

Session 14-30 a Special Meeting of the Homer City Council was called to order on December 1, 2014 at 6:01 p.m. by Mayor 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:	COUNCILMEMBERS:	LEWIS, REYNOLDS, ROBERTS, VAN DYKE, ZAK
	ABSENT:	BURGESS (excused)
	STAFF:	CITY ATTORNEY WELLS CITY CLERK JOHNSON

Councilmember Burgess has requested telephonic participation or excusal.

Mayor Wythe ruled Councilmember Burgess' absence as excused. There was no objection from the Council.

Councilmember Zak has requested telephonic participation.

REYNOLDS/VAN DYKE – MOVED TO APPROVE COUNCILMEMBER ZAK'S PARTICIPATION BY TELEPHONE.

Mr. Griswold objected from the audience. City Clerk Johnson called for a point of order as it is the Council's decision.

Councilmember Roberts asked if Councilmember Zak was allowed to participate in Executive Session since he was telephonic.

City Clerk Johnson answered the code does not allow a councilmember to participate in Executive Session if telephonic. She deferred the question to Attorney Wells.

Attorney Wells advised an Executive Session is not needed to deliberate under the Open Meetings Act. If Councilmember Zak participates by telephone for the hearing he may participate by telephone in deliberations if they are conducted in an open forum.

VOTE: YES. LEWIS, ROBERTS, REYNOLDS, VAN DYKE

Motion carried.

AGENDA APPROVAL

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

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

LEWIS/REYNOLDS – SO MOVED.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

A. APPEAL TO THE BOARD OF ADJUSTMENT

Regarding the Planning Commission Decision on Remand Conditional Use Permit 13-13 for More Than One Building Containing a Permitted Principal Use on a Lot at 3850 Heath Street, Homer, Alaska. Frank Griswold, Appellant.

I. Identification of the Appeal

This is an Appeal to the Board of Adjustment of the Homer Advisory Planning Commission Decision on remand of August 8, 2014. In that decision, the Commission considered additional evidence regarding Conditional Use Permit 13-13 and again approved the permit, but imposed additional conditions in response to BOA instructions on remand. CUP 13-13 permits the Applicant to erect more than one building containing a permitted principal use on Lot 1-A-1 Carl Sholin Subdivision No. 5 3850 (the “Property”), Homer, Alaska.

On December 4, 2013, the Commission issued a decision approving CUP 13-13. Frank Griswold filed a notice of appeal with the City Clerk. On June 6, 2014 this Board remanded this matter to the Commission ordering it to consider additional evidence in determining whether the Property complies with the Homer Zoning Code as required under HCC 21.90.030, to make findings regarding the Property’s compliance with the Homer Zoning Code, and revisit Findings Nos. 5 and 8 after considering additional evidence regarding compliance. This Board upheld the Commission’s findings in all other respects.

On July 16, 2014, the Commission held the remand hearing regarding CUP 13-13. After considering additional evidence, including materials submitted by both the City Planning Department and Mr. Griswold, the Commission issued its decision once again approving CUP 13-13 on August 8, 2014. On or about September 16, 2014, Mr. Griswold filed an amended Notice of Appeal of the Commission’s decision on remand.

The hearing today is limited to the Commission’s decision on remand.

Attorney Wells advised the parties to carefully stick to the issues that were remanded to the Planning Commission. Both the Commission and Appellant have gone outside that scope. She recommended avoiding prejudice to parties not present.

Mayor Wythe confirmed the items under remand are whether or not the property complied with the Homer zoning code and items 5 and 8 only. Any other items are not up for reconsideration.

II. Identification of the Parties

As of this date, the Board has not received any Notices of Appearance in this Appeal. Accordingly, the only parties permitted to participate in this hearing are: Frank Griswold, the Appellant, Rick Abboud, City Planner, and the Applicant for CUP 13-13, Kenton Bloom d/b/a Seabright Survey & Design.

Appellant Frank Griswold and City Planner Rick Abboud were present.

III. Disclosures by Board of Adjustment

A. Conflicts of Interest

There were none stated.

B. Partiality

Appellant Griswold questioned the lack of a procedural notice in this appeal since they have been issued in past appeals.

Attorney Wells answered the hearing was noticed by date and time. If the procedural notice is to be raised by parties not present the Board would need to consider that.

Appellant Griswold objected to telephonic participation in an Executive Session by Councilmember Zak. He asked that the Council's decision to allow Councilmember Zak to participate telephonically be reconsidered. He has several exhibits Mr. Zak would not be able to view.

Attorney Wells advised the Board that Councilmember Zak may participate by telephone.

Mr. Griswold noted the precedent set by the Board of Adjustment to allow additional evidence pertaining to procedural matters only.

Appellant Griswold questioned the dual representation of Attorneys Holly Wells and Tom Klinkner.

Mayor Wythe advised the stated conflicts were decided in previous appeals and do not need to be revisited. There was no objection from the Council.

Mr. Griswold noted it was a different Board with new members Catriona Reynolds and Bryan Zak.

Councilmember Roberts expressed interest in hearing Mr. Griswold's concerns due to the change of make-up of the Council.

Appellant Griswold cited Mayor Wythe's partiality as she volunteered advice and mentored the Planning Commission. She recently accepted an award for her service. He referenced a newspaper article from the Homer News written by McKibben Jackinsky.

Mayor Wythe passed the gavel to Mayor Pro Tempore Roberts.

The Council found there was no award given to the Mayor. The event was for the Council to thank commissioners for volunteering their service. The newspaper reporter misunderstood the event and reported it wrong.

Mayor Pro Tempore Roberts returned the gavel to Mayor Wythe.

Mayor Wythe noted the claims raised by Appellant Griswold on Birch Horton Bittner and Cherot dual representation, herself, and planning staff conflict were reviewed and determined to have no merit.

Appellant Griswold asserted Councilmember Van Dyke has a bias in favor of business due to his comments for the September 25, 2013 Homer News article.

Mayor Wythe questioned Councilmember Van Dyke and found there was no bias. There was no objection from the Council.

Appellant Griswold asserted Councilmember Zak is biased due to his remarks about prominent business men being exempted from planning laws. The comment was made at a September 24, 2013 candidate forum.

Mayor Wythe questioned Councilmember Zak and found there was no bias. There was no objection from the Council.

Appellant Griswold questioned the standing of City Planner Rick Abboud.

Mayor Wythe ruled Mr. Abboud does have standing; this was previously determined by the Board of Adjustment. There was no objection from the Board.

Attorney Wells advised the decision on page 147, paragraph 83, where the issue was raised the Planning Commission must seek legal counsel. Mr. Abboud's issue has been clearly addressed.

Mayor Wythe called for a recess at 6:55 p.m. and reconvened the meeting at 7:02 p.m.

City Clerk Johnson read Ordinance 14-45 enacted September 22, 2014 regarding the city planner's participation in the appeal.

Appellant Griswold objected since the ordinance was adopted after the fact.

Appellant Griswold read Attorney Klinkner's preamble. He indicated on November 3 he filed a motion for reconsideration. There was no ruling on the motion.

Attorney Wells advised the practice before the courts requires a stricter standard; it is frustrating to not get a ruling. It is appropriate to discuss motions at the hearing.

Appellant Griswold noted in CUP 14-05 the Board did respond to his motion and set a deadline; this was setting a precedent.

Attorney Wells advised there is no obligation to follow and mirror decisions; we provide due process and procedural rights and follow and comply with the code. That is all that is expected of the courts.

Mayor Wythe called for a motion to strike the brief. There was no motion from the Board.

Appellant Griswold asked that his arguments be listened to. It is pure folly to accept whatever was agreed to by a previous board.

Mayor Wythe noted the Board is interested in hearing evidence pertaining to three items. The presence or absence of the City's opening brief may not change that. The Board chooses not to hear more information following their choice.

Appellant Griswold noted the Board is strongly influenced by the Mayor's recommendations.

C. Ex Parte Communications

The Board had no ex parte communications.

IV. Preliminary Rulings on Procedural Matters

Appellant Griswold cited HCC 21.93.540(b) taking of testimony and asked who makes the decisions as to not consider new evidence or changed circumstances.

Attorney Wells advised the Board against making advisory decisions. The Board is not accepting new evidence other than points on remand. The parties are not here to engage in discussion.

Appellant Griswold commented Mayor Wythe is a member of the Board and asked why she can vote only in the case of a tie.

Attorney Wells advised those questions were asked at the original proceeding. Pursuant to HCC 21.91.100 the Board is comprised of the Homer City Council. The Mayor is a full member of the Board.

Appellant Griswold questioned why three members wouldn't represent a quorum when you have three members and the chair.

Appellant Griswold questioned the 14.75 hours Birch Horton billed for researching and responding to procedural questions; he did not receive any response.

Attorney Wells advised she is here to advise the Board. She spent quite a few hours researching and developing answers to Mr. Griswold's questions.

Appellant Griswold commented not enforcing planning rules is the saving grace, unless such authority expressly pertained wherein. Zoning permits must be obtained prior to commencement of construction prohibits occupancy.

A. Motion to Strike City's Opening Brief

Mayor Wythe stated on November 3, 2014, Mr. Griswold sent the City Clerk an email moving to strike the opening brief filed by the Planning Department. It does not appear that this email was served upon the Planning Department. It would benefit the Board to hear argument from both parties regarding Mr. Griswold's motion to strike the Planning Department's opening brief. If there is no objection from the Board, we will now hear arguments regarding Mr. Griswold's motion.

These arguments must be limited to Mr. Griswold's motion. Each party will have 10 minutes to present their argument.

Appellant Griswold stated he came here prepared to address procedural issues. He intends to rely on his briefing. The transcript of the commission's deliberations was alarming. The Board has two options; either instruct the commission to conduct deliberations in secret so the public doesn't find out what a debacle it was. The commissioners are not trained and are not receiving good advice from the planning staff. You can cover it up or you can provide training to the commissioners and hire trained staff.

8:25 minutes saved for rebuttal.

The Board made no motion on appellant's motion to strike. Parties began oral argument.

V. Oral Argument on Substantive Matters

City Planner Rick Abboud stated 30 points have been ciphered down to 5. The whole crux is “Thou shall not issue any permit.” He has not issued any permit yet. There is a CUP on the table, there are buildings there; he doesn’t know any place in the world where you start construction without getting a permit. If they have created a structure that he wasn’t able to verify met the code you then have a serious problem. It would require a building inspection; we don’t have that. We have a residential building code only. A commercial building must receive Fire Marshal permit. If something like this comes up he gives them the opportunity to make it right. If it meets all requirements of the setback and has water/sewer access it deserves a valid permit without knocking down the structure and building it over again. This is a CUP that is required to get a zoning permit. We have tried to give them opportunity to do what they can on site with CUP approval. We analyze proposed structures to make sure they meet code; that is the intent here. If they were not able to get permits the deal was off.

Councilmember Roberts asked if a duplex was a commercial building. City Planner Abboud answered it was not, thus a Fire Marshal permit was not required.

Councilmember Roberts asked if you have to be in compliance to get a CUP. City Planner Abboud answered when you come in for a CUP they may or not have been in compliance. There were things issued he cannot issue now. If he denied everyone a permit if there were any problem on the lot not many people would get a permit. What they are doing is legal. We will have to make an amendment to code to allow reasonable expectations what the City decides is appropriate for development.

Councilmember Roberts reiterated the question. City Planner Abboud answered as long as he could identify what needed to be corrected he would advise the Planning Commission to issue a CUP if the corrections were made. He tries to put a timeline on it.

Rebuttal:

Appellant Griswold noted there was no evidence in the record of what other places in the world do. He never suggested any structure be knocked down, just that no further construction be authorized until the rest of the structures are in compliance. His saving grace is that he doesn’t have to enforce anything; his non saving grace is he cannot authorize more construction. The property owner could build the seventh structure and the Planning Department would have the ability to ignore it. The Board has the obligation and sworn oath to follow the code; they have the means to change it. A duplex can be commercial if the occupancy is less than 30 days. There was no finding made as to the term of occupancy. They said two structures were commercial. If there were a fire on a middle structure it could be difficult to get to and could spread to other structures. It is a dense situation and Fire Marshal approval should be mandatory. The Planning Commission has the authority to do that under the catchall for public health safety and welfare of the City’s residents. The Borough

discourages long skinny lots that are more than 3-1 in length/width ratio. Councilmember Burgess would have appreciated the conditional use process is a very efficient way to get compliance. When the City actively seeks to force someone into compliance it costs tens of thousands of dollars. The CUP process is a way to get property owners to comply. Structures could be moved from the lot to come into compliance. If you allow someone to get a permit after the fact where is the incentive for one before?

Mayor Wythe called for a motion for the Board to go into Executive Session for deliberations.

Attorney Wells asked the Board to consider deliberations outside an Executive Session to allow Councilmember Zak to join deliberations.

Mayor Wythe advised Appellant Griswold of his right to appeal within thirty days of the Board's decision.

REYNOLDS/ROBERTS - MOVED TO ESTABLISH A DATE FOR DELIBERATIONS.

The Council discussed dates for deliberations. Councilmember Zak will not return until December 5th.

REYNOLDS/LEWIS - MOVED TO MEET ON DECEMBER 8TH AT 4:00 P.M. TO DELIBERATE.

It will be a closed session.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

LEWIS/VAN DYKE - MOVED TO ADJOURN.

There was no discussion.

VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

Motion carried.

ADJOURNMENT

There being no further business to come before the Council, Mayor Wythe adjourned the meeting at 7:58 p.m. The next Regular Meeting is Monday, December 8, 2014 at 6:00 p.m. and Committee of the Whole 5:00 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

JO JOHNSON, MMC, CITY CLERK

Approved: _____