would violate HCC 1.18.048(a) and create the appearance of impropriety.

Board Member Burgess asked Chair Wythe if she participated in the Planning Commission's decision of CUP 13-13.

Chair Wythe answered in her lifetime on the Council she has maybe been to a Planning Commission once, never since she was elected mayor.

Chair Wythe noted for partiality review we will follow the same protocol. If there is a motion from the floor regarding partiality or the absence thereof, we will act on that motion.

BURGESS/LEWIS - MOVED TO DISCUSS THIS ISSUE BRIEFLY.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

BURGESS/LEWIS - MOVED THAT MAYOR WYTHER BE ALLOWED TO CHAIR THIS BOARD OF ADJUSTMENT.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Frank Griswold noted a partiality by both City Planner Rick Abboud and Deputy City Planner Engebretsen by favoring approval of CUP 13-12. If they qualify as city officials of HCC 1.18.048(a) it would be illegal for them to advise the BOA or influence their decision. If Ms. Engebretsen does not qualify as a city official she does not qualify for standing to appeal the determination of the commission per HCC 21.93.060(b).

City Attorney Wells advised under HCC 21.93.500 both Mr. Abboud and Ms. Engebretsen are people actively and substantively participating and qualify under HCC 21.93.060. They are participating as parties to present the position of the Planning Department in approving the conditional use permit (CUP). The Planning Department at times advises the Planning Commission to represent their decision before the commission.

Frank Griswold noted the Planning Department and the Planning Commission are two separate entities and there is no one here from the Planning Commission.

City Attorney Wells advised Julie Engebretsen is here to present information from the commission because it was aligned with the Planning Department that it should be approved. She read the definition of partiality in HCC 1.18.020.

Chair Wythe called for a motion for determination if Ms. Engebretsen is an official.

LEWIS/BURGESS - MOVED THAT MRS. ENGBRETSSEN IS AN EMPLOYEE OF THE CITY AND IS NOT AN OFFICIAL OF THE CITY.

City Attorney Wells advised narrowing the finding to partiality. A definition for another government official outside of HCC 1.18 may be different.

Board Member Roberts asked for clarification of Deputy City Planner Engebretsen's role in this hearing.

Chair Wythe called for a recess at 6:41 p.m. and reconvened the meeting at 6:47 p.m.

Chair Wythe clarified Deputy City Planner Engebretsen assumes the capacity of City Planner when City Planner Abboud is absent or unavailable. She is in that qualified, recognized governmental capacity for the Board now.

City Attorney Wells added in Ms. Engebretsen's capacity as Deputy City Planner she will qualify for standing under the standing provisions that Mr. Griswold may raise later. For purposes of partiality it would be outside the scope of a city official for the Code of Ethics. The Board should limit their scope of the finding to HCC 1.18.020.

VOTE: NO. LEWIS, BURGESS, ROBERTS, HOWARD, VAN DYKE

Motion failed.

Mayor Wythe called for a motion that Ms. Engebretsen is not an elected official for the purpose of HCC 1.18.020 in determining partiality.

HOWARD/LEWIS - SO MOVED

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

BURGESS/LEWIS – MOVED THAT BECAUSE MS. ENGBRETSSEN IS NOT DEFINED AS AN OFFICAL FOR THE PURPOSES OF PARTIALITY AND BECAUSE MS. ENGBRETSSEN HAS DISCLOSED THAT SHE HAS NO PERSONAL PARTIALITY CONFLICT IN THESE PROCEEDINGS THAT SHE NOT BE CONSIDERED TO HAVE A PARTIALITY CONFLICT.

Mr. Griswold objected since the question has not yet been asked of Ms. Engebretsen.

Deputy City Planner Engebretsen disclosed she has no personal or professional partiality in the proceedings. Her child attends daycare within 300 feet of the proposed property, but she just drives by the property every day on her way to work.

Board Member Burgess restated his motion.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

(3) Ex Parte communications

Frank Griswold referenced HCC 21.93.710(a) and (e) for ex parte communications. He asserted Ms. Engebretsen and Mr. Abboud are qualified parties to this appeal. He questioned ex parte communications with any of the commissioners or the Board on CUP 13-13. Mr. Abboud who co-signed the commission's decision is not present for questioning.

Chair Wythe commented Mr. Abboud is not present and she does not anticipate that any further questioning of him will take place. She asked Ms. Engebretsen if she has talked to the commission about the appeal.

Deputy City Planner Engebretsen doesn't believe she has spoken to the Planning Commission about the appeal and does not agree with Mr. Griswold's interpretation of the code. It is talking about where there is a decision of staff that is appealed to the Planning Commission.

City Attorney Wells agreed Mr. Griswold is right that once you are a party to the appeal it would be inappropriate if Ms. Engebretsen were to have ex parte or any communications with the Board. The role that the Planning Department serves with the Planning Commission is two-fold; they both present the reasons for recommending approval for a CUP and often help with drafting of the decision. The commission tells them what to write and then there is a process that is well vetted and appropriate and approved under Alaska law. If the Planning Department is advising the Planning Commission in a way that is not transparent that would be an ex parte problem. The more pertinent question is has there been any contact between the Planning Department and the Board.

Chair Wythe asked the Board of Adjustment to disclose any ex parte communication regarding this case with anyone not sitting at this table. Chair Wythe noted there were none stated.

Frank Griswold asked for determination whether City Planner Abboud and City Deputy Planner Engebretsen have standing to participate in the appeal and if so, who do they represent. The entries of appearance state they represent the City of Homer, not the Planning Commission. It appears they are both representing the owner of the subject property, Mr. Ramos. Neither city planners are aggrieved by the decision of the commission nor would they be by a Board reversal. Mr. Griswold referenced State vs. Taylor 114, Washington Appellate Court, 124, 2002 case and Griswold vs. City of Homer in KSMA 252 Pacific Third 1020.

City Attorney Wells referenced HCC 21.93.160 and (b) for standing. Ms. Engebretsen would be considered a government official, or most certainly working for the city government. There is an express provision granting standing to the Planning Department, therefore the need to prove aggrieved status would not apply.

City Attorney Wells agreed with Mr. Griswold that Mrs. Engebretsen would not be representing the commission. It may not have been an accurate portrayal of their role; they may have been intending to say they were representing the decision of the Planning Commission. It is appropriate for the Board to limit their role as a party to this proceeding with standing to move forward.

BURGESS/ROBERTS - MOVED TO RESTRICT JULIE'S PARTICIPATION IN THESE PROCEEDINGS AS A REPRESENTATIVE OF THE CITY OF HOMER AND TO NOT REPRESENT THE INTEREST OF ANY WAY TO BIAS OF THE RULING OF THE DETERMINATIONS OF THE HOMER ADVISORY PLANNING COMMISSION.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Frank Griswold clarified he did not assert Ms. Engebretsen claimed to represent the Planning Commission. If her role is restricted it should be to represent the Planning Department.

Frank Griswold noted the entries of appearance of Mr. Abboud and Ms. Engebretsen failed to meet the requirements of HCC 21.93.090. It should be determined whether city employees can represent themselves without the written authorization of the City Manager or the City Council. An attorney hired to represent the City of Homer files an entry of appearance; anyone other than an attorney needs written authorization.

City Attorney Wells agreed with Mr. Griswold that the authorized representative provision never intended a signature by the City. It only refers to a person. It may be wise for the Council to amend that section of the code to make it expressly clear that a notice of appearance by a city representative is on behalf of the City of Homer. This is an ambiguous code provision and the Board could not find a violation of that code provision.

BURGESS/LEWIS - MOVED TO FURTHER CLARIFY THAT MS. ENGBRETSSEN IS REPRESENTING THE HOMER CITY PLANNING DEPARTMENT, ADVISING ON THE ACTIONS TAKEN BY THE PLANNING DEPARTMENT, AND DOES NOT NECESSARILY REPRESENT THE CITY OF HOMER AS A WHOLE.

The Board discussed the Planning Department as a part of the City of Homer.

Chair Wythe thanked Mr. Griswold for pointing the ambiguity within the code that can be adjusted later.

Vote: NO. ROBERTS, HOWARD, LEWIS, BURGESS, VAN DYKE

Motion failed.

Frank Griswold noted neither Mr. Abboud or Mrs. Engebretsen filed an appeal or cross appeal and neither constitutes an appellant, a cross appellant, or a respondent as required under HCC 21.93.530(a) for filing briefs and presenting oral argument. He referenced the denial of his March 26, 2014 public records request from City Manager Wrede noting it was routine for the City Planner to prepare an opening brief. Mr. Griswold referenced a superior court judge's decision that is appealed; court personnel do not defend their positions. Neither party qualifies under 21.93.540(b) to present oral argument. The Planning Commission's decision does not need to be defended by partisan staff of the Planning Department.

City Attorney Wells advised HCC 21.93.530 deals expressly with parties. The language binding on the Board is each party to the appeal may file. Respondent or Appellee are terms used to define who is responding or filing. In a quasi-judicial proceeding that has no bearing. It would be inappropriate to exclude the Planning Department as a party despite express provisions that permit them to be a party.

City Attorney Wells addressed Mr. Griswold's analogy of the case referring to the superior court judge. The Planning Department's participation in these proceedings is not like the involvement of a superior court judge. It is like the involvement of an attorney general or a district attorney. Those officials are constantly appearing on appeal for the agencies they

represent. If they lose a case before the superior court they will carry the case forward as an advocate and appeal to the supreme court. Homer City Code is designed to allow the Planning Department to fulfill that recommendation they carry forth through procedural hearings.

Board Member Roberts questioned the email from Walt Wrede that Mr. Griswold referenced.

Frank Griswold clarified it was the public records request. He stated it was established Attorney Klinkner assisted or wrote the brief.

City Attorney Wells stated she does not have any idea if Attorney Klinkner had any involvement in the drafting of the opening brief. Mr. Klinkner has been assigned to the Planning Department for purposes of this CUP. He may have had no contact with the Planning Department. Because of the Chinese wall the attorneys do not discuss cases.

Frank Griswold asked that Mr. Abboud be allowed to state who wrote the brief. It is prejudicial to him if one attorney from the law firm has already written a brief that Attorney Wells would challenge the wisdom of her law partner.

Frank Griswold believes neither Mr. Abboud or Ms. Engebretsen can represent the City of Homer or any department without being licensed to practice law. He referenced AS 08.08.230 and Alaska Bar Rule 63.

City Attorney Wells advised Homer City Code is very clear that as a party the Planning Department and its representative can present the position of that party. She referenced an opinion with the Human Rights Commission, Attorney General opinion: WL22915, file no. A66-055-80 issued on September 11, 1979. Homer City Code 21.93.090 clearly anticipates the participation in quasi-judicial proceedings by non-attorneys. The Board should consider what is the ramification and consequences of limiting parties before them. Attorney Wells argues the consequence is a restriction on due process, access, and rights to decisions. The Board should err on the side of fulfilling due process rights of individuals and allowing access of the quasi-judicial proceedings. The Planning Department is almost representing themselves as pro se. There is a clean and clear line.

Frank Griswold commented if they are representing themselves pro se they should have said so. The Homer City Code can still be wrong and if the Board follows it a court could rule it invalid.

Board Member Burgess asked Mr. Griswold if he has found that any member of the Planning Department represented themselves in the capacity of an attorney.

Frank Griswold answered if they want to exercise their appeal rights they are entitled to have an attorney represent them. If they are authorized to represent themselves they should file an entry of appearance to represent themselves.

City Attorney Wells clarified the city planners do have access and can receive advice from Attorney Klinkner. He has been assigned to the Planning Department. It is not relevant to this issue whether a non-attorney can represent a commission. Based on the city code provisions and advice of the Attorney General, the department is allowed and it is proper to represent themselves as a party. Requiring them to have an attorney present at all proceedings has costly and restrictive ramifications. There is ambiguity of the law; very clear municipal provisions permit Ms. Engebretsen to proceed as a party. It is a decision that the Board needs to make as it is a valid issue raised by Mr. Griswold.

Chair Wythe asked if a precedent has been set by past hearings of the Board of Adjustment (BOA) where the Planning Department has represented themselves. In past BOA hearings they have had access to an attorney but don't always have an attorney in the room.

City Attorney Wells answered consistency of government practice is important. We are not at the level of a state quasi-judicial body; we are at the level of a municipal quasi-judicial body that needs more flexibility.

(4) Other preliminary issues

Frank Griswold referenced HCC 21.93.540(b) of the taking of testimony as limited by HCC 21.93.510 and (a) that the Board shall not consider allegations of new evidence or changed circumstance and shall make its decision based solely on the record. The Board has accepted briefs and is about to hear oral argument. He asked if testimony was limited to arguing points in the briefs and what happens if new evidence is introduced at oral argument. He asked if objections be acknowledged and decided by the Chair subject to override by the Board or will they be decided by the Board as a whole.

Chair Wythe answered following completion of preliminary issues she will outline the oral argument process.

Deputy City Planner Engebretsen had no preliminary issues.

B. ORAL ARGUMENTS

Chair Wythe recommended the Board hear oral arguments and grant each side a total 30 minutes, if they need it. There were no objections from the Board.

Chair Wythe reminded the parties that this is not the time for them to offer new evidence to the Board pursuant to HCC 21.93.510. Parties must base their case on the evidence in the record from the Planning Commission.

Oral argument will proceed as follows: Mr. Griswold, as the appellant, will go first. He will have a total of 30 minutes. If wanted, he may reserve some of that time for his response to the Homer Deputy City Planner. After Mr. Griswold presents his argument, then Julie Engebretsen, Homer Deputy City Planner, will have 30 minutes to make her argument. Then, if Mr. Griswold

has reserved any time, he will be allowed to respond to the Deputy City Planner, up to the limit of his remaining time. When he is finished, that will conclude the arguments.

BURGESS/ROBERTS - MOVED THAT ANY PARTY THAT HAS OBJECTION ON NEW EVIDENCE BEING RAISED, THE CLOCK WILL BE STOPPED.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Chair Wythe called for a recess at 7:42 p.m. and reconvened the meeting at 7:49 p.m.

Chair Wythe noted applicant Kenton Bloom is here, but did not file an opening brief.

Kenton Bloom, applicant, was identified and reserved his right to respond.

Frank Griswold objected to Mr. Bloom's participation since he did not file an entry of appearance; it is inappropriate for him to participate in this proceeding.

Chair Wythe noted there are entries of appearance from both Jose Ramos and Seabright Survey (Mr. Bloom) dated March 11. Both have submitted their entry of appearance timely. Neither party provided any written documentation or brief. They reserve their right to participate in the proceedings.

Frank Griswold stated he was never provided copies of those entries of appearance.

City Attorney Wells advised under HCC 21.93.500(b) both the appellant and the applicant are not required to submit entry of appearance in order to appear as parties. We do have the entries of appearance. She advised the Board to look at the section of the code and what is required of the applicant and also note if Mr. Griswold did not receive notice of the entries of appearance excluding the party from participation might be a much more prejudicial and destructive action than moving forward. It is understood when something is filed with the clerk it should be served and sent to opposing parties. It is usually done by the clerk although this is not an express requirement.

BURGESS/ROBERTS - MOVED THAT BECAUSE THIS MATTER IS NOT EVIDENTIARY, IT SIMPLY HAS TO DO WITH PARTIES WHOSE UNCERTAIN INTERPRETATIONS OF THE CODE WOULD BE EXPLICITELY ALLOWED TO PARTICIPATE OTHERWISE, THAT MR. BLOOM BE ALLOWED TO PARTICIPATE IN THESE PROCEEDINGS.

City Attorney Wells advised notice of appearance must be filed 14 days before the hearing, but the code expressly exempts the appellant and owner of the property from the entry of appearance requirement.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Frank Griswold referenced HCC 21.93.090 that says no person may represent a party to an appeal without filing with the city clerk written authorization which shall be signed by the parties so represented and provide the name and address of the party's representative. If the person representing another is a lawyer licensed to practice law in Alaska, an entry of appearance signed by the attorney is acceptable in lieu of authorization signed by the person so represented. He questioned the entry of appearance documents that say Kenton Bloom, property owner representative. He doesn't believe it meets the requirements of HCC 21.93.090 as nothing authorizes him to represent anyone else. If Mr. Griswold had known in advance he would have had objections and raised conflict of interest and other issues. Now there is a non-attorney representing a party.

City Attorney Wells advised it is appropriate to address Mr. Griswold's concerns. HCC 21.71.020(a) requires an application for a CUP include the name of the owner of the subject lot and the name of the applicant for the permit. If the applicant is not the owner of the lot as is the situation here, (a)(g) requires that the application include the owner's signed authorization granting applicant the authority to apply for the CUP and bind the owner to the terms of the CUP if it is granted. The record shows on behalf of Seabright Survey Kenton Bloom signed the application for the CUP as the applicant and Jose Ramos signed the application as the owner of the property. Mr. Bloom is not here as a representative of the owner. He is here as the applicant and has that right. He has followed the procedure to be an applicant

Kenton Bloom affirmed he is representing himself and his company as the applicant.

Chair Wythe confirmed Kenton Bloom will be representing himself as the applicant.

City Attorney Wells advised it is appropriate for the Board to limit his representation as the applicant.

BURGESS/LEWIS – MOVED THAT MR. BLOOM'S COMMENTS BE CONFINED TO HIM REPRESENTING HIMSELF AND SEABRIGHT CONSTRUCTION AS AN APPLICANT AND HE IN NO WAY SHAPE OR FORM MAY REPRESENT THE INTEREST OF THE OWNER OR ANOTHER APPLICANT.

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

VOTE: NO. ROBERTS

Motion carried.

Frank Griswold rested on his briefs and reserved his 30 minutes for rebuttal.

Kenton Bloom addressed the applicant item that was alleged to require the expertise of an attorney for submission of a CUP application. There has never been a determination to that effect in any of the process that he is aware of for the City of Homer. The nature of the process as the City has presented to his firm is applicable and appropriate for submitting a CUP.

Chair Wythe noted 29:13 minutes remain for Mr. Bloom's rebuttal.

Deputy City Planner Julie Engebretsen asserted the applicant applied to build a duplex at the property and applied for a CUP for more than one building containing a principal permitted use on the lot. Per opening brief #5 the applicant's property was evaluated for the current proposal and the Planning Commission evaluated the proposal, made conditions, and considered current permitting requirements as displayed in Mr. Abboud's response #4. Previous permits or plans over a decade or longer ago do little to enforce what is proposed in the current CUP. As part of the permitting process the City Planner will review to determine whether all permits and approvals required by applicable Federal, State, or local law or regulation have been obtained. All other permits must be applied before the Planning Department will issue a zoning permit for that development.

Deputy City Planner Engebretsen noted point of appeal #7 Mr. Griswold states the commission erred in finding that other conditions were not necessary to protect the interests of the community and surrounding area or to protect the health, welfare, and safety of persons working in the vicinity. Mr. Abboud's response was that the Planning Commission reviewed the application, held a public hearing, and proposed conditions. They did respond to written testimony and comments and displayed due considerations to all concerns presented.

Deputy City Planner Engebretsen referenced point of appeal #8 Mr. Griswold states that the Planning Commission erred in making a finding if all structures and uses of the subject property conformed to the Homer zoning code. Mr. Abboud responded that nothing in Homer City Code prescribes abatement of any alleged zoning violation as a prerequisite prior to hearing or ruling on a CUP application. Mr. Griswold discusses the Community Design Manual (CDM). The Planning Department's interpretation is that the CDM applies to all nonresidential uses and uses with more than twelve residential uses. There are not twelve residential structures on the subject property so the CDM does not apply. Lighting and landscaping provisions in city code do apply.

C. REBUTTAL

Chair Wythe told Frank Griswold he has 30 minutes remaining that he may use for response to the Deputy City Planner.

Frank Griswold rebutted just because there is nothing in Homer City Code that requires prerequisite compliance with code doesn't mean it is not appropriate for the Planning Commission to mandate under HCC 21.71.040. They have broad discretion to mandate any conditions to protect the public health, welfare, and community. It is disingenuous to say it is not required; it is in the catchall category of the CUP. If all of these things cannot be met and

protections put in place, then the CUP must be denied. They clearly have the authority to apply any number of conditions to make it an appropriate development. The CDM is very convoluted; it was enacted in 2004. Before that, this provision was mandated by the CUP application process. The CDM is supposed to be amended from time to time, but it still refers to the 1999 Comprehensive Plan. In the CUP process one of the requirements is that the development must meet all applicable provisions of the CDM. You have applicability restrictions within the CDM and one is lighting that applies to all uses. Lighting is required whether it is a permitted or a conditional use.

Chair Wythe asked if the Board had any questions for either party.

Board Member Roberts referenced the CDM page 2 of 38, applicability. If you are in the Central Business District then site plan review should be followed when issuing a permit. Should the architectural requirements be applied?

Deputy City Planner Engebretsen answered it is staff's interpretation on page 3 and 5 of the CDM that applicable uses in areas zoned Central Business District or Gateway Business District are all nonresidential uses and uses with more than twelve residential uses. The intent is not for a single family home or for five or eleven residences on a lot. It is twelve; it is a volume of development. The major rewrite of Title 21 was after the CDM. Lighting standards became part of city code; at the time the CDM was written we did not have those lighting regulations.

Board Member Burgess had hoped to hear more about some other points raised. The issues are relatively minor reasons to overturn a CUP. He would give more weight to topics like the Planning Commission lacking authority to permit as opposed to recommend a CUP. He is curious that Mr. Griswold would not use his time to speak on it.

Frank Griswold answered he briefed it and took a lot of time to prepare the argument. He would only be stating it again. The Board is supposed to have read the briefs and ask questions. The points in the brief are no less important than if he presented oral argument, which is optional.

Board Member Roberts asked Deputy City Planner Engebretsen and Frank Griswold to comment on item 8 in Mr. Griswold's brief that talks about zoning violations. How do we know there are zoning violations?

Frank Griswold answered there is lots of information in the street file that should have been provided to the commission. This would be grounds for remand for the taking of new evidence. His public records request for that information was delayed and not received in time to present. Some is referenced in the testimony and documents presented to the Planning Commission. There should have been an effort to make sure all the structures on the property were in compliance.

Board Member Burgess asked what Mr. Griswold finds objectionable about the CUP? Does he object to use of the site or the building?

Frank Griswold answered this is an invalid land use permit that is being approved as an abatement tool. The Planning Department is aware of multiple zoning violations on the lot and instead of seeking abatement they are issuing an invalid land use permit. It is actually a planned unit development encompassing the whole lot. Previously a structure was required to be removed from this property. While one governmental agency is requiring structures to be removed another is allowing structures to be constructed.

Board Member Roberts referenced pages 37 and 38 of the appeal record, the two maps of the lot. The building closest to Heath Street says tool shed as of 2005. The CUP application says some buildings are stores. When you change from a tool shed to a business do you have to do anything?

Deputy City Planner Engebretsen answered she cannot speak to the rules at the time as she does not know when it changed from a tool shed to what it is now.

Board Member Roberts noted the packet information lists conflicting uses for the buildings. She expressed confusion of the eleven residences on the lot.

Deputy City Planner answered she does not know when the tool shed became the use that it is today. If it were to change to a different occupancy today they should apply for a change of use zoning permit.

Board Member Roberts referenced argument #6 street file documents. She asked if those kinds of documents would be in the record of appeal.

Deputy City Planner Engebretsen answered those documents are not in the appeal record as that would be admitting new information. The street file is a paper file with permits, water and sewer bills, etc. stored according to the records retention schedule.

Board Member Burgess questioned #5 in Mr. Griswold's brief on the assertions that the Planning Department is not required to investigate or make sure all permitted uses on the lot are in compliance when issuing a CUP. Mr. Griswold is claiming the opposite. He asked either party what their understanding of that section of the code is.

Frank Griswold answered HCC 21.90.030 was cited in his opening brief.

Deputy City Planner referenced #5 the zoning permit requirement. Enforcement of a violation is the authority granted to the City Planner to pursue or to not pursue.

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

HOWARD/LEWIS – SO MOVED.

The Board briefly discussed the necessity of going into executive session to discuss the appeal. City Attorney Wells noted the Board needs to maintain the procedural process. Once in deliberations the Board is exempted from the Open Meetings Act and can meet at any time to deliberate. She reminded the Board that her counsel is for procedural issues only and she will not be joining the Board in deliberations.

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

Motion carried.

ADJOURNMENT

There being no further business to come before the Board, the public portion of the Board of Adjustment meeting adjourned at 8:37 p.m. Board deliberations will commence and continue in executive session as needed until completion.

JO JOHNSON, MMC, CITY CLERK

Approved: _____