

Session 21-18 a Special Meeting of the Homer City Council sitting as Board of Adjustment was called to order on August 2, 2021 by Mayor Ken Castner at 4:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

**PRESENT:** COUNCILMEMBER ADERHOLD, HANSEN-CAVASOS, LORD, SMITH, VENUTI<sup>1</sup>

**STAFF:** CITY CLERK JACOBSEN  
ATTORNEY BRANDT-ERICHSEN  
CITY PLANNER ABBOD

**AGENDA APPROVAL** (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

LORD/ADERHOLD MOVED TO APPROVE THE AGENDA.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

## **NEW BUSINESS**

- a. Appeal to the Board of Adjustment Re: Appeal of the Planning Commission Decision on appeal of Zoning Permit 1020-782 issued for the property located at 541 Bonanza Avenue, Homer, Alaska.

Mayor Castner identified the matter before the Board of Adjustment (BOA), an appeal to the Board of Adjustment of the Planning Commission Decision on Appeal of Zoning Permit 1020-782 issued for the property located at 541 Bonanza Avenue, Homer, Alaska. He advised that opening briefs and reply briefs were filed by the Appellant Frank Griswold and by Jermain Dunnagan & Owens, LLC on behalf of the City. He provided an overview of the process for the hearing, and asked the Clerk to identify the parties and attendees present.

City Clerk Jacobsen announced in addition to Mayor Castner and the City Council sitting as BOA that Attorney Scott Brandt-Erickson, Attorney Max Holmquist, IT Manager Nick Poolos, and property owners Scott and Stacy Lowry were attending by Zoom, and Frank Griswold, City Planner Abboud, and two audience members were in attendance in person.

Mayor Castner opened the floor to address preliminary matters. The first matter is the motion submitted by the appellant that Board member Venuti be excused from the hearings and the appellant and appellee each have three minutes to comment on the matter.

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<sup>1</sup> Board Member Venuti was excused and left meeting at 4:16

Frank Griswold commented he submitted the motion will all his concerns. He added that party isn't well defined but it seems a judge in a preceding below would be at least in the same category as a party to the case, and Homer City Code (HCC) provides that a party should not be involved in adjudicating the matter. He stressed that in the past Councils and Boards have abdicated their responsibility by asking the person if they feel they can make an impartial decision. A lot of people think they can lean against their prejudice but it's not humanly possible, and that's why we have the rules.

Attorney Holmquist commented that the City takes no position on the issue, however the BOA should follow procedures in HCC 1.18.048 to determine how to proceed.

LORD/ADERHOLD MOVED TO APPROVE THE APPELLANTS MOTION FOR THE EXCUSAL OF BOARD MEMBER CAROLINE VENUTI AND THAT SHE BE EXCUSED FROM THESE PROCEEDINGS.

Board Member Venuti commented that she has no agenda on this issue, and the appellant's accusation that she has a conflict of interest in this matter is a fabrication designed to cloud the issue at hand. She acknowledged her husband serves on the Planning Commission and she on Council. They both have their individual responsibilities and duties and in their mutual household they have a private office where they each participate in their meetings so all business is conducted privately. The appellant has no concrete information on how they function as a household. She doesn't agree the appellant has the right to eliminate her from participating in this matter.

There were comments from the Board acknowledging Board Member Venuti's comments, noting that she was excused from the last BOA hearing for similar reasons, and it would be appropriate to follow suit regarding this matter as well.

VOTE: YES: SMITH, ADERHOLD, LORD, HANSEN-CAVASOS

Motion carried.

Board Member Venuti left the meeting at 4:16 p.m.

Mayor Castner opened the floor for disclosure of conflict of interest. No disclosures were made.

Mayor Castner opened the floor for disclosure of ex-parte communications. No disclosures were made.

Mayor Castner opened the floor to the matter of the motion to supplement the record by the appellant.

Mr. Griswold noted in the City Attorneys reply brief they objected to the supplement to his reply brief and they thought it was new evidence, but it was an attachment to his exhibit that was included in the record at page 126, so there should be no objection to it, and it's not part of the Clerk's recent supplement. He believes there's a key piece of evidence not in the record and that's a copy of a draft stipulation for procedures that was to be signed by him and City Planner Abboud, showing agreement to the stipulations which was assumed that he agreed to but he never signed. He thinks it may deserve exception to the new evidence rule in that it may be critical to contesting someone's testimony.

Attorney Holmquist noted the motion to strike the supplement to the record that was filed back in June that he assumes will be taken up shortly, but the City isn't going to take any position on the motion of July 27<sup>th</sup>.

LORD/ADERHOLD MOVED TO APPROVE THE APPELLANTS MOTION TO SUPPLEMENT THE RECORD.

There was brief comment in support of creating a full record.

VOTE: YES: ADERHOLD, HANSEN-CAVASOS, LORD, SMITH

Motion carried.

Mayor Castner asked if there are other matters.

Attorney Holmquist requested the matter of the City's motion to strike the supplement that was filed in June, and Mayor Castner opened the floor to the parties.

Attorney Holmquist explained this motion was filed in response to the City Clerk's notice that the record had been supplemented at Mr. Griswold's request, pages 1 through 20. The City is asking those be stricken because provisions for zoning appeals do not allow for additional evidence to be considered in a BOA appeal unless meets specific exception. These materials were not part of the record that was considered by the Planning Commission and the City argues it would be inappropriate to include them. He cited HCC 21.93.510(a) which prohibits the BOA from considering new evidence.

Mr. Griswold questioned what's being addressed. There was brief discussion clarifying this is related to the supplement noticed by the City Clerk on July 20<sup>th</sup> paginated as Supplement Page#1 through 20. There's a series of emails and a partial copy of minutes.

Boardmember Smith noted what's in this supplemental isn't any revelatory type of information and asked if Mr. Griswold could clarify why he thinks it's necessary.

Mayor Castner noted its Attorney Holmquist's motion and gave him further opportunity to speak.

Attorney Holmquist reiterated HCC is specific about when new evidence can be considered, and that in general it can't as this is a closed record appeal under HCC. It's the City's position that the BOA should follow the code and not supplement the record with materials that weren't before the Planning Commission, because it's the Commission's decision that's being decided on in this appeal. He doesn't believe the emails they're seeing between the City Clerk and Mr. Griswold were never presented to or considered by the Commission.

Councilmember Lord asked for input from the Boards counsel.

Attorney Brandt-Erichsen referenced HCC 21.93.510 is narrow in that it allows new evidence only if it's necessary for determining standing or the initial disqualification of a member of the BOA. He hasn't heard this new evidence is provided for one of those purposes and there hasn't been suggestion that this information had been provided to the Planning Commission for consideration.

Boardmember Lord shared her understanding this information isn't provided for the purpose of determining standing or disqualification of a boardmember, nor was it provided to the Commission to consider.

LORD/ADERHOLD MOVED TO STRIKE THE SUPPLEMENT TO THE RECORD.

Boardmember Smith shared he feels conflicted as some of the emails refer to process is probably relevant and some of the material is already public record.

Boardmember Aderhold expressed support to striking because it's not for the two reasons allowable for new evidence. Some of this is already in the record, so striking these page doesn't affect those. If we're supposed to considering the information the Planning Commission used to make their decision, than that's what we need to stick to.

VOTE: YES: LORD, ADERHOLD, HANSEN-CAVASOS, SMITH

Motion carried.

Mr. Griswold requested to discuss duration of presentation before moving on to oral arguments.

There was brief discussion about the order of process and then Mayor Castner opened the floor to Mr. Griswold who requested 45 minutes to present oral argument. Attorney Holmquist had no objection to allowing 45 minutes.

ADERHOLD/LORD MOVED TO ALLOW 45 MINUTES FOR ORAL ARGUMENTS FOR EACH SIDE.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

Mayor Castner asked if there were any other questions concerning standing or jurisdictional matters.

Mr. Griswold expressed concern regarding the standing of City Planner Abboud to be a party to this appeal such that he has the City Attorney to represent the Commission when in fact he should be representing the BOA. It prejudices him because the Commission relied heavily on his advice because they had no attorney to provide advice.

Mayor Castner commented briefly regarding the attorneys roles, then reviewed the process for oral arguments and opened the floor to Mr. Griswold.

Mr. Griswold noted the city's archaic briefing process and explained he'll use this opportunity to respond to the City's reply brief. He explained he's relying on the arguments in his own briefs regarding Planning Technician Brown's lack of authority to grant zoning permit 1020-782, the violation of HCC 21.70.010 (b), the bias of Chair Smith, and the improper notice to property owners.

Mr. Griswold argued points 1 through 6 of the City's reply brief citing Homer City Code related to definitions of an accessory building and accessory use, nuisance standards, and the role of the City's Attorney. He referenced the record regarding the Planning Commission action related to CUP 20-14 related to water and sewer connections following subdivision of the property, and to support his argument that a converted connex is not incidental the mobile home or an accessory structure to the mobile home. He referenced the record regarding Commissioner Barnwell's perceived partiality as expressed in the March 15, 2021 meeting minutes. He referenced memos from City Clerk Jacobsen to justify his arguments related to establishing a hearing process and that witnesses should have been compelled to be questioned by him.

Mayor Castner confirmed Mr. Griswold has 19 minutes remaining for rebuttal and opened the floor to Attorney Holmquist.

Attorney Holmquist noted there's been a significant amount of written briefing in the appeal relative to the complexity of the appeal and the City will primarily rely on its written briefing and take the opportunity to highlight some of the issues for the BOA consideration.

He cited HCC and referenced the record to support the City's argument that Homer City Planning's granting of permit 1020-782 was appropriate in all respects, that the central business district allows the construction of an accessory dwelling unit with an existing family dwelling, that there are no limitations who can live in an accessory dwelling, the authorization of Planning Technician Brown to issue the permit, to remedy the circumstance of building prior to receiving a zoning permit, establish the unit doesn't meet the criteria of a nuisance, the validity of the driveway permits, and the appropriateness of public notice provided. He noted that the Commission made factual findings based on evidence in the record and that Mr. Griswold's appeal is factually and legally meritless. Attorney Holmquist also addressed the City's efforts to reasonably resolve due process issues by proposing a set of hearing procedures, which was ultimately left to the Commission to establish hearing procedures, the situation of witness's unwillingness to be questioned, and briefing limitations in appeals to the Planning Commission.

Mayor Castner opened the floor to Mr. Griswold for rebuttal.

Mr. Griswold responded that Attorney Holmquist is very clever at reframing things in a light that suits him and rebutted the points addressed in Attorney Holmquist's oral argument.

Mayor Castner opened the floor to questions from the Board members. No questions were raised and Mayor Castner began to pose three questions to Attorney Holmquist when Mr. Griswold objected. His basis was that typically an adjudicatory body asks questions during oral arguments, he thinks this is improper and an unfair advantage is being given to Attorney Holmquist. Mayor Castner asked Attorney Brandt-Erichsen for advice on this matter. Attorney Brandt-Erichsen responded it wasn't specified that questions could only be asked during oral arguments and suggested it is allowable for the Board to ask questions of both parties.

Mayor Castner asked Attorney Holmquist if the City is asserting that accessory means anything as long as it's smaller, if the appellant was given the opportunity for the best cross examination, and clarification regarding HCC 21.18.030 (j) and the City's position of whether two single family dwellings on a lot would require a CUP.

Attorney Holmquist cited HCC 21.18.030 (j) that requires a CUP for more than on principal permitted use on a lot. He clarified the position that an accessory dwelling unit would not be considered a principal single family home, and 21.18.020 (ii) would permit it outright and would require a zoning permit. Regarding size of an accessory dwelling unit he believes the language is subsequent or incidental to. It doesn't necessarily mean smaller, but in practice they typically are. Regarding the appellant's opportunity for cross examination, he

commented that Mr. Griswold was unable to secure voluntary witnesses and had the opportunity to cross examine City Planner Abboud and Planning Technician Brown. He recalled Mr. Griswold was allowed 10 minutes to cross examine and had additional time reserved from his oral argument and believes he had about 20 minutes for cross examination. He noted a footnote from the City's brief that the imposition of reasonable time limits doesn't violate an individual's due process. He addressed the cross examination process and noted Mr. Griswold began addressing issues that were not relevant to the case and bordered on badgering the witnesses.

Mr. Griswold requested to rebut. Mayor Castner provided for a three minute rebuttal.

Mr. Griswold rebutted the HCC doesn't mention the word smaller or subsequent regarding accessory dwelling units, but the City Planner used the words repeatedly during the hearing. He reviewed the procedures outlined for the Planning Commission hearing process and the time limits allotted to him. He commented regarding reference to irrelevance and witness badgering, and that he wasn't allowed to directly examine them in the first place. He argued it's highly prejudicial that all the city employees to circle their wagons and answer the City's leading questions but refuse to answer his. He reiterated that his due process rights were clearly violated.

**COMMENTS OF THE AUDIENCE** (3 minute time limit)

There were no audience comments.

LORD/ADERHOLD MOVED THAT THE BOARD OF ADJUSTMENT RECESS INTO EXECUTIVE SESSION FOR THE PURPOSE OF DELIBERATING THE PENDING APPEAL AND TO INVITE ATTORNEY SCOTT BRANDT-ERICHSEN WHO IS ADVISING THE BOARD ON PROCEDURAL MATTERS TO ATTEND THE EXECUTIVE SESSION.

There was no discussion.

VOTE: YES: ADERHOLD, HANSEN-CAVASOS, SMITH, LORD

Motion carried.

The BOA recessed into executive session.

Mayor Castner called the meeting back to order. Boardmember Lord reported the BOA met in executive session to deliberate this matter and provide input to the Board's Council. 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 of the parties who entered an appearance in the appeal pursuant to HCC 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 government official agency or unit. That appeal must be filed within 30 days of the date of distribution of the final decision, HCC 2191.130(a) and (b).

Mayor Castner announced by BOA will reconvene at a time and date to be announced after they receive the written recommendations from their counsel.

**ADJOURN**

There being no further business to come before the BOA Mayor Castner adjourned the meeting at 7:46 p.m. Next Regular Meeting of the Homer City Council is Monday, August 9, 2021, at 6:00 p.m. Committee of the Whole at 5:00 p.m. All meetings are scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.



Melissa Jacobsen, MMC, City Clerk

Approved: September 13, 2021