

Session 21-07, a Special Meeting of the Planning Commission was called to order by Chair Scott Smith at 5:31 p.m. on March 11, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, via Zoom Webinar.

PRESENT: COMMISSIONERS BARNWELL, VENUTI, SMITH, CONLEY, PETSKA-RUBALCAVA, BENTZ, AND HIGHLAND

STAFF: CITY CLERK JACOBSEN
DEPUTY CITY CLERK KRAUSE

APPROVAL OF THE AGENDA

Chair Smith requested a motion to approve the agenda.

HIGHLAND/VENUTI – SO MOVED.

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

- A. Appeal Hearing on Appeal of the City Planning Staff Issuance of Zoning Permit 1020-782 issued to Scott and Stacy Lowry for their property located at 541 Bonanza Avenue

Chair Smith stated for the record the action before the Commission being a continuance of the Appeal Hearing for Zoning Permit 1020-782 from January 27, 2021. The notice of appeal and nine allegations of error can be found on page three of the appeal record. The Commission was to hear oral arguments regarding this appeal.

Deputy City Clerk Krause identified the following were in attendance:

- Frank Griswold
- Max Holmquist, City Attorney
- Scott and Stacy Lowry
- Rick Abboud, City Planner
- Travis Brown, Planning Technician

Chair Smith stated that the process for this hearing that was developed, provided to parties, and posted on the City's website in January and will be followed for this meeting. He then reminded those in attendance on the conduct that was expected throughout the hearing.

Chair Smith announced that the Commission will address preliminary matters and asked if any Commissioners needed to make any declarations of conflict of interest or ex parte contacts.

No disclosures were made.

Chair Smith then stated the first preliminary issue to address was a reply brief submitted by Appellant Griswold on January 27, 2021 prior to the last scheduled hearing. Homer City Code 21.93.300 addresses appeals to the Planning Commission and subsection "d" reads that any person may file a written brief or testimony in an appeal before the Commission. He noted that both parties filed their written briefs by the deadline provided in the noticed meeting process and the attorney for the Appellee has filed a motion to strike the reply brief.¹

Chair Smith requested a motion and second.

HIGHLAND/CONLEY MOVED TO STRIKE THE REPLY BRIEF SUBMITTED BY FRANK GRISWOLD.

City Clerk Jacobsen addressed the interference with the audio was due to Mr. Griswold unmuting his connection.

Mr. Griswold called a point of order stating the Chair skipped the ex parte communication.

City Clerk Jacobsen explained to Mr. Griswold since he did not hear, that the question on the matter of ex parte communication was addressed by the Chair.

Chair Smith assured Mr. Griswold he asked the question and repeated the question that he asked of the Commissioners and stated that there were none disclosed.

Chair Smith restated the motion on the floor and asked for confirmation that the Commissioners were able to read the associated documents.

Commissioner Bentz noted that she was unable to review the information due to late submission.

Chair Smith asked if any of the other Commissioners were unable to review the documents.

Commissioner Highland voicing concerns on the interference she was experiencing with regards to the audio, then requested confirmation that the document in question was submitted on January 27, 2021.

¹ Audio interference was experienced when Appellant unmuted their connection throughout the meeting making transcription difficult at times.

Chair Smith responded that it was the brief submitted on January 27, 2021 that was the document in question at this time.

Commissioner Bentz apologized and requested her comment to be stricken as she was referring to the filing of March 9, 2021.

Chair Smith inquired if there was any objection to the motion.

Mr. Griswold requested the opportunity to comment to the motion.

After a brief discussion with Mr. Griswold expressing his right to comment Chair Smith allotted Mr. Griswold three minutes.

Mr. Griswold provided further reasons to allow him to comment as follows:

- City Code allows the Commission to accept new testimony and evidence necessary to develop the record and does not establish time limits.
- The City Attorney does not want the record to be fully established and wanted his evidence stricken so that it cannot be considered by this Commission or future reviewing parties.
- The Commission does not even have to read all this stuff tonight since they have 60 days to deliberate and render a decision.
- This is an evidentiary hearing and to intentionally reject evidence is appealable and if it goes to the Board of Adjustment it will be remanded back.
- The extension of the filing deadline to accommodate the City Attorney and the policy that was set by the Commission was extended twice before and there was no reason that the briefing period could not be extended a third time.

City Clerk Jacobsen noted for the record that it would be appropriate, having given time to the Appellant that the same consideration be extended to the Appellee.

City Attorney Holmquist stated the following as support for striking the documents entitled "Reply Brief" and "Evidence":

- A deadline was established as January 25, 2021 at 4:30 p.m. and both parties filed written briefs by the established deadline.
- In the Commission hearing procedures there were no additional briefings allowed.
- The document entitled, "Evidence" does not actually contain evidence it contains argument, evidence would be other documents or testimony to support the argument.
- Written argument, is also known as a brief
- The City will not object to Mr. Griswold reading his brief entitled "Evidence" into the record
- Objection to the additional filing of written briefing that is contrary to the procedural order in this case as the City would be prejudiced if Mr. Griswold would be allowed to file that additional briefing when the City was not afforded the same opportunity.
- The two untimely additional briefs of Mr. Griswold's are unfair to the City and prejudicial so the City is asking that they be stricken.

There was a brief discussion on clarification of the status of the motion on the floor, that the document in question is the one entitled "Reply Brief" dated January 27, 2021 and if the Commission can allow ample time for the Appellant to read the document into the record to allow for all evidence to be presented.

City Clerk Jacobsen confirmed that it would be addressed separately in response to a question from the Chair on process.

Chair Smith stated that the procedure allows thirty minutes for the Appellant and the Appellee and if the time is extended for one side then it requires the time to be extended to the other party. If the time is extended it is by Commission approval not because either side wants to run long. The Commission's posture is that thirty minutes is sufficient and that both the Appellant and Appellee have had significant time to draft their information and become very familiar and concise with what they want to say during that thirty minutes. The Commission needs to be cautious with extending the time period especially in favor of one party.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Chair Smith read the next preliminary matter into the record: A motion filed by Frank Griswold for Legal Counsel for the Planning Commission. He then recited HCC 21.93.300 (g) into the record and requested a motion.

HIGHLAND/BENTZ MOVED THAT THE COMMISSION REQUEST THE ASSISTANCE OF LEGAL COUNSEL AND OR CITY STAFF AS DESIGNATED BY THE CITY MANAGER IN THE PREPARATION OF THE DECISION AND FINDINGS OF FACT.

Mr. Griswold commented on hiring legal counsel for the Commission to answer the questions that they have and that the only attorney present is for the city and that being the only attorney present the Commission would give deference to his legal opinion and he is partisan and will do anything to make sure his party prevails. He then commented on the meeting may need to be continued because of insufficiency of the public notice like it has been twice already and if it continued, especially if you are going to hire an attorney it will be helpful to have that attorney present at the beginning and save the Commission reversible errors.

Attorney Holmquist acknowledged the motion made by the Appellant and stated that it is the City's position that the Commission can hire attorney if it wants to, it is not required to do so, and that it is discretionary. He then noted that in the motion, Mr. Griswold mischaracterized the record by claiming that he provided legal advice to the Commission and the opposite is true. Attorney Holmquist stated he identified the City as his client and advised that he does not represent the Commission and then provided the city's position on the issue that was being discussed.

Commissioner Highland stated that due to all the questions that she does not have answers for she would like to have legal counsel and then questioned addressing the possible issue with public notice.

Commissioner Bentz expressed that she would be voting yes on the motion requesting legal assistance.

Commissioner Petska-Rubalcava questioned who they would be requesting legal counsel from and where those funds would be coming from and how they would obtain legal counsel.

Chair Smith stated that he was unaware of the experience the other Commissioners have regarding a legal hearing and so they are pretty green when it comes to procedure, so they may make procedural errors as far as evaluating a permit application and all the different information surrounding this particular decision he believed that the Commission was competent and capable without legal representation to do so and city code is not overly complicated. This Commission is fairly thorough and because of that he would vote no.

Commissioner Conley questioned that they could consult an Attorney during deliberations considering they were having the hearing now and they can move on.

Chair Smith responded that he believed so but there was still the issue of budget so did not believe it would be possible and noted that they would have to submit the request to Council. He then stated that it would be good for future discussion since it has exposed a need and appreciated the effort to bring this to a motion but without legal representation they would also be extending this meeting all over again.

Commissioner Bentz reminded the Commission that the motion on the floor was for legal counsel for the preparation of the Decision and Findings of Fact. She then confirmed with City Clerk Jacobsen that procedurally the Commission would submit the request for legal counsel to the City Manager.

City Clerk Jacobsen responded that it would be up to the City Manager to decide who would be the appropriate staff person to work with the Commission and the same request for an attorney as well, but unfortunately there is no professional services budget for the Commission so that would require locating the funding.

Commissioner Venuti requested the motion on the floor to be stated.

Chair Smith repeated the motion before the Commission.

VOTE. NO. SMITH, HIGHLAND, CONLEY, BARNWELL, VENUTI
YES. PETSKA-RUBALCAVA, BENTZ

Motion failed.

Chair Smith read the next preliminary item regarding the document filed by Mr. Griswold entitled "Evidence" submitted on March 9, 2021. He then read from Homer City Code 21.93.300 (d) regarding the Commission accepting new testimony or other evidence, including public testimony and hear oral arguments to develop a full record upon which to decide the appeal.

HIGHLAND/BARNWELL - MOVED TO STRIKE THE DOCUMENT ENTITLED "EVIDENCE" SUBMITTED BY FRANK GRISWOLD.

Mr. Griswold stated the following in support of accepting the document entitled "Evidence":

- There is no definition in city code as to what constitutes written evidence
- If they were meeting in person he would have been able to submit the document as a laydown
- The Commission has created a very strict time limit and opined that it would not be sufficient for oral arguments, question witnesses and present evidence.
- HCC 21.93.300 (d) addresses developing a full record and you must allow sufficient time to perform that.
- The Commission while having the authority to write procedures they cannot be contrary to city code.
- The City Attorney did not have objection to him reading the document into the record because it would use up all his time and he not be able to exercise his right to question the parties.

Attorney Holmquist stated the following to support the motion to strike:

- It is not evidence but written argument
- Not objecting to Mr. Griswold reading the document into the record because he has 30 minutes to present oral argument.
- The City objects to the filing of additional briefing that doesn't comply with the procedural order.

Commissioner Conley requested clarification on the filing of the document.

Chair Smith responded that the document was filed on March 9, 2021 at 1:52 p.m.

Commissioner Highland stated that they have a lot of facts from city code and what was presented to the Commission but the Commission established the procedure and January 25, 2021 was the deadline.

City Clerk Jacobsen confirmed for Commissioner Bentz that the procedure that was developed for continued Planning Commission hearings is on the website and was approved by both parties. She further noted that this procedure was developed prior to the first hearing, when the hearing

was continued the Commission did not take any additional action to make amendments to the procedure.

Chair Smith acknowledged Mr. Griswold and noted that his opportunity to speak has passed and it was with the Commission now.

VOTE. YES, PETSKA-RUBALCAVA, HIGHLAND, CONLEY, BARNWELL, VENUTI, SMITH.
NO. BENTZ.

Motion carried.

Chair Smith stated that the next preliminary matter is two emails submitted to the City Clerk on March 10th that have been provided and raise issues regarding notice, opportunity to comment, and parties to the appeal.

City Clerk Jacobsen reported the date and time of the first email and that it raised questions regarding the notice of the appeal hearing. She responded as follows:

- HCC 21.94.020 (b) 1-4 does not apply to Administrative Appeals 21.93 does not require notice in accordance with that section of city code.
- The notice mailed to surrounding property owners does not contain a legal or common description of the property as the appeal section of city code requires written notice of the time and place of the appeal hearing be submitted to the parties as outlined in HCC 21.93.100 (b)
- The newspaper notification does not contain information regarding the review of documents since the section of city code, 21.93.100 (b), as previously stated does not require this to be done. That is outlined under 21.94.020 (b) 1-4 which does not apply to appeals.

City Clerk Jacobsen then addressed the issues raised in the second email after noting the date and time received:

- The second notice of meetings is not addressed by 21.94.020 (b) 1-4
- Regarding the agenda not specifically identifying that the public may provide testimony or comment for up to 10 minutes or written comment since they were not provided with the Commission's procedures all documents regarding this hearing were posted to the City webpages and the meeting was advertised in the local newspaper in accordance with Homer City Code 1.14 Notice of Meetings
- Mr. Abboud is party to this appeal since it is an appeal of an action by the City Planner or his staff
- Scott and Stacy Lowry are the applicants and property owners and the appeal is against the City Planner or his staff for issuance of the permit.
- Travis Brown is not a party since it was addressed to the Planning Office and since Mr. Abboud is the Department Director it was routed through him.

- There was no date on the notice that was mailed out, it was an oversight, the notice was prepared by staff, I reviewed it and signed it. There is an affidavit of distribution noting the mailing date.

City Clerk Jacobsen responded to questions on the following:

- It is at the discretion of the Commission to extend the time at any portion of the agenda.
- The Commission can use their discretion to accepting written testimony submitted by any person by motion as previously done.

City Clerk Jacobsen noted a point of order on finishing discussion on the notice issue raised.

Mr. Griswold stated that the City Clerk is wrong regarding the requirements of notice in city code. He then read the requirement from 21.94.020 requires newspaper notice for all public hearings and then notice to surrounding property owners if stated in 21.94.030, stating that these two are linked and you have to refer to the previous paragraph 21.94.020 (b) 1-4. This outlines the information that must be contained in the notice to property owners, and two items were missing regarding legal description and where they can find information. He further noted that the notice could be mailed to property owners. Mr. Griswold then noted that there was nothing to indicate that members of the public can testify for 10 minutes or submit written briefs. He believed that people were not properly noticed and that it was grounds for automatic reversal.

Attorney Holmquist argued that the notice for this hearing falls under Homer City Code 21.93.100 and it was properly noticed.

Chair Smith called for a motion.

There were no motions offered by the Commission.

Mr. Griswold requested a motion by Commission that the notice was sufficient.

Chair Smith asked the Commission again for a motion. There were none offered.

Chair Smith noted that Mr. Griswold's request was noted and in the record but it appeared the Commission did not feel there was a necessity to address the matter.

Chair Smith asked if Mr. Griswold had any additional preliminary matters and if he did to bring them forward one at a time to be addressed by the Commission.

Mr. Griswold brought forward the issue of who the party or parties are being represented by the City Attorney. He noted that there is no individual listed by name as Appellee.

Commissioner Highland stated that there is no motion on the floor but that it has been very clear that the City Attorney is representing the city and not the Commission.

Commissioners Petska-Rubalcava and Conley echoed those same sentiments.

Chair Smith requested the next preliminary matter from Mr. Griswold.

Mr. Griswold stated that in a parallel but unrelated appeal before the Homer Board of Adjustment the second order of business was identifying the appeal, was “identification of the parties”, this procedure should be followed for this appeal as well. The Commission’s procedure states that, “the Commission may question each of the parties listed above” however the procedure merely cites Appellant and Appellee without naming the associated parties. There are multiple appellees in this appeal including property owners, Scott and Stacy Lowry, they should be recognized as parties and Appellees and subject to questioning. Travis Brown issued the zoning permit and the Commission should make a decision as to whether he is a party to the appeal and an Appellee.

Chair Smith noted that they are not the Board of Adjustment and opinion of procedures being transferred from one board to the Commission unfortunately does not legally apply here and that is his personal opinion. It does not seem logical for the Commission to be governed by the rules of another board when they are not specified in their own code.

Commissioner Petska-Rubalcava requested a brief recess.

Chair Smith called for a five minute recess at 6:45 p.m. The meeting was called back to order at 6:50 p.m.

Chair Smith asked for additional preliminary matters from Mr. Griswold.

Mr. Griswold provided his opinion on how preliminary matters should be addressed by the Commission and that they should vote on a matter regardless. He then requested a determination by the Commission on whether they will allow exclusion of witnesses.

Chair Smith requested Mr. Griswold to provide an example of exclusion of witnesses.

Mr. Griswold provided a definition on how exclusion of witnesses is conducted in Court when testimony may be influenced by a person attending the action before the Court.

City Clerk Jacobsen provided an explanation on how they can separate the two witnesses that are present.

HIGHLAND/BENTZ MOVED THAT THE COMMISSION ALLOW EXCLUSION OF WITNESSES.

Attorney Holmquist stated that the Exclusionary Rule does not always apply in court and it is not used in Administrative Appeals and is not stated anywhere in city code to his knowledge. He

then provided details on how exclusionary rule is applied to witnesses with regard to testimony and cross examination.

Mr. Griswold stated that Attorney Holmquist was wrong he was not speaking of the exclusionary rule which was related to evidence. It does not apply to witnesses. The City Clerk indicated that it was not a problem to exclude the witnesses and if the Commission was interested in honest answers from the witnesses, they should allow it.

Commissioner Highland commented that it was something that was not difficult to do so she was going to vote yes and called for the question.

City Clerk Jacobsen stated for the record that procedurally all debate on the question is done and a vote on the call for the question is conducted in case other people wanted to comment.

VOTE. (Call for the Question). YES. HIGHLAND, CONLEY, BENTZ, BARNWELL, VENUTI
NO. SMITH, PETSKA-RUBALCAVA.

Motion carried.

Deputy City Clerk read the main motion currently on the floor.

VOTE. (Main Motion). NO. PETSKA-RUBALCAVA, SMITH, VENUTI, BARNWELL
YES. BENTZ, CONLEY, HIGHLAND

Motion failed.

Chair Smith requested additional preliminary matters from Mr. Griswold.

Mr. Griswold stated that Scott and Stacy Lowry indicated at the last meeting that they declined to respond to questioning and he believed when they filed this application that they gave consent to pursuant procedures and that there should be some sanction or penalty or they should not be allowed to attend. He then cited information on pleading the fifth (or equivalent) in a non-criminal trial does not have a negative connotation where in a proceeding such as this it could be taken negatively. He would like a determination on if the Lowry's would be allow to participate and not answer questions.

Attorney Holmquist stated the following for the record:

- The Commission does not have subpoena power to compel witnesses to testify like a court could.
- It does not have the authority to hold any party or witness in contempt or impose sanctions.

- The Administrative Procedures Act does not apply to this appeal, the Homer City Code applies and it does not provide the Commission with any authority to subpoena witnesses or compel testimony or hold a party in contempt.
- Mr. Brown and Mr. Abboud are city witnesses and have agreed to testify on the city's behalf. Mr. Griswold will have an opportunity to cross examine them after they testify for the City. The City would object to Mr. Griswold calling Mr. Brown or Mr. Abboud as his witnesses for his case.
- Mr. Griswold has the right to call witnesses and present evidence but does not have the right under city code or a due process right to compel a witness to testify as part of this hearing and neither does the Commission.

City Clerk Jacobsen clarified that Mr. Griswold has requested the Lowry's to be called as witnesses for him and when contacted, they declined to be witnesses but she did not give them any indication that they would not be able to participate as any other interested party would be able to and they were not advised any differently.

Chair Smith acknowledged Mr. Lowry's wish to speak but noted that the time was not appropriate.

City Clerk Jacobsen confirmed that it would not be appropriate to take comments from other parties other than the Appellant or Appellee during preliminary matters.

Chair Smith asked if there was a motion to address this matter.

There was a brief discussion on the ability of the Commission to enforce a person being called as a witness to provide testimony.

City Clerk Jacobsen requested, for clarification to assist the Commission in verbiage, for Mr. Griswold to repeat his request.

Mr. Griswold repeated that he would like the Commission to determine if the Lowry's can be compelled to respond to questioning by the Commission and other parties. He then pointed out that a Commissioner stated Mr. Holmquist said the questioning was voluntary using it as an example that the Commission is taking what he says as legal advice and if the Commission had an independent attorney you might get a very different response so just because Mr. Holmquist does something and I state the opposite every single time. The Commission has sided with Mr. Holmquist and my side is not that week. You also denied Mr. Lowry the right to respond and that is not right as they are the property owner, they are Appellees, they are indispensable parties and if it goes to Superior Court it would be thrown out if I did not list them as parties.

Commissioner Bentz stated that the preliminary matter would be that the Commission would need to vote on whether to compel witnesses to respond to the request for questioning.

City Clerk Jacobsen confirmed that it was the request.

BENTZ/HIGHLAND MOVED THAT THE COMMISSION SHOULD COMPEL WITNESSES TO RESPOND TO REQUEST FOR QUESTIONING.

Discussion ensued regarding the Commission not having the authority to operate at that level of judiciary process.

VOTE. NO. CONLEY, BENTZ, BARNWELL, VENUTI, SMITH, PETSKA-RUBALCAVA, HIGHLAND.

Motion failed.

Chair Smith complimented Mr. Griswold on how clever he was as he addressed each topic in his submission and believed that they have covered them all but noted that they would like to begin oral arguments.

Mr. Griswold stated that they had no idea what preliminary matters he wanted to bring up, he had a right to bring these issues up under preliminary matters whether it was in his evidence or not and he was giving them a heads up so it was a bonus for the Commission. He denied it was clever or devious.

Mr. Griswold requested that the Commission make a determination on the times specified to handle oral arguments, to include time for testimony, cross examination and rebuttal stating that it was not sufficient for him. He would need at minimum one hour. He noted the time allotted in a recent Board of Adjustment Hearing was 45 minutes.

Chair Smith thanked Mr. Griswold and wanted the record to reflect that his comment about Mr. Griswold being clever was by no means nefarious it was a compliment. We will move past that.

Commissioner Highland inquired about a list of witnesses.

City Clerk Jacobsen noted that City Attorney Holmquist is available for comment and then she will address Commissioner Highland's question regarding witnesses.

Chair Smith recognized City Attorney Holmquist.

City Attorney Holmquist stated that with regard to this type of hearing in response to Mr. Griswold's reference to due process a number of times, the following:

- Courts have held that due process for quasi-judicial hearings require notice and an opportunity to be heard.
- Regarding specific hearing procedures, the Courts hold that due process requirements as to the particular procedure employed for the hearing, such as the length of the hearing,

time limits for the hearing, the manner in which evidence can be presented, timeframe to present evidence based on the nature of the issue being decided.

- A very complex issue requires a more elaborate and longer proceeding, a similar issue requires less evidence testimony and argument, so a shorter and simple proceeding satisfies the process that the Commission has the authority under Homer City Code to set a hearing procedure that is appropriate in light of the nature of the appeal.
- This hearing is regarding a zoning permit and is not a complex issue. Mr. Griswold has raised issues that could make it complex but that is not the issue at hand.
- In the potential range of Administrative Hearings, a zoning permit is fairly simple, it has a brief record and the issues are relatively simple.
- Hearing procedures set by the Commission in the city's opinion are adequate to satisfy the due process requirement and the Commission should proceed with the hearing procedure as established in January.
- The City is not taking a position on the time necessary for a full record.

City Clerk Jacobsen commented on the reference to the Board of Adjustment hearing the time allotted was 30 minutes and Mr. Griswold requested additional time and the Board allowed 45 minutes which included his opportunity for rebuttal. Any remaining time could be reserved for rebuttal up to 45 minutes. There was a witness list provided in the materials and on the website.

Chair Smith asked if there was a motion from the Commission to address the request for additional time.

No motion was offered by the Commission.

Mr. Griswold stated that he requested Dan Gardner to appear as a witness and he declined. Mr. Gardner is a city employee and could be compelled to testify as a condition of his employment with the City. He further stated that he believed Mr. Gardner would be able to answer questions.

Attorney Holmquist stated that he believes this falls under the same issue that was discussed previously with regard to compelling witnesses to testify.

Chair Scott requested a motion from the Commissioners to address this matter.

No motion was offered by the Commission.

City Clerk Jacobsen noted that it was the Appellee's opportunity to bring forth preliminary matters before Oral Arguments.

Chair Smith asked City Attorney Holmquist if he had any preliminary matters he would like to address.

City Attorney Holmquist addressing Chair Smith and City Clerk Jacobsen stated that he reviewed his documents and did not have any preliminary matters to bring before the Commission.

Chair Smith announced that they will move to Oral Argument starting with the Appellant. He invited Mr. Griswold to begin, noting that he had 30 minutes to present testimony, other evidence, question witnesses and oral argument.

Mr. Griswold called City Planner Mr. Abboud.

City Clerk Jacobsen noted for the record that witnesses needed to be sworn in.

City Attorney Holmquist objected to Mr. Griswold calling Mr. Abboud stating that he cannot be compelled to testify on behalf of Mr. Griswold. He further noted that it was his understanding that Mr. Abboud was not willing to testify and will defer to Mr. Abboud to tell the Commission himself.

Mr. Abboud stated for the record that he agreed to testify for the City, not for Mr. Griswold.

Commissioner Bentz noted that would be a question procedurally for the Clerk, but the Appellant could call his next witness.

Chair Smith stated that the Commission cannot compel a witness to testify and believed that to be accurate.

Mr. Griswold stated that he was following the procedures and using his time and the Commission would not allow additional time, to question witnesses or accept written evidence and Mr. Abboud was on my list and he cannot question him.

Chair Smith recognized Mr. Griswold's dilemma but stated that the Commission has ruled on those issues. He encouraged Mr. Griswold to continue producing his evidence and testimony.

Mr. Griswold stated his belief of the Chair's partiality and cannot direct him on how to present his case. He then called Mr. Travis Brown as his next witness.

City Attorney Holmquist objected to the calling of Mr. Brown as he is a witness for the City on behalf of their case and cannot be compelled to testify. He will defer to Mr. Brown if he wishes to testify for Mr. Griswold.

Chair Smith noted that Mr. Griswold would have an opportunity to cross exam the witnesses and invited Mr. Griswold to continue.

Mr. Griswold then read into the record, section of the document submitted on March 9, 2021 entitled "Evidence" starting at page 7, first paragraph, line five. This covered the following points:

- The application of a zoning permit by the property owner was for a 360 sf single family dwelling not an accessory dwelling unit.
- HCC 21.70.020(b) requires that the application include the zoning code use and Accessory Dwelling Unit is not shown on the application
- Water and Sewer permits were illegally issued as there cannot be two water and sewer services on one lot
- No finding was found in the record and the converted connex does not constitute an accessory dwelling unit
- Mr. Brown did not have authority under 21.90.020 (b) to issue the zoning permit and there is no evidence in the record that he was being supervised by City Planner Abboud when he did issue the permit.
- HCC 21.70.030 (a) takes precedent over HCC 21.90.020 (b) since it is more specific, stating that the City Planner will review the application to determine if it complies
- HCC 21.70.030 (a) authorized the City Planner to refer the application to other city officials, Mr. Brown is not a city official
- The subject structure is not new construction, it is a converted connex.
- A second single family dwelling on the subject lot would require a conditional use permit per HCC 21.18.030 (j)
- The structures are independent of each other and not occupied by a single family
- Violation of the applicants failure to obtain a zoning permit prior to placement of the converted connex
- The additional fee was not sufficient for the violation.
- The City Planner did not investigate the driveway permit thoroughly.

Mr. Griswold then noted for the record that he would reserve his remaining time for rebuttal.

Chair Smith noted that Mr. Griswold reserved 10.5 minutes and opened the floor to the Appellee noting that he had 30 minutes to present testimony, other evidence, question witnesses and oral argument.

City Attorney Holmquist called the City's first witness Mr. Travis Brown.

Deputy City Clerk Krause swore in Mr. Brown.

City Attorney Holmquist questioned Mr. Brown, and it was brought forward for the record the following information:

- Mr. Brown is an employee of the City of Homer in the Planning Department as the Planning Technician and is supervised by the City Planner
- His responsibilities are Zoning Permits, Code Enforcement and General Office Administration.
- He was involved with the processing of the Zoning Permit Application for 541 Bonanza Avenue in that he initially contacted the owner regarding the dwelling the property owners put on the property as a mobile home and they would need a conditional use permit. The

property owners were cooperative and submitted an application which went forward to the Commission for Public Hearing and approval. The Commission did not approve the Conditional Use Permit since they determined that it did not meet the definition of a mobile home. He consulted with his supervisor, City Planner Abboud, who reviewed city code on how it should be applied to this structure. It was determined that they should consider it an accessory dwelling on a lot. He contacted the property owners who completed the Zoning Permit Application. They worked back and forth until the application was completed. Mr. Brown stated he then reviewed it and issued the permit.

- Mr. Brown inspected the property during this time and while unable to physically get into the structure he was able to view the inside and was able to determine the interior content had appliances and some furniture, cooking facilities, sleeping areas, two entrances/exits.
- Mr. Brown stated that he checked with Public Works Department to verify that the property owners had connected utilities which included sanitation and those were also visible from outside the structure.

Mr. Griswold raised an objection.

Chair Smith acknowledged Mr. Griswold.

Mr. Griswold objected to the leading questions that City Attorney Holmquist was using with his witness.

Chair Smith noted that this was not a court of law but a hearing to gather information. Mr. Griswold's objection is noted for the record.

City Attorney Holmquist noted for the record that the procedural orders for the hearing state that they need not be conducted according to technical rules relating to evidence and witnesses which is the nature of the objection.

Mr. Brown continued his response to questions:

- Homer City Code 21.18.020 (ii) allows for the detached accessory dwelling unit
- Initially there was some missing information and this is typical when the Planning Department receives an application for zoning permits, they usually work through the deficiencies with the applicant who were responsive and provided the missing information so that they could review the application to see that it was meeting city code.
- The application was complete when approved, Mr. Brown confirmed her signed this permit himself and that this work was completed under the supervision of the City Planner.

City Attorney Holmquist stated that his questions for this witness is now complete and he calls on his next witness, Rick Abboud.

Deputy City Clerk Krause swore in Mr. Abboud.

City Attorney Holmquist posed numerous questions to Mr. Abboud who responded with the following information:

- He is employed as the City Planner for Homer.
- His responsibilities include reviewing applications and decisions on zoning applications and enforcement of City Code regarding zoning.
- He did review the appeal record in this case.
- He was involved with the consideration of the application for the zoning permit for 541 Bonanza Avenue and the applicants desired to build an dwelling on the lot and there was an opportunity to have an accessory dwelling on the lot which is more specific than the general dwelling.
- Provided a description of the project as a secondary structure onto the lot and needed to meet all requirements for such in city code.
- He confirmed that zoning code allows for a zoning permit for that purpose and that Homer City Code 21.18.020 (ii)
- He did not agree with Mr. Griswold interpretation of 21.18.020 (ii) that an accessory dwelling unit must be occupied by the same family as the single family home on the lot because they were talking about one structure the accessory dwelling which is a dwelling designed for use by one family.
- No conditional use permit was required as construct or place the accessory dwelling unit as it was not listed in the city code 030 section which lists the specific uses that require a conditional use permit. He confirmed that the 020 section of code lists the permitted uses that can be approved by his office.
- Mr. Abboud described his involvement with the application stating that once the Commission determined that this structure was not a mobile home, it looks like a dwelling by definition and by association is an accessory dwelling by measures of becoming secondary to the principle primary dwelling.
- The zoning permit application was complete and there was no missing information or documentation.
- The zoning permit does not specifically state it is for an accessory dwelling unit does that affect the application in making it incomplete, there is a dwelling there and circumstances on the dictate that it is an accessory dwelling unit.
- Mr. Abboud confirmed that there were conversations with the applicant about the fact that this would be considered an accessory dwelling unit and was required to apply for the zoning permit.
- Mr. Abboud confirmed that the applicants started the project prior to getting a zoning permit, he then stated that the applicants paid the zoning permit fee of \$300 which included a penalty for starting the project prior to obtaining that permit. He provided a breakdown of the permit fee of \$200 plus a \$100 violation fee.
- Mr. Abboud did not feel that this structure met the city code for nuisance, it was converted to a dwelling as described by city code and with the features it now has as a dwelling it would not be suitable for the use of a container.

- Mr. Abboud stated that Mr. Brown signed and has authority to sign the permit, he was working under his supervision and it is stated in city code, but could not recall the citation.
- Mr. Abboud stated that new construction is new on the lot whether it is prefabbed or not, it was connected to the ground improvements were done to it.
- Public Works Department handles the driveway, water and sewer permits and they received these permits from the Public Works. He noted that they have copies of the driveway permits and no driveway permit had been excluded or abandoned to his knowledge. There is only one connection to water and sewer for the lot and did not understand the accusation and this was confirmed by the technician at Public Works.

City Attorney Holmquist noted that he had seven minutes left and would use that time for oral argument. He thanked the Commission for their time and acknowledged that they are volunteers dealing with this matter. He then made the following points to support the Commission upholding the issuance of Zoning Permit 1020-782:

- The zoning code allows a property owner to construct an accessory dwelling unit in the commercial business district.
- It is an outright permitted use listed in city code.
- The application included all the required information for Planning Department to review the application.
- The Planning Department appropriately interpreted code to allow the accessory dwelling.
- The appropriate fees were charged and paid by the applicant

Chair Smith opened the floor for comments of interested persons noting they had 10 minutes.

Larry Slone, city resident, stated that he did not have any evidence but wanted to make comment on the procedures. He believed that the Planning Commission should definitely consider obtaining legal counsel, with respect to the appellant process, Mr. Griswold is clearly an unusually technically, knowledgeable, dedicated, and persistent appellant, which regularly demonstrated his capacity to introduce highly nuanced procedural issues that the Commission and staff are not prepared to legally and definitively refute not that they should necessarily be expected to. The Commission is composed of ordinary citizens without necessary legal background or experience as admitted by the Chairman, to properly evaluate Mr. Griswold's extensive arguments, particularly with regard to whether or not to apply city code, administrative procedure or legal procedures. While I think the Planning Commission and staff are fully capable of engaging in mutually beneficial background discussion, intersection and interaction with the vast majority of those applying for development or a development permit in a manner that serves their desire, allows guided development within the city, while also maintaining fundamentally the integrity of the city code, the Staff is not an expert in a specialized field either. Nor in any case were they able or allowed to participate in procedural discussion. While he believed that the issuance of the zoning permit to the Lowry's was substantially consistent with city code, it was also evident that, as Mr. Griswold stated, undisputed items, procedural items, the Commission has relied on interpretations by the City Attorney, in their uncertainty, as a basis for many of their decisions. Past experience in the case of Mr. Griswold, will utilize any undisputed or any disputed issues as

a basis for subsequent court action that ultimately will cost the city more money. So when an Appellant raises the bar for thought processes procedurally, as is evident here, the city needs to up the quality of its game also.

Chair Smith opened the floor to the Appellant for cross examination of witnesses and rebuttal comments.

Mr. Griswold confirmed with Chair Smith that he still had his 10.5 minutes from oral arguments.

Mr. Griswold called Mr. Abboud for cross examination. Mr. Abboud provided the following responses:

- The Planning Commission does not issue stop orders.
- The Planning Department enforces the zoning code and the most recent incident was in February 2021, a person was occupying a lot that they should not on Mariner Drive.
- He did not recall stating at a meeting that it was a "saving grace" not to be required to enforce the zoning code.
- To his knowledge no asbuilt survey has been submitted as required for Zoning Permit 1020-782
- The difference between a single family dwelling and a detached accessory dwelling unit is the relationship to another structure. It is associated with the primary principal dwelling. The connex meets the definition of an accessory dwelling unit. It is subsequent to the mobile home due to being smaller and less prominent.
- A second structure could be subordinate to another just due to size, subordinate in this case means subsequent and smaller, less prominent and incidental means subsequent or even not in greater stature.
- The zoning permit does not specifically state that the application was for an accessory dwelling unit, it stated that it was for a residential one bedroom, one bath 360 square foot structure, it did not state a single family dwelling but that is what a single family residence is.
- Mr. Abboud could not confirm or deny he was physically present in the office when Mr. Brown issued the Zoning permit on October 5, 2021
- Mr. Abboud did not recall the amount of time or the degree of his involvement in review of the application prior to issuance. He did not personally inspect the interior of the converted connex.
- Mr. Abboud stated that Mr. Brown is authorized under his supervision to issue the zoning permit and it is standard office procedure. He did not waive or ignore HCC 21.70.030 (a) and it is customary to delegate the issuance of zoning permits to subordinate members of the planning staff.

Chair Smith noted that the Appellant had used his time allotted.

Mr. Griswold requested to use his reserve time.

City Clerk Jacobsen noted that Mr. Griswold reserved his time at the end of his testimony and the Chair agreed to that at that time. It would be appropriate to honor that agreement and allow the additional 10.5 minutes.

There was no objection from the Commission and Chair Smith requested Mr. Griswold to continue.

Mr. Griswold repeated the last question to Mr. Abboud regarding the customary delegation of issuing zoning permits to subordinate planning staff in which Mr. Abboud responded affirmatively. Mr. Abboud then provided the following responses to additional questions:

- Mr. Abboud stated he has personally issued zoning permits but did not have that information to specifically cite which ones or the time period he did.
- Mr. Abboud provided no guarantees nor implied that he would not issue any enforcement action with regards to the connex.
- Mr. Abboud stated that he had conversations with the Lowry's but none since the filing of the appeal regarding Zoning Permit 1020-782. He additionally affirmed that he has had no conversations with the Planning Commission regarding this subject either.
- Mr. Abboud was not prepared to respond to the question of his actions if the Commission denies Zoning Permit 1020-782 and the property owners do not bring the converted connex into compliance with Homer City Code
- Mr. Abboud stated that he believed last year, there was one commissioner who attended training this year, he would have to review the calendar when the last training session was offered but he believed it was a year ago. He did not recall the information on who provided the training so was unable to provide accurate information.

City Attorney Holmquist objected to the line of questioning as irrelevant.

Mr. Griswold noted that this was an informal proceeding and official court proceeding do not apply.

Mr. Griswold inquired who made the decision to hire the City Attorney for the Planning Department.

City Attorney Holmquist directed Mr. Abboud not to respond as that was Attorney Client privilege.

Mr. Griswold objected to the Commission allowing City Attorney Holmquist to interject without permission from the Commission. He then requested to cross examine Mr. Brown.

City Clerk Jacobsen confirmed that Mr. Brown was still under oath as was Mr. Abboud.

Mr. Griswold then proceeded to cross examine Mr. Brown who provided the following responses:

- He has an environmental undergraduate degree in urban development, he is not a member of AICP

- He is always under supervision by Mr. Abboud and issued the permit under his direction.
- Mr. Abboud was present in the office when he approved the permit.
- He could not provide the percentage of time that he was directly in communication and supervision but Mr. Abboud was consulted throughout the permit process which is typical. He signs most of the zoning permits issued.
- Mr. Brown was unable to respond to the questions regarding the City Planner signing zoning permits outlined in city code since he did not have that code citation in front of him.
- He affirmed that he personally viewed the interior of the structure.
- He affirmed that he knew the difference between a single family dwelling and a detached accessory dwelling unit when he signed the zoning permit.
- Since he did not have the record in front of him so he could not state what the description on the permit was for the structure but it could be looked up
- He issued a permit for a single family dwelling but it was an accessory dwelling on the lot.

Chair Smith interrupted Mr. Griswold stating that he has reached his time limit. He confirmed with City Clerk Jacobsen that this concluded the hearing and thanked everyone who participated and that the Commission will deliberate the matter and render their decision within the 60 day timeframe allowed.

Chair Smith then noted that City Attorney Holmquist appeared and reviewing his agenda, stated that it was his understanding that they were at the conclusion of the public hearing and requested clarification from the City Clerk.

City Clerk Jacobsen clarified that it was an appeal hearing, not public hearing for the record.

Commissioner Highland stated that the Commission has an opportunity to ask questions at this time.

Chair Smith reported he was missing a part of his agenda and requested clarification from the City Clerk.

City Clerk Jacobsen clarified for the Chair referring to the procedures that the Commission had the opportunity to ask questions.

Chair Smith opened the floor to questions from the Commission hearing none he opened the floor to audience comments.

COMMENTS OF THE AUDIENCE

Larry Slone, city resident, apologized for commenting earlier he was unclear on when he was to comment. He referred to the comments made about additional procedure which allowed him to

make comments at the end of this procedure. He reiterated his recommendation that the Commission hire legal representation.

Chair Smith requested clarification from City Clerk Jacobsen on who constituted a member of the audience.

City Clerk Jacobsen responded that anyone in attendance can comment for three minutes with the restriction that they cannot provide additional evidence or testimony regarding the hearing.

Frank Griswold commented that Mr. Slone just proved his point about notification of the public and used to be a Planning Commissioner and he could not figure out when or how much time he had to present testimony, evidence or otherwise and I would like to point out that the Chair at the very conclusion of my remarks, that you asked Mr. Holmquist if the Chair had the authority to give Mr. Holmquist time for rebuttal that is a question you would ask of your attorney, you are treating the city attorney, who represents my opposition, as your attorney, and you are not even aware of it.

City Attorney Holmquist thanked the Commission for their time and consideration.

Commissioner Venuti questioned when they would be setting a date for deliberations.

Chair Smith responded that they would leave that to the Clerk to coordinate and sort out the calendar for that.

Commissioner Barnwell commented that it strikes him as a simple case, not a complex case and he thought that what they have heard here and what their role as a Planning Commissioner and in recent training performed by the American Planning Association he was told that the foremost function of a Planning Commission is to ensure compliance with the Comprehensive Plan and they stressed that key function. What he has been hearing at this meeting and in the last couple of months is calling our role into analyzing and judging the proper procedural conduct of the planning department and the city staff and he does not believe that is their role. He believed that they should be in a watch dog role but not in a higher capacity to oversee in detail planning function such as making recommendations on zoning permits such as this one. So he had to say that he has perceived this to be an inordinately excessive amount time not only by the Commission but by staff, which costs money in this case and that he states this carefully and guardedly as he fully respects Mr. Griswold's right to question city procedures but I just want to say that this has been an inordinately excessive use of Commission time.

City Clerk Jacobsen expressed her appreciation for everyone's work tonight.

ADJOURN

There being no further business to come before the Commission, the meeting adjourned at 8:47 p.m. The next Regular Meeting is scheduled for Wednesday, March 17, 2021 at 6:30 p.m. A

worksession is scheduled prior to the regular meeting at 5:30 p.m. All meetings are scheduled to be held virtually by Zoom Webinar from the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska



RENEE KRAUSE, MMC, DEPUTY CITY CLERK

Approved: April 7, 2021