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Memorandum
Agenda Changes/Supplemental Packet

TO: MAYOR PRO TEM ADERHOLD AND HOMER CITY COUNCIL
FROM: MELISSA JACOBSEN, MMC, CITY CLERK
DATE: SEPTEMBER 24, 2018
SUBJECT: AGENDA CHANGES AND SUPPLEMENTAL PACKET

SPECIAL MEETING

Memorandum 18-103 from City Clerk, Request for Executive Session Pursuant to AS 44.42.310(A-C)(1&5), Matters, the Immediate Knowledge of Which Would Clearly have an Adverse Effect Upon the Finances of the Public Entity and Attorney-Client Privilege (City Attorney Billings and City Attorney Update on Pending Court Cases Griswold vs. City of Homer)

Informational materials from Mr. Griswold. Page 3

REGULAR MEETING

PUBLIC HEARING

Resolution 18-070(A), A Resolution of the City Council of Homer, Alaska, Adopting the 2019-2024 Capital Improvement Plan and Establishing Capital Project Legislative Priorities for Fiscal Year 2020. Mayor/City Council.

Written public comment. Page 15

ORDINANCES

Ordinance 18-43, An Ordinance of the City Council of Homer, Alaska Prohibiting Sellers from Providing Buyers with Single-Use Plastic Disposable Shopping Bags. Venuti.

Informational materials from sponsor. Page 17

PENDING BUSINESS

Ordinance 18-39, An Ordinance of the City Council of Homer, Alaska, Amending HCC 21.18.040 to Reduce the Setback Requiring a Conditional Use Permit from Twenty Feet to Ten Feet in the Central Business District. Aderhold.

Written public comment. Page 19

1. THE BOARD DID NOT VIOLATE THE OPEN MEETINGS ACT a. Standard of Review.

Whether or not the Board complied with the Open Meetings Act, AS 44.62.310, is a question of law. This court may substitute its judgment for that of the superior court. Ben Lomond, Inc. v. Fairbanks North Star Borough, Bd. of Equalization, 760 P.2d 508, 511 (Alaska 1988).

b. The Board's Executive Session Was Not Improper.

On May 3, 1989, the Board convened to review the Borough's assessment of Cool Homes' property. Its first order of business was to call an executive session to discuss "the ins and outs and status of both Cool Homes and the Alaska Housing cases" and "litigation."[18] Mark Andrews, *1260 who served as both the Board's and the Borough's attorney, was present at the session. The session was held over Cool Homes' objection.[19]

Cool Homes contends that this executive session was in violation of the Open Meetings Act, AS 44.62.310.[20] Cool Homes thus asks that the Board's actions be rendered void.

The Open Meetings Act requires that all meetings of any administrative board be open to the public. The act allows for certain excepted subjects to be discussed at executive sessions closed to the public. Among those excepted subjects are "matters which by law, municipal charter, or ordinance are required to be confidential." AS 44.62.310(c)(3). The remedy provided by the Act is to void all action taken contrary to the Act. AS 44.62.310(f).

The superior court found that the Act was not violated because the executive session with the Board's attorney was a protected communication. The court held that " [b]ecause the attorney-client privilege operates concurrently with AS 44.62.310 although it is not an expressed exception, the Board's executive session, called to discuss the status of this case with its attorney, did not violate AS 44.62.310."

The Board claims that it is proper to assert the privilege in this case because the Board members had been threatened with personal liability if they failed to follow the directions given by the courts in the numerous appeals which preceded the hearing. Just three months before the hearing, Superior Court Judge Richard D. Savell specifically suggested that Mr. Andrews, in his capacity as the Board's counsel, advise the Board that any appearance of noncompliance with previous orders could potentially expose them to personal financial liability.[21] Thus, the executive session was merely to allow the Board members to receive legal advice to protect themselves from personal liability.

The lawyer-client privilege is set out in Evidence Rule 503: "A client has a privilege to refuse to disclose and to prevent *1261 any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client ... between himself ... and his lawyer." Alaska R.Evid. 503(b). A "client" includes an "organization or entity, either public or private." Alaska R.Evid. 503(a)(1). Thus, the Board may exercise the privilege.[22]

The threshold question is thus whether the Open Meetings Act and the lawyer-client privilege can coexist. Cool Homes argues that they can, but not in this situation. We disagree.

The policies underlying the principle of open meetings are set out in AS 44.62.312. Among these is that "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created." AS 44.62.312(a)(5). Thus, the applicability of the lawyer-client privilege must be narrow to afford this objective maximum realization. In The Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal. App. 2d 41, 58, 69 Cal. Rptr. 480 (1968) (since superseded by statute), relied upon by the superior court below, the California Court of Appeals noted the importance of limiting the privilege:

The two enactments are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions... . Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.

Other jurisdictions have limited a lawyer-public body exception to their open meeting acts to consideration of pending litigation. Such a limitation reflects a concern that when the public body is a party to a lawsuit, it should not be disadvantaged by allowing its opponents access to its meetings with counsel. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328, 334 (Tenn. 1984) (would impair the attorney's ability to fulfill ethical duties as an adjunct of the court); Oklahoma Ass'n of Mun. Attorneys v. State, 577 P.2d 1310, 1315 (Okla. 1978) (might seriously impair the ability of the public body to process a claim or conduct pending litigation); Channel 10, Inc. v. Independent School Dist. No. 709, St. Louis County, 298 Minn. 306, 215 N.W.2d 814, 825-26 (1974) (the machinery of justice would be adversely affected if clients were not free to discuss legal matters with their attorneys without fear of disclosure).[23] The exception is not appropriate for "the mere request for general *1262 legal advice or opinion by a public body in its capacity as a public agency." Minneapolis Star & Tribune Co. v. The Housing & Redevelopment Authority in and for Minneapolis, 246 N.W.2d 448, 454 (Minn. 1976).

The privilege should not be applied blindly. Id. at 453. It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies. Channel 10, 215 N.W.2d at 825-26. See also City of San Antonio v. Aguilar, 670 S.W.2d 681, 686

(Tex. App. 1984) (holding that a conference on decision to appeal deserves confidentiality); Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. App. 304, 666 P.2d 177, 183-84 (1983) (holding that a settlement conference deserves confidentiality). The principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential. Channel 10, 215 N.W.2d at 825.

The privilege thus should be applied only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential. Such requirements are especially appropriate where, as here, the public body's counsel is also appearing before the body as an advocate. Public revelation of public counsel's interpretation of "what has happened in the year between the last session and today as to Court findings" would not be injurious to the public interest. It might be informative and desirable.

However, we find this case to be a very specific exception to the Open Meetings Act. The Board members had been threatened with personal liability. The liability was with reference to ongoing litigation. By calling the executive session, the Board was merely following through on Judge Savell's admonition to the Borough's counsel. The Board was entitled to legal advice as to how it and its members could avoid legal liability, although not general legal advice. The Borough did not violate the Open Meetings Act.

From: Frank Griswold
To: Melissa Jacobsen
Subject: Excerpt Re: Executive Sessions from Alaska"s Open Meetings Law, 3d Edition 92002) by Gordon Tans
Date: Friday, September 21, 2018 2:13:54 PM
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VI. EXECUTIVE SESSIONS _ _ _ _

It seems that no other facet of the OMA generates more questions than the subject of executive sessions. An executive session is a portion of a public meeting from which the public is excluded because of the nature of the subject matter to be discussed. Implicit in the legislative conclusion that certain subjects qualify for executive session is the judgment that the danger of harm to public or private interests that may result from public discussion of such subjects outweighs the public benefits of a public discussion.

It is important to distinguish an executive session from a private or secret meeting. An executive session must begin and end in a public meeting. The public will be excluded only from the executive session portion of an otherwise public meeting. The body itself will determine who, if anyone, will be invited into the executive session along with the members of the body.

A. What Subjects Qualify For Executive Session? 1. In general

AS 44.62.310(c)(1) describes the subjects that may be discussed in executive session as follows:

(a) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(b) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(c) matters which by law, municipal charter, or ordinance are required to be confidential;

(d) matters involving consideration of government records that by law are not subject to public disclosure.

The court has also held that some attorney-client communications qualify for executive session treatment.[71]

It is very interesting to note that a municipality cannot by ordinance or charter narrow the list of exceptions that qualify for executive session. *Walleri v. City of Fairbanks*[72] held that the effect of AS 29.20.020 ("meetings of all municipal bodies shall be public as provided in AS 44.62.310") was to preempt municipal enactments that provide for a narrower list of executive session subjects than as provided in the OMA. The ramifications of the court's conclusion that the OMA preempts inconsistent municipal ordinances are yet to be discovered.

2. Adverse financial impact

The first category of eligible subjects, matters having an adverse financial impact, has several limiting qualifiers attached. The statue requires that it be *clear* that *immediate* public knowledge of the discussion will adversely affect government finances. A mere possibility of adverse effect on government finances does not suffice.

One example that appears to qualify under this test is the consideration of offers to settle litigation. A government body cannot candidly discuss settlement offers and potential counter offers publicly without great risk of letting opposing litigants know how much the government is willing to pay or accept in settlement. All opportunities to bargain for a more favorable settlement will be lost when everyone knows what the government's bargaining position and points of weakness are. The only way to discuss settlement offers without harming the public financial interest is in executive session.

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However, it is not enough to qualify for an executive session to merely say the matter is one of "pending litigation" or a "financial matter," as is often heard. As a practical matter, for an adverse financial impact executive session to withstand a court challenge, there must be facts in the record to enable the court to conclude it was clear that immediate public knowledge of the particular issue to be discussed would harm the government's financial interests. A court is directed to construe the law narrowly to avoid unnecessary executive sessions,[73] so an informative on-the-record statement of the facts justifying an executive session seems necessary.

3. Reputation and character

Subjects that tend to prejudice the reputation and character of any person may be discussed in executive session. The person in question does not have to be a government employee or job applicant, but often it is.

In *City of Kenai v Kenai Peninsula Newspapers, Inc.*,[74] the court reviewed a legal challenge to an executive session held to discuss the applicants for a city manager position. The court said, "Ordinarily an applicant's reputation will not be damaged by a public discussion of his or her qualifications relating to *experience*, *education* and *background* or by a comparison of them with those of other candidates."[75] The court recognized an exception, however, for the discussion of *personal characteristics*, especially in the context of comparing several applicants, acknowledging that such discussion would "carry a risk that the applicant's reputation will be compromised."[76]

Our court shed more light on the meaning of this exception in *University of Alaska v. Geistauts*[77] where a

university tenure committee held executive sessions to consider whether a professor should be granted tenure status. The court recognized such meetings are appropriate for executive sessions. Such a meeting was "likely to focus on perceived deficiencies in the candidate's qualifications. Tenure committee members may raise concerns for the purpose of discussion which would damage the applicant's reputation if aired publicly."78 This statement shows not only a concern to protect the individual from damages, but also a realization that an executive session will encourage a full and candid discussion of important concerns that should be addressed.

In a footnote to the *Geistauts* decision, the court discussed this exception in a general employment context, observing that AS 44.62.310(c)(2) was designed to serve the same function as other states' exemption of employment matters from open meeting law requirements. "The reasoning behind the 'personnel matters' exception in other jurisdictions appears to be the avoidance of embarrassment to employees whose strengths and weaknesses will be evaluated."79

In the context of considering whether the stated grounds for recall of a school board member sufficiently described misconduct in office or failure to perform prescribed duties, the court stated in *Von Stauffenberg v. Committee For An Honest And Ethical School Board* that "there is no law which precludes public officials from discussing sensitive personnel matters in closed door executive sessions."80

It should be remembered, however, that the person whose reputation or character is in issue is entitled to specific notice of the executive session and of the right to demand that the discussion be public. If a demand for a public discussion is made by that person, then an executive session may not be held on that ground.81

4. Matters required to be kept confidential

The third exception is a catch-all for other subjects that are *required* by law, municipal charter, or ordinance to be kept confidential. Note that this language leaves open the question of whether laws, charters, or ordinances authorizing, but not requiring, confidentiality will satisfy this exception.

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In addition to federal and state constitutions and laws, this exception specifically recognizes municipal charters and ordinances as valid sources of law requiring confidentiality. However, many municipalities have few, if any, charter provisions or ordinances requiring confidentiality, even though there are some subjects that would easily qualify for required confidential treatment, such as juvenile and individual student matters, collective bargaining and similar negotiations, settlement negotiations, and certain attorney advice (discussed further below).82

There has not been any Supreme Court decision in which the validity of a local ordinance requiring confidentiality has been challenged in the Open Meetings Act context. It is possible such an ordinance might be challenged on the basis that the ordinance unduly restricts the public's right to know about the affairs of the government. Such a challenge might be successful if the court concludes the local government does not "need" the confidentiality when the interest of the public in knowing outweighs the governmental interest in keeping confidentiality. The Supreme Court already uses that balancing test in the public records context to determine the validity of local exemptions from the state law requiring disclosure of records.83 Because of this possibility, ordinances requiring confidentiality should be based on a legitimate need for confidentiality that outweighs the public's interest in knowing what is going on with the government.

The confidential-by-law category was the basis for the Alaska Supreme Court holding that the common law attorney-client privilege justifies executive session treatment of some attorney-client communications.84 This attorney-client privilege exception is discussed below in Section VI.A.6. Other common law privileges might also provide a basis for additional executive session treatment under the court's analysis.

There is also the constitutional right of privacy,85 another "law" that requires confidential treatment of a subject when the individual in question has an expectation of privacy that society recognizes as reasonable. The full extent of the constitutional right of personal privacy is not well defined, and a complete discussion of the issue is beyond the scope of this paper.

5. Confidential records

Matters involving government records that are protected from public disclosure by law may also be discussed in executive session. As a general rule, records of public agencies (which include municipalities and school districts86) are subject to public disclosure unless the law provides an exception.87

A number of confidential records are listed in AS 40.25.120(a), including records pertaining to juveniles (unless disclosure is authorized by law), medical and related public health records, records required to be kept confidential by a federal law or regulation or by state law, and certain records compiled for law enforcement.

Our court has been willing to consider whether municipal ordinances concerning confidential records qualify for common law (i.e., nonstatutory) exceptions from disclosure. The court's analysis focuses on the need for the exception, which requires weighing the public interest in favor of disclosure against the governmental interests and individual privacy interests favoring nondisclosure.88 However, the government will bear the burden of justifying the exception, and public policy favors public access.89 Under these constraints, new exceptions to the general rule of public disclosure may be approved by the court, but probably not frequently.

An interesting case now pending in the Alaska Supreme Court, *Fuller v. City of Homer*,90 should answer the question of whether a city manager is entitled to the same deliberative process privilege for documents that is granted to the governor.91 If so, this will establish another category of documents that are required by law to be confidential and, therefore, may be discussed in executive session under this exception.

6. Attorney-client privilege

Under limited circumstances communications between a governmental body and its attorney qualify for executive session treatment, according to *Cool Homes, Inc. v. Fairbanks North Star Borough*.92 This exception is based on the attorney-client privilege, but for Open Meetings Act purposes, the privilege is defined narrowly.

This executive session exception is not available for general legal advice or opinion. It applies only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential. It is not even enough that the public body is involved in pending litigation.93 Rather, the specific communication must be one that the confidentiality rationale for the privilege deems worthy of protection. The court cited a number of examples of attorney-client communications that might qualify for executive sessions: candid discussions of facts and litigation strategies; a conference on a decision to appeal; a conference about settlement; and advice about how a body and its members might avoid legal liability. A discussion generally about the "ins and outs and status" of litigation, and "what has happened in the year . . . as to court findings" did *not* qualify for executive session.94

B. Procedure For Executive Sessions

An executive session cannot be an unannounced, secret meeting. Except in very limited circumstances,95 an executive session is only a part of a public meeting. Several steps must be followed in calling an executive session.

1. Public meeting

Before an executive session may be held, the meeting must first be convened as a public meeting. In the public meeting, a motion to hold an executive session must be considered and decided by a majority vote of the body. As at any public meeting, the public has a right to attend and, to a certain extent, participate. At least at municipal public meetings, this includes a reasonable opportunity to be heard under AS 29.20.020 during the public portion, but not during the confidential portion of the meeting.96

2. Notice

Because an executive session occurs at a public meeting, reasonable notice of the meeting must be given to the public according to the same requirements for any public meeting.97 This applies whether the executive session is to be held at a regular or a special meeting. That does not mean, in this author's view, that the public notice must specifically state that an executive session will be held. It is enough if reasonable public notice of the meeting has been given, including any reasonable subject matter notice that might be required. Even if the meeting notice and agenda do not mention the words "executive session," an executive session may be held if the body deems it necessary and the public has sufficient reasonable notice of the meeting and the subject matter.

However, specific advance notice of the executive session is required in at least one circumstance. If it is anticipated in advance that an executive session will be required to discuss a topic that might prejudice the reputation and character of a person, that person must be personally notified of the meeting and the contemplated executive session so the individual may exercise the right to demand a public discussion.98 If it is not known in advance that such a discussion will occur, it will be necessary to postpone that discussion until the individual in question has been advised of his or her rights.

3. Motion calling for executive session

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The motion calling for an executive session must "clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private."99 A well-stated motion will also identify the legal grounds being relied upon. A mere recitation of the statutory language (*e.g.*, "a matter that would prejudice a person's reputation") may not satisfy the "clearly and with specificity" standard.

In the case where an individual's reputation or character may be at issue, it may be appropriate to name the individual in some cases but not in other cases. For example, when a city council is about to discuss the personal characteristics of a short list of candidates for city manager, there is no likelihood that stating the names of these individuals would cause any harm at all. On the other hand, if the purpose of the executive session is to consider confidential information concerning allegations about a dishonest police officer, it would not be appropriate to say that the purpose of the executive session is "to consider allegations of dishonesty involving Officer Smith." Identifying the individual in these circumstances would entirely defeat the purpose of holding the discussion in private by causing damage to his reputation before the discussion even starts.

Clearly identifying the specific topic and, where possible without causing harm, naming the specific individual under consideration is important for several reasons. If an executive session is challenged, the court will need to know what subject was to be discussed and why it qualified for executive session treatment. Furthermore, it is important to properly describe the subject matter to be discussed in the motion because anything not mentioned in the motion cannot be discussed in the executive session, unless it is auxiliary to the main question.100 Finally, even though the public may not have a right to hear what is said in executive session, the state's public policy indicates that the public does have a right to know what the session is about and why it is justified.

Because both the public and the court have an interest in knowing why an executive session is warranted, either the motion or the debate preceding the vote on the motion should explain how the matter legally qualifies as a legitimate executive session subject. For example, during debate on the motion for the executive session a member of the body should describe how knowledge of the matter will clearly have an immediate adverse effect on the government finances, or mention the particular law that requires confidentiality. A proper discussion on the record will minimize the chances of a successful legal challenge.

It is inadequate when the motion contains only short-hand phrases, such as "pending litigation" or "attorney-client privilege" or "personnel matter." None of these phrases describes the *subject matter* "clearly and with specificity," nor do they accurately describe subjects that are within the lawfully allowable executive session categories. Further, they fail to give adequate notice to the public or to the courts about what is to be discussed and why it qualifies. The courts are compelled to give a narrow construction to the executive session exceptions so unnecessary executive sessions may be avoided,101 and such short-hand phrases fail to show that an executive session is necessary.

4. Recording and minutes

There is no statutory requirement to take minutes or make a recording of the discussions in executive session.102 However, at least one superior court judge has observed that one reason why he was unable to determine whether an executive session in question was legal was that no recording had been made of the session.103

Some public bodies do record executive sessions (the tapes are not released to the public) while others do not. Municipal attorneys and public officials in this state disagree about whether an executive session should be recorded. Until the law is clarified by the legislature or the Supreme Court, it seems likely there will continue to be inconsistency in the practices of various public entities on this issue.

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C. Limitations On Executive Sessions
1. Only main and auxiliary issues may be discussed

The discussion in executive session must be limited to those subjects described in the motion calling for the session and those subjects "auxiliary" to the main question.104 The OMA does not attempt to define "auxiliary," and the Supreme Court has not done so either. According to *Webster's Third New International Dictionary* (1981), "auxiliary" means "functioning in a subsidiary capacity."

Given the strong public policy favoring open meetings and *Webster's* definition, it seems likely the court will require that any auxiliary issues discussed have a fairly close degree of subsidiary relationship to the main question. Thus, the OMA gives the public body only limited flexibility to address subsidiary issues. This still enables the public to have a fair idea about the subjects the governing body is discussing so the public may retain appropriate control over the government it created.105

Court interpretations of the OMA suggest that as much of the subject matter as possible should be discussed publicly. It may be that on a given subject some details should be discussed in executive session, while other facets of the same subject matter should be discussed in public session. The Supreme Court pointed to this result in *City of Kenai v. Kenai Peninsula Newspapers, Inc.*106 when it observed that public discussion of a city manager applicant's experience, education and background would not ordinarily endanger a reputation, while discussion of personal characteristics and habits might very well carry such a risk. The court's ruling authorized executive sessions only for "discussing the personal characteristics of the applicants."107 The same kind of direction was given in *Cool Homes, Inc. v. Fairbanks North Star Borough*108 (borough attorney's general status report about litigation does not qualify for executive session, but legal advice about avoiding liability does qualify.) So far, the court has not attempted to explain why these other matters are not "auxiliary to the main question," which would allow them to also be discussed in the executive session.

2. Generally, no action may be taken in executive session

Generally, no action may be taken in executive session.109 Except as discussed below, the body may only **discuss** matters in executive session, and if any action must be taken on the subject, the body must reconvene in a public session to do so. The taking of "straw votes" in an executive session would probably be held to be a violation of this rule, as it tends to circumvent the policy of the OMA to require governmental body actions to be taken openly.110 Reconvening in public session to announce a decision made in executive session violates the OMA, unless one of the following exceptions or exemptions applies.

3. Exceptions: directions on legal matters and labor negotiations

As exceptions to the rule that no action may be taken in executive session, the OMA authorizes a public body to give directions in executive session on two kinds of matters. First, the body may direct its attorney about the handling of a specific legal matter. This makes it clear that the attorney may be instructed in executive session about things like negotiating positions and legal strategies for a specific legal matter. Second, direction may be given to a labor negotiator about the handling of pending labor negotiations. This allows the body to instruct the negotiator in executive session about such things as bargaining positions and negotiating points.

4. Exemption: quasi-judicial decision-making

When a governmental body acting quasi-judicially meets solely to make a decision in an adjudicatory proceeding, it is entirely exempt from the OMA.111 This means the decision-making may be done in private.112 Logically, this should mean

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that it is also permissible to conduct such decision-making in an executive session convened during an otherwise public meeting. Surely it is proper to make a decision in executive session that could lawfully have been made in total privacy. Therefore, a court should approve using an executive session to make a final decision while functioning quasi-judicially in an adjudicatory matter.

My name is Peter Roedl I live at 4029 Main St. I have lived at this address for over 30 years and watch people walk up and down the street that has a 2 foot wide combination bike path and foot path on one side of the road. There is heavy foot traffic on Main Street, especially after movies and when the bars close.In the winter time The street is very dark and pedestrians are hard to see when driving. There seems to be more people walking up and down Main Street every year. Mothers pushing strollers, kids riding bikes and skate boards, groups of people walking from one destination to another. I think we are fortunate that there hasn't been a mishap so far. Keeping this on top of the CIP list is very important and if we never get CIP funds, we still need to do something to make Main Street safer. Make it one way with separate bike, pedestrian, and driving paths.

Sincerely,

Peter Roedl

P.S if you want a real thrill, try walking up Main Street in the dark on the bike/foot path.

SEP 21 2018 AM10:22 RK

10 Reasons Why Plastic Bags Should Be Banned

1. **Plastic bags pollute our land and water.**
   They litter landscapes, float around in waterways and pollute our oceans.
2. **Plastic bags are made from non-renewable resources and contribute to climate change.** Plastic bags are made from petroleum and natural gas.
   The production of plastic bags creates greenhouse gases and contributes to global warming.
3. **Plastic bags never break down.** Plastic bags do not truly degrade.
4. **Plastic bags are harmful to wildlife and marine life.**
   Plastic bags are often mistaken for food by animals, birds and marine life.
5. **Plastic bags are harmful to human health.** When plastic bags are consumed by marine organisms, the chemicals in the bags make their way into the food chain and then into humans who eat fish and other marine organisms.
6. **Plastic bags are costly to pay for and to clean up after.** The cost of a plastic bag averages 3-5 cents. The cost of plastic bag clean-up is estimated to be 17 cents per bag.
7. **Plastic bags are difficult to recycle.** Most recycling facilities do not have the capacity to recycle plastic bags and therefore do not accept them.
8. **Plastic bags have external costs.** There are many external costs to the production and use of plastic bags including environmental costs, resource extraction and depletion, quality of life loss, economic loss from littering and wildlife loss.
9. **There are better alternatives available.** Once an individual gets into the habit of using re-useable bags when shopping they learn it is not much of an inconvenience at all.
10. **Other governments are banning plastic bags, we should too.** To date, many countries and municipalities around the world, as well as here in Alaska have instituted a plastic bag ban. Even the United Nations Environmental Program has recommended a ban of all plastic bags world-wide.

From: **Frank Griswold** fsgriz@alaska.net
Subject: Remand of 3HO-15-00021CI
Date: September 21, 2018

SEP 21 2018 AM10:30 ek

To Mayor and Council,

City Manager Katie Koester is quoted as follows in the Homer News: "The City is looking forward to the court's decision on the substantive issues of the case, which will provide the city important guidance regarding municipal land use and administrative proceeding matters." One then has to wonder why the City fought so hard in the Alaska Supreme Court to prevent this guidance from being provided. If the city attorneys had non-opposed my Motion for Reconsideration regarding the superior court's clearly bogus dismissal of my appeal, tens of thousands of taxpayer dollars would not have been expended and that important guidance would likely have already been provided. One also has to wonder whether the highly paid city attorneys were acting in the City's interests or in their own. Attached are some relevant court documents that may assist you in making this determination.

Frank Griswold

Frank Griswold
519 Klondike Avenue
Homer, Alaska 99603
(907) 235-7627

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT HOMER

FRANK GRISWOLD,

Appellant,

v.

HOMER BOARD OF ADJUSTMENT,

RICK ABBOUD, JOSE RAMOS,

KENTON BLOOM,

Appellees.

_____/

Case: 3HO-15-00021CI

MOTION FOR RECONSIDERATION

Appellant Frank Griswold hereby moves for reconsideration of the Superior Court's Decision Dismissing Appeal dated January 17, 2017. The Court appears to have overlooked HCC 21.90.080(d) regarding civil remedies which provides as follows:

> Any person aggrieved by a violation of the Homer Zoning Code, a regulation or a permit may bring a civil action against the violator as provided in subsection (a) of this section. **For purposes of this section, a person occupying or owning land within 300 feet of the perimeter of the parcel containing the violation is irrebuttably presumed to be a person aggrieved.** The City shall not be responsible for the costs or fees of such an action, which shall be the sole responsibility of the person filing the action. [Ord. 08-29, 2008].

While Mr. Griswold's appeal of Conditional Use Permit 13-13 is distinguishable from a civil action regarding a violation of the

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Homer Zoning Code, the facts that Mr. Griswold owns property within 300 feet of the subject property and would irrebuttably qualify as a person aggrieved under HCC 21.90.080 establishes that Mr. Griswold is also irrebuttably a person aggrieved under HCC 21.93.060(d) and therefore irrebuttably has standing to appeal CUP 13-13. There is no rational justification for declaring Mr. Griswold non-aggrieved under HCC 21.93.060(d) when he would ***irrebuttably*** be presumed to be a person aggrieved under HCC 21.90.080(d) with regards to the same subject property. Since Mr. Griswold irrebuttably has standing to file a civil complaint regarding a potential violation of CUP 13-13, and since he actively participated in the proceedings before the Planning Commission regarding CUP 13-13, he clearly has standing to appeal CUP 13-13. While the Court acknowledged that Mr. Griswold owns real property "located nearby" it may have overlooked the fact that one of Mr. Griswold's properties lies within 300 feet of the subject property. [R. 6]. All property owners within 300 feet of the subject property, including Mr. Griswold, were notified of the appeal of CUP 13-13. [R. 4; 17]. HCC 21.93.080(b)(6) required that Mr. Griswold's Notice of Appeal contain proof showing that he is an aggrieved person with standing to appeal under HCC 21.93.060. City Clerk Jo Johnson found Mr. Griswold's Notice of Appeal to be compliant with HCC 21.93.070 and HCC 21.93.080. [R. 3]. The Board of Adjustment

had the authority under HCC 21.93.510(b) to take and consider evidence regarding standing if it was at issue, but it was not. Counsel for Appellees were well aware of the 300 foot rule prescribed under HCC 21.90.080(d) which was enacted in 2008 with City Attorney Thomas Klinkner's approval. Appellees waived the issue of standing for good reason.

The Court misinterpreted AS 29.40.060 and the meaning of "general public." CUP 13-13's potential adverse effects on the use, enjoyment, or value of real property owned by Mr. Griswold are clearly different than its potential adverse effects on members of the general public who do not own real property in close proximity to the subject property. While criminal activity, visual blight, traffic congestion, and the leaching/migration of sewage at 3850 Heath Street will clearly decrease the value of Mr. Griswold's adjacent property, it will not have the same adverse effect on the property values or quality of life of members of the general public who live miles away. The fact that Mr. Griswold's neighbors may also be adversely affected is not ground for denying standing to Mr. Griswold. Mr. Griswold does not need to be affected *uniquely* to have standing. If being affected differently from every other member of the general public were the standard for conveying standing then there could never be a public interest zoning appeal. If activities at 3850 Heath Street authorized by CUP

13-13 could potentially contaminate the drinking water supply of the general public or poison the air that was breathed by every citizen of Homer, then (perversely) Mr. Griswold would have no standing to appeal because he would not be adversely affected in a manner different from that of the general public. In its May 22, 2009 Decision on Appeal regarding *Griswold v. City of Homer, City Clerk Jo Johnson and Don Blackwell*, 3HO-08-148CI this Court stated: "Even though standing may be restricted legislatively as the Fairbanks North Star Borough and the City of Homer have done, the proposition that standing is to be liberally construed within the applicable restrictions is still good law." *Sua sponte* dismissal of an administrative appeal via a court's strained interpretation of standing restrictions, while expeditious, is not good law.

A lack of standing is not a jurisdictional defect and does not warrant a *sua sponte* dismissal of the complaint by the court. *Mortgage Electronic System, Inc. v. Holmes*, 2015 NY Slip Op. 06662 (New York, 2015). Absent compelling circumstances, trial and appellate courts should not come to the aid of litigants. *Jacobsen v. Filler*, 790 F.2d 1362, 1365 at n.7 (9th Cir. 1986) ("It is not for the trial court to inject itself into the adversary process on behalf of one class of litigant. Doing so necessarily implicates the court's impartiality and discriminates against opposing parties."

The Court's *sua sponte* dismissal is inconsistent with the fundamental principles of due process that a party should have notice of and the opportunity to be heard on the determinative issue in the case. It is also inconsistent with the American judicial system's reliance on the adversary process because it was contrary to its (1) central premise that the adversarial clash provides an appellate body with the best arguments and analysis on an issue, (2) emphasis on neutral and passive decision makers, and (3) commitment to party presentation of evidence and arguments. *Sua sponte* decisions are an abuse of judicial discretion because appellate bodies cannot fully consider an issue without thorough briefing and argument from the parties. "The crux of due process is [the] opportunity to be heard and the right to adequately represent one's interests." *D.M. v. State, Div. of Family & Youth Servs.*, 995 P.2d 205, 213-14 (Alaska 2000) (quoting *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980)). Appellants should be given an opportunity to rebut prior to dismissal. 116 U.S. at 591-92. *Cf. Huntington v. Laidley*, 176 U.S. 668 (1900). "[T]he law favors deciding cases on their merits." *Sheehan v. Univ. Alaska*, 700 P.2d 1295, 1298 (Alaska 1985).

DATED: January 23, 2017.

By: Frank Griswold

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT HOMER

FRANK GRISWOLD,

Appellant,

v.

HOMER BOARD OF ADJUSTMENT, RICK ABBOUD, JOSE RAMOS, and KENTON BLOOM,

Appellees.

Case No. 3HO-15-00021 CI

RESPONSE TO MOTION FOR RECONSIDERATION

Appellees Homer Board of Adjustment and Rick Abboud (hereafter collectively referred to as the "City"), hereby provide the following response to the Motion for Reconsideration filed by Appellant Frank Griswold. As the Court correctly noted, the appeal of a municipal zoning decision is governed by AS 29.40.050 and Homer City Code Chapter 21.93. Conversely, Mr. Griswold misapplied the Homer City Code to this appeal, accidentally relying upon the standing requirements for individuals against violators that apply to enforcement order/Code violation appeals rather than the standing requirements in conditional use permit appeals.

Unlike Homer City Code 21.90 and specifically HCC 21.90.080(d), HCC 21.93, which applies to the case at hand, contains no presumption of standing, irrebuttable or otherwise, regardless of proximity to the property seeking a permit. Instead, it requires proof that the person appealing the permit decision is aggrieved. Consequently, the Court correctly found that Mr. Griswold failed to demonstrate that he is an aggrieved person, as defined by HCC 21.03.040 and required by HCC 21.93.060. The City fully supports the Judge's determination and analysis and respectfully requests that Mr. Griswold's Motion for Consideration be denied.

I. The Court Applied the Correct Legal Standard when it found that Mr. Griswold does not have Standing to Appeal CUP 13-13.

In his Motion for Reconsideration, Mr. Griswold erroneously relies upon HCC 21.90.080(d) to support the argument that he is "irrebuttably presumed to be a person aggrieved," for purposes of having standing to appeal CUP 13-13. To be clear, HCC 21.90.080(d) provides an aggrieved person a legal avenue to institute a civil action against a violator of the Homer City Code. This provision is wholly inapplicable to Mr. Griswold's appeal of CUP 13-13, which is not a violation as defined by 21.90.090.

Instead, the Homer City Code provision that applies to this appeal is HCC 21.93.060. Homer City Code 21.93.060(c) provides that, to have standing to appeal an appealable action or determination of the Planning Commission to the Board of Adjustment, a person must have "actively and substantively participated in the proceedings before the Commission and [be] aggrieved by the action or determination." HCC 21.03.040 defines "person aggrieved" as:

> [A] person who shows proof of the adverse effect an action or determination taken or made under the Homer Zoning Code has or could have on the use, enjoyment, or value of real property owned by that person. *An interest that is no different from that of the general public is not sufficient to establish aggrievement.* (emphasis added)

As the Court rightly stated in its Decision Dismissing Appeal, "the concerns which Mr. Griswold raises regarding CUP 13-13 do not rise to the level of aggrievement sufficient to satisfy the Homer ordinance on standing . . . [as] his potential injury is indistinguishable from the potential adverse effect . . . on any member of the general public."[1] Mr. Griswold's unsupported statement that CUP 13-13 will cause "criminal activity, visual blight, traffic congestion, and the leaching/migration of sewage at 3850 Heath Street will clearly decrease the value of [his] adjacent property"[2] does not show proof that CUP 13-13 will have an adverse effect on his use, enjoyment, or value of his real property. Because Mr. Griswold failed to provide **any** proof in support of these bold allegations, the Court correctly dismissed his action for lack of standing.

II. The Court has Sua Sponte Authority to Dismiss Griswold's Action for Lack of Standing.

Not only does the Court have the authority to dismiss an action *sua sponte* for lack of standing, it is, indeed, obligated to as part of its jurisdictional analysis. Federal courts will examine standing even if it is not challenged and dismiss *sua sponte* if the court lacks jurisdiction. For example, in *Grocery Mfrs. Ass'n v. E.P.A.* the Circuit Court of Appeals for the District of Columbia examined whether the plaintiffs had standing to bring the case even though neither party had raised the issue.[3] The Court reasoned

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1 P. 3, Jan. 17, 2017.

2 Motion for Reconsideration, p. 3.

3 693 F.3d 169 (D.C. Cir. 2012).

that, "[r]egardless of whether the parties raised the issue, we have an independent obligation to be sure of our jurisdiction."[4]

Standing in Alaska's courts "is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions."[5] However, just as in Federal Court, Alaskan courts lack subject matter jurisdiction when the plaintiff does not have standing to bring the action.[6] Therefore, the Court was obligated to dismiss Mr. Griswold's claim for lack of standing, regardless of whether the City asserted the argument or the Court came to that determination on its own.

III. Conclusion

For the reasons stated above, the Court correctly dismissed Mr. Griswold's claim against the City and, therefore, his Motion for Reconsideration should be denied.

DATED this 15th day of February, 2017.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Appellees HOMER BOARD OF ADJUSTMENT and RICK ABBOUD

By: _____
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4 Id. at 174 citing , 292 F.3d 895, 898 (D.C.Cir.2002).

5 *Gilbert M. v. State*, 139 P.3d 581, 586 (Alaska 2006).

6 *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1034 (Alaska 2004).

IN THE SUPREME COURT FOR THE STATE OF ALASKA

FRANK GRISWOLD, Appellant, vs. HOMER BOARD OF ADJUSTMENT, RICK ABBOUD, JOSE RAMOS AND KENTON BLOOM, Appellees.	Trial Court No. 3HO-15-00021 CI Supreme Court No. S-16660

APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT
JENNIFER K. WELLS, JUDGE

BRIEF OF APPELLEES

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Filed this 18th day of September, 2017, in the Supreme Court for the State of Alaska.

By: _____
Deputy Clerk

If the policy supporting the requirement that an appellant be a person aggrieved supports distinguishing the role of an appellant from that of a proper party to an appeal, it certainly also supports distinguishing the role of an appellant from that of a plaintiff in a zoning enforcement action. As the Michigan court pointed out, the different standard for instituting a zoning enforcement action only illustrates how a simple legislative change could have relieved Griswold of the requirement to be a party aggrieved.

Moreover, as pointed out in *Griswold v. City of Homer,* the requirement in HCC 21.93.060(c) that an appellant be a person aggrieved conforms to AS 29.40.060(a), the state statute that provides for appeals of municipal zoning actions.[64] AS 29.40.060(a) makes no provision for a presumption of standing such as that in HCC 21.90.080. If HCC 21.93.060(c) incorporated the presumption of standing in HCC 21.90.080, it would invalidly expand the class of appellants beyond those that were authorized by AS 29.40.060(a), its enabling statute.

III. The Superior Court's *sua sponte* dismissal of Griswold's appeal for lack of standing was appropriate.

A. Upon finding that Griswold lacked standing to appeal, the Superior Court was authorized to dismiss the appeal for lack of subject matter jurisdiction.

Standing in Alaska "is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions."[65] However, Alaskan courts lack subject matter

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64 252 P.3d at 1028.

65 *Gilbert M. v. State*, 139 P.3d 581, 586 (Alaska 2006).

decision.[62] The Board argued that it was not required to establish that it was a party aggrieved by the decision, relying on another statute ("section 11") that provided that any person entitled to notice of the municipal zoning proceeding was a proper party to an appeal that was initiated under section 10. The Board claimed that it could bring an appeal under section 10 because it received notice of the proceeding as an owner of property within 300 feet of the Brink property, which made it a proper party to the appeal under section 11. The court rejected this argument:

> Plaintiff, as an owner of land located within 300 feet of defendant Brink's premises, was entitled to and did receive notice of the proceedings before the Zoning Board of Appeals ... Hence, plaintiff was, under section 11, a proper party to any review instituted under section 10.
>
> However, plaintiff argues that section 11 not only made plaintiff a proper party to any appeal taken by an aggrieved party, but also gave plaintiff itself standing to institute such an appeal, regardless of whether it was an aggrieved party.
>
> Plaintiff cites no authority for this construction of the statute, and we do not find it persuasive. The 'aggrieved party' requirement is a standard limitation in state zoning acts providing for review of zoning board of appeals decisions. Had the Legislature meant to unshoulder this burden from parties in plaintiff's status it could have done so in simple terms. However, section 11 does not speak in terms of standing to seek review, but only of notice and a right to appear in 'any action for review instituted'. We do not read this language as broadening the class of parties privileged to begin such reviews. Such a reading would tend to clog our courts with suits by parties who could allege no legally cognizable interest in the outcome. For this reason we will not strain to reach plaintiff's reading of this statute.[63]

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62 265 N.W.2d 56, 57, 81 Mich.App. 99, 101.

63 *Id.* at 102-103 (citations omitted).

Homer land use decision.[70] His notice of appeal to the Board was required to include "[p]roof showing that the appellant is an aggrieved person with standing to appeal."[71] Each of Griswold's notices of appeal to the Board in this matter responded to this requirement:

> Griswold believes the use(s) approved by CUP 13-13 will create congestion, visual blight, and leaching/migration of sewage and other contaminates [sic] that will adversely affect the general character of the neighborhood and the value of his real property. Accordingly, Griswold has standing to appeal under HCC 21.93.060(c).[72]
>
> Mr. Griswold believes the use(s) approved by CUP 13-13 will promote congestion, visual blight, and criminal activity that will adversely affect the general character of the neighborhood and the value of his real property. Mr. Griswold was the appellant in the original appeal so he irrebuttably has standing to appeal on remand.[73]

Moreover, after the Superior Court entered its Decision Dismissing Appeal, Griswold moved for reconsideration of that decision,[74] obtaining another chance to argue the question of his standing, and to present any information in the record regarding his standing that he believed the Superior Court overlooked. Instead, Griswold used his motion for reconsideration to advance new, and spurious, arguments for his standing, rather than directing the Superior Court's attention to specific facts in the record.

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70 *Griswold,* 252 P.3d 1020.

71 HCC 21.93.080(b)(6).

72 Exc. 7.

73 Exc. 84.

74 Exc. 131-135.

Griswold has received all the process to which he was due on the issue of standing, and there is no procedural defect in the Superior Court's *sua sponte* dismissal of Griswold's appeal for lack of standing.

CONCLUSION

Griswold failed to show the standing required to challenge CUP 13-13. The Superior Court correctly raised the issue of Griswold's standing, and of its subject matter jurisdiction, *sua sponte*. Consequently, the Superior Court correctly dismissed Griswold's appeal for lack of subject matter jurisdiction and that decision should be affirmed.

Respectfully submitted this 13th day of September, 2017.

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