

Planning and Zoning Commission

May 6, 2024
Work Session

Case #: **2024-0006**

Case Title: **Title 21 Text Amendments: H.O.M.E.
Initiative**

Agenda Item #: **-----** Supplementary Packet #: **3**



Additional information:

— MOA Legal Opinion Updated

- AO 2023-87(S) constitutes a rezoning;
landowner permission is not required



Other:

Sent by email: **X** yes no



MUNICIPALITY OF ANCHORAGE
Office of the Municipal Attorney
Memorandum

DATE: April 22, 2024 (revised from the January 2, 2024 version)
TO: Craig Lyon, Director of Planning
FROM: Allison P. Bolgiano, Assistant Municipal Attorney *AB*
THRU: Anne R. Helzer, Municipal Attorney *CR for A.H.*
SUBJECT: AO 2023-87(S), the "HOME Initiative," constitutes rezoning; landowner permission is not required to rezone (RFLS 12/4/23)

THE PLANNING DEPARTMENT HAS ELECTED TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE FOR THIS OPINION OF THE OFFICE OF THE MUNICIPAL ATTORNEY BY SHARING THIS OPINION WITH THE PLANNING AND ZONING COMMISSION AS PART OF THE PLANNING DEPARTMENT'S REVIEW OF AO 2023-87(S), THE "HOME INITIATIVE." ACCORDINGLY, THIS OPINION IS PART OF THE PUBLIC RECORD FOR PLANNING AND ZONING COMMISSION CASE 24-0006.

I. Questions Presented

The Planning Department submitted the following questions to the Municipal Attorney's Office in a Request for Legal Services dated December 4, 2023, and requested a written opinion answering them. The Municipal Attorney's Office issued an opinion to the Planning Department on January 2, 2024, and later revised that opinion based on follow-up questions from the Planning Department and new considerations as the legislative process for AO 2023-87 and its S-version progressed. The Planning Department's original questions referred to AO 2023-87; this revised opinion refers to 2023-87(S) for clarity and currentness. The substitute version of the AO did not affect the legal analysis contained here when compared to the original AO.

- a. Does the action of AO 2023-87(S), the "HOME Initiative," meet the definition of a "rezone"?

- b. If AO 2023-87(S), the “HOME Initiative,” constitutes a “rezone,” must this action follow the rezone process of AMC 21.03.160?
- c. Lastly, the Assembly may initiate a rezone per AMC 21.03.160D.1.a, but is landowner permission required per AMC 21.03.020D? Does the Assembly have the legal ability to rezone property without landowner permission?

II. Short Answer

The actions proposed in AO 2023-87(S) qualify as a “rezone” and the procedures of AMC 21.03.160 must be followed before the ordinance can be enacted. The Assembly does not need landowner permission to rezone parcels or rewrite zoning code restricting uses of land because these are legislative acts within the Assembly’s broad authority to pass laws to protect the public health, safety, welfare, and economic vitality. Landowners have the right to provide input during the legislative process, but their approval is not needed for new zoning laws to apply to their parcels.

III. Legal Analysis

a) Does the action of this ordinance meet the definition of a “rezone”?

Yes, the actions in this ordinance qualify as a rezone. Rezoning is “[a]n amendment to the official zoning map¹ to effect a change in the boundaries of any zoning district or the zone classification of any parcel of land in the municipality.”² The AO proposes reducing the number

¹ “The official zoning map designates the location and boundaries of the various zone districts established in this title. It consists of a series of map pages adopted by ordinance and any subsequent amendments in accordance with this title. The official zoning map is incorporated herein by reference and referred to as the ‘zoning map’ in this title. . . . The map shall be the final authority as to the current zoning status of lands, water areas, buildings, and other structures in the municipality.” AMC 21.01.050A. The official zoning map is different from the Anchorage 2040 Land Use Plan Map, Map 2-1, of the Anchorage 2040 Land Use Plan, which is an element of the comprehensive plan.

² AMC 21.15.040 “Rezoning (zoning map amendments)”.

of residential zoning districts in the Anchorage Bowl from fifteen to five.³ In reducing the number of different residential zones by one-third, the zoning classification of many parcels of land in the municipality will, by necessity, change. Additionally, the boundaries of residential zoning districts will change when the number of different residential zones is reduced by two-thirds. Both actions necessitate editing the official zoning map in order to apply the new zoning to parcels and ensure the Municipality has an up-to-date map for identifying the zoning of residential parcels throughout the Anchorage Bowl.⁴ The Municipality cannot go from having a patchwork of fifteen residential zones to a pattern of five residential zoning districts without the boundaries of the zones changing or parcels being reclassified.⁵ Accordingly, the conclusion of the Department of Law is that AO 2023-87(S) calls for rezoning as defined in AMC 21.15.040 and a new official zoning map is required.

b) If AO 2023-87(S) proposes a “rezone,” must this action follow the rezone process of AMC 21.03.160?

Yes, the process found in AMC 21.03.160 must be followed for this rezone. Under AMC 21.01.050, rezoning actions must follow the process set out in AMC 21.03.160. “Changes made in zoning district boundaries or other matters portrayed on the official zoning map shall be made only in accordance with the provisions of Section 21.03.160, Rezoning (Zoning Map Amendments).”⁶ The required procedures for a rezoning, in brief, include public notice, notice to community councils, community meetings, review by the Planning Department in the form of a report on the ordinance to the Planning and Zoning Commission (“the PZC”), a public hearing before the PZC, a written recommendation from the PZC to the Assembly, a public hearing

³ See AO 2023-87(S) at pp. 4, 6, 9.

⁴ See *supra*, n. 1.

⁵ Cf. AMC 21.15.040.

⁶ AMC 21.01.050.

before the Assembly, and finally a vote of the Assembly.⁷ AO 2023-87(S) also proposes amendments to the text of Title 21, the land use code, so the procedures of AMC 21.03.210 must be followed to change the code.⁸ To the extent that the AO proposes zoning changes and regulations inconsistent with Anchorage’s Comprehensive Plan or 2040 Land Use Plan, these plans must be amended first or concurrently following the procedures of AMC 21.03.070.

It is important to note that “[t]he land use review and approval procedures specified in Chapter 21.03, Review and Approval Procedures, *supplement the assembly’s procedures under Title 2.*”⁹ This code provision makes clear that when the Assembly undertakes land use legislation it must follow not only its typical procedures from Title 2 but also those of Chapter 21.03 of the land use code. Furthermore, “Where a board or commission has authority under this title to review and comment on a land use matter, *the assembly shall not take final action* on the matter until it has received and taken notice of the review comments and recommendations of the board or commission.”¹⁰ The PZC has authority under Title 21 to review and make recommendations to the Assembly on rezonings, Title 21 text amendments, and as well as comprehensive plan amendments (among other actions).¹¹ The Assembly, therefore, is prohibited from taking final action on a rezoning, comprehensive plan amendment, or Title 21 Text amendment without first receiving and taking notice of the PZC’s comments and recommendations on the matter.¹²

c) Is landowner permission required per AMC 21.03.020D for the rezone? Does the Assembly have the legal authority to rezone property without landowner permission?

⁷ See AMC 21.03.160 *et seq.*

⁸ AMC 21.03.210A.

⁹ AMC 21.02.090B.1 (emphasis added).

¹⁰ AMC 21.02.090B.2 (emphasis added).

¹¹ See AMC 21.02.030A.

¹² See AMC 21.02.090B.2.

In brief, landowner permission is not required for the Assembly to pass AO 2023-87(S), and AMC 21.03.020D does not apply to rezoning. The power to zone and amend the land use code is a traditional function of local government and is within local governments' broad police powers to legislate for the general health, safety, and welfare of their residents. The United States Supreme Court has held, "[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our [1926] decision in *Village of Euclid v. Ambler Realty Co.*"¹³ Alaska follows the longstanding *Euclid* precedent, holding that a local government not only has the authority to engage in land use planning under the U.S. Constitution but also may restrict the use of land without compensating landowners even when the restrictions reduce property values or preclude owners from using their land for particular purposes.¹⁴ "The Alaska Constitution and state law grant municipalities broad authority to legislate in the public interest, and [Alaska courts] accordingly give a liberal construction to the powers of local government," including their power to regulate land use.¹⁵

Alaska law not only recognizes local governments' authority to pass land use restrictions, but Alaska statute mandates that home rule municipalities, like Anchorage, enact zoning laws. Zoning is a mandatory area-wide power of a home rule municipality under Alaska law. "A home rule borough shall provide for planning, platting, and land use regulation."¹⁶ Per Municipal Code, the Anchorage Assembly is charged with developing a comprehensive plan and

¹³ *Dolan v. City of Tigard*, 512 U.S. 374, 384–85, 114 S. Ct. 2309, 2316, 129 L. Ed. 2d 304 (1994) (citing 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)).

¹⁴ *See Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1297-98 (Alaska 1982) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)).

¹⁵ *Griswold v. Homer Advisory Plan. Comm'n*, 484 P.3d 120, 126 (Alaska 2021).

¹⁶ AS 29.35.180(b). The provisions of Alaska Statutes Chapter 29.35 apply equally to home rule boroughs and unified home rule municipalities even though the law, in places such as AS 29.35.180, refers only to boroughs. *See* AS 29.04.010. ("A home rule municipality is a municipal corporation and political subdivision. It is a city or a borough that has adopted a home rule charter, or it is a unified municipality. A home rule municipality has all legislative powers not prohibited by law or charter.")

implementing it in a manner that “protects the public health, safety, welfare, and economic vitality.”¹⁷ As the code indicates, the Assembly’s authority to enact zoning laws flows from its police power to protect the general welfare.

Accordingly, the Anchorage code also does not require landowner permission to rezone land. AMC 21.03.020D is not applicable in this situation where the Assembly intends to alter the official zoning map and amend the text of Title 21. The reason is that AMC 21.030.020 applies to “to all applications for *development activity* under this title unless otherwise stated,” but rezoning and amending the text of Title 21 are not “development activity.” AMC 21.15.040 defines “Development” as:

The initiation, construction, change, or enlargement of any use or structure, the disturbance of land, or the division of land into two or more parcels. “Development” shall include, but not be limited to, the following:

- Construction or enlargement of a building or structure;
- Change in the type of use of a building, structure, or land;
- Material increase in the intensity of use of land, such as an increase in the number of businesses, offices, manufacturing establishments, or dwelling units located in a building or structure or on the land;
- Commencement or expansion of resource extraction, agricultural, horticultural, or forestry activities on a parcel of land;
- Demolition of a structure or the clearing of vegetation from a parcel of land;
- Deposition of refuse, solid or liquid waste, or fill on a parcel of land;
- Alteration of the shore, bank, or channel of any stream, lake, or other body of water or alteration of any wetland; and
- Any land-disturbing activity that adds to or changes the amount of impervious or partially impervious cover on a land area or which otherwise decreases the infiltration of precipitation into the soil.

¹⁷ AMC 21.01.030.

Development activity is what physically happens on individual parcels of land, not the underlying zoning rules that set the bounds on what may be developed. Based on the Code's definition of "development," rezoning and text amendments are not development activity under Title 21, rather they are legislative actions within the Assembly's authority. Altering the zoning map, creating or subtracting zones, and changing what can be built in zones is within the "city's legislative judgment."¹⁸

Furthermore, Title 21 specifies the procedures that must be followed to carry out certain land use actions, and AMC 21.03.020D is not applicable to rezonings. Regarding the applicability of various procedures, AMC 21.03.010 provides: "This chapter describes the procedures for review and approval of all applications for *development activity* in the municipality. Common procedures, which are applicable to all or most types of development applications, are set forth in section 21.03.020. *Subsequent sections set forth additional provisions that are unique to each type of application*, including timetables, staff and review board assignments, review standards, and other information." (emphasis added). Both rezonings and text amendments have their own sections separate from AMC 21.03.020, meaning that the procedures for rezonings and text amendments are not governed by 21.03.020 but rather by their own Code sections: AMC 21.03.160 and 21.03.210, respectively. This is further indication that rezonings and text amendments are not development or development activity, but instead are legislative processes with their own codified processes.

The zoning changes proposed in in AO 2023-87(S) will be broadly applicable to thousands of parcels and property owners throughout the Anchorage Bowl. The Assembly is not targeting only a few parcels for rezoning, an action that could raise concerns of illegal spot-

¹⁸ *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1298 (Alaska 1982).

zoning. “Spot zoning,” is “any zoning amendment which ‘reclassifies a small parcel in a manner inconsistent with existing zoning patterns, for the benefit of the owner and to the detriment of the community, or without any substantial public purpose.’ ”¹⁹ Spot zoning is one of the few zoning actions a local government can take that will not survive the lenient rational basis test in which courts look for any conceivable legitimate public policy supporting legislation.²⁰

Unlike with illegal spot zoning, the proposed zoning map and code changes will impact most property owners in the Anchorage Bowl; whether the impact is “positive” or “negative” will vary depending on property owners’ opinions, preferences, and desires for their property. It is also worth considering that the Ordinance, if passed, will impact non-property-owning residents of the Municipality since rezoning may affect the cost of rent, the availability of housing, the location of services, and traffic patterns. The Assembly would be rendered essentially powerless if the permission of every affected constituent was required to pass laws. Residents, both property owners and non-landowners alike, have the right to give input on the proposed rezoning and text amendments as written comments to the PZC or Assembly or orally during community meetings, PZC meetings, and Assembly meetings.²¹ Property owners do not, however, have a right to decide whether a law of general applicability applies to their property. If the rezoning proposed in AO 2023-87(S), or a subsequent version of that legislation, is implemented, residents and Community Councils will have the opportunity to comment on or challenge individual development applications submitted to the Planning Department.²²

¹⁹ *Griswold v. City of Homer*, 925 P.2d 1015, 1020 (Alaska 1996) (citing Robert M. Anderson, *American Law of Zoning* 3d § 5.12, at 362 (1986)).

²⁰ *See id.* at 1019 (citing *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974)).

²¹ *See generally* AMC 21.030.160.D and AMC 21.03.210B (setting out public participation procedures).

²² *See* AMC 21.03.020C, H.

In sum, public input on rezoning and text amendments is required and provided for by Code, but landowner permission is not required to implement a rezoning and requiring it would thwart the Assembly's power to legislate.