



February 26, 2016

Final Investigative Report Concerning Ombudsman Complaint 2015-1244

COMPLAINT

An individual contacted the Ombudsman's Office alleging that a draft resolution of the Municipal Planning and Zoning Commission (Commission) posted on muni.org with the November 2, 2015 Commission meeting agenda would not open, and was marked "confidential". She believes that the draft resolution was a public document that should not have been withheld from the public. She believes that this is contrary to Municipal Code. She further alleged that the resolution, adopted by the Commission on November 2, 2015, was not signed and available to the public until November 10, 2015. She believed that the twenty day clock to file an appeal of Commission decisions to the Board of Adjustment starts when resolutions are adopted, not signed. In this instance, the individual alleges that the resolution was not available to the public until after eight days of the twenty day appeal timeframe had elapsed.

NOTE: This complaint involves actions of the Municipal Planning and Zoning Commission. The Ombudsman recognizes that members of the Municipal Planning Department Staff are responsible for drafting resolutions on behalf of the Commission, and posting Commission agendas and other documents.

FINDINGS

The complaint against the Municipality of Anchorage, Planning and Zoning Commission that the Commission's draft resolution 2015-041 was not made available to the public is **JUSTIFIED**. The complaint alleging that the resolution, adopted by the Commission on November 2, 2015, was not available to the public until after eight days of the twenty day appeal timeframe had elapsed is **NOT SUPPORTED**.

ANALYSIS AND CONCLUSIONS

The complainant contacted the Ombudsman's Office on November 6, 2015. She alleged that it is the practice of the Municipal Planning and Zoning Commission to withhold draft Commission resolutions from the public until they are adopted by the Commission, and signed by the Chair and Secretary (Planning Director). She believes that the draft resolutions are public documents that should be available to the public. She believes that withholding the documents is contrary to Municipal Code. She further alleged that draft Commission Resolution 2015-041, Case 2015-0057, although adopted at the November 2nd Commission meeting, was not signed and made available to the public until November 10th, eight days into the statutory twenty day timeframe

to appeal the Commission's decision to the Board of Adjustment. The complainant believes that this circumvents the public process, and negatively impacts the filing of appeals.

The Ombudsman reviewed the Commission's page on muni.org, and verified that draft resolutions, although listed on the posted agendas, are not available to the public. When the public clicks on draft resolutions listed on the agendas, instead of the document being available to view under "Supporting Materials", a message appears that reads "One or more files are marked confidential and are hidden." The Ombudsman spoke with the Manager of the Current Planning Division, who confirmed that it is the policy of the Commission and Planning Staff to not make draft Commission resolutions available to the public. They are made available and posted online after they are adopted by the Commission, and signed by the Chair and Secretary (Planning Director). The Manager noted that the draft documents are not made available to the public until after they are adopted and signed because they might not accurately capture the intent and desires of the Commissioners, and could generate lobbying of Commissioners based on incorrect information. She also noted that the public has no opportunity to comment or testify when the draft resolutions are before the body for approval.

During his review of this complaint the Ombudsman reviewed AMC Chapter 1.25 – PUBLIC MEETINGS, AMC Title 4 - BOARDS AND COMMISSIONS, AMC Chapter 3.90 – ACCESS TO PUBLIC RECORDS, and the relevant chapters of Title 21 (AMC 21.10.005-Old Code and AMC 21.02.050-New Code) pertaining to the Commission.

AMC 1.25.015 – Notice of meetings, requires that "A. Pursuant to AS 44.62.310(e), reasonable notice of meetings of the assembly, school board, all regulatory and adjudicatory boards and commissions listed in Chapter 4.40, the election commission, the Anchorage Community Development Authority board of directors, the Alaska Center for the Performing Arts board of directors, and any other municipal bodies with authority for spending, policy, regulation or adjudication, not including community councils, shall be announced as defined in the definition of the term "announcement" in section 1.25.005 as follows:

1. Regular meetings shall, in addition to other advertising requirements of this Code, be announced using one or more of the methods described in the definition of the term "Announcement" in section 1.25.005, except that the subject may be omitted."

While meetings of the Commission must be publicly noticed, there is no requirement that the Commission publicize/post meeting agendas, or supporting documents for regular meetings. For special meetings, the "subject" of the meeting must be publicized. By publicizing their meeting agendas and supporting documents, the Commission is going above and beyond the requirements of Municipal Code. The Ombudsman applauds the Commission for setting a standard that should be met by all Municipal boards, commissions and other public bodies.

AMC 4.05.130 – Reports, minutes and public hearing records, states that "A board or commission shall keep minutes of the board or commission proceedings, and such minutes shall

record the vote of each member physically present upon every question formally presented to the board or commissions for its consideration. The minutes shall be maintained in the custody of the municipal agency which supplies staff support to the board or commission and shall be a public record, open to inspection by any person.”

If the minutes of the Commission’s meetings are a “public record open to inspection by any person”, the Ombudsman believes that Commission documents referenced in the minutes are also public documents, with a few narrow exceptions, involving attorney-client privilege, confidential business information of applicants, and other exceptions outlined in AMC 3.90.040. Draft Commission resolutions would not generally fall under any of those exceptions.

AMC 3.90.010 – Policy (Access to Public Records) states that “It is the policy of the municipality to provide the fullest and most rapid public access to municipal records and information so that the right of the people to remain informed is protected. In enacting this measure, the assembly recognizes the competing interests of personal privacy and the right of the public to have access to information concerning the conduct of the people's business. This chapter shall therefore be liberally construed to require full disclosure of all public records in the possession or control of any municipal agency, except those specifically exempted under section 3.90.040.”

AMC 3.90.020 – Definitions, states that “The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Document means any method of storing information, including but not limited to spoken words, handwriting, typewriting, printing, photostating, photographing and any other form of communication or reproduction, whether a draft or final copy, upon any medium, including but not limited to paper, magnetic or paper tape, photographic film or prints, magnetic or punched cards, discs, drums and phonographic records.”

It is the stated policy of the Municipality to “provide the fullest and most rapid public access to municipal records and information...” and to liberally construe code to “require full disclosure of all public records...” “Document” as defined in AMC 3.90.020, includes documents “whether a draft or final copy...” Withholding of draft Commission resolutions from the public is contrary to Municipal Code; they are, by definition, public documents.

It is important to note however, that the fact that a “record” is defined to include “draft” documents does not mean they are necessarily “public records.” Established Alaska Supreme Court case law provides an exception for draft documents under which they do *not* have to be released as a public record. This exception is known as the deliberative process privilege and was set forth in Gwich'in Steering Comm. v. State, Office of the Governor, 10 P.3d 572, 578 (Alaska 2000) in which the court stated:

The deliberative process privilege is one of the judicially recognized “state law” exceptions under AS 09.25.120(a)(4). Public officials may assert this privilege and withhold documents when public disclosure would deter the open exchange of opinions and recommendations between government officials. The privilege is intended to protect the executive's decision making process, its consultative functions, and the quality of its decisions.

Gwich'in Steering Comm. v. State, Office of the Governor, 10 P.3d 572, 578 (Alaska 2000).

Although this exception to the release of draft documents does exist, it would not be applicable in this case due to the very public nature of the commission discussions on the exact matters which were contained in the draft resolution.

As to the allegation that Commission Resolution 2015-041 was not made available to the public until eight days of the twenty day timeframe to file an appeal had elapsed, the Ombudsman interviewed Planning Staff and reviewed the audio recording of the November 2nd Commission meeting in determining the validity of the complaint. Based on his inquiry the Ombudsman ascertained that the resolution was adopted by the Commission at their November 2nd meeting, with five additional findings of fact being moved by Commissioner Spring, and incorporated into the final document.

Planning Staff noted that generally Commission resolutions are signed by the Chair the same evening that they are adopted, and that they are generally signed by the Secretary (Planning Director) the same evening, or the next day. Because five additional findings of fact were incorporated into the document when it was adopted, a final draft was not available for signature on November 2nd. The Chair subsequently signed the final document at the Commission's November 9th meeting, and the Secretary signed the next day (November 10th). The complainant made multiple requests for a copy of the final document between when it was adopted, and when it was signed. She was finally provided with a copy on November 10th, which she believed to be eight days into the twenty day timeframe to file an appeal with the Board of Adjustment.

Under AMC 21.03.050A, in order to file an appeal of a decision by the Commission, persons must file with the Municipal Clerk's Office “within 20 days of the date of service of the decision”. Appellants must fill out the form provided by the Clerk's Office, and pay a \$1080.00 appeal fee, and \$50.00 cost bond (both refunded if they prevail before the Board of Adjustment). Appeals may be considered for 1) Procedural Error, 2) Error in Application of Law, and/or 3) Findings or Conclusions that were Not Supported by Evidence.

AMC 21.14.040 defines Date of Service as “The date that the secretary mails or otherwise distributes the summary of action or approved resolution to the applicant.” The Ombudsman was initially informed by Planning staff that the timeframe to file an appeal commenced with

the approval of the resolution by the Commission, and the Commission's agendas state "Appeals must be filed with the Clerk's Office within twenty (20) days after approval by the Planning and Zoning Commission of the resolution which is the Commission's final decision."

Based on the information provided by Planning staff, and the verbiage on Commission agendas, the Ombudsman, in his preliminary report, found the allegation regarding the appeal timeframe to be justified. However, in their comments regarding the preliminary report, provided to the Ombudsman on February 24, 2016, Planning provided the definition of "Date of Service" found in AMC 21.14.040, and noted that the appeal timeframe does not commence until after the secretary "mails or otherwise distributes the summary of action or approved resolution to the applicant." Based on this information, the Ombudsman found the allegation regarding the appeal timeframe for Commission Resolution 2015-041 to be unsupported.

Because draft resolutions of the Planning and Zoning Commission are not made available to the public, and because Anchorage Municipal Code, Chapter 3.90 defines public documents to include those in draft format (subject to certain limitations found in code and case law), and because Commission draft resolutions are not exempt from public information requests under AMC 3.90.040, and because the Planning and Zoning was not meeting in a regulatory or adjudicatory capacity, the Ombudsman finds the complaint that withholding draft Commission resolutions from the public is contrary to Municipal Code to be JUSTIFIED.

Because the twenty day timeframe to appeal decisions of the Commission to the Board of Adjustment starts with the "Date of Service" of a summary of action or approved resolution to the applicant, and because "Date of Service" is defined as "The date that the secretary mails or otherwise distributes the summary of action or approved resolution to the applicant" (AMC 21.14.040), and because a copy of approved Commission Resolution 2015-041 was provided to the complainant the same day that it was distributed to the applicant, the Ombudsman finds the allegation that the Commission's final decision (resolution) was provided to the complainant eight days into the timeframe to file an appeal to be UNSUPPORTED.

Based on the investigation of this case, the Municipal Ombudsman recommends the following:

- 1) That Planning and Zoning Commission draft resolutions be made available to the public, and posted online with the meeting agendas. *Planning concurs with the Ombudsman's determination that draft Commission resolutions are generally public documents; they will be made available to the public. Detailed comments from staff are attached to this report.***
- 2) That the definition of "Date of Service" in Municipal Code, Chapter 21.14.040 be amended to read "The date that the secretary mails or otherwise distributes the summary of action or approved resolution to the applicant, and posts the summary or resolution on Planning's website." Or, that Planning implement a written policy which requires that summaries of action and resolutions be posted on their website the same day that they are distributed to applicants. Implementing either of these options would make it easier for the Municipal**

Clerk's Office, which handles appeals, to know when the 20 day appeal timeframe started.

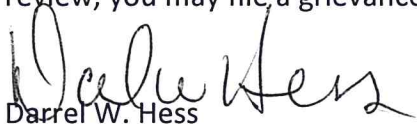
Planning concurs and will address this issue.

3) Change the verbiage on Planning & Zoning Commission agendas to reflect current Municipal Code regarding the 20 day appeal timeframe. *Planning concurs, and will address this issue.*

4) Management review with staff the current code requirements vs. what is articulated on the Commission agendas, to ensure that staff is correctly implementing the code. *Planning concurs and will address this issue.*

Based on these findings and these recommendations, this case is closed.

If you object to the Ombudsman's decision to decline or discontinue this investigation or review, you may file a grievance with the Ombudsman as specified in A.M.C.R. 2.60.006.



Darrel W. Hess

Municipal Ombudsman

Planning's Comments regarding the Preliminary Report for OM 2015-1244

1. Whether or not draft resolutions should be made available to the public.

Your analysis of code is correct, we'll need to make the draft resolutions public. However, there are some concerns about making draft resolutions available to the public since these draft resolutions are staff's attempt to document the commission's reasons for making a particular decision and their conditions placed on a development. While staff does their best to accurately capture what the commission says (they almost always re-listen to the case), sometimes commissioners will want to change or clarify the findings drafted by staff. Also, sometimes a condition placed by the commission is unclear and the commission clarifies their intent. If the draft resolution is publicly available, there is concern that the public, including the petitioner, may attempt to contact commissioners to lobby them for language or other changes, either in the findings or the conditions, that are more favorable to that person's point of view. This kind of *ex parte* contact is illegal.

(On a separate note, Planning recognizes that we need to do a better job of training commissioners that such ex parte contact is illegal—more regular training is needed in this and other basic policies and procedures.)

Additionally, it is always worrisome to have a draft document “out there” (in a situation that doesn't include a public review) as people may make decisions based on the draft, or get the draft confused with the final.

But putting those concerns aside, the analysis of code is correct and without some sort of code change we'll need to make the draft resolutions public. Planning should probably monitor whether or not this changes the number of times resolutions get revised by the commissions (PZC in particular). But unless we see a consistent pattern that indicates a problem, we don't think a code change is warranted.

2. When an adopted resolution is made available and how this relates to the appeal period.

We believe that you have misinterpreted code on this issue, probably due to us giving you bad information on the front end. *AMC 21.03.050.A* says a person must file an appeal “within 20 days of the date of service of the decision.” But when you look at the definition of “date of service” in *AMC 21.14*, it is defined as “the date that the secretary mails or otherwise distributes the summary of action or approved resolution to the applicant.” So, if a commission changes the resolution and it takes 8 days for the staff to make the changes and get the two needed signatures, the appeal period would not start until after those 8 days. ***Based on these comments, the Ombudsman revised his report, and the finding for allegation 2 was changed from JUSTIFIED to UNSUPPORTED.***