

MINUTES
PLANNING COMMISSION
CITY AND BOROUGH OF JUNEAU
Mike Satre, Chairman

SPECIAL MEETING
September 10, 2013

I. **ROLL CALL**

Mike Satre, Chairman, called the special meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC) Special Meeting, held in the Assembly Chambers of the Municipal Building, to order at 6:01 p.m.

Commissioners present: Mike Satre, Chairman; Marsha Bennett, Jerry Medina, Ben Haight, Nathan Bishop, Dennis Watson, Karen Lawfer, Dan Miller

Commissioners absent: Nicole Grewe

A quorum was present

Staff present: Hal Hart, Planning Director; Beth McKibben, Interim Planning Manager/Senior Planner; Teri Camery, Senior Planner; Christopher Orman, Assistant City Attorney; Rob Steedle, Deputy City Manager; Eric Feldt, Planner II

II. **SPECIAL AGENDA**

INQ2013 0016: Adoption of hearing procedures relating to appeal cases
Applicant: City and Borough of Juneau
Location: Borough-wide

Assistant City Attorney Christopher Orman explained to the Commission that the hearing procedures relating to appeals drawn up by the Law Department for the Commission's approval were to serve as a guideline for the Commission to use at its discretion and latitude.

Ms. Lawfer asked Mr. Orman about the procedure for the Commission deciding on the rules of evidence.

RULES OF EVIDENCE AND DE NOVO

Mr. Orman said he knew there was confusion about the term “*de novo*”. He spoke about various interpretations about the meaning of *de novo* in relation to the *de novo* hearing the Commission was involved in, and about to what extent the record could be augmented. Mr. Orman said that while the term *de novo* (Latin for “anew”) sounds like everything is new, he said that is not the case. He said this is not a process in which the record has to be increased, or that this is now an entirely new process, even though the term makes the process sound like that.

The Assistant City Attorney explained that what the *de novo* process does mean in this instance is that the Commission gets to use its set of eyes on this record. It does not need to give any discretion to what the Director had previously determined. He added in contrast to this, under the other standard of review under 49.20.110, that there would be quite a bit of discretion granted to the Director’s decision. A *de novo* decision, under that discretion standard, is different, according to Mr. Orman.

Mr. Orman continued to explain that part of the procedures that are going to be applied and some of the dates that are going to be outlined and mentioned are going to have for example; a Submission of the Record, a Motion to Supplement the Record. When considering these motions he said his feeling was that *de novo* does not necessarily mean that all doors are opened. Part of these policies, the appeal deadlines and Chapter 1.50 under Title 1 of the Juneau Code of Ordinances helps with some of this, and will provide some of those answers, but he said it will allow a party which feels there should be more of a record to present that information. It also allows the CDD (Community Development Department) or the appellant to object to that.

In a more succinct answer, Mr. Orman said his conclusion was that he did not feel that changing the rules of evidence was necessary.

TIME LIMITS

Mr. Watson asked if it was customary for each party to have a time limit attached to their opening statements, noting that in the past at meetings he has noticed a lack of focus when time limits were not attached.

Mr. Orman said that the hearing procedures outlined before the Commission are general procedures, with the goal, as he envisioned it, that the Commission start fleshing out the detailed requirements such as if there was to be a time limit on opening statements, as the hearing dates were set.

Mr. Orman said the idea of the legal department was to provide a malleable document that could be used by the Commission in all kinds of different contexts.

Mr. Medina said he felt there should be a time limit set for opening and closing arguments. He said it has been his experience that if more than five minutes are used that the party engaged in the speaking starts to ramble.

Mr. Orman said his role was to help flesh out the process and to help create a system that functions. He said it would be up to the Commission to set specific time limits.

Mr. Satre mentioned that in the Rules of Order followed by the Commission for normal hearings, that it was at the discretion of the Chair to set time limits for public testimony. He said that perhaps under rule 5A, where it talks about the responsibility of the Chair; adding a sentence that the Chair may set time limits, or something along those lines.

Ms. Lawfer wanted to know if these proposed procedures before the Commission were comparable to those used by other commissions or bodies that do have a quasi-appeal process.

Mr. Orman said that his understanding was that these procedures were for the most part structured under 1.50 (Juneau, Alaska, Code of Ordinances, Part II, Title I – General Provisions, Chapter 1.50 - Administrative Appeal Procedures). He said that these procedures were being applied by another body in handling appeals.

Mr. Orman added that 1.50 provided the administrative roadmap for administrative appeals.

Mr. Watson wanted to know what the process for the procedure to adopt was.

Mr. Satre explained that the Commission could move to adopt, throwing out any potential amendments.

MOTION: *Mr. Watson moved to adopt the hearing procedures that were before the Commission asking for unanimous consent.*

Mr. Medina offered a friendly amendment under 5A as the Chair had mentioned that at the Chair's discretion that he could set time limits. He asked Mr. Satre for his exact verbiage on that item.

Mr. Satre offered that item 5. *Conduct of Hearing (A)* within the *Hearing Procedures Relating to Appeals* be modified to add at the end of the sentence ...*"including setting time limits for statements for and testimony as described in "5C."*

Mr. Watson also contributed "rebuttal."

Mr. Satre withdrew the items "5C" from the final phrase.

Thus, the amended sentence now read:

The chair or, in the absence of the chair, the vice-chair, shall preside at the hearing. The chair shall maintain decorum, rule on objections to evidence, and assure that all parties have reasonable opportunities to present their cases, including setting time limits for statements, testimony or rebuttal. The chair may hold one or more pre-hearing conferences with the parties for scheduling or other purposes prior to the hearing.

Ms. Bennett added that she felt adding more clarification was not getting the Commission much more in that regard. She said that she opposed that amendment.

The above motion passed by unanimous consent.

APL2013 0003: Set schedule for appeal proceedings.
Applicant: Eric Twelker
Location: 10471 Dock Street

The legal staff had prepared a draft hearing schedule to present to the Commission that meets the various milestones within the appeal process.

Mr. Orman informed the Commission that there has been a Motion to Intervene filed by Mr. Comstock, the owner of the subject property in the case. Mr. Comstock is represented by an attorney, who was present at this meeting telephonically.

Mr. Satre said that since the Commission was amenable, that Mr. Comstock and his attorney would be free to speak regarding the schedule after the Commission and the appellant had addressed their scheduling issues.

MOTIONS

Mr. Orman informed the Commission that a few other items had been filed including a Motion for Summary Judgment. A Motion for Recusal was also filed. He said he could provide information about a Motion for Recusal should the Commission desire. He said the motion was basically requesting the recusal of two individuals within the CDD and their representation in this case. Mr. Orman said he believed those individuals were Teri Camery and Ben Lyman.

Mr. Orman explained that a Motion of Recusal is a motion to have the decider of the issue removed for bias. The idea is that it serves to protect the due process rights of the individual by ensuring that the individual that is hearing the issue is going to be unbiased. The Motion for Recusal affects the party trying the case, not the party participating in or presenting the case.

In this instance, the Motion for Recusal would apply theoretically to a Commissioner, for example, not an individual trying the case. Mr. Orman said that was his understanding of the law.

Mr. Haight asked in light of the scenario just presented how this would fit in with the concept of *de novo*, considering that the case was being considered in a new light in any case.

Mr. Orman said that *de novo* would be the standard under which the evidence would be judged. He said the filing of additional motions within the case do not change the nature of the case itself.

Ms. McKibben added that her understanding of *de novo* as explained by the law department was that it was not a matter of a new record with new information but that it was a new decision.

Mr. Satre inquired as to the next step for the Commission procedurally in this type of situation. He said the normal procedure would be to discuss the motion, put it on the floor, discuss the motion, and then take a vote.

Mr. Orman said he thought that would be the way to go. He said a written decision was something he foresaw for the appeal. He said he felt the typical procedure of the Commission was appropriate.

Mr. Satre added that the Commission would need to include some sort of finding with that.

Mr. Bishop said that he was concerned; that on the agenda they were to set the schedule for appeal proceedings, and that generally they did not stray from the agenda because they had not notified the public, and here they were speaking of making a decision as to whether someone were prejudiced in making a determination on a case. He wondered if this was appropriate since it was not on the agenda.

Mr. Orman said the reason these items could be brought up is because they had a potential effect on moving forward. Mr. Orman added that because the Motion for Recusal has been made and it would have an effect on bringing the case forward, it might be that it needs to be dealt with.

Mr. Satre said that now that the Commission is in the appeals process and not following the normal public process that it typically follows, does that change the rules for the Commission. Is this a public notice issue?

Mr. Orman answered that because this is an appeal there will be motions and other items of record presented to the Commission. Mr. Orman said that while the issue is not removed from

the public, it is in play between the parties involved in the case. The question becomes that if there is a motion for recusal, to what extent does someone else come in to discuss this motion other than the intervener and Mr. Twelker. This issue is confined by the pleadings file and now by Mr. Twelker, and it is going to be responded to by the CDD and by Mr. Comstock, explained Mr. Orman.

Mr. Bishop asked if the Commission was in the midst of the appeal process right now. Mr. Orman responded that the appeal was filed. This special meeting was to set dates, and to establish the procedures that are going to be used for the appeal. He said that the Commission was in the middle of the process, right now.

Mr. Satre said at the prior meeting the Commission did accept Mr. Twelker's appeal and then because of some confusion about hearing procedures the Commission was told to adopt procedures this evening and then start down the path.

Mr. Satre said he thought they were all taken by surprise by the motions presented. They had expected to set schedules and make sure those were acceptable to the appellant.

Mr. Bishop said he was not ready regarding making a decision on the Motion for Recusal because he had not read the evidence. Mr. Bishop said he had ten minutes to look at the material before the meeting, so any decision of a Motion for Summary Judgment or Recusal would be premature in his case.

Mr. Bishop said he did not know if others had time to look at the material but that he felt it was inappropriate to move forward until they had time to gestate over the process and the information provided to them. He said he would be more comfortable making decisions on Recusal and Summary Judgment at the next meeting.

Mr. Miller added that he was in complete agreement with Mr. Bishop. He said he believed when a date is set for the hearings that if there are any motions, that the staff should receive these items at least a week prior so that the Commissioners do not receive these for review when they walk in to the meeting.

Mr. Satre said he understood the concerns of Mr. Bishop and Mr. Miller. Mr. Satre said perhaps it would be good to spend a few minutes on the Motion for Summary Judgment, taking into consideration the fact that no one has had an opportunity to study the documents for any period of time. He said he thought it would be helpful for the Commissioners to understand what that motion was and what the concerns of the staff may be who don't normally deal with the appeals process with that motion before they finalized their discussion on the appeals.

Mr. Orman said a Motion for Summary Judgment is typically filed to get a case dismissed or to

win a case depending on how you want to look at it. A Motion for Summary Judgment is not filed in an appellant situation. The law department reviewed Mr. Twelker's file as briefing. Typically in an appeal there are points on appeal filed by the individual, and a scheduling hearing and briefing.

Mr. Orman had set hearing dates for the appeal. He set November 12, 2013 for the appeal hearing date.

Below are current dates developed by Mr. Orman with the assistance of staff that can be adjusted somewhat by staff with the exception of the appeal hearing to fit the participants' schedules:

HEARING - MOTION	COMMENT	DATE
Twelker Hearing Appeal Date		11/12/13
Motion to Intervene	Last day to be filed	09/16/13
Submission of the record by CDD	Record and all materials by CDD	09/24/13
Briefing Due	Mr. Twelker	10/01/13
Objections to the record, or motions to supplement the record		10/07/13
Responses to objections to the record or motions to supplement the record	Mr. Spitzfaden not available	10/11/13
CDD and Intervener Brief Due	In response to Mr. Twelker	10/15/13

Mr. Orman said it may be helpful to have a motion deadline period on all of this. There could be a general motion deadline of October 18. Perhaps no more motions at all by October 18 might make a lot of sense.

Mr. Satre asked if that would defer any response they have to the motions they have in their packets this evening to after that time, or would they be obligated to take them up prior to that date.

Mr. Orman said that usually courts have a timeline where they receive a motion and they are timed to respond. In trial courts they are dictated by rules of procedure as to when they respond. Mr. Orman said a general motion deadline should fit the Planning Commission's schedule.

Mr. Satre said then it would be appropriate to take up those motions at their meetings in a timely fashion and following the correct procedure regarding the timing of the motions.

Mr. Twelker said on his Motion to Recuse Ms. Camery and Mr. Lyman in this matter that it is not his intent to make this a formal motion. He says he would withdraw that Motion to Recuse. Mr. Twelker said the schedule gave him way more time than was necessary.

Under questioning from Mr. Satre, Mr. Twelker said that he considers his Motion for Summary Judgment to be his complete brief. He said in this motion he has taken as true all the facts the City has alleged so there should not even be a need for a hearing.

Mr. Satre said perhaps the process could be expedited after hearing Mr. Twelker's explanation of his brief.

Mr. Twelker added that he will be gone from October 25, on.

Robert Spitzfaden , the attorney representing Mr. Comstock, communicated telephonically with the Commission and verified dates. He requested ten working days from once the record was finalized in which to respond. If the final hearing appeal date were accelerated to October 22, that should not be a problem, he said.

He said he did have a problem with October 11, as a date for responding to any motions or supplementing the record as he had a conflict with that date.

Mr. Comstock said that late October is not a good time for him due to his business travel. He said basically Mr. Twelker is trying to go back and litigate this before he (Mr. Comstock) even bought the property. He said he followed directions by the City and followed every guideline that he was told to do.

Mr. Satre said the most important thing the Commission needs to be aware of is the final hearing date. He said there will be some leeway within the dates they have set out to move those dates to fit within everyone's schedules. They can allow staff leeway to see that the times fit within everyone's schedules.

MOTION: *Mr. Watson moved to set 11/12/13 as the hearing date for this appeal and asked for unanimous consent.*

The above motion passed by unanimous consent.

III. **OTHER BUSINESS** - None

IV. **REPORT OF REGULAR AND SPECIAL COMMITTEES** - None

V. **ADJOURNMENT**

The special meeting was adjourned at 7:00 p.m.