

MUNICIPALITY OF ANCHORAGE
ANCHORAGE ASSEMBLY

Assembly Conference Room
First Floor, City Hall

Minutes for Special Meeting of February 8, 2008

1. CALL TO ORDER

The Special Assembly Meeting was convened by Acting Chair Ossiander at 2:00 p.m. in the Assembly Conference Room, Room 155, First Floor, City Hall, 632 West 6th Avenue in Anchorage, Alaska.

2. ROLL CALL A Quorum was achieved with Assemblymembers present.

PRESENT: Allan Tesche, Dick Traini, Dan Sullivan, William Starr, Debbie Ossiander, Chris Birch, Paul Bauer, Sheila Selkregg and Matt Claman (*participating telephonically*).

ABSENT: Dan Coffey and Jennifer Johnston, each as an excused absence.

Also present were Municipal Attorney Jim Reeves, Planning Director Tom Nelson, Assistant Municipal Attorney Bob Owens, Municipal Clerk Barbara Gruenstein, Assembly Counsel Julia Tucker and Municipal Manager Michael Abbott.

3. PLEDGE OF ALLEGIANCE None.

4. ITEM OF BUSINESS

4.A. Updating Assembly on content and impact of the decision of the Superior Court in the **Stuart v. MOA** (Wal-Mart Rezone).

Acting Chair Ossiander stated that the Special Meeting was to present an update on content and impact of the Superior Court decision in the Stuart vs. the Municipality of Anchorage, concerning the Wal-Mart rezone. She requested that Mr. Tesche explain his current status with Wal-Mart.

Mr. Tesche stated that at the time that the rezone first came before the Assembly he had disclosed that he was an employee of the law firm which represented Wal-Mart employees in workman compensation cases. The Assembly found that the conflict was substantial and he had been excused from further participation. Now, he was no longer employed by his law firm, had no financial ties or contractual obligations with the law firm and had no financial ties or interest in Wal-Mart.

Acting Chair Ossiander called for discussion on Mr. Tesche's current situation.

To Mr. Bauer, Mr. Tesche responded that his retirement was through the American Bar Association, which was a separate third-party and the law firm was not involved. He had no continuing or future obligation.

Acting Chair Ossiander ruled that Mr. Tesche's conflict of interest no longer existed and she ordered that he participate in the matter. There were no objections.

Acting Chair Ossiander reported that Mr. Coffey had voluntarily not attended the Special Meeting that day.

Mr. Tesche disclosed that within the last 24 hours he had had a conversation with Mr. Coffey about procedural matters that would be considered at the Special Meeting. He requested a ruling from the Assembly on whether that contact was appropriate.

Acting Chair Ossiander stated the Court felt that Mr. Coffey had had a significant financial interest and a conflict with the rezone. The Court had not ruled and had not had an opinion on Mr. Coffey's participation in rules of procedures of the Assembly or in general matters outside of the specific rezone discussion. She ruled that Mr. Tesche's report was not inappropriate and that it did not need consideration. Municipal Attorney Jim Reeves concurred.

Mr. Birch reported that Mayor Begich had been instrumental in negotiations of the Wal-Mart matter. Mr. Reeves responded that he and Assistant Municipal Attorney Bob Owens were present to respond to the Assembly's questions on the litigation matter and Mayor Begich's presence was not essential.

Mr. Traini stated that when the matter was previously before the Assembly his motion to send it back to the Planning and Zoning Commission (P&Z) was defeated. The matter still needed to be reviewed by P&Z.

Mr. Owens stated the purpose of the Special Meeting was to discuss the status of the Superior Court opinion and where the ordinance was, procedurally. There would be no discussion on the ordinance itself and the discussion would be limited to the opinion of the Court, which invalidated AO 2006-104(S), pertaining to the Wal-Mart application for rezone. The Court concluded that Mr. Coffey had had a conflict of interest that could not be waived, so his participation in the discussion and the vote was inappropriate. The Court also concluded there were procedural

shortcomings with what was referred to as the Wood Amendment, involving how many times an ordinance could be continued without final action. There was the question of the ordinance being remanded to P&Z. The Assembly had four choices, including approving the ordinance as originally submitted; denying the ordinance as originally submitted; (approving after) modifying the ordinance so long as it was as restrictive as the restrictions recommended by P&Z, or; remanding the ordinance to P&Z. Because P&Z had denied the application, the Court considered it improper for the Assembly to modify the original application without remanding it to P&Z.

Mr. Birch stated that with the Public Hearing process the Assembly could take deliberate action. It was not reasonable or consistent to hold Public Hearing and then prohibit the Assembly from making changes. Mr. Owens responded the Court's decision was because the rezone had been not recommended by P&Z. If there were changes, the ordinance would go back to P&Z. If there was a P&Z recommendation of approval, modifications could be made as long as they were at least as restrictive as what was recommended. Mr. Birch stated that was unreasonable. P&Z was delegated their authority through the Assembly. Mr. Owens responded there may be a Charter provision that addressed P&Z requirements. Mr. Reeves responded the relationship between P&Z and the Assembly was treated differently than other boards or commission.

Planning Director Tom Nelson stated that Assembly rezoning actions were legislative actions and P&Z acted in an advisory capacity to the Assembly. Mr. Birch responded the Assembly could do a rezone without advisory involvement. Mr. Nelson responded the Assembly had established its own procedures and the issue was whether the Assembly followed what had been established in AMC 21.20.120.

Mr. Tesche stated that the Court based their decision on the law that existed at the time. The Assembly passed and could change Title 21, which set out rules and procedures governing advice that the Assembly receives from P&Z. The Court questioned whether or not Assembly action comported with those rules and procedures.

Mr. Sullivan stated the Court had described P&Z as advisory on land use recommendations. The Court found that if P&Z recommended not approving a rezone, an applicant could request the Assembly to consider amending the zoning map, which the Assembly had approved by a vote of eight. The Assembly procedure had been appropriate.

Dr. Selkregg stated the judge's decision was that the Assembly had not acted on the ordinance, but had created a substitute version (S-version), which was substantially different from what had come from P&Z. Mr. Owens responded the S-version was a key factor and the judge had concluded it was different from what had been before P&Z. The modified ordinance should have been remanded to P&Z. Dr. Selkregg stated that perhaps the judge had viewed the ordinance as well-intended, but it had not followed process and not met expectations of the law. Acting Chair Ossiander responded there had been Public Hearing, the document had been distributed, a worksession had been held and P&Z had been asked to come and informally meet with the Assembly, but it was not a specific remand. Mr. Traini responded the original version had been manifestly changed and the S-version should have been remanded. Dr. Selkregg stated it should have gone back to P&Z, for a review according to the new big box (store) site (plan) review. Mr. Nelson responded P&Z would submit a concept plan for the development. There was not a direct connection between that concept plan and the zoning action, because the applicant would still need to go through a large retail site plan review, before P&Z.

Acting Chair Ossiander stated that exclusionary language "notwithstanding the provisions ..." could have been added and the matter would not have to go back (to P&Z). Mr. Reeves responded that the Assembly probably had the power to do that. The judgment was uncertain. The judge had viewed the matter as debatable.

Mr. Traini stated that sending it to P&Z for Public Hearing was not required when including exclusionary language "notwithstanding the provisions..." The ordinance had not included that language. P&Z made a decision, it went to the Assembly, which held Public Hearing and took action on it, and the matter did not go back to P&Z. That was the difference between the two processes.

Mr. Sullivan stated the exclusionary language involved the question whether or not the Assembly could change things on an ordinance being considered. Once an ordinance was before the Assembly, the Assembly had the opportunity to make changes or introduce an S-version, as long as it complied with the title. He urged following up with the judge, because the procedures had been followed.

Dr. Selkregg stated that the Assembly approved the Dena'ina Convention Center which included many related projects and did not go through the typical review process of P&Z. Mr. Nelson responded that instance was not relevant to the case being considered.

Mr. Tesche stated there were four options for Assembly consideration. First was the use of exclusionary language, "notwithstanding the provisions..." The Assembly could hold a new Public Hearing on the S-version and take up discussion and action. Technically, that issue had not been litigated by the Superior Court and he recommended against using that option. There were three other options. The Assembly had 30 days to file an appeal to the Superior Court opinion, following a final judgment being entered in the case. The Assembly could consider telling the applicant that the matter would be set for further consideration by the Assembly, but only on the original ordinance as submitted and not the S-version. The last and safest option would be to allow the ordinance to become invalid and if Wal-Mart or another applicant wanted to proceed with rezoning, a process could begin with a new application.

To Mr. Tesche, Mr. Reeves responded that a motion for reconsideration needed to be filed by February 14th. A 30-day time period for (filing an) appeal would not start until a final judgment was entered in the case.

Acting Chair Ossiander stated the purpose of the Special Meeting was for discussion and understanding on the implementation of the Court decision.

To Mr. Starr, Mr. Reeves responded that using exclusionary "notwithstanding provisions..." language was an issue being weighed by the judge. The Assembly followed that procedure from time to time as a way of attempting to establish what they were doing as an exception to a practice that was normally followed. Mr. Owens responded that

1 because P&Z had denied the ordinance, AMC 21.20.120 did not apply, according to the Court. The section laid out
2 the options the Assembly had. When P&Z made a negative recommendation the only option was to approve as
3 submitted or remand it back to P&Z. There were no options for making changes. That was the judge's ruling.
4

5 Mr. Sullivan stated that the judge had included (*Assembly*) options when there was a disapproval recommendation.
6 The zoning map could be approved, as submitted; be approved with changes, but such changes must be at least as
7 restrictive as recommended (*by P&Z*); be disapproved, or; be remanded (*back to P&Z*).
8

9 To Mr. Starr, Mr. Owens responded the provisions did not address 'at least as restrictive as' on P&Z reconsiderations.
10 Mr. Nelson responded that provisions on negative appeals were lacking. The purpose of the Special Meeting was to
11 discuss the matter and solicit input on whether the city sought reconsideration or appeal. The deadline for filing a
12 motion for reconsideration was February 14th. An appeal could be filed after the final judgment was entered.
13

14 Mr. Birch stated this involved real impacts affecting the property owner and their investments. Barbara Kraft,
15 representing Wal-Mart, responded that Wal-Mart was the property owner and wanted to develop their property and
16 construct a store in that location.
17

18 Mr. Sullivan stated that P&Z recommended denial and the applicant had submitted the application separately through
19 the process, which meant there should be four options available to the Assembly, not just two. Mr. Nelson responded
20 the judge wanted Assembly action to be at least as restrictive as that recommended by P&Z. It could not be more
21 restrictive than what was submitted by the commission. Mr. Sullivan stated that AMC 21.20.120 allowed four options
22 for action if an applicant submitted an application to the Assembly after a P&Z recommendation of disapproval. The
23 document (*judge's opinion*) showed a direct contradiction.
24

25 Acting Chair Ossiander stated that if potential litigation was to be discussed they would have to go into Executive
26 Session. Mr. Reeves responded that anything he would say would not be deemed confidential or sensitive.
27

28 Mr. Traini requested to know how much money and time the plaintiff had spent and where this case was headed.
29 There had been many cases like this during the Wuerch Administration and the costs had escalated.
30

31	Mr. Tesche moved,	to allow the Department of Law full authority, as it sees fit, to
32	Mr. Sullivan seconded,	pursue a motion for reconsideration, as appropriate. Once
33	and later this was ruled out of order.	filed, the Assembly Chair could set up an Executive Session
34		to discuss the matter with the Department of Law.;
35		

36 Acting Chair Ossiander questioned what discussion could be legally included or excluded.
37

38 Mr. Traini stated that the reason for the Special Meeting involved the content and impact of the decision of the
39 Superior Court. The Assembly could not move to take action on anything. Mr. Reeves responded the Assembly was
40 the best judge of its own business. He concurred with Mr. Traini.
41

42 Acting Chair Ossiander ruled that the motion was out of order. She called for additional discussion.
43

44 Dr. Selkregg stated there were two issues of concern with this case, one procedural and one that Mr. Coffey should
45 not have voted on the matter. It was extremely complex.
46

47 To Mr. Sullivan, Mr. Owens responded that the key case that was argued in the proceedings involved the Homer City
48 Council and a potential conflict of interest issue on a similar rezoning ordinance. The Superior Court had two different
49 decisions on the same matter, involving *Griswold I vs. City of Homer* and *Griswold II vs. City of Homer*. The Court
50 addressed the merits and requirements of the ordinance, notwithstanding the action of the Assembly. The Superior
51 Court had the ability to interpret Code. The judge had concluded that Code contained definitions of a "significant
52 financial interest," with three exceptions to the general rule. When the Assembly voted that Mr. Coffey had no
53 significant financial interest, it failed to articulate which of the three exceptions applied. Mr. Reeves responded that
54 there could be an argument that the Assembly had passed the matter and were sophisticated people who understood
55 and knew a lot more about the case than the judge. The Assembly had applied their law and passed the ordinance
56 and their judgment and action should not be second-guessed. The judge had responded by saying if the record
57 showed that the Assembly had made an intricate analysis and had applied each section of the Code, she may be
58 inclined to be deferential. The record indicated that the Assembly had not done that. Mr. Nelson responded a new
59 rezoning petition would have to go through the process with P&Z. The petitioner could move forward where the
60 application was last left off, to save time.
61

62 Mr. Birch stated that the timeliest way to deal with the matter was for the Assembly to reconsider the rezone,
63 addressing the shortcomings as outlined by Judge Gleason. Mr. Nelson responded the question on the procedures
64 would be whether or not the Assembly wanted to change any of its procedures of rezoning. Mr. Birch stated that he
65 had been satisfied with the process and the result. He supported finding the most appropriate routing to solve the
66 matter in an expeditious manner. Mr. Nelson responded that Wal-Mart needed to be involved in the decision.
67

68 To Mr. Starr, Acting Chair Ossiander responded that the Assembly had a legal decision concerning Mr. Coffey's
69 significant financial conflict of interest in the Wal-Mart rezone. Mr. Coffey could participate with any procedural
70 discussions of the Assembly and could have attended the Special Meeting that day, but he had chosen not to.
71

72 To Mr. Starr, Acting Chair Ossiander responded that an Executive Session could not be called that day because of
73 how the meeting was (*publicly*) noticed. Mr. Reeves responded that the Special Meeting was to discuss the content
74 and impact of the court decision. Ms. Ossiander responded that a motion to hold an Executive Session could be made
75 at the next Assembly Meeting. Mr. Reeves concurred and stated the Department of Law had authority to make
76 decision on appeals or reconsiderations without specific Assembly direction. They would receive all recommendations
77 on motions to appeal or reconsider.
78

To Mr. Claman, Mr. Reeves responded the Municipality was named defendant in the case.

To Mr. Tesche, Mr. Reeves responded the Department of Law could file a request for reconsideration by Thursday's deadline. Mr. Owens was considering all information and evaluating all options. Mr. Owens responded the information from the Assembly had been helpful. Mr. Tesche requested that Mr. Owens contact the Assembly Chair to set up an Executive Session to discuss the matter with the Assembly once the time was determined for filing a motion.

Mr. Traini stated that the Assembly had the authority to set an Executive Session for the following Tuesday afternoon.

Dr. Selkregg stated there were two sides. The applicant and the owners of the property had spent a lot of money. But, there was also a neighborhood that was angry enough to bring the lawsuit. If the community thought the Assembly was adjusting things for the applicant, the Assembly would be in trouble.

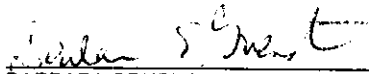
Mr. Tesche stated the Code changed from the time the rezone was last considered. The Court's decision was under the old Code. Before the Assembly discussed this again on the record, including Mr. Coffey's participation, the Assembly needed the advice from the Department of Law as to which standards and procedures were to be followed.

Mr. Birch stated the plaintiff, Walter Stuart, was not a resident of the district and did not live near Wal-Mart. He was the president of the union that was not engaged by Wal-Mart. This was a union issue and not a neighborhood issue.

5. ADJOURNMENT Acting Chair Ossiander adjourned the meeting at 3:30 p.m.


DEBBIE OSSIANDER, Acting Assembly Chair

ATTEST:


BARBARA GRUENSTEIN, Municipal Clerk
Date Minutes Approved: April 15, 2008
MC/BG

(Approved Meeting Minutes can be viewed online on the Municipal Web Site, www.muni.org~Assembly~Minutes~year~month/day or copies are available from the Municipal Clerk's Office, 632 West 6th Avenue, Suite 250, Anchorage, Alaska, (907)343-4505)