

Session 21-04, a Special Meeting of the Planning Commission was called to order by Chair Scott Smith at 5:45 p.m. on January 20, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, via Zoom Webinar.

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

STAFF: DEPUTY CITY CLERK KRAUSE

### **APPROVAL OF THE AGENDA**

Chair Smith requested a motion to approve the agenda.

HIGHLAND/BENTZ– SO MOVED.

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

### **NEW BUSINESS**

- a. Appeal Hearing of 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 announced the action before the Commission stating the purpose of the hearing was to hear oral argument from the Appellant Frank Griswold; regulations to conduct the appeal and noted the items that were provided to the Commission regarding the action before them.

Deputy City Clerk Krause acknowledged all persons in attendance for the record as follows:

Appellant: Frank Griswold

Appellee: Max Holmquist, Esq. & Michael R Gatti, Esq. Jermain, Dunnagan & Owens, P.C.  
Attorneys for the City of Homer

Witnesses for Appellee: Rick Abboud, City Planner and Travis Brown, Planning Technician

Property Owner: Scott & Stacy Lowry

## PRELIMINARY ISSUES

Chair Smith stated that the Commission would address preliminary matters at this time. He continued by relaying that at the January 6, 2021 Special Meeting two preliminary matters were raised by Mr. Griswold and a third was outlined in his brief. Due to one of those issues involving Vice Chair Petska Rubalcava and himself, he would pass the gavel to Commissioner Highland to address those preliminary matters raised against them first.

Max Holmquist interjected that the City would like to address a preliminary matter on the notice issue that was discussed in memorandum from City Clerk Jacobsen. He believed that may present an issue with going forward and suggested that the Commission may want to address that matter before other preliminary issues.

Deputy City Clerk Krause responded that the notice issue was referenced in the City Clerk's memorandum and will be handled under additional preliminary issues under the procedural outline provided.

Commissioner Smith turned the meeting over to Commissioner Highland.

Acting Chair Highland addressed what she believed was an error in stating the Zoning Permit number and wanted that corrected for the record and recognizing that the property owners, Scott & Stacy Lowry were present as she believed they were not recognized by the Clerk. She then addressed Mr. Griswold, stating that the Commission has read his brief, asking if he had any additional information to share, not included in his brief, regarding Commissioner Smith.

Mr. Griswold stated that he had other issues, but felt it was explained in his brief and he had nothing to add regarding Mr. Smith.

Acting Chair Highland requested a motion.

BENTZ/PETSKA-RUBALCAVA – MOVED TO EXCUSE MR. SMITH FROM PARTICIPATION IN THIS APPEAL HEARING DUE TO HIS INABILITY TO SERVE AS AN IMPARTIAL ADJUDICATOR AS SUGGESTED BY THE APPELLANT.

City Attorney Holmquist responding for the City stated that in accordance with Homer City Code 1.18.048 Commissioner Smith comments highlighted in Mr. Griswold's brief did not demonstrate that he has any bias or partiality with regard to the Zoning Permit since they were in context of denying the Conditional Use Permit, so in their perspective it is hard to imagine how the comments can be construed as bias in favor of the applicants who were applying for the conditional use permit.

Commissioner Bentz stated a recollection from the September 2, 2020 meeting and believed Commissioner Smith from his tone and demeanor did not exhibit bias but was trying to work

through the issue and trying to make sure that everyone was aware of the process and that the Commission tries to consider all voices and move forward as a service to the city.

Deputy City Clerk Krause noted for the record that the Appellant had his hand raised.

Acting Chair Highland requested clarification from the Clerk if that would be permissible.

Deputy City Clerk Krause stated the Commission allowed the Appellee to comment and so to be fair they should allow the Appellant to comment.

Mr. Griswold stated that the procedures that were cited by the City Attorney indicated that it would be appropriate for Mr. Smith to be included in these discussions. He believed Mr. Smith should be the one that should be asked questions about his potential partiality or animosity. He wanted to further state that just because the Commission denied CUP 20-14 does not mean that Commissioner Smith was not biased or lacked partiality. There was an implied agreement that that request would be denied and quickly replaced by an alternative that would put the Lowry's in the position that they wanted to be in.

Commissioner Bentz acknowledged that typically when motions of conflict are made they do ask the Commissioner if they feel they have a conflict and would put that question to Commissioner Smith.

Commissioner Smith responded that he feels he does not carry any bias, his comments at the time were meant to recognize that there were various players in the discussion including Mr. Griswold's laydown at the time. He is fully aware of the position and process that he represents and that it is a part of the system, public hearing and public testimony, it needs to be there. He fully embraces his role so does not currently, or then, carry bias on the matter.

Acting Chair Highland stated for the record that she was going to exercise caution and vote that Commissioner Smith does have a conflict and should not participate in this matter. She inquired if there were any additional objections, noting her own.

There were no additional comments from the Commission.

Acting Chair Highland called for a roll call vote.

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

Motion failed.

Commissioner Highland turned the meeting back over to Chair Smith.

Chair Smith requested Mr. Griswold to address the matter regarding Commissioner Petska-Rubalcava.

Mr. Griswold stated that he expressed his concerns at a previous hearing and believed that the Commission did not address his concerns regarding the oath of office, although that is not as well defined in City Code as bias and conflict of interest. He then acknowledged the memorandum from City Clerk Jacobsen and the circumstances as presented but he will reserve it as a point on appeal because he believed that if someone does not have a valid oath of office anything that they participate in is potentially invalidated. One of his concerns in particular is the issue on appeal is whether the city can allow an “after the fact zoning permit” and in this case, this is an “after the fact oath of office” so that particular connection bothers him and if somebody thinks that an “after the fact oath of office” is okay they might believe “after the fact zoning” is okay.

Chair Smith thanked Mr. Griswold for his comments noting that they were in record.

City Attorney Holmquist stated in rebuttal that Commissioner Rubalcava did not take any action on this matter prior to signing her oath of office and so there is no reason that she should be precluded from participating in this hearing or in this matter.

Chair Smith called for a motion.

HIGHLAND/BENTZ MOVED TO EXCUSE COMMISSIONER PETSKA-RUBALCAVA FROM PARTICIPATION IN THIS APPEAL HEARING DUE TO CONFLICT WITH HER OATH OF OFFICE AS RAISED BY THE APPELLANT.

Commissioner Highland expressed that she would be erring to the side of caution and voting that Commissioner Petska –Rubalcava had a conflict.

Commissioner Bentz requested clarification on the date that the oath of office should have been signed since her reappointment, noting that they have not met in person due to COVID 19 and if the previous oath on record would not be effective.

Deputy City Clerk Krause stated that currently the content of the oaths of office as written expire with the Commissioner’s term of office.

Chair Smith believed that whether or not Commissioner Petska-Rubalcava was in good standing when they addressed CUP 20-14, she is now and is on similar footing as Commissioner Conley and does not believe that technicality, at this level, of not having the piece of paper signed, does not present an issue for this hearing while maybe in higher courts it may. He believed that Commissioner Petska-Rubalcava did not have any divisive intent or trying to work around the rules. He believed the Commissioner to be in good standing as the rest of the commission is today and capable of hearing this appeal with total authority.

Chair Smith inquired if there were any additional comments, hearing none he requested the Clerk to perform a roll call vote.

VOTE. NO. SMITH, CONLEY, VENUTI, BENTZ  
VOTE. YES. HIGHLAND.

Motion failed.

Chair Smith then requested Mr. Griswold to add to his expressed complaint regarding Commissioner Venuti.

Mr. Griswold proceeded to explain that the motions regarding conflict of interest do not require a second because they are mandatory and when brought forth they are obligated to discuss them but he would hate to see this disregarded just because they did not have a second.

Mr. Griswold continued by stating that Mr. Venuti made derogatory remarks about him that was addressed by Mr. Bob Shavelson at the end of the meeting. Mr. Venuti claimed that because of the past litigation with the city those negative comments were justified and furthermore similar sentiments have been expressed to City Council by Mrs. Venuti, his wife, who thinks that he has too many opportunities to win his cases, suggesting it is not fair to the city that I have appeal rights, but when a city official expresses publically, an appellant or citizen who raises concerns and not only expresses those concerns but encourages others or justifies the negative comments of others, it does show animosity whether overt or implicit it affects Mr. Venuti's ability to be impartial and in this case, Mr. Griswold stated he included in his brief the various reasons that you can look at to determine partiality or when someone has animosity towards one party or favors another.

Chair Smith then asked the Appellee if they wanted to offer rebuttal.

City Attorney Holmquist stated that the city did not have comment on this issue.

Chair Smith requested a motion.

HIGHLAND/BENTZ MOVED TO EXCUSE COMMISSIONER VENUTI FROM PARTICIPTION IN THIS APPEAL HEAIRNG DUE TO HIS BIAS AS SUGGESTED BY THE APPELLANT.

Commissioner Highland stated that she will be voting that Commissioner Venuti has a conflict of bias.

Commissioner Venuti stated that he had no agenda, his purpose in participating in public service is to serve the community in a friendly and inclusive manner. He continued by stating that his mantra has always been to act purposely and with civility in this life and believed that his remarks

were twisted around to become confrontational which deflects from the successful resolution of this appeal.

Commissioner Venuti further stated that his comments were intended to support any individual a right to disagree that the Planning Commission's decisions and absolutely no animosity toward anyone was intended and he is sorry that the Appellant has misinterpreted his remarks and is trying to use this to cloud the issue at hand.

There were no further comments and Chair Smith called for the vote.

VOTE. NO. BENTZ, PETSKA-RUBALCAVA, CONLEY, SMITH.

VOTE. YES. HIGHLAND.

Motion failed.

Chair Smith inquired if Mr. Griswold had any other preliminary issues.

Mr. Griswold noted that there was an issue with the Notice as the City Clerk noted in her memorandum. He then stated that was his understanding on delaying this appeal 21 days in order to notice the neighboring property owners as directed under Homer City Code. He believed a new date was suggested of February 16<sup>th</sup> which he stated that it would be very prejudicial to his side since he will be preparing for another appeal. He further stated that it would be perilous to proceed in this hearing when the Commission has not properly followed code and notified the property owners within the 300 foot periphery.

Chair Smith stated that currently the Commission cannot obtain legal counsel, the city attorney is representing the city, Mr. Abboud is a witness and stated his understanding of this hearing and he may be wrong but that this meeting did not have a Public Hearing attached to it.

Chair Smith requested input from the other commissioners on this matter.

Chair Smith acknowledged that City Attorney Holmquist would like to offer rebuttal.

Commissioner Bentz stated that in reflecting on city code and echoing her thoughts on the matter about parties eligible to appeal the notice of appearance for the party, witnesses called and did not really want to speak to the public notice for this meeting versus the previous initial public notice that was sent out for this appeal hearing but the fact of new evidence or changed circumstances in the code the Board is not supposed to be accepting new evidence or change of circumstances but making their decision on the record.

Commissioner Highland requested clarification on the sentence that was shown in city code 21.93.100.(b) that the neighboring property owners should have been notified or is Commissioner Smith and Bentz correct.

Chair Smith requested the cited code by Commissioner Highland.

Deputy City Clerk Krause requested a moment to pull up the city code to review the cited language.

Commissioner Bentz read the language as cited in 21.93.100(b) confirming that was done with the Clerk.

Chair Smith stated that this meeting was not a Public Hearing and only a Special Meeting so he opined that it would fall under a different criteria and requested clarification from the Clerk.

Deputy City Clerk Krause noted that city code addresses the appeal hearing which is what this meeting is and city code does not cite what the process is in continuance but notice is required to be sent to the property owners.

Commissioner Bentz recited city code 21.94.030 into the record and believed that it was done prior to the January 6, 2021 meeting which was the first meeting on this matter.

City Attorney Holmquist speaking on behalf of the city and reiterating that they cannot provide legal advice to the Commission and did not find out about the notice issue until this afternoon but believe that notice should be sent out in accordance with 21.94.030 and would request a continuance based on the requirement as cited in city code.

Chair Smith acknowledged Mr. Griswold raised hand and requested he wait just a few moments until he could receive input from the Commission.

There were no further comments from the Commissioners and Chair Smith requested Mr. Griswold make his comment if it was in regards to a continuance.

Mr. Griswold commented on the previous gross misunderstanding on this being a closed record and explaining that it is an open evidentiary hearing and they are supposed to take evidence from parties and the public. The public doesn't just speak when the meeting is over, referring to the adopted procedures, the commission then opens the floor to comments of interested persons and they get 10 minutes, not just three minutes to provide testimony. It would then be part of the record that if later it gets appealed, then it would go to the Board of Adjustment and be a closed record.

Mr. Griswold continued by explaining that if the surrounding property owners have no knowledge of the hearing being conducted then they do not have the opportunity to file briefs or provide testimony on the subject. He further commented on being astounded that people would misinterpret the improper code and deciding that this is not a public hearing and opined that is why the Commission needed their own attorney to keep them straight and he further noted that if they failed to honor the public notice it would be automatic grounds for reversal.

Chair Smith requested a motion for a continuance.

BENTZ/VENUTI MOVED TO CONTINUE THE APPEAL HEARING TO SUCH A TIME AS THAT COULD BE PROPERLY NOTICED.

Chair Smith opened discussion on possible date for continuance opining that this needed to be resolved by a specific date due to time requirements.

Mr. Griswold requested permission to comment relaying that he could resolve that question.

Chair Smith gave the floor to Mr. Griswold who proceeded to state that the Commission would need to decide the issue either 45 or 60 days after the hearing. Until the hearing is completed they are under no deadline. The City Clerk suggested the earliest date that this could be continued to is February 16, 2021 in accordance with her memorandum.

Commissioner Bentz questioned the requirement that all appeals must be heard within 60 days after the appeal record has been prepared and would like to know what date that was completed.

Deputy City Clerk Krause responded that the record was ready on December 30, 2020.

City Attorney Holmquist offered that the continuance is allowed by city code beyond the timeframe for good cause shown and I believe this would be a good cause to continue this hearing further.

Commissioner Highland noted that Mr. Griswold previously stated he could not attend February 16, 2021 and wondering if we can schedule this later in February or March or even for our next meeting date of February 17<sup>th</sup> instead of a worksession.

The Commissioners briefly discussed possible dates and determined that it would be best to leave it in the hands of the Clerk's Office to arrange a mutually acceptable date between all parties involved.

Chair Smith inquired if Mr. Griswold was acceptable to that solution.

Mr. Griswold responded that for the record he did not state that February 16<sup>th</sup> was any worse than any other day and that it was not in his best interest to delay this, but he thought of the necessity that it be delayed and that no matter what date it would be, he has another appeal before the Board of Adjustment and it is just a bad situation as he has spent time to be prepared for tonight but he recognizes that it would be improper for the Commission to hold the meeting tonight without the proper notice.

Chair Smith requested confirmation from Mr. Griswold that he was okay with allowing the Clerk to establish a date by March 16<sup>th</sup>.



Mr. Griswold responded that he would, but hope that it would be done well in advance of that but he was okay with the Clerk contacting parties and establishing a mutually agreeable time.

Chair Smith confirmed with the City Attorney Holmquist and Mr. and Mrs. Lowry regarding the continuance that the procedure would be acceptable.

Chair Smith inquired if there was any further discussion, hearing none he asked if there was any objections to the motion to continue to a date to be determined, there were none.

The Commission agreed by consensus to the continuance of the Appeal Hearing on Zoning Permit 1020-782.

Chair Smith recognized that Mr. Griswold had his hand raised, then confirmed with the Clerk that there were no additional items that they had to address before concluding the meeting.

Chair Smith inquired what Mr. Griswold would like to address.

Mr. Griswold stated that in the memorandum submitted by City Clerk Jacobsen on page two that the city did not have subpoena powers, then proceeded to explain what a subpoena actually was and that the Lowry's were in attendance and that they declined being questioned, but noted that the Commission's recently adopted procedures authorizes parties and the Commission to question the Lowry's. He noted that there is no place in city code or the adopted procedures that allows that the Lowry's can attend but decline to be questioned. The prospective witness, Superintendent Dan Gardner also declined to attend. The city does not require subpoena powers to request a Public Works supervisor with professional knowledge about a critical issue on appeal to attend the hearing and he believed it would be critical to address these issues now.

Chair Smith acknowledged Mr. Griswold's comments, even though it is written regarding the Lowry's decision to attend but not be questioned and even though it is understood about Mr. Gardner's participation, he chose not to attend. The Commission did not plan to address that type of decision at this meeting and he believed it would be appropriate for all parties to be able to prepare for and reflect on what responses to that might be, rather than trying to process that now since the Commission does not have legal counsel now nor will they obtain legal counsel, he believed, in the future over this matter. Chair Smith stated that it would be best for the Commission not to process that request at this time unless there is overwhelming objection by other Commissioners.

Chair Smith opened the floor to comments from the Commission and there were none offered.

Chair Smith opened the floor to City Attorney Holmquist for comment.

City Attorney Holmquist noted that the city was prepared to respond at this time but would not be opposed to discussing at the beginning of the next hearing as well whichever the Commission would prefer.

Deputy City Clerk Krause confirmed for Chair Smith that a motion was not required, that the Commission dispensed of the motion to continue the hearing, noted Mr. Griswold's objection and stated that it can be addressed at that time.

Chair Smith asked if there were any additional items that required to be addressed at this time.

City Attorney Holmquist stated that Mr. Griswold filed what was titled a reply brief and that was not authorized under the hearing procedures that the City Clerk distributed and the City would move to strike it. They can do this in writing following this hearing if that would be the Commission's preference. The City would be prejudiced if the Appellant, Mr. Griswold, is allowed to file an additional brief that was not authorized by the procedure that was given out by the Commission prior to the hearing. The city has not had the same opportunities as Mr. Griswold if that brief is allowed so the city is requesting that the brief be stricken from the record.

Mr. Griswold requested permission to respond.

Chair Smith stated no, he did not think it was appropriate to respond in this situation. He stated that Mr. Griswold would be able to address it at the next meeting.

Mr. Griswold interjected why not and proceeded to state that this showed how biased that Chair Smith was since he was denying him his due process rights to respond to an issue that was brought up by City Attorney Holmquist regarding his reply brief. He opined that it was blatantly biased.

Chair Smith continued to explain that he meant no bias, he was trying to give everyone a fair process, he was no lawyer but that in all fairness Mr. Griswold had submitted an additional brief and the city did not; so the city should also have the ability to submit an additional brief and to not allow them the ability or time to submit one would show bias, so I do not give you, Mr. Griswold, at this time the ability to respond.

Mr. Griswold stated that Chair Smith made his decision without hearing his response and that was prejudicial and that he was unfit to be a Chair or a Commissioner.

Chair Smith recognized Commissioner Highland.

Commissioner Highland noted that the procedures stated that briefs must be filed with the City Clerk by 4:30 p.m. on Monday, January 25, 2021.

Mr. Griswold interjected that he would like the Commission to vote on whether he has an opportunity to respond to the City Attorney's objection to his brief.

Commissioner Bentz referencing the procedural aspect of the issue, but that since the Commission voted to continue the hearing that the issue should be addressed at that time when there would be ample time to discuss their concerns. But since we are at the end of our meeting I believe it would be wise to continue to hear what the three minute comments are to make sure they are hearing the issues fully and then the issues can be addressed when the hearing is continued.

Deputy City Clerk Krause stated that the Commission dispensed with a motion to continue the hearing and should proceed to Comments of the Audience.

Chair Smith noting the comments received he will proceed. He informed Mr. Griswold that if he comments under this topic in rebuttal to City Attorney Holmquist statement they will not be addressed he will have opportunity at the continuance to present his objections.

#### **COMMENTS OF THE AUDIENCE**

Frank Griswold commented that he warned the Commission when they were doing the procedures, through emails to the City Clerk that they were not allowing near enough time for any of these different points and that they allocated only 20 minutes for preliminary matters and they have gone well over one hour; he pointed out that in the procedures it states specifically that the hearing parties may testify and among other things submit evidence. He further stated that he had requested from the City Clerk direction on how he was to submit evidence at the meeting if it was being conducted telephonically. She did not respond so he submitted his brief well in advance of the meeting as evidence and that other provision that had a deadline of January 25<sup>th</sup> that applied to the opening briefs, it did not address reply briefs and you have so stifled the parties from giving testimony that if I had taken the time that you allocated me to present my oral argument, which I would have done in the brief, I would not have had time to question witnesses or anything else, so it's your own actions that have so prejudiced me that I am forced to provide my reply brief as evidence at the meeting. Instead of leisurely giving oral argument so your procedures are to blame, not me and you just categorically say oh, it looks like we are not going to have legal counsel and probably never going to have, well the big question here is all these legal issues that come up, why don't you get legal counsel, you need it more than anybody. You need it more than anybody, the planning department can take care of themselves, the board of adjustment is mandatory that they have legal counsel, you should demand legal counsel. The only reason you don't is the system of hiring legal counsel for the planning department forces you to rely on their legal advice and not your own. This is prejudicial to an appellant and he wished that someday the commissioners would be able to be an appellant and then see how prejudicial this whole system is, you do not want to hear anybody question the authority or a decision of your city planner or planning staff. It is very apparent and this may be implicit but to an outsider the views, the commission may think they are acting properly but when you allow one side to raise

an argument and not allow the other side to respond, you would not do that if I were represented by counsel, if I was represented by a suit and tie you would show more respect. That's all I got good night.

Chair Smith thanked Mr. Griswold for his comments and will carry them forward to the next meeting.

City Attorney Holmquist stated that in regards to those comments the board of adjustment procedure does call for reply briefs specifically, but if you look at the procedure for the Planning Commission appeal hearings it just simply states that any person may file a written brief and the procedure set by the Commission prior to the hearing had a deadline for a written brief so the intention was that each party gets to file the written brief but there are no reply briefs and Mr. Griswold is trying to find a way around that by filing an extra brief. If Mr. Griswold has an extra argument that he would like to make he can certainly do that during oral arguments during the course of this hearing but filing of an extra brief would be prejudicial to the city and it would be disregarding the procedures that were established prior to the hearing.


Commissioner Conley thanked the Lowry's for their patience.

Commissioner Bentz expressed appreciation for the patience from all parties noting that the Commissioners have never dealt with an appeal as the body is composed and that they are learning as they go and are very interested in following due process and are doing the best that they can in their voluntary appointed positions.

Chair Smith agreed with Commissioner Bentz and that they do not mean any disrespect to the parties involved. He believed that it was important to hear all sides and to follow the process that is legal.

#### **ADJOURN**

There being no further business to come before the Commission, the meeting adjourned at 6:48 p.m. The next Regular Meeting is scheduled for Wednesday, February 3, 2021 at 6:30 p.m. A Worksession is scheduled 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.



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RENEE KRAUSE, MMC, DEPUTY CITY CLERK

Approved: April 7, 2021