

**Planning Commission Agenda
REGULAR MEETING
LIBRARY CONFERENCE ROOM
TUESDAY, NOVEMBER 13, 2012**

Chairman

Tom Bailer

Commissioners

David Reggiani
John Greenwood
Roy Srb
Greg LoForte
Thomas McGann
Scott Pegau

**In those matters coming before the Cordova Planning Commission at 6:30 p.m.;
Tuesday, November 13, 2012 in the Library Conference Room, 622 First Street,
Cordova, Alaska, are as follows:**

- A. CALL TO ORDER**
- B. ROLL CALL**
**Chairman Tom Bailer, Commissioner David Reggiani, John Greenwood, Roy Srb,
Greg LoForte, Tom McGann and Scott Pegau.**
- C. APPROVAL OF AGENDA**
- D. APPROVAL OF CONSENT CALENDAR**
Minutes from the October 9, 2012 Regular Meeting (Pages 1-8)
- E. RECORD ABSENCES**
Excused absence for David Reggiani for the October 9, 2012 Regular Meeting
- F. DISCLOSURE OF CONFLICT OF INTEREST**
- G. CORRESPONDENCE**
CEC letter of support (Page 9)
- H. COMMUNICATIONS BY AND PETITIONS FROM VISITORS**
 - 1. Guest Speakers (10-15 minutes per item)**
Kate Morse from the Copper River Watershed Project
 - 2. Audience comments regarding items on the agenda (3 minutes per speaker)**
 - 3. Chairpersons and Representatives of Boards and Commissions**
- I. PLANNERS REPORT (Page 10)**
- J. NEW BUSINESS**
 - 1. Letter of interest from PWSSC (Page 11-16)**
Portion of ATS 220 (west of Lot 1, Block 1, CIP) (Page 17)
Portion of Lot 2, Block 7A, Tidewater Development Park (Page 18)
Portion of Lot 1, Block 7A, Tidewater Development Park (Page 19)
Lot 1, Block 1, Cordova Industrial Park (Page 20-22)
- K. OLD BUSINESS**
- L. MISCELLANEOUS BUSINESS**
Proposal Grading Criteria (Page 23)
Planning Commission Training Session Discussion (Pages 24-50)

City Planner

Samantha Greenwood

Assistant Planner

Faith Wheeler-Jeppson

M. PENDING CALENDAR
November 2012 Calendar
December 2012 Calendar

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N. AUDIENCE PARTICIPATION

O. COMMISSION COMMENTS

P. ADJOURNMENT

**PLANNING COMMISSION
REGULAR MEETING
CITY HALL CONFERENCE ROOM
TUESDAY, OCTOBER 9, 2012
MINUTES**

In those matters coming before the Cordova Planning Commission at 6:30 p.m.; Tuesday, October 9, 2012, in the City Hall Conference Room, 602 Railroad Road Cordova, Alaska, are as follows:

A. Call to order –

B. Roll Call Present for roll call were Chairman Tom Bailer, John Greenwood, Roy Srb, Greg LoForte, Tom McGann and Scott Pegau.

Also present were City Planner Samantha Greenwood and Assistant Planner Faith Wheeler-Jeppson.
There were 10 people in the audience.

C. Approval of Agenda

M/Greenwood S/McGann

Upon voice vote, motion passed, 6-0

D. Approval of Consent Calendar

Minutes from the September 11, 2012 Public Hearing
Minutes from the September 11, 2012 Regular Meeting
Minutes from the September 17, 2012 Special Meeting

M/Srb S/Greenwood

Upon voice vote, motion passed, 6-0

E. Record Absences

David Reggiani was excused from the October 9, 2012 Regular Planning Commission meeting.

F. Disclosure of Conflict of Interest

None

G. Correspondence

None

H. Communication by and Petitions from Visitors

1. Guest Speakers

None

2. Audience comments regarding items in the agenda

Tom Carpenter 501 Lakeview Drive ~ Thanks for this opportunity, unfortunately I won't be here later to take questions if there is any in regards to the proposal I've submitted. When you look through my proposal it may be a little rudimentary with the drawings and the conceptual ideas that I have. My proposal that I submitted was not for the entire piece of property that the City has offered to the public at this time, the reason is that it doesn't make financial sense for me to try to purchase the whole piece of property because it just wouldn't work for the type of business that I have. The real problem that I have is that I have an old building that the design of the building makes it pretty close to impossible through the research that I've done over the last few years to try to resurface the outside. It's pre-bent metal and if I were to find it I would have

to get it in California and it would be more expensive to get it here than what it would cost for the metal in general. So my plan was to change the existing shape of the structure to make it more conventional, but I don't have enough property in my own possession at this time to make that happen. So I took the piece of property, the 17,000 square feet and I figured out about what I was going to need to make the changes to the current structure happen. So that's why my proposal and you can look at the basic drawings is for about 6,000 square feet, the other reason I did that was as you are all aware it takes 10,000 square feet to make a transferable piece of property in the City. If you were to accept my proposal, the rest of the property being 11,000 square feet is still available to a second party or another party so that you could incorporate two newer structures on to basically the existing property. It would be an easy conversion in my estimation because I do own the property right next to it so there would be some survey work and all the expenses incurred would obviously be due to me. I know there are some other proposals and some of those proposals I read through them and there's a lot more money going to be spent on those and I am the first one to recognize that. But, this business has been there since 1989 and I think it has contributed over that time period to Cordova and I would hope that the Planning Commission would take it into consideration kind of the position I'm in. I'm probably going to lose that building if I can't do something, so basically that's all I have. If there are any questions I'd be happy to answer them now, I apologize that I won't be able to be here during the deliberations, thanks.

Mark Heidbrink 402 Council Avenue ~ My package was a little bit disorganized because I was out of town and only learned about this (inaudible). Basically I'm the owner of Mark Marine Services; I am an original founding member of Alaska Marine Response which is a Spill Response and Salvage operation that Andy Craig owns now. I represent the diving end of that business and I supply and offer services to pretty much every entity of the City. In the last few years our business has just been exploding as far as clientele. My problem is in the nature of this business that I'm in is the quick response is critical and where I live and where I have all of this growingly expensive equipment piled up it is ridiculous. It's spread out and it really hampers me and restricts my ability to grow into a more viable dive and salvage business. My deal is that I need to be located closer to the source which is the Harbor in essence and I need a place to have all my stuff to be able to get at it when things happen. When a boat sinks the owner and the insurance company wants it dealt with right away and it's tough to do that when it takes half the day to locate all of my gear. That's my spiel, thank you.

Dan Nichols 607 Alder Street ~ I'm looking for a lot to stick a 7,000 square foot warehouse on so I can run a trucking business. I have three 34' vans in town just about every minute of every day in Cordova; I have at least one box truck I'd like to have two. After last year trying to get my freight in through the alley for Nichols Front and Back Door Store was just about impossible, we had to transfer it into box trucks and try to get it into the alley and sometimes we had to deliver it up front. I'm bringing down two 34' vans every week of the year when the ferry runs, approximately 28 pallets. I need a facility to do that and expand my business because there is no place for me to do it. On the other portion of the warehouse, I have my own boat but there's no place to work on a boat. There are very few places with lighting and heat that you can actually get in there and work on your boat. I'd like to be able to have a warehouse bay where somebody can pull their boat in and if they want to change the cabin or change the hydraulics they can sit there and do a day, a week or a monthly rental of that property so they can get in there and do it. I even thought about having a separate bay for cutting and grinding fiberglass there's no place to do that. We do have the talent here to do it if you had the space to do it in. I'm sure I can save Cordovans at least 25-40% on some of the stuff. If you bring a box in and drop it off at AML I believe the minimum is \$65. I have people drop boxes off at my trucks up in Anchorage and sometimes I charge them and sometimes I don't, it's just that simple. There are people who know where my truck is and I said just throw it in, if I don't have to do anything with my driver it's not a problem. It's just being able to offer that, I use Alaska Logistics to consolidate my freight its \$25 pick-up. I can undercut anybody else in town. Look at how much space the other truckers have in town, mine will probably be a sixth or less than what Samson has and I hope to run close to the same business as they have. Any questions? Thank You.

Becky Chapek 608 Cedar Street ~ This is the fourth time I've been here, this is not a new one I think that you guys must misunderstand because you're not buying into it. But, it is the Depot Diner brought to a lot down on the South Fill. I think that Mark (Heidbrink) has a great idea but why is that not down on the other side? It seems like that is a more suitable place. Part of what's happened is that there is mixing, this should be a small business I'd like to see more retail and I'd like to see retail buildings that look more like the visual drawing that you're seeing, I think that Cordova has turned into some sort of a "lick and stick" town with a lot of warehouse buildings, which we need and have their place in our community because they are very utilitarian. I'm putting some metal siding on the east wall of a house right now because that's impervious to rain and things. But, I would like to see Cordova with a little more character. I would like to utilize a building that is not being utilized for the proper purpose, I'd like to bring it to town I know it's a building that is built in the early nineties, but it's a structurally sound building. People are turning old canneries into duplexes and

things happen to buildings and they can have a new life. It looks good; this is what I was trying to talk about an event building. It's actually three stories, you actually can't see the back side with the (inaudible) an open area for special occasions, the lower area as a staging area. This facility in town I want to do a networking so that everyone leaves town with a fresh red, I have this idea about packaging. The basement area could be utilized for storage. The middle area would be for an event. The top area on the back would be like dormered windows with a (inaudible) and then all around the deck in the seating for the summer traffic and then the front would be open year round. I still think it's a good idea, I'm here again hoping that you will see the wisdom to that. Thank you.

Thai Vu 129 Harbor Loop Road ~ My name is Thai Vu and we currently own Camtu's Center, 3 years ago the City approved our proposal. And now we would like to make another proposal of Lot 6, Block 2 because we would like to expand our business because the current building that we have right now we have run out of space. We promised before that we would try to have a restaurant in our building but right now we have no more room. We would just like to expand. Thank you

Jamie Foode representing the Eyak Preservation Council PO Box 460 ~ I have accepted the position of Program Manager for the Cordova Community Cold Storage project. Basically one of the things that we wanted to present that's briefly touched on within this proposal is our partnership that we've been forging with the State. Working on this project I'll actually be meeting with Sue Cogwell who is the Executive Director for the Prince William Sound Economic Development District in this area to go over our feasibility study for this program and set up our five year business plan. And in this really fun packet if anyone would like to look at it is their Comprehensive Economic Development Strategy from 2010 and it's a six year plan for what they've worked on and what they'd like to see with Economic Development in our region. One of the main points that they have been focusing on is promoting Prince William Sound fishing industry and in order to do that they're looking for ways to increase value added products from the Prince William Sound, which reflects a lot of the missions that we have with the Cordova Community Cold Storage as well as providing local residents and seasonal fishermen with a place to be able to procure their subsistence foods. They were actually very instrumental in getting the Cold Storage facilities in Valdez started, which kind of a brief explanation of that project was done with their Valdez Development Fisheries Association and they have a large space up there where they do value adding for direct marketing as well as work with other processors on value adding instead of the usual H & G that we see our fish leave the state with and then go and further be processed and make more money out of state. As of right now once we submit our applications to the State that we're working on we'll be in a match program where any funds that we raise the State of Alaska with match us at a minimum of fifty percent. We're also actually working with an architect who has been kind of providing ad hoc services for us until we look forward to hiring someone and he's with Bettisworth North Architects & Planners, his name is Randall Rozier. One thing that I would be really interested in talking with Tom (Carpenter) about would be what he needs, what his setbacks would be and what we would need as setbacks for our proposed project which I believe is a little over 10,000 feet of usable space. If there was a way that we might be able to design a facility that could compensate for his needs then we could work that in. All though that's something that I would need to talk to our architect about, but I think that he would be able to create a design that would take that into consideration. I mean that could be a possibility. Thank You

3. Chairpersons and Representatives of Boards and Commissions

None

I. Planners Report

Samantha Greenwood ~ Does anybody have any questions? I obviously didn't get much written in the Planners Report this time around. So I'll give you a quick update, waiting on Paul Cloyd for the electrical bid for Samson and once we get that in place we'll get together with Glenn from the Harbor, Paul, Jim and Eric and we'll start trading the plans. So Samson is moving along, the contract is at their lawyers and we're waiting for that to come back. I'm not quite sure how I got into the Chapter 8 code writing but we are spending a lot of time on that and it's back to the Chief and Mark. We're about ready to send that to the lawyer. This is budget time, I've been working a lot on Building Inspector fees and how (inaudible) that position is flying (inaudible) it's flying as a Building Inspector/Facility Supervisor Coordinator and Project Manager so it's going to be a multi-tasking position. And that's about it. Any questions?

Bailer ~ I guess I just have a quick comment, if you look on your bullet point here you've got #1, 8 and 11 for me those three items don't seem like they necessarily need a building permit. I understand that now they have to and we're changing that. But those are the kinds of things that you should be able to replace without a building permit.

Faith Wheeler-Jeppson ~ Those three people wanted a tax exemption card and in order to get a tax exemption card you are required to have a building permit.

J.

New Business

1. Review of proposals for Lot 6, Block 2, South Fill Development Park

Bailer ~ So, I'm open for suggestions on this but one of the things I was thinking about is kind of taking them in order we have Becky Chapek, NVE, Camtu and Mark Heidbrink all on that lot. What I thought was maybe going around and seeing what you had rated highest and see if we've got any kind of consensus there and then start breaking it down. For everybody this is just something that helps us come to a decision, just because one thing scores higher than another that doesn't mean game over. It's just something for us to give us a benchmark (inaudible). So does that sound reasonable to everybody?

McGann ~ I'm not sure how you're going to do that.

Bailer ~ Well I guess we can go right to you, who'd you have ranked highest on your list and then we'll go to John and then go to Greg, Roy and if we all happen to have two of them ranked highest then maybe that's the spot to start. Unless you want to go thought everyone's individually? This is a new process so we're going to have to work through it. I guess I am trying to find where we have common ground.

LoForte ~ I filled it out and I thought that there were open ended questions that really fit in our criteria.

When we wrote up the criteria everything was black and white, so then you review the proposals and there's a lot of grey so I'll give you numbers but I don't know how good they are.

Bailer ~ I guess I don't really want the numbers, maybe perhaps your number one pick for this lot, your preference.

McGann ~ Then the multiplier doesn't work.

Pegau ~ I went through and I did both the 1-10 and then multiplied out so I have a total with the multiplier that still can tell me how I ranked them.

McGann ~ I think we need to do that. I don't know how else we can use this system if we just pick our highest one.

Bailer ~ Each one of us looked at these proposals, we had our own thoughts and ideas and mine are probably different from yours and vice versa. I came up with one using our multipliers that ranked higher so I have them in order of one, two, three and four. So that's where I'm starting from.

McGann ~ So you're looking at the second set of columns not the first.

Bailer ~ So I was looking for the common ground and then certainly we need to break that down and have a discussion as to why. We owe it to everybody here if we are going to choose one over the other anyway.

Which is another point, we don't have to choose one over the other we can forward a couple of recommendations and we can table this, think about it and bring it to another meeting there doesn't have to be a decision tonight, so we'll see where this leads. So for instance on the first three, we have a proposal by Becky Chapek, NVE, Camtu and Mark Heidbrink, I was thinking go around and see what proposal had the highest rating and we'll start with that one and break it down.

Pegau ~ I actually agree with your process, I think it would be good to identify a top two and maybe go in and look at the individual numbers.

Value of Improvements ~ (highest ranking based on the criteria)

Greenwood ~ Camtu

McGann ~ Camtu

LoForte ~ Camtu

Srb ~ Camtu

Pegau ~ Chapek

Bailer ~ Camtu

Number of Employees ~ (highest ranking based on the criteria)

LoForte ~ Camtu

McGann ~

Greenwood ~

Srb ~ Chapek/Camtu tie

Pegau ~ Chapek/Camtu tie

Bailer ~ Chapek/Camtu tie

Sales Tax ~ (highest ranking based on the criteria)

Greenwood ~ Camtu

McGann ~ Camtu

LoForte ~ Camtu

Pegau ~ Camtu

Bailer ~ Camtu

Srb ~ Camtu/Chapek tie

Importance to the Community (highest ranking based on the criteria)

Greenwood ~ Camtu

McGann ~ Camtu

LoForte ~ Camtu

Srb ~ Camtu/Chapek tie

Pegau ~ Camtu/Chapek tie

Bailer ~ Camtu

5 Year Business Plan Timeline (highest ranking based on the criteria)

Greenwood ~ Camtu

McGann ~ NVE/Heidbrink tie

LoForte ~ NVE

Srb ~ Camtu/Chapek/NVE/Heidbrink tie

Pegau ~ Camtu/Chapek tie

Bailer ~ Camtu/Chapek/NVE/Heidbrink tie

Enhanced Architectural Design (highest ranking based on the criteria)

Greenwood ~ Chapek

McGann ~ Chapek

LoForte ~ Chapek

Srb ~ Chapek

Pegau ~ Chapek

Bailer ~ Chapek

Proposal Price (highest ranking based on the criteria)

Greenwood ~ Chapek

McGann ~ Chapek/Camtu tie

LoForte ~ Chapek/NVE/Heidbrink tie

Srb ~ Chapek/Camtu/NVE/Heidbrink tie

Pegau ~ Chapek/Camtu/NVE/Heidbrink tie

Bailer ~ Camtu

Consistency with the Comprehensive Plan

Bailer ~ I didn't see anything that was out of the ordinary there. We're really close with the two plans, my thought process right now would be to forward these two as a number one and a number two. I think both of them are really good proposals.

After a lengthy discussion the Commissioners each chose their top two proposals based on the criteria of the proposals submitted to be forwarded to City Council.

Greenwood ~ Chapek and Camtu

McGann ~ Camtu and Chapek

LoForte ~ Chapek and Camtu

Srb ~ Camtu and Chapek

Pegau ~ Chapek and Camtu

Bailer ~ Camtu and Chapek

M/Greenwood S/Pegau

"I move to forward the proposals of Camtu and Chapek to City Council."

Upon voice vote motion passed 6-0

2. Review of proposals for Lot 2, Block 3, Cordova Industrial Park

Bailer ~ Okay so these are the proposals by Tom Carpenter, Dan Nichols and the Eyak Preservation Council. I guess one real quick question for you, if this lot went with Mr. Carpenter's proposal and the lot was divided all though it is over 10,000 feet it is nonconforming because of??

Samantha Greenwood ~ In the code there is a lot requirement of 100 feet. It could be addressed by a Variance but it would have to be with a Variance. If we accepted Mr. Carpenter's proposal he would be a conforming lot because he really isn't right now because he doesn't have a hundred foot width. The City lot would then become nonconforming which without some kind of variable.

Srb ~ How did it become nonconforming? Was it subdivided between those two businesses?

Samantha Greenwood ~ Yea

Bailer ~ Now we heard from Eyak Preservation Council that they may be willing to work with us, I'd like to ask Mr. Nichols if that is even an option for his proposal, just something for us to consider.

Dan Nichols ~ It would be too narrow, I could accomplish one thing but not two things.

Bailer ~ That doesn't have any weight on my decision I just wanted to see if it was out there. With that being said, we have three proposals. I guess we'll go around the room the same way.

Pegau ~ Unfortunately it was a poor choice because in the end I gave them all the same grade and quite honestly right now I'm sitting down because of the presentation by Dan actually would have me kind of reconsidering a couple of the things that I had scored lower. But in my scoring they all ended up at the same points, just in different paths.

Srb ~ Interesting proposals with some of the nuances added in there in regards to the substandard lot size and such. At face value as far as total value to the area I think Dan Nichols proposal in my mind ranks the highest all though I can certainly see other needs from the aspects of reading the other proposals total valuation in regards to return to the City with regards to taxes and such I think his proposal meets a higher standard.

LoForte ~ I had a tough one here because I looked at Mr. Carpenter as an existing business down there and wanted to accommodate him, but in the end Mr. Nichols proposal outdid Mr. Carpenter's proposal.

McGann ~ I had them ranked very close between Whiskey Ridge and Nichols but with the notion that the City retained 11,000 square foot lot kind of puts more weight on Whiskey Ridge.

Greenwood ~ I kind of echo that feeling; I like the idea of retaining some valued property down there for either a future or a snow dump that we talked about for a while. So I rated Whiskey Ridge just slightly above Mr. Nichols.

Bailer ~ I rated Mr. Nichols proposal probably twice as high as the other two, just because the overall benefit to the community I guess is what I was looking at. I'm very familiar with trying to get things here from Anchorage as we all know is tough, plus the boat area to work on is something that is really needed in this community in that industry. I kind of looked towards that, there's a warehouse for sale out a six mile but it's pretty much out of many individuals reach to put it out there just for a boat. So I was leaning towards Dan with the hopes that we could also accommodate Whiskey Ridge in some fashion. I was thinking in the same lines, that we could kill two birds with one stone. The Eyak Preservation Council I went through that line by line and read her proposal more than once but I kept going back to we've kind of been there done that and there really wasn't any money forward. The business plan to me didn't address a lot of issues and how it was going to operate. Dan has spoken that he needs all of the lot so we're going to have to come to some kind of consensus here.

Pegau ~ One of the questions I had was apartments I believe we're part of the Nichols proposal for the drivers which seems consistent with the permitted use, and this is where I got really torn was I really agree that we need more housing available but I'm concerned about putting it in an industrial zoned area. Full time housing in an industrial area, I wasn't sure where that was going to fit. I threw this out so that Dan could address this.

Samantha Greenwood ~ So the only thing that's allowed there is a watchman's quarters, you can't have multiple apartments in one building. You can have a watchman's quarters and it's basically the maximum size can be 750 sq feet or 20% of the total square footage not to exceed 750 sq ft. So there are rules about what you can have down there as far as living area. And that it what would have to be met.

Bailer ~ So it is allowed and there is a number there.

Dan Nichols ~ Right across the street is a 300 unit apartment basically for Trident North Plant being built, less than a rocks throw away. With the conditions of the ferry coming in at 2 or 3am, my driver having to go down and start the truck and be there and then getting the phone call later that something has happened or

sometimes they turn around and he's awake and he's there, somebody has to be there. Sometimes we have to unload the truck and last year was just a nightmare. One thing about my trucking company is that I would be the only Cordova owned I actually have a stake in this community, AML doesn't, AML parks their vans here in the winter time because it's a lot cheaper than parking them in Tacoma. And the amount of freight that Samson brings in for the size it's just ludicrous.

The Commission had a lengthy discussion regarding the dimensions from the existing Whiskey Ridge building to the lot line and the possibility of expansion of Mr. Carpenter's structure within the existing lot.

Srb ~ Well I do have a certain empathy for Tom's situation with regards to that size and I have a certain concurrence with what Tom's (McGann's) sentiments were in regards to both parties being able to work together to straighten out that nonconforming issue. But looking at it from the perspective of valuation and what it is to the community I did score Mr. Nichols proposal the highest and at face value from that perspective I would vote for that project.

Greenwood ~ Is there a way that, I know we can't do it tonight but try to determine those property lines?

McGann ~ I don't know how accurate the drawing is on page 63, it shows this building quite a bit to the north.

Greenwood ~ But getting back, we can encroach into a setback with a Fire and Life Safety review we don't have to maintain a certain footage according to IBC he can go to zero lot line if he meets the requirements.

McGann ~ If this drawing is any place close to correct his concern is to the north side not the south side. So selling the land to Dan wouldn't prevent him from expanding his business.

Bailer ~ I guess my concern there was, I'm not advocating that we (inaudible) shed roof on there, if he needs to expand he's going to have to come forward or do something else. I'm not advocating splitting that lot up to make a viable business and changing Mr. Nichols proposal, but I am concerned that we created this by allowing it to be subdivided if we sell this piece of property without adequate assurance that he can repair that building whatever it takes, that's my concern. I'm not advocating that we give him room for another whole shed; I just want to make sure that the existing business can be repaired.

M/Srb S/Greenwood

"I move that we forward Dan Nichols proposal for the purchase of Lot 2, Block 3 to Council."

Upon voice vote motion passed 6-0

3. Review of Lot 3, Block 8, North Fill Industrial Park

Bailer ~ This is the review of Lot 3, Block 8 North Fill Industrial Park, that's the lot that Harbor Commission and staff give a pretty strong recommendation not to sell this lot. Unless this needs to be brought up and debated it is on the not available list. We have a strong statement from the Harbor and staff, I guess it would be my opinion that it stay there unless someone wants to make an appeal that for some reason it should come off.

McGann ~ I would, I think there's room for everyone there and the notion that it has to be one or the other or the other is, I don't see that as being true. There's room for SERVS to take a couple of their main barges and (inaudible) they don't need to spread them all out all over the whole thing one at a time. There's room for boat washing and storage and that half a lot would allow for one more storage facility in town and I'll leave it at that.

Pegau ~ I missed the initial discussion, but I was actually surprised that it kept moving because it was listed as not available and I guess I was assuming that the first request had to be to change the status from unavailable to available. Since there was a desire from the City to use that land they had already designated it as unavailable, you should honor that.

Srb ~ With where the City is going with enhancing the boat launch facilities on that end of town and trying to take some of the pressure off of the South Fill I would certainly I would argue to certainly wait and see what the City's needs are going to be over the next 4 or 5 year period, get the new Harbor Master on board and see how that's going to shake out. It may be required for parking, storage and then also maintenance facilities. Right now we're better served keeping it in the City's hands.

LoForte ~ My issue is with the entire process, the property was listed as unavailable and yet an individual can come in and anyone can even though its unavailable. If this individual is coming in asking for this property and we say it's available then it goes out to bid to everyone. Here's my point from an organizational standpoint, it was not available property okay we've gone over it and it was not available, it was known to be not available. An individual comes in and desires this piece of property; I'd like to have a time clock on how

much time staff spent in the process, I think it's wrong. If it's an unavailable piece of property then someone should move to put it on the available list first, not to come in and say "I want to buy it" because I can do this. I think if you look at the time that staff had to spend on this process, it's an embarrassment. I am against selling this property.

Bailer ~ I agree with Scott's statement, I think the first procedure would be does the Commission want to reconsider the sale of this lot, without a proposal in it at all. I think we should take a look at these every now and then, what's changed, maybe the Harbor Commission has scrapped those set of plans. So a letter comes in and Sam puts it on and says do you want to sell it, nothing has changed so no we don't want to sell it. That's probably the appropriate way to go.

Greenwood ~ I agree with the Harbor Commission, follow their recommendation.

After a lengthy discussion the Commission decided to leave Lot 3, Block 8, North Fill Development Park on the Land Disposal List as unavailable.

K. Old Business

Hazard Mitigation Plan

Samantha Greenwood ~ again the concept behind the Hazard Mitigation Plan is (inaudible) and Joanie and I are continuing to re-write (inaudible). The State and FEMA will review and then it will come back to P&Z with a recommendation to City Council and it will have to be accepted by resolution and that will make us A-Okay to apply for those grants. We did send out some letter to some people in town asking for suggestions (inaudible) but if anyone has any suggestions about anyone who might be interested let me know.

L. Miscellaneous Business

None

M. Pending Calendar

Samantha Greenwood ~ Training on the 11th, Holly will be here. Dinner will be provided. I put a copy of the agenda in front of you. Library Conference Room at 5:30pm and would you rather have pizza or subs?

N. Audience Participation

Dan Nichols ~ I appreciate the work you people do, I know most of time it's thankless. Thank you for being (inaudible) minded and spending your time here. A lot of people don't understand that, but I do understand. Thank you very much I do appreciate it.

O. Commission Comments

Pegau ~ I won't be here on the 13th, I'll see if I can call in.

Srb ~ One proposal came in as a wild card, it didn't address what we were asking for, it made using the criteria difficult.

LoForte ~ 2 hours ago, I would have bet that we never would have gotten through this, I think the process worked really good.

McGann ~ I agree with most of your comments, and there's nothing that says that those criteria are set in stone.

Greenwood ~ I'm glad we had the criteria, we were able to use it and put the numbers to things. I like it but there is room for improvement.

Bailer ~ Can we have the Criteria on the next agenda. I appreciate everyone coming prepared. I was concerned too I wasn't sure how it was going to go.

P. Adjournment

M/McGann S/Greenwood

Motion to adjourn at 8:35 pm

Thomas Bailer, Chairman

Date

Faith Wheeler-Jeppson, Assistant Planner Date



**CORDOVA
ELECTRIC
COOPERATIVE, INC**

P.O. Box 20, 705 Second Street, Cordova, Alaska 99574-0020 * (907) 424-5555 * Fax (907) 424-5527

November 7, 2012

Planning and Zoning Commission
City of Cordova
PO Box 1210
Cordova, AK 99574

RE: Prince William Sound Science Center Development

Zoning Commissioners:

Cordova Electric Cooperative supports the development plans of the Prince William Sound Science Center in the northwest corner of the Cordova Boat Harbor. The Science Center has been collaborating with CEC regarding development plans for nearly five years. The development plans are consistent with the zoning for the area, are compatible with adjacent uses, and are permitted uses for the property. Given the suitability of this development for the location and purpose, I encourage the Planning and Zoning Commission to recommend the sale of property from the City of Cordova to the Prince William Sound Science Center either through direct negotiation, or through sealed proposal process.

The City of Cordova has indicated for several years a desire to dispose of City Property to interested parties, and it is particularly appropriate that parcels be sold to the Science Center as the Center proceeds with development plans.

The Science Center is a year round employer, and the increasing emphasis on ocean science and climate change is a good opportunity for Cordova to diversify our economy. The Science Center helps create economies of scale for Cordova Electric Cooperative directly through their commercial use of electricity at their site and residential use of electricity by their employees. CEC considers Science Center development on this site to be the highest and best use of this property.

Thank you for your consideration, and please contact me if you have any questions.

Sincerely,

Clay Koplin

Planners Report

To: Planning Commission
From: Planning Department Staff
Date: 11/08/2012
Re: Recent Activities and updates

- Assistant Planner completed the minutes from the October 9, 2012 Regular Meeting.
- Assistant Planner received a call regarding an unpermitted construction project; a letter and application were sent out, the recipient came in and the issue was resolved by issuance of a building permit.
- Assistant Planner worked on a resolving an issue of an unrecorded plat from 2004 for a resident looking to transfer property.
- Assistant Planner has been working on updating Variance and CUP's applications and FAQ sheets.
- Assistant Planner issued Building Permits in the last month:
 1. Faye Pahl, a bathroom remodel @ 910 Chase Avenue.
 2. Copper River Seafoods, construction of a commercial storage building @ 101 First Street.
 3. Mike Balint, construction of a detached carport @ 270 Prince William Marina Road.
 4. Tom Bailer, siding installation on an existing structure @ 308 Orca Inlet Drive.
 5. Sarah Lytle, construction of an attached carport @ 370 Gandil Drive.
 6. GCI, constructing 2 walls to create a small office/storage space @ 102 Nicholoff Way.
 7. Joy Landaluce, construction of a 6'x8' artic entry @ 501 Fourth Street.
 8. Troy Matveev, construction of a 40'x80' net storage building @ 170 Prince William Marina Road.
 9. Jason Pallas, enclosing an 8'x12' deck @ 1400 Lakeshore Drive #26.
- Finalizing Utility plan for Samson and getting title work done on property; hoping to wrap up by end of the year
- Shoreside lease and sale has been signed and will be final by end of the year
- Chapter 8 will be reviewed by Mark, Chief Bob and me then sent to lawyer for review
- Waiting for contract from Agnew and Beck (Shelly Wade) for southfill expansion public meetings
- Working on building permit and inspection fees.
- Josh Hallquist took the Supervisor of Facilities which includes the building inspector position.
- Land purchase contracts and performance deed of trust for Nichols Trucking and Thai Vu and Camtu Ho are at lawyers will be on next City Council meeting
- Completed budget and fee schedules.
- Working on multiple encroachment permits
- New Harbor Masters started work on 11/7/2012

Memorandum

To: Planning and Zoning
From: Planning Department
Date: 11/1/2012
Re: Letter of Interest from Prince William Sound Science Center on Properties -- Lot 1 Block 7A Tidewater Development Park (Breakwater Fill Lot), A portion of Lot 2 Block 7A Tidewater Development Park (Currently leased by PWSSC), Lot 1 Block 1 Cordova Industrial Park, A portion of ATS 220 (shell beach).

PART I. GENERAL INFORMATION:

This letter of interest is for multiple properties and is being forwarded to Planning and Zoning per CMC 5.22. to make it easier to move through the process I have address each property with a separate memo.

I am attaching to this overview memo the letter from Prince William Sound Science Center, a map of all the properties and the land disposal map showing the properties. The individual memos will include any background information on the lots and staff recommendations.



Katrina Hoffman, President & CEO
Prince William Sound Science Center
PO Box 705
Cordova, Alaska 99574

Mark Lynch, City Manager
City of Cordova
PO Box 1210
Cordova, AK 99574

October 16, 2012

Re: Land Negotiations

Dear Mark,

Per Section 5.22.040 of Cordova Municipal Code, and requests in your letter dated September 7th, 2012, I submit to you this application of the Prince William Sound Science Center's request to purchase four real properties from the City of Cordova. The purpose of these proposed purchases is to support the development of the Prince William Sound Science Center's research and education campus as dictated in City Resolution 2-95-13.

Applicant name: Prince William Sound Science and Technology Institute, doing business as the Prince William Sound Science Center

Applicant mailing address: PO Box 705, Cordova, AK 99574

Applicant's registered office address: 300 Breakwater Avenue, Cordova, AK 99574

We apply to purchase the four properties listed below. We state the proposed purchase price for each property and the basis for the price, final dimensions to be determined by survey. Where relevant, we state the use, value and nature of any improvements PWSSC proposes to construct on the property, per CMC 5.22.040 A.4.c.

1. A portion of Lot 1, Block 7A TDP filled land approximately 28,000 sq. ft. (see attached map)
 - Proposed purchase price: \$4.60/sq. ft. city land price = \$128,800
 - Use, value and nature of improvements: New office and laboratory building with equipment storage space and off-street parking. Estimated building and associated systems value = \$6.5 million

2. A portion of Lot 2, Block 7A TDP, approximately 38,175 sq. ft. tideland (see attached map)
 - Proposed purchase price: \$1.26/sq. ft. city tideland price = \$48,100
 - Use, value and nature of improvements: Maintenance of existing office and laboratory building and access to said building.
3. Lot 1, Block 1 CIP, approximately 12,477 square feet (see attached map)
 - Proposed purchase price: \$4.60/sq. ft. city land price = \$57,395
 - Use, value and nature of improvements: 9,000 sq. ft. two-story mixed occupancy building combining low hazard warehouse and fabrication space and accessory dwelling units for staff, yard storage space and off-street staff parking. Estimated building value = \$1.7 million.
4. A portion of ATS 220, approximately 16,950 sq. ft. (see attached map)
 - Proposed purchase price: \$1.26/sq. ft. city tideland price = \$ 21,375
 - Use: water access for both the public and PWSSC staff.

PWSSC meets all applicable qualifications established in CMC 5.22.040 subsection B, as follows:

- 5.22.040 B (1). PWSSC is not delinquent in the payment of any obligation to the city.
- 5.22.040 B (2). PWSSC has not previously breached or defaulted in the performance of a material contractual or legal obligation to the city.
- 5.22.040 B (5). PWSSC is authorized to transact business in the state of Alaska and in the city under all applicable laws.

We submit to you a check in the amount of \$4,000 with our request to purchase the four properties listed in this application, reflecting a \$1,000 earnest money deposit per parcel.

Sincerely,



Katrina Hoffman
President and CEO
Prince William Sound Science Center
907 424 5800 x 225
khoffman@pwssc.org

CC: Jim Kallander, Samantha Greenwood, Tim Joyce, Jim Kasch, David Allison, Bret Bradford, E.J. Cheshier, David Reggiani, Robert Beedle



**Prince William Sound
Science Center**

Location of lots for request to purchase
and develop land in accordance with
City Resolution 2-95-134

TIDEWATER DEVELOPMENT PARK & CORDOVA INDUSTRIAL PARK

City Properties

Status

AVAILABLE

NOT AVAILABLE

LEASED

SNOW DUMP

UNDETERMINED

Land Owners

CITY

FEDERAL

NATIVE CORPORATION

PRIVATE

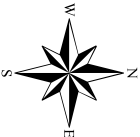
STATE OF AK

US COAST GUARD

Subdivision

Cordova Industrial Park

Tidewater Development Park



Note: All proposals for lease or sale are subject to City Council review and approval



This map is for illustration purposes only. All distances are approximate. It is not intended as a survey.

0 135 270 540 810 1,080 Feet

This map created by City of Cordova Planning Dept. MARCH 23, 2011



City Dock

Breakwater
Fill Lot Portion
of Lot 1
Block 7A TDP

A portion
of ATS 220
Shell Beach

Lot 2 Block 7A TDP
PWWSC OFFICE

Lot 1 Block 1
CLP

Breakwater Avenue

Jim Poor Avenue

Memorandum

To: Planning and Zoning
From: Planning Department
Date: 11/1/2012
Re: Letter of Interest from Prince William Sound Science Center
a portion of ATS 220 (Shell Beach)

PART I. GENERAL INFORMATION:

A letter of interest has been received on a part of ATS 220. All ATS property per the land disposal criteria/maps will be address by P&Z on a case by case basis. This lot is adjacent to the Lot 1 Block 1 Cordova Industrial Park which is currently in a lease to purchase contract with PWSSC.

The request is for approximately 17,000 square feet of property that would have to be surveyed, plated and recorded prior to disposal.

Since a letter of interest has been received on a portion of an ATS property the next step would be to determine if this property is available. This property is also located in the defined harbor area it seems appropriate to have a recommendation from the harbor commission on the availability of this property, prior to Planning and Zoning making a recommendation to City Council on the disposal of this property.

PART II. STAFF RECOMMENDATION

Staff recommends this request be referred to the Harbor Commission to be reviewed at their next meeting and a recommendation on the disposal of this property be made and given to the Planner. The Planner will then put the Harbor Commission's recommendation on the next P&Z meeting agenda.

Memorandum

To: Planning and Zoning
From: Planning Department
Date: 11/1/2012
Re: Letter of Interest from Prince William Sound Science Center
a portion of Lot 2 Block 7A Tidewater Development Park--- Currently
leased by PWSSC.

PART I. GENERAL INFORMATION:

This lot is marked as leased on the land disposal maps. Currently this lot is leased by PWWSC from the city, although the lease has expired. The lease is now in a hold over which is a clause in the lease allowing for the lease to run on a month by month basis. The re-negotiation of this lease has not been completed because of various issues and the ongoing negotiation with the PWSSC for the breakwater fill lot.

Considering the lease is expired and a letter of interest has been received the next step would be to determine if this lot is available at this time. Since this property is located in the harbor proper it seems appropriate to have a recommendation from the harbor commission on the availability of this property, prior to Planning and Zoning making a recommendation to City Council on the disposal of this property.

PART II. STAFF RECOMMENDATION

Staff recommends this request be referred to the Harbor Commission to be reviewed at their next meeting and a recommendation on the disposal of this property be made and given to the Planner. The Planner will then put the Harbor Commission's recommendation on the next P&Z meeting agenda.

Memorandum

To: Planning and Zoning
From: Planning Department
Date: 11/1/2012
Re: Letter of Interest from Prince William Sound Science Center
Lot 1 Block 7A Tidewater Development Park---Breakwater Fill Lot

PART I. GENERAL INFORMATION:

This lot is currently marked available on the land disposal maps. The maps are updated annually and have not been updated to show that this lot is currently under contract.

11/8/2011 P&Z reviews letter of interest and recommends to city council to dispose

M/Reggiani S/Greenwood “I move that the Planning Commission recommend to City Council to dispose of Lot 7A, Block 1, Tidewater Development Park based on the findings as contained in the Staff Report.”

Special Condition: To exclude the City T-Dock (old Coast Guard Dock), Tidelands underneath the Dock and access to the City Dock.

Upon Voice Vote, motion passed 6-1

Yea: Bailer, McGann, Padawer, Reggiani, Greenwood & Srb

Nay: LoForte

11/16/2011 City Council reviews P&Z recommendation and choose to have City Manager negotiation with PWSSC

M/Allison S/Bradford that the City dispose of Lot 7A Block 14 Tidewater Development Park for not less than fair market value as outlined in chapter 5.22.060 using disposal method #1 (negotiate an agreement with the person or entity who applied to lease or purchase the property).

Vote on motion: 7 yeas, 0 nays. Bradford – yes; Cheshier – yes; Reggiani – yes; Beedle – yes; van den Broek – yes; Kacsh- yes and Allison- yes. Motion passes.

PART II. STAFF RECOMMENDATION

Staff recommends this request be referred back to City Manager. This lot has been through process outlined in 5.22 and City Council has directed the City Manager to negotiate the terms of the contract.

Memorandum

To: Planning and Zoning
From: Planning Department
Date: 11/1/2012
Re: Letter of Interest from Prince William Sound Science Center
Lot 1 Block 1 Cordova Industrial Park

PART I. GENERAL INFORMATION:

This lot is marked leased on the land disposal maps. The Prince William Sound Science Center is currently in lease to purchase agreement (attached) with the City of Cordova. Below is the history of this agreement.

4/5/2007 P&Z reviews letter of interest and recommends to city council to dispose by proposals.

M/Sjostedt S/Buscher move that the Planning Commission recommend to the City Council that the application to lease and/or purchase Lot1, Block 1 Cordova Industrial Park be accepted and that the City Council direct the City Manager to begin noticing requirements in accordance with Chapter 5.22 of the Cordova Municipal Code with the following method of disposal: Request sealed proposals to lease/purchase the property.

4/18/2007 City Council reviews P&Z recommendation and puts the lot out for proposal - lease with option to purchase

M/Rodrigues, S/O'Leary that the City Council to direct the City Manager to begin noticing requirements in accordance with Chapter 5.22 of the Cordova Municipal Code with the following recommended method of disposal: request sealed proposals to lease with an option to purchase the property (described as Lot 1, Block 1, Cordova Industrial Park)

Vote on the motion: 6 yeas, 0 nays. Motion carried.

Council discussed the current use of the property by Bidarki Rec Center to store tools and equipment. Council concurred that the City will find a suitable facility for Bidarki to use for equipment storage.

Request for Proposals for a month ends May 28th 2007

6/7/2007 P&Z review proposals and makes recommendation to City Council of the PWSSC proposal.

M/ Bailer S/ McDaniel amendment to the main motion “I move that the Planning Commission recommend to the City Council that the proposal from The Prince William Sound Science Center be accepted and that they be granted the award lease with an option to purchase Lot 1, Block 1 of the Cordova Industrial Park and that City Council direct the city manager to begin disposing of the property in accordance with Chapter 5.22 of the Cordova Municipal Code”.

Vote on the motion: 3 yeas; 1 nay: Collins-yes; Bailer-yes; McDaniel-yes; Sjostedt no. Motion carried

2/6/2008 City Council passes lease to purchase contract and Ordinance

15. Ordinance 1012

An ordinance of the City Council of the City of Cordova, Alaska, approving conveyance of city property legally described as Lot 1, Block 1, Cordova Industrial Park, containing approximately 12,477 square feet – 1st reading

M/Kallander S/Cheshier to adopt Ordinance 1012, an ordinance of the City Council of the City of Cordova, Alaska, approving conveyance of city property legally described as Lot 1, Block 1, Cordova Industrial Park, containing approximately 12,477 square feet.

Roll Call vote on the motion. 6 yeas (Kallander - yes, Rodrigues - yes, Cheshier - yes, O’Leary, Kacsh - yes, Henrichs - yes) 0 nays, 1 absent (Anderson). Motion carried 6-0.

1st reading: February 6, 2008

2nd reading and public hearing: March 19, 2008

2/8/2011 P&Z Site Plan Review

Prince William Sound Science Center site plan review for Lot 1, Block 1, Cordova Industrial park

M/Reggiani S/Sjostedt “I move that the Planning and Zoning Commission recommend to the City Council that the Prince William Sound Science Center site plan dated 1/03/2011 to construct an office/warehouse on Lot 1, Block 1 in the Cordova Industrial Park be approved.”

Reggiani ~ The first question is, we had testimony earlier from an Ocean Beauty representative that there’s discussions and there may be accord, where do we stand on that?

RJ Kopchak ~ I can respond that we have had a brief conversation with Hap at our last Board Meeting and he has indicated his interest in the property. So we did have a discussion with Hap, but at this particular point there’s no formal accord. The Board of Directors made a decision to proceed with this development plan so

that we could better meet our obligations to the City and begin to raise money for the development. I can also say that in the process of pursuing that site plan, the door is open.

Bailer ~ How are you going to deal with snow placement and/or storage?

RJ Kopchak ~ My assumption would be that our architects in the final design will deal with snow loads that prevent those problems from occurring, whether that ends up being snow jacks on the roof or something else.

Upon voice vote, motion passed unanimously

2/16/2011 City Council Site Plan Review

A resolution of the City Council of the City of Cordova, Alaska, approving a site plan for the Prince William Sound Science Center for construction of a 7,650 square foot building composed of warehouse, office and educational space.

MI Kacsh S/van den Broek to approve Resolution 02-11-10 a resolution of the City Council of the City of Cordova, Alaska, approving a site plan for the Prince William Sound Science Center for construction of a 7,650 square foot building composed of warehouse, office and educational space.

Allison wanted to express to the representatives from the Science Center who were present that he would approve this tonight, but if their plans change, he is still willing to review their site plan again in the future.

Reggiani asked if this building is consistent with the terms of the lease that they currently have. **Lynch** said it was because the lease called for a building of between 6,000 and 8,000 square feet- and this fits that parameter.

PART II. STAFF RECOMMENDATION

Staff recommends this request be forwarded to City Council. This lot is currently in a lease with option to purchase contract, it has been through process outlined in 5.22. Staff feels that direction on this request needs to come from City Council.

Memorandum

To: Planning and Zoning
From: Planning Department Staff
Date: 11/8/2012
Re: Land disposal Criteria

PART I. BACKGROUND:

At the October 9th P&Z meeting the evaluation criteria were used for the first time on proposals submitted for two separate lots. All commissioners used the criteria to rank the proposals prior to the meeting and this was used to start the discussion at the meeting.

The criteria helped the commissioners to focus and progress through evaluating all proposals. The criteria is applied to all proposals which allows for the proposals to be rated on the same criteria and also provides for the discussion to be centered on what the commissioners feels are important to determining which proposal gets recommended to City Council.

The criteria are presented at this meeting for review, discussion and editing if the group feels it is needed.

Criteria	Multiplier	Proposal A Rank 1-10	Proposal B Rank 1-10	Subtotal For Proposal A	Subtotal For Proposal B
Value of improvements	1.75				
Number of Employees*	1				
Sales Tax Revenue*	1				
Importance to Community	1.75				
5yr Business Plan/Time line	0.75				
Enhanced Architectural Design	1.25				
Proposal Price	1				
Consistency with Comprehensive Plan	1.5				
Total	10				

*Residential properties will not be evaluated with these criteria

Memorandum

To: Planning Commission
From: Planning Department Staff
Date: November 7, 2012

Re: Discussion on the Planning Commission Variance Training with Holly Wells

Attachments:

Overview: Procedures and practices for considering Variance applications
Section 1; Open Meetings Act as it applies to the City Council, and Boards and Commissions
Section 2; Ex Parte Communications

PART I. GENERAL INFORMATION:

Attached you will find copies of the training materials provided at the October 11, 2012 Procedures and Practices for considering Variance applications training presented by Holly Wells. Members of the Planning Commission have expressed interest in further reviewing and having an open discussion on this material.

PROCEDURES AND PRACTICES FOR CONSIDERING VARIANCE APPLICATIONS

*What you need to know about Variance applications and drafting
sufficient findings in variance hearings*

Planning Commission Training

October 11, 2012

Presented by:

Holly Wells

I. INTRODUCTION

The following is intended to provide the Cordova Planning Commission with a one stop location to find information regarding the variance application and hearing process. The questions and answers presented within this handout are intended to provide an introduction to variances as well as the ground rules for drafting good findings when considering variances. This is by no means an exhaustive discussion of variances or how to formulate findings and should not be relied upon as such.

II. WHAT IS A VARIANCE?

Put simply, a variance is a form of relief that may be available to a property owner when unusual challenges or difficulties arise from the standard application of the zoning regulations. In order for a variance to be granted, an applicant must show and the Planning Commission must find that the following four conditions are met:

- a) There is an exceptional physical circumstances or conditions applicable to the property or to its intended use or development which do not apply generally to the other properties in the same land use district
- b) That the strict application of the provisions of this title would result in practical difficulties or unnecessary hardship
- c) That the granting of the variance will not result in material damage or prejudice to other parties in the vicinity nor be detrimental to the public health, safety or welfare
- d) That the granting of the variance will not be contrary to the objectives of the comprehensive plan. *See* CMC 18.64.020(A)(2)

The Commission must also show that granting the application will not endanger the public health, safety or general welfare or produce results inconsistent with the general purposes of the City of Cordova's zoning regulations. *See* CMC 18.64.010(D). For ease of reference and based upon their importance, we will call these five conditions the "Big Five" throughout this handout.

III. HOW DOES A PROPERTY OWNER FILE A VARIANCE?

A variance application must contain (1) a legal description of the property involved; (2) plot plans showing the location of all existing and proposed buildings or alterations, elevations of such buildings or alterations, and such other data as may be required; and (3) evidence of the ability and the intention of the applicant to proceed in accordance with the plans within six months after the effective date of the variance. *See* CMC 18.64.020(A). Most importantly, an applicant must provide a detailed

statement that presents evidence to the Commission of the Big Five. CMC 18.64.020(A)(2).

IV. DOES THE PLANNING COMMISSION HAVE DISCRETION TO GRANT A VARIANCE?

Not really. Under the current provisions of the Cordova Municipal Code, the Commission can only grant a variance if it finds that:

the necessary facts and conditions set forth in [the variance section of the CMC] apply in fact to the property referred to, and that the same comes within the purview of the planning commission. CMC 18.64.020(F)

This means that the Commission must find evidence supporting *each* of the Big Five before granting a variance. An approval absent such evidence may fall outside the Commission's discretion.

Further, the Cordova Municipal Code expressly permits the Commission to deviate from strict application of the zoning regulations, but only:

in the case of an exceptionally irregular, narrow, shallow or sloping lot or other exception physical condition where strict application would result in practical difficulty or unnecessary hardship that would deprive the property concerned of rights possessed by other properties in the same district, *but in no other case*. CMC 18.64.010(A) (emphasis added)

Thus, while this gives the Commission some discretion where the first two requirements of the Big Five are met, there is no way for the Commission to ignore the Big Five entirely.

V. ISSUING THE COMMISSION'S DECISION

The Commission has thirty days to render its decision on the zoning application. It is required to hold a hearing no later than thirty days after the application is submitted. CMC 18.64.020(B). The Commission has the express authority and duty to investigate the facts surrounding the application or to have the planning department staff conduct such an investigation. CMC 18.64.020(D). The Commission then has thirty days to issue its decision. Each decision issued by the Commission should be supported by written findings addressing each of the Big Five.

VI. WHAT IS A FINDING?

Findings are statements or conclusions made by a body and relied upon by it in support of that body's decision in awarding or rejecting a claim of entitlement. They act

as a blueprint to the analytical processes of the body, demonstrating how it used the evidence the parties presented to build its ultimate conclusion.

VII. ARE FINDINGS REALLY NECESSARY?

Well-made findings are necessary and benefit the body making them, the appellate body reviewing them, and the parties to the action in which they are made. Findings ground a body, helping it to avoid making decisions based on irrelevant or unsubstantiated factors. The act of making findings requires a body to focus its attention on the evidence presented and how this evidence reflects on each of the elements required in an ordinance or statute. The act of making findings not only helps a body formulate the basis for its decision but also helps the body communicate that basis to an appellate body. Well-drafted findings allow a reviewing court to understand why a body made a certain decision rather than having to guess as to the basis for a certain ruling. Findings also provide the parties to an action with guidance, giving these parties insight into the basis for the body's decision, which in turn allows them to make strategic decisions about whether or not to appeal the body's action. *Mobile Oil Corp. v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974); *see also Faulk v. Board of Equalization*, 934 P.2d 750 (Alaska 1997).

VIII. ARE FINDINGS REQUIRED BY LAW IN ALL PROCEEDINGS?

Findings are required under state law but not expressly in the Cordova Municipal Code. *See South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168 (Alaska 1993), quoting from *Kenai Peninsula Borough v. Ryherd*, 628 P.2d 557, 562 (Alaska 1981). The Alaska court requires that findings be made in all quasi-judicial proceedings (see Open Meetings Act section for discussion of what qualifies as a quasi-judicial proceeding).

In *Fields v. Kodiak City Council*, the court required findings in a variance action, stating that:

The statute requires an aggrieved party seeking review to specify the grounds for the appeal. AS 29.33.130(b) [now, AS 29.40.040(b)]. This requirement is also found in the governing local ordinance. KIBC 17.69.030. A board's failure to provide findings, that is, to clearly articulate the basis of its decision, precludes an applicant from making the required specification and thus can deny meaningful judicial review. We believe that implicit in AS 29.33.130(b) is the requirement that the agency rendering the challenged decision set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order. Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the board's action is supported by substantial evidence. Thus

we hold that regardless of whether a local ordinance requires findings, a board of adjustment ruling on a variance request must render findings “sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board’s action.” *Fields v. Kodiak City Council*, 628 P.2d 927 (Alaska 1981) (citations omitted).

According to the court in *Fields*, “[a]bsent findings, a court is forced into ‘unguided and resource-consuming explorations,’ groping through the record to determine ‘whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order and decision’ of the board.” *Fields*, 628 P.2d at 934 (citations omitted).

Despite the court’s general requirement of findings, there are cases in which the court determines that findings are unnecessary to decipher a board or commission’s decision and upholds the decision in question despite the lack of findings. See *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 940 (Alaska 2001). See also *Fields*, 628 P.2d 927 at 932; *Galt v. Stanton*, 591 P.2d 960, 962-965 (Alaska 1979). However, even in the cases where the court upholds a commission or board’s decision without adequate findings, the court invariably reiterates the general findings requirement.

IX. HOW THOROUGH DOES A FINDING REALLY NEED TO BE?

The Alaska Supreme Court asks itself the following when reviewing a body’s decision: “do the findings facilitate this court’s review, assist the parties and restrain the agency [or board or commission] within proper bounds?” See *Faulk*, 934 P.2d at 751. The more direct and thorough a finding, the more likely that it will hold up under fire. Well-structured findings address clearly each and every element of a claim, reflecting all the evidence a body considered as well as the evidence it rejected. In making its findings, the body should note the standard of proof it used in considering each piece of evidence and in drawing a particular conclusion from this evidence. Where there is a lack of evidence regarding a particular element, the body should make a finding regarding this lack of evidence, ensuring that its analytical process is transparent. Additionally, the body should detail evidence that should have been but was not presented.

Findings should also include the body’s final decision regarding the entitlement at issue. If there are any special accommodations, requirements or limitations, the body should make findings directly addressing these as well. Where the body doesn’t believe a witness or finds certain evidence unbelievable and thereby chooses not to rely upon it, it should state this in its findings.

Once the body finishes drafting its findings, it may be worthwhile for the body to work backwards, matching its findings to the elements of the entitlement, ensuring that

every piece of evidence considered or discarded has been accounted for in its findings. Finally, the body should review its findings to confirm that it applied the proper standard of review. This methodical process, albeit time-consuming initially, will ensure that the body's findings are always thorough and complete.

X. WHAT IS "THE RECORD" AND HOW IS IT USED?

The record is all the documents, evidence, statements, comments, surveys, deeds, plats, drawings, photographs, expert reports, notice publications, and all other documents introduced at the proceeding and available for consideration by the body. It is the compilation of evidence on which the council, commission or board will base its decision and on which an appellate body will rely in determining whether the council, commission or board at issue made supportable findings.

The appellate body is not going to reconsider the evidence, drawing its own conclusion. Instead, this body will examine whether there is substantial evidence in the record to support the Council's, the commission's or the board's findings and, if such evidence exists, uphold these findings. The court has defined "substantial evidence" as evidence "a reasonable mind might accept as adequate to support a conclusion." *See Griswold v. City of Homer*, 55 P.3d 64, 67 (Alaska 2002). The court will not reject a body's findings just because it might have drawn a different conclusion so long as the findings could be accepted by a reasonable mind. This test lets the body pick and choose from the record without much scrutiny. It is when the body decides to venture from the record that its decisions may become vulnerable.

While it is very important for a body to draft thorough and precise findings, a solid record can occasionally save not so solid findings because an appellate body can decipher from the record why a council, commission or board came to a certain decision. *See Coffey*, 862 P.2d 168 at 175. Thus, a council, commission or board should also ensure that the record is carefully preserved and properly organized.

XI. HOW, WHERE, AND WHEN SHOULD A COMMISSION DRAFT ITS FINDINGS?

In Alaska, there are three procedures commonly used for making findings. A body may: (1) make findings as part of its normal decision-making process, (2) present a summary of its decision and the basis for it to its staff, who then draft the findings and decision, or (3) instruct its staff to submit findings with the application, which are later adopted or rejected by the body in its decision-making process. All of these methods appear to be available to the Council, and commission or board under the Cordova Municipal Code. There are pros and cons to all of these methods, which a commission should be aware of in adopting a particular approach.

A. Making Findings as Part of the Decision-Making Process

This method is appealing because the body maintains control over every stage of the process and is also making its findings only after reviewing the application and considering evidence submitted at the hearing. However, deciding what to include in the findings can be painfully arduous and often the written findings suffer from the “too many cooks in the kitchen” syndrome. Instead of having carefully crafted findings, they are often poorly constructed, incomplete, vague and/or ambiguous.

B. Summarizing Findings and Submitting Them to Staff for Drafting

This method can produce much more complete and accurate findings. Here, the body reviews the evidence, makes its decision and submits a summary of its decision and the basis for it to its staff, which then drafts the decision and findings. Once the staff has drafted a decision and detailed findings supporting it, the body reviews these before they are sent to the parties. This method is not only more likely to produce well written findings; it also allows the staff to discuss the body’s findings with the municipal attorney if the staff questions the validity of the body’s summary. While this method is far more likely to produce thorough and well crafted findings, there are several drawbacks. First, this process may take over a month to complete depending on how frequently a body meets. This delay can be unacceptable where a municipality’s code proscribes a shorter period in which a decision must be made after the hearing. Even where time is not an issue, there can often be a problem in securing final approval for the findings. It is difficult to guarantee that all the members present at the hearing will also be present for the final review. Also, the question arises as to whether a member absent at the hearing can vote on findings that he or she did not hear the evidence supporting. One way to avoid the problems arising through the final review process is for the body to delegate the power to authorize the final draft decision and findings solely to the members who were present at the hearing.

C. Staff Submits Findings and a Decision with its Application Report

While this method will also likely lead to well-written findings, it may have a negative impact on the completeness of these findings and the validity of the decision on which they are based. Here, the findings and decision are drafted before the hearing is held. Thus, any evidence presented during the hearing will not be reflected in the findings. Also, in the event the body doesn’t accept the staff’s determination, it then has the task of drafting its own findings and decision during its decision-making process. This again can lead to incomplete, vague or confusing findings. Some bodies have attempted to solve this potential downfall by having their staffs draft findings and a decision coming out both ways. There is a risk that this practice will support an appeal of the body’s decision because it supports the argument that the commission’s decision was arbitrary and could have gone either way.

When deciding which method to employ, a body should consider the time frame in which it must conduct itself, the staffing resources available to it, and the procedures that are most likely to produce the most articulate, well written and thorough findings possible.

XII. IS THERE ANY WAY FOR A COMMISSION TO PROTECT ITS FINDINGS FROM SCRUTINY?

There is no way for a body to guarantee its findings will be upheld. However, a body can include certain words in its findings to limit the other party's window of appeal. A body should include a sentence in all decisions that it is a final decision by the body at issue but may be appealed. All of the information regarding when and where to appeal the decision should be clearly communicated.

XIII. POLICY REASONS FOR DRAFTING GOOD FINDINGS

There are policy reasons for drafting well-written complete findings. Findings reflect a body's decision-making process. A solid set of findings demonstrates a body's ability to reason and articulate its analytical process. When the public and an appellate body are privy to the complete analytical process of a council, commission or board, it diminishes questions of political and social bias, which may enhance the body's credibility both among the public and the members of an appellate body. It also can lead to a more streamlined and efficient process, both during the hearing and on appeal. It can be argued that where the public believes that a body is objective, the parties appearing before it will make a greater attempt to provide the necessary evidence to support their arguments. It may be easier for a body to draft its findings and decision where there is ample and relevant evidence for it to rely upon. Also, well-articulated findings enable an appellate court or body to quickly interpret and analyze a council's, a commission's or a board's decision, potentially speeding up the appeals process.

UNDERSTANDING THE PROCESS FOR DRAFTING GOOD WRITTEN FINDINGS DURING A VARIANCE HEARING

THE SCENARIO

John Smith lived in a somewhat shady part of town. He loved his home, though, and he wanted to set a good example for his neighbors. He had an old car port that was falling apart. It had a little lean to it and its roof was rotted. John Smith decided to build an attached heated garage in place of the car port. Of course, the plans required it to fall in the set back a bit but the impact on the neighborhood was so positive that John didn't think it was even an issue worth mentioning. He built the garage and it definitely gave the neighborhood a little lift. While John was proud of himself, he won the lottery and decided to move to Hawaii. Before going he sold his house to Jane. Jane's favorite part of the house was the garage.

Jane decided that she wanted to build a workshop off the back of the garage to even further improve the property. In order to do so she would have to maintain the footprint of the garage, which it turns out was in the setback. Jane was a real stickler for the rules so she applied for a variance.

YOUR TASK

Step 1: Please be ready to discuss what Jane will likely argue in support of her variance application.

Step 2: On a separate piece of paper, please draft the Commission's findings. Also, please be ready to discuss the process for developing these findings.

18.64.020 - Variances.

A. An application for a variance shall be filed in writing and verified by the owner of the property concerned.

1. The application shall contain the following data with respect to the property and the applicant:
 - a. A legal description of the property involved,
 - b. Plot plans showing the location of all existing and proposed buildings or alterations, elevations of such buildings or alterations, and such other data as may be required,
 - c. Evidence of the ability and intention of the applicant to proceed in accordance with the plans within six months after the effective date of the variance;
2. The application shall contain a statement and adequate evidence showing the following conditions, all four of which must exist before a variance may be granted.
 - a. That there are exceptional physical circumstances or conditions applicable to the property or to its intended use or development which do not apply generally to the other properties in the same land use district,
 - b. That the strict application of the provisions of this title would result in practical difficulties or unnecessary hardship,
 - c. That the granting of the variance will not result in material damage or prejudice to other properties in the vicinity nor be detrimental to the public health, safety or welfare,
 - d. That the granting of the variance will not be contrary to the objectives of the comprehensive plan.

B. The planning commission shall hold a public hearing upon each properly submitted application. Such hearing shall be held not less than ten days nor later than thirty days following the date of filing of such application and the applicant shall be notified of the date of such hearing. The commission shall cause to be sent to each owner of property within a distance of three hundred feet of the exterior boundary of the lot or parcel of land described in such application notice of the time and place of the hearing, a description of the property involved and the provisions of this title from which a variance is sought. For the purposes of this section, "property owner" means that owner shown upon the latest tax assessment roll.

C. From the time of filing such application until the time of such hearing, the application, together with all plans and data submitted, shall be available for public inspection in the office of the city clerk.

D. The commission shall cause to be made by its own members, or its authorized agent, an investigation of facts bearing on any application sufficient to assure that the action taken is consistent with the intent and purpose of this title.

E. The planning commission shall hear and consider evidence and facts from any person at the public hearing or written communication from any person relative to the matter. The right of any person

to present evidence shall not be denied for the reason that any such person was not required to be informed of such public hearing.

F. Within thirty days from the conclusion of the public hearing, the planning commission shall render its decision unless such time limit be extended by common consent and agreement signed by both applicant and the commission. If, in the opinion of the commission, the necessary facts and conditions set forth in this section apply in fact to the property referred to, and that the same comes within the purview of the planning commission, it may grant the variance. If, however, such facts and conditions do not prevail nor apply, or if the granting of the variance will adversely affect the property of persons in the vicinity of the applicant's property, or for any other valid reason, the commission shall deny the application.

G. The commission, in granting the variance, may establish conditions under which a lot or parcel of land may be used or a building constructed or altered; make requirements as to architecture, height of building, or structure, open spaces or parking areas; require conditions of operation of any enterprise; or may make any other conditions, requirements or safeguards that it may consider necessary to prevent damage or prejudice to adjacent properties or detriment to the city. When necessary, the commission may require guarantees in such form as deemed proper under the circumstances to insure that the conditions designated will be complied with.

H. The decision of the planning commission, either for the granting, with or without conditions, or the denial of an application for variance, shall become final and effective ten days following such decision.

I. Any variance approved by the planning commission shall be conditional upon the privilege granted being utilized within six months after the effective date of the variance. In the event some construction work is involved, it must actually commence within the stated period and must be diligently prosecuted to completion, otherwise the variance is automatically voided. In such cases, the planning commission may extend the time of the construction start if satisfactory evidence of planning progress is presented.

J. In order to defray the expense of making maps, sending out notices, and incidental administration costs involved in any application for variances and appeals, the person filing such application shall pay a fee to the city to cover the expenses incurred by the city in processing the application. Regardless of the action taken on the application, the fee will not be refunded.

(Ord. 582 (part), 1984; prior code § 15.220(C)).

SECTION 1

THE OPEN MEETINGS ACT AS IT APPLIES TO THE CITY COUNCIL, AND CITY BOARDS AND COMMISSIONS

I. WHAT IS THE PURPOSE BEHIND THE OPEN MEETINGS ACT?

The Open Meetings Act ("OMA"), AS 44.62.310-312, mandates that meetings held by a governmental body be open to the public and properly noticed. The OMA is narrowly construed to prevent unnecessary executive sessions and exemptions from the Act. *See* AS 44.62.312. According to AS 44.62.312, while a governmental unit's purpose is to "aid in the conduct of the people's business," this purpose does not result in a forfeiture of the people's sovereignty or right to determine what information they can access. Further, the people have a right to be informed so that they have the power to "control ... the instruments they have created." *See* AS 44.62.312.

II. HOW DOES THE OPEN MEETINGS ACT APPLY TO A PLANNING COMMISSION?

The OMA applies to every "governmental body." A "governmental body" includes "an assembly, council, board, commission, committee, or other similar body of a public entity" that has the authority to either develop policies and make decisions for a public entity or to advise or make recommendations to the public entity. The definition of "governmental body" includes subcommittee members and subordinate units of a governmental body with two or more members. Although both decision-making bodies and advisory bodies are included under the OMA, the repercussions for violations of the OMA differ depending on the nature of the body.

III. A BOARD'S QUASI-JUDICIAL V. LEGISLATIVE CAPACITY

The first step in ensuring compliance with the OMA is being aware of when your Council, Commission or Board is and when it is not subject to the OMA. The following types of functions are *not* subject to the OMA: (1) meetings held to make a decision in its performance of a quasi-judicial function; (2) staff and/or employee meetings; and (3) national, state or regional membership organization meetings where no business of the Commission is discussed (commonly known as the "AML exception"). AS 44.62.310(d)(1), (6) and (7).

A. Quasi-Judicial Decision Meetings

The City Council and most of the City's commissions and boards perform legislative as well as quasi-judicial functions. A function is "quasi-judicial" when it directly affects an individual or a small identifiable group in his/her or its private capacity rather than the community at large. *See Cabana v. Kenai Peninsula Borough*, 21 P.3d 833, 835-836 (Alaska 2001). The Planning Commission may make quasi-judicial decisions that include, but are not limited to, whether or not to grant a variance or approve a conditional use permit. The City Council may make quasi-judicial decisions when reviewing the City Manager's revocation of a license or hearing an

appeal as the Board of Adjustment. Similarly, the Hospital Services Board (“HSB”) acts quasi-judicially when it receives the grievance decision by the administration. While deliberations during a quasi-judicial proceeding are not subject to the OMA, the meeting in which arguments are presented and evidence is introduced must still be conducted before the public.

B. Legislative Decisions and Application of the OMA to These Decisions

When a body is called upon to institute or remark upon policy and procedure it is acting in its legislative capacity and is subject to the OMA. For example the Planning Commission is acting legislatively when it conducts such acts as investigating matters related to City planning under CMC 3.40.080(I), developing and/or revising a master plan for City development as authorized under CMC 3.40.080(A) or drafting an official city map under CMC 3.40.080(K). *See Friends of Cooper Landing v. Kenai Peninsula Borough*, 79 P.3d 643, 644 (Alaska 2003). The City Council acts legislatively when it approves the comprehensive plan or amends the City Code. The HSB acts legislatively when it reviews its bylaws or discusses policy implementations at the hospital. *See* CMC 14.28.010.

While it can be difficult to determine when a body is acting legislatively rather than quasi-judicially, a good rule of thumb is anytime it takes action for the community as a whole and not for or against a single individual or small group, it is acting legislatively.

IV. WHAT IS A “MEETING?”

Once you have determined that the council, commission or board on which you sit is acting legislatively and not deliberating in its quasi-judicial capacity and thus is subject to the OMA, the next step is to determine whether or not the gathering at issue is a “meeting” for purposes of the OMA. Cordova has both decision-making and advisory-only bodies. While the Council, the Planning Commission, and the HSB are decision-making bodies, the Council has the authority to create advisory-only boards and committees. *See* CMC 3.50.010.

A. Policy- and/or Decision-Making Body

A policy- and/or decision-making body has a “meeting” when (1) “more than three members or a majority of the members, whichever is less, are present” and (2) “a matter upon which the governmental body is empowered to act is considered by the members collectively.” AS 44.62.310(h)(2)(A).

B. Advisory-Only Body

Many Alaska municipalities create commissions whose purpose is advisory-only. For example, Cordova's Parks and Recreation Advisory Commission advises the City Council and the City Manager regarding problems with and development of the parks and recreation facilities within the City. A body with only the power to advise or make recommendations has a "meeting" when (1) there is a gathering of governmental body members and (2) this gathering is "prearranged for the purpose of considering a matter upon which the governmental body is empowered to act." AS 44.62.310(h)(2)(b).

The following chart provides a glimpse at how the requirements for policy and/or decision-making meetings compare to those for advisory-only meetings.

DECISION-MAKING BODIES	ADVISORY-ONLY BODIES
As long as a sufficient number of members are present, <i>any</i> gathering can be considered a meeting, whether it takes place in a meeting hall or a restaurant.	Meeting must be prearranged for the purpose of considering matter upon which the body is empowered to act. Chance encounters will not constitute a meeting, even if the members discuss a matter on which they could advise or make a recommendation.
A matter on which the body is permitted to act includes <i>every</i> step of the deliberative process, from brainstorm sessions to fine tuning a proposal. <i>See Brookwood Homeowners Ass'n</i> , 702 P.2d 1317, 1323 (Alaska 1985).	Also includes every step of the deliberative process. <i>See Brookwood</i> , 702 P.2d 1317 at 1323.
Need at least four members or a majority of members present, whichever is a smaller amount, for a meeting to occur.	There is no requirement as to how many members must be present for a meeting to occur. Just two members could have a meeting.
A social gathering arranged for a given social purpose and not to discuss matters on which the body can act is not a meeting under the OMA. However, any attempt to hold a social gathering as a pretext for a discussion on body matters will probably be a meeting under the OMA. Moreover, if at a social gathering, the members do discuss a matter upon which they are empowered to act collectively, a violation of the OMA could occur. <i>See, e.g., Att'y Gen. Op.</i> , 1993 WL 393353 (July 6, 1993).	Same.

C. Teleconference Meetings

In today's technological age, the Council, and commission and board members must also be aware of how the OMA applies to "virtual" meetings such as teleconferences, video meetings, etc. The OMA expressly permits meetings via teleconference. When voting in a teleconference meeting, all votes should be taken via roll call so the public can identify how each member voted. AS 44.62.310(a). When providing notice of a teleconference meeting, the body must include the locations of all teleconference sites. AS 44.62.310(e).

An issue that arises from this language is whether allowing members to participate in meetings by phone would violate the OMA if the place from which they call in has not been designated as a teleconference site and the other requirements have not been satisfied. The Supreme Court has held that members of the public may participate in meetings via phone without complying with such requirements. *See Hickel v. Southeast Conference*, 868 P.2d 919, 929 (Alaska 1994). It has not yet opined on whether members of a body may participate by telephone without following the teleconferencing procedures of the OMA. However, the Attorney General interpreted the teleconference procedures to excuse members from providing notice of and access to their locations when attending a public meeting via telephone. *See* 1994 Alaska Op. Att'y Gen. 367 (November 30, 1994). In this opinion, the Attorney General interprets the reference in AS 44.62.310(e) to "teleconference sites" as applying only to "those official teleconference facilities at which the public may participate," and not to the telephone location of a member. 1994 AG's Op. 367. Additionally, the City has by practice permitted members to attend City Council meetings by telephone under certain situations from a nonpublic location.

D. Serial Communications

At first glance, it seems odd that a "meeting" for purposes of the OMA could include an email or telephone call from one person to another, or that a series of such conversations could constitute a meeting. However, in the case of a decision-making body, if four of the members email each other about a matter that the body can collectively act on, a meeting could occur. Similarly, if a majority of the members of a subcommittee that consists of two or more members email each other about the same kind of matter, a meeting could occur. *See* AS 44.62.310(h)(2)(A).

The Alaska Supreme Court has not directly addressed the matter. However, it has hinted that emails and telephone conversations can constitute meetings and violate the OMA. *See Hickel*, 868 P.2d 919 at 929-930 (one-on-one conversations between reapportionment board members along with a "dearth" of discussion of substantive issues during the public meeting was sufficient evidence to prove a violation of the OMA); *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (assuming the

superior court correctly found that a violation of the OMA occurred when a majority of the redistricting board members emailed one another regarding a substantive matter, the court correctly held that such a violation should not void the redistricting plan altogether).

Given the case law in this area, a body should avoid all discussions outside of the context of a properly noticed meeting where such discussions, whether by email, phone, during meeting breaks or otherwise, could be characterized as “important decision making and substantive discussion [that] took place outside the public eye” See *Hickel*, 868 P.2d 919 at 930.

V. REQUIRED NOTICE FOR MEETINGS

According to AS 44.62.310(e), reasonable public notice is required and such notice “must include the date, time, and place of the meeting and if, the meeting is by teleconference, the location of any teleconferencing facilities that will be used.” The most important factor in determining if adequate notice has been provided is whether or not the method used is consistent with the procedures of the body at issue. The amount of notice required may also be influenced by the nature of the issues to be discussed. While in an emergency the required time might be short, in a situation involving a matter of public concern, the required time could be much longer. See *Tunley v. Municipality of Anchorage School District*, 631 P.2d 67 (Alaska 1981).

Whether or not the minimum notice times included in a municipal code comply with the OMA reasonableness requirement ultimately depends on the “complexity and importance of the issue involved.” *Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*, 672 P.2d 891, 895 (Alaska 1983). The Code provisions of a municipality must be consistent with AS 44.62.310 or they are preempted. *Walleri v. City of Fairbanks*, 964 P.2d 463, 468 (Alaska 1998). The Cordova Municipal Code has different requirements for different bodies. However, CMC 3.14.020 requires reasonable consistent notice for meetings by all government bodies. The location of where notice must be posted differs for some bodies, such as the HSB. CMC 14.28.010(a).

Finally, although the OMA does not provide the public with the right to be heard at meetings, Title 29 does provide a “reasonable opportunity” to be heard at meetings. See AS 29.20.020(a).

VI. EXECUTIVE SESSIONS

A. When is an Executive Session Warranted?

An executive session occurs when a public body determines that a particular issue should be discussed in private and thus takes time out from a public meeting to

discuss this issue outside the public's purview. The subjects that may be discussed in executive session are limited to the following:

- matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity. AS 44.62.310(c)(1).
- subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion. AS 44.62.310(c)(2).
- matters which by law, municipal charter, or ordinance are required to be confidential. AS 44.62.310(c)(3).
- matters involving consideration of government records that by law are not subject to public disclosure. AS 44.62.310(c)(4).
- Additionally, AS 44.62.310(b) provides that an executive session is appropriate to give direction to an attorney (or labor negotiator) regarding a specific legal matter or pending labor negotiations.

The court construes these exceptions very narrowly. AS 44.62.310(h)(1). The Cordova Municipal Code also enumerates what may be discussed in an executive session under Section 3.14.030. In this manual, we discuss each one of these potential subjects for executive session. In addition to the purposes enumerated in the Alaska statutes, the Council, and commission or board members may also question whether an executive session may be used to make quasi-judicial decisions during the course of a public meeting. As discussed earlier, when a body deliberates for solely quasi-judicial purposes the OMA is inapplicable and the body may comfortably make its decisions outside the public purview.

1. Subjects Leading to Adverse Effects on the City's Finances

A body may be tempted to use financial impact as justification for entering executive session. However, this justification should be used sparingly. The court has placed strict limits on what qualifies as a matter having adverse financial impact for purposes of allowing an executive session. A body must demonstrate that the public's immediate knowledge of a given matter will clearly have an adverse effect on the City's finances. There must be more than just the potential for adverse impact, it has to be *immediate* and *clear*. See AS 44.62.310(b).

While it may be difficult to determine what issues will clearly impact a City's finances, there has been some guidance from the Alaska court. The court has recognized that settlement offers are a proper topic for executive sessions. Where discussions surrounding settlements are required to be conducted in public, the government body loses its bargaining power because everyone, including the other side, has access to the body's weaknesses, its strengths and its limitations. While this

does not guarantee that the settlement will be adverse to the body's financial interest, it is "clear" any strain on the body's bargaining power has an adverse impact on the body's finances immediately after such information is divulged. *Anchorage School Dist. v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989).

2. Subjects Tending to Prejudice the Reputation and Character of an Individual

This justification often arises where a body is considering employing an individual and is reluctant to discuss the applicant in public. However, a body cannot presume that any discussion of an applicant's qualifications, strengths, and/or weaknesses justifies an executive session. The Alaska court has stated that a discussion of "qualifications relating to experience, education, and background" or even a comparison of these qualifications with those of other candidates does not generally justify an executive session. However, executive session may be justified where the discussion involves the employee's "personal characteristics," since discussions of these characteristics may tarnish the applicant's reputation. See *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1326 (Alaska 1982). While in theory the difference between qualifications and personal characteristics makes sense, it is much more difficult to distinguish between the two in practice. For example, an executive session held by a university tenure committee to consider granting a professor tenure was upheld by the court under this personal character justification. See *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983). The court determined that an executive session was justified because the committee's meeting would likely focus on a tenure candidate's deficiencies. However, it is arguable that such deficiencies would also involve a professor's characteristics relating to background and experience.

Where an executive session is called for the above purpose, the individual to be discussed has a right to require a public discussion rather than an executive session on the subject. In order to ensure the individual is able to exercise this right, the Alaska Supreme Court has implied that the governmental body at issue has a duty to give notice to the individual whose character is the basis for executive session. See *generally Geistauts*, 666 P.2d 424. Along with such notice, the individual must be notified of his or her right to require that any meeting adversely affecting his or her character be public.

3. Matters Required to be Kept Confidential

Allowance for executive sessions to discuss confidential matters includes all topics involving subjects that a law, municipal charter, or ordinance *requires* to be confidential. This allowance does not comment on whether laws, charters, or

ordinances that allow for rather than require confidentiality also warrant an executive session.

4. Confidential Records

It is unlikely that a body will be faced with entering executive session to discuss records required to be kept confidential by law. However, where a council, commission or board member believes that the records to be considered are of such a nature, an executive session would be warranted.

5. Attorney-Client Privilege

The Alaska court has found that certain communications between a government body and its lawyer may be held in executive session. This justification is applied very narrowly. It is only available where divulging the attorney-client communications goes against the public interest or there is another identifiable reason for keeping the communications between attorney and client. General legal advice or simply being involved in pending litigation does not justify a body's use of an executive session to meet with its attorney. *See Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993). The Alaska court has identified the following topics as appropriate for executive sessions for attorney-client discussions: (1) discussions regarding the facts of a particular case and potential litigation strategies, and (2) meeting to determine whether or not to appeal, settle or avoid an action against the body.

B. Calling an Executive Session

A valid executive session takes place during a public meeting that is properly noticed. After the public meeting begins, a motion for executive session must be proposed and approved by vote. A motion for executive session must clearly and specifically describe the subject of the executive session without nullifying the need to address the given subject privately. AS 44.62.310(b).

1. The Motion for Executive Session

When a council, or a commission or board member makes a motion for executive session, that member should be as specific as possible when identifying the justification for the session. Under AS 44.62.312(b), the law governing executive sessions is construed narrowly to prevent unnecessary executive sessions. Thus, it is important that any motion made by a member is as explicit as possible. For example, terms such as "executive session to discuss financial matters" or "executive session to address pending litigation" are probably too vague to give a court sufficient evidence to conclude that there is justification for an executive session. Simply restating the

statutory language describing the topics that warrant executive sessions may not withstand a court's scrutiny.

2. Subjects for Consideration in Executive Session

The only subjects that can be discussed in executive session are those mentioned in the motion and "auxiliary" issues to the main issue. The court has applied the term "auxiliary" fairly narrowly. While it has not yet defined this term, it determined that where personal characteristics were at issue, only these characteristics could be discussed in executive session while the individual's experience, education, and background should be discussed in public. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 at 1326. In *Cool Homes, Inc.*, the court found that a general litigation status report could not be discussed in executive session even where legal advice on avoiding liability in the same case did warrant an executive session. *Cool Homes, Inc.*, 860 P.2d 1248 at 1261.

A body cannot, for the most part, take action during the executive session. Instead, a body must reconvene a public meeting to make a decision regarding the topics discussed in executive session. AS 44.62.310(b). This requires that a body's decision actually be made before the public rather than decided in executive session and merely announced in public. However, a body may take action in executive session to tell its attorney how to handle a particular legal issue or to advise a labor negotiator regarding points for negotiation and/or bargaining.

3. Recording the Executive Session

Currently, there is no statute or case requiring that an executive session be audio recorded or that minutes be taken. However, a superior court has opined that since there were no records of what was said in an executive session, he was unable to determine if the executive session was legal. *See Pioneer Printing Co. v. Skannes*, 1KE-86-494 Civil (Alaska Sup. Ct., Dec. 19, 1986) (Memorandum of Decision). In determining whether to record an executive session, there are differing opinions in the legal world and no definitive answers.

VII. ENFORCEMENT OF OMA VIOLATIONS

In determining how violations of the OMA will be treated, the first question is what type of governmental body is involved. Where a policy and/or decision-making body is involved, the unlawful action is voidable, which means the court can, but is not required to, consider the action void. *See* AS 44.62.310(f) and CMC 3.14.050. Where an advisory-only body that does not make decisions or policy is involved, the voidability provision does not apply. *See* AS 44.62.310(g).

A court may void an action that either takes place at a secret or unlawfully closed meeting or an action that took place in an open meeting but was based upon fact-finding and deliberations that took place during an earlier secret or unlawfully closed meeting. *See generally Brookwood*, 702 P.2d 1317. An individual or entity can file a lawsuit to void the body's action within 180 days after the date of the action. AS 44.62.310(g).

Before declaring an action void, the court must determine that "considering all of the circumstances, the public interest in compliance with [the OMA] outweighs the harm that would be caused to the public interest and to the public entity by voiding the action." AS 44.62.310(f). In applying this balancing test, the court is required to consider the following:

- (1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;
- (2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;
- (3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;
- (4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;
- (5) the amount of time that has passed since the action was taken;
- (6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;
- (7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;
- (8) the degree to which violations of this section were willful, flagrant, or obvious; and
- (9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).

A body can attempt to cure the violation by holding a meeting in compliance with the OMA where it conducts a "substantial and public reconsideration" of the matters considered at the earlier unlawful meeting. AS 44.62.310(f). In a situation where an action is held void by the court, the body can still act on the matter at a later meeting that complies with the OMA. AS 44.62.310(f).

SECTION 2

EX PARTE COMMUNICATIONS

I. DUE PROCESS AND *EX PARTE* COMMUNICATIONS

A body must strive to conduct a “fair” hearing and to project this “fairness” to the parties involved. Where a party believes a body acted unfairly, he or she is far more likely to appeal the decision. Further, if he or she was treated unfairly, an appellate body is far more likely to overturn the body’s decision. This is the basic principle underlying the due process requirement. If a body consistently underlines its actions with the basic question, “Is this fair to both parties?” it is far more likely to meet due process requirements.

Under the Alaska and the United States constitutions, an individual has a right to due process when his or her property rights are at stake. “Due Process” includes the right to a fair trial, which includes the right to be notified of the hearing, the right to question witnesses testifying against you at trial, the right to examine the evidence and the right to be heard by an impartial body.

Due process is as much about conducting a hearing that “appears” fair, as it is about providing an individual with an actual “fair” hearing. Whether a party is actually treated unfairly is often less important than whether a party could perceive a body’s actions as unfair. Imagine you are seeking a variance and you catch a glimpse of your neighbor having coffee with a City Council member discussing your upcoming hearing. While that member may be fully capable of being objective come the hearing, it is likely that you have lost faith in the City Council’s ability to address your grievances. Due process is intended to ensure the individual’s faith in the legal process thereby ensuring that he or she will work within the system rather than outside it. Where an individual believes a body is unfair, he or she is more likely to ignore or violate the mechanisms the body has put in place. In so doing, a body’s ability to protect its community and assist in its progress will be greatly diminished.

There are certain actions that reflect poorly on the fairness of a hearing both in the eyes of the court and those of the parties involved. Perhaps the most dangerous of these is *ex parte* communications. *Ex parte* communications are prohibited under state law. Under case law, an *ex parte* communication occurs when a decision maker hears from one side without the knowledge or participation of the other side. See *Cook v. State*, 36 P.3d 710, 727 (Alaska App. 2001).

In adjudicatory proceedings, only information that the parties have an opportunity to hear, object to or supplement can be submitted. It is mandatory that all communications and information received should be placed on the record as it was received by the governmental body. See *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1382 (Alaska 1991). Pursuant to AS 44.62.630:

The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the right of all parties These officers ... may not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present.

II. *EX PARTE* COMMUNICATIONS AND BALANCING A BODY'S QUASI-JUDICIAL AND LEGISLATIVE ROLES

While *ex parte* communications are prohibited under state laws, remember that an *ex parte* communication is only a problem where the communication occurs regarding a matter being decided by the body in its *quasi-judicial capacity*. A body is often in the difficult position of acting as a quasi-judicial body in some matters and a legislative body in others. To be successful in these roles, a City Council, commission or board member is expected to follow two very distinct sets of rules. As a legislative body, the body is expected to meet with various groups and individuals who hope to influence it. When a body is acting as a policy maker, dealing with issues affecting the public as a whole, *ex parte* communications are really just lobbying, a lawful and deeply rooted component of political life.

However, where the Council, commission or board member is acting under his or her judicial function, *i.e.*, sitting in a hearing to decide whether to uphold the denial of a zoning permit or to grant a conditional use permit, that member should not communicate *ex parte* with the parties involved. While most members realize that *ex parte* communications are prohibited, many members struggle to avoid them. The reasons for this are both the public's confusion as to when it can and cannot contact the members and the member's own confusion as to when and how it can communicate with the parties. The following is an example of a recurring *ex parte* communication that often leads council, commission or board members into trouble:

The Dilemma: A tour of the building site is necessary for a commission to make its decision and one of the parties conveniently approaches a member of the commission and offers to give them a personal tour of the site.

The Approach: Turn down the offer for the individual site visit but schedule a visit for all the members of the commission at the same time. Arrange for a neutral third party to act as a guide for the commission. This neutral party can be used by both sides to make sure that the commission members are aware of any items the parties wish to present. The results of the tour and any observations made by the commission members should then be

placed in the record so that they can later be relied upon by the commission in its decision.

III. REMEDYING AN UNINTENTIONAL *EX PARTE* COMMUNICATION

Occasionally, even the most conscientious council, commission or board member may find his or herself unwittingly involved in an *ex parte* communication. When this happens, the member taking part in such communication should disclose the communication, on the record, as soon as possible. In an attempt to neutralize any perceived unfairness, the council, commission or board member should submit all written communications received and sent, along with a memorandum stating the substance of all oral communications between the member and the interested party. While this is not a required practice in Cordova, it may go a long way to curing any harm caused by the *ex parte* communication.

While an *ex parte* communication disadvantages one party, the Alaska court has recognized that disclosure of the communication can remedy that inequality between the parties. Disclosure at the beginning of the hearing permits the disadvantaged party to submit evidence regarding the *ex parte* information, leveling the playing field.

Alaska law does not expressly provide the consequences for participating in *ex parte* communications. However, in *Frontier Companies of Alaska v. Jack White Co.*, 818 P.2d 645 (Alaska 1991), the court did state that violations in an adjudicatory proceeding did not make the findings of the body *per se* reversible and that such a finding would depend on whether the error was "harmless beyond a reasonable doubt." See *Frontier*, 818 P.2d 645 at 652; *Pease v. State*, 54 P.3d 316 (Alaska App. 2002). See also *Crouse v. Municipality of Anchorage*, 79 P.3d 660 (Alaska App. 2003). The court went on to state that:

The standards of evaluating *ex parte* contact need not be as high in civil as in criminal cases since the right of the accused to be present at every stage of a criminal trial has constitutional status, and there is no similar protection on the civil side. *Frontier*, 818 P.2d 645 at 652.

The court determined that disqualification of a board member where he participated in substantive discussions with a party after the hearing was an acceptable response to his *ex parte* violation. *Frontier*, 818 P.2d 645 at 652.

November 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4 Daylight Savings ends	5	6	7 CITY COUNCIL MEETING LIBRARY	8	9	10
11 Veteran's Day	12 CITY HALL CLOSED Veteran's Day (OBSERVED)	13 PLANNING COMMISSION 6:30PM LIBRARY	14	15	16	17
18	19	20	21 CITY COUNCIL MEETING LIBRARY	22 CITY HALL CLOSED Thanksgiving	23 CITY HALL CLOSED	24
25	26	27	28	29	30	

December 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4	5 CITY COUNCIL MEETING LIBRARY	6	7	8
9 Hanukkah begins	10	11 PLANNING COMMISSION 6:30PM CITY HALL	12	13	14	15
16	17	18	19 CITY COUNCIL MEETING LIBRARY	20	21 Winter begins	22
23	24 New Year's Eve	25 CITY HALL CLOSED Christmas Day	26 Kwanzaa	27	28	29
	30	31				