

MUNICIPALITY OF ANCHORAGE

ANCHORAGE ASSEMBLY

Minutes for Special Meeting of June 5, 2001

1. CALL TO ORDER:

The meeting was convened at 4:00 p.m. by Assembly Chairman Dick Traini in the Assembly Chambers, 3600 Denali, Anchorage, Alaska.

2. ROLL CALL:

Present: Dan Sullivan, Dick Traini, Pat Abney, Dan Kendall, Fay Von Gemmingen, Anna Fairclough, Melinda Taylor, Doug Van Etten, Cheryl Clementson.

Absent: Allan Tesche, Dick Tremaine. (excused)

3. BOARD OF ADJUSTMENT/ASSEMBLY APPEALS:

A. Appeal S-10625, Eagle Crossing Subdivision, Clerk's Office.
(POSTPONED FROM 4-24-01 AND 5-15-01; CONTINUED FROM 5-22-01)

Ms. Fairclough moved, to postpone S-10625 to 4:00 p.m. on June 19, 2001.
seconded by Mr. Sullivan

Ms. Fairclough expressed concern that Mr. Van Etten and Ms. Clementson had not yet arrived, leaving only eight Assemblymembers to hear this appeal, given the absence of Mr. Tremaine.

(Clerk's Note: Mr. Tesche was excused from this case due to a conflict of interest. See May 22, 2001special meeting minutes.)

Ms. Von Gemmingen did not support postponement of this item, which had been delayed previously. She felt the review of this appeal was moving too slowly and suggested that a longer period of time than one hour be allotted to consider the full appeal.

Mr. Sullivan moved, to amend the motion to postpone for ten minutes in order to allow
seconded by Ms. Taylor time for Ms. Clementson and Mr. Van Etten to arrive.
and it passed without objection

Chair Traini called an at-ease pending the arrival of Ms. Clementson and Mr. Van Etten.

Mr. Van Etten arrived at 4:06 p.m. and Ms. Clementson arrived at 4:10 p.m.

The meeting reconvened at 4:15 p.m.

Ms. Fairclough expressed her concern with considering this appeal at this time, given the absence of Mr. Tremaine and the fact that six affirmative votes would be required in order to remand the case. She believed the appellants would be disadvantaged by a body of nine members rather than ten considering the appeal.

Ms. Taylor agreed with Ms. Fairclough's concerns, as well as the comments made by Ms. Von Gemmingen that it was unfair to both the appellant and petitioner in case S-10625 to hear the appeal points in a piecemeal fashion. She felt it would be prudent to allot sufficient time to hear the full appeal.

Ms. Fairclough moved, to postpone S-10625 to June 19, 2001 from 2:00 p.m. to 4:45 p.m.
seconded by Mr. Van Etten at the Assembly Chambers

Ms. Taylor suggested beginning the Special Meeting at 1:00 p.m. in order to allow sufficient time to hear the appeal in S-10625. This was accepted as a friendly amendment.

Mr. Kendall felt it was not possible to guarantee all Assemblymembers would be present at a Special Meeting on June 19, 2001 and, therefore, supported continuing with the appeal at this time. He noted the body could, as the Board of Adjustment, reconsider any point of this appeal until the findings of fact on the case were completed.

Ms. Clementson believed a postponement to June 19, 2001 was too lengthy and that the matter should be considered at this meeting. She inquired whether there might be an earlier date to hear this appeal. Ms. Fairclough agreed with hearing this matter at an earlier date. Noting that counsel had advised the Board of Adjustment to be specific as to the points of appeal, she asked whether it would be disadvantageous to either party for different members of the Board to be present to consider different points of the appeal.

Counsel Sally Kucko replied there were sufficient members to proceed on the appeal at this time. She explained the record must be clear in terms of findings so that, should the decision of the Board be appealed, the reviewing court could understand the thinking behind a particular decision.

Ms. Fairclough asked whether either party would be given greater credibility if a vote of six was required for any motion to prevail and the motion failed on a vote of 5:4. Ms. Kucko responded that, from a legal standpoint, the Board of Adjustment

could proceed with considering this matter. In terms of unfairness to the appellant, she stated there would certainly be a perceived unfairness because six votes out of ten would be required for the appeal to prevail, in any case, and given Mr. Tesche's conflict and Mr. Tremaine's absence, six votes out of nine would be required. However, she noted the code could address this situation, if it was in fact problematic, yet the code does not address it.

Question was called on the motion to postpone and it failed:

AYES: Sullivan, Von Gemmingen, Kendall, Clementson.

NAYS: Fairclough, Taylor, Van Etten, Traini, Shamberg.

Chair Traini gave the history of action on this appeal.

Ms. Von Gemmingen asked legal counsel to advise as to what constituted a quorum. Ms. Kucko explained the code required a majority vote of the fully constituted Board, which would be ten despite Mr. Tremaine's absence, to constitute a quorum.

Chair Traini explained the fourth issue on appeal before the Board was site plan approval without determining if 15 percent of the site was usable open space.

Ms. Von Gemmingen moved, to remand to the Platting Board issue #4, determining if 15 percent of the site was usable open space.
seconded by Mr. Van Etten

Ms. Von Gemmingen felt the petitioner had not proved 15 percent of the site was left as usable open space. She felt this was critical to the entire case and that proof in this regard should have been presented to the Platting Board.

Mr. Kendall referred to page 560 of the appeal documentation, a conversation between Platting Board Member Barrier and Mr. Brown and Mr. Gamel. He read this conversation into the record, noting that Mr. Brown indicated a tremendous amount of usable open space had been provided, although a calculation of the amount had not been made. Mr. Kendall also referred to page 570, a conversation between Platting Board Member Deak and Staff member Margaret O'Brien in which Ms. O'Brien indicated the petitioner's calculations were that 53 percent of the site was being left as open space and that the usable open space requirement could be met; further that the site plan could be conditioned to verify that 15 percent of usable open space existed. Mr. Kendall noted Platting Board condition of approval 8 stated, "Verifying that 15 percent of the open space is usable open space as defined under AMC 21.35."

Ms. Fairclough referred to page 537, Mr. Gamel's testimony, and noted that, while open space was mentioned several times, usable open space was not mentioned. She stated there was always a contention between the community, Platting, Planning and Zoning as to the definition of usable open space. She commented that the Assembly's minutes also show there was a conflict between how the Assembly, Platting Board, Planning and Zoning, and Staff would define usable open space. She next referred to page 554, testimony from Mr. Steiner, the Chair of the Eagle River Valley Community Council, in which he stated that 15 percent of the open space must be usable in a cluster development and that the Council did not believe that had been documented to exist in the plat. On page 561, Mr. Brown's testimony states the petitioner would have to prove 15 percent usable open space existed. On page 570, Ms. O'Brien's testimony refers to open space, but notes that usable open space was not calculated. Ms. Fairclough stated the bottom line in this issue was whether or not wetlands were usable open space. She felt that matter should be remanded back to the Platting Board.

Mr. Kendall noted that AMC 21.35.020 defines open space and usable open space. He stated wetlands were included in the calculation of open space and he believed, if there was an intention to exclude them, the definition of usable open space would so provide. He noted that 15 percent of the total site was 31.6 acres. Ms. Fairclough clarified these were Mr. Kendall's personal comments, not language included in the code. Mr. Kendall felt the code allowed an array of uses on usable open space, noting that wetlands could be usable in terms of viewing wildlife and habitat in the summer and for cross-country skiing during winter. Ms. Fairclough read the intent of cluster housing development as contained in AMC 21.50.210, specifically subsection 'g', which indicates "conservation wetlands maintained as open space under 21.05.015 are included in computation of open space provided toward this requirement." She felt the Assembly must decide whether wetlands were or were not included in usable open space. She believed wetlands were included in the calculation of the overall 30 percent open space requirement, but not in the calculation of usable open space. She felt the code language indicated this by including reference to wetlands in the section dealing with open space, but not in the section dealing with usable open space. Mr. Kendall stated the Assembly could change the definition of usable open space by introducing an ordinance and changing the code, but absent that, the authority to address cluster housing development lay with the Platting Board. Ms. Fairclough stated the Board of Adjustment could decide whether or not wetlands were included in the calculation of usable open space and could remand this matter back to the Platting Board for that consideration.

Ms. Fairclough moved, to amend to include that wetlands should not be allowed in the computation of open space.
seconded by Ms. Von Gemmingen

Ms. Clementson voiced concern that individual issues under appeal in this case were not being treated fairly. She stated the Assembly must adhere to the code as it was written and the opportunity to address other issues existed at the time the Assembly considered the rezoning of this property.

Ms. Fairclough asked counsel to advise the Board whether the Assembly could clarify through the code what classification of wetlands could be included in open space calculations. Ms. Kucko replied the Board could not receive additional information to consider. She noted there was a definition of open space and of usable open space before the Board and the Board must make a determination how it wished to construe those code provisions, or remand the matter to the Platting Board to make a decision how to construe those definitions.

Ms. Fairclough noted AMC 21.05.115.B.2 indicated the provisions of 21.80.100 through 21.80.110 may be applied to plats showing development of wetlands designated "A" under the plan where a fee simple acquisition is required by the plan. She

believed this meant only “A” wetlands could be considered in the calculation of open space. She indicated the applicant had not provided information with regard to the types of wetlands on the site and their amounts.

Mr. Sullivan stated the code specifically states that roadway and parking were excluded from calculations of open space. He believed, had the intent been to exclude wetlands, it would have been so stated. He believed condition 8 recommended by the Platting Board sufficiently addressed the issue of proving the existence of 15 percent usable open space.

Ms. Fairclough remarked that the code also did not specifically exclude 50 percent slopes, but she questioned whether the intent of the law was to then include 50 percent slopes.

Mr. Sullivan reiterated it was his belief that the code did not preclude inclusion of wetlands in the calculation of usable open space.

Ms. Fairclough believed AMC 21.50.210.G.1 *Common area* did not allow inclusion of 50 percent slopes.

Ms. Von Gemmingen noted that the Platting Board conditioned the approval of the site plan on verification that the 15 percent usable open space requirement had been met. She felt that verification should have been provided when the case came before the Platting Board. Because of that, she supported remand of this item to the Platting Board.

Question was called on the motion to amend and it failed:

AYES: Fairclough, Taylor, Van Etten, Shamberg.

NAYS: Sullivan, Von Gemmingen, Traini, Kendall, Clementson.

Question was called on the motion to remand issue #4 to the Platting Board and it failed:

AYES: Fairclough, Von Gemmingen, Taylor, Van Etten, Shamberg.

NAYS: Sullivan, Traini, Kendall, Clementson.

Chair Traini explained the fifth issue before the Board was a variance from slope chart made without required findings being made.

Ms. Clementson moved, to affirm the decision of the Platting Board in issue #5 that a variance
seconded by Ms. Fairclough from slope chart was made without required findings being made.

Ms. Clementson understood the concerns of the appellant that the variance approved was not the minimum; however, page 150 of the appeal documentation begins pages of slope calculations, proving that slope had been calculated. She believed Staff had reviewed the variance request in the context of that information.

Ms. Fairclough spoke against the motion, referring to page 464 and noting the variance was based on maps with which she and Ms. Clementson had some concern. She cited Platting Board finding of facts 64 and 66 and noted the applicant had used Exhibit B, which had been approved by the Assembly on a vote of 6:5.

Ms. Kucko noted there were three sub-issues involved in this decision: 1) alleged procedural error and error in the application of law, that is, the Board did not make the finding required by AMC 21.15.010.A; 2) that finding of fact 64 was not supported by the evidence; and 3) that finding of fact 66 was not supported by the evidence.

Ms. Fairclough addressed finding of fact 64, citing page 464 of the appeal documentation in which Commissioner Hodel indicated the Planning and Zoning Commission recognized the need to protect the slopes affected and that slopes of 25 percent slope were an issue. He also recommended that the Assembly set a higher than normal standard for any changes to the Commission’s decision. At the Assembly meeting, Mr. Sullivan moved and it was seconded by Mr. Kendall to impose a lesser restriction than the Commission had forwarded to the Assembly. Ms. Fairclough further cited the content of the appeal documentation that stated, “notwithstanding, Exhibit B shows secondary access for the purposes of development at Eagle River Lane. Secondary access at that location is neither a requirement nor a statement of intent of the ordinance.”

Chair Traini indicated the meeting would have to adjourn. Mr. Kendall asked that this item be dealt with at the end of the regular meeting, if time allowed.

5. ADJOURNMENT:

The meeting adjourned at 5:00 p.m.

(Clerk’s Note: The Assembly addressed the appeal further at a Special Meeting on June 18, 2001 in City Hall.)

Chairman Dick Traini

ATTEST:

Municipal Clerk

Date Minutes Approved: _____, 2001

VMC:kds