June 15, 2011
5:30 P.M.

Cowles Council Chambers
491 East Pioneer Avenue
Homer, Alaska

WORK SESSION
Advisory Planning Commission
AGENDA

1. Call To Order, 5:30 P.M.

2. Discussion of Items on the Regular Meeting Agenda

3. Staff Report PL 11-68, Draft Ordinance 11-XX, Sign Code Amendments

4. Public Comments
   The public may speak to the Planning Commission regarding matters on the work session agenda that are not scheduled for public hearing or plat consideration. (3 minute time limit).

5. Commission Comments

6. Adjournment

HOMER ADVISORY PLANNING COMMISSION
491 E. PIONEER AVENUE
HOMER, ALASKA

JUNE 15, 2011
WEDNESDAY AT 7:00 P.M.
COWLES COUNCIL CHAMBERS

REGULAR MEETING
AGENDA

1. Call to Order

2. Approval of Agenda

3. Public Comment

The public may speak to the Planning Commission regarding matters on the agenda that are not scheduled for public hearing or plat consideration. (3 minute time limit).

4. Reconsideration

5. Adoption of Consent Agenda

All items on the consent agenda are considered routine and non-controversial by the Planning Commission and are approved in one motion. There will be no separate discussion of these items unless requested by a Planning Commissioner or someone from the public, in which case the item will be moved to the regular agenda and considered in normal sequence.

1. Approval of Minutes of June 1, 2011
2. Time Extension Requests
3. Approval of City of Homer Projects under HCC 1.76.030 g.
4. KPB Coastal Management Program Reports
5. Draft Decision and Findings for Conditional Use Permit (CUP) 11-10, Lot 5-A-1 Northern Enterprises No. 1 Sub. At 5155 Kachemak Drive, Northern Enterprises Boatyard

6. Presentations

7. Reports

a. Staff Report PL 11-70, City Planner's Report

8. Public Hearings

Testimony limited to 3 minutes per speaker. The Commission conducts Public Hearings by hearing a staff report, presentation by the applicant, hearing public testimony and then acting on the Public Hearing items. The Commission may question the public. Once the public hearing is closed the Commission cannot hear additional comments on the topic. The applicant is not held to the 3 minute time limit.

A. Staff Report PL 11-56, A Public Hearing in the Remand from the Board of Adjustment to the Homer Advisory Planning Commission to consider new conditions regarding 1033 Skyline Drive

B. Staff Report PL 11-72, CUP 11-06, 4721 Homer Spit Road, Central Charters Boardwalk Expansion for HCC 21.28.030 (a) Restaurants and drinking establishments HCC 21.28.030(i) More than one permitted principal use on a lot, HCC 21.28.030(j)Planned unit development, and HCC 21.28.040(d) More than 8,000 sf of building area

C. Staff Report PL 11-71, Draft Ordinance 11-xx, Conservation District

9. Plat Consideration

A. Staff Report PL 11-67, Oscar Munson No. 25 Goode Replat Preliminary Plat **CANCELED**

10. Pending Business

A. Staff Report PL 11-68, Draft Ordinance 11-XX, Sign Code Amendments

B. Staff Report PL 11-69, Bylaws change to amend the meeting time

11. New Business

12. Informational Materials

~~A. City Manager's Report~~

13. Comments of The Audience

Members of the audience may address the Commission on any subject. (3 minute time limit)

14. Comments of Staff

15. Comments of The Commission

16. Adjournment

Meetings will adjourn promptly at 10 p.m. An extension is allowed by a vote of the Commission. Notice of the next regular or special meeting or work session will appear on the agenda following "adjournment."

HOMER ADVISORY PLANNING COMMISSION
REGULAR MEETING MINUTES
JUNE 1, 2011

UNAPPROVED

Session 11-10, a Regular Meeting of the Homer Advisory Planning Commission was called to order by Chair Minsch at 7:01 p.m. on June 1, 2011 at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

PRESENT: COMMISSIONERS BOS, DOLMA, DRUHOT, HIGHLAND, MINSCH, VENUTI

STAFF: CITY PLANNER ABBOUD
DEPUTY CITY CLERK JACOBSEN

APPROVAL OF AGENDA

The agenda was approved by consensus of the Commission.

PUBLIC COMMENT

The public may speak to the Planning Commission regarding matters on the agenda that are not scheduled for public hearing or plat consideration. (3 minute time limit).

There were no public comments.

RECONSIDERATION

There were no items for reconsideration.

ADOPTION OF CONSENT AGENDA

All items on the consent agenda are considered routine and non-controversial by the Planning Commission and are approved in one motion. There will be no separate discussion of these items unless requested by a Planning Commissioner or someone from the public, in which case the item will be moved to the regular agenda and considered in normal sequence.

1. Approval of the May 18, 2011 minutes
2. Time Extension Requests
3. Approval of City of Homer Projects under HCC 1.76.030 g
4. KPB Coastal Management Program Reports
5. Draft Decision and Findings for CUP 11-09, 3406 Main Street
6. Draft Decision and Findings for CUP 11-07, Alaska Village Mission
7. Draft Decision and Findings for CUP 11-04, 880 East End Road/Seldovia Wellness Center
8. Draft Decision and Findings for CUP 11-08, Amending CUP 10-04, Kachemak Bay Campus

Commissioner Bos requested that Item 8 on the consent agenda be moved to new business item A.

The amended Consent Agenda was approved by consensus of the Commission.

PRESENTATIONS

There were no presentations scheduled.

REPORTS

A. Staff Report PL11-66, City Planner's Report

City Planner Abboud reviewed his staff report.

PUBLIC HEARINGS

Testimony limited to 3 minutes per speaker. The Commission conducts Public Hearings by hearing a staff report, presentation by the applicant, hearing public testimony and then acting on the Public Hearing items. The Commission may question the public. Once the public hearing is closed the Commission cannot hear additional comments on the topic. The applicant is not held to the 3 minute time limit.

A. Staff Report PL 11-58, CUP 11-10, A Request for a Conditional Use Permit at 5155 Kachemak Drive, Northern Enterprises Boatyard, for more than one building containing a permitted principal use on a lot, HCC 21.24.030(k) and More than 8,000 sf of building area HCC 21.24.040(d)

City Planner Abboud reviewed the staff report.

Kenneth Moore, applicant, commented that their plan is to replace the building that burned down with a better building. They intend to exceed fire marshal requirements in some ways because they don't want to have another building that will burn and take other peoples boats with it. The building that burned was built in 1981 and at the time they weren't sure what types of activities would be happening there. As time went by a lot of different work happened in it, but more recently it became what a building in a boat yard should be. They better understand the needs for the new building. He hopes that the water and sewer LID goes through as they expect to hook up a sprinkler system. If this LID doesn't go, he will work with the City to see what else can be done, whether it is a smaller LID area or some other way to service their property.

In response to questioning Mr. Moore explained that currently their septic is some holding tanks and leech fields but it is an old system that needs to be replaced. As far as uses not allowed at the boat yard the main thing is to keep people from living there in their boats. Also they try to keep from taking derelict vessels as they end up in a situation of having to get rid of the vessels themselves. The vessels become an environmental hazard and are costly to remove. He explained that they are looking into ways to deal with hazardous materials on site. He is working with his friend John Wolf who does environmental assessment work for large companies like Crowley. Mr. Wolf has currently done a phase 1 assessment for them.

Bryan Byler with Sunland Development commented that Sunland is the general contractor for the building project. Mr. Byler said he is storm water LEED certified with the State of Alaska. They are familiar with best management practices and storm water management and will develop a plan to meet code specifics on the site. It is their understanding that since annexation and zoning has happened everything else on site has been grandfathered in. They understand storm water is a concern and as they make the application they will have to follow what ever DEC prescribes for this project. Mr. Byler explained the storm water pollution prevention plan applies when more than an acre of ground is disturbed in new construction. They will not be disturbing more than an acre in new construction. He will file a notice of intent (NOI) per the requirement, but technically they are not required to have a storm water pollution prevention plan on the property per DEC regulations. He added that they plan to leave the foundation in place, but if they had to take it out and cut in a driveway they would disturb more than an acre that requirement would come into to play. Since they are using the current foundation they will not be disturbing more than an acre.

Chair Minsch opened the public hearing.

Rachel Lord, Outreach Monitoring Coordinator with Cook Inletkeeper, commented that the NOI requirement through DEC for a multi-sector general permit (MSGP) is for industrial sectors that have storm water discharges. She agrees that the boat yard over all would fall under this standard but probably not for this specific building project. The MSGP addresses runoff of polluted water during rain events from industrial facilities. It is a requirement under the clean water act for any facility discharging pollutants into the nation's waters. This permit, pursuant to EPA, requires boatyard facilities to develop a storm water pollution prevention plan, implement control measures, and submit a notice of intent. Control measures often include site specific best management practices, employee training and maintaining records and reporting. Since the state took over this permitting from EPA there has been some confusion around the MSGP and compliance assistance with facilities. Ms. Lord said Inletkeeper has been working hard to learn more from the state as well as from a variety of facilities to increase their capacity to be a resource as issues come up. It is in this capacity she is here tonight. When she saw the requirement for granting the CUP for Northern Enterprises to file an NOI with the state she wanted to show her support for granting the CUP and to offer assistance to the boatyard if needed. Northern Enterprises is a vital local business that provides necessary services to our fleet. Inletkeeper believes that developing a storm water pollution prevention plan will provide Northern Enterprises with a living document that can be an asset to them and their customers. There are costs to this permit which should not be overlooked especially for a small business; however there are major benefits including better understanding and control of pollutants from boatyard activities for our community. Inletkeeper would formerly like to offer their assistance to Northern Enterprises if they do pursue the MSGP with the state. While the CUP requirement was probably an unexpected extra hurdle in rebuilding their lost structure, Inletkeeper is available as a resource to help to minimize associated costs and provide assistance as a local organization deeply connected to the bay, our fishing fleet, and the community.

Michael Kennedy, city resident, commented in support of the Northern Enterprise project. Regarding the CUP he thinks the Commission should put as few road blocks as possible for the rebuild. Northern Enterprises provides sustainable jobs that primarily deal with the fishing industry. He asked that the Commission remember that the property was annexed into the city and under their previous grandfather rights they should be able to continue under the same business without undo extra considerations and be able to operate under the same guidelines as before they were annexed. He remembers when the annexation process took place industries outside the city were promised that they would be grandfathered in under the same rights and uses that currently existed before the annexation. To provide them with any additional requirements after annexation would be going back on the city's word. He believes that Northern Enterprises was in support of being annexed in a way that they would get sewer and water. He doesn't think they appreciated the extra taxes, but the Commission should remember those uses were promised to them to remain in perpetuity, and honor the promises made to the annexed areas.

There was no further testimony and the public hearing was closed.

There was brief discussion defining grandfather rights as the right to continue operations or buildings or structures that were in existence prior to a change in code or condition of the land. Homer City Code does not refer to grandfather rights but does refer to nonconforming status for uses or structures. It was noted that state and federal regulations apply regardless of grandfather terminology.

Commissioner Dolma noted that the analysis under item h in the staff report refers to "Fire Marshal certification for all existing and proposed buildings" contradicts staff recommendation 1.

BOS/HIGHLAND MOVED TO ADOPT STAFF REPORT PL 11-58, CUP 11-10, A REQUEST FOR A CONDITIONAL USE PERMIT AT 5155 KACHEMAK DRIVE, NORTHERN ENTERPRISES BOATYARD, FOR MORE THAN ONE BUILDING CONTAINING A PERMITTED PRINCIPAL USE ON A LOT, AND MORE THAN 8,000 SF OF BUILDING AREA, WITH STAFF RECOMMENDATIONS AND FINDINGS.

Commissioner Bos expressed his agreement with the testimony that the activity at the boatyard is vital to the community and with the staff recommendations it will be a better product than what was there originally.

There was brief discussion regarding the NOI in recommendation two. It was noted that the applicant hired a firm and they plan to file the NOI at which time the DEC will hold the firm and the boatyard accountable for what happens around the new building, and it will satisfy the item g in the staff report. City Planner Abboud commented that the NOI will ensure verification that the site is current with DEC storm water pollution prevention standards. The NOI is a plan that will be reviewed. Homer City Code has no direction on the issue other than the project must meet state and federal regulations.

VOTE: YES: BOS, MINSCH, HIGHLAND, DRUHOT, VENUTI, DOLMA

Motion carried.

PLAT CONSIDERATION

No plats were scheduled for consideration.

PENDING BUSINESS

A. Staff Report PL 11-60, Draft Ordinance 11-xx, Conservation District

City Planner Abboud reviewed the staff report.

HIGHLAND/VENUTI MOVED TO DISCUSS, MAKE RECOMMENDATIONS, AND SCHEDULE THE DRAFT CONSERVATION DISTRICT ORDINANCE FOR PUBLIC HEARING.

There was brief discussion in support of moving the draft ordinance to public hearing.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

Chair Minsch noted that they missed the amendment that Commissioner Dolma pointed out.

MINSCH/DRUHOT MOVED TO RECONSIDER CUP 11-10, 5155 KACHEMAK DRIVE.

There was no discussion.

VOTE: NON OBJECTION

MINSCH/DRUHOT MOVED TO AMEND PACKET PAGE 34 ITEM H ANALYSIS TO READ: PRIOR TO ISSUANCE OF A ZONING PERMIT THE APPLICANT TO PROVIDE FIRE MARSHAL CERTIFICATION FOR ~~ALL EXISTING AND~~ PROPOSED BUILDINGS AND VERIFICATION THAT THE SITE IS IN COMPLAINS WITH DEC STORMWATER RUNOFF STANDARDS.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

There was no further discussion on the main motion as amended.

VOTE: (Main motion as amended): VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

B. Staff Report PL 11-59, Draft Ordinance 11-xx East End Mixed Use

HIGHLAND/BOS MOVED TO MAKE DISCUSS AND MAKE RECOMMENDATIONS REGARDING THE EAST END MIXED USE DRAFT ORDINANCE.

City Planner Abboud reviewed the staff report and reviewed the discussion points from the worksession.

- Production, processing, assembly and packaging of fish, shellfish, and seafood products permitted outright.
- Public stables not allowed and Private stables as an accessory use.
- Bulk petroleum storage, above or under ground, as a conditional use.
- Impound yards as a conditional use.
- Daycare facilities are not allowable as they are not compatible with the industrial district.
- Existing residential uses are exempt. Rebuild and possibly expansion may be allowable without introducing a change of use, i.e. going from residential to multi family.
- Establish a time constraint for rebuilding existing residential, possibly 12 to 18 months, and clarify the rebuilding is considered an approved permit.
- No CUP for new residential single family, multi family, duplex, townhouse, shelter for the homeless, group care, or assisted living homes.
- No day care homes, bed and breakfasts, or rooming houses.
- Some allowance may be made for employee dormitory or caretaker residence for employee as an accessory to the primary use.
- Keep the district boundaries as displayed on the map in the Comprehensive Plan.

The Commission made no specific recommendation regarding customary accessory uses starting on line 72, but did have discussion to try to clarify open air use. The Commission requested a definition of open air land uses or open air business.

There was brief discussion that there are a few rural residential lots that are in the proposed area and if this draft ordinance is adopted their zoning will change. Public hearing notices will be sent out to all affected property owners in the proposed district.
The Commission had further discussion regarding private stables, how they are handled in other districts, and how they relate to the industrial district.

VENUTI/BOS MOVED TO OMIT PRIVATE STABLES ENTIRELY.

If someone has issue with this they will make it known through the public hearing process. It was noted that this includes all livestock, not just horses.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

They also briefly reviewed:

- Level two site development standards outlined in HCC 21.50.030. (line 191)
- Issues with extractive enterprises. (line 116)
- Auto fueling station as a CUP. Auto fueling stations are highly regulated however design and aesthetics may be more of a factor for requiring the CUP.

NEW BUSINESS

A. Draft Decision and Findings for CUP 11-08, Amending CUP 10-04, Kachemak Bay Campus

HIGHLAND/BOS MOVED TO ADOPT THE DRAFT FINDINGS FOR CUP 11-08 AMENDING CUP 10-04, KACHEMAK BAY CAMPUS.

MINSCH/HIGHLAND MOVED TO AMEND PACKET PAGE 27 UNDER CONCLUSION: AT THE INITIAL PLANTING, THE TRUNK DIAMETERS ARE TO BE A MINIMUM OF 1 ½ INCHES, A MINIMUM OF 6 FEET IN HEIGHT. ~~AND CONSIST OF AT LEAST 70% EVERGREENS.~~

There was brief discussion.

VOTE (Amendment): NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

BOS/DRUHOT MOVED TO AMEND PACKET PAGE 26 UNDER FUTURE PLANTINGS: AT THE INITIAL PLANTING, THE TRUNK DIAMETERS ARE TO BE A MINIMUM OF 1 ½ INCHES, A MINIMUM OF 6 FEET IN HEIGHT. ~~AND CONSIST OF AT LEAST 70% EVERGREENS.~~

There was brief discussion.

VOTE (Amendment): NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

DOLMA MOVED TO TAKE 6 FOOT OUT OF ALL OF IT.

Motion died for lack of a second.

There was no further discussion on the main motion as amended.

VOTE (Main motion as amended): YES: HIGHLAND, DRUHOT, MINSCH, VENUTI, BOS
NO: DOLMA

Motion carried.

B. Staff Report PL 11-64, Planning Commission Worklist

The Commission reviewed and discussed priorities for the work list.

C. Staff Report PL 11-65, Planning Commission Meeting Times

The Commission discussed amending meeting times.

HIGHLAND/ DRUHOT MOVED TO CHANGE THE WORKSESSION END TIME TO 6:30 AND START THE REGULAR MEETING TIME AT 6:30.

There was brief discussion.

HIGHLAND/DRUHOT MOVED TO AMEND THE REGULAR MEETING END TIME TO 9:30 P.M.

There was brief discussion.

VOTE: (Amendment): YES: DRUHOT, BOS, HIGHLAND, VENUTI
NO: MINSCH, DOLMA

Motion carried.

VOTE: (Main motion as amended): YES: MINSCH, DOLMA, VENUTI, HIGHLAND, BOS, DRUHOT

Motion carried.

INFORMATIONAL MATERIALS

A. City Manager's Report dated May 24, 2011

COMMENTS OF THE AUDIENCE
Members of the audience may address the Commission on any subject. (3 minute time limit)

There were no audience comments.

COMMENTS OF STAFF

Deputy City Clerk reminded Commissioners Bos and Dolma that their terms expire July 1 and asked they express their intent by June 15 for timely reappointment.

COMMENTS OF THE COMMISSION

Commissioner Venuti asked if the tent at Cosmic Kitchen is a permitted use. City Planner Abboud said staff will look into it.
Commissioner Dolma said it was a fun meeting and they got some things done.

Commissioner Bos commented that the kings are in the Anchor River and he really enjoys his Mexican food at the Cosmic Kitchen with the wind not blowing through his ears.

Chair Minsch encouraged everyone to keep up the good work.

ADJOURN

There being no further business to come before the Commission, the meeting adjourned at 9:25 p.m. The next regular meeting is scheduled for June 15, 2011 at 7:00 p.m. in the City Hall Cowles Council Chambers.

_____
MELISSA JACOBSEN, CMC, DEPUTY CITY CLERK

Approved: _____

City of Homer
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HOMER ADVISORY PLANNING COMMISSION
DECISION and FINDINGS
Meeting of June 1, 2011

RE: Conditional Use Permit (CUP) 11-10
Legal: Lot 5-A-1 Northern Enterprises No. 1 Sub. At 5155 Kachemak Drive

Introduction

Ken and Roseleen Moore applied to the Homer Advisory Planning Commission (the "Commission") under Homer City Code 21.24.030 (d) and (k) for approval of "more than one permitted principal building on a lot" and a building area greater than 8,000 square feet in the General Commercial 1 district.

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on June 1, 2011. Notice of the public hearing was published in the local newspaper and sent to eight (8) property owners of seventeen (17) parcels.

Ken Moore, the applicant, Bryan Byler, the general contractor, Rachel Lord with Cook Inlet Keeper and Michael Kennedy, a city resident, spoke at the public hearing.

At the June 1, 2011 meeting of the Commission, the Commission voted to approve the request with six (6) Commissioners present, six (6) Commissioners voted in favor of the conditional use permit.

After due consideration of the evidence presented, the Homer Advisory Planning Commission, hereby makes the following findings of fact and conclusions of law.

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Introduction:

On March 18, 2011, a fire destroyed a 12,372.25 sf boat shop at the Northern Enterprise Homer Boat Yard. The applicant was approved to rebuild the shop using the same footprint. This 5.766 acre parcel is one of three lots owned by the applicant, and has direct access to the boat haul-out on Kachemak Drive. This application reviews only Lot 5-A-1, the most northern lot. The survey dated April 19, 2011 shows seven existing buildings; the eighth building was destroyed by fire. The combined square footage of all the buildings is 22,700 sf. A CUP is needed for:

HCC 21.24.030(k) More than one building containing a permitted principal use on a lot.
HCC 21.24.040(d) More than 8,000 sf of building area.

DEC: State and federal stormwater pollution prevention (SWPP) requirements have been in effect since the mid 1990's and are now administered by the Dept. of Environmental Conservation (DEC). The DEC requirements deal with pollution prevention, minimizing chemical exposure, maximizing infiltration and buffering discharge from adjacent water bodies. Public water and sewer is not required for a viable SWPP Plan.

EVIDENCE PRESENTED

The criteria for granting a CUP is set forth in HCC 21.71.030 & HCC 21.71.040.

a. The applicable code authorizes each proposed use and structure by conditional use permit in that zoning district.

Finding 1: With a CUP, Homer City Code allows:
More than one building containing a permitted principal use on a lot per HCC 21.24.030(k).
More than 8,000 sf of building area per HCC 21.24.040(d).

b. The proposed use(s) and structure(s) are compatible with the purpose of the zoning district in which the lot is located.

Finding 2: This project is compatible with the purpose of the GC1 district.

c. The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.

Finding 3: No evidence has been found indicating that the project will have a negative impact greater than that of other permitted or conditionally permitted use permitted in the district.

d. The proposal is compatible with existing uses of surrounding land.

Finding 4: Reconstructing the shop is compatible with existing uses of surrounding land.

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e. Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed structure.

Finding 5: Public water and sewer is not adequate but are due to be constructed during the summer of 2011 and/or 2012.

f. Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character.

Finding 6: This reconstruction of a shop is in harmony with the scale, bulk, coverage, density, and traffic generation of the surrounding GC1 district.

g. The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole.

Finding 7: The reconstruction of a shop will not be detrimental to the health, safety or welfare of the surrounding area or city as a whole.

Finding 8: Public water and sewer, fire marshal certification and stormwater pollution prevention is needed for the health and safety of the surrounding area.

h. The proposal does or will comply with the applicable regulations and conditions specified in this title for such use.

Finding 9: This proposal shall comply with local, state and federal regulations.

i. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

Finding 10: The project meets goals and objectives of the 2008 Homer Comprehensive Plan.

j. The proposal will comply with all applicable provisions of the Community Design Manual (CDM).

Finding 11: The CDM does not apply in this area of the GC1 district.

In approving a conditional use, the Commission may impose such conditions on the use as may be deemed necessary to ensure the proposal does and will continue to satisfy the applicable review criteria. Such conditions may include, but are not limited to, one or more of the following:

1. **Special yards and spaces.** No conditions deemed necessary.
2. **Fences, walls and screening.** No conditions deemed necessary.
3. **Surfacing of vehicular ways and parking areas.** No conditions deemed necessary.
4. **Street and road dedications and improvements (or bonds).** No conditions deemed necessary.

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5. **Control of points of vehicular ingress and egress.** No conditions deemed necessary.
6. **Special restrictions on signs.** No conditions deemed necessary.
7. **Landscaping.** No conditions deemed necessary.
8. **Maintenance of the grounds, buildings, or structures.** No conditions deemed necessary.
9. **Control of noise, vibration, odors, lighting or other similar nuisances.** Surrounding properties are used for boat storage and shops which generate noise, vibrations and odors.
10. **Limitation of time for certain activities.** The property is surrounded by commercial activity so no time conditions deemed necessary.
11. **A time period within which the proposed use shall be developed and commence operation.** No conditions deemed necessary.
12. **A limit on total duration of use or on the term of the permit, or both.** No conditions deemed necessary.
13. **More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code. Dimensional requirements may not be altered by conditional use permit when and to the extent other provisions of the zoning code expressly prohibit such alterations by conditional use permit.** No conditions deemed necessary.
14. **Other conditions necessary to protect the interests of the community and surrounding area, or to protect the health, safety, or welfare of persons residing or working in the vicinity of the subject lot.** No conditions deemed necessary.

Planning Commission to approve CUP 11-10 with the following conditions:

1. Prior to issuance of a Zoning Permit, the applicant to provide verification that the proposed building meet the State of Alaska Fire Marshal standards.

2. Prior to issuance of a Zoning Permit, the applicant to file a Notice of Intent for a Stormwater Pollution Prevention Plan per HCC 21.70.020(b)(7).

3. If public water and sewer is not provided by Dec. 31, 2012 the applicant is to install an alternative source for water and sewer by Sept. 15, 2014.

Date:_____ _____
Chair, Sharon Minsch

Date:_____ _____
City Planner, Rick Abboud

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NOTICE OF APPEAL RIGHTS

Pursuant to Homer City Code, Chapter 21.93.060, any person with standing that is affected by this decision may appeal this decision to the Homer Board of Adjustment within thirty (30) days of the date of distribution indicated below. Any decision not appealed within that time shall be final. A notice of appeal shall be in writing, shall contain all the information required by Homer City Code, Section 21.93.080, and shall be filed with the Homer City Clerk, 491 East Pioneer Avenue, Homer, Alaska 99603-7645.

CERTIFICATION OF DISTRIBUTION

I certify that a copy of this Decision was mailed to the below listed recipients on , 2011. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

Date:_____ _____

Shelly Rosencrans, Planning Assistant

Walt Wrede, City Manager
491 E Pioneer Avenue
Homer, AK 99603

Thomas Klinkner
Birch, Horton, Bittner & Cherot
1127 West 7th Ave
Anchorage, AK 99501

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City of Homer
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E-mail *Planning@ci.homer.ak.us*
Web Site *www.ci.homer.ak.us*

STAFF REPORT PL 11-70

TO: Homer Advisory Planning Commission
FROM: Rick Abboud, City Planner
MEETING: June 15, 2011
SUBJECT: Planning Director's Report

June 13th Regular City Council Meeting

Ordinance 11-23, An Ordinance of the City Council of Homer, Alaska, Amending Homer City Code Sections 21.12.020; 21.14.020; 21.16.020; 21.18.020; 21.20.020; 21.22.020; 21.24.020; 21.26.020; Addressing Permitted Uses and Structures; and Homer City Code 21.28.030 Conditional Uses and Structures; to Add Hostel as a Permitted Use in the Rural Residential, Urban Residential, Residential Office, Central Business, Town Center, Gateway Business, General Commercial 1, and General Commercial 2 Zoning Districts, and to Add Hostel as a Conditional Use in the Marine Commercial Zoning District. Wythe. Recommended dates: Introduction June 13, 2011, Public Hearing and Second Reading June 27, 2011.

Memorandum 11-085 Recommending Right Turns Only off Streets Between Pioneer Avenue and Lake Street

At the May 17, 2011 regular meeting of the Transportation Advisory Committee the Committee discussed and approved a recommendation to make the roads between Lake Street and Pioneer Avenue, which access the bypass, right turn only thoroughfares during the summer when our traffic increases substantially.

RESOLUTION 11-063

A RESOLUTION OF THE HOMER CITY COUNCIL ENCOURAGING THE KENAI PENINSULA BOROUGH ASSEMBLY TO DESIGNATE 80 ACRES, KENAI PENINSULA BOROUGH PARCEL NUMBER 179-010-26 NORTHWEST OF THE HOMER AIRPORT AS WILDLIFE HABITAT.

Activities: We are finally in the old high school building. Our office can be accessed from the north door directly across from the veterinary clinic. We are still unpacking some boxes but are online, have most of the major functions of the office working and are reorganizing files and such. Still seem to be having periodic difficulties with phones, if at first you do not get through on a personal extension try calling 235-3106. By the end of the meeting week, we expect to be joined by administration in our temporary home.

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STAFF REPORT PL 11-73

TO:	Homer Advisory Planning Commission
THROUGH:	Holly Wells, City Attorney
FROM:	Rick Abboud, City Planner
REMAND HEARING:	MAY 18, 2011, with hearing continued to June 15, 2011
SUBJECT:	Remand of the Homer Advisory Planning Commission's Decision Regarding Variance 10-01 Requested by David Becker

SYNOPSIS:

I. Introduction

On May __, 2011, the City of Homer Planning Department ("Department") submitted its synopsis and recommendations in response to findings by the Homer Board of Adjustment ("Board") at the January 4, 2011 hearing regarding Variance 10-01 requested by David Becker ("Becker"). In that synopsis, the Department reasserted the recommendations in the Staff Report submitted to the Homer Advisory Planning Commission ("Commission"). In addition, the Department addressed the matters raised by the Board on remand. In that report, the Department recommended, among other things, that Becker be granted an additional 30 days to present evidence regarding the legitimacy of the public utility easement recorded on the property.

After reviewing the information submitted by Becker and reassessing the evidence regarding his request for a variance on the property at issue, the Department finds that the public utility easement recorded on the property does not permit the erection of towers and an equipment shelter like the one at issue and thus a variance is still necessary. The Department also reiterates its recommendation that Becker's application for a variance be granted for all of the reasons stated in the Department's original staff report and as further supported by the Memorandum on Remand filed by Becker on June 8, 2011. This report is intended to supplement the Department's previous staff reports on this matter and is in no way intended to replace or negate the Department's recommendations based upon the evidence presented at the time the original Staff Report was drafted.

II. Facts & Background

On July 21, 2010, a hearing was held before the Commission to decide whether to grant Becker's variance request. The Department recommended approval but, after hearing testimony from Becker regarding his use of the property at issue and from neighboring property owners, the Commission denied Becker's application. On September 2, 2010, Becker recorded a public utility easement on the property. This easement granted

> Homer Electric Association, Inc.; General Communications, Inc.; Peninsula Communications, Inc.; Turquoise Broadcast Company, LLC; Becker Communications, LLC; Becker Rentals; any other entity providing electricity, water, sewage, and natural gas as a public utility; and any successors in interest to such entities right and access to the property to install, maintain, repair, and remove water and sewer lines, telephone lines, electrical lines, antennas, repeater/relay/translator stations and the like, as well as structures, storage facilities, and stations to support such systems.

On September 2, 2010, Becker informed the City that he recorded this public utility easement and was withdrawing his variance application as moot.

On September 14, 2010, the Commission issued its decision based upon the evidence presented at the hearing. After the utility easement had been recorded and the Commission issued its decision, Becker appealed that decision to the Board. A hearing was held on this appeal on January 4, 2011. On February 2, 2011, the Board issued a decision, finding that:

(1) The Commission's September 14, 2010, decision denying Mr. Becker's variance application was not supported by sufficient substantial evidence;

(2) copies of the written transcript of the hearing are incomplete;

(3) no evidence opposing the Department's recommending approval of the variance is included in the record;

(4) the record does not reflect whether the Commission considered the executed and recorded Utility Easement or its relevance to the application; and

(5) the Commission's decision fails to distinguish whether Mr. Becker's application for a variance is as a public or private utility facility.

The Board remanded the matter back to the Commission in accordance with Homer City Code 21.93.510(a) and HCC 21.93.540(e). The Board remanded the case both to address the lack of sufficient substantial evidence regarding the reasons for denying the variance and consider new evidence regarding the utility easement recorded by Becker on the site at issue.

On May 18, 2011 a remand hearing was held by the Commission during which the Commission decided, upon the recommendation of the Department and at the request of Becker, to continue the hearing to allow Becker to submit additional evidence regarding the status of the entities listed in the public use easement as public utilities under state and local law. The Department

also recommended that, due to a technical failure leading to the loss of a portion of the original hearing transcript, new evidence be accepted and heard on remand regarding the variance application.

On June 8, 2011, Becker submitted a Memorandum on Remand addressing the legitimacy of the public use easement as well as the evidence supporting a variance on the property and Becker's belief that a variance was unnecessary as the equipment shelter and towers erected by Becker did not constitute a "building" under Homer City Code.

The Department addresses each of Becker's arguments in his Memorandum on Remand below.

III. Analysis

In Becker's Memorandum on Remand, he argues that the erection of towers and an equipment shelter in the set back on the property in question should be permitted because:

1) The equipment shelter is not a "building" and thus is not governed by the setback requirements in the Homer City Code
2) The public utility easement is enforceable
3) There is substantial evidence supporting Becker's variance application

Each of these arguments are addressed in turn.

The Structure Erected by Becker are Subject to the Setback Requirements under the Homer City Code

The equipment shelter erected by Becker constitutes a "building" under the Homer City Code and thus is subject to the setback requirements under the Code. Contrary to the fictional dialogue provided by Becker interpreting the City Code, a person or entity may not erect towers or equipment shelters, even where such structures qualify as a public utility or structure, in the Rural Residential district without first obtaining a conditional use permit and cannot erect such structures in a setback without obtaining a variance.

Homer City Code 21.12.040 unequivocally provides the setback requirements for "buildings" in the RR district. The equipment shelter is clearly a "building" under the HCC. Under HCC 21.03.040, a "building" is any structure used or intended to be used or intended for supporting or sheltering any use or occupancy." "Use" means "the purpose for which land or a structure is occupied, arranged, designed or intended, or for which either land or a structure is or may be occupied or maintained." Finally, "structure" is defined as "anything constructed or erected that requires location on the ground or that is attached to something having location on the ground." See HCC 21.03.040.

Nowhere in the definitions are public utility facilities excluded from the definition of "buildings" nor does it make sense to except such facilities from the definition of buildings. Indeed, excluding public utility facilities from the definition of buildings simply because a separate definition of a public utility facility is provided in the Code would potentially exempt all uses specifically defined in the Code from the dimensional requirements under the Code. For

example, HCC 21.12.030, permits not only public utility facilities and structures as a conditional use in the RR district, but also group care homes. While "group care home" is separately defined under the Code, such homes are traditionally housed in buildings. Under Becker's rationale, any building used to house a group home would be exempt from the dimensional requirements of the Code and could be erected in a setback without a variance. Such a rule would have detrimental effects on Homer's zoning efforts.

Becker's argument that the definition of building is too broad and would encompass poles and other minimal structures is also without merit. The purpose of setbacks is to prohibit erection of structures in the setback, whether the structure is a fence, pole, or a shelter. Public utility companies do in fact obtain public utility easements to erect poles within setbacks and landowners often seek variances for the erection of fence. Again, Becker must obtain a variance to erect a "building" in the setback, regardless of whether that building constitutes a public utility facility permitted in the district with a conditional use permit.

The Public Utility Easement Does Not Permit Erection of the Structures in the Setback

In Becker's Memorandum on Remand, Becker recognizes that neither of the parties leasing the tower space are registered public utilities with the Regulatory Commission of Alaska ("RCA"). Similarly, there is no argument made that the landowner or the entity erecting the buildings in the setback are public utilities registered with the RCA. As argued by the Department in its Staff Report submitted in May, 2011 and for all of the reasons stated in that report, a public utility easement cannot be relied upon by Becker to permit construction in the setbacks unless the entity granted the easement qualifies as a public utility under State law. Becker's concession that the entities granted the easement are not registered as public utilities with the RCA requires the Commission to ignore the public utility easement recorded by Becker and focus instead on evidence regarding Becker's variance application.

Becker's Variance Application Should be Granted

The Department continues to support Becker's application for a variance and reiterates its recommendation that this application should be granted. In the interest of brevity, the Department will not restate all of the reasons supporting Becker's application. However, the Department's earlier reports in this matter are attached as Attachments A and B and are incorporated into this report.

IV. Staff Recommendation

For all of the reasons discussed above, the Department reiterates its recommendations regarding the merits of Becker's request reported in its original staff report and its supplemental report submitted to the Commission on May __, 2011 and further recommends the following:

1. Commission should recognize that a variance is required under the Homer City Code but grant Becker's variance application;

2. Commission should not consider the public utility easement recorded by Becker on September 2, 2010 as a basis for erecting the structures in violation of City Code; and

3. Commission should directly address any deviations from the Department's recommendations within this Supplemental Staff Report as well as the Department's original Staff Report regarding Becker's variance request.

Alaska Statutes

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 1. Powers and Duties of the Commission
§ 42.05.145. Telecommunications regulation policy

A utility that provides local exchange or interexchange telecommunications service in the state affects the public interest. Regulation of these utilities shall, consistent with this chapter, seek to maintain and further the efficiency, availability, and affordability of universal basic telecommunications service.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 2. Certificate of Public Convenience and Necessity
§ 42.05.221. Certificates required

(a) A public utility may not operate and receive compensation for providing a commodity or service without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require or will require the service. Where a public utility provides more than one type of utility service, a separate certificate of convenience and necessity is required for each type. A certificate must describe the nature and extent of the authority granted in it, including, as appropriate for the services involved, a description of the authorized area and scope of operations of the public utility.

(b) All certificates of convenience and necessity issued to a public utility before July 1, 1970, remain in effect but they are subject to modification where there are areas of conflict with public utilities that have not previously been required to have a certificate or where there is a substantial change in circumstances.

(c) A certificate shall be issued to a public utility that was not required to have one before July 1, 1970, and that is required to have one after that date, if it appears to the commission that the utility was actually operating in good faith on that date. Such a certificate is subject to modification where there are areas of conflict with other public utilities or where there has been a substantial change in circumstances.

(d) In an area where the commission determines that two or more public utilities are competing to furnish identical utility service and that this competition is not in the public interest, the commission shall take appropriate action to eliminate the competition and any undesirable duplication of facilities. This appropriate action may include, but is not limited to, ordering the competing utilities to enter into a contract that, among other things, would:

(1) delineate the service area boundaries of each in those areas of competition;

(2) eliminate existing duplication and paralleling to the fullest reasonable extent;

(3) preclude future duplication and paralleling;

(4) provide for the exchange of customers and facilities for the purposes of providing better public service and of eliminating duplication and paralleling; and

(5) provide such other mutually equitable arrangements as would be in the public interest.

(e) If the commission employs professional consultants to assist it in administering this section, it may apportion the expenses relating to their employment among the competing utilities.

(f) Repealed.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 8. Miscellaneous Provisions
§ 42.05.631. Eminent domain

A public utility may exercise the power of eminent domain for public utility uses. This section does not authorize the use of a declaration of taking.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 8. Miscellaneous Provisions
§ 42.05.641. Regulation by municipality

The commission's jurisdiction and authority extend to public utilities operating within a municipality, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision, or regulation of the commission and a charter, permit, franchise, ordinance, rule, or regulation of such a local governmental entity, the certificate, order, decision, or regulation of the commission shall prevail.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 8. Miscellaneous Provisions
§ 42.05.711. Exemptions

(e) Notwithstanding any other provisions of this chapter, any electric or telephone utility that does not gross $50,000 annually is exempt from regulation under this chapter unless the subscribers petition the commission for regulation under AS 42.05.712(h).

(g) A utility, other than a telephone or electric utility, that does not gross $150,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221-42.05.281 under the procedure described in AS 42.05.712.

(k) A utility that furnishes cable television service is exempt from the provisions of this chapter other than AS 42.05.221-42.05.281 unless the subscribers petition the commission for regulation under the procedure described in AS 42.05.712.

(*l*) A person, utility, joint action agency established under AS 42.45. 310, or cooperative that is exempt from regulation under (a), (d)--(k), (o), or (r) of this section is not subject to regulation by a municipality under AS 29.35.060 and 29.35.070.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 10. General Provisions
§ 42.05.990. Definitions

In this chapter,

(5) "public utility" or "utility" includes every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for;

(A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;

(B) furnishing telecommunications service to the public for compensation;

(C) furnishing water, steam, or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;

(F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation;

(G) furnishing the service of natural gas storage to the public for compensation;

(10) "telecommunications" means the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force variations, or impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a specified area or between designated points.

Title 29. Municipal Government
Chapter 35. Municipal Powers and Duties
Article 1. General Powers
§ 29.35.141. Regulation of radio antennas

(a) A municipality that regulates the placement, screening, or height of radio antennas must reasonably accommodate amateur radio antennas. A municipality may require reasonable and customary engineering practices to be followed in the erection of amateur radio antennas. A municipality may impose only the minimum requirements relating to amateur radio antennas that are necessary to accomplish the legitimate purposes intended to be served by the requirements.

(b) A municipality may not restrict the number of support structures for an amateur radio antenna. Based on the most recently published United States census, a municipal restriction on amateur radio antenna height may not be lower than

(1) 200 feet above ground level as permitted by the Federal Communications Commission in an area with a population density of 120 or less per square mile;

(2) 75 feet above ground level in an area with a population density of more than 120 per square mile for an antenna on a lot that is smaller than one acre; or

(3) 140 feet above ground level in an area with a population density of more than 120 per square mile for an antenna on a lot that is one acre or larger.

(c) Subject to (a) and (b) of this section, a municipality may, by ordinance, impose requirements to meet clearly defined objectives relating to screening, placement, aesthetic, and health and safety factors with respect to the erection, maintenance, and operation of amateur radio antennas.

(d) An ordinance regulating or restricting radio antennas adopted under this section may not apply to a radio antenna that was erected before July 26, 2001.

(e) This section applies to home rule and general law municipalities.

Title 21 Zoning and Planning
Chapter 21.03 Definitions and Rules of Construction
21.03.040 Definitions used in zoning code

"Public utility facility or structure," for the purpose of requiring a conditional use permit, means (i) any facility or structure owned and operated by a public or private utility, or (ii) a telecommunications tower or antenna, but it excludes water distribution mains, pressure stations and hydrants, sewage collection lines, manholes and lift stations, underground and overhead electrical, cable and telephone lines and poles, street lights and small wind energy systems.

Chapter 21.72 Variances
21.72.010 General.

A variance may be granted by the Planning Commission to provide relief when a literal enforcement of the Homer Zoning Code would deprive a property owner of the reasonable use of a lot.

21.72.020 Conditions precedent to granting variance.

a. All of the following conditions shall exist before a variance may be granted:

1. A literal interpretation of the provisions of the Homer Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district.

2. Special conditions and circumstances exist that are peculiar to the land or structures involved and are not applicable to other lands and structures in the same district.

3. The special conditions and circumstances that require the variance have not been caused by the applicant.

b. Financial hardship or inconvenience shall not be the sole reason for granting a variance.

c. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

d. If approved, a variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

e. A variance shall not be granted that will permit a land use in a district in which that use is otherwise prohibited. (Ord. 08-29, 2008).

Chapter 21.93 Adminstrative Appeals
Subchapter 2
Planning Commission Appeal Procedures

21.93.300 Appeals to the Planning Commission.

a. Within 30 days after receipt of a timely notice of appeal to the Planning Commission, the City Planner will prepare an appeal record consisting of all relevant documents submitted to or used by the Planning Department in making the decision under appeal, including any staff reports, correspondence, applications, or other documents. The appeal record shall be paginated. The appellant shall be notified by mail when the appeal record is complete. Any person may obtain a copy of the appeal record from the Planning Department upon payment of the costs of reproduction.

b. An appeal hearing shall be scheduled within the time specified in HCC § 21.93.100. The hearing will be open to the public.

c. The Commission may prescribe rules of procedure for additional public notification in cases where the Commission determines its decision would have a substantial effect on the surrounding neighborhood.

d. The Commission may accept new testimony and other evidence, including public testimony, and hear oral arguments as necessary to develop a full record upon which to decide an appeal from an act or determination of the City Planner. Any person may file a written brief or testimony in an appeal before the Commission.

e. The Commission may undertake deliberations immediately upon the conclusion of the hearing on appeal or may take the matter under advisement and meet at such other time as is convenient for deliberations until a decision is rendered. Deliberations need not be public and may be in consultation with an attorney acting as legal counsel to the Commission.

f. The Commission may affirm or reverse the decision of the City Planner in whole or in part. A majority vote of the fully constituted Commission is required to reverse or modify the action or determination appealed from. For the purpose of this section the fully constituted Commission shall not include those members who do not participate in the proceedings due to a conflict of interest or disqualifying ex parte contacts, disqualifying partiality, or other disqualification for cause. A decision affirming, reversing, or modifying the decision appealed from shall be in a form that finally disposes of the case on appeal, except where the case is remanded for further proceedings.

g. The Commission may seek the assistance of legal counsel, city staff, or parties in the preparation of a decision or proposed findings of fact. (Ord 10-41(A)§3, 2010; Ord. 08-29, 2008).

21.93.310 Other procedures.

If no specific procedure is prescribed by the code, the Planning Commission may proceed in an administrative appeal in any lawful manner not inconsistent with this title, statutes, and the constitution. (Ord. 08-29, 2008).

Subchapter 3
Board of Adjustment Appeal Procedures
21.93.510 New evidence or changed circumstances.

a. Except as provided in subsections (b) and (c) of this section, the Board of Adjustment shall not consider allegations of new evidence or changed circumstances and shall make its decision based solely on the record. If new evidence or changed circumstances are alleged, the Board may, in its discretion, either hear the appeal without considering the allegations or may remand the matter to the appropriate lower administrative body or official to rehear the matter, if necessary.

b. When the standing of a person is in issue, the Board of Adjustment may take additional evidence for the limited purpose of making findings on the question of the person's standing. No evidence received under this subsection shall be considered for purposes other than determining standing.

c. When the disqualification of a member of the Board of Adjustment for conflict of interest, ex parte contact, partiality or other cause is in issue, the Board of Adjustment may take additional evidence for the limited purpose of making findings on the question of disqualification. No evidence received under this subsection shall be considered for purposes other than determining disqualification. (Ord. 10-41(A)§5, 2010; Ord. 08-29, 2008).

21.93.540 Appeal hearing.

a. The meeting at which the Board of Adjustment hears an appeal shall be open to the public. The City Attorney or another attorney acting as legal counsel to the Board shall be present.

b. Each party (each appellant, cross-appellant, and respondent) may present oral argument at the appeal hearing, subject to the order of presentation and time limitations that the chair adopts at the commencement of the hearing. The taking of testimony or other evidence is limited by HCC § 21.93.510.

c. The Board of Adjustment may undertake deliberations immediately upon the conclusion of the hearing on appeal or may take the matter under advisement and meet at such other time as is convenient for deliberations until a decision is rendered. Deliberations need not be public and may be in consultation with the legal counsel to the Board.

d. The Board of Adjustment may exercise its independent judgment on legal issues raised by the parties. "Legal issues" as used in this section are those matters that relate to the interpretation or construction of the zoning code, ordinances or other provisions of law.

e. The Board of Adjustment shall defer to the findings of the lower administrative body regarding disputed issues of fact. Findings of fact adopted expressly or by necessary implication by the lower body shall be considered as true if they are supported by substantial evidence. But findings of fact adopted by less than a majority of the lower administrative body shall not be given deference, and when reviewing such findings of fact the Board of Adjustment shall exercise independent judgment and may make its own findings of fact. If the lower administrative body fails to make a necessary finding of fact and substantial evidence

exists in the record to enable the Board to make the finding of fact, the Board may do so in the exercise of its independent judgment, or, in the alternative, the Board may remand the matter for further proceedings. "Substantial evidence", as used in this section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Ord. 10-41(A) §8, 2010; Ord. 08-29, 2008).

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BEFORE THE CITY OF HOMER ADVISORY PLANNING COMMISSION

In RE the application of David Becker)
)
for Variance #10-01 and CUP #10-04)
)

MEMORANDUM ON REMAND

Introduction

This matter is back before the Commission following a remand from the Board of Adjustment. The factual and procedural background has been set forth in Staff Report PL 11-63 and the attachments to it and will not be repeated here. Instead, Mr. Becker will focus on the three issues addressed below.

1.) *Are the towers and associated equipment shelter a "building" governed by the setback requirement??*

The underlying problem with applying the variance requirement to Mr. Becker's situation is the fact that the towers and associated equipment shelter are not a "building" under HCC §21.12.040(b), both because the context requires otherwise and because they are more appropriately defined as a "public utility facility or structure." See HCC §21.03.040. Only a CUP was needed. Requiring a variance to the setback requirement was inappropriate. In lieu of a narrative analysis, set forth below is a series of questions and answers which explains Mr. Becker's interpretation of the setback requirement and why it does not apply here:

Q: What types of structures are prohibited within the City of Homer's 20 foot setback requirement for the RR District?

A: Under HCC §21.12.040(b), the setback requirement applies only to "buildings."

Q: What is a "building?"

A: Under HCC §21.03.040, a "building" is defined as "any structure used or intended for supporting or sheltering any use or occupancy."

Q: And what is a "structure?"

A: The same code section defines "structure" as "anything constructed or erected that

requires location on the ground or that is attached to something having location on the ground."

Q: That sounds like virtually anything affixed in some way to the ground, including structures providing utility related services like telecommunication towers, utility poles, transformer boxes, hydrants and the like. As "structures" wouldn't they all be "buildings" subject to the setback requirement?

A: Not necessarily. HCC §21.03.040 provides that words and phrases defined in that section have the meanings stated, *except where* "(1) the context clearly indicates a different meaning or (2) a special definition is given for particular chapters or sections of the zoning code."

Q: How does that apply to utility structures?

A: In two respects. First, in the context of utility structures, the term "building" clearly indicates a different meaning. It would be nonsensical (and probably contrary to state law) to impose the setback requirement on utility structures which are traditionally installed in setbacks. Second, there is a "special definition" for utility structures in HCC §21.03.040, which trumps the definitions of "building" and "structure."

Q: What is it?

A: The term "public utility facility or structure," for purposes of requiring a conditional use permit is defined in HCC §21.03.040 as "(i) any facility or structure owned and operated by a public or private utility, or (ii) a telecommunications tower or antenna, but it excludes water distribution mains, pressure stations and hydrants, sewage collection lines, manholes and lift stations, underground and overhead electrical, cable and telephone lines and poles, street lights and small wind energy systems."

Q: So, you're saying that a utility structure is neither a "building" nor a "structure?"

A: Yes.

Q: Then what is it?

A.: It's a "public facility or structure."

Q: So, such objects are covered under their own special definition?

A: Correct.

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Q: And since a "public facility or structure" is not a "building," it is not covered by the setback requirement?

A: Correct.

Q: I see a flaw in your analysis. The code definition of "public utility facility or structure" applies "for the purpose of requiring a conditional use permit." It says nothing about setbacks.

A: That was my initial impression as well. However, I think the more logical interpretation of the definition is that the term "public utility facility or structure" implicitly includes all of the objects identified in the definition, including those specifically excluded.

Q: That makes no sense.

A: Actually, it does. It would be disingenuous to suggest that "cable and telephone lines and poles" and the other objects excluded by the definition are not "public utility facilities or structures."

Q: True, but the definition specifically excludes them just the same.

A. Agreed, but only for a limited purpose.

Q: Explain.

A. If you read the definition carefully, you'll see that the truncated definition applies only for the purposes of requiring a conditional use permit.

Q: And so…?

A. Well, *in the context of a conditional use permit application*, the term "public utility facility or structure" is a term of art. As a consequence of the exclusions, the term essentially is limited to telecommunications towers and antennae. That means only a tiny fraction of all public utility facilities and structures are subject to the conditional use permit requirement.

Q: And in other contexts?

A: The definition is not truncated in other contexts.

Q: So, to summarize, a "public utility facility or structure" encompasses all of the objects set forth in the definition, included and excluded alike, except in the context of a conditional use permit application?

A: Correct. Or to say it differently, except in the context of a conditional use permit application, a "public facility or structure" is "any facility or structure owned or operated by a public or private utility" or "a telecommunications tower or antenna."

Q: But in the conditional use permitting context, because of the exclusionary language, the term essentially applies only to towers and antennae.

A: Correct.

Q: I'm still confused.

A: Well, the code definition is not saying that telephone poles and the like are not "public utilities or structures" even though on the excluded objects list. That would be silly. It only says that such objects are not to be considered "public utilities or structures" *for purposes of the conditional use permitting process.*

Q: So, I don't need to get a CUP for a telephone pole.

A: Correct.

Q: But I do for a telecommunications tower.

A: Correct.

Q: But that doesn't change the fact that both are "public utilities or structures."

A. Correct again.

Q: And not "buildings."

A. Exactly.

Q: And how does that relate back to the setback requirement?

A: Again, the setback requirement pertains to "buildings." Utility structures are not "buildings," they are separate animals altogether, encompassed within the code's "special definition" of "public utility facility or structure." Since they are not "buildings," they are not covered by the setback requirement.

Q: But doesn't that mean that someone could install a telecommunications tower wherever he or she wants?

A: No. Remember that telecommunications towers are still covered by the

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conditional use permitting process. Under HCC §21.71.040(b), the planning commission can impose reasonable conditions on placement of such towers. I'm only saying that such towers are not covered by the setback requirement.

Q: And if not covered by the setback requirement, there should be no need to obtain a variance to that requirement prior to installation.

A: Correct. Only a conditional use permit is necessary.

Q: So, there are really three types of structures to consider in this context. The first are "buildings" which are covered by the setback requirement. The second are those "public utility facilities or structures" covered by the conditional use permitting process, but not the setback requirement. And the third are all other "public utility facilities and structures" which are covered by neither the conditional use permitting process nor the setback requirement.

A: Correct

2.) *Do the towers and associated equipment shelter service a public utility?*

The *public utility vs. private utility* issue has morphed over time. Mr. Becker has argued that with the towers and building being situated in a utility easement, any need for the variance should be moot: an implied exception to the setback requirement should exist for utility structures situated within a dedicated utility easement. At the hearing before the Board of Adjustment, William Glynn, a neighbor, argued that the towers were not a *public* utility and therefore no implied exemption should exist. In its DECISION ON APPEAL, the Board of Adjustment found at ¶5 that the planning commission decision failed to distinguish whether Mr. Becker's application for a variance was for a public or a private utility facility.

Following remand, Staff Report PL 11-63 was issued and states at the bottom of page 3:

> The utility easement recorded by Becker providing Becker Communications, LLC, and Becker Rentals, among others, the right to use the right-of-way would, if valid, render the Commission's decision regarding the variance application moot or otherwise unnecessary. The easement would bring Becker into compliance with the Homer City code. However, based solely upon the evidence before the Board, the Department does not have adequate information to determine the validity of the utility easement recorded by Becker.

The report goes on to note that neither Mr. Becker nor any of his businesses is

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registered as a public utility with the Regulatory Commission of Alaska and concludes that absent proof of such registration, the fact that the towers and equipment shelter are located within a utility easement would not exempt Mr. Becker from the setback requirement.

Mr. Becker suggests that the Commission approach the issue differently. As a preliminary matter, it matters not how Mr. Becker or his companies are using the towers and shelter. The pertinent question is how his tenants are using them. With respect to the towers and shelter, Mr. Becker is acting as a landlord only. The City of Homer leases one of the towers (and space in the shelter) in order to facilitate police and fire communications. The second tower (and corresponding space in the shelter) is leased to Horizon Satellite, LLC, and is used to provide wireless internet service to its customers on the southern Kenai Peninsula from Ninilchik to Homer.

As for the equipment shelter, the Horizon Satellite side houses the ACS fiber optic equipment that provides high speed bandwidth for wireless internet service, as well as the routers, switches and various microwave links that make the system work. The City of Homer side shelters the electronic equipment needed to support the communications function which the tower and antenna serve.

Due to the sensitive nature of the equipment, it must be protected from the elements, temperature fluctuations and the like. And because the equipment requires service technicians to troubleshoot, make adjustments, perform diagnostics and conduct repairs, a shelter providing a comfortable indoor working environment is critical. The shelter also satisfies both tenants' concerns about security, including protection against theft and vandalism.

Admittedly, neither of the lessees (the City of Homer and Horizon Satellite) is a telecommunications public utility registered with the Regulatory Commission of Alaska. However, that does mean that the towers and shelter are not a "public utility or structure" under HCC §21.03.040. For the reasons explained in the Q & A analysis above, the structure satisfies the code definition of the term[1] and should therefore be permitted within the utility easement, the setback requirement notwithstanding.

As noted in Rathkopf's *The Law of Zoning and Planning* at §79.14: "An entity may also be considered a public utility [for zoning purposes] though it is not subject to the jurisdiction of a state's public utility commission." That would seem particularly true of the wireless internet service provided by Horizon Satellite, inasmuch as it is regulated by the FCC and several court decisions have held that "cellular telephone facilities and towers are public utility projects." Id. See, e.g., Hawk v. Zoning Hearing Board of Butler Township, 618 A.2d 1087, 1090 (Pa. Cmwlth. 1992) (mobile telecommunication company seeking to install tower in residential neighborhood a "public utility" for zoning purposes even though not regulated by state public utilities commission). See also,

[1] Specifically, the code definition confirms that the term encompasses structures owned by public *and* private utilities and lists telecommunication towers as an example.

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Rathkopf at §78.11.

In sum, the towers and equipment shelter serve a "public utility" function under local zoning ordinances, even though the owner and lessees are not regulated by the Regulatory Commission of Alaska. Accordingly, so long as they are located within a dedicated utility easement, they should be exempt from the setback requirement.

3.) *Is there substantial evidence supporting denial of the variance?*

As noted in Staff Report PL 11-63, the Board of Adjustment found that the Planning Commission's decision to deny the variance was not supported by substantial evidence. In making its determination, the Board of Adjustment had before it the minutes of the Planning Commission meeting of July 21, 2010, where the City Planner reviewed the earlier staff report recommending that the variance application be granted and Messrs. Becker and Wrede testified in favor of the application. Mr. Glynn testified that he had no problem with Mr. Becker developing the property as he saw fit "as long as the same rules apply to everyone."

At a second hearing held on August 18, 2010 (scheduled because there were insufficient commissioners present at the July 21st hearing to act on a variance application), the Commission voted to deny the application. It was at this hearing that a malfunction of the recording equipment apparently occurred preventing the Board of Adjustment from determining whether any additional evidence was submitted which might have justified the Commission's decision to deny the variance request.

At the remand hearing held May 18, 2011, anyone wishing to offer evidence against the variance application was given another opportunity to do so. No one testified or otherwise offered any evidence. Staff Report PL 11-63 confirms that planning and zoning staff continue to recommend that the application be granted.

Mr. Becker will be given the opportunity to offer additional evidence in support of the application at the June 15, 2011, hearing. However, such evidence may now prove unnecessary. If the evidence before the Board of Adjustment was insufficient to justify denial of the variance, based upon the status of the record at the time of review, it will be equally insufficient now. In other words, the time for supplementing the record with evidence in opposition to the application was at the May 18th hearing. Since none was presented, the current state of the record (having remained static) cannot justify denial of the variance as a matter of law -- the Board of Adjustment having already found it legally insufficient.

Assuming additional evidence is warranted, Mr. Becker will offer testimony and exhibits supporting his application and the conclusions earlier reached in Staff Report PL 10-65:

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- A literal interpretation and application of the setback requirement in this context would force "the new structure onto slopes greater than 40%" depriving the applicant of "the right to use the small portion of the property that abuts Skyline Drive which has slopes of approximately 20%."

- The structure supports and advances technological capabilities within the City of Homer by enhancing wireless communication thus forwarding the goals of the comprehensive plan.

- Locations for communication equipment providing optimal coverage for the entire City of Homer are very limited.

- The parcel has steep slopes of 38% to 42%. Parcels this steep are often considered "unfeasible" for typical residential development, Homer Comprehensive Plan, page 4-3. Disturbance of native vegetation for the creation of site development on steep slopes presents on site and off site hazards.

- The structure provides a beneficial service to the city which has specific site requirements for maximum effectiveness.

- The benefit to all the Citizens of Homer combined with the potential hazard of creating an unstable bluff justifies an exception to the setback requirement.

- Building outside the setback would require leveling the site to match the height of the setback or cutting and filling on a steep slope. Neither is conducive to slope stabilization and each presents a preventable hazard.

- The need for the variance was the result of a natural phenomenon and not circumstances created by the applicant; hardship and inconvenience were not the reasons for seeking the variance[2]; and the presence of other nonconforming structures within the setback was immaterial to the application.

Enclosed are photos and other exhibits demonstrating the expense, difficulty and inconvenience of placing the shelter and the towers farther down the hill, corroborating the report's conclusions that doing so would be impractical and hazardous. Other photos demonstrate that placement of equipment shelters within setbacks is a standard industry

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[2] Under HCC §21.72.020(b), "financial hardship or inconvenience shall not be the *sole* reason for granting a variance." (Emphasis added.) However, they are certainly important factors which may be considered in determining whether a variance should be granted, especially in a situation as here where the hardship and inconvenience is the direct consequence of the property's unique topographical features. See, City and Borough of Juneau v. Thibodeau, 595 P.2d 626, 635 (Alaska 1979), rev'd on other grounds, State v. Alex, 646 P.2d 203, 208, n. 4 (Alaska 1982) ("Peculiarities of the specific property sufficient to warrant a grant of a variance must arise from the physical conditions of the land itself which distinguish it from other land in the general area.") See also: Levy v. Town of Westport, 2007 WL 3318079 Conn. Super. (unreported) ("The topography of a property is a recognized ground for hardship.")

practice.

Moreover, since setback distances are measured on a horizontal plane (and not along the topography), the distance from the edge of the right of way to any new construction site would actually exceed 20 feet (as measured along the grade), given the steepness of the slope. HCC 21.05.020.

Finally, given the purpose of the structure (a repeater station designed to service police and fire radio communications), it is imperative to set its location at the highest possible elevation so as to maximize its efficiency; allow ready access for maintenance; and protect its integrity in the event of a natural disaster. A drop in elevation would either reduce the efficiency of the device or require the erection of significantly higher towers in order to make up the lost height.

Conclusion

To recap, Mr. Becker requests that the Commission determine that a variance to the setback requirement is unnecessary both because the towers and equipment shelter are not a "building" under §21.12.040(b) and because they are a "public utility facility or structure" situated within a dedicated utility easement. In the alternative, a variance to the setback requirement should be granted on the merits.

DATED this 6th day of June, 2011.

Daniel Westerburg
Attorney for Appellant
ABA #7906062

The undersigned hereby certifies that on the 6th day of June, 2011, a true and correct copy of the foregoing was served by Mail on the following attorneys of record:
Holly Wells - Birch-Horton Bittner + Cherot
1127 W. 7th Ave
Anchorage, AK 99501
By: Lauretta B West

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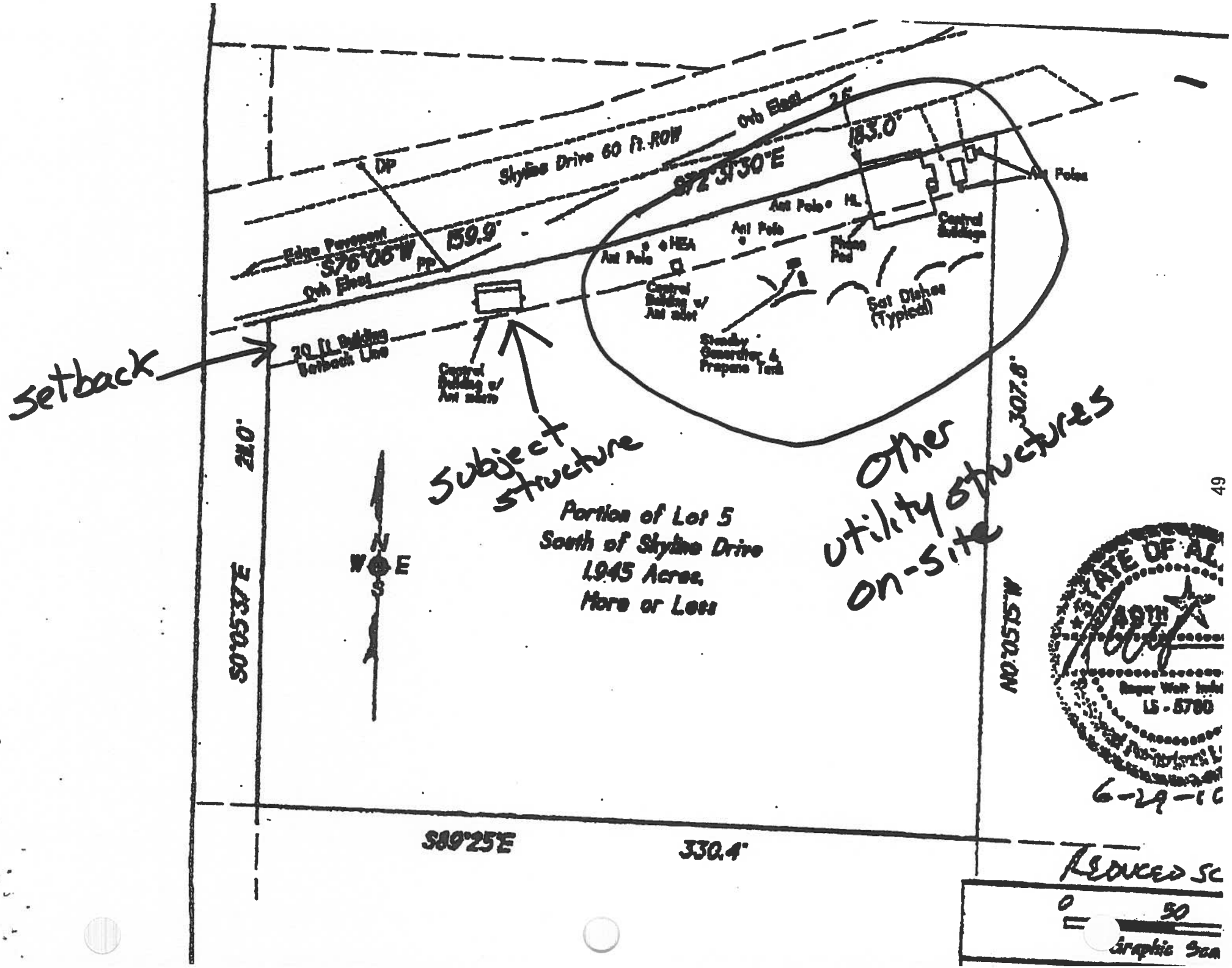
Skyline Drive 60 ft. ROW
Orb East
26'
183.0'
S72°31'30"E
DP
Edge Pavement
S76°06'W
PP
159.9'
Orb East
Ant Poles
Ant Pole
Ant Pole
Central Building
Central Building w/ Ant mast
Central Building w/ Ant mast
Satellite Dishes (Typical)
Standby Generator & Propane Tank
20 ft. Building Setback Line
setback
Subject structure
other utility structures on-site
Portion of Lot 5
South of Skyline Drive
1.945 Acres,
More or Less
N
W
E
S
210'
S0°53'E
307.8'
N0°05'W
S89°25'E
330.4'
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City of Homer
Planning & Zoning
491 East Pioneer Avenue
Homer, Alaska 99603-7645

Telephone (907) 235-8121
Fax (907) 235-3140
E-mail Finance@ci.homer.ak.us
Web Site www.ci.homer.ak.us

STAFF REPORT PL 10-65

TO: Homer Advisory Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Dotti Harness-Foster, Planning Technician
MEETING: July 21, 2010
SUBJECT: Variance 10-01 at 1033 Skyline Drive

SYNOPSIS: If approved, this variance will allow the newly constructed communication building to remain 4.9 feet from the property line. The northern part of the property that abuts Skyline Drive is the flattest portion of the property. The remaining property has slopes in the 40-42% range. **Approval of a zoning variance requires five yes votes.**

ANALYSIS: Due to the steep slopes, all the buildings on the parcel have been built within the 20 foot setback, including the newest, a 9 foot by 20 foot communication building. Only the newest, most westerly building is in need of a variance. It was built not knowing that a variance we required. The other buildings were built in the 1990's. These buildings existed prior to annexation and zoning and were granted nonconforming status in July 2010.

Applicant:	Dave Becker, P. O. Box 109, Homer, AK 99603
Legal:	SKYLINE VIEW SUB LOT 5 LYING S OF DIAMOND RIDGE RD
Parcel ID #	17402404
Size of Lot:	1.85 acres
Zoning Designation:	Rural Residential
Existing Land Use:	Communication site
Water – Wastewater:	Public water and sewer are not needed.
Surrounding Land Use:	North: Communication site South: Residential East: Residential West: Residential
Comprehensive Plan:	"The City should strive to provide public services and facilities that meet current needs while planning for the future. The City wishes to develop strategies to work with community partners that provide beneficial community services outside of the scope of City government." Homer Comprehensive Plan, page 6-1. "Target high tech industries or professional/web-based activities in these new commercial zones by public provision of access to wireless communication." Homer Comprehensive Plan, pg 4-17.
Wetlands:	No designated wetlands.

Public Notice: Notice was sent to property 14 owners of 15 parcels as shown on the KPB tax assessor rolls.

FINDINGS OF FACT

Pursuant to HCC 21.72.010, a variance may be granted to provide relief when a literal enforcement of Homer Zoning Code would deprive a property owner of the reasonable use of his real property.

Variance Code Requirements: HCC 21.72.020 Conditions precedent to granting variance.

a. All of the following conditions shall exist before a variance may be granted:

1. **A literal interpretation of the provisions of the Homer Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district.**

   Applicant: Requiring a 20 ft building setback on a steep bluff would simply not work.

   Finding 1: Requiring a 20 foot building setback forces the new structure onto slopes greater than 40%. This would deprive the applicant the right to use the small portion of the property that abuts Skyline Drive which has slopes of approximately 20%.

2. **Special conditions and circumstances exist which are peculiar to the land or structures involved and which are not applicable to other lands and structures in the same district.**

   Finding 2: The structure supports and advances technological capabilities within the City of Homer by enhancing wireless communication thus forwarding goals of the comprehensive plan.

   Finding 3: Locations for communication equipment providing optimal coverage for the entire City of Homer are very limited.

   Finding 4: The parcel has steep slopes of 38% to 42%. Parcels this steep are often consider "unfeasible" for typical residential development, Homer Comprehensive Plan, page 4-3. Disturbance of native vegetation for the creation of site development on steep slope presents on site and off site hazards.

   Finding 5: The structure provides a beneficial service to the city which has specific site requirement for maximum effectiveness.

   Finding 6: The benefit to all the Citizens of Homer combined with the potential hazard of creating an unstable bluff justifies an exception to the setback requirement.

3. **The special conditions and circumstances have not been caused by the actions of the applicant.**

   Finding 7: The steep slope is a natural phenomenon, not cause by the applicant.

   Finding 8: The applicant has not created the circumstances which demand this service.

B. Financial hardship or inconvenience shall not be reason for granting a variance.

Applicant: The existing structures are on pilings. Without a variance pilings would elevate the structures to the grade of the road.

Finding 9: Granting this variance allows the use of the most northern and flatter portion of the property. Hardship and inconvenience is not the reason for granting this variance.

Finding 10: Building out of the setback would require leveling the site to the height of the setback or cut and fill on the steep slopes. Neither is conducive to slope stabilization and presents a preventable hazard.

C. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

Finding 11: The applicant is seeking a variance due to the steep slopes on the lot. Though the other structures were built prior to City annexation and zoning, this is not seeking a variance due of other nonconforming land use or structures within the district.

D. A variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

Applicant: Based on the survey dated 6/29/10 I am requesting a building setback variance allowing the most westerly structure to be 4.9 feet from the right-of-way. The most westerly structure is 9 feet x 20 feet on steel pilings.

Finding 12: The minimum variance necessary is 4.9 feet between the most westerly structure and the right-of-way.

E. A variance shall not be granted which will permit a land use in a district in which that use is otherwise prohibited.

Finding 13: A communication site is allowed with a Conditional Use Permit in the Rural Residential District per HCC 21.12.030(g).

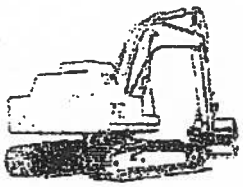
STAFF RECOMMENDATION:

The Planning Commission holds a public hearing and move to executive session.

Recommendation: The Planning Commission approves this variance to allow the most westerly structure to be 4.9 feet from the right-of-way.

ATTACHMENTS

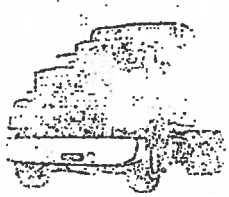
1. Zoning Variance Application
2. Survey dated 6/29/10
   Topo map



PO Box 1772
Homer, Alaska 99603

ARNO CONSTRUCTION TRUCKING & EXCAVATION

(907) 235-3643



To: Dave Becker
Re: Building relocate

Proposal from Arno Construction to relocate the communications building on Skyline drive down hill to place it inside the building setback on the lot.

Proposal includes: Driving piling for new foundation
Lifting building off present foundation, and relocating on new foundation.

Total proposal: $ 38,465.00

Arno construction

Mike Arno

Not sure if this is possible due to lack of area to base a crane , More research is needed.

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Horizon Satellite

May 18, 2011

Horizon Satellite, LLC

P.O. Box 2394

Homer, AK 99603

To whom it may concern:

Horizon Satellite, LLC owns and operates a local wireless internet service company. We have been long term tenants of Becker Rentals (owned and operated by Mr. Dave Becker) at the Skyline address that is currently being deliberated on for certain easement concerns.

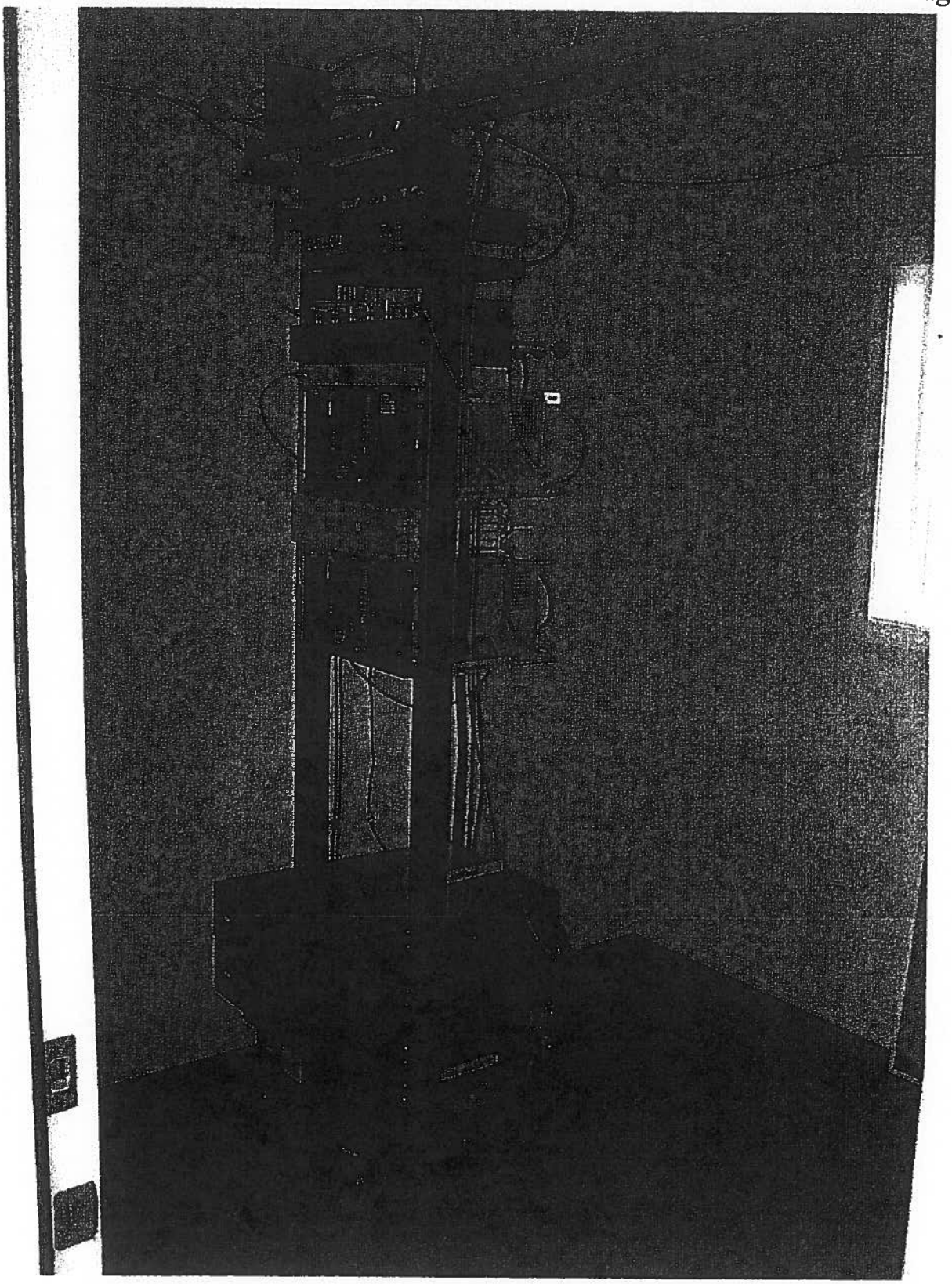
We wanted to share a little information about the cost and other activities that would affect our current operations of day to day business if any changes to the present facilities were to occur.

1) Height is the most optimal situation to propagate radio signal for the wireless internet to service more locations effectively. We serve several hundred customers who benefit from the service at this location. The cost would be very comprehensive to erect another tower at a lower elevation.

2) Horizon just added a new fiber service connection to the existing facility which was very costly to have installed at the current location. Any new changes would be very costly to extend the fiber connection to a new location.

3) The time to make any changes would further prove costly and would affect the current wireless internet subscribers from this service site.

Thank you for your time and consideration regarding the effects on the current services being provided to Horizon Satellite, LLC customers were there to be any changes to the current location.



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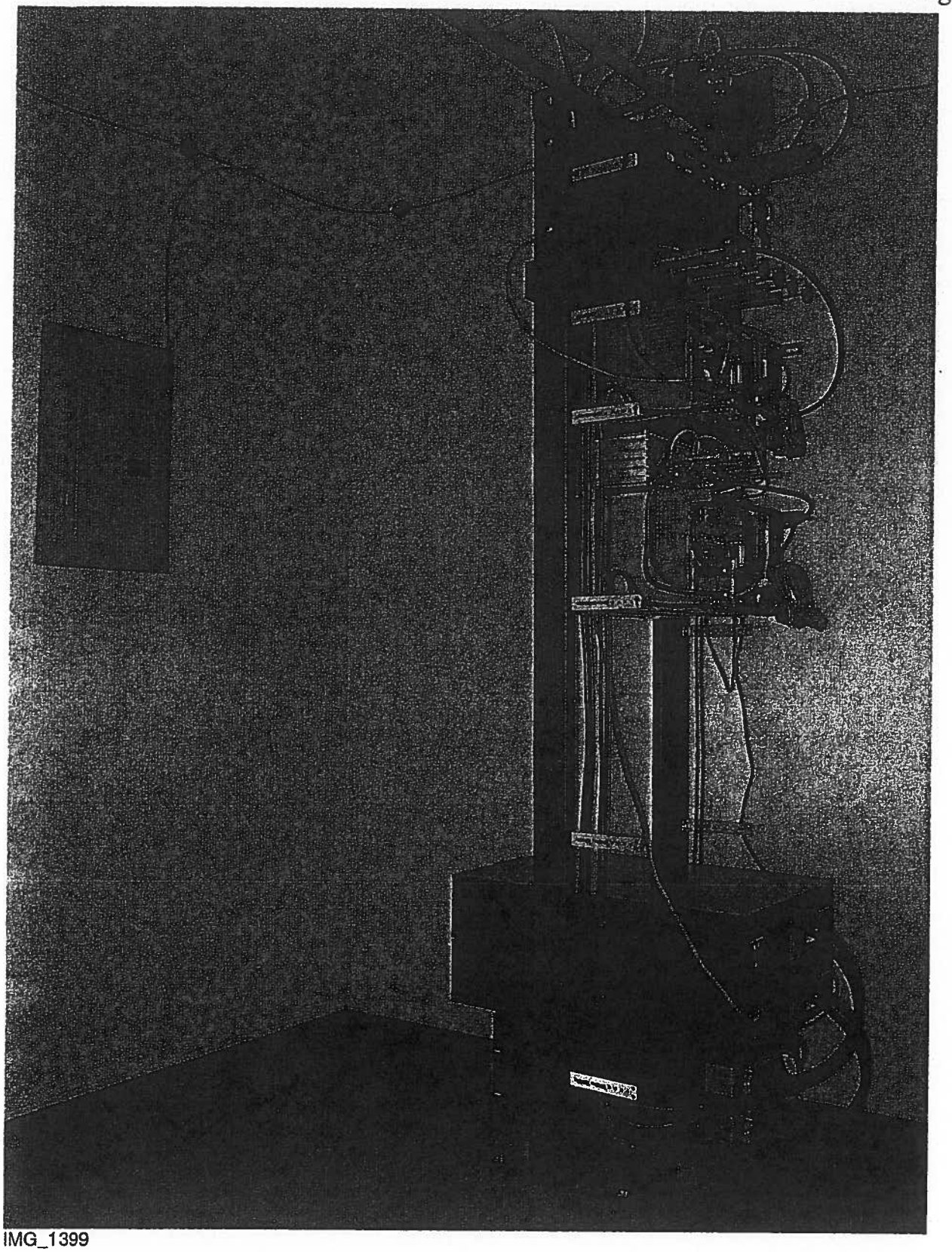

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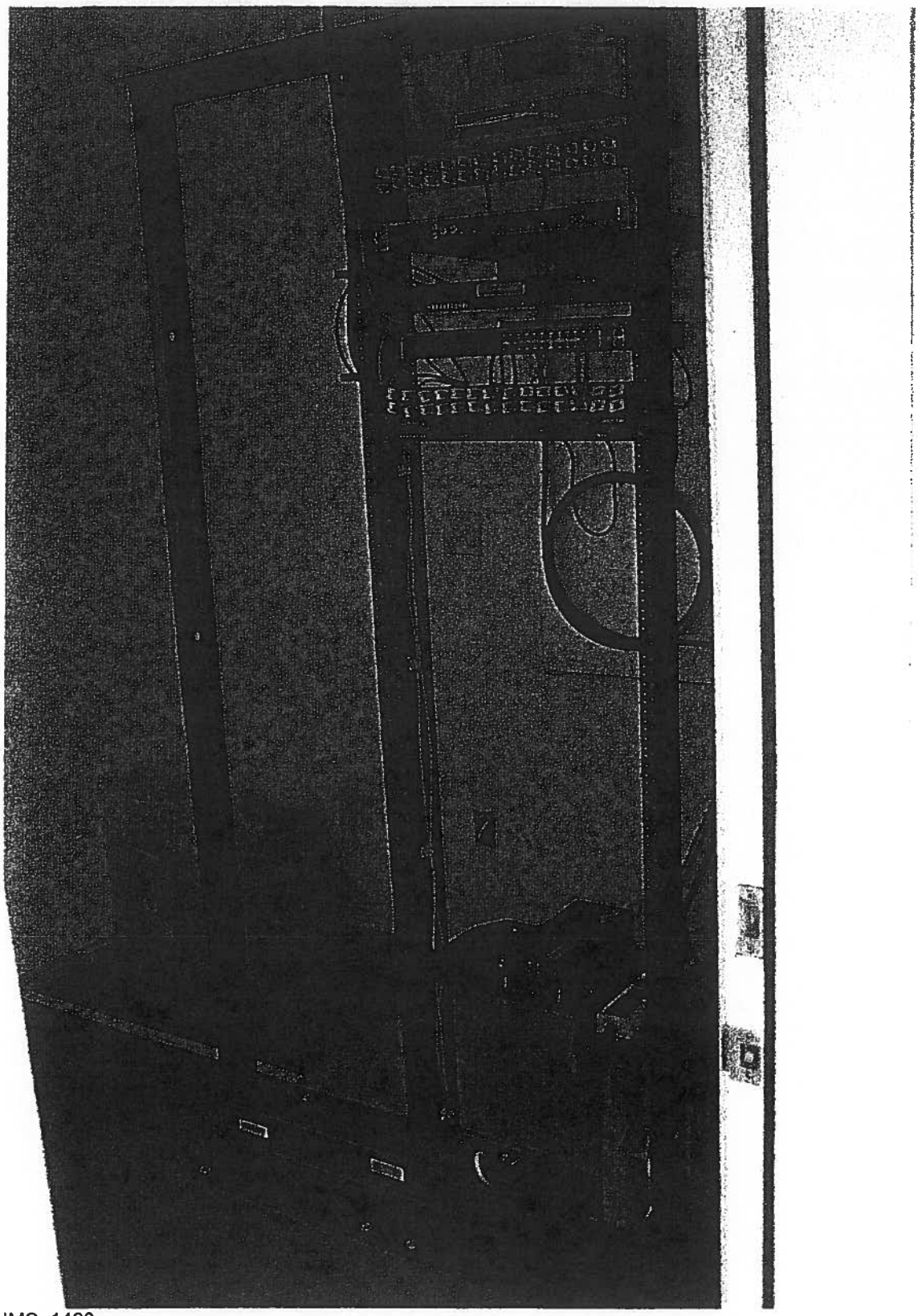

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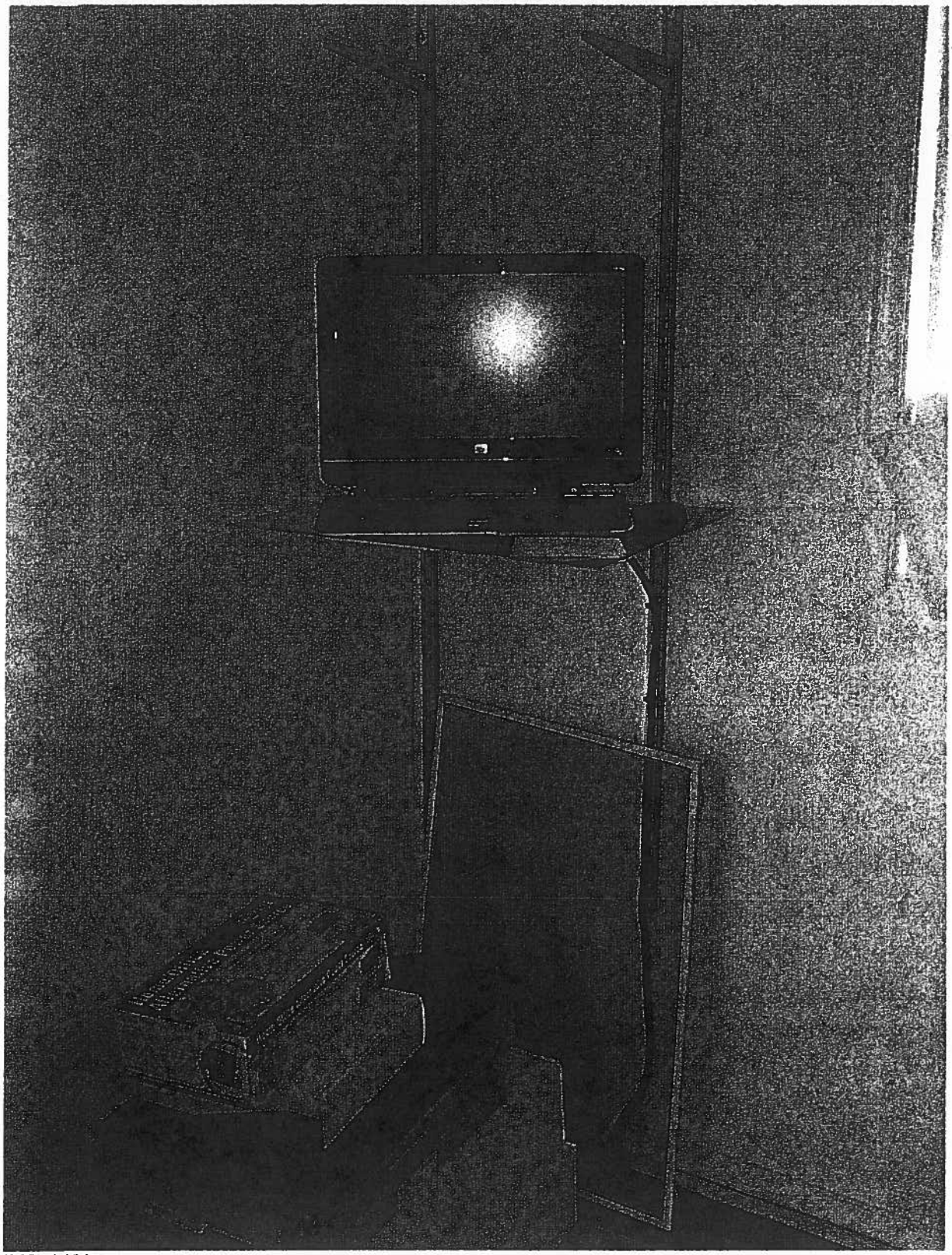

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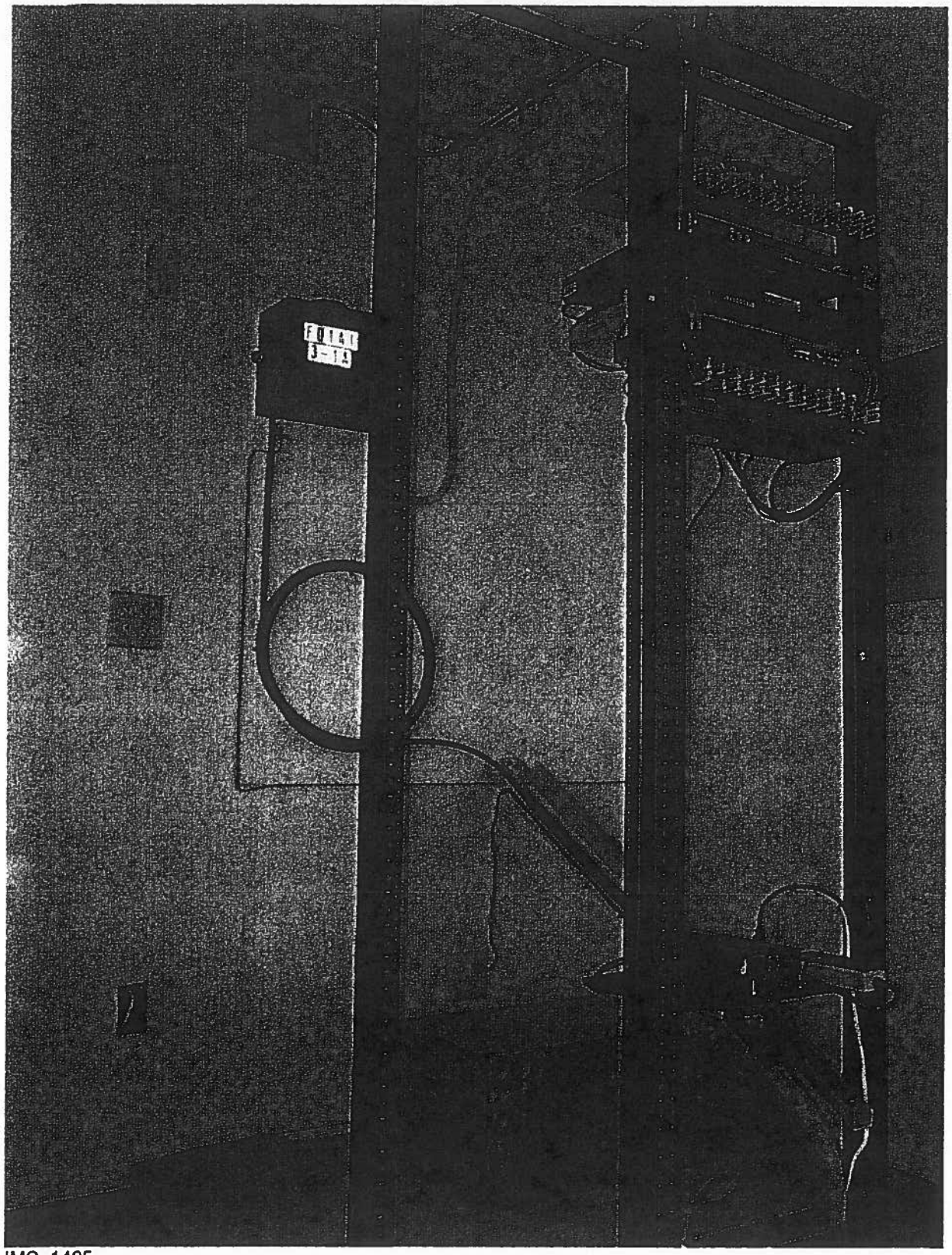

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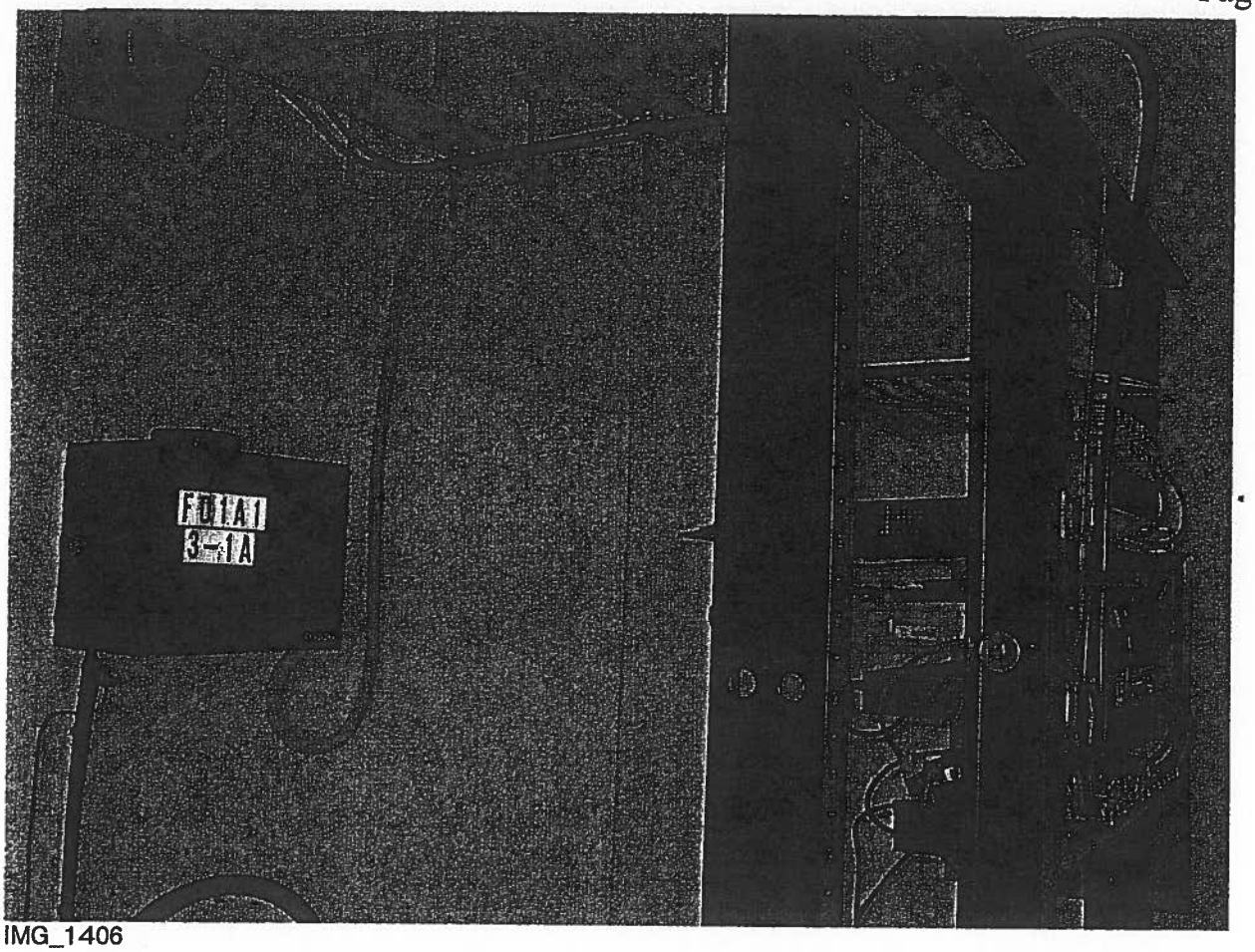

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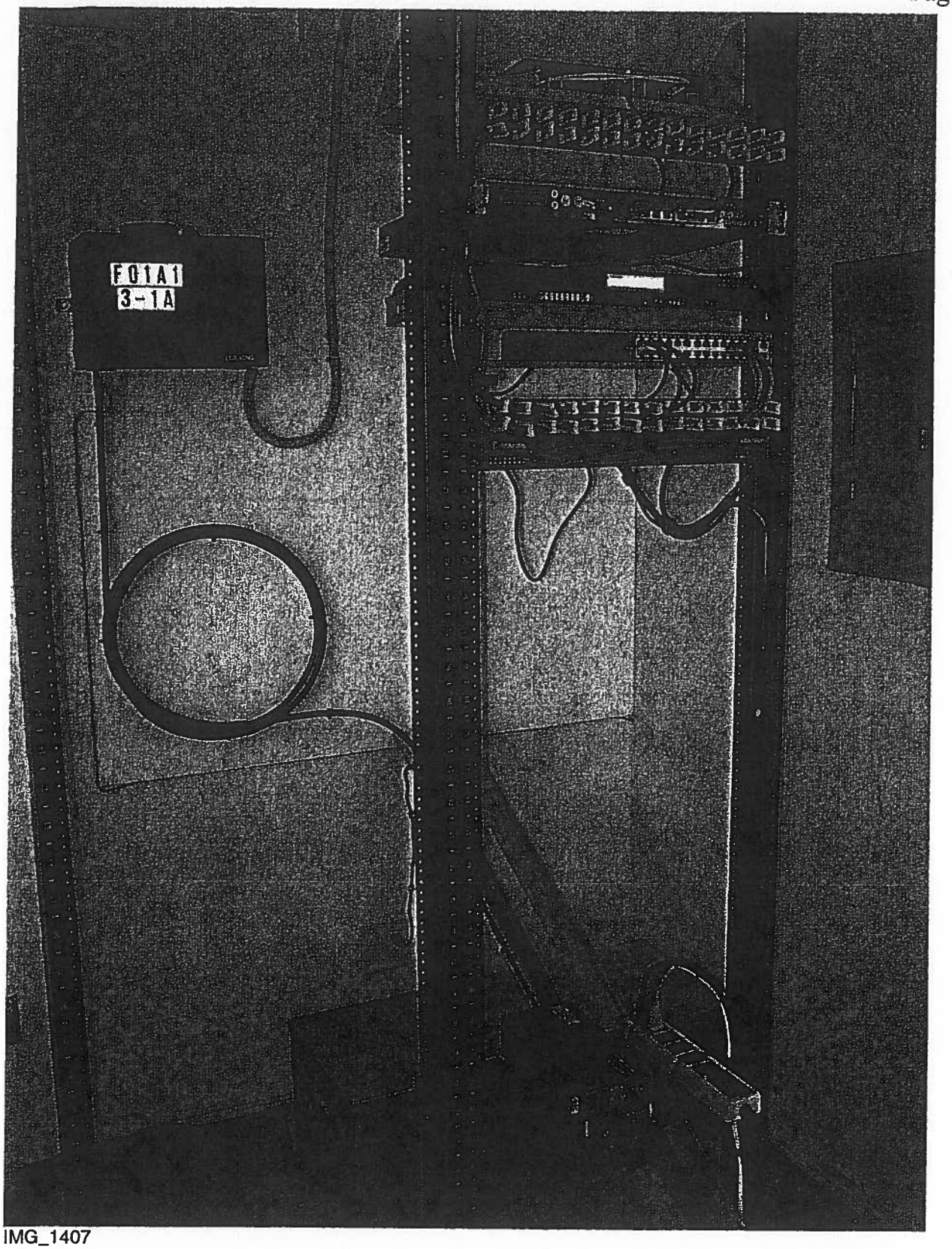

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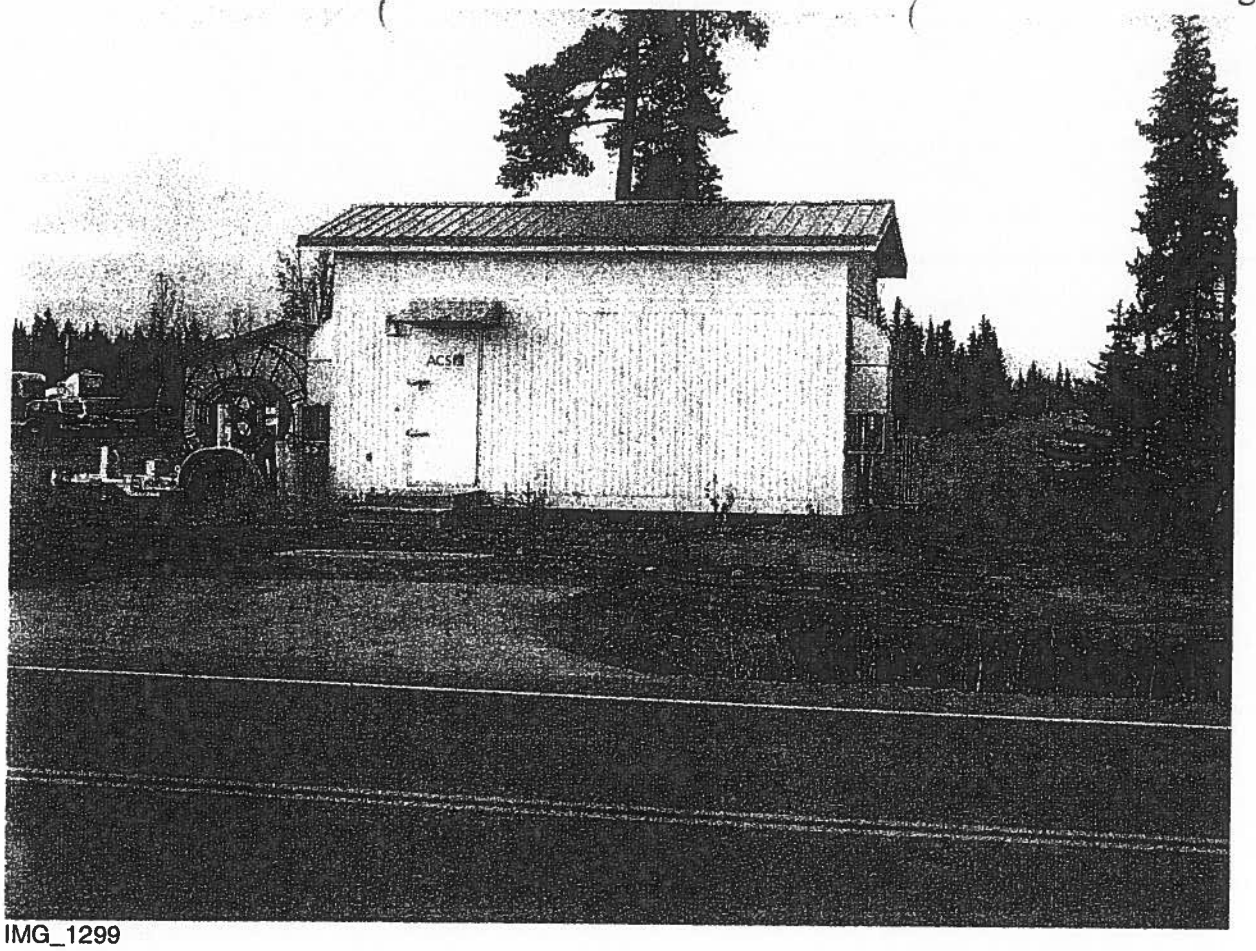

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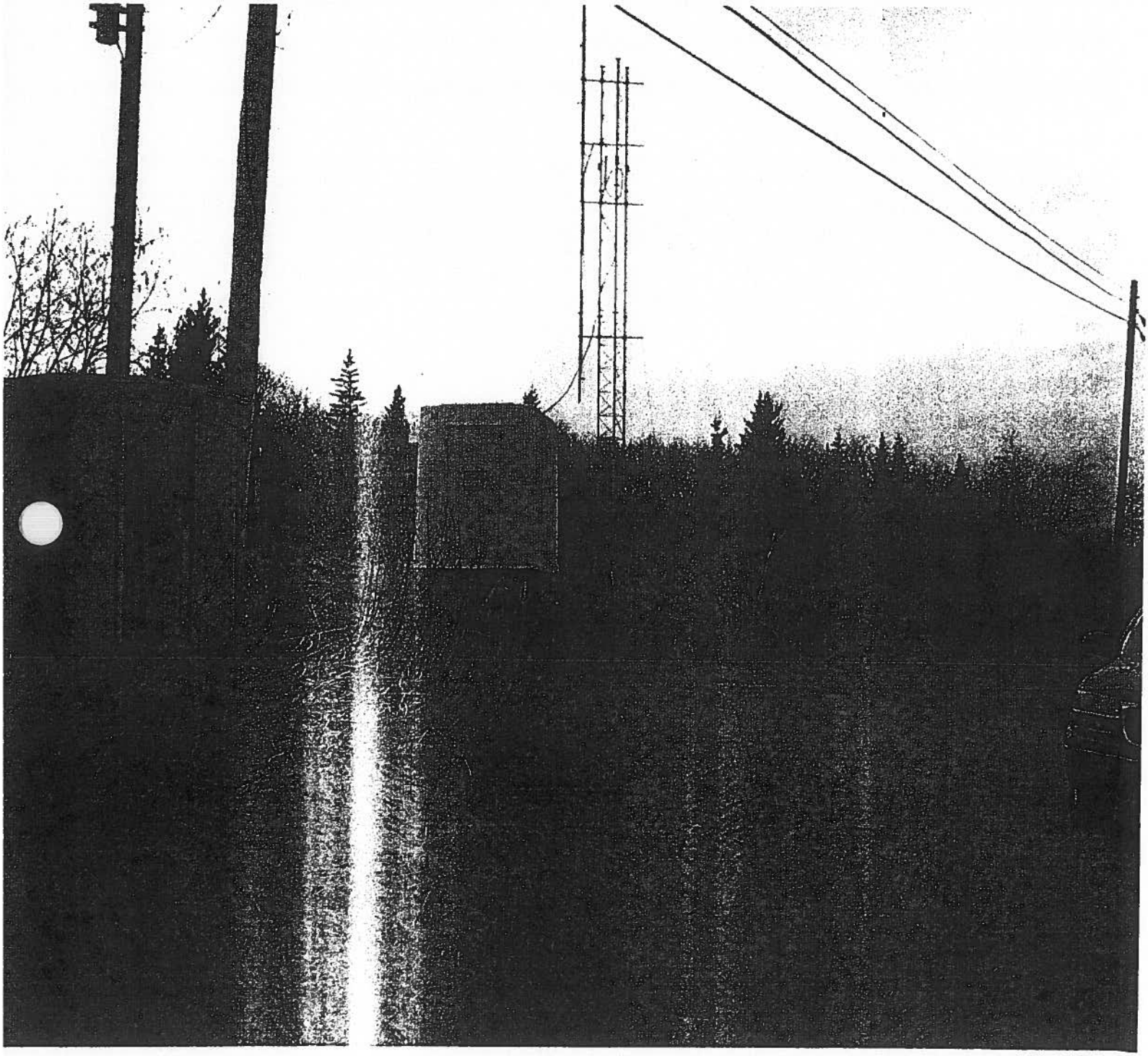

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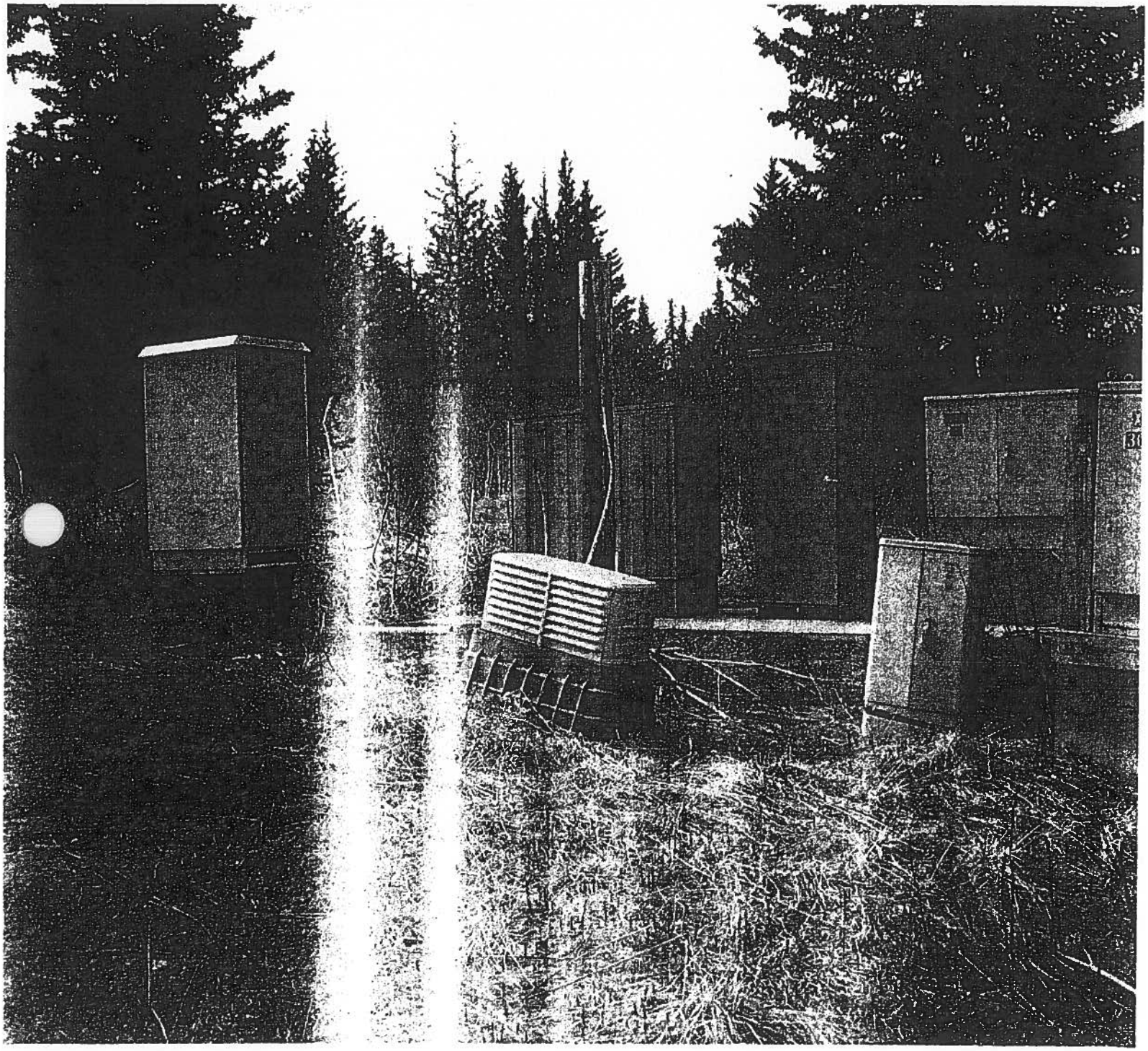

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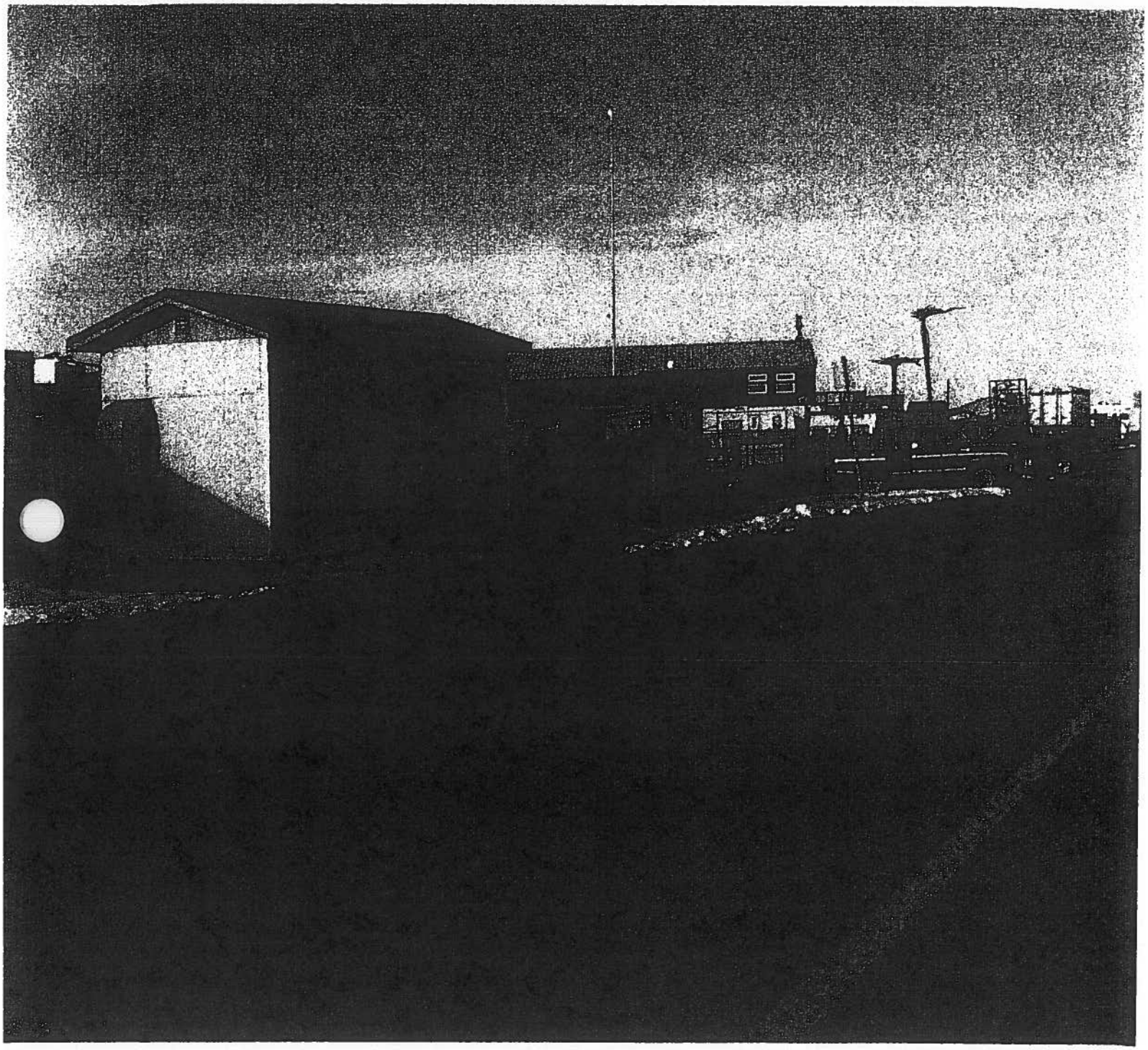

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Web Site *www.ci.homer.ak.us*

STAFF REPORT PL 11-63

TO: Homer Advisory Planning Commission
THROUGH: Holly Wells, City Attorney
FROM: Rick Abboud, City Planner
MEETING: May 18, 2011
SUBJECT: Remand of the Homer Advisory Planning Commission's Decision Regarding Variance 10-01 Requested by David Becker

SYNOPSIS:

I. Introduction

The Planning Department submits the following synopsis and recommendations in response to findings by the Homer Board of Adjustment ("Board") at the January 4, 2011 hearing regarding Variance 10-01 requested by David Becker ("Becker"). This synopsis is based upon a review of the record by the City of Homer Planning Department ("Department") and incorporates advice from the City of Homer attorney regarding the proper review process on remand. This Staff Report is intended to compliment the Staff Report previously submitted to the Homer Advisory Planning Commission ("Commission") on this matter and is not intended, except to the extent specified within this report, to replace or negate the Department's recommendations based upon the evidence presented at the time the original Staff Report was drafted.

II. Facts & Background

On July 21, 2010, a hearing was held before the Commission to decide whether to grant Becker's variance request. The Department recommended approval but, after hearing testimony from Becker regarding his use of the property at issue and from neighboring property owners, the Commission denied Becker's application. On September 2, 2010, Becker recorded a public utility easement on the property. This easement granted

> Homer Electric Association, Inc.; General Communications, Inc.; Peninsula Communications, Inc.; Turquoise Broadcast Company, LLC; Becker Communications, LLC; Becker Rentals; any other entity providing electricity, water, sewage, and natural gas as a public utility; and any successors in interest to such entities right and access to the property to install, maintain, repair, and remove water and sewer lines, telephone lines, electrical lines, antennas,

repeater/relay/translator stations and the like, as well as structures, storage facilities, and stations to support such systems.

On September 2, 2010, Becker informed the City that he recorded this public utility easement and was withdrawing his variance application as moot.

On September 14, 2010, the Commission issued its decision based upon the evidence presented at the hearing. After the utility easement had been recorded and the Commission issued its decision, Becker appealed that decision to the Board. A hearing was held on this appeal on January 4, 2011. On February 2, 2011, the Board issued a decision, finding that:

(1) The Commission's September 14, 2010, decision denying Mr. Becker's variance application was not supported by sufficient substantial evidence;

(2) copies of the written transcript of the hearing are incomplete;

(3) no evidence opposing the Department's recommending approval of the variance is included in the record;

(4) the record does not reflect whether the Commission considered the executed and recorded Utility Easement or its relevance to the application; and

(5) the Commission's decision fails to distinguish whether Mr. Becker's application for a variance is as a public or private utility facility.

The Board remanded the matter back to the Commission in accordance with Homer City Code 21.93.510(a) and HCC 21.93.540(e). The Board remanded the case both to address the lack of sufficient substantial evidence regarding the reasons for denying the variance and consider new evidence regarding the utility easement recorded by Becker on the site at issue. The Board's findings and the Department's recommendations for addressing these findings are discussed below.

III. Analysis

The Incomplete Record

The Board was unable to review a full record of the proceeding before the Commission because parts of the audio recording were lost due to technical difficulties. Therefore, the Board found that the "written transcripts of the hearing are incomplete."

Under Alaska law, it is unclear whether a new evidentiary hearing would be warranted in this case. "The general rule for records which are so incomplete as to preclude meaningful review calls for remand to the factfinder." John v. Baker, 30 P.3d 68, 78 n. 40 (Alaska 2001); see also State Dep't of Revenue v. Merriouns, 894 P.2d 623, 627 n. 4 (Alaska 1995) ("[W]hen the factual record is incomplete or improperly developed, the proper course is a remand to the factfinder, in this case the agency."). However, the Alaska Rules of Appellate Procedure provide the courts several options for curing an incomplete record on appeal, including obtaining a stipulation from

the parties regarding the contents of the missing record. See Alaska Rule of Appellate Procedure 604(a)(2).

Here, only a small portion of the record is missing and thus the complete record could likely be recreated by the parties through stipulation or some other means short of hearing new evidence. Further, the Board's purpose in remanding to the Commission does not make clear whether the Board intended the Commission to hear new evidence on both the variance and the submittal of the utility easement by Becker. However, given the Board's findings that there was not sufficient substantial evidence to support the Commission's denial of Becker's variance request, the Department recommends conducting a new evidentiary hearing on remand with regards to both Becker's variance application and his recordation of a utility easement. This approach ensures compliance with case precedent and the protection of Mr. Becker's rights.

Commission's Denial of Becker's Variance Request

Based upon both the Board's finding that there was not sufficient substantial evidence supporting the Commission's denial of the variance application and the need to re-hear evidence due to the incomplete transcript, the Department encourages the Commission to provide more specific citations to the record in support of its findings on remand. To the extent that the Commission disagrees with the Department's recommendations, these recommendations should be expressly addressed in the Commission's decision with citations to supporting evidence.

The Department reasserts its staff report and the reasoning underlying that report with regard to the variance requirements and, in the interest of brevity, will not revisit its findings in that report. In light of the Board's findings that the Commission failed to include the reasons it deviated from the Department's report, the Commission should enumerate its reasons for and evidence on remand supporting deviation from or agreement with the Department's recommendations.

Consideration of the Public Utility Easement

The Board remands to the Commission in part because "the record does not reflect whether or not the Commission considered the executed and recorded Utility Easement or its relevance to the application." Neither the Department nor the Commission considered the utility easement in reviewing Becker's application as Becker did not record this easement or submit it to the Department until after the Commission hearing.

The utility easement recorded by Becker providing Becker Communications, LLC, and Becker Rentals, among others, the right to use the right-of-way would, if valid, render the Commission's decision regarding the variance application moot or otherwise unnecessary. The easement would bring Becker into compliance with the Homer City Code. However, based solely upon the evidence before the Board, the Department does not have adequate information to determine the validity of the utility easement recorded by Becker.[1]

[1] While Becker requested withdrawal of his variance application on September 2, 2010 after the Commission had already held a hearing on the variance, he did not reassert this request before the Board. Thus, it is necessary for the Commission to make its hearing on remand as ordered by the Board,

In its original Staff Report, the Department recognized Becker's tower as a "public utility facility" as that term is defined in HCC 21.03.040.[2] However, that definition is specific to the conditional use permit process and in no way reflects whether a facility qualifies as a public utility for any other purpose. In order to determine if an enterprise or facility qualifies as a "public utility" for purposes of an easement, the Commission should determine if that enterprise is considered a "public utility" by the State of Alaska. The State governs and regulates public utilities and, to the extent that a City "charter, permit, franchise, ordinance, rule or regulation" contradicts with a State "certificate, order, decision, or regulation" regarding public utilities, the State's certificate, order, decision, or regulation will prevail. See AS 42.05.641.

The State of Alaska heavily regulates and governs public utilities operating in the State. It requires that public utilities obtain a Certificate of Public Convenience and Necessity to operate within the State. See AS 42.05.221. The State defines "public utility" as:

> every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for;
>
> (A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;
>
> (B) furnishing telecommunications service to the public for compensation;
>
> (C) furnishing water, steam, or sewer service to the public for compensation;
>
> (D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;
>
> (E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;
>
> (F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation;
>
> (G) furnishing the service of natural gas storage to the public for compensation. AS 45.05.990(5).

It defines "telecommunication" as:

> the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force

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which includes hearing new evidence and making a determination regarding the validity of the utility easement.

[2] The Board noted that the Commission failed to identify whether it also considered Becker's variance application to be for a public utility facility. Thus, the Commission should expressly address this issue in its written decision on remand.

variations, or impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a specified area or between designated points. AS 45.05.990(10).

Although it appears that Becker's facility and the nature of his businesses would require registration with the State of Alaska and regulation by it under these definitions, the Department could not find any evidence that Becker or any of the Becker enterprises listed in the public utility easement were registered with the Regulatory Commission of Alaska, the body regulating public utilities. The State does provide for certain public utilities to obtain exemption from the statutes and regulations governing public utilities but there is no evidence presented that Becker has obtained exempt status. Finally, it is possible that Becker's companies and his facility fall outside the scope of regulated facilities but again, no evidence has been presented by Becker supporting this.

The Department cannot recommend a finding that a variance is unnecessary due to the public utility easement without evidence that Becker's enterprises qualify as a public utility. Thus, the Department recommends that the Commission hear evidence regarding whether Becker Communications, LLC and Becker Rentals qualify as "public utilities" and, if the Commission finds that they do, it may also find the variance issue moot. In the event that Becker requests additional time to present evidence to the Commission regarding the "public utility" nature of his enterprises, the Department recommends a thirty (30) day stay to permit Becker to submit evidence to the Commission regarding the status of his companies as "public utilities" as that term is defined by the State of Alaska. In the event that such evidence is not presented or the evidence is inadequate, the Department cannot support the use of the public utility easement to use the property in violation of City law.

IV. Staff Recommendation

For all of the reasons discussed above, the Department recommends the following:

1. Commission should reconsider and hear new evidence regarding Becker's variance application and should issue a new decision and provide detailed reasons for its findings on each of the variance requirements;

2. Commission should solicit evidence from Becker regarding the public utility easement recorded by him on September 2, 2010, and whether the Becker companies granted use under the easement constitute "public utilities" under State law and for purposes of a public utility easement;

3. Provide a thirty (30) day stay to Becker to gather evidence regarding the status of his companies as "public utilities" under State law unless Becker presents sufficient evidence at the hearing regarding this issue or concedes that his companies named in the easement do not qualify as a "public utility" under State law or otherwise rejects the stay; and

4. Directly address any deviations from the Department's recommendations within this Staff Report or the Department's original Staff Report regarding Becker's variance request.

Alaska Statutes

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 1. Powers and Duties of the Commission
§ 42.05.145. Telecommunications regulation policy

A utility that provides local exchange or interexchange telecommunications service in the state affects the public interest. Regulation of these utilities shall, consistent with this chapter, seek to maintain and further the efficiency, availability, and affordability of universal basic telecommunications service.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 2. Certificate of Public Convenience and Necessity
§ 42.05.221. Certificates required

(a) A public utility may not operate and receive compensation for providing a commodity or service without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require or will require the service. Where a public utility provides more than one type of utility service, a separate certificate of convenience and necessity is required for each type. A certificate must describe the nature and extent of the authority granted in it, including, as appropriate for the services involved, a description of the authorized area and scope of operations of the public utility.

(b) All certificates of convenience and necessity issued to a public utility before July 1, 1970, remain in effect but they are subject to modification where there are areas of conflict with public utilities that have not previously been required to have a certificate or where there is a substantial change in circumstances.

(c) A certificate shall be issued to a public utility that was not required to have one before July 1, 1970, and that is required to have one after that date, if it appears to the commission that the utility was actually operating in good faith on that date. Such a certificate is subject to modification where there are areas of conflict with other public utilities or where there has been a substantial change in circumstances.

(d) In an area where the commission determines that two or more public utilities are competing to furnish identical utility service and that this competition is not in the public interest, the commission shall take appropriate action to eliminate the competition and any undesirable duplication of facilities. This appropriate action may include, but is not limited to, ordering the competing utilities to enter into a contract that, among other things, would:

(1) delineate the service area boundaries of each in those areas of competition;

(2) eliminate existing duplication and paralleling to the fullest reasonable extent;

(3) preclude future duplication and paralleling;

(4) provide for the exchange of customers and facilities for the purposes of providing better public service and of eliminating duplication and paralleling; and

(5) provide such other mutually equitable arrangements as would be in the public interest.

(e) If the commission employs professional consultants to assist it in administering this section, it may apportion the expenses relating to their employment among the competing utilities.

(f) Repealed.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 8. Miscellaneous Provisions
§ 42.05.631. Eminent domain

A public utility may exercise the power of eminent domain for public utility uses. This section does not authorize the use of a declaration of taking.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 8. Miscellaneous Provisions
§ 42.05.641. Regulation by municipality

The commission's jurisdiction and authority extend to public utilities operating within a municipality, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision, or regulation of the commission and a charter, permit, franchise, ordinance, rule, or regulation of such a local governmental entity, the certificate, order, decision, or regulation of the commission shall prevail.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 8. Miscellaneous Provisions
§ 42.05.711. Exemptions

(e) Notwithstanding any other provisions of this chapter, any electric or telephone utility that does not gross $50,000 annually is exempt from regulation under this chapter unless the subscribers petition the commission for regulation under AS 42.05.712(h).

(g) A utility, other than a telephone or electric utility, that does not gross $150,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221-42.05.281 under the procedure described in AS 42.05.712.

(k) A utility that furnishes cable television service is exempt from the provisions of this chapter other than AS 42.05.221-42.05.281 unless the subscribers petition the commission for regulation under the procedure described in AS 42.05.712.

(*l*) A person, utility, joint action agency established under AS 42.45. 310, or cooperative that is exempt from regulation under (a), (d)--(k), (o), or (r) of this section is not subject to regulation by a municipality under AS 29.35.060 and 29.35.070.

Title 42. Public Utilities and Carriers and Energy Programs
Chapter 05. Alaska Public Utilities Regulatory Act
Article 10. General Provisions
§ 42.05.990. Definitions

In this chapter,

(5) "public utility" or "utility" includes every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for;

(A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;

(B) furnishing telecommunications service to the public for compensation;

(C) furnishing water, steam, or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;

(F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation;

(G) furnishing the service of natural gas storage to the public for compensation;

(10) "telecommunications" means the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force variations, or impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a specified area or between designated points.

Title 29. Municipal Government
Chapter 35. Municipal Powers and Duties
Article 1. General Powers
§ 29.35.141. Regulation of radio antennas

(a) A municipality that regulates the placement, screening, or height of radio antennas must reasonably accommodate amateur radio antennas. A municipality may require reasonable and customary engineering practices to be followed in the erection of amateur radio antennas. A municipality may impose only the minimum requirements relating to amateur radio antennas that are necessary to accomplish the legitimate purposes intended to be served by the requirements.

(b) A municipality may not restrict the number of support structures for an amateur radio antenna. Based on the most recently published United States census, a municipal restriction on amateur radio antenna height may not be lower than

(1) 200 feet above ground level as permitted by the Federal Communications Commission in an area with a population density of 120 or less per square mile;

(2) 75 feet above ground level in an area with a population density of more than 120 per square mile for an antenna on a lot that is smaller than one acre; or

(3) 140 feet above ground level in an area with a population density of more than 120 per square mile for an antenna on a lot that is one acre or larger.

(c) Subject to (a) and (b) of this section, a municipality may, by ordinance, impose requirements to meet clearly defined objectives relating to screening, placement, aesthetic, and health and safety factors with respect to the erection, maintenance, and operation of amateur radio antennas.

(d) An ordinance regulating or restricting radio antennas adopted under this section may not apply to a radio antenna that was erected before July 26, 2001.

(e) This section applies to home rule and general law municipalities.

City of Homer, City Code

Title 21 Zoning and Planning
Chapter 21.03 Definitions and Rules of Construction
21.03.040 Definitions used in zoning code

"Public utility facility or structure," for the purpose of requiring a conditional use permit, means (i) any facility or structure owned and operated by a public or private utility, or (ii) a telecommunications tower or antenna, but it excludes water distribution mains, pressure stations and hydrants, sewage collection lines, manholes and lift stations, underground and overhead electrical, cable and telephone lines and poles, street lights and small wind energy systems.

Chapter 21.72 Variances
21.72.010 General.

A variance may be granted by the Planning Commission to provide relief when a literal enforcement of the Homer Zoning Code would deprive a property owner of the reasonable use of a lot.

21.72.020 Conditions precedent to granting variance.

a. All of the following conditions shall exist before a variance may be granted:

1. A literal interpretation of the provisions of the Homer Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district.

2. Special conditions and circumstances exist that are peculiar to the land or structures involved and are not applicable to other lands and structures in the same district.

3. The special conditions and circumstances that require the variance have not been caused by the applicant.

b. Financial hardship or inconvenience shall not be the sole reason for granting a variance.

c. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

d. If approved, a variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

e. A variance shall not be granted that will permit a land use in a district in which that use is otherwise prohibited. (Ord. 08-29, 2008).

Chapter 21.93 Adminstrative Appeals
Subchapter 2
Planning Commission Appeal Procedures

21.93.300 Appeals to the Planning Commission.

a. Within 30 days after receipt of a timely notice of appeal to the Planning Commission, the City Planner will prepare an appeal record consisting of all relevant documents submitted to or used by the Planning Department in making the decision under appeal, including any staff reports, correspondence,

applications, or other documents. The appeal record shall be paginated. The appellant shall be notified by mail when the appeal record is complete. Any person may obtain a copy of the appeal record from the Planning Department upon payment of the costs of reproduction.

b. An appeal hearing shall be scheduled within the time specified in HCC § 21.93.100. The hearing will be open to the public.

c. The Commission may prescribe rules of procedure for additional public notification in cases where the Commission determines its decision would have a substantial effect on the surrounding neighborhood.

d. The Commission may accept new testimony and other evidence, including public testimony, and hear oral arguments as necessary to develop a full record upon which to decide an appeal from an act or determination of the City Planner. Any person may file a written brief or testimony in an appeal before the Commission.

e. The Commission may undertake deliberations immediately upon the conclusion of the hearing on appeal or may take the matter under advisement and meet at such other time as is convenient for deliberations until a decision is rendered. Deliberations need not be public and may be in consultation with an attorney acting as legal counsel to the Commission.

f. The Commission may affirm or reverse the decision of the City Planner in whole or in part. A majority vote of the fully constituted Commission is required to reverse or modify the action or determination appealed from. For the purpose of this section the fully constituted Commission shall not include those members who do not participate in the proceedings due to a conflict of interest or disqualifying ex parte contacts, disqualifying partiality, or other disqualification for cause. A decision affirming, reversing, or modifying the decision appealed from shall be in a form that finally disposes of the case on appeal, except where the case is remanded for further proceedings.

g. The Commission may seek the assistance of legal counsel, city staff, or parties in the preparation of a decision or proposed findings of fact. (Ord 10-41(A)§3, 2010; Ord. 08-29, 2008).

21.93.310 Other procedures.

If no specific procedure is prescribed by the code, the Planning Commission may proceed in an administrative appeal in any lawful manner not inconsistent with this title, statutes, and the constitution. (Ord. 08-29, 2008).

Subchapter 3
Board of Adjustment Appeal Procedures
21.93.510 New evidence or changed circumstances.

a. Except as provided in subsections (b) and (c) of this section, the Board of Adjustment shall not consider allegations of new evidence or changed circumstances and shall make its decision based solely on the record. If new evidence or changed circumstances are alleged, the Board may, in its discretion, either hear the appeal without considering the allegations or may remand the matter to the appropriate

lower administrative body or official to rehear the matter, if necessary.

b. When the standing of a person is in issue, the Board of Adjustment may take additional evidence for the limited purpose of making findings on the question of the person's standing. No evidence received under this subsection shall be considered for purposes other than determining standing.

c. When the disqualification of a member of the Board of Adjustment for conflict of interest, ex parte contact, partiality or other cause is in issue, the Board of Adjustment may take additional evidence for the limited purpose of making findings on the question of disqualification. No evidence received under this subsection shall be considered for purposes other than determining disqualification. (Ord. 10-41(A)§5, 2010; Ord. 08-29, 2008).

21.93.540 Appeal hearing.

a. The meeting at which the Board of Adjustment hears an appeal shall be open to the public. The City Attorney or another attorney acting as legal counsel to the Board shall be present.

b. Each party (each appellant, cross-appellant, and respondent) may present oral argument at the appeal hearing, subject to the order of presentation and time limitations that the chair adopts at the commencement of the hearing. The taking of testimony or other evidence is limited by HCC § 21.93.510.

c. The Board of Adjustment may undertake deliberations immediately upon the conclusion of the hearing on appeal or may take the matter under advisement and meet at such other time as is convenient for deliberations until a decision is rendered. Deliberations need not be public and may be in consultation with the legal counsel to the Board.

d. The Board of Adjustment may exercise its independent judgment on legal issues raised by the parties. "Legal issues" as used in this section are those matters that relate to the interpretation or construction of the zoning code, ordinances or other provisions of law.

e. The Board of Adjustment shall defer to the findings of the lower administrative body regarding disputed issues of fact. Findings of fact adopted expressly or by necessary implication by the lower body shall be considered as true if they are supported by substantial evidence. But findings of fact adopted by less than a majority of the lower administrative body shall not be given deference, and when reviewing such findings of fact the Board of Adjustment shall exercise independent judgment and may make its own findings of fact. If the lower administrative body fails to make a necessary finding of fact and substantial evidence exists in the record to enable the Board to make the finding of fact, the Board may do so in the exercise of its independent judgment, or, in the alternative, the Board may remand the matter for further proceedings. "Substantial evidence", as used in this section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Ord. 10-41(A) §8, 2010; Ord. 08-29, 2008).

HOMER BOARD OF ADJUSTMENT

CITY OF HOMER
491 EAST PIONEER AVENUE
HOMER, ALASKA 99603-7645

RECEIVED
FEB - 2 2011
City of Homer City Clerk

APPEAL OF HOMER ADVISORY PLANNING COMMISSION DECISION DATED SEPTEMBER 14, 2010

RECEIVED
FEB - 2 2011
CITY OF HOMER
PLANNING/ZONING

DECISION ON APPEAL

David Becker ("Mr. Becker") appeals, through his attorney Daniel Westerburg, the Homer Advisory Planning Commission's ("Commission") Decision and Findings: Variance 10-01, 1033 Skyline Drive. In its Decision dated September 14, 2010, the Commission determined that Mr. Becker ". . . has not met all the requirements for granting a variance and the application is denied." An appeal hearing was scheduled to be held before the City of Homer Board of Adjustment ("Board") on December 14, 2010 and rescheduled for January 4, 2011, at which time the Board heard oral argument from the parties. After deliberation, the Board issues this Decision on Appeal.

I. EVIDENCE AND PRELIMINARY ISSUES.

The Chairman of the Board reviewed preliminary issues prior to hearing oral argument from the parties. Potential conflicts of interest regarding Board Chairman James Hornaday and Board Members David Lewis, Kevin Hogan and Barbara Howard were disclosed and reviewed by the Board. After review, it was determined that no conflicts of interest existed. Board Chairman Hornaday also revealed ex-parte contact with Mr. Becker; however, no discussion regarding the merits of the issue at hand were discussed.

The evidence before the Board consisted of both the Record of Appeal (53 pages); a Supplemental Record of Appeal (3 pages, including a copy of a Utility Easement); and a Brief submitted by attorney Westerburg on behalf of Mr. Becker (10 pages with a 4 page Appendix).

Public Comments were presented by Mr. William J. Glynn, Jr., owner of an adjacent parcel of Lot 5, located across the street from Mr. Becker's property. Mr. Glynn, who participated at both the Commission and Board level, spoke in favor of Mr. Becker's development as long as Mr. Becker was held to the same standards as everyone else. Mr. Glynn argued that Mr. Becker was in violation of the Homer City Code ("HCC") regarding both the setback and the driveway and should be compelled to comply. Mr. Glynn shared his personal compliance experience and argued that a two-way radio was not a public utility.

II. FINDINGS OF FACT.

1. This appeal involves a parcel of property located at 1033 Skyline Drive, Homer, Alaska, owned by Mr. Becker and Eileen Becker. The legal description for the property is Skyline View Sub Lot 5 Lying S of Diamond Ridge Road. Record of Appeal ("R.") at p. 6.

2. The property was annexed into the City of Homer sometime during 2003. R. at page 24.

3. Sometime during early 2010, Mr. Becker spoke with Homer Police Chief Robl concerning a need for a repeater to provide better coverage for the police and improve public safety. A sense of urgency existed to install the repeater prior to the 4th of July, 2010. R. at page 24.

4. According to Mr. Becker, "[i[t was not explained to him initially which permits were necessary to proceed, so he is now applying for a conditional use permit [and a variance] to be in compliance with current city code." R. at page 24.

5. According to Homer City Manager Walt Wrede, he concurred that ". . . this was the best place for the repeater, timing was important due to the necessity to increase public safety. He clarified that when he gave Mr. Becker the go ahead, he was clear that the developer is responsible for obtaining all necessary permits." R. at page 25.

6. The actual site construction and installation of the repeater was in process on or about June 3, 2010. R. at page 1.

7. William J. Glynn, Jr., ("Mr. Glynn") owner of an adjacent parcel of property wrote a letter to the Homer City Planning Department on June 3, 2010, lodging a formal complaint. R. at page 1.

8. According to Mr. Glynn, the lot across the street from him was ". . . being developed commercially[,]" without a conditional use permit, without a driveway, and in violation of setback requirements etc. R. at page 1.

9. Mr. Glynn further explained that he was required to comply with all planning and zoning ordinances and that Mr. Becker should be as well. R. at pages 1-2.

10. In response to the complaint, Mr. Becker submitted applications with the City Planning Department for a Variance and for a Conditional Use Permit ("CUP") on June 30, 2010. R. at page 6 and 15-18.

11. Upon review, the City Planning Department submitted Staff Reports recommending that the Commission approve both the Variance and the CUP. R. at pages 3-5 and 11-14.

12. According to the City Planning Department both the Variance and the CUP would require five (5) Commission votes to be approved. R. at page 3 and 11.

13. Both applications were set for hearing during the Commission's Regular Meeting of July 21, 2010. R. at pages 24-25.

14. Only four (4) Commission members were present during the July 21, 2010, Commission meeting. Therefore, the Commission voted to continue deliberations pertaining to both applications until five (5) Commission members were present. R. at pages 24-25.

15. Both applications were continued until the Commission's Regular Meeting of August 18, 2010. R. at pages 26-27.

16. The written transcripts from the meetings do not appear to be complete. A review of the Record on Appeal reveals that no evidence was presented in opposition of the City Planning Department Recommendation to approve the Variance.

17. The Commission issued two (2) Decisions, both dated September 14, 2010 and distributed on September 15, 2010. R. at pages 34-37 and 40-44.

18. Regarding the CUP application, the Commission voted to approve the request. R. at page 40.

19. Regarding the application for a Variance, the Commission voted to deny the request. R. at page 34.

20. This appeal followed; Mr. Becker challenges only the Commission's decision that a variance is required. R. at page 39.

21. The Supplemental Record ("S.R.") of Appeal includes a copy of a Utility Easement dated and recorded on September 2, 2010. S.R. at page 2.

22. The Utility Easement grants an easement directly to Becker Communications, LLC and Becker Rentals, as well as to other utility companies. S.R. at page 2.

23. There is no evidence in the Commission's Decision Denying the Variance that it considered the Utility Easement.

24. The property at issue ". . . has been developed since 1986 (24 years) as a 'communications' site for FM radio, Cable TV and Wireless Internet (Wi-Fi)[.]" R. at page 16.

III. ISSUE CURRENTLY BEFORE THE BOARD.

The issue before the Board is whether or not the Commission erred in denying Mr. Becker's application for a Variance.

IV. PLANNING AND ZONING CODE

HHC 21.12.030 authorizes conditional uses and structures including "Public utility facilities and structures" in the rural residential district. HCC 21.12.030 (g).

HHC 21.03.040 defines "Public utility facility or structures" for conditional use permit purposes as (i) any facility or structure owned and operated by a public or private utility, or (ii) a telecommunications tower or antenna, but it excludes water distribution mains, pressure stations and hydrants, sewage collection lines, manholes and lift stations, underground and overhead electrical, cable and telephone lines and poles, street lights and small wind energy systems."

V. BOARD OF ADJUSTMENT APPEAL PROCEDURES

1. HHC 21.93.510 titled 'New evidence or changed circumstances' provides in part:

   a. Except as provided in subsection (b) of this section, the Board of Adjustment shall not consider allegations of new evidence or changed circumstances and shall make its decision based solely on the record. If new evidence or changed circumstances are alleged, the Board may, in its discretion, either hear the appeal without considering the allegations or may remand the matter to the appropriate lower administrative body or official to rehear the matter, if necessary.

2. HHC 21.93.540 titled 'Appeal hearing' provides in part:

   e. The Board of Adjustment shall defer to the findings of the lower administrative body regarding disputed issues of fact. Findings of fact adopted expressly or by necessary implication by the lower body shall be considered as true if they are supported by substantial evidence. But findings of fact adopted by less than a majority of the lower administrative body shall not be given deference, and when reviewing such findings of fact the Board of Adjustment shall exercise independent judgment and may make its own findings of fact. If the lower administrative body fails to make a necessary finding of fact and substantial evidence exists in the record to enable the Board to make the finding of fact, the Board may do so in the exercise of its independent judgment, or, in the alternative, the Board may remand the matter for further proceedings "Substantial evidence", as used in this section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

ORDER

Therefore, having reviewed the materials provided by the parties, testimony from the parties and the public, and upon deliberation, the Board finds that:

1) The Commission's September 14, 2010 Decision denying Mr. Becker's application for a Variance is not supported by sufficient substantial evidence.

2) The copies of the written transcript of the hearing are incomplete.

3) No evidence opposing the Planning Department's recommendation is included in the record.

4) The record does not reflect whether or not the Commission considered the executed and recorded Utility Easement or its relevance to the application.

5) The Commission's decision fails to distinguish whether Mr. Becker's application for a Variance is as a public or private utility facility.

Pursuant to HCC 21.93.510 (a) and HCC 21.93.540 (e), the Board remands the matter for further proceedings.

Adopted by the Board of Adjustment on February 2, 2011.

James C. Hornaday

James C. Hornaday, Chairman

NOTICE OF APPEAL RIGHTS

Pursuant to Homer City Code §21.91.130 titled Appeals to Superior Court:

(a) An appeal from a final decision of the Board of Adjustment may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the Board of Adjustment or by the City Manager, City Planner or any governmental official, agency, or unit.

(b) An appeal to the Superior Court shall be filed within 30 days of the date of distribution of the final decision to the parties appearing before the Board of Adjustment.

(c) An appeal from a final decision of the Board of Adjustment to the Superior Court is governed by court rules.

CERTIFICATION OF DISTRIBUTION

I certify that a copy of this Decision was mailed to Daniel Westerburg, attorney for Mr. Becker, and William J. Glynn, Jr., on February 2, 2011. A copy was also delivered to the City of Homer Planning Department, Homer City Clerk and the City Attorney on the same date.

Dated: 2/02/11

DEC 07 2010 PM04:18

Daniel Westerburg

Attorney at Law

4164 Pennock Street, Suite A
Homer, Alaska 99603
(907) 235-2717-Phone
(907) 235-2715-Fax

December 7, 2010

HAND DELIVERED
Jo Johnson, City Clerk
City of Homer
491 E. Pioneer Avenue
Homer, AK 99603

RE: In RE the Application of David Becker for Conditional Use Permit No. 10-04 and Variance No. 10-01

Dear Ms. Johnson:

Enclosed please find the appellant's brief in the above-referenced matter. Per our conversation earlier this week, I am requesting a five (5) day extension of time for the filing of this brief. As you know, it was my understanding that in light of the deficiencies with your November 12, 2010, notification, a new notification would be issued and that the time for filing the appellant's opening brief would be calculated from the date of the corrected notice. Although mistaken, I believe my assumption was reasonable under the circumstances and that a five (5) day extension for filing the brief is justified.

Moreover, it does not appear that any other party has filed a brief and, with the hearing now scheduled for January 4, 2011, no one should be prejudiced by the five (5) day delay. I believe you have already granted the extension verbally but I thought it best to submit something in writing.

Let me know if you have any questions.

Best Regards,

Dan Westerburg

DW:ac
Enclosures
cc: David Becker (w/ enclosures)
Thomas Klinkner (w/ enclosures)
William J. Glynn, Jr. (w/ enclosures)

DEC 07 2010 PM04:18

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

In RE the application of David Becker)
)
for Variance #10-01 and CUP #10-04)
)

APPELLANT'S OPENING BRIEF

Introduction

This appeal concerns application of the 20 foot setback requirement to public utility structures erected within a dedicated public utility easement.

Factual and Procedural Background

The property in question is that portion of Lot 5, Skyline View Subdivision, lying south of Skyline Drive, owed by David and Eileen Becker. Its location atop a steep bluff overlooking Homer makes it a perfect site for telecommunications and over the past 25 years the site has housed various towers, antennae, satellite dishes and associated sheltered electronic equipment serving local FM radio, Wireless Internet and Cable TV industries. (R. 16.) Due to the steepness of the slope, the property is not conducive to residential use.

Mr. Becker was approached earlier this year by Homer Police Chief Mark Robl about installing a repeater station on the site as a means of improving the quality of local fire and police radio traffic. An agreement was ultimately reached between Mr. Becker and the City that Mr. Becker would install the station at his expense and would then lease it back to the City over a three year period. The station would consist of two fifty foot towers with antennae and a small (180 square feet) wood frame shelter designed to protect the

associated electronics from the elements. The agreement would be reduced to writing upon completion of construction. Chief Robl was anxious to have the station in place by the 4th of July weekend and Mr. Becker immediately retained a contractor to perform the work which was completed in June. The station has been on-line and serving the City since that time. (R. 24-25.)

As the result of a miscommunication between Mr. Becker and Chief Robl during negotiations, Mr. Becker was under the mistaken impression that no special permits were needed from the City before starting construction. Accordingly, he did not apply or receive any permits from Planning and Zoning prior to project completion. (R. 24-25.) Upon learning of the construction, William J. Glynn, who owns property on the opposite side of Skyline Drive, objected to Mr. Becker's failure to obtain a conditional use permit. (R. 1-2.) After looking into the complaint, Planning & Zoning staff informed Mr. Becker that he would need to apply for an after-the-fact conditional use permit as well as for a variance to the 20 foot setback requirement.

The CUP was required because the property is zoned "Rural Residential" and "public utilities and structures" is a conditional use in that zoning classification. HCC 21.12.030(g). The variance was required because the towers and equipment shelter were erected within the 20 foot setback because of the steep slope and the need to optimize placement of the towers. HCC 21.12.040(b)(1).

Thereafter, Mr. Becker, as requested, filed applications for both a CUP and a variance. (R. 6-8; 15-18; 20-21.) Recognizing the unique character of the lot, its history as a communications site long before its annexation in 2003 and the goals of the Comprehensive

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Plan to encourage access to wireless communication, Planning & Zoning recommended in Staff Report PL 10-64 that the CUP be granted. (R. 11-14.)

In Staff Report PL 10-65, Planning & Zoning also recommended that the variance application be granted. (R. 3-5.) The report recognized that a number of similar utility structures had been constructed in the setback pre-annexation and had already been granted nonconforming use status. No variance was required for those structures even though located squarely within the setback. The new structure under consideration, however, was erected post-annexation and therefore required a variance. (R. 3.)

Emphasizing the unique properties of the site for telecommunications and the impracticality of requiring construction farther down the slope, the report found that the application met all of the requirements for a variance set forth in HCC 21.72.020. Specifically, a literal interpretation and application of the setback requirement in this context would force "the new structure onto slopes greater than 40%" depriving the applicant of "the right to use the small portion of the property that abuts Skyline Drive which has slopes of approximately 20%." (R. 4.) It also found the following special conditions and circumstances peculiar to the property favored granting a setback variance:

- The structure supports and advances technological capabilities within the City of Homer by enhancing wireless communication thus forwarding the goals of the comprehensive plan. (R. 4.)

- Locations for communication equipment providing optimal coverage for the entire City of Homer are very limited. (R. 4.)

- The parcel has steep slopes of 38% to 42%. Parcels this steep are often considered "unfeasible" for typical residential development, Homer Comprehensive Plan, page 4-3. Disturbance of native vegetation for the creation of site development on steep slopes presents on site and off site hazards. (R. 4.)

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- The structure provides a beneficial service to the city which has specific site requirements for maximum effectiveness. (R. 4.)
- The benefit to all the Citizens of Homer combined with the potential hazard of creating an unstable bluff justifies an exception to the setback requirement. (R. 4.)
- Building outside the setback would require leveling the site to match the height of the setback or cutting and filling on a steep slope. Neither is conducive to slope stabilization and each presents a preventable hazard. (R. 5.)

The report also found that the need for the variance was the result of a natural phenomenon and not circumstances created by the applicant; that hardship and inconvenience were not the reasons for seeking the variance; and that the presence of other nonconforming structures within the setback was immaterial to the application. (R. 4-5.)

The two applications were considered by the Homer Advisory Planning Commission at a public hearing conducted on July 21, 2010. The staff reports and recommendations were reviewed by the City Planner and Mr. Becker offered supporting testimony. Mr. Glynn, the neighbor, explained that he had no objection to Mr. Becker developing the property as he saw fit "as long as the same rules apply to everyone." City Manger Wrede confirmed the City's position that the selected site was "the best place for the repeater" and that the accelerated timing of the project was "due to the necessity to increase public safety." Consideration of the two applications was then tabled due to the lack of a quorum of commissioners. (R. 24-25.)

The applications were again taken up by the Commission at its meeting of August 18, 2010. With no substantive discussion on the record, the CUP application was granted and the variance application denied. (R. 26-27.) In its written decision on the CUP application issued several weeks later (R. 45-49), the Commission confirmed that despite

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the CUP it had granted Mr. Becker, the construction within the setback required an approved variance – the CUP alone would be insufficient. (R. 46.)

In its written decision denying the variance application (R. 50-53), the Commission rejected the findings set forth in staff Report PL 10-65 and concluded instead that "structures on pilings can be built on slopes of 40%;" no special conditions existed warranting variance of the setback requirement; Mr. Becker had placed the structure within the setback through his own actions; the application was made in order to alleviate hardship and inconvenience (an impermissible rationale); and that "locating the structure in the setback is not necessary to permit reasonable use of the land." (R. 51-52.)

Upon learning of the Commission's actions taken at its August 18th, meeting, Mr. Becker contacted counsel and on September 2, 2010, a few weeks before the written decisions were issued, he and wife recorded a 20 foot utility easement along the north border of the subject property to "Homer Electric Association, Inc.; General Communications, Inc.; Peninsula Communications, Inc.; Turquoise Broadcast Company, LLC; Becker Communications, LLC; Becker Rentals; any other entity providing electricity, water, sewage and natural gas as a public utility; and any successors in interest to such entities." (Supp.R. 2-3.)

The easement gives the identified grantees the right "to install, maintain, repair and remove water and sewer lines, telephone lines, electrical lines, antennas, repeater/relay/translator stations and the like, as well as structures, storage facilities and stations to support such systems." (R. 2.)

Following recordation of the easement, counsel forwarded a conformed copy to City

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Planner Aboud, together with a cover letter explaining that with the 20 foot utility easement now in place, the Beckers considered their application for a variance to the 20 foot setback moot and wished to withdraw it. Nonetheless, the Commission's written decision denying the variance was issued a few weeks later. (Supp.R. 1-3; R. 45-53.)

This appeal follows.

Analysis

I. THIS MATTER SHOULD BE REMANDED TO THE PLANNING COMMISSION TO CONSIDER THE EFFECT OF THE NEW UTILITY EASEMENT ON THE NEED FOR THE VARIANCE.

As explained above, a utility easement now encompasses the same 20 foot corridor covered by the setback. (Supp.R. 2-3.) The easement was created after the Commission voted to deny the setback variance. (R. 26-27.) Accordingly, in the context of this appeal, it constitutes a changed circumstance. Ordinarily where the city council sits as a Board of Adjustment, it will not consider new evidence or changed circumstances and will instead make its decision on the basis of the existing record alone. HCC 21.93.510. However, when such evidence or circumstances surface, the Board may, in its discretion, remand the matter to the Commission for a rehearing to consider the new development. HCC 21.93.510(a). Mr. Becker urges the Board to do so here.

As explained above, Mr. Becker believes that the erection of a utility structure within a dedicated utility easement obviates the need for a setback variance. The setback requirement of HCC 21.12.040(b)(1) provides that "buildings" be set back twenty feet from all dedicated rights of way. However, the analysis does not end there. The term "building" is defined by HCC 21.03.040 as "any *structure* used or intended for supporting or sheltering

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any use or occupancy." (Emphasis added.) The term "structure," in turn, is defined in the same ordinance as "*anything* constructed or erected that requires location on the ground or that is attached to something having location on the ground." (Emphasis added.)

Applying the wording of these ordinances literally to the erection of utility structures within utility easements would become quickly problematic. If a "building" subject to the setback requirement is *any* "structure" supporting or sheltering *any* use and a "structure" is *anything* erected on the ground or attached to something else on the ground, then any utility apparatus, including utility poles; overhead power and telephone lines supported by such poles; underground cables and conduit sheltering them; junction and transformer boxes sheltering telephone and electric utility electronics; water and sewer lines; lift stations; fire hydrants and the like – commonly found within utility easements – would be subject to the setback requirement.

In order to avoid such a nonsensical result, an exception to the setback requirement for utility-related structures located within a utility easement, including devices designed to shelter utility electronics from the weather, must be implied. Otherwise, every such structure located within twenty feet of every right-of-way in the City would constitute a separate violation of the setback ordinance. Presumably, that was not the Council's intent in adopting the ordinance nor would such an interpretation be one the City would likely wish to enforce or establish as precedent. For if the ordinance is to be applied consistently, every utility company would need to apply for a waiver to the setback requirement for every utility structure erected within a utility easement located along a right-of way.

Moreover, given that many utilities are installed within rights-of-way themselves

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through a permitting process, following such an interpretation would accomplish nothing constructive. If a telephone pole can be lawfully placed within a public right-of-way with the appropriate permit, why would the City want to require a variance to permit the erection of that same pole in a dedicated utility easement running parallel to that right-of way? Indeed, the whole point of a utility easement is to simplify and facilitate the erection of utilities within its confines. Imposing setback requirements and corresponding requests for variance to the process will only defeat that purpose.

Inasmuch as the Commission did not have the opportunity to consider the new utility easement and how it might relate to the setback and variance requirements at issue, Mr. Becker submits that a remand to the Commission is appropriate. A remand would not only give the Commission first opportunity to address the issue, it may moot the appeal altogether if the Commission agrees with Mr. Becker's analysis. Moreover, other local utility companies will likely wish to weigh in on the issue and a fuller record therefore would be available for review by the Board in the event of any further appeal.

II. IF THE APPEAL IS NOT REMANDED, THE BOARD SHOULD REVERSE THE COMMISSION'S DECISION DENYING THE VARIANCE ON THE MERITS.

The Commission's decision denying Mr. Becker's request for a variance to the 20 foot setback requirement is not supported by "substantial evidence," defined in the Homer zoning ordinances as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." HCC 21.93.540. As explained above, following an investigation, Planning & Zoning staff submitted a detailed report explaining the unusual topographical features of the Becker lot necessitating the variance. Appended to this brief is a series of

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photos depicting the structure's current perch atop the bluff overlooking town. (Appendix A, pp.1-4.) The photos corroborate the report's conclusions that dismantling the existing structure and re-erecting it farther down the bluff would be impractical and hazardous. They also confirm that Mr. Becker erected the structure as far away from the Skyline Drive right of way as reasonably possible. Moreover, since setback distances are measured on a horizontal plane (and not along the topography), the distance from the edge of the right of way to any new construction site would actually exceed 20 feet (as measured along the grade), given the steepness of the slope. HCC 21.05.020.

Finally, given the purpose of the structure (a repeater station designed to service police and fire radio communications), it is imperative to set its location at the highest possible elevation so as to maximize its efficiency; allow ready access for maintenance; and protect its integrity in the event of a natural disaster. A drop in elevation would either reduce the efficiency of the device or require the erection of significantly higher towers in order to make up the lost height.

At neither hearing where the variance was considered by the Commission, was any evidence offered suggesting that the findings made in the Planning and Zoning report were incorrect. No one testified that construction farther down the slope was feasible; that another location would provide the same quality of reception; or that access and slope stability would not be problems. The report findings on these issues and the supporting testimony of Messrs. Becker and Wrede went completely unrebutted. Accordingly, there is no evidentiary basis in the record supporting the Commission's decision to deny the variance and it should be reversed on that basis.

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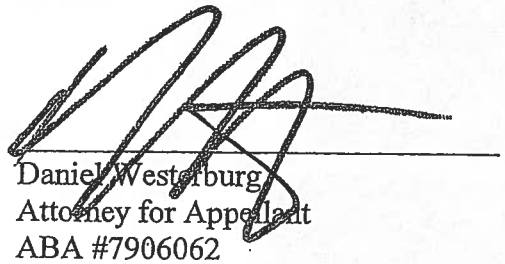
Conclusion

For all of these reasons, Mr. Becker respectfully requests that the decision of the Commission denying his application for a variance be remanded to the Commission for consideration of the impact of the new utility easement on the application or, in the alternative, that the decision be reversed on the merits.

DATED this 7th day of December, 2010.



Daniel Westerburg
Attorney for Appellant
ABA #7906062

The undersigned hereby certifies that on the 7th day of December, 20 10, a true and correct copy of the foregoing was served by mail on the following attorneys of record: Thomas Klinkner and William J. Glynn, Jr.

By: April Chesebro

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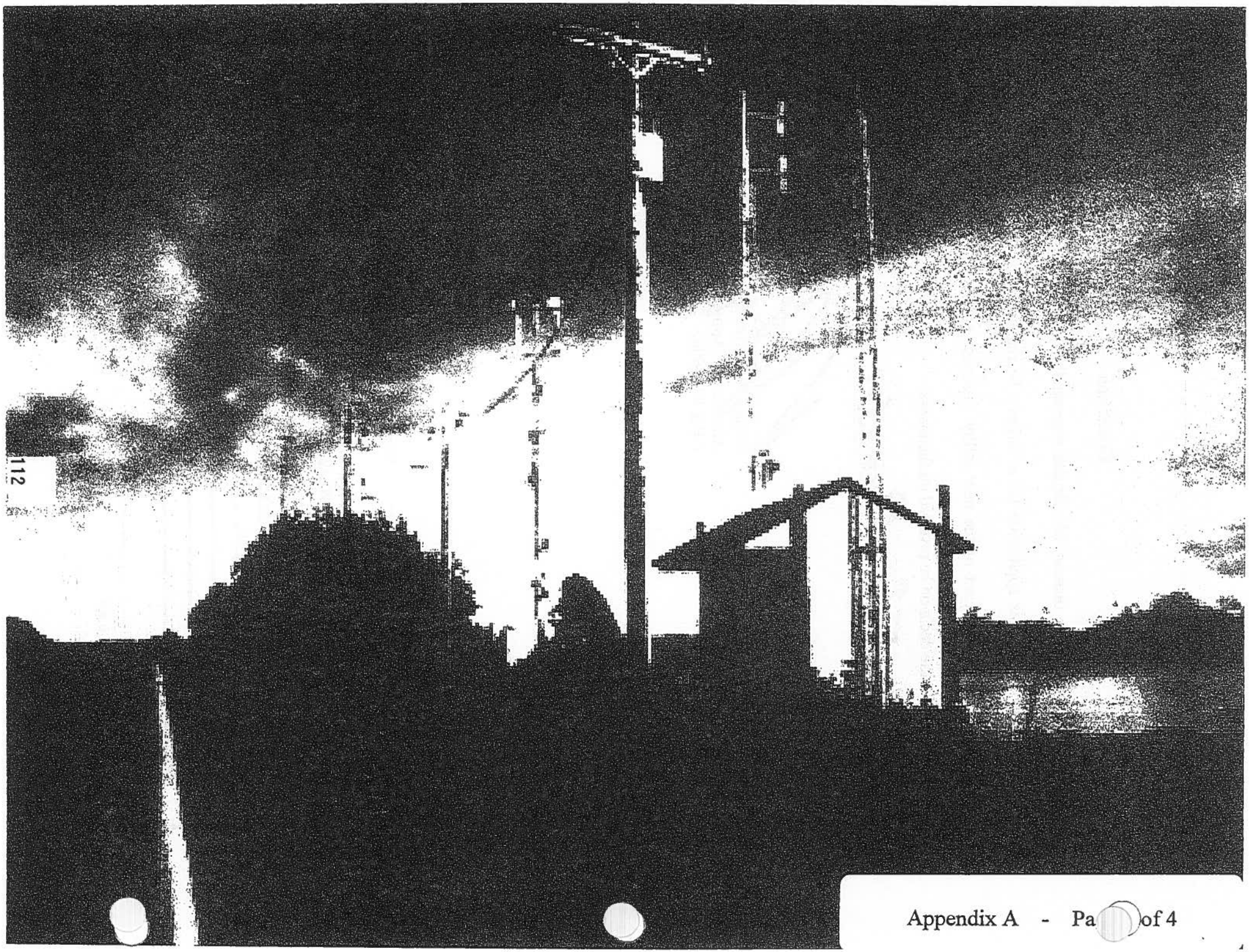

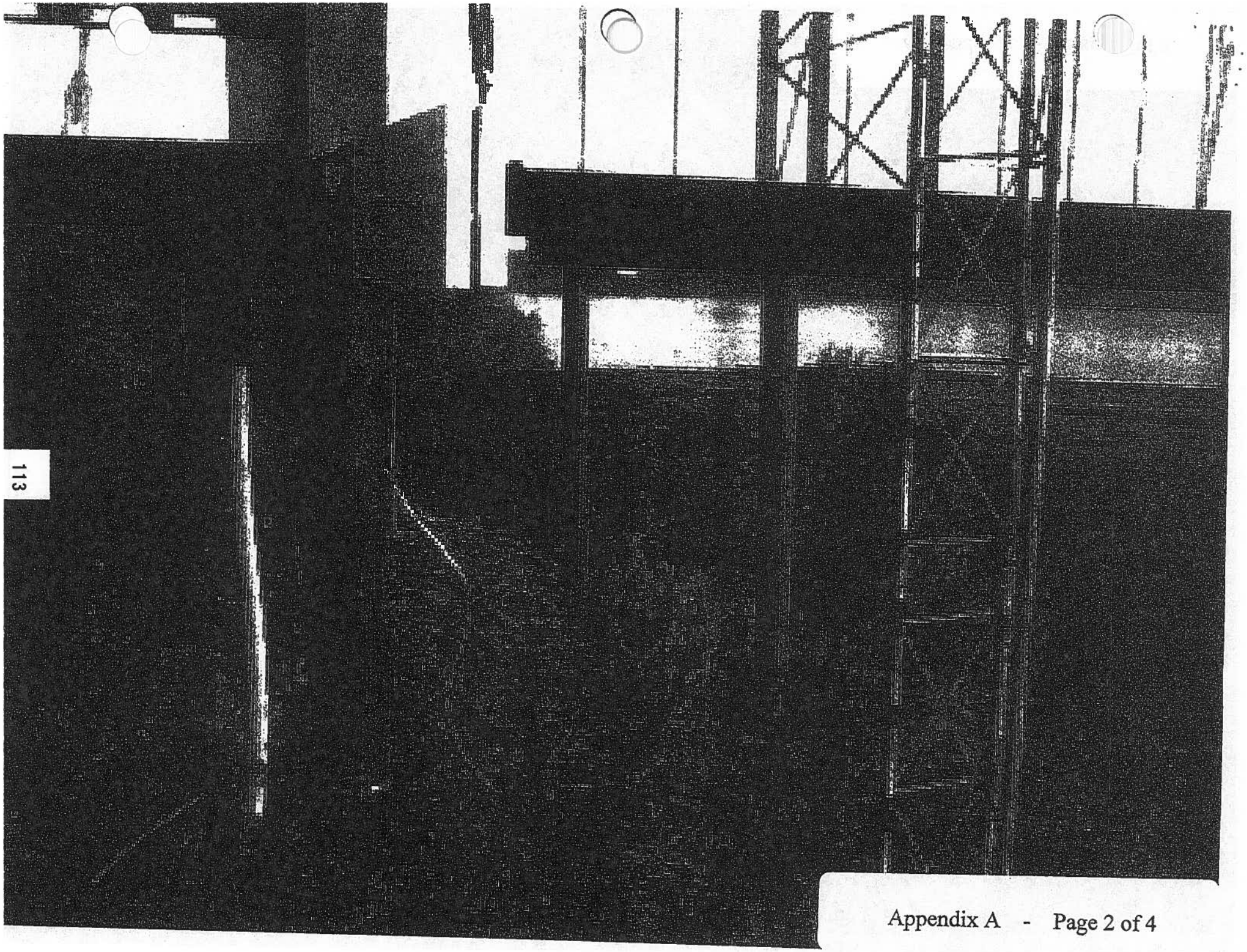

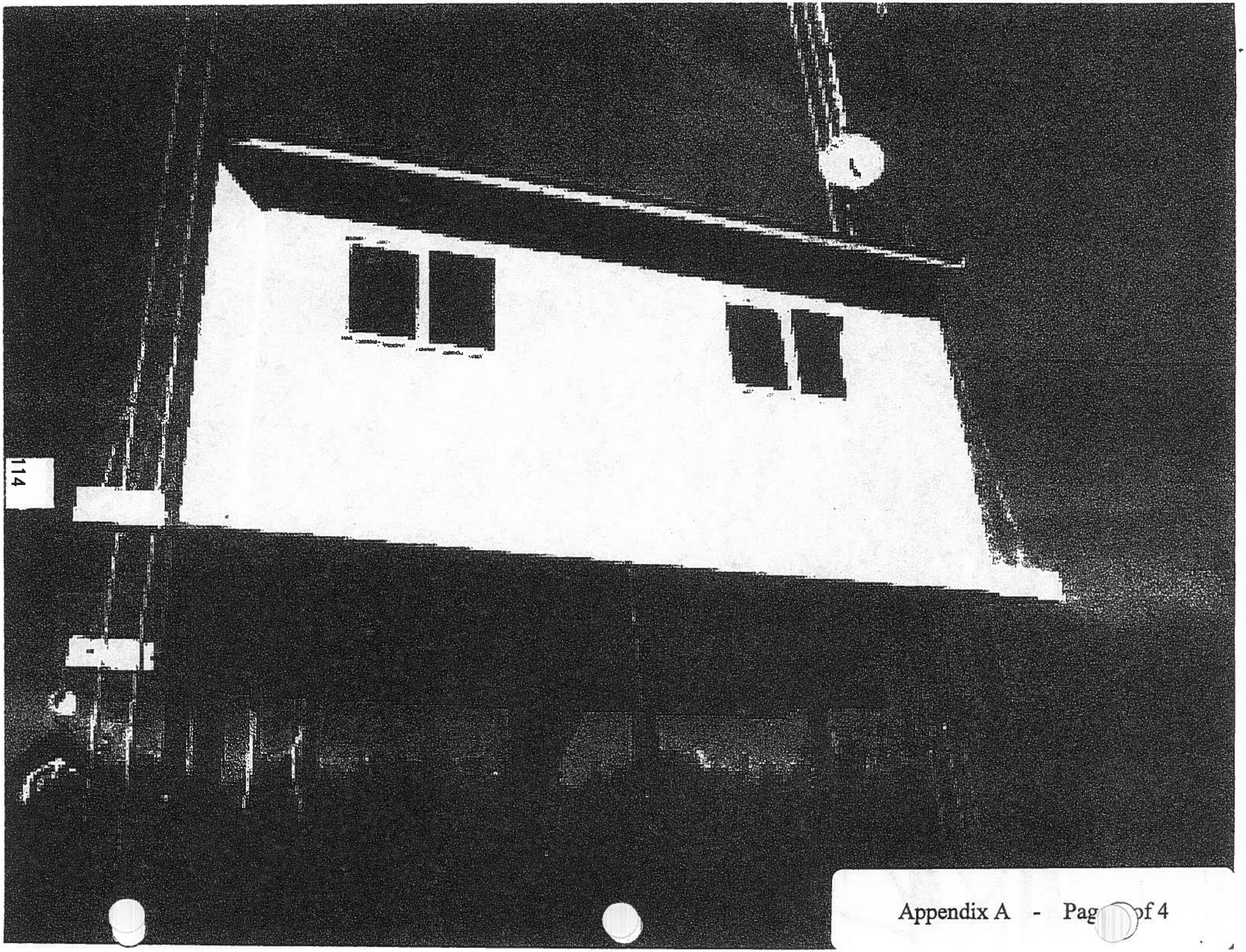

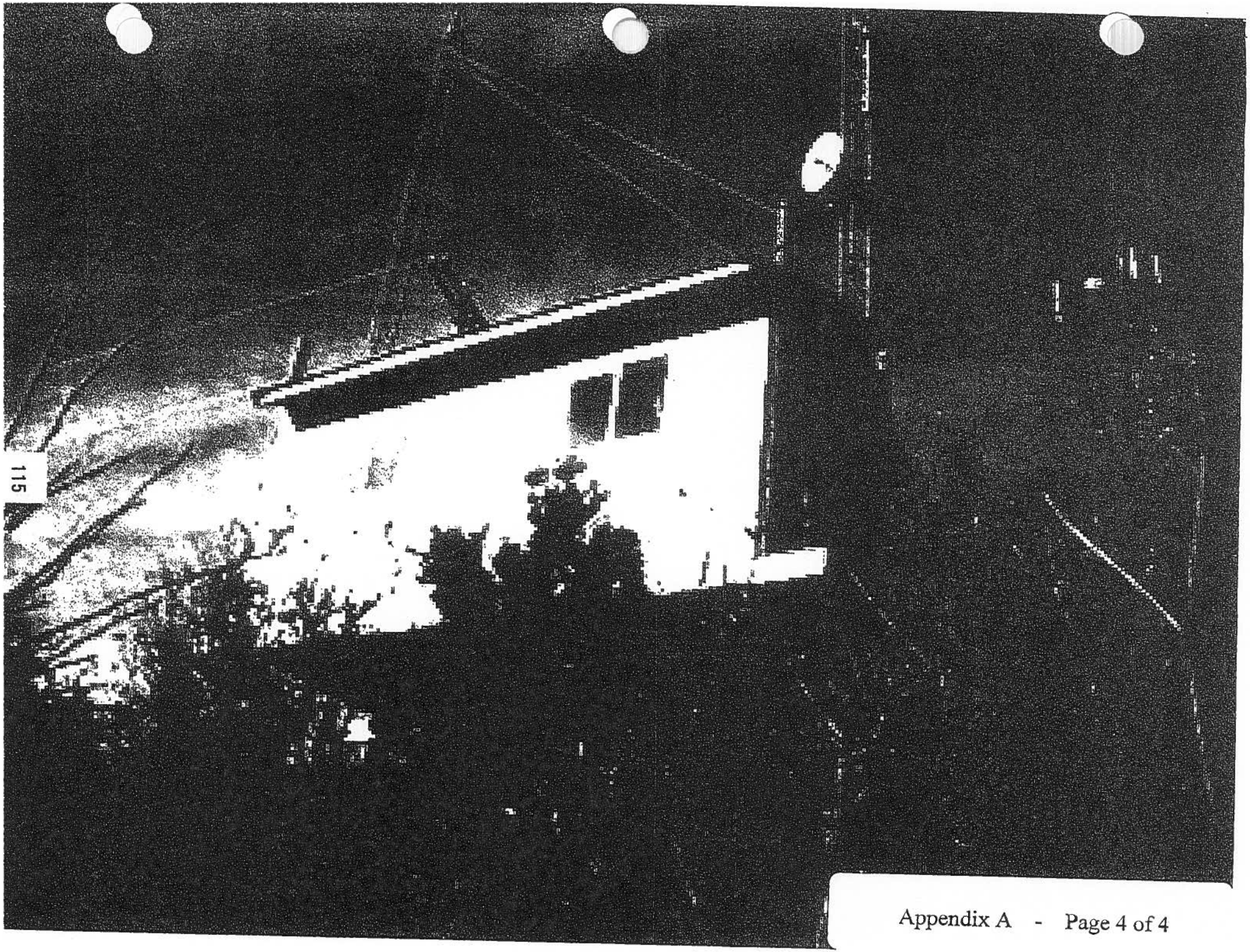

RECORD OF APPEAL

DAVID BECKER VS. CITY OF HOMER

APPEAL OF PLANNING COMMISSION DECISION OF SEPTEMBER 14, 2010

Special Meeting

December 14, 2010

6:00 p.m.

City Hall Cowles Council Chambers
491 E. Pioneer Ave.
Homer, AK 99603

APPEAL

to the

BOARD OF ADJUSTMENT

OF THE PLANNING COMMISSION DECISION

OF SEPTEMBER 14, 2010

DAVID BECKER

CONDITIONAL USE PERMIT 10-04

VARIANCE 10-01

RECORD OF APPEAL
Index

David Becker vs. City of Homer
Decision of the Planning Commission September 14, 2010

VOLUME I

(Dave Becker 399-7783

William J. Glynn, Jr.
P.O. Box 79
Kasilof, Ak 99610

420-2345 cell
260-7702 radio

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JUN - 3 2010
PLANNING/ZONING

City of Homer
Planning Dept
Homer, AK 99603

6-3-10

To Whom It may Concern:

This letter is a formal complaint against the City of Homer for failing to provide equal protection of the laws.

I own the lot at 1028 Skyline West. An area that was outside of the City of Homer prior to annexation. Alaska Digitel was installing updated hardware at the property where they had been tenants since 2002 and a neighbor who operates a commercial trucking company from his house across the street filed a complaint with the City in 2009 saying we were using the property commercially. This led to a public hearing for a conditional use permit to allow AK Digitel (now GCI) to replace their existing outdated antenna system with a new antenna.

After the public hearing the City of Homer Planning Commission approved the conditional use permit allowing AK Digitel's new antenna with the written stipulation that the 90 foot tower owned by me had to be removed from the property. The tower had four rent paying tenants that have since found other locations for their antennas leaving me with no income from those former tenants. One of the tenants, Kasilof Public Broadcasting, had to take their radio two stations off the air. One, for a month and the other for almost a year.

I also was required to modify another tower on the property because the guy wires were encroaching on another lot not owned by me, meet all lot line setback requirements for the new construction, and install a State of Alaska mandated driveway with a paved apron for the new AK Digitel antenna.

The lot across the road from me, owned by Dave Becker, is being developed commercially. No conditional use permit public hearing has been held. No driveway has been constructed. The new construction does not comply with setback requirements (too close to the front lot line). Additionally, the lot across the street being developed has a preexisting zoning non compliance condition. One of the buildings partially encroaches on the road right of way.

I had to correct the encroachments on my lot. So does the neighbor if the law is equally applied.

The cost of complying has run into the thousands of dollars. We have lost rent income from four former tenants and we cannot get those former tenants back as we now have no tower to mount their antennas. We also lost the KMJG driveway as the State of Alaska only allows one driveway per lot.

Since we are within 300 ft. of the new non complying construction we expect to be notified of the yet to be scheduled public hearing for the conditional use permit that Dave Becker must request under the law.

Your attention to this matter will be appreciated.

Bill Glynn

Bill Glynn

6/28/10 Dave B. will call Roger I

City of Homer
Planning & Zoning
491 East Pioneer Avenue
Homer, Alaska 99603-7645

Telephone (907) 235-8121
Fax (907) 235-3140
E-mail Finance@ci.homer.ak.us
Web Site www.ci.homer.ak.us

STAFF REPORT PL 10-65

TO: Homer Advisory Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Dotti Harness-Foster, Planning Technician
MEETING: July 21, 2010
SUBJECT: Variance 10-01 at 1033 Skyline Drive

SYNOPSIS: If approved, this variance will allow the newly constructed communication building to remain 4.9 feet from the property line. The northern part of the property that abuts Skyline Drive is the flattest portion of the property. The remaining property has slopes in the 40-42% range. **Approval of a zoning variance requires five yes votes.**

ANALYSIS: Due to the steep slopes, all the buildings on the parcel have been built within the 20 foot setback, including the newest, a 9 foot by 20 foot communication building. Only the newest, most westerly building is in need of a variance. It was built not knowing that a variance we required. The other buildings were built in the 1990's. These buildings existed prior to annexation and zoning and were granted nonconforming status in July 2010.

Applicant:	Dave Becker, P. O. Box 109, Homer, AK 99603
Legal:	SKYLINE VIEW SUB LOT 5 LYING S OF DIAMOND RIDGE RD
Parcel ID #	17402404
Size of Lot:	1.85 acres
Zoning Designation:	Rural Residential
Existing Land Use:	Communication site
Water – Wastewater:	Public water and sewer are not needed.
Surrounding Land Use:	North: Communication site South: Residential East: Residential West: Residential
Comprehensive Plan:	"The City should strive to provide public services and facilities that meet current needs while planning for the future. The City wishes to develop strategies to work with community partners that provide beneficial community services outside of the scope of City government." Homer Comprehensive Plan, page 6-1. "Target high tech industries or professional/web-based activities in these new commercial zones by public provision of access to wireless communication." Homer Comprehensive Plan, pg 4-17.
Wetlands:	No designated wetlands.

Public Notice: Notice was sent to property 14 owners of 15 parcels as shown on the KPB tax assessor rolls.

FINDINGS OF FACT

Pursuant to HCC 21.72.010, a variance may be granted to provide relief when a literal enforcement of Homer Zoning Code would deprive a property owner of the reasonable use of his real property.

Variance Code Requirements: HCC 21.72.020 Conditions precedent to granting variance.

a. All of the following conditions shall exist before a variance may be granted:

1. **A literal interpretation of the provisions of the Homer Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district.**

   Applicant: Requiring a 20 ft building setback on a steep bluff would simply not work.

   Finding 1: Requiring a 20 foot building setback forces the new structure onto slopes greater than 40%. This would deprive the applicant the right to use the small portion of the property that abuts Skyline Drive which has slopes of approximately 20%.

2. **Special conditions and circumstances exist which are peculiar to the land or structures involved and which are not applicable to other lands and structures in the same district.**

   Finding 2: The structure supports and advances technological capabilities within the City of Homer by enhancing wireless communication thus forwarding goals of the comprehensive plan.

   Finding 3: Locations for communication equipment providing optimal coverage for the entire City of Homer are very limited.

   Finding 4: The parcel has steep slopes of 38% to 42%. Parcels this steep are often consider "unfeasible" for typical residential development, Homer Comprehensive Plan, page 4-3. Disturbance of native vegetation for the creation of site development on steep slope presents on site and off site hazards.

   Finding 5: The structure provides a beneficial service to the city which has specific site requirement for maximum effectiveness.

   Finding 6: The benefit to all the Citizens of Homer combined with the potential hazard of creating an unstable bluff justifies an exception to the setback requirement.

3. **The special conditions and circumstances have not been caused by the actions of the applicant.**

   Finding 7: The steep slope is a natural phenomenon, not cause by the applicant.

   Finding 8: The applicant has not created the circumstances which demand this service.

B. Financial hardship or inconvenience sha be reason for granting a variance.

Applicant: The existing structures are on pilings. Without a variance pilings would elevate the structures to the grade of the road.

Finding 9: Granting this variance allows the use of the most northern and flatter portion of the property. Hardship and inconvenience is not the reason for granting this variance.

Finding 10: Building out of the setback would require leveling the site to the height of the setback or cut and fill on the steep slopes. Neither is conducive to slope stabilization and presents a preventable hazard.

C. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

Finding 11: The applicant is seeking a variance due to the steep slopes on the lot. Though the other structures were built prior to City annexation and zoning, this is not seeking a variance due of other nonconforming land use or structures within the district.

D. A variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

Applicant: Based on the survey dated 6/29/10 I am requesting a building setback variance allowing the most westerly structure to be 4.9 feet from the right-of-way. The most westerly structure is 9 feet x 20 feet on steel pilings.

Finding 12: The minimum variance necessary is 4.9 feet between the most westerly structure and the right-of-way.

E. A variance shall not be granted which will permit a land use in a district in which that use is otherwise prohibited.

Finding 13: A communication site is allowed with a Conditional Use Permit in the Rural Residential District per HCC 21.12.030(g).

STAFF RECOMMENDATION:

The Planning Commission holds a public hearing and move to executive session.

Recommendation: The Planning Commission approves this variance to allow the most westerly structure to be 4.9 feet from the right-of-way.

ATTACHMENTS

1. Zoning Variance Application
2. Survey dated 6/29/10
   Topo map

Date: June 30, 2010

Property address: 1033 Skyline Drive Owner: David or Eileen Becker, POBox 109, Homer, AK 99603

Legal Description: SKYLINE VIEW SUB LOT 5 LYING S OF DIAMOND RIDGE RD

Variance Code Requirements: HCC 21.62.020 Conditions precedent to granting variance.

A. All of the following conditions shall exist before a variance may be granted:

1. A literal interpretation of the provisions of chapters 21.28 through 21.70 would deprive the applicant of rights commonly enjoyed by other properties in the same district.

Applicant: Requiring a 20 ft building setback on a steep bluff would simply not work.

2. Special conditions and circumstances exist which are peculiar to the land or structures involved and which are not applicable to other lands and structures in the same district.

Applicant: The entire 1.85 acre parcel has slopes ranging from 40% to 45%.

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JUN 30 2010
CITY OF HOMER
PLANNING/ZONING

3. The special conditions and circumstances have not been caused by the actions of the applicant.

Applicant: The steep slope is a natural phenomenon, not cause by the applicant.

B. Financial hardship or inconvenience shall not be reason for granting a variance.

Applicant: The existing structures are on pilings. Without a variance pilling would have to elevate the structures to the grade of the road.

C. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

D. A variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

Applicant: Based on the survey dated 6/29/10 I am requesting a building setback variance allowing the most westerly structure to be 4.9 feet from the right-of-way. The most westerly structure is 9 feet x 20 feet on steel pilings.

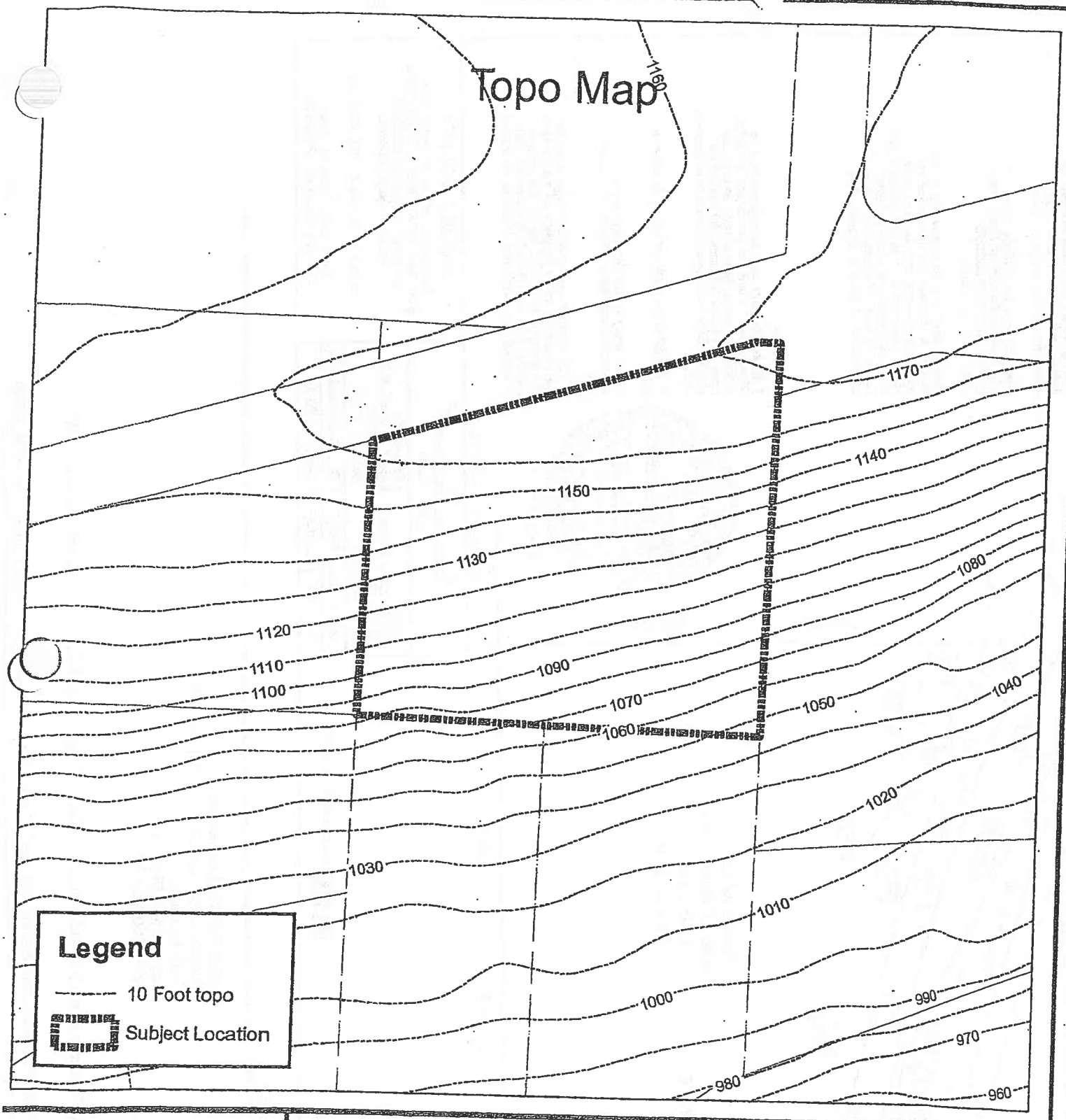
E. A variance shall not be granted which will permit a land use in a district in which that use is otherwise prohibited.

Applicant: A communication site is allowed with a Conditional Use Permit in the Rural Residential District per HCC 21.12.030(g) Site has been used continuously for a communications facility since approximately 1984 (19 years before City annexation).

Applicant's signature and date: David Becker 6/30/10

13-1306

Topo Map



City of Homer
Planning and Zoning Department
July 13, 2010

0 100 200 Feet

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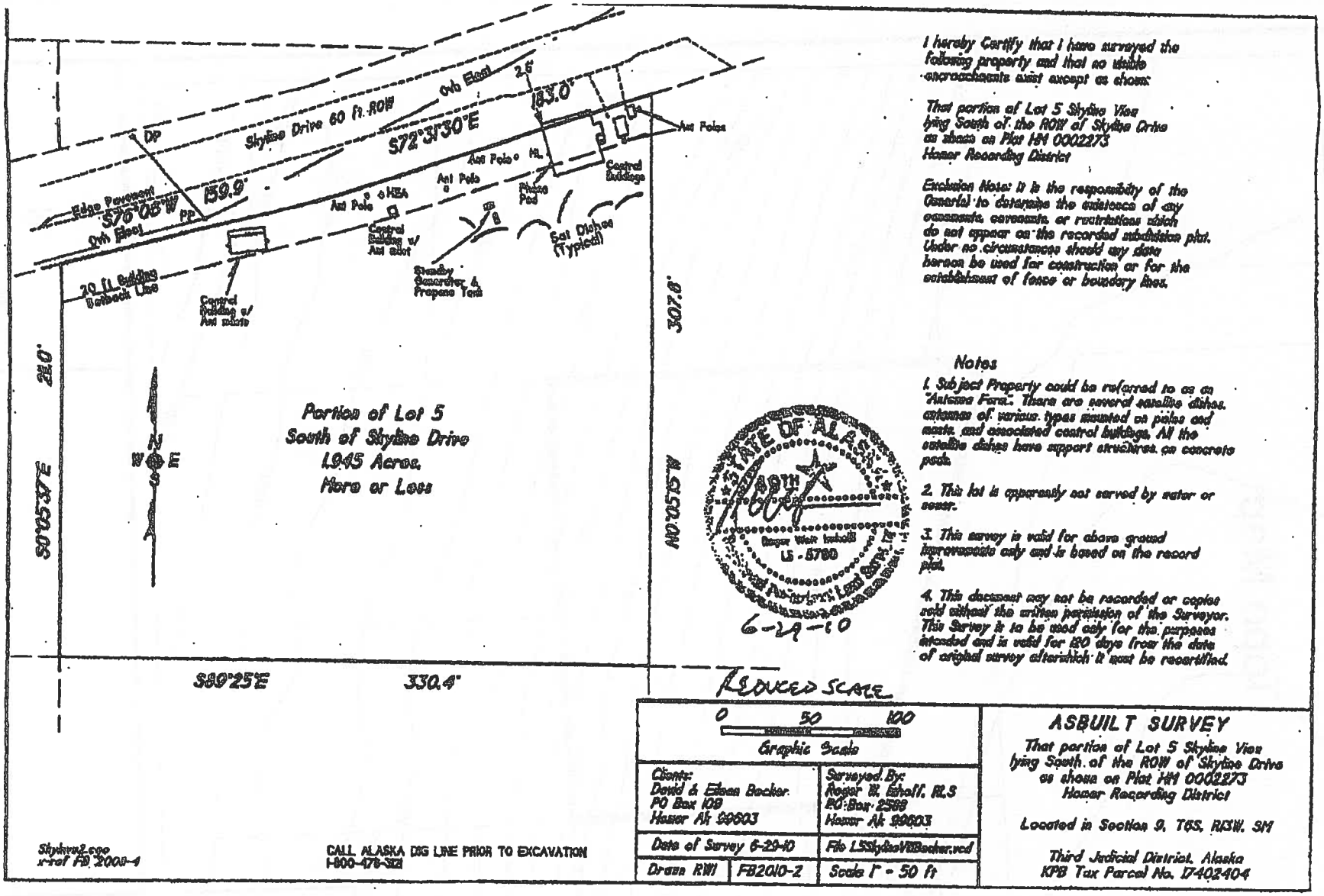
Disclaimer:
It is expressly understood the City of Homer, its council, board, departments, employees and agents are not responsible for any errors or omissions contained herein, or deductions, interpretations or conclusions drawn therefrom.



Dotti Harness

From: rogerimhoff@alaska.net
Sent: Wednesday, June 30, 2010 11:09 AM
To: Dotti Harness
Subject: Re: Becker-Skyline
Attachments: IMG_9507A.JPG

4.9 ft from the NW corner of the 3 ft wide "deck" on the north side of the building (to the edge of the ROW)

building is 9x20 ft nominal dimensions with the 3 ft deck towards the Building is placed on steel piling.

PUBLIC NOTICE

Public notice is hereby given that the City of Homer will hold a public hearing by the Homer Advisory Planning Commission on Wednesday, July 21, 2010 at 7:00 p.m. at Homer City Hall, 491 East Pioneer Avenue, Homer, Alaska on the following matters:

A Request for a Conditional Use Permit (CUP) for "Public Utility Facilities and Structures" for a communication site at 1033 Skyline Drive, Lot 5 Skyline View Subdivision Lying South of Skyline Drive. If approved, this CUP will allow the fourth building to remain, which houses repeaters and support antennas.

A Request for a Variance to allow the newly constructed communication building at 1033 Skyline Drive, Lot 5 Skyline View Subdivision Lying South of Skyline Drive, to remain 4.9 feet from the property line.

Anyone wishing to present testimony concerning these matters may do so at the meeting or by submitting a written statement to the Homer Advisory Planning Commission, 491 East Pioneer Avenue, Homer, Alaska 99603, by 4:00 p.m. on the day of the meeting.

For additional information, please contact Dotti Harness in the City Planning and Zoning Office at 235-8121, ext. 2239.

NOTICE TO BE SENT TO PROPERTY OWNERS WITHIN 300 FEET OF PROPERTY.

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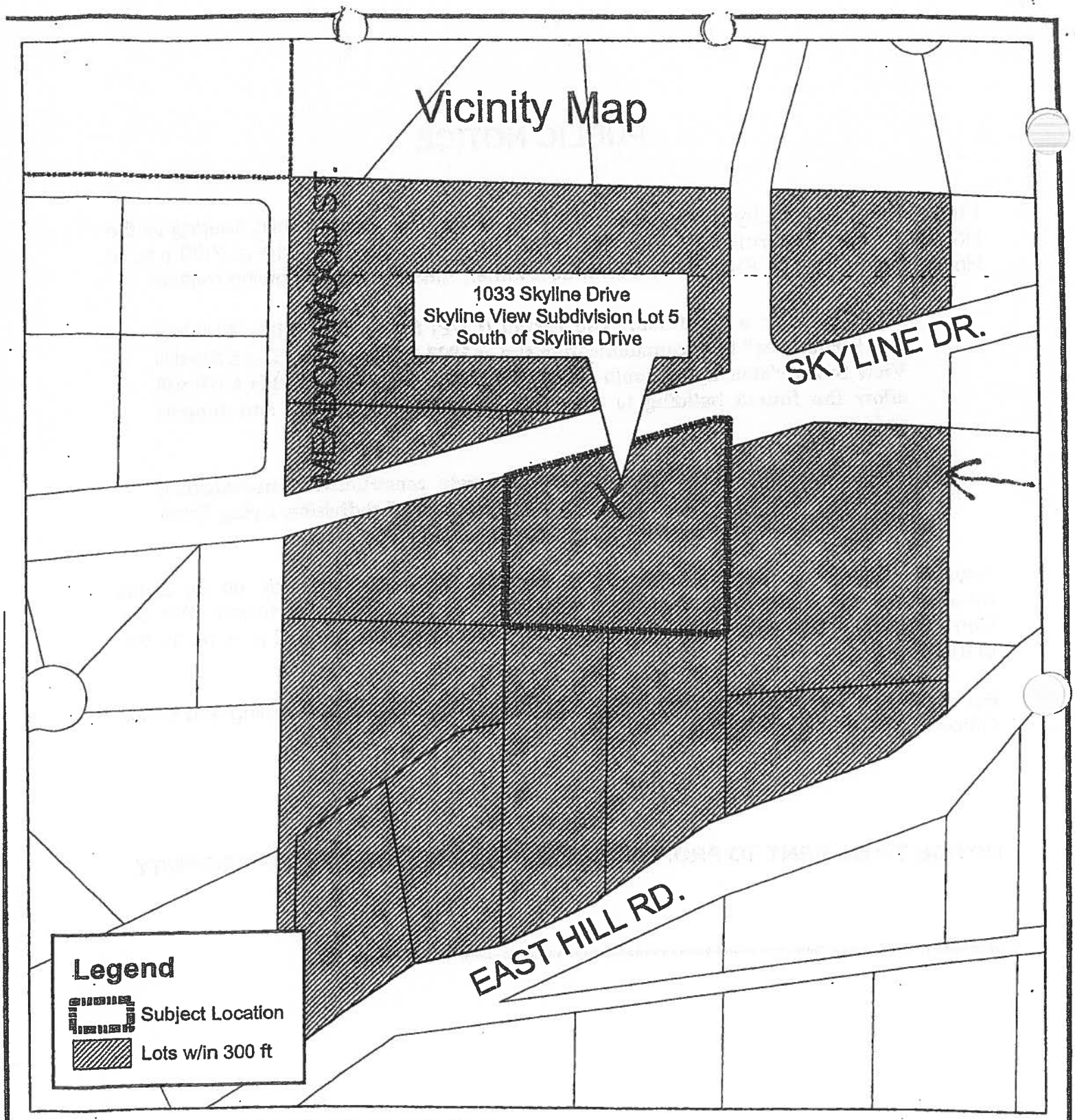

City of Homer
Planning and Zoning Department
July 1, 2010

0 250 500 Feet

N

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City of Homer
Planning & Zoning
491 East Pioneer Avenue
Homer, Alaska 99603-7645

Telephone (907) 235-8121
Fax (907) 235-3118
E-mail Planning@ci.homer.ak.us
Web Site www.ci.homer.ak.us

STAFF REPORT PL 10-64

TO: Homer Advisory Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Dotti Harness-Foster, Planning Technician
MEETING: July 21, 2010

SUBJECT: Conditional Use Permit (CUP) 10-04, 1033 Skyline Drive for Public Utility Facilities and Structures per HCC 21.12.030(g).

SYNOPSIS: This CUP will allow the addition of one building that has two attached 50 foot metal towers. **This is a quasi-judicial decision and requires five yes votes to be approved.**

Owner:	Dave Becker, PO Box 109, Homer, AK 99603	
Location:	1033 Skyline Drive	
Legal:	Lot 5 Skyline View Sub lying south of Diamond Ridge Road	
Parcel ID:	17402404	
Lot Size:	1.85 acres	
Zoning Designation:	Rural Residential	
Existing Land Use:	Communications site	
Surrounding Land Use:	North:	Communication site
	South:	Residential
	East:	Residential
	West:	Residential
Wetland Status:	No wetlands.	
Floodplain Status:	Not in a mapped flood hazard area.	
BCWPD:	Not in the Bridge Creek Watershed Protection District.	
Utilities:	No public water or sewer.	
Public Notice:	Notice was sent to property 14 owners of 15 parcels as shown on the KPB tax assessor rolls.	

Introduction

This property is located in the Rural Residential District. The City Planner has accepted the nonconforming status of three (3) buildings, and four (4) wooden towers. If approved, this conditional use permit will allow the addition of one 9 foot by 20 foot building that has two attached 50 foot metal towers.

21.03.040 Definitions used in zoning code.

"Public utility facility or structure," for the purpose of requiring a conditional use permit, means (i) any facility or structure owned and operated by a public or private utility, or (ii) a telecommunications tower or antenna, but it excludes water distribution mains, pressure stations and hydrants, sewage collection lines, manholes and lift stations, underground and overhead electrical, cable and telephone lines and poles and street lights.

Parking: City code does not have parking requirements for a communication site. The applicant has one parking space on site. Due to the very low traffic volume for this site, the city planner has determined under 21.55.090(b) that only one parking space is required.

Encroachments: The as-built survey dated June 29, 2010, shows a 2.6 feet building encroachment into the Skyline Drive a state right-of-way. The approval of this CUP does not indicate acceptance of any encroachments into the right-of-way.

21.71.030 Review criteria.

a. The applicable code authorizes each proposed use and structure by conditional use permit in that district.

Finding 1: Public utility facilities and structures are authorized by HCC 21.12.030 (g).

b. The proposed use(s) and structure(s) are compatible with the purpose of the district in which the lot is located.

21.12.010 Purpose. The purpose of the rural residential district is primarily to provide an area in the City for low-density, primarily residential, development; allow for limited agricultural pursuits; and allow for other uses as provided in this chapter.

Applicant: KPB classified the structures as "Accessory Building"

Finding 2: The 1.85 acres parcel has a total of five (5) structures. The combined square footage of all the structures is less than 1500 square feet and fronts Skyline Drive. The structures and uses are consistent with low density development.

Finding 3: With a Conditional Use Permit, public utility facilities and structures are allowed per HCC 21.12.30(g).

c. The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.

Applicant: Adjoining property was developed after this site was developed, with the only exception being the home owned by Mary Ann Brosnan down Skyline Drive west, on the north side. Peter Arno built his home adjacent to property after this communication site had already been developed.

Finding 4: The value of adjoining property will not be negatively impacted more than from other uses in this district. Other uses permitted or conditionally permitted include multifamily dwellings which would create more traffic than the proposed use, kennels, which would create more noise, and storage of heavy equipment per HCC 21.12.030.

d. The proposal is compatible with existing uses of surrounding land.

Applicant: There are two other developed communication sites in the area: a cell tower, FM radio tower and wireless internet towers are directly across the street and another cell phone site/tower is directly east of this site.

Finding 5: The proposal is compatible with the existing surrounding land uses. The land to the north is also a telecommunications site. The land to the south, east and west are low density residential.

e. Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed use and structure.

Finding 6: Public services and facilities are adequate to serve the proposed use. Public water and sewer are not needed. The property is accessed via Skyline Drive, which is a paved, state maintained public road.

f Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character.

Applicant: This site was developed before the rest of the neighborhood. Minimal traffic, with an average of 12 site visits annually per lease.

Finding 7: The newly constructed single story structure is 9 feet by 20 feet with two attached metal towers approximately 50 ft in height. The placement and operation of the tower will not generate significant traffic, nor create density or coverage that will harm the neighborhood. Traffic to and from the site is for maintenance purposes only. The tower will not cause undue harmful effect on the desirable neighborhood character.

g. The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole.

Finding 8: The communication site is not detrimental to the health, safety or welfare of the surrounding area or the city as a whole. The towers are part of a telecommunications system that serves the wider area and is an important and necessary service.

h. The proposal does or will comply with the applicable regulations and conditions specified in this title for such use.

Applicant: The site was located in the Kenai Peninsula Borough and developed long before the City annexed the property in 2003.

Finding 9: Title 21 requires a conditional use permit under 21.12.030(g) for "Public utility facilities and structures."

i. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

"The City should strive to provide public services and facilities that meet current needs while planning for the future. The City wishes to develop strategies to work with community partners that provide beneficial community services outside of the scope of City government." Homer Comprehensive Plan, page 6-1.

"Target high tech industries or professional/web-based activities in these new commercial zones by public provision of access to wireless communication." Homer Comprehensive Plan, pg 4-17.

Finding 10: The facility is located in a rural, low density area. The property to the north is also a telecommunications site, and the continuation of the subject property as a communications site is a compatible use type and density, with a residential zone. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

j. The proposal will comply with all applicable provisions of the Community Design Manual.

Finding 11: All lighting must be down lit per the Community Design Manual.

21.71.040 Approval of conditional use. a. The Planning Commission will review and may approve, approve with conditions, or deny an application for conditional use permit. The application shall not be approved unless it is established that the proposal, with conditions if necessary, satisfies the applicable review criteria.

b. In approving a conditional use, the Commission may impose such conditions on the use as may be deemed necessary to ensure the proposal does and will continue to satisfy the applicable review criteria. Such conditions may include, but are not limited to, one or more of the following:

1. **Special yards and spaces.**
2. **Fences, walls and screening.**
3. **Surfacing of vehicular ways and parking areas.**
4. **Street and road dedications and improvements (or bonds).**
5. **Control of points of vehicular ingress and egress.**
6. **Special restrictions on signs.**
7. **Landscaping.**
8. **Maintenance of the grounds, buildings, or structures.**
9. **Control of noise, vibration, odors, lighting or other similar nuisances.**
10. **Limitation of time for certain activities.**
11. **A time period within which the proposed use shall be developed and commence operation.**
12. **A limit on total duration of use or on the term of the permit, or both.**
13. **More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code.**
The applicant has applied for a variance for building setback due to the steep slopes.
14. **Other conditions necessary to protect the interests of the community and surrounding area, or to protect the health, safety, or welfare of persons residing or working in the vicinity of the subject lot. (Ord. 08-29, 2008).**

Finding 12: No special conditions are imposed.

STAFF COMMENTS/RECOMMENDATIONS:

Planning Commission approve this Conditional Use Permit as a public utility facility and structure to allow the use of the 9 foot by 20 foot communication building that has two attached metal towers at 1033 Skyline Drive.

Attachments

1. Application
2. Location map
3. Survey dated 6/29/10

CUP 10-06

City of Homer Planning & Zoning

491 East Pioneer Avenue
Homer, Alaska 99603-7645
Telephone (907) 235-3106
Fax (907) 235-3118
E-mail Planning@ci.homer.ak.us
Web Site www.ci.homer.ak.us

RECEIVED
JUN 30 2010
CITY OF HOMER
PLANNING/ZONING

Applicant

Name: David Becker Telephone No.: 399-3283 or 235-7526

Address: POBox 109 Email: kwavefm@xyz.net

Property Owner (if different than the applicant):

Name: _____ Telephone No.: _____

Address: _____ Email: _____

PROPERTY INFORMATION:

Address: 1033 Skyline Lot Size: 1.85 acres KPB Tax ID # 17402404

Legal Description of Property: SKYLINE VIEW SUB LOT 5 LYING S OF Skyline Drive

For staff use:
Date: 6/30/2010 Fee submittal: Amount 500.00 13-1306
Received by: dlh Date application accepted as complete _____
Planning Commission Public Hearing Date: 7/21/2010

Conditional Use Permit Application Requirements:

1. A Site Plan
2. Right of Way Access Plan
3. Parking Plan
4. A map showing neighboring lots and a narrative description of the existing uses of all neighboring lots. (Planning can provide a blank map for you to fill in).
5. Completed Application Form
6. Payment of application fee (nonrefundable)
7. Any other information required by code or staff, to review your project

Circle Your Zoning District

	RR	UR	RO	CBD	TCD	GBD	GC1	GC2	MC	MI	OSR	BCWPD
[redacted]												
Level 1 ROW Access Plan	x	x							x		x	
[redacted]												
Level 1 Lighting				x	x	x	x	x	x	x		
[redacted]												
Level 2 ROW Access Plan			x	x	x		x	x		x		
[redacted]												
Level 3 ROW Access Plan						x						
[redacted]												

Circle applicable permits. Planning staff will be glad to assist with these questions.

No Are you building or remodeling a commercial structure, or multifamily building with more than 3 apartments? If yes, Fire Marshal Certification is required. Status: _____

No Will your development trigger a Development Activity Plan? Application Status: _____

No Will your development trigger a Storm water Plan? Application Status: _____

No Does your site contain wetlands? If yes, Army Corps of Engineers Wetlands Permit is required. Application Status: _____

No Is your development in a floodplain? If yes, a Flood Development Permit is required.

No Does your project trigger a Community Design Manual review? If yes, complete the design review application form.

No Do you need a traffic impact analysis?

No Are there any nonconforming uses or structures on the property?

No Have they been formally accepted by the Homer Advisory Planning Commission?

No Do you have a state or city driveway permit? Status: _____

No Do you have active City water and sewer permits? Status: _____

1. Currently, how is the property used? Are there buildings on the property? How many square feet? Uses within the building(s)?

The property is a communications site established prior to City annexation in about 1984. GCI Cablevision has a building housing the "head end" of the Homer Cable TV system. Building size is shown on the Roger Imhoff "As Built" 6/29/10 survey. There are currently 4 small equipment shelters also located on the property. Two shelters were built prior to 2003 and 2 were added after 2003. All building structures are used for communication purposes.

2. What is the proposed use of the property? How do you intend to develop the property? (Attach additional sheet if needed. Provide as much information as possible).

Property has been developed since 1986 (24 years) as a "communications" site for FM radio, Cable TV and Wireless Internet (Wi Fi) and as such, has been in use long before the site was annexed by the City in 2003. Future use includes a 3 year communications lease with the City of Homer for Police and Fire Radio Repeaters and antennas. A brief history of the site development since 1986 is attached.

CONDITIONAL USE INFORMATION: (Please use additional sheet(s), if necessary)

a. What code citation authorizes each proposed use and structure by conditional use permit?
HCC 21.12.030 Public utility facilities and structures.

b. Describe how the proposed uses(s) and structures(s) are compatible with the purpose of the zoning district. Lot 5 Skyline Subdivision is already classified as "Accessory Building" on the KP Borough Parcel Viewer website.

c. How will your proposed project affect adjoining property values? Adjoining property was developed after this site was developed, with the only exception being the home owned by Mary Ann Brosnan down Skyline Dr. west, on the north side. Peter Arno built his home adjacent to property after this communication site had already been developed.

d. How is your proposal compatible with existing uses of the surrounding land? There are two other developed communication sites in the area: A Cell tower, FM radio tower and wireless internet towers are directly across the street and another Cell phone site/tower is directly east of this site.

e. Are/will public services adequate to serve the proposed uses and structures? Yes.

f. How will the development affect the harmony in scale, bulk, coverage and density upon the desirable neighborhood character, and will the generation of traffic and the capacity of surrounding streets and roads be negatively affected? This site was developed before the rest of the neighborhood. Minimal traffic, averaging 12 site visits annually per leasee.

g. Will your proposal be detrimental to the health, safety or welfare of the surrounding area or the city as a whole? No.

h. How does your project relate to the goals of the Comprehensive Plan? There was no "Comprehensive Plan" in effect as this site was located in the KP Borough and developed long before the City annexed the property in 2003.

i. The Planning Commission may require you to make some special improvements. Are you planning on doing any of the following, or do you have suggestions on special improvements you would be willing to make? **(circle each answer)**

1. No Special yards and spaces.
2. No Fences, walls and screening.
3. No Surfacing of parking areas.
4. No Street and road dedications and improvements (or bonds).
5. No Control of points of vehicular ingress & egress.
6. No Special provisions on signs.
7. No Landscaping.
8. Yes Maintenance of the grounds, buildings, or structures.
9. Yes Control of smoke, odors, gases, particulate matters, noise, vibration, heat, glare, water and solid waste pollution, dangerous materials, material and equipment storage, or other similar nuisances.
10. No Time for certain activities.
11. No A time period within which the proposed use shall be developed.
12. No A limit on total duration of use.
13. No Special dimensional requirements such as lot area, setbacks, building height.
14. No Other conditions deemed necessary to protect the interest of the community.
15. No Control of smoke, odors, gases, particulate matters, noise, vibration, heat, glare, water and solid waste pollution, dangerous materials, material and equipment storage, or other similar nuisances.
16. No Time for certain activities.
17. No A time period within which the proposed use shall be developed.
18. No A limit on total duration of use.
19. No Special dimensional requirements such as lot area, setbacks, building height.
20. No Other conditions deemed necessary to protect the interest of the community.

PARKING

1. How many parking spaces are required for your development? Two work vans
2. How many spaces are shown on your parking plan? Two
3. Are you requesting any reductions? No

Include a site plan, drawn to a scale of not less than 1" = 20' which shows allow existing and proposed structures, clearing, fill, vegetation and drainage.

An "as built" survey performed 6/29/2010 by Roger Imhoff has been provided. See attached.

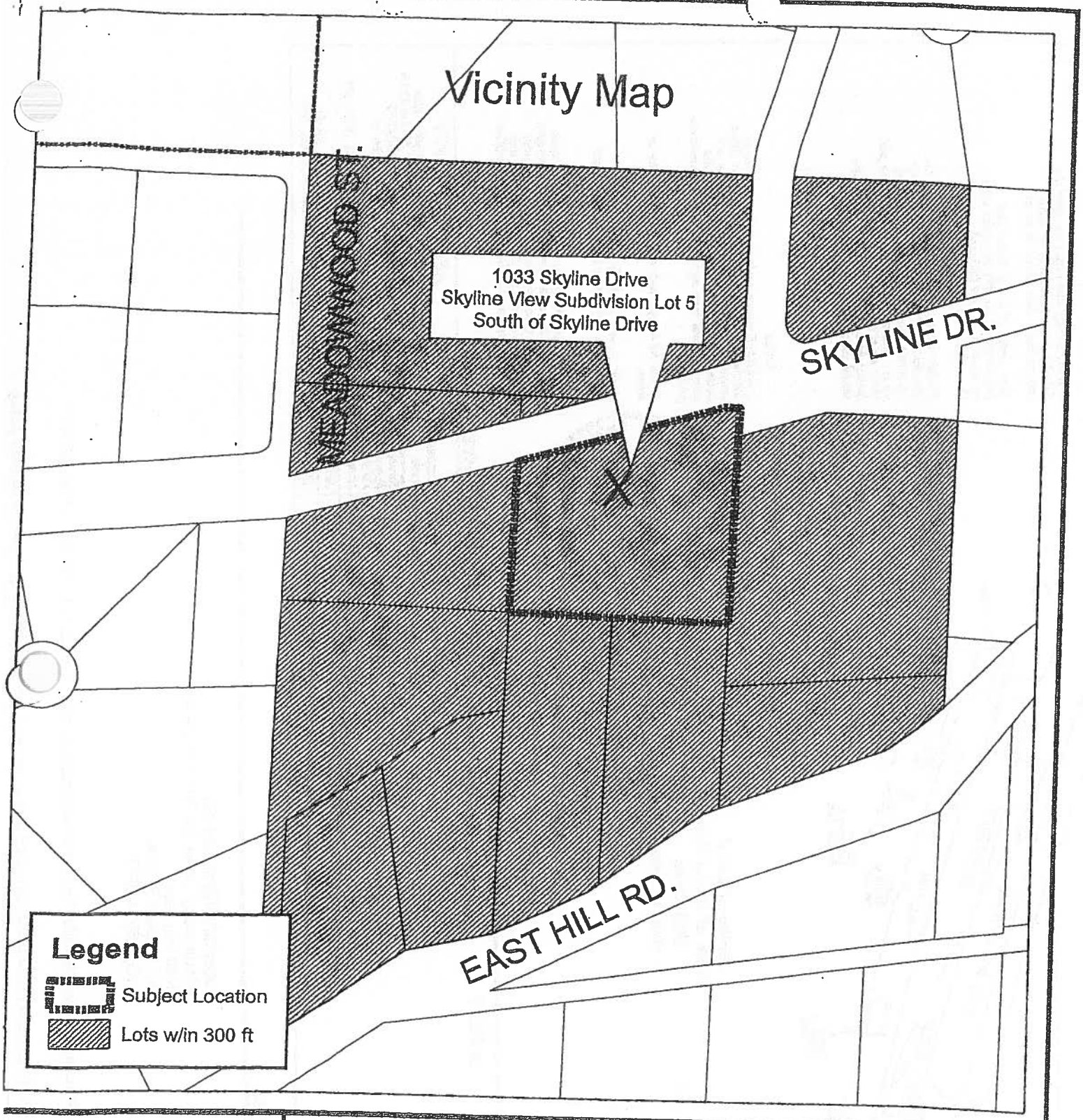
I hereby certify that the above statements and other information submitted are true and accurate to the best of my knowledge, and that I, as applicant, have the following legal interest in the property:

CIRCLE ONE: Owner of record Lessee Contract purchaser

Applicant signature: David A Becker Date: 6/30/10

Property Owner's signature: _____ Date: _____

Vicinity Map



City of Homer
Planning and Zoning Department
July 1, 2010

0 250 500 Feet

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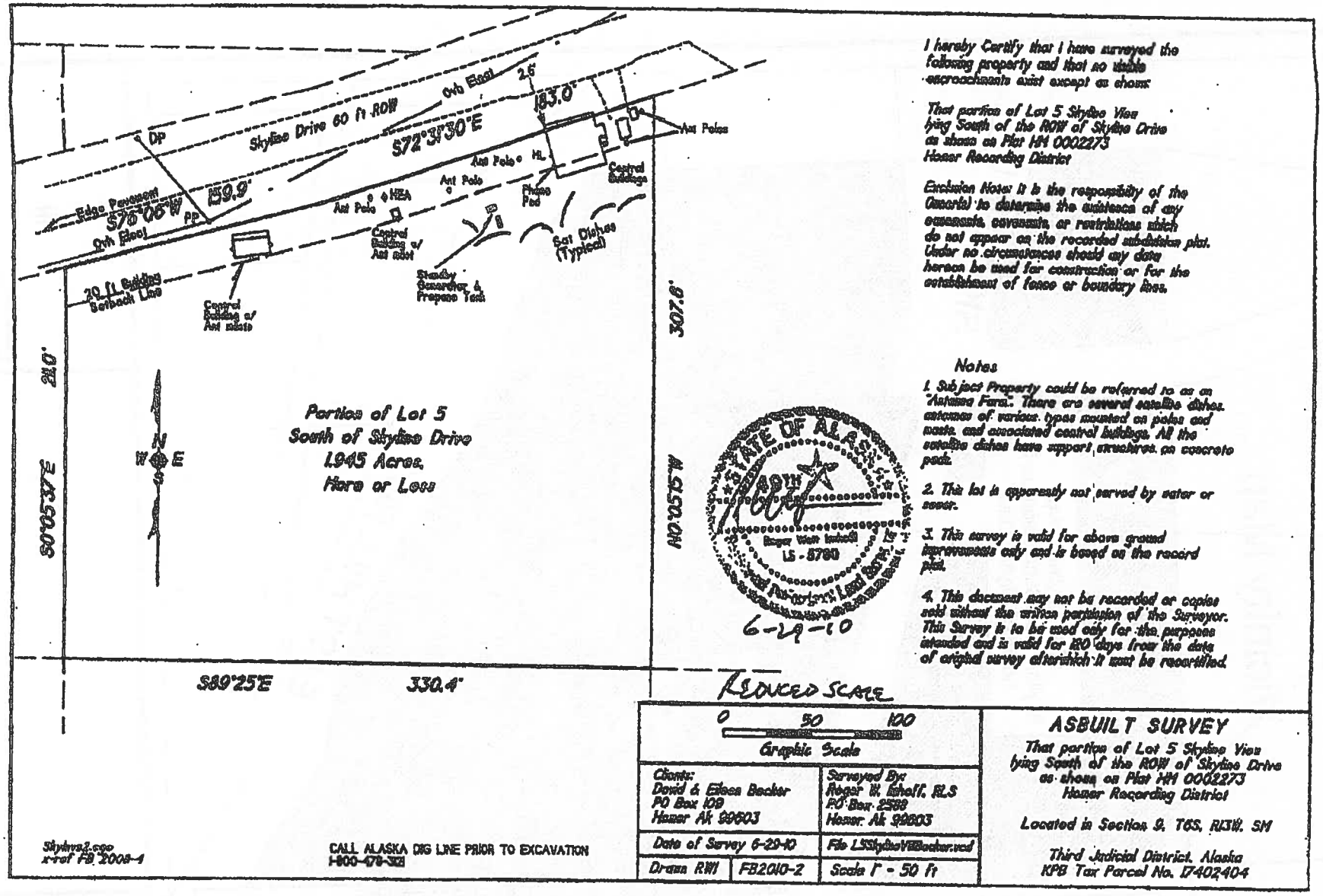

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4.9 ft from the NW corner of the 3 ft wide "deck" on the north side of the building (to the edge of the ROW)

building is 9x20 ft nominal dimensions with the 3 ft deck towards the d. Building is placed on steel piling.

Roger W. Imhoff, RLS
*PO Box 2588 * Homer Ak 99603*
(907) 235-7279 fax (907)235-5254
rogerimhoff@alaska.net

6-29-2010

Dottie - Planning Dept COH

re Lot 5 skyline view antenna farm

Dave Becker asked me to fax this asbuilt survey to you

Thanks, Roger

1 page follows

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A Request for a Variance to allow the newly constructed communication building at 1033 Skyline Drive, Lot 5 Skyline View Subdivision Lying South of Skyline Drive, to remain 4.9 feet from the property line.

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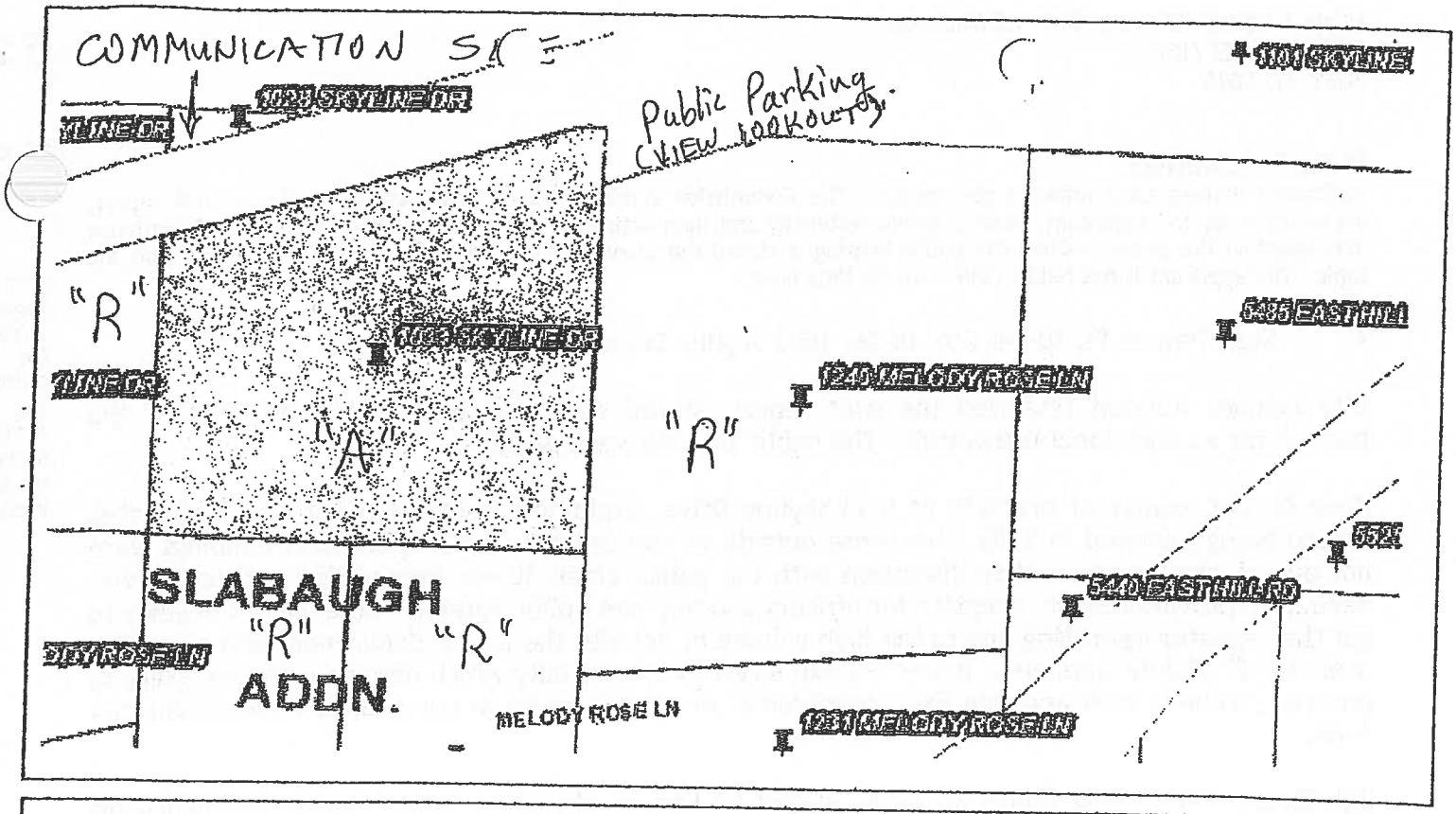

KPB Parcel Viewer

Printed:Jun 30, 2010

EXISTING LANDUSE: 1033 SKLINE DR,
"A" = "Accessory Building"
"R" = Residential

PUBLIC HEARINGS

Testimony limited to 3 minutes per speaker. The Commission conducts Public Hearings by hearing a staff report, presentation by the applicant, hearing public testimony and then acting on the Public Hearing items. The Commission may question the public. Once the public hearing is closed the Commission cannot hear additional comments on the topic. The applicant is not held to the 3 minute time limit.

A. Staff Report PL 10-64, CUP 10-06, 1033 Skyline Drive/Becker

Staff Report PL 10-64, CUP10-06, 1033 Skyline Drive/Becker

City Planner Abboud reviewed the staff report; stated staff is recommending approval of the request for a conditional use permit. The public hearing was opened.

Dave Becker, owner of property at 1033 Skyline Drive, explained to the planning commission that before being annexed in 2003, they were outside of city limits. The property and buildings were not out of compliance. After discussion with the police chief, it was agreed that a repeater was needed to provide better reception for officers and improve public safety. There was an urgency to get the repeater operating due to the high volume of activity the police department was expecting over the 4th of July weekend. It was not explained to him initially which permits were necessary to proceed, so he is now applying for a conditional use permit to be in compliance with current city code.

Bill Glynn, neighboring property owner, stated he had no objection to Mr. Becker developing his property as he wished as long as same rules apply for everyone. He stated he has adhered to city code in terms of setback requirements, driveway and encroachment requirements. He said in doing so, he had to move a tower, thus losing customers. Mr. Glynn also expressed the same rules should apply to parking as people have parked in his space when there isn't enough room across the street.

Mr. Becker replied Chief Robl would like to see minimal parking, to avoid liability and the attraction for some to park, climb towers, etc. He responded that no one he knows is parking in Mr. Glynn's space anymore; it was temporary, and only when his contractor was working on site.

With only four commissioners present there was a lack of a quorum, the public hearing was closed. Discussion followed.

SINN/BOS-MOVED TO CONTINUE DELIBERATIONS ON STAFF REPORT PL 10-64, CUP 10-04 WHEN THERE ARE FIVE COMMISSIONERS PRESENT.

Motion carried.

B. Staff Report PL 10-65, Variance at 1033 Skyline Drive/Becker

Staff Report PL 10-65, Variance, 1033 Skyline Drive/Becker

City Planner Abboud reviewed the staff report; stated staff is recommending approval of the request for a variance. The public hearing was opened.

Dave Becker, owner of property at 1033 Skyline Drive, explained the property was surveyed and the plat was done in 1954, so there were no set back requirements at the time. When the property was annexed in 2003, it was recognized the building in question was not in compliance. To move the building would put it in a dangerous spot and access would be difficult.

Bill Glynn mentioned that his property is steep as well, and he had to use many yards of fill on his property in order to comply, and access it.

Public hearing closed.

Commissioner Bos asked Mr. Becker if he would consider this to be the last building opportunity on the lot, and where he would choose to put another structure. Mr. Becker stated he would consider other development on the property, and if he were aware of the rules up front he would have considered moving the building further down the slope. The site was chosen because it was the best place for the tower.

City Manager Wrede addressed the issue and concurred this was the best place for the repeater, timing was important due to the necessity to increase public safety. He clarified that when he gave Mr. Becker the go ahead, he was clear that the developer is responsible for obtaining all necessary permits. The miscommunication was that the permits weren't specified up front.
Public hearing closed.

SINN/BOS-MOVED TO CONTINUE DELIBERATIONS ON STAFF REPORT PL 10-6, Variance 10-01, WHEN THERE ARE FIVE COMMISSIONERS PRESENT.

Motion carried.

PLAT CONSIDERATION

A. Staff Report PL 10-60, Stream Hill Park Unit 2, Resubdivision of Lots 35 & 45 Preliminary Plat

City Planner Abboud reviewed the staff report; stated staff is recommending approval of the plat.

SINN/BOS-MOVE TO APPROVE STAFF REPORT PL10-60 WITH STAFF RECOMMENDATIONS.

Motion carried.

PENDING BUSINESS

A. Staff Report PL 10-57, Draft Steep Slope Ordinance

The commission continued their discussion from the work session.

Consensus of 50% slope, discussion of 40% versus 50, and what is the right number, 32-40.

HIGHLAND/SINN-MOVE TO FORWARD STAFF REPORT PL 10-57 FORWARD TO PUBLIC HEARING.

Discussion followed regarding percentage of slope.

HIGHLAND/SINN-MOVE TO AMEND STAFF REPORT PL 10-57 TO CHANGE SLOPE TO NO MORE THAN 45%.

Motion carried.

B. Staff Report PL 10-58, Draft Spit Comprehensive Plan

HIGHLAND/BOS-MOVED TO CONTINUE DISCUSSION OF STAFF REPORT SR PL 10-58 AT THE NEXT WORK SESSION.

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

KRANICH/BOS - MOVE TO AMEND FINDING TWO TO CHANGE WORDING TO 'WITH A CONDITIONAL USE PERMIT' AFTER PUBLIC FACILITIES.

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

KRANICH/BOS - MOVE TO AMEND FINDING 9 TO DELETE THE LAST SENTENCE.

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

KRANICH/BOS - MOVE TO AMEND FINDING 11 TO INSERT THE WORD 'IN' AFTER THE WORD 'WITH' AFTER COMPATIBLE USE WITH RESIDENTIAL ZONING.

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

KRANICH/BOS - MOVE TO DELETE SENTENCE WITH 'OUTDOOR PATIO.'

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

Motion approved as amended, and added two special conditions:

- Code compliant parking shall be provided on the property.
- Property owner to obtain a valid DOT driveway permit.

VOTE: (main motion as amended): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

B. Draft Decision and Findings for Variance 10-01, 1033 Skyline Drive

KRANICH/BOS - MOVE TO ADOPT DECISION AND FINDINGS FOR VARIANCE 10-01, 1033 SKYLINE DRIVE.

KRANICH/BOS - MOVE TO PLACE PERIOD AFTER THE WORD SLOPE ON PAGE place period after the word slope at the end of find slope to replace 40%

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

Public Works Director Meyer explained the process and option of obtaining the section line easement. He stated the city has acquired land west of the water treatment plant and is proposing to vacate Carter Drive around the water treatment plant from Skyline Drive to the north of the treatment plant.

Nancy Hillstrand addressed the Commission but her comments were not audible on the recording.

Discussion followed regarding access to Hillstrand property and extending Carter Drive.
KRANICH/BOS - MOVE TO ADOPT STAFF REPORT PL 10-67 AS AMENDED TO INCLUDE STAFF RECOMMENDATIONS AND TO BE CONTINGENT ON NEW RIGHT OF WAY EXTENDING CARTER DRIVE.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

PLAT CONSIDERATION

A. Staff Report PL 10-66, Hillstrand's Homestead Preliminary Plat

Planning Technician Engebretsen summarized the staff report.

Nancy Hillstrand addressed the Commission but her comments were not audible on the recording.

Discussion followed regarding preventing development next to the ravine, protecting the watershed, and drainage.

KRANICH/BOS - MOVE TO ADOPT STAFF REPORT PL 10-66 WITH STAFF COMMENTS AND RECOMMENDATIONS.

KRANICH/BOS - MOVE TO AMEND MAIN MOTION TO ADD CONTOUR INFORMATION AS REQUIRED IN ITEM #12.

VOTE: (amendment): NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

VOTE: (main motion as amended) NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

PENDING BUSINESS

A. Draft Decision and Findings for Conditional Use Permit 10-04, 1033 Skyline Drive

Chair Minsch excused Commissioner Venuti from the table and for deliberations for pending business items A, B, and C. Deliberations were continued for 10 minutes.

KRANICH/BOS - MOVE TO ACCEPT THE DECISION AND FINDINGS FOR CONDITION USE PERMIT 10-04, 1033 SKYLINE DRIVE.

KRANICH/BOS - MOVE TO DELETE FINDING 4.

Office of the City Clerk

Jo Johnson, CMC, City Clerk
Melissa Jacobsen, CMC, Deputy City Clerk II
Renee Krause, CMC, Deputy City Clerk I

491 E. Pioneer Avenue
Homer, Alaska 99603
(907) 235-3130
(907) 235-8121
ext: 2224, 2226, or 2227
Fax: (907) 235-3143
Email: clerk@ci.homer.ak.us

October 21, 2010

Parties of Record

Notice of Appeal to the Board of Adjustment Re: Planning Commission Decisions - David Becker Variance 10-01 Structure Within the Building Setback from Rights of Way and Conditional Use Permit 10-04 Public Utility Facilities and Structures in the Rural Residential District

Attached is a copy of that appeal.

Homer City Code Section § 21.93.500 states that a. Only persons who actively and substantively participated in the matter before the Commission and who would be qualified to appeal under HCC § 21.93.060 may participate as parties in an appeal from the Commission to the Board of Adjustment; and b. Any person so qualified who desires to participate in the appeal as a party, other than the appellant, the applicant for the action or determination that is the subject of the appeal and the owner of the property that is the subject of the action or determination, must, not less than 14 days before the date set for the appeal hearing, file with the City Clerk a written and signed notice of appearance containing that party's name and address, and proof that the person would be qualified under HCC § 21.93.060 to have filed an appeal.

Please contact the City Clerk's Office at 235-3130 if you have any questions regarding this matter.

Thank you,

Jo Johnson, CMC
City Clerk

Cc: Attorney Daniel Westerburg
Mayor and City Council
City Manager Wrede
City Attorney Klinkner
City Planner Abboud

OCT 15 2010 PM12:41 RK

BEFORE THE HOMER BOARD OF ADJUSTMENT

In RE the application of David Becker)
)
for Conditional Use Permit #10-04)
)

ENTRY OF APPEARANCE

COMES NOW Daniel Westerburg, and hereby enters his appearance on behalf of the appellant, David Becker.

DATED this 15th day of October, 2010.

DANIEL WESTERBURG
Attorney for Plaintiff
ABA #7906062

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

OCT 15 2010 PM 12:41 RK

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

In RE the application of David Becker)
)
for Variance #10-01)
)

ENTRY OF APPEARANCE

COMES NOW Daniel Westerburg, and hereby enters his appearance on behalf of the appellant, David Becker.

DATED this 15th day of October, 2010.

DANIEL WESTERBURG
Attorney for Appellant
ABA #7906062

RECEIVED
OCT 21 2010
City of Homer City Clerk

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT (amended caption)

In RE the application of David Becker)
for Variance #10-01)

NOTICE OF APPEAL

1.) Name and Address of Appellant.

David Becker
P.O. Box 109
Homer, AK 99603

Appellant is appearing in this matter through undersigned counsel.

2.) Description and Date of Determination.

This appeal is from a DECISION by the Homer Advisory Planning Commission ("HAPC") distributed on September 15, 2010, and attached hereto as Exhibit A. The DECISION will become final on October 16, 2010.

3.) Description of Subject Property.

The subject property is located at 1033 Skyline Drive, Homer, Alaska 99603, and bears the following legal description:

> That portion of Lot Five (5), SKYLINE VIEW SUBIDIVISON, according to Plat No. 54-2273, in the Homer Recording District, Third Judicial District, State of Alaska, lying South of the Southerly right-of-way of Skyline Drive.

The owners of record are David F. Becker and Eileen L. Becker, P.O. Box 109, Homer, Alaska 99603-0901.

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

OCT 15 2010 PM 12:41 RK

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

In RE the application of David Becker)
)
for Conditional Use Permit #10-04)
)

NOTICE OF APPEAL

1.) Name and Address of Appellant.

David Becker
P.O. Box 109
Homer, AK 99603

Appellant is appearing in this matter through undersigned counsel.

2.) Description and Date of Determination.

This appeal is from a DECISION by the Homer Advisory Planning Commission ("HAPC") distributed on September 15, 2010, and attached hereto as Exhibit A. The DECISION will become final on October 16, 2010.

3.) Description of Subject Property.

The subject property is located at 1033 Skyline Drive, Homer, Alaska 99603, and bears the following legal description:

> That portion of Lot Five (5), SKYLINE VIEW SUBDIVISION, according to Plat No. 54-2273, in the Homer Recording District, Third Judicial District, State of Alaska, lying South of the Southerly right-of-way of Skyline Drive.

The owners of record are David F. Becker and Eileen L. Becker, P.O. Box 109, Homer, Alaska 99603-0901.

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Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

4.) Allegations of Error.

The HAPC committed reversible error in denying Appellant's application for a variance to install structures within the subject property's setback. In making its determination, the HAPC acted arbitrarily, capriciously and contrary to law and misinterpreted the following City ordinances: HCC 21.12.030(g); HCC 21.71.030-040; HCC 21.72.010-040; and definitions set forth in HCC 21.03.040. In addition, Findings 1-4 and 6, set forth in the HAPC's DECISION, are clearly erroneous. Moreover, the HAPC's DECISION has been rendered moot by changed circumstances, namely, the recording of a utility easement, twenty (20) feet in width along the north border of the subject property. Appellant should not be required to secure a setback variance in order to install utility structures within a dedicated utility easement.

5.) Requested Result.

The DECISION of the HAPC should be reversed or, in the alternative, remanded to the HAPC for further proceedings in light of changed circumstances.

6.) Proof of Standing.

Appellant was the applicant for the conditional use permit in question and therefore has standing to file this appeal under HCC 21.93.060.

DATED this 13th day of October, 2010.

DANIEL WESTERBURG
Attorney for Appellant
ABA #7906062

City of Homer
Planning & Zoning

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HOMER ADVISORY PLANNING COMMISSION
Meeting of July 21, 2010

Decision and Findings: Variance 10-01, 1033 Skyline Drive

DECISION

Introduction

Dave Becker ("Applicant") applied to the Homer Advisory Planning Commission, (the "Commission") under Homer City Code (HCC) 21.72.010 for approval of a structure within the twenty foot building setback from rights of way. The existing 9' x 20' building with two 50' metal towers attached is located at 1033 Skyline Drive, Skyline View Subdivision Lot 5, lying south of Diamond Ridge Road. The structure is 15.1' feet into the required 20' setback, or 4.9' from the Skyline Drive right-of-way).

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on July 21, 2010. Notice of the public hearing was published in the local newspaper and sent to 14 property owners of sixteen 15 parcels.

Testimony from the Applicant, one member of the public and the City Manager was received at the public hearing. After deliberations, at the August 18, 2010 meeting of the commission, the commission voted to deny the request with 6 Commissioners present, and 6 Commissioners voted to deny variance. As he was new to the planning commission, Commissioner Venuti was excused from deliberations.

After due consideration of the evidence presented, the Homer Advisory Planning Commission, hereby makes the following findings of fact and conclusions of law.

EVIDENCE PRESENTED

The Applicant sought approval to have a 9' x 20' structure located 15.1 feet into the required 20' setback per HCC 21.12.040 (b) (1) at 1033 Skyline Drive in the Rural Residential District. The structure is currently located on the property and was constructed without acquiring a zoning permit from the City of Homer. The structure is located within the 20' setback from the Skyline Drive Right-of-Way. Pre-existing structures, also located on the lot, were accepted as legal non-conforming structures.

EXHIBIT A

The as-built survey dated June 29, 2010, shows a 2.6 feet encroachment of an existing building, built prior to City annexation, into the Skyline Drive state right-of-way. The approval or denial of this Variance does not indicate acceptance of any encroachments into the right-of-way.

FINDINGS OF FACT

Pursuant to HCC 21.72.010, a variance may be granted to provide relief when a literal enforcement of Homer Zoning Code would deprive a property owner of the reasonable use of his real property.

Variance Code Requirements: HCC 21.72.020 Conditions precedent to granting variance:

a. All of the following conditions shall exist before a variance may be granted:

1. **A literal interpretation of the provisions of the Homer Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district.**

   Finding 1: Requiring a 20 foot building setback would not deprive the applicant of rights commonly enjoyed by other properties in the district. Structures on pilings can be built on slopes of 40%.

2. **Special conditions and circumstances exist which are peculiar to the land or structures involved and which are not applicable to other lands and structures in the same district.**

   Finding 2: Special conditions and circumstances do not exist on this parcel, any structures in addition to accepted nonconformities must not be located in designated setbacks.

3. **The special conditions and circumstances have not been caused by the actions of the applicant.**

   Finding 3: There is no special condition/circumstance, the placement of the structure was caused by the actions of the Applicant.

B. Financial hardship or inconvenience shall not be reason for granting a variance.

Finding 4: Hardship and inconvenience is the reason for this variance request. A variance may not be granted to ease financial hardship or inconvenience.

C. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

Finding 5: The applicant is seeking a variance due to the steep slopes on the lot. Though the other structures were built prior to City annexation and zoning, the Applicant is not seeking a variance due of other nonconforming land use or structures within the district.

D. A variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

Finding 6: Locating a structure in the setback is not necessary to permit reasonable use of the land.

E. A variance shall not be granted which will permit a land use in a district in which that use is otherwise prohibited.

Finding 7: A communication site is allowed with a Conditional Use Permit in the Rural Residential District per HCC 21.12.030(g).

DECISION

THE APPLICANT HAS NOT MET ALL THE REQUIREMENTS FOR GRANTING A VARIANCE AND THE APPLICATION IS DENIED.

Date: 9/14/10 Sharon Minsch

Chair, Sharon Minsch

Date: 9/13/10

City Planner, Rick Abboud

NOTICE OF APPEAL RIGHTS

Pursuant to Homer City Code, Chapter 21.93, any person with interests in land that is affected by this decision may appeal this decision to the Homer Board of Adjustment within thirty (30) days of the date of distribution indicated below. Any decision not appealed within that time shall be final. A notice of appeal shall be in writing, shall contain all the information required by Homer City Code, Section 21.93.080, and shall be filed with the Homer City Clerk, 491 East Pioneer Avenue, Homer, Alaska 99603-7645.

CERTIFICATION OF DISTRIBUTION

I certify that a copy of this Decision was mailed to the below listed recipients on Sept 15, 2010. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

Date: 9/15/10

Shelly Rosencrans, Planning Assistant

Walt Wrede, City Manager
491 E Pioneer Avenue
Homer, AK 99603

Thomas Klinkner
Birch, Horton, Bittner & Cherot
1127 West 7th Ave
Anchorage, AK 99501

Dave Becker
P.O. Box 109
Homer AK 99603

OCT 15 2010 PM 12:41 RK

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

In RE the application of David Becker)
)
for Conditional Use Permit #10-04)
)

NOTICE OF APPEAL

1.) Name and Address of Appellant.

David Becker
P.O. Box 109
Homer, AK 99603

Appellant is appearing in this matter through undersigned counsel.

2.) Description and Date of Determination.

This appeal is from a DECISION by the Homer Advisory Planning Commission ("HAPC") distributed on September 15, 2010, and attached hereto as Exhibit A. The DECISION will become final on October 16, 2010.

3.) Description of Subject Property.

The subject property is located at 1033 Skyline Drive, Homer, Alaska 99603, and bears the following legal description:

> That portion of Lot Five (5), SKYLINE VIEW SUBDIVISION, according to Plat No. 54-2273, in the Homer Recording District, Third Judicial District, State of Alaska, lying South of the Southerly right-of-way of Skyline Drive.

The owners of record are David F. Becker and Eileen L. Becker, P.O. Box 109, Homer, Alaska 99603-0901.

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

4.) Allegations of Error.

The HAPC committed reversible error in determining that a variance is required before appellant may locate utility structures within the subject property's setback. The balance of the HAPC's DECISION is not being challenged. In making its determination, the HAPC acted arbitrarily, capriciously and contrary to law and misinterpreted the following City ordinances: HCC 21.12.030(g); HCC 21.71.030-040; HCC 21.72.010-040; and definitions set forth in HCC 21.03.040. In addition, the DECISION should be reversed in pertinent part due to changed circumstances, namely, the recording of a utility easement, twenty (20) feet in width, along the north boundary of the subject property. Appellant should not be required to secure a setback variance in order to install utility structures within a dedicated utility easement.

5.) Requested Result.

The DECISION of the HAPC should be reversed in pertinent part or, in the alternative, remanded to the HAPC for further proceedings in light of changed circumstances.

6.) Proof of Standing.

Appellant was the applicant for the conditional use permit in question and therefore has standing to file this appeal under HCC 21.93.060.

DATED this 15th day of October, 2010.

DANIEL WESTERBURG
Attorney for Appellant
ABA #7906062

City of Homer
Planning & Zoning

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Web Site: www.ci.homer.ak.us

HOMER ADVISORY PLANNING COMMISSION
Meeting of July 21, 2010

Decision and Findings: Conditional Use Permit (CUP) 10-04, 1033 Skyline Drive

DECISION

Introduction

Dave Becker ("Applicant") applied to the Homer Advisory Planning Commission, (the "Commission") under Homer City Code (HCC) 21.12.030(g) for approval of a CUP for a Public Utility Facilities and Structures located in the Rural Residential District at 1033 Skyline Drive per HCC 21.12.030(g). The structure for consideration was a 9' x 20' building with two 50' metal towers attached.

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on July 21, 2010. Notice of the public hearing was published in the local newspaper and sent to 14 property owners of 15 parcels.

Testimony from the applicant, one member of the public and the City Manager was received at the public hearing. After deliberations, at the August 18, 2010 meeting of the commission, the commission voted to approve the request with 6 Commissioners present, and 6 Commissioners voted in favor of the conditional use permit, allowing lawful placement of a 9' x 20' public utility structure on the property. As he was new to the planning commission, Commissioner Venuti was excused from deliberations.

After due consideration of the evidence presented, the Homer Advisory Planning Commission hereby makes the following findings of fact and conclusions of law.

EVIDENCE PRESENTED

The Applicant sought approval to utilize a 9' x 20' structure at 1033 Skyline Drive, Skyline View Subdivision Lot 5 in the Rural Residential District for the support of communication equipment. The structure currently located on the property was constructed without gaining a zoning permit from the City of Homer and is located in the 20' setback from the Skyline Drive Right-of-Way. Pre-existing structures, also located on the lot, were accepted as legal non-conforming structures. The as-built

built prior to City annexation, into the Skyline Drive state right-of-way. The approval of this CUP does not indicate acceptance of any encroachments into the right-of-way. An approved variance is required to locate a structure within the setback.

FINDINGS OF FACT

Parking: City code does not have parking requirements for a communication site. The applicant has one parking space on site. Due to the very low traffic volume for this site, the city planner has determined under 21.55.090(b) that one parking space is required.

Finding 1: One parking space shall be provided on the lot.

The review criteria for a Conditional Use Permit are outlined in 21.71.030.

a. The applicable code authorizes each proposed use and structure by conditional use permit in that zoning district.

Finding 2: Public utility facilities and structures are authorized with a Conditional Use Permit by HCC 21.12.030 (g).

b. The proposed use(s) and structure(s) are compatible with the purpose of the zoning district in which the lot is located.

Finding 3: The 1.85 acres parcel has a total of five (5) structures. The combined square footage of all the structures is less than 1500 square feet and fronts Skyline Drive. The structures and uses are consistent with low density development.

c. The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.

Finding 4: The value of adjoining property will not be negatively impacted more than from other uses in this district. Other uses permitted or conditionally permitted include multifamily dwellings which would create more traffic than the proposed use, kennels, which would create more noise, and storage of heavy equipment per HCC 21.12.030.

d. The proposal is compatible with existing uses of surrounding land.

Finding 5: The proposal is compatible with the existing surrounding land uses. The land to the north is also a telecommunications site. The land to the south, east and west are low density residential.

e. Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed use and structure.

Finding 6: Public services and facilities are adequate to serve the proposed use. Public water and sewer are not needed. The property is accessed via Skyline Drive, which is a paved, state maintained public road.

f. Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character.

Finding 7: The newly constructed single story structure is 9 feet by 20 feet with two attached metal towers approximately 50 ft in height. The placement and operation of the tower will not generate significant traffic, nor create density or coverage that will harm the neighborhood. Traffic to and from the site is for maintenance purposes only. The tower will not cause undue harmful effect on the desirable neighborhood character.

g. The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole.

Finding 8: The communication site is not detrimental to the health, safety or welfare of the surrounding area or the city as a whole. The towers are part of a telecommunications system that serves the wider area and is an important and necessary service.

h. The proposal does or will comply with the applicable regulations and conditions specified in this title for such use.

Finding 9: HCC Title 21, Rural Residential District requires a conditional use permit under 21.12.030(g) for "Public utility facilities and structures."

i. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

Finding 10: The facility is located in a rural, low density area. The property to the north is also a telecommunications site, and the continuation of the subject property as a communications site is a compatible use type and density, in a residential zone. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

j. The proposal will comply with all applicable provisions of the Community Design Manual.

Finding 11: All lighting must be down lit per the Community Design Manual.

HCC 21.71.040(h). In approving a conditional use, the Commission may impose such conditions on the use as may be deemed necessary to ensure the proposal does and will continue to satisfy the applicable review criteria. Such conditions may include, but are not limited to, one or more of the following:

1. Special yards and spaces: **No conditions deemed necessary.**

2. Fences, walls and screening. **No conditions deemed necessary.**

3. Surfacing of vehicular ways and parking areas. **One parking space must be provided on property, including DOT approved driveway permit.**

4. Street and road dedications and improvements (or bonds). **No conditions deemed necessary.**

5. Control of points of vehicular ingress and egress. **A driveway permit is necessary.**

6. Special restrictions on signs. **No conditions deemed necessary.**

7. Landscaping. **No conditions deemed necessary.**

8. Maintenance of the grounds, buildings, or structures. **No conditions deemed necessary.**

9. Control of noise, vibration, odors, lighting or other similar nuisances. **No conditions deemed necessary.**

10. Limitation of time for certain activities. **No conditions deemed necessary.**

11. A time period within which the proposed use shall be developed and commence operation. **No special conditions deemed necessary.**

12. A limit on total duration of use or on the term of the permit, or both. **No conditions deemed necessary.**

13. More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code. Dimensional requirements may not be altered by conditional use permit when and to the extent other provisions of the zoning code expressly prohibit such alterations by conditional use permit. **No conditions deemed necessary.**

14. Other conditions necessary to protect the interests of the community and surrounding area, or to protect the health, safety, or welfare of persons residing or working in the vicinity of the subject lot. **No conditions deemed necessary.**

Condition 1: One parking space must be provided on property.

Condition 2: Obtain AKDOT Driveway Permit.

CONCLUSION

The Commission approved CUP 10-04 for a 9' x 20' public utility structure with conditions of providing an on-site parking space and AKDOT driveway permit.

Date: 9/14/10 Sharon Minsch
Chair, Sharon Minsch

Date: 9/08/10 Rick Abboud
City Planner, Rick Abboud

NOTICE OF APPEAL RIGHTS

Pursuant to Homer City Code, Chapter 21.93, any person with interests in land that is affected by this decision may appeal this decision to the Homer Board of Adjustment within thirty (30) days of the date of distribution indicated below. Any decision not appealed within that time shall be final. A notice of appeal shall be in writing, shall contain all the information required by Homer City Code, Section 21.93.080, and shall be filed with the Homer City Clerk, 491 East Pioneer Avenue, Homer, Alaska 99603-7645.

CERTIFICATION OF DISTRIBUTION

I certify that a copy of this Decision was mailed to the below listed recipients on Sept. 15, 2010. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

Date: 9/15/10 Shelly Rosencrans
Shelly Rosencrans, Planning Assistant

Walt Wrede, City Manager
491 E Pioneer Avenue
Homer, AK 99603

Thomas Klinkner
Birch, Horton, Bittner & Cherot
1127 West 7th Ave
Anchorage, AK 99501

Dave Becker
P.O. Box 109
Homer, AK 99603

EXHIBIT A
Page 3 of 3

City of Homer
Planning & Zoning

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Web Site: www.ci.homer.ak.us

HOMER ADVISORY PLANNING COMMISSION
Meeting of July 21, 2010

Decision and Findings: Conditional Use Permit (CUP) 10-04, 1033 Skyline Drive

DECISION

Introduction

Dave Becker ("Applicant") applied to the Homer Advisory Planning Commission, (the "Commission") under Homer City Code (HCC) 21.12.030(g) for approval of a CUP for a Public Utility Facilities and Structures located in the Rural Residential District at 1033 Skyline Drive per HCC 21.12.030(g). The structure for consideration was a 9' x 20' building with two 50' metal towers attached.

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on July 21, 2010. Notice of the public hearing was published in the local newspaper and sent to 14 property owners of 15 parcels.

Testimony from the applicant, one member of the public and the City Manager was received at the public hearing. After deliberations, at the August 18, 2010 meeting of the commission, the commission voted to approve the request with 6 Commissioners present, and 6 Commissioners voted in favor of the conditional use permit, allowing lawful placement of a 9' x 20' public utility structure on the property. As he was new to the planning commission, Commissioner Venuti was excused from deliberations.

After due consideration of the evidence presented, the Homer Advisory Planning Commission hereby makes the following findings of fact and conclusions of law.

EVIDENCE PRESENTED

The Applicant sought approval to utilize a 9' x 20' structure at 1033 Skyline Drive, Skyline View Subdivision Lot 5 in the Rural Residential District for the support of communication equipment. The structure currently located on the property was constructed without gaining a zoning permit from the City of Homer and is located in the 20' setback from the Skyline Drive Right-of-Way. Pre-existing structures, also located on the lot, were accepted as legal non-conforming structures. The as-built

built prior to City annexation, into the Skyline Drive state right-of-way. The approval of this CUP does not indicate acceptance of any encroachments into the right-of-way. An approved variance is required to locate a structure within the setback.

FINDINGS OF FACT

Parking: City code does not have parking requirements for a communication site. The applicant has one parking space on site. Due to the very low traffic volume for this site, the city planner has determined under 21.55.090(b) that one parking space is required.

Finding 1: One parking space shall be provided on the lot.

The review criteria for a Conditional Use Permit are outlined in 21.71.030.

a. The applicable code authorizes each proposed use and structure by conditional use permit in that zoning district.

Finding 2: Public utility facilities and structures are authorized with a Conditional Use Permit by HCC 21.12.030 (g).

b. The proposed use(s) and structure(s) are compatible with the purpose of the zoning district in which the lot is located.

Finding 3: The 1.85 acres parcel has a total of five (5) structures. The combined square footage of all the structures is less than 1500 square feet and fronts Skyline Drive. The structures and uses are consistent with low density development.

c. The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.

Finding 4: The value of adjoining property will not be negatively impacted more than from other uses in this district. Other uses permitted or conditionally permitted include multifamily dwellings which would create more traffic than the proposed use, kennels, which would create more noise, and storage of heavy equipment per HCC 21.12.030.

d. The proposal is compatible with existing uses of surrounding land.

Finding 5: The proposal is compatible with the existing surrounding land uses. The land to the north is also a telecommunications site. The land to the south, east and west are low density residential.

e. Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed use and structure.

Finding 6: Public services and facilities are adequate to serve the proposed use. Public water and sewer are not needed. The property is accessed via Skyline Drive, which is a paved, state maintained public road.

f. Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character.

Finding 7: The newly constructed single story structure is 9 feet by 20 feet with two attached metal towers approximately 50 ft in height. The placement and operation of the tower will not generate significant traffic, nor create density or coverage that will harm the neighborhood. Traffic to and from the site is for maintenance purposes only. The tower will not cause undue harmful effect on the desirable neighborhood character.

g. The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole.

Finding 8: The communication site is not detrimental to the health, safety or welfare of the surrounding area or the city as a whole. The towers are part of a telecommunications system that serves the wider area and is an important and necessary service.

h. The proposal does or will comply with the applicable regulations and conditions specified in this title for such use.

Finding 9: HCC Title 21, Rural Residential District requires a conditional use permit under 21.12.030(g) for "Public utility facilities and structures."

i. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

Finding 10: The facility is located in a rural, low density area. The property to the north is also a telecommunications site, and the continuation of the subject property as a communications site is a compatible use type and density, in a residential zone. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

j. The proposal will comply with all applicable provisions of the Community Design Manual.

Finding 11: All lighting must be down lit per the Community Design Manual.

HCC 21.71.040(b). In approving a conditional use, the Commission may impose such conditions on the use as may be deemed necessary to ensure the proposal does and will continue to satisfy the applicable review criteria. Such conditions may include, but are not limited to, one or more of the following:

1. Special yards and spaces: **No conditions deemed necessary.**

2. Fences, walls and screening. **No conditions deemed necessary.**

3. Surfacing of vehicular ways and parking areas. **One parking space must be provided on property, including DOT approved driveway permit.**

4. Street and road dedications and improvements (or bonds). **No conditions deemed necessary.**

5. Control of points of vehicular ingress and egress. **A driveway permit is necessary.**

6. Special restrictions on signs. **No conditions deemed necessary.**

7. Landscaping. **No conditions deemed necessary.**

8. Maintenance of the grounds, buildings, or structures. **No conditions deemed necessary.**

9. Control of noise, vibration, odors, lighting or other similar nuisances. **No conditions deemed necessary.**

10. Limitation of time for certain activities. **No conditions deemed necessary.**

11. A time period within which the proposed use shall be developed and commence operation. **No special conditions deemed necessary.**

12. A limit on total duration of use or on the term of the permit, or both. **No conditions deemed necessary.**

13. More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code. Dimensional requirements may not be altered by conditional use permit when and to the extent other provisions of the zoning code expressly prohibit such alterations by conditional use permit. **No conditions deemed necessary.**

14. Other conditions necessary to protect the interests of the community and surrounding area, or to protect the health, safety, or welfare of persons residing or working in the vicinity of the subject lot. **No conditions deemed necessary.**

Condition 1: One parking space must be provided on property.

Condition 2: Obtain AKDOT Driveway Permit.

CONCLUSION

The Commission approved CUP 10-04 for a 9' x 20' public utility structure with conditions of providing an on-site parking space and AKDOT driveway permit.

Date: 9/14/10 Sharon Minsch

Chair, Sharon Minsch

Date: 9/08/10 Rick Abboud

City Planner, Rick Abboud

NOTICE OF APPEAL RIGHTS

Pursuant to Homer City Code, Chapter 21.93, any person with interests in land that is affected by this decision may appeal this decision to the Homer Board of Adjustment within thirty (30) days of the date of distribution indicated below. Any decision not appealed within that time shall be final. A notice of appeal shall be in writing, shall contain all the information required by Homer City Code, Section 21.93.080, and shall be filed with the Homer City Clerk, 491 East Pioneer Avenue, Homer, Alaska 99603-7645.

CERTIFICATION OF DISTRIBUTION

I certify that a copy of this Decision was mailed to the below listed recipients on Sept. 15, 2010. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

Date: 9/15/10 Shelly Rosencrans

Shelly Rosencrans, Planning Assistant

Walt Wrede, City Manager
491 E Pioneer Avenue
Homer, AK 99603

Thomas Klinkner
Birch, Horton, Bittner & Cherot
1127 West 7th Ave
Anchorage, AK 99501

Dave Becker
P.O. Box 109
Homer, AK 99603

City of Homer
Planning & Zoning

491 East Pioneer Avenue Telephone (907) 235-3106
Homer, Alaska 99603-7645 Fax (907) 235-3118
E-mail: Planning@ci.homer.ak.us
Web Site: www.ci.homer.ak.us

HOMER ADVISORY PLANNING COMMISSION
Meeting of July 21, 2010

Decision and Findings: Variance 10-01, 1033 Skyline Drive

DECISION

Introduction

Dave Becker ("Applicant") applied to the Homer Advisory Planning Commission, (the "Commission") under Homer City Code (HCC) 21.72.010 for approval of a structure within the twenty foot building setback from rights of way. The existing 9' x 20' building with two 50' metal towers attached is located at 1033 Skyline Drive, Skyline View Subdivision Lot 5, lying south of Diamond Ridge Road. The structure is 15.1' feet into the required 20' setback, or 4.9' from the Skyline Drive right-of-way).

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on July 21, 2010. Notice of the public hearing was published in the local newspaper and sent to 14 property owners of sixteen 15 parcels.

Testimony from the Applicant, one member of the public and the City Manager was received at the public hearing. After deliberations, at the August 18, 2010 meeting of the commission, the commission voted to deny the request with 6 Commissioners present, and 6 Commissioners voted to deny variance. As he was new to the planning commission, Commissioner Venuti was excused from deliberations.

After due consideration of the evidence presented, the Homer Advisory Planning Commission, hereby makes the following findings of fact and conclusions of law.

EVIDENCE PRESENTED

The Applicant sought approval to have a 9' x 20' structure located 15.1 feet into the required 20' setback per HCC 21.12.040 (b) (1) at 1033 Skyline Drive in the Rural Residential District. The structure is currently located on the property and was constructed without acquiring a zoning permit from the City of Homer. The structure is located within the 20' setback from the Skyline Drive Right-of-Way. Pre-existing structures, also located on the lot, were accepted as legal non-conforming structures.

The as-built survey dated June 29, 2010, shows a 2.6 feet encroachment of an existing building, built prior to City annexation, into the Skyline Drive state right-of-way. The approval or denial of this Variance does not indicate acceptance of any encroachments into the right-of-way.

FINDINGS OF FACT

Pursuant to HCC 21.72.010, a variance may be granted to provide relief when a literal enforcement of Homer Zoning Code would deprive a property owner of the reasonable use of his real property.

Variance Code Requirements: HCC 21.72.020 Conditions precedent to granting variance:

a. All of the following conditions shall exist before a variance may be granted:

1. **A literal interpretation of the provisions of the Homer Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district.**

   Finding 1: Requiring a 20 foot building setback would not deprive the applicant of rights commonly enjoyed by other properties in the district. Structures on pilings can be built on slopes of 40%.

2. **Special conditions and circumstances exist which are peculiar to the land or structures involved and which are not applicable to other lands and structures in the same district.**

   Finding 2: Special conditions and circumstances do not exist on this parcel, any structures in addition to accepted nonconformities must not be located in designated setbacks.

3. **The special conditions and circumstances have not been caused by the actions of the applicant.**

   Finding 3: There is no special condition/circumstance, the placement of the structure was caused by the actions of the Applicant.

B. Financial hardship or inconvenience shall not be reason for granting a variance.

Finding 4: Hardship and inconvenience is the reason for this variance request. A variance may not be granted to ease financial hardship or inconvenience.

C. Other nonconforming land use or structures within the district shall not be considered grounds for granting a variance.

Finding 5: The applicant is seeking a variance due to the steep slopes on the lot. Though the other structures were built prior to City annexation and zoning, the Applicant is not seeking a variance due of other nonconforming land use or structures within the district.

D. A variance shall be the minimum variance necessary to permit the reasonable use of the land or structure.

Finding 6: Locating a structure in the setback is not necessary to permit reasonable use of the land.

E. A variance shall not be granted which will permit a land use in a district in which that use is otherwise prohibited.

Finding 7: A communication site is allowed with a Conditional Use Permit in the Rural Residential District per HCC 21.12.030(g).

DECISION

THE APPLICANT HAS NOT MET ALL THE REQUIREMENTS FOR GRANTING A VARIANCE AND THE APPLICATION IS DENIED.

Date: 9/14/10

Sharon Minsch

Chair, Sharon Minsch

Date: 9/13/10

City Planner, Rick Abboud

NOTICE OF APPEAL RIGHTS

Pursuant to Homer City Code, Chapter 21.93, any person with interests in land that is affected by this decision may appeal this decision to the Homer Board of Adjustment within thirty (30) days of the date of distribution indicated below. Any decision not appealed within that time shall be final. A notice of appeal shall be in writing, shall contain all the information required by Homer City Code, Section 21.93.080, and shall be filed with the Homer City Clerk, 491 East Pioneer Avenue, Homer, Alaska 99603-7645.

CERTIFICATION OF DISTRIBUTION

I certify that a copy of this Decision was mailed to the below listed recipients on Sept 15, 2010. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

Date: 9/15/10

Shelly Rosencrans, Planning Assistant

Walt Wrede, City Manager
491 E Pioneer Avenue
Homer, AK 99603

Thomas Klinkner
Birch, Horton, Bittner & Cherot
1127 West 7th Ave
Anchorage, AK 99501

Dave Becker
P.O. Box 109
Homer AK 99603

SUPPLEMENTAL
RECORD OF APPEAL
Index

David Becker vs. City of Homer
Decision of the Planning Commission September 14, 2010

VOLUME I

Daniel Westerburg
Attorney at Law

4164 Pennock Street, Suite A
Homer, Alaska 99603
(907) 235-2717-Phone
(907) 235-2715-Fax

RECEIVED
SEP 2 2010
CITY OF HOMER
PLANNING/ZONING

September 2, 2010

HAND DELIVERED
Rick Abboud, City Planner
City of Homer
491 East Pioneer Avenue
Homer, AK 99603-7645

RE: David & Eileen Becker/Application for Variance #10-01, 1033 Skyline Drive

Dear Mr. Abboud:

I have been asked to represent David and Eileen Becker, owners of 1033 Skyline Drive, with respect to their application for the variance referenced above.

Enclosed please find a conformed copy of a utility easement for the subject property recorded earlier today. As you can see, the instrument provides for a 20' utility easement along the property's northern boundary.

The corresponding Conditional Use Permit #10-04 for a 9' by 20' building and two 50' metal towers is permitted per HCC §21.12.30. (See Finding #4 of the DRAFT CUP Decision and Findings.) The structures in questions are now located entirely within the 20' utility easement.

The Beckers view their application for the variance moot and now withdraw it. In light of the unusual circumstances surrounding the application (specifically, the City Manager's mistaken assurance to Mr. Becker that no permit applications would be required for the project), the Beckers asked me to request a refund of the $250 filing fee.

Let me know if you have any questions.

Sincerely,

Dan Westerburg

DW:ac
Enclosures
cc: David and Eileen Becker

cc

A L A S K A

2010-002802-0

Recording Dist: 309 - Homer
09/2/2010 10:49 PM Pages: 1 of 2

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

UTILITY EASEMENT

FOR AND IN CONSIDERATION of the sum of TEN AND NO/100 DOLLARS ($10.00), and other good and valuable consideration in hand paid, the receipt and sufficiency of which is hereby acknowledged, David F. Becker and Eileen L. Becker, husband and wife, whose address is P.O. Box 109, Homer, Alaska 99603-0109, Grantors, hereby grant Homer Electric Association, Inc.; General Communications, Inc.; Peninsula Communications, Inc.; Turquoise Broadcast Company, LLC; Becker Communications, LLC; Becker Rentals; any other entity providing electricity, water, sewage and natural gas as a public utility; and any successors in interest to such entities (hereinafter collectively referred to as "Grantees"), an easement twenty feet (20') in width, along the north boundary of the following described real property:

> That portion of Lot Five (5), SKYLINE VIEW SUBDIVISION, according to Plat No. 54-2273, in the Homer Recording District, Third Judicial District, State of Alaska, lying south of the southerly right-of-way of Skyline Drive.

This easement grants Grantees the right to install, maintain, repair and remove water and sewer lines, telephone lines, electrical lines, antennas, repeater/relay/translator stations and the like, as well as structures, storage facilities and stations to support such systems.

DATED this 2 day of September, 2010.

Return to:
David F. Becker
Box 109
Homer, AK 99603
Homer Recording District

David F. Becker, Grantor

Eileen L. Becker, Grantor

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this 2nd day of September, 2010 before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn as such, personally appeared David F. Becker, known to me to be the individual who executed the foregoing instrument and acknowledged to me that said person signed and sealed the same freely and voluntarily for the uses and purposes therein described.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal on the date first above written.

APRIL CHESEBRO NOTARY PUBLIC STATE OF ALASKA

Notary Public in and for Alaska
My Commission Expires: 09/2013

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this 2nd day of September, 2010 before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn as such, personally appeared Eileen L. Becker, known to me to be the individual who executed the foregoing instrument and acknowledged to me that said person signed and sealed the same freely and voluntarily for the uses and purposes therein described.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal on the date first above written.

Notary Public in and for Alaska
My Commission Expires: 7/8/2011

DANIEL WESTERBURG NOTARY PUBLIC STATE OF ALASKA

Daniel Westerburg • 4164 Pennock St., Ste. A • Homer, AK 99603 • T: (907)235-2717 • F: (907)235-2715

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STAFF REPORT PL 11-72

TO: Homer Advisory Planning Commission
FROM: Rick Abboud, City Planner
MEETING: June 15, 2011
SUBJECT: CUP 11-06 Central Charters Boardwalk

This is a quasi-judicial decision and requires 5 yes votes.

SYNOPSIS: The HAPC held a public hearing on May 5, 2011 to consider a CUP for expansion on the boardwalk referenced above. After some deliberations, the Commission made a request for additional information. The Commission wished to see if the applicant would be able to present an alternate site design that eliminated the side lot line encroachment and added architectural elements that better incorporated the existing varied roof pitches currently found on the site into the proposed structure.

1. The new design eliminates the encroachment into the 5' side setback requirement.
2. Two gabled roofs are visible from the Sterling Highway.
   a. One gabled roof is attached to the structure.
   b. Another gable is produced on top of a 200sf structure placed directly in front of the proposed addition for accommodations.

Staff is pleased with the elimination of the encroachment into the side setback. We believe that the varied roof pitches heads in the direction that the Commission wished to explore. According to the variance granted to place the boardwalk into the front setback, we see no issue with the physical placement of the 200sf structure on the boardwalk. It would be material to inquire to the use of such a structure and to its permanent disposition since the architectural feature is designed in relief of structure located directly adjacent.

Since the side setback is eliminated, we would ask the applicant if they would like to withdraw the PUD element from consideration.

This CUP includes existing and proposed uses and structures in the Marine Commercial District.

HCC 21.28.030 (a)	Restaurants and drinking establishments (existing)
HCC 21.28.030(h)	Hotel and motels (existing and proposed)
HCC 21.28.030(i)	More than one permitted principal use on a lot (existing)
HCC 21.28.030(j)	Planned unit development (for setback exception)
HCC 21.28.040(d)	More than 8,000 s.f. of building area (existing) or a building area in excess of 30% of the lot area.

Applicants: Seabright Survey + Design
Property Owners: William and Catrin Lovett
Location: 4241 Homer Spit Road

Parcel ID:	18103307
Lot Size:	0.88 acres equals 38,333 s.f.
Zoning Designation:	Marine Commercial
Existing Land Use:	Boardwalk with five existing buildings
Surrounding Land Use:	North: Retail, restaurant South: Kachemak Bay East: Retail, restaurant West: Open recreation space
Comprehensive Plan:	1999 Homer Spit Comprehensive Plan pg 4.
Flood Plain Status:	Flood Dev. Permit for boardwalk expansion issued 4/28/2010
Utilities:	Public water and sewer
Public Notice:	Notice was sent to34 property owners of 41 properties as shown on the KPB tax assessor rolls.

The Central Charters Boardwalk has five (5) existing buildings with a combined square footage of 8,042 sf. The existing buildings are used for retail, restaurant and a booking office.

Boardwalk addition: Permitted and under construction is a boardwalk expansion that is elevated 45 inches above the existing boardwalk. The increased deck elevation was engineered to meet FEMA requirements per Homer's Flood Prone Areas code HCC 21.41. The new boardwalk extends the existing boardwalk to the northwest and wraps around to the southern bay side. A handicap accessible ramp will connect the existing and new boardwalk. As proposed, the additional boardwalk will house five (5) units for overnight accommodations, a laundry/mechanical room and a southern bay side addition for Captains Patties Restaurant.

FEMA regulations require that when the boardwalk is complete, the applicant is to submit an engineer certified Flood Elevation Certificate which verifies that the boardwalk was constructed to meet Homer's Flood Prone Areas HCC 21.41. **Staff recommends that the final Elevation Certificate for the boardwalk be submitted prior to issuance of a Zoning Permit for the buildings.**

A setback variance was granted on May 4, 1989 which allowed the extension of the deck up to the north property line along Homer Spit Road. The pilings for the existing and proposed deck are setback five feet (5') from the property lines and the deck planks cantilever five feet (5') to the property lines. ~~This proposal asks for a zero (0) building setback on the west corner of one of the buildings. If approved, this request would allow approximately 26 sf of building area to be in the side setback.~~

Parking: Eight (8) parking spaces are provided on private property. HCC 21.55.100(d) requires five (5) parking spaces for year-round permanent employees. All of the businesses on the Central Charters Boardwalk are seasonal, with no year-round permanent employees. In an effort to be consistent with other CUPs, this site meets the need for five (5) parking spaces per HCC 21.55.100(d).

Staff note: In the past, AkDOT issued parking permits but those permits have expired and AkDOT will not be reissuing those permits.

The combined building area is more than 8,000 sf of building area which requires a CUP per HCC 21.28.040(d).

8,042 sf = The existing building area
3,824 sf = The proposed new building area
200 sf = New structure (revised)
12,066 sf = Total combined building area

The combined building area is 31% of the lot area which requires a CUP per HCC 21.28.040(d).

Hotel and motels in the Marine Commercial district require a CUP per HCC 21.28.030(h). Homer City Code defines a hotel or motel as "....any building or group of buildings containing six or more guest rooms that are used, rented or hired out to be occupied for sleeping purposes by guests...." There are five existing "guest units," three upstairs in the Central Charters building, and two upstairs in the Sea Lion Gallery building. When complete this parcel will have a total of ten (10) overnight accommodation units.

Fire Marshal: The buildings on the Central Charters Boardwalk have several Fire Marshal certifications dating back to 1990's. The uses and floor plans may or may not be as permitted. In additional to the Fire Marshal review for the new buildings, **staff recommends that the applicant provide verification that all the buildings (existing and proposed) meet State of Alaska Fire Marshal standards based on their current use.**

The criteria for granting a Conditional Use Permit is set forth in HCC 21.71.030 and 21.71.040.a. The applicable code authorizes each proposed use and structure by conditional use permit in that zoning district.

Finding 1: HCC 21.28.030 (a) Restaurants and drinking establishments
HCC 21.28.030(h) Hotel and motels (existing and proposed)
HCC 21.28.030(i) More than one permitted principal use on a lot.
HCC 21.28.030(j) Planned unit development
HCC 21.28.040(d) More than 8,000 sf of building area

b. The proposed use(s) and structure(s) are compatible with the purpose of the zoning district in which the lot is located.

Analysis: The "purpose of the Marine Commercial District is primarily for water-related and water-dependent uses and the business and commercial uses that serve and support them, including but not limited to fishing, marine transportation, off-shore energy development, recreation and tourism. It is recognized that unique natural features of Homer's marine environment contribute significantly to the economic and social environments, therefore performance standards are required to minimize the impact of development on the natural features on which they depend" per 21.28.010.

The project supports tourism with retail, recreational fishing booking office, overnight accommodations and a restaurant. The raised boardwalk minimizes the impact of development on the natural features.

Finding 2: This project is compatible with the purpose of the Marine Commercial district.

c. The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.

Analysis: The adjoining property to the west is owned by the City of Homer and is zoned Open Space Recreational. The applicant is requesting a setback exception along the west lot line to allow a corner of one building (26 sf) to encroach into the side setback.

The adjoining property to the SE is privately owned and is developed as a boardwalk with retail, charter offices and restaurants.

The value of the adjoining property should not be negatively affected greater than that of other permitted or conditionally permitted uses in the district such as cold-storage facilities and wholesale outlets for marine products.

Finding 3: No evidence has been found that the project will have a negative impact on the adjoining properties.

d. The proposal is compatible with existing uses of surrounding land.

Analysis: The surrounding land uses include fish processing, retail, charters office and restaurants which is compatible with the proposed project.

Finding 4: The proposed boardwalk expansion is compatible with of the surrounding land.

e. Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed use and structure.

Analysis: The site is served with city water and sewer along a paved State of Alaska highway.

Finding 5: Public services and facilities are adequate to serve the project.

f. Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character.

Analysis: The existing Captain Patties Restaurant is a two-story, 1,815 sf structure. The proposed addition to Captain Patties is single-story, on the bay side and not visible from Homer Spit Road.

Also proposed, is one building with five overnight accommodations units with an attached laundry/mechanical room. This single-story, 1,776 sf building with a maximum building height of twelve feet (12') and views to the south, bay side. According to the North Elevation

approximately half of this 5-unit building sits behind the Alpaca store and the Crab Shack with a roofline lower than the existing buildings.

The addition of 2,048 sf to Captain Patties Restaurant plus five (5) overnight accommodation units, to an already mixed used site is difficult to isolate the traffic impacts. The *Trip Generation, 7th Edition* published by the Institute of Transportation Engineers estimates 58 peak vehicle trips for a retail center which does not require a Traffic Impact Analysis per HCC 21.76.060.

Finding 6: This project is in harmony with the scale, bulk, coverage, density, and traffic generation of the surrounding Marine Commercial district.

Condition 3: Architectural features shall be designed to integrate varied roof pitches to better match that of the existing structures on the lot.

Finding 7: This project will not have an undue harmful effect on the character of the Marine Commercial Spit activity.

g. The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole.

Analysis: The proposed project is designed to meets all current health and safety requirements. There is a variety of Fire Marshal certificates from the 1990's for a variety of buildings and uses. **Staff recommends that applicant provide verification that all the buildings meet State of Alaska Fire Marshal standards based on their current use. This verification to be provided prior to issuance of a Zoning Permit.**

Finding 8: The proposed project will not be detrimental to the health, safety or welfare of the surrounding area or city as a whole.

h. The proposal does or will comply with the applicable regulations and conditions specified in this title for such use.

Analysis: An approved CUP and zoning permit is required. **Finding 9:** The proposed project will comply with the applicable regulations.

i. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

Analysis: 1999 Homer Comprehensive Plan Update is the adopted plan that identifies the future vision of the Homer Spit. On page 4 it states, "Manage the land and other resources of the Spit to accommodate its natural processes, while allowing fishing, tourism, and other marine related development, and open space/recreational uses." Action items encourage the mix and cluster of charter offices, boat and gear suppliers and other tourist related activities, construction of walkways and weather-protected picnic areas.

A raised boardwalk accommodates the natural processes and provides walkways. The businesses on the boardwalk promote fishing and tourism and are cluster with other near-by charter office and tourist related activities.

Finding 10: The site meets the goals and objectives of the 1999 Comprehensive Plan.

j. The proposal will comply with all applicable provisions of the Community Design Manual (CDM).

Analysis: Only the Outdoor Furnishing section of the CDM applies. The proposal includes outdoor seating, seasonal planters and hanging baskets.

Finding 11: The proposal provides outdoor furnishings on the boardwalk.

In approving a conditional use, the Commission may impose such conditions on the use as may be deemed necessary to ensure the proposal does and will continue to satisfy the applicable review criteria. Such conditions may include, but are not limited to, one or more of the following:

1. **Special yards and spaces.** No conditions deems necessary.
2. **Fences, walls and screening.** Screening is provided between the individual overnight units.
3. **Surfacing of vehicular ways and parking areas.** Gravel
4. **Street and road dedications and improvements (or bonds).** No conditions deems necessary.
5. **Control of points of vehicular ingress and egress.** No conditions deems necessary.
6. **Special restrictions on signs.** No conditions deems necessary.
7. **Landscaping.** Seasonal planters and hanging baskets will be placed around the boardwalk.
8. **Maintenance of the grounds, buildings, or structures.** No conditions deems necessary.
9. **Control of noise, vibration, odors, lighting or other similar nuisances.** No conditions deems necessary.
10. **Limitation of time for certain activities.** No conditions deems necessary.
11. **A time period within which the proposed use shall be developed and commence operation.** No conditions deems necessary.
12. **A limit on total duration of use or on the term of the permit, or both.** No conditions deems necessary.
13. **More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code. Dimensional requirements may not be altered by conditional use permit when and to the extent other provisions of the zoning code expressly prohibit such alterations by conditional use permit.**

14. **Other conditions necessary to protect the interests of the community and surrounding area, or to protect the health, safety, or welfare of persons residing or working in the vicinity of the subject lot.** No conditions deems necessary.

21.52.060(b)A planned unit development that includes commercial, noncommercial or industrial uses shall comply with the following requirements and conditions:

1. The PUD site shall have direct access to an arterial or collector street.

Finding 12: The project has direct access to Homer Spit Road, a State of Alaska Highway.

2. Utilities, roads and other essential services must be constructed, installed and available for the immediate use of occupants of the PUD.

Finding 13: Utilities and roads exist and are available for use by the occupants.

3. The PUD shall be developed with a unified architectural treatment.

Analysis: The Central Charters Boardwalk will be developed in a cohesive marine-nautical theme to blend the natural environment.

Finding 14: The PUD, **as presented at the May 4th meeting of the HAPC, does not provide** a unified architectural treatment.

c. If topographical or other barriers do not provide adequate privacy for uses adjacent to the PUD, the Commission may impose conditions to provide adequate privacy, including without limitation one or both of following requirements:
1. Structures located on the perimeter of the planned development must be set back a distance sufficient to protect the privacy of adjacent uses;

Analysis: All the structures meet the five (5) foot building setback except one building corner, 26 sf of along the west property line. Privacy fences will be built for all five (5) overnight units. The applicant requests an exception to this setback requirement. The adjacent property to the west is zoned Open Space Recreation and the parcel is owned by the City of Homer.

Finding 15: The project does not interfere with the privacy of the adjacent uses which is Open Space Recreational land owned by the City of Homer.

2. Structures on the perimeter must be permanently screened by a fence, wall or planting or other measures sufficient to protect the privacy of adjacent uses.

Analysis: The overnight accommodation building includes a privacy fence along a portion of the west property line.

Finding 16: The structure on the west perimeter provides a permanent fence to protect the privacy of adjacent uses, Open Space Recreation.

d. Dimensional Requirements. Setbacks and distances between buildings within the development shall be at least equivalent to that required by the zoning district in which the PUD is located unless the applicant demonstrates that:

1. A better or more appropriate design can be achieved by not applying the provisions of the zoning district; and

Finding 17: The five (5) unit building **must** ~~could~~ be moved out of the setback area.

2. Adherence to the dimensional requirements of the zoning district is not required in order to protect health, safety and welfare of the occupants of the development and the surrounding area.

Finding 18: Exception to the dimensional requirements does not affect the health safety and welfare of occupants of the development and the surrounding area.

PUBLIC WORKS COMMENTS: No comment.

FIRE DEPARTMENT COMMENTS: Fire Chief Painter – Fire Marshal approval required.

STAFF COMMENTS/RECOMMENDATIONS: *Approval of a Conditional Use Permit requires five yes votes.*

The Planning Commission to approve CUP 11-06 by adopting SR 11-49 with Findings 1–18 which denies the five foot (5') building setback along the west property. The following conditions apply:

1. Prior to issuance of a Zoning Permit for the structures, the applicant to submit an engineer certified Flood Elevation Certificate proving the boardwalk meets Homer's Flood Prone Area code HCC 21.41.

2. Prior to issuance of a Zoning Permit, the applicant to provide verification that all the buildings (existing and proposed) meet State of Alaska Fire Marshal standards based on their current use.

3. **Architectural features shall be designed to integrate varied roof pitches to better match that of the existing structures on the lot.**

The HAPC adopts the findings and conditions of this staff report as amended, approving the CUP and denying the PUD.

ATTACHMENTS

1. Location map
2. Application
3. Site Plan page 1 of 3
4. North Elevation page 2 of 3
5. South Elevation page 3 of 3

City of Homer
Planning & Zoning
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E-mail Planning@ci.homer.ak.us
Web Site www.ci.homer.ak.us

STAFF REPORT PL 11-49

TO: Homer Advisory Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Dotti Harness-Foster, Planning
MEETING: May 4, 2011
SUBJECT: CUP 11-06 Central Charters Boardwalk

This is a quasi-judicial decision and requires 5 yes votes.

SYNOPSIS: The existing Central Charters Boardwalk has five buildings: Central Charters, Captains Patties, Sea Lion Gallery, Alpaca and new this year, The Crab Shack. The boardwalk owner requests an expansion for five units to be used for overnight accommodations and an addition to Captains Patties restaurant. The applicant is also requesting a setback exception along the west lot line to allow a corner of one building (26 s.f.) to encroach into the side setback.

This CUP includes existing and proposed uses and structures in the Marine Commercial District.

HCC 21.28.030 (a)	Restaurants and drinking establishments (existing)
HCC 21.28.030(h)	Hotel and motels (existing and proposed)
HCC 21.28.030(i)	More than one permitted principal use on a lot (existing)
HCC 21.28.030(j)	Planned unit development (for setback exception)
HCC 21.28.040(d)	More than 8,000 s.f. of building area (existing) or a building area in excess of 30% of the lot area.

Applicants:	Seabright Survey + Design
Property Owners:	William and Catrin Lovett
Location:	4241 Homer Spit Road
Parcel ID:	18103307
Lot Size:	0.88 acres equals 38,333 s.f.
Zoning Designation:	Marine Commercial
Existing Land Use:	Boardwalk with five existing buildings
Surrounding Land Use:	North: Retail, restaurant South: Kachemak Bay East: Retail, restaurant West: Open recreation space
Comprehensive Plan:	1999 Homer Spit Comprehensive Plan pg 4.
Flood Plain Status:	Flood Dev. Permit for boardwalk expansion issued 4/28/2010
Utilities:	Public water and sewer
Public Notice:	Notice was sent to34 property owners of 41 properties as shown on the KPB tax assessor rolls.

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The Central Charters Boardwalk has five (5) existing buildings with a combined square footage of 8,042 sf. The existing buildings are used for retail, restaurant and a booking office.

Boardwalk addition: Permitted and under construction is a boardwalk expansion that is elevated 45 inches above the existing boardwalk. The increased deck elevation was engineered to meet FEMA requirements per Homer's Flood Prone Areas code HCC 21.41. The new boardwalk extends the existing boardwalk to the northwest and wraps around to the southern bay side. A handicap accessible ramp will connect the existing and new boardwalk. As proposed, the additional boardwalk will house five (5) units for overnight accommodations, a laundry/mechanical room and a southern bay side additional for Captains Patties Restaurant.

FEMA regulations require that when the boardwalk is complete, the applicant is to submit an engineer certified Flood Elevation Certificate which verifies that the boardwalk was constructed to meet Homer's Flood Prone Areas HCC 21.41. **Staff recommends that the final Elevation Certificate for the boardwalk be submitted prior to issuance of a Zoning Permit for the buildings.**

A setback variance was granted on May 4, 1989 which allowed the extension of the deck up to the north property line along Homer Spit Road. The pilings for the existing and proposed deck are setback five feet (5') from the property lines and the deck planks cantilever five feet (5') to the property lines. This proposal asks for a zero (0) building setback on the west corner of one of the buildings. If approved, this request would allow approximately 26 sf of building area to be in the side setback.

Parking: Eight (8) parking spaces are provided on private property. HCC 21.55.100(d) requires five (5) parking spaces for year-round permanent employees. All of the businesses on the Central Charters Boardwalk are seasonal, with no year-round permanent employees. In an effort to be consistent with other CUPs, this site meets the need for five (5) parking spaces per HCC 21.55.100(d).

Staff note: In the past, AkDOT issued parking permits but those permits have expired and AkDOT will not be reissuing those permits.

The combined building area is more than 8,000 sf of building area which requires a CUP per HCC 21.28.040(d).

8,042 sf = The existing building area
3,824 sf = The proposed new building area
11,866 sf = Total combined building area

The combined building area is 31% of the lot area which requires a CUP per HCC 21.28.040(d).

Hotel and motels in the Marine Commercial district require a CUP per HCC 21.28.030(h). Homer City Code defines a hotel or motel as "....any building or group of buildings containing six or more guest rooms that are used, rented or hired out to be occupied for sleeping purposes by guests...." There are five existing "guest units", three upstairs in the Central Charters building, and two upstairs in the Sea Lion Gallery building. When complete this parcel will have a total of ten (10) overnight accommodation units.

Fire Marshal: The buildings on the Central Charters Boardwalk have several Fire Marshal certifications dating back to 1990's. The uses and floor plans may or may not be as permitted. In additional to the Fire Marshal review for the new buildings, **staff recommends that the applicant provide verification that all the buildings (existing and proposed) meet State of Alaska Fire Marshal standards based on their current use.**

The criteria for granting a Conditional Use Permit is set forth in HCC 21.71.030 and 21.71.040.a. The applicable code authorizes each proposed use and structure by conditional use permit in that zoning district.

Finding 1: HCC 21.28.030 (a) Restaurants and drinking establishments
HCC 21.28.030(h) Hotel and motels (existing and proposed)
HCC 21.28.030(i) More than one permitted principal use on a lot.
HCC 21.28.030(j) Planned unit development
HCC 21.28.040(d) More than 8,000 sf of building area

b. The proposed use(s) and structure(s) are compatible with the purpose of the zoning district in which the lot is located.

Analysis: The "purpose of the Marine Commercial District is primarily for water-related and water-dependent uses and the business and commercial uses that serve and support them, including but not limited to fishing, marine transportation, off-shore energy development, recreation and tourism. It is recognized that unique natural features of Homer's marine environment contribute significantly to the economic and social environments, therefore performance standards are required to minimize the impact of development on the natural features on which they depend" per 21.28.010.

The project supports tourism with retail, recreational fishing booking office, overnight accommodations and a restaurant. The raised boardwalk minimizes the impact of development on the natural features.

Finding 2: This project is compatible with the purpose of the Marine Commercial district.

c. The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.

Analysis: The adjoining property to the west is owned by the City of Homer and is zoned Open Space Recreational. The applicant is requesting a setback exception along the west lot line to allow a corner of one building (26 sf) to encroach into the side setback.

The adjoining property to the SE is privately owned and is developed as a boardwalk with retail, charter offices and restaurants.

The value of the adjoining property should not be negatively affected greater than that of other permitted or conditionally permitted uses in the district such as cold-storage facilities and wholesale outlets for marine products.

Finding 3: No evidence has been found that the project will have a negative impact on the adjoining properties.

d. The proposal is compatible with existing uses of surrounding land.

Analysis: The surrounding land uses include fish processing, retail, charters office and restaurants which is compatible with the proposed project.

Finding 4: The proposed boardwalk expansion is compatible with of the surrounding land.

e. Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed use and structure.

Analysis: The site is served with city water and sewer along a paved State of Alaska highway.

Finding 5: Public services and facilities are adequate to serve the project.

f. Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character.

Analysis: The existing Captain Patties Restaurant is a two-story, 1,815 sf structure. The proposed addition to Captain Patties is single-story, on the bay side and not visible from Homer Spit Road.

Also proposed, is one building with five overnight accommodations units with an attached laundry/mechanical room. This single-story, 1,776 sf building with a maximum building height of twelve feet (12') and views to the south, bay side. According to the North Elevation approximately half of this 5-unit building sits behind the Alpaca store and the Crab Shack with a roofline lower than the existing buildings.

The addition of 2,048 sf to Captain Patties Restaurant plus five (5) overnight accommodation units, to an already mixed used site is difficult to isolate the traffic impacts. The *Trip Generation, 7th Edition* published by the Institute of Transportation Engineers estimates 58 peak vehicle trips for a retail center which does not require a Traffic Impact Analysis per HCC 21.76.060.

Finding 6: This project is in harmony with the scale, bulk, coverage, density, and traffic generation of the surrounding Marine Commercial district.

Finding 7: This project will not have an undue harmful effect on the character of the Marine Commercial Spit activity.

g. The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole.

Analysis: The proposed project is designed to meets all current health and safety requirements. There is a variety of Fire Marshal certificates from the 1990's for a variety of buildings and uses. **Staff recommends that applicant provide verification that all the buildings meet State of Alaska Fire Marshal standards based on their current use. This verification to be provided prior to issuance of a Zoning Permit.**

Finding 8: The proposed project will not be detrimental to the health, safety or welfare of the surrounding area or city as a whole.

h. The proposal does or will comply with the applicable regulations and conditions specified in this title for such use.

Analysis: An approved CUP and zoning permit is required.

Finding 9: The proposed project will comply with the applicable regulations.

i. The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan.

Analysis: 1999 Homer Comprehensive Plan Update is the adopted plan that identifies the future vision of the Homer Spit. On page 4 it states, "Manage the land and other resources of the Spit to accommodate its natural processes, while allowing fishing, tourism, and other marine related development, and open space/recreational uses." Action items encourage the mix and cluster of charter offices, boat and gear suppliers and other tourist related activities, construction of walkways and weather-protected picnic areas.

A raised boardwalk accommodates the natural processes and provides walkways. The businesses on the boardwalk promote fishing and tourism and are cluster with other near-by charter office and tourist related activities.

Finding 10: The site meets the goals and objectives of the 1999 Comprehensive Plan.

j. The proposal will comply with all applicable provisions of the Community Design Manual (CDM).

Analysis: Only the Outdoor Furnishing section of the CDM applies. The proposal includes outdoor seating, seasonal planters and hanging baskets.

Finding 11: The proposal provides outdoor furnishings on the boardwalk.

In approving a conditional use, the Commission may impose such conditions on the use as may be deemed necessary to ensure the proposal does and will continue to satisfy the applicable review criteria. Such conditions may include, but are not limited to, one or more of the following:

1. **Special yards and spaces.** No conditions deems necessary.
2. **Fences, walls and screening.** Screening is provided between the individual overnight units.
3. **Surfacing of vehicular ways and parking areas.** Gravel
4. **Street and road dedications and improvements (or bonds).** No conditions deems necessary.
5. **Control of points of vehicular ingress and egress.** No conditions deems necessary.
6. **Special restrictions on signs.** No conditions deems necessary.
7. **Landscaping.** Seasonal planters and hanging baskets will be placed around the boardwalk.
8. **Maintenance of the grounds, buildings, or structures.** No conditions deems necessary.
9. **Control of noise, vibration, odors, lighting or other similar nuisances.** No conditions deems necessary.
10. **Limitation of time for certain activities.** No conditions deems necessary.
11. **A time period within which the proposed use shall be developed and commence operation.** No conditions deems necessary.
12. **A limit on total duration of use or on the term of the permit, or both.** No conditions deems necessary.
13. **More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code. Dimensional requirements may not be altered by conditional use permit when and to the extent other provisions of the zoning code expressly prohibit such alterations by conditional use permit.**

Analysis: A setback variance was granted on May 4, 1989 which allowed the extension of the deck up to the property line. By today's standards a Commercial PUD provides for flexibility for building setbacks, per HCC 21.52.060(d). A Planned Unit Development (PUD) provides flexibility of Dimensional Requirements.

14. **Other conditions necessary to protect the interests of the community and surrounding area, or to protect the health, safety, or welfare of persons residing or working in the vicinity of the subject lot.** No conditions deems necessary.

21.52.060(b)A planned unit development that includes commercial, noncommercial or industrial uses shall comply with the following requirements and conditions:

1. The PUD site shall have direct access to an arterial or collector street.

Finding 12: The project has direct access to Homer Spit Road, a State of Alaska Highway.

2. Utilities, roads and other essential services must be constructed, installed and available for the immediate use of occupants of the PUD.

Finding 13: Utilities and roads exist and are available for use by the occupants.

3. The PUD shall be developed with a unified architectural treatment.

Analysis: The Central Charters Boardwalk will be development in a cohesive marine-nautical theme to blend the natural environment.

Finding 14: The PUD will be developed with a unified architectural treatment.

c. If topographical or other barriers do not provide adequate privacy for uses adjacent to the PUD, the Commission may impose conditions to provide adequate privacy, including without limitation one or both of following requirements:
1. Structures located on the perimeter of the planned development must be set back a distance sufficient to protect the privacy of adjacent uses;

Analysis: All the structures meet the five (5) foot building setback except one building corner, 26 sf of along the west property line. Privacy fences will be built for all five (5) overnight units. The applicant requests an exception to this setback requirement. The adjacent property to the west is zoned Open Space Recreation and the parcel is owned by the City of Homer.

Finding 15: The project does not interfere with the privacy of the adjacent uses which is Open Space Recreational land owned by the City of Homer.

2. Structures on the perimeter must be permanently screened by a fence, wall or planting or other measures sufficient to protect the privacy of adjacent uses.

Analysis: The overnight accommodation building includes a privacy fence along a portion of the west property line.

Finding 16: The structure on the west perimeter provides a permanent fence to protect the privacy of adjacent uses, Open Space Recreation.

d. Dimensional Requirements. Setbacks and distances between buildings within the development shall be at least equivalent to that required by the zoning district in which the PUD is located unless the applicant demonstrates that:

1. A better or more appropriate design can be achieved by not applying the provisions of the zoning district; and

Finding 17: The five (5) unit building could be moved out of the setback area.

2. Adherence to the dimensional requirements of the zoning district is not required in order to protect health, safety and welfare of the occupants of the development and the surrounding area.

Finding 18: Exception to the dimensional requirements does not affect the health safety and welfare of occupants of the development and the surrounding area.

PUBLIC WORKS COMMENTS: No comment.

FIRE DEPARTMENT COMMENTS: Fire Chief Painter – Fire Marshal approval required.

STAFF COMMENTS/RECOMMENDATIONS: *Approval of a Conditional Use Permit requires five yes votes.*

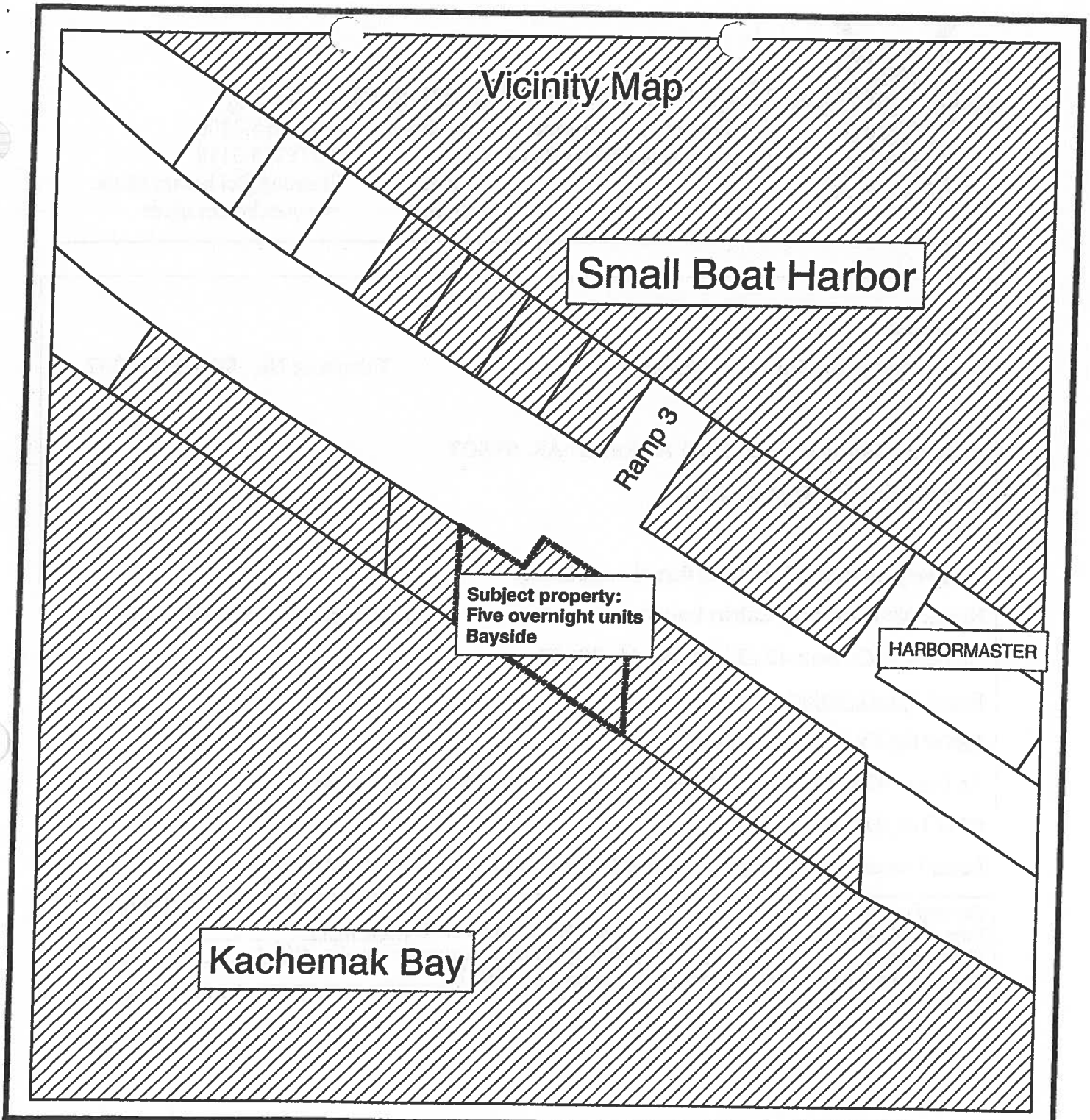
The Planning Commission to approve CUP 11-06 by adopting SR 11-49 with Findings 1–18 which denies the five foot (5') building setback along the west property. The following conditions apply:

1. Prior to issuance of a Zoning Permit for the structures, the applicant to submit an engineer certified Flood Elevation Certificate proving the boardwalk meets Homer's Flood Prone Area code HCC 21.41.
2. Prior to issuance of a Zoning Permit, the applicant to provide verification that all the buildings (existing and proposed) meet State of Alaska Fire Marshal standards based on their current use.

IF the Planning Commission chooses to approve CUP 11-06 and allow for a zero (0) building setback, to allow for 26 sf of building area along the west property line, the HAPC needs to replace Findings 17.

ATTACHMENTS

1. Location map
2. Application
3. Site Plan page 1 of 3
4. North Elevation page 2 of 3
5. South Elevation page 3 of 3



City of Homer
Planning and Zoning Department
4.20.11

CUP 11-06
4241 Homer Spit Road

Shaded area is w/i 300ft notice

0 150 300 Feet

N

Disclaimer:
It is expressly understood the City of Homer, its council, board, departments, employees and agents are not responsible for any errors or omissions contained herein, or deductions, interpretations or conclusions drawn therefrom.

City of Homer Planning & Zoning

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Homer, Alaska 99603-7645

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Web Site www.ci.homer.ak.us

Applicant

Name: Seabright Survey + Design Telephone No.: 907-235-4247

Address:1044 East Road Suite A Homer, AK 99603

Email:seabrightz@gmail.com

Property Owner (if different than the applicant):

Name: William and Catrin Lovett Telephone No.: 907-299-0901

Address: P.O. Box 4243 Homer, AK 99603

Email: inua2@alaska.net

PROPERTY INFORMATION:

Address: 4241 Homer Spit Road Lot Size: 0.88 acres

KPB Tax ID # 181-033-07

Legal Description of Property: Lot 22 Homer Spit Subdivision Amended

For staff use: 26-2106

Date: 4/12/11 Fee submittal: Amount $1000.00

Received by: Date application accepted as complete 4/12/11

Planning Commission Public Hearing Date: May 4, 2011

RECEIVED
APR 12 2011
CITY OF HOMER
PLANNING/ZONING

Conditional Use Permit Application Requirements:

1. A Site Plan
2. Right of Way Access Plan
3. Parking Plan
4. A map showing neighboring lots and a narrative description of the existing uses of all neighboring lots. (Planning can provide a blank map for you to fill in).
5. Completed Application Form
6. Payment of application fee (nonrefundable)
7. Any other information required by code or staff, to review your project

Circle Your Zoning District

	RR	UR	RO	CBD	TCD	GBD	GC1	GC2	MC	MI	OSR	BCWPD
Level 1 Site Plan	x	x	x			x			x		x	x
Level 1 ROW Access Plan	x	x							x		x	
Level 1 Site Development Requirements	x	x										
Level 1 Lighting			x	x	x	x	x	x	x	x		
Level 2 Site Plan			x	x	x		x	x		x		
Level 2 ROW Access Plan			x	x	x		x	x		x		
Level 2 Site Development Requirements			x	x	x	x	x	x	x	x		
Level 3 ROW Access Plan						x						
DAP/SWP questionaire				x	x	x	x	x	x	x		

Circle applicable permits. Planning staff will be glad to assist with these questions.

Yes Are you building or remodeling a commercial structure or multifamily building with more than 3 apartments? If yes, Fire Marshal Certification is required. Status: Formal Fire Marshal approval is pending approval of the CUP/PUD.

No Will your development trigger a Development Activity Plan? Application Status: Not Applicable

No Will your development trigger a Storm water Plan? Application Status: Not Applicable

No Does your site contain wetlands? If yes, Army Corps of Engineers Wetlands Permit is required. Application Status: Not Applicable

Yes Is your development in a floodplain? If yes, a Flood Development Permit is required. Existing Permit is in place

Yes Does your project trigger a Community Design Manual review? We are providing details on the location of outdoor furnishings and planters on the site plan

No Do you need a traffic impact analysis?

No Are there any nonconforming uses or structures on the property?

N/A Have they been formally accepted by the Homer Advisory Planning Commission?

Yes Do you have a state or city driveway permit? Status: Exisiting

Yes Do you have active City water and sewer permits? Status: Existing

1. Currently, how is the property used? Are there buildings on the property? How many square feet? Uses within the building(s)? There are currently five buildings on the existing boardwalk. The existing uses are all seasonal, tourist related retail shops. These include retail shops, a restaurant, charter office and overnight lodging.

   Existing Building Square Footages:

   Captain Patties 1815 s.f.

   Sea Lion Gallery 1248 s.f.

   Alpaca Sweaters 320 s.f.

   Central Charters 4219 s.f.

   The Crab Shack 440 s.f

   Total existing built square footage: 8042 s.f.

2. What is the proposed use of the property? How do you intend to develop the property? The proposed development of the property is primarily the addition of five fully equipped cabins for overnight accommodations and an addition to the existing Captain Patties restaurant.

   Proposed New building Square Footages:

   Addition to Captain Patties 2048 s.f.

   New overnight lodging (5 cabins) 1776 s.f.

   Total proposed new building square footage: 3824 s.f.

   Total combined building square footage: 11,866 s.f.

   Both of these improvements will be constructed on new boardwalk approved in March, 2010 and currently under construction. This new boardwalk is engineered and designed to meet the most current flood zone requirements. The elevation of the new boardwalk will be approximately 45" above the existing boardwalk. There will be steps and a universally accessible ramp to provide access between the two boardwalks.

Care has been t n to create a design for the propos new development that is harmonious with the existing buildings on this boardwalk and the overall flavor of the Spit boardwalk developments in general. Along with the proposed new construction, there will be a variety of upgrades and enhancements of the existing buildings. The intention is to continue develop the boardwalk into a cohesive and attractive setting that provides a variety of products and services to visitors and locals alike.

Attention has been given to the street side view and the design keeps the new roofline lower than the existing buildings. The views from the proposed new buildings look out over the ocean and outer bay. This creates a unique dining experience for guests at the restaurant, especially in the long evenings of summer. The cabins are also oriented towards the outer bay. They have privacy fences between each cabin as well adjacent to the public spaces. Access to the cabins and the restaurant addition is by a 5' wide walkway. There is also a 5' wide deck in front of the cabins. There is also a mechanical room on the northwesterly end of the deck that will include a boiler system for the cabins, laundry and washing facilities and an universally accessible bathroom.

The proposed buildings will be sided in a wooden board and batten style, similar to the existing Central Charters building. The color palette will include muted grays and blues. This will help the buildings blend nicely together and with the surrounding landscape.

CONDITIONAL USE INFORMATION: (Please use additional sheet(s), if necessary)

a. What code citation authorizes each proposed use and structure by conditional use permit?
HCC 21.28.030(a) Restaurants and drinking establishments
HCC 21.28.030(b) Hotels and motels (six or more units)
HCC 21.28.030(i) More than one building containing a permitted principal use on a lot.
HCC 21.28.030(j) Planned Unit Development

b. Describe how the proposed uses(s) and structures(s) are compatible with the purpose of the zoning district. The proposed development is an upgrade of an existing boardwalk development. The new buildings are examples of long term investment in Homer Spit tourism. The specific uses are compatible with existing uses on this boardwalk and in the zoning district in general. The expansion of

Captain Patties Restaurant provides more tables with dramatic views of Kachemak Bay. The new cabins will provide overnight lodging that is of a high quality and with the same great views. These improvements exemplify the best case scenario in meeting the goals of this zoning district.

c. How will your proposed project affect adjoining property values? The adjacent property values will likely experience positive effects from this improvement. "A rising tide raises all boats."

d. How is your proposal compatible with existing uses of the surrounding land? The proposed development is an improvement of the long established Central Charters Boardwalk development. The expansion of the restaurant and availability of additional lodging creates more activity and interest in the immediate area of retail shops and tourist oriented services.

e. Are/will public services adequate to serve the proposed uses and structures? Yes. City of Homer sewer and water mains front the property.

f. How will the development affect the harmony in scale, bulk, coverage and density upon the desirable neighborhood character, and will the generation of traffic and the capacity of surrounding streets and roads be negatively affected? The existing Central Charters Boardwalk is a landmark on the Homer Spit. The scale and orientation of the proposed improvements are both in harmony with this boardwalk and the surrounding character of this area of the Spit. The improvements are intended to meet the existing demand for services during the short summer tourist season.

g. Will your proposal be detrimental to the health, safety or welfare of the surrounding area or the city as a whole? This development is designed to meet all current requirements in health and safety. The raised boardwalk is a good example. The additional height establishes the revised FEMA requirement for elevation of boardwalks on the Spit. All future improvements or new development of boardwalks will have to meet this standard. The tsunami evacuation plan for the Homer Spit will be posted prominently in all of the businesses and in each of the overnight cabins.

h. How does your project relate to the goals of the Comprehensive Plan?
The 2006 Town Center Plan and the 2008 Comprehensive Plan are online at: http://www.ci.homer.ak.us/documents/planning. We are advised that the Comprehensive Plan is not yet online and to leave this section blank.

i. The Planning Commission may require you to make some special improvements. Are you planning on doing any of the following, or do you have suggestions on special improvements you would be willing to make? **(circle each answer)**

1. Yes Special yards and spaces. The boardwalk is a special space and is designed to provide viewing areas and outdoor seating.
2. Yes Fences, walls and screening. Fencing and screening for privacy are being planned for this project.
3. No Surfacing of parking areas. The project scope proposes increasing the amount of parking within the R/W adjacent to the property by 4 spaces.
4. N/A Street and road dedications and improvements (or bonds).
5. N/A Control of points of vehicular ingress & egress.
6. Yes Special provisions on signs. We are participating in ongoing discussions and workshops regarding signage on the Homer Spit.
7. Yes Landscaping. There will be areas of seasonal planters and hanging baskets placed around the boardwalk.
8. Yes Maintenance of the grounds, buildings, or structures. Maintenance of the existing buildings and boardwalk will be ongoing.
9. N/A Control of smoke, odors, gases, particulate matters, noise, vibration, heat, glare, water and solid waste pollution, dangerous materials, material and equipment storage, or other similar nuisances.
10. N/A Time for certain activities.
11. Yes A time period within which the proposed use shall be developed.
12. No A limit on total duration of use.
13. Yes Special dimensional requirements such as lot area, setbacks, building height. The proposed buildings are designed to minimize visual impact and there only a minor area of setback affected by this improvement.
14. Yes Other conditions deemed necessary to protect the interest of the community.

PARKING

1. How many parking spaces are required for your development? 5
   If more than 24 spaces are required see HCC 21.50.030(f)(1)(b).
2. How many spaces are shown on your parking plan? 8 spaces are shown on the property and 16 are located in the R/W
3. Are you requesting any reductions? No

PUD HCC 21.52.060(b)

b. A planned unit development that includes commercial, noncommercial or industrial uses shall comply with the following requirements and conditions:

1. The PUD site shall have direct access to an arterial or a collector street. The site is directly accessed by the Homer Spit Road, a State maintained highway.
2. Utilities, roads and other essential services must be constructed, installed and available for the immediate use of occupants of the P.U.D. Public sewer and water is installed. Fire protection is available.

3. The P.U.D. shall be developed with a unified architectural treatment. The marine environment is the theme of the boardwalk and the proposed development will serve to enhance the existing buildings. Upgrades and improvements of the existing buildings will also increase the overall cohesiveness on the Central Charters boardwalk.

c. If topographical or other barriers do not provide adequate privacy for uses adjacent to the P.U.D., the Commision may impose conditions to provide adequate privacy, including without limitation one or both of the following requirements:

1. Structures located on the perimeter of the planned unit development must be setback a distance sufficient to protect the privacy of adjacent uses. The Central Charters boardwalk was previously granted a setback variance on May 4, 1989. This same variance has also been applied in the Floodplain Development Permit granted on March 1, 2010. Due consideration has been given to privacy concerns, especially with the overnight lodging proposed for this project. We have designed these cabins with privacy fences and without windows on the side walls. The one cabin that falls partially within the setback does not have any impact on the privacy of the adjacent vacant ocean frontage owned by the City of Homer.

2. Structures on the perimeter must be permanently screened by a fence, wall or planting or other measures sufficient to protect the privacy of adjacent uses. The side wall of buildings adjacent to the vacant ocean frontage is privatized by walls and seasonal plantings. There is no privacy issue with the property to the southeast.

d. Dimensional Requirements. Setbacks and distances between buildings within the development shall be at least equivalent to that required by the zoning district in which the P.U.D. is located unless the applicant demonstrates that:

1. A better or more appropriate design can be achieved by not applying the provisions of the zoning district. The existing building setbacks to the R/W are approved by variance granted May 4, 1989. These dimensions are noted on the site plan. The request for a variance for setback on the northwest side affects a corner of one cabin.

2. Adherence to the dimensional requirements of the zoning district is not required in order to protect health, safety and welfare of the occupants of the development and the surrounding area. We have provided for accessibility and open areas on the new boardwalk. This allows movement throughout the entire area. The walkways are a minimum of 5' wide and the ramp meets the standards for universal accessibility.

e. The site development standards of HCC 21.50.030 shall be met. We believe these requirements are fully met. The beachfront location is well drained. The existing site is developed. New site work will be limited to improving additional parking in the R?W for public use.

Include a site plan, drawn to a scale of not less than 1" = 20' which shows allow existing and proposed structures, clearing, fill, vegetation and drainage. We have included various graphic renderings of the project including:

- A site plan detailing the existing and proposed structures as well as the parking plan and existing ingress/egress to the Homer Spit Road. This plan also details the adjacent property and uses.

- Profile views of the proposed project from both the roadway side and the ocean side of the property.

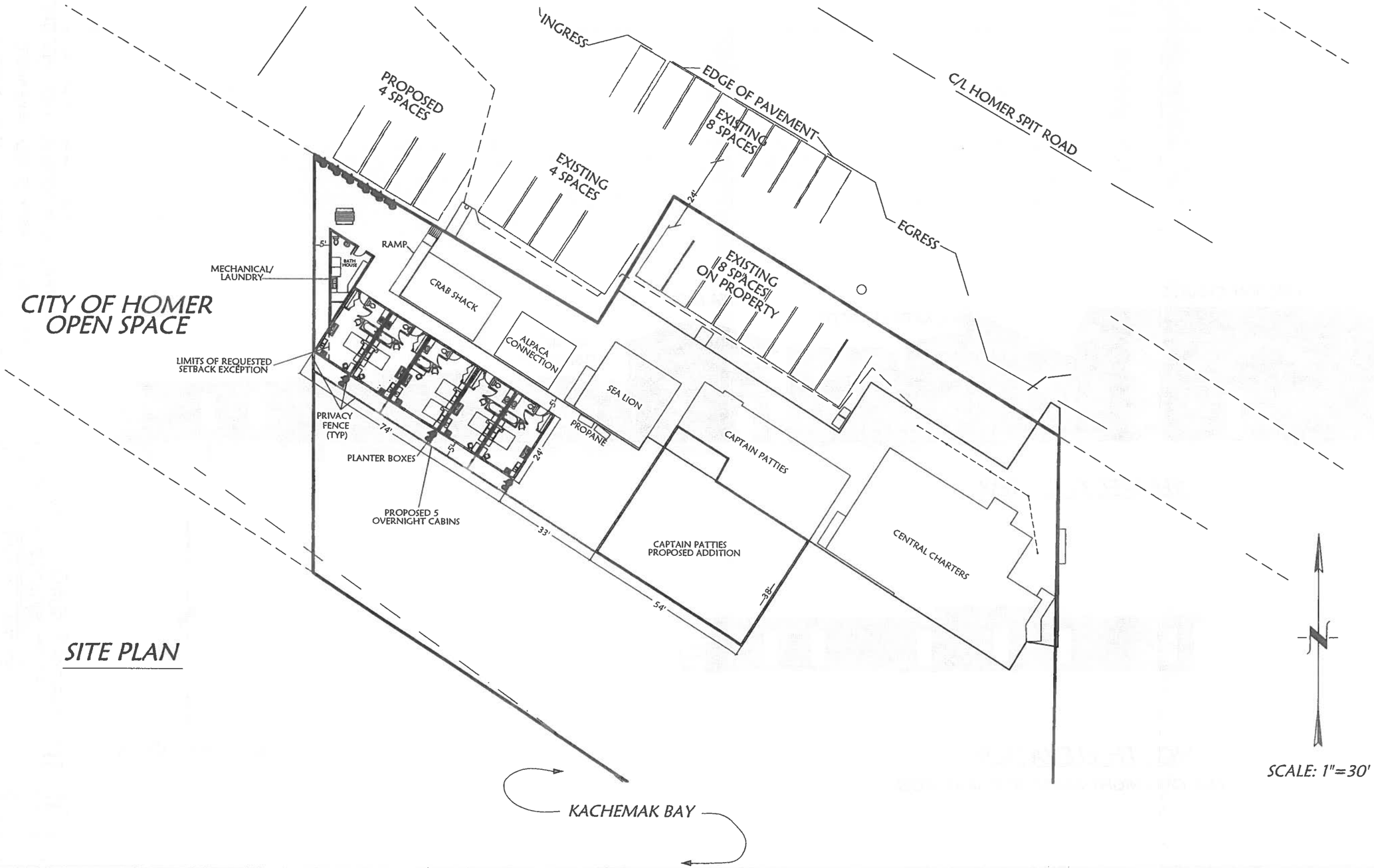
- An overview of the larger surrounding area that shows the neighborhood in which the Central Charters Boardwalk is an integral part.

I hereby certify that the above statements and other information submitted are true and accurate to the best of my knowledge, and that I, as applicant, have the following legal interest in the property:

CIRCLE ONE: Owner of record Lessee Contract purchaser

Applicant signature: Kenton Bloom Date: 4/11/11

Property Owner's signature: Cathy L. Lovett Date: 4-11-11



SITE PLAN

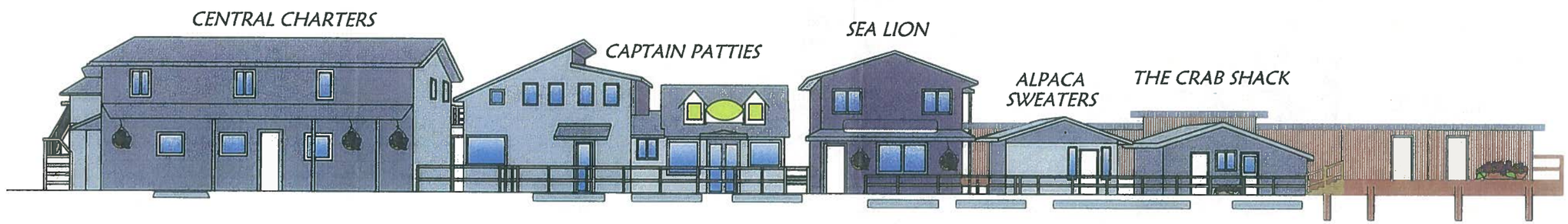
CENTRAL CHARTERS BOARDWALK SITE PLAN
LOT 22, HOMER SPIT SUBD. AMENDED
T. 7S., R. 13W., SEC. 1., S.M. ALASKA

SEABRIGHT SURVEY + DESIGN
1044 EAST ROAD, SUITE A, HOMER, ALASKA 99603
(907) 235-4247

CENTRAL CHARTERS
P.O. BOX 4243 HOMER, ALASKA 99603
(907) XXX-XXXX

DATE APRIL 2011
DRAWN
CHECKED KB

SHEET NO.
1 OF 3
SITE PLAN



PERSPECTIVE VIEW

NORTH ELEVATION

FIVE OVERNIGHT CABINS AND WASHROOM

SCALE: NOT TO SCALE

CENTRAL CHARTERS CONCEPTUAL PERSPECTIVE
LOT 22, HOMER SPIT SUBD. AMENDED
T. 7S., R. 13W., SEC. 1., S.M. ALASKA

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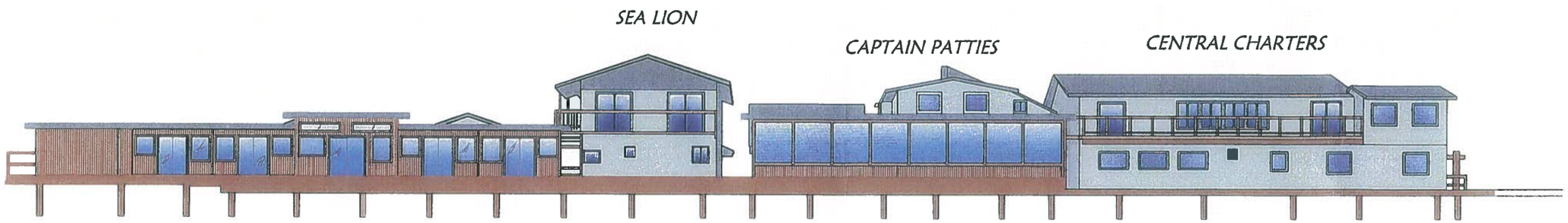
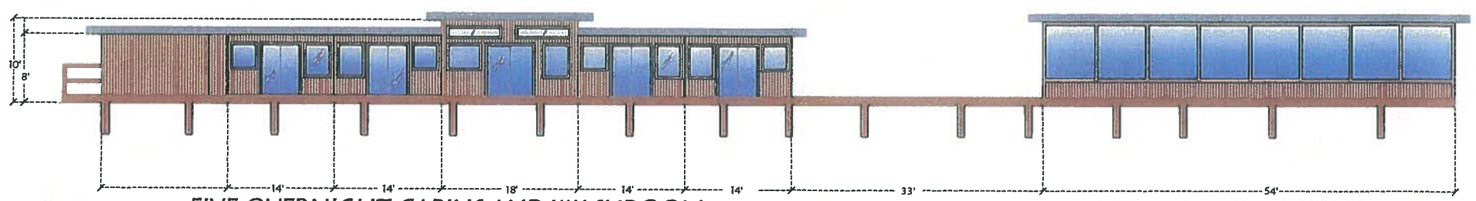
(907) XXX-XXXX

DATE APRIL 2011
DRAWN
CHECKED KB

SHEET NO.
2 OF 3
NORTH ELEV.



PERSPECTIVE VIEW



SOUTH ELEVATION

SCALE: NOT TO SCALE

CENTRAL CHARTERS CONCEPTUAL PERSPECTIVE
LOT 22, HOMER SPIT SUBD. AMENDED
T. 7S., R. 13W., SEC. 1., S.M. ALASKA

SEABRIGHT SURVEY + DESIGN
1044 EAST ROAD, SUITE A, HOMER, ALASKA 99603
(907) 235-4247

CENTRAL CHARTERS
P.O. BOX 4243 HOMER, ALASKA 99603
(907) XXX-XXXX

DATE APRIL 2011
DRAWN
CHECKED KB

SHEET NO.
3 OF 3
SOUTH ELEV.

Kathy Corp

From: "David Allen Brauner" <drbrauner@alaska.net>
To: <kcorp@alaska.net>
Cc: <drbrauner@alaska.net>
Sent: Tuesday, June 07, 2011 2:13 PM
To Homer Planning Commission

I am writing In opposition of Conditional Use Permit at 4241 Homer Spit Rd , Central Charters Boardwalk, for HCC s 2.28.030, 21.28. 30(i), 21.28.030(j), 21.28.040(d)

I would like to begin with a little background information. My wife Jana and I purchased the old liquor store from Mel Strydom on March 10, 2011. During our evaluation process we spoke several times with William Lovett. At none of these times did Mr Lovett mention his plans for his boardwalk expansion behind our building. He stated in fact that he would not spend one "one thin dime" to up grade the electrical to meet our building's needs.
Although not the concern of this board I thought you should be informed about the misrepresentation and unethical behavior of Mr Lovett.

After extensive renovation we opened our Alaska Crab Shack restaurant on May 6th with unobstructed views of Kachemak bay. Every day our customers comment about the magnificent view out our back windows.

We never received any notice of this expansion plan. We found out about it from our neighbor a week after we opened for business.

This project will completely obliterate our view. It will negatively impact the dining experience within our restaurant and will certainly diminish the value of our building.
The comment about a "rising tide" will raise our property value is farcical.

The proposal repeatedly states the importance of the view to the value of Central Charters and Captain Patties. How can this not be true for our business?

There is insufficient parking currently. The addition of further parking demand for 5 additional hotel rooms makes no sense. There is no viable parking plan for the increased demand by the restaurant and hotel rooms.

I hope the Commission can see that this an I'll advised plan and that in an attempt to increase the vitality to the Spit they will be cause substantial damage to our business.

Please do not approve this plan

David a Brauner DO
JANA BRAUNER
June 7, 2011

RECEIVED
JUN - 8 2011
CITY OF HOMER
PLANNING/ZONING

To : Planning Commissioners

From : Frank Griswold

RE : Proposed CUP for Homer Spit Boardwalk

Please consider this training article written by Attorney Lee Sharp in 1995.

Street Vacations and the Public Trust

1995

The Borough holds the public interest in patent and public use easements and other dedicated rights-of-way in trust for street purposes and may take only such action with respect to these property interests as are in the public interest. Vacation of a public right-of-way to accommodate a permanent, private encroachment into the right-of-way or to eliminate a structure set back violation is done for a private interest, and not a public interest. Further, a permanent encroachment into the right-of-way that interferes with the use of the full length and width of a right-of-way for its intended purpose is unlawful and a public nuisance to be abated by the municipality. In some cases, the courts have ruled that a private person may bring suit to require a municipality to undertake the abatement action.

When the location of structures on the property is the reason for a vacation request, it is clear that the vacation, if granted, would be solely for a private purpose. Granting such a vacation would be a breach of the trust and illegal.

Although, to date, the courts in Alaska have not had an opportunity to address the public trust aspects of public rights-of-way, the legal principles involved were recognized and established long ago in other states. In Perillis v. Mayor and City Council of Baltimore, 57 Atl.2d 341 (MD 1948), the Maryland Court of Appeals stated that abutting property owners were entitled to use dedicated streets from end-to-end and the full width, side-to-side. It also stated that even when an abutter gives up property for improvement of public access, there must still be an examination to see whether an associated vacation itself promotes the public interest.

In State v. Oklahoma City, 525 P.2d 612 (OK 1973), the Oklahoma Supreme Court restated the rule that dedicated ways are held in trust for the public and that such trustees have no authority to sell or give away the public streets. A vacation to serve the convenience of a private individual was held to be improper.

In Jackson v. Moody, 432 So.2d 509 (AL 1983), the Alabama Supreme Court had before it the vacation of an alley associated with beach access. In this case, the alley did not even provide beach access to the property owner who brought suit. In fact, at most, the alley provided a place for the complaining property owner to park his car when he went to the beach. His access to the beach was not impaired in any way by the vacation of the alleys. Further, the complaining property owner did not front on the actual beach access, but fronted on a road that connected to the beach access. The Alabama court made several instructive observations regarding the vacations. It noted that the principles that apply to the vacation of access to a system of public roads applies as well to vacation

of access of waterways. It also noted that if a person purchases property based on a map showing more than one convenient way of access, the property owner has a right to continued multiple access. It then observed that a right of access to water adds to property values and that any vacation that reduces the convenience of that access cannot be permitted.

With respect to encroachments and private use of public rights-of-way, the courts have almost universally denied the right of a person to make a permanent private use of a right-of-way. In Bates v. Mueller, 413 S.W.2d 853 (MO 1967), the Missouri Court of Appeals had before it an attempt by an abutting owner to fence in 10 feet of a public alley which had not been used by the public. The court noted that such non-use by the public did not constitute an abandonment and that an abutting owner does not have the right to make a permanent, exclusive use of any part of the right-of-way.

In Boise City v. Sinsel, 241 P.2d 173 (ID 1952), the Idaho Supreme Court had before it the problem of a structure that had been constructed in the street pursuant to a city building permit many years previously. The Court reiterated the principle that streets belong to the public and are held by the municipality in trust for the use of the public from side-to-side and end-to-end. It held that without express legislative authority, a city was without power to grant a permit to erect or maintain a permanent obstruction in a public street for a purely private purpose. It ruled that a person making such a private use of a street, whether with or without a permit, does so at his own risk. Even when the obstruction is built pursuant to a permit, the Court held that the person holding a permit to install an obstruction in a public street for a private purpose acquires no property or contractual right by virtue of the permit. It also ruled that a permanent encroachment into the streets cannot give rise to any rights by prescription (adverse possession).

In the Perellis case, a property owner had apparently constructed a storm door that extended only 53 inches into a 20 foot alley. The owner proposed to convey to the city other land that it was thought would provide better access and improve traffic flow in the area in exchange for vacating the 20 foot alley way. The property owner agreed to bear all the expenses in opening the new way, and the city provided testimony showing that there would be numerous public benefits under the proposal. There is also testimony that the vacation would impair the access to some of the abutting property owners presently enjoyed. The court stated:

> The fact that another means of access is provided, as good or better for some purposes, is not controlling. The decisions in [prior cases] did not turn upon a balance between damage from loss or impairment of the existing means of access and benefit from any alternative means. The private purpose vitiated the entire transaction as to the property owners damaged.
>
> .... The plan is supported by the city authorities on the ground that it will provide access for trucks and other vehicles somewhat better than existing access, but primarily on the ground that the entire cost will be borne by the

> proponents of the change, rather than by the taxpayers in general, or by those specially assessed for benefits.
>
> Cost is always a proper consideration and a particular choice of location is not to be condemned merely because persons specially benefited may agree to pay the cost in whole or in part. But the choice must be made upon considerations of public benefit and not by barter and sale to private interest, otherwise the location of highways would be in the hands of the highest bidders.

Perellis, supra at 345-46. The court went on to invalidate the vacation because the vacation itself was for the private use and advantage of the requesting property owner.

When a structure is determined to be encroaching into the front yard setback by, say, 3 feet or so, one approach owners of the offending structure often take is to request a vacation of 3 feet of the street directly in front of the structure. If the vacation is granted, the setback violation is eliminated. The problem with this approach is that the Borough (the trustee) has given away a part of its public trust street property for a private, non street purpose. This is a clear violation of its trust.

On occasion, the property owner supposedly gives the Borough a road maintenance and snow storage easement in the area that is vacated. This conveyance to the Borough is viewed as a *quid pro quo* or as compensation for the vacation. This arrangement is flawed for two reasons. As noted in the Perellis case, the vacation must be justified upon consideration of public interest, and not barter and sale to or for private interest. Further, because the Borough had many street use rights, including what amounted to a maintenance and snow storage easement as a part of the street right-of-way before the vacation, receiving back a small part of what it previously had can hardly be called adequate (or even any) compensation for what it gave away with the vacation (even if the Borough could barter away the right-of-way).

City of Homer
Planning & Zoning
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Fax *(907) 235-3118*
E-mail *Planning@ci.homer.ak.us*
Web Site *www.ci.homer.ak.us*

STAFF REPORT PL 11-71

TO: Homer Advisory Planning Commission
FROM: Rick Abboud, City Planner
MEETING: June 15, 2011
SUBJECT: Draft Ordinance amending Chapter 21.34 Conservation District

GENERAL INFORMATION:

After review at the June 1st Regular Meeting the HAPC recommended the ordinance be presented for a public hearing.

STAFF COMMENTS/RECOMMENDATIONS:

Planning Commission to receive public comments and forward to the City Council for approval.

ATTACHMENTS

1. 5.10.11 Attorney Review Draft Ordinance

CITY OF HOMER
HOMER, ALASKA

Planning

ORDINANCE 11-

AN ORDINANCE OF THE CITY COUNCIL OF HOMER, ALASKA, AMENDING HOMER CITY CODE 21.34.010, PURPOSE; HOMER CITY CODE 21.24.020, PERMITTED USES; AND HOMER CITY CODE 21.34.030, CONDITIONAL USES; REGARDING THE PURPOSE AND USES PERMITTED IN THE CONSERVATION ZONING DISTRICT.

THE CITY OF HOMER ORDAINS:

Section 1. Homer City Code 21.34.010, Purpose, is amended to read as follows:

21.34.010 Purpose. The ~~purposes of the~~ conservation district **is applied to sensitive** ~~are primarily to identify, protect and enhance those~~ public lands that **are** ~~have been identified by state or federal agencies or the City of Homer as habitat~~ critical to the maintenance of fish and wildlife resources, **protect important watershed areas, or serve other key environmental functions. Private lands meeting the same criteria also may be included in the district with the consent of the owner. These lands are to be maintained in an undisturbed and natural state, except for** ~~and secondarily including~~ parks **with passive** ~~whose~~ recreation activities and facilities ~~are passive in nature,~~ (e.g., ~~those activities that include~~ wildlife viewing, nature walks, educational and interpretive uses) and other uses that do not change the character of the land or disrupt fish and wildlife. **Passive recreation activities are secondary to habitat protection and enhancement.**

Section 2. Homer City Code 21.34.020, Permitted uses, is amended to read as follows:

21.34.020 Permitted uses. The following uses are permitted outright in the conservation district:

a. Fish and wildlife habitat protection and enhancement.~~; and~~
b. Marine-life and wildlife sanctuary or preserve.

Section 3. Homer City Code 21.34.030, Conditional uses, is amended to read as follows:

21.34.030 Conditional uses. The following uses are conditionally permitted in the conservation district when authorized by conditional use permit issued in accordance with HCC Chapter 21.71:

a. Pedestrian trails, including boardwalks and viewing platforms.~~; and~~
b. Educational and interpretive displays and signs.~~; and~~

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

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c. **Public utility facilities and structures that cannot be reasonably located in another district.**

d. Parking lots incidental to a permitted or conditionally permitted use.~~; and~~

~~e~~d. Other conservation uses that will enhance the conservation district, approved by the Planning Commission, provided, however, a finding of no adverse impact to the integrity of the fish and wildlife resources and habitat must be found.

Section 4. This Ordinance is of a permanent and general character and shall be included in the City Code.

ENACTED BY THE CITY COUNCIL OF HOMER, ALASKA, this _____ day of _____ 2011.

CITY OF HOMER

_____
JAMES C. HORNADAY, MAYOR

ATTEST:

_____
JO JOHNSON, CMC, CITY CLERK

YES:
NO:
ABSTAIN:
ABSENT:

First Reading:
Public Hearing:
Second Reading:
Effective Date:

Reviewed and approved as to form:

_____
Walt E. Wrede, City Manager
Date: _____

_____
Thomas F. Klinkner, City Attorney
Date: _____

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

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Web Site *www.ci.homer.ak.us*

STAFF REPORT PL 11-60

TO: Homer Advisory Planning Commission
FROM: Rick Abboud, City Planner
MEETING: May 18, 2011, June 1, 2011
SUBJECT: Draft Ordinance amending Chapter 21.34 Conservation District

GENERAL INFORMATION:

Staff has incorporated changes and had the attorney review and amend the draft ordinance. Changes include a different positioning relating to public land and private lands with consent of owner, the elimination of the reference of public utilities in the purpose statement and the dimension limits found in the conditional use of public utility facility and structures that cannot be reasonably located in another district.

STAFF COMMENTS/RECOMMENDATIONS:

Planning Commission discuss the draft ordinance, review the amendments and recommend public hearing on June 1st.

ATTACHMENTS

1. 5.10.11 Attorney Review Draft Ordinance

CITY OF HOMER
HOMER, ALASKA

Planning

ORDINANCE 11-

AN ORDINANCE OF THE CITY COUNCIL OF HOMER, ALASKA, AMENDING HOMER CITY CODE 21.34.010, PURPOSE; HOMER CITY CODE 21.24.020, PERMITTED USES; AND HOMER CITY CODE 21.34.030, CONDITIONAL USES; REGARDING THE PURPOSE AND USES PERMITTED IN THE CONSERVATION ZONING DISTRICT.

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b. Educational and interpretive displays and signs.~~; and~~

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

c. **Public utility facilities and structures that cannot be reasonably located in another district.**

d. Parking lots incidental to a permitted or conditionally permitted use**.**~~; and~~

e~~d~~. Other conservation uses that will enhance the conservation district, approved by the Planning Commission, provided, however, a finding of no adverse impact to the integrity of the fish and wildlife resources and habitat must be found.

Section 4. This Ordinance is of a permanent and general character and shall be included in the City Code.

ENACTED BY THE CITY COUNCIL OF HOMER, ALASKA, this _____ day of _____ 2011.

CITY OF HOMER

_____
JAMES C. HORNADAY, MAYOR

ATTEST:

_____
JO JOHNSON, CMC, CITY CLERK

YES:
NO:
ABSTAIN:
ABSENT:

First Reading:
Public Hearing:
Second Reading:
Effective Date:

Reviewed and approved as to form:

_____
Walt E. Wrede, City Manager
Date: _____

_____
Thomas F. Klinkner, City Attorney
Date: _____

[Bold and underlined added. ~~Deleted language stricken through.~~]

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Planning & Zoning

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STAFF REPORT PL 11-68

TO: Homer Advisory Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Dotti Harness-Foster, Planning Technician
MEETING: June 15, 2011
SUBJECT: DRAFT sign ordinance

After our well-meant intentions of simplifying the sign code to make compliance on the spit a reality, we sent it off to the attorney and ended up with more than we expected (and we did expect some modification). I received the ordinance from the attorney and put it on the agenda, then took a closer look and figured that staff needed to work with the attorney to explain some of the reasoning behind some of the existing code provisions. At this time, the attorney is on vacation and unable to consider additional refinements. So instead of pulling it from the agenda, I made a few adjustments and thought that the Planning Commission could have a look prior to a final revision. It is my intent to have a logic check with the commission and work to get a final draft for the next meeting. The most significant topics for discussion in my estimation revolve around two particular items:

1. *The definition of banner – The definition found in lines 38-41. This effectively eliminates banners, so do we really need it at all? Wouldn't this just be a sign and then a non-rigid banner be a flag?*
2. *Removal of the exemption for signs existing prior to February 11, 1985, lines 282 – 283. This is effectively the exception for signs over 10 feet in height. Are we ready to require these to be removed? Other concerns regarding amnesty are discussed below.*

Another item we thought needed to go was provisions for permitting temporary signs in the rights-of-way. After thinking about it, most all of the desire to put up such a sign is found in State ROW, a place where we really do not have the authority to grant. Additionally, we would not want to deal with election signs in the ROW since the attorney thought that reference to content could be suspect.

Because of the complicity of the sign ordinance in general, we do not address all scenarios in this staff report. Although we believe that we have had enough internal discussion to explain the logic regarding most all scenarios. If you are in need of clarification of how the ordinance treats or responds to a specific scenario and are not seeing it, PLEASE contact us prior to the meeting, so we may explain or research it. RICK

Before the City Attorney left on vacation he submitted a draft sign ordinance. We have not had the opportunity to edit this draft with him, so at first glance the **bold, ~~strike throughs~~** and balloons are overwhelming. This draft ordinance has blossomed beyond Spit signage for multiple buildings, but in the end the recommended changes simplify the code by eliminating duplication and contradiction. Many of the changes deal with semantics and the First Amendment right to free speech by seeking content-neutral provisions.

Staff remains concerned about the complete ban on commercial temporary signs. A compromise by allowing **commercial temporary signs during the hours the business is open, with a maximum of 12 hours per day** would reflect the message in the Chamber's June newsletter which proclaims, "We encourage businesses to place sandwich rds or signage in front of their businesses to encourage (cruise) passengers to stop in."

In the draft, "iR" balloons are the attorneys comments, "DH" balloons are Dotti Harness-Foster comments.

Line 27-143 cleans up sign definition.
Line 148-155 changes the abbreviation for Table 1 more readable.
Line 157-161 allows temporary signs in the residential districts.
Line 171-179 establishes the sign allowance per principal building
Line 208-213 broadens those who can apply for a sign permit.
Line 261 treats electoral signs as any temporary sign by repealing HCC 21.60.095 Electoral signs.
Line 281- 2 Clarification is needed on the timeline to "amortize" existing signs.

It's our understanding that:

- Temporary, portable sandwich board would need to comply upon adoption, or January 1st, 20xx.
- Building signs on multiple buildings would need to comply within three years, or January 1st, 20xx.
- There were no changes to the amortization of any other signs.

Line 331-352 authorizes Planning staff to remove temporary sign in ROWs.
Line 338-346 requires that an appeal be filed within 7 days with the HAPC being the final decision from the city.

With your comments our goal is to have a FINAL DRAFT for the July 20th HAPC meeting. Only then can we move forward for public comment.

STAFF RECOMMENDS:

1. Review and submit questions in advance to Dotti at dharness@ci.homer.ak.us or by calling 235-3106.
2. Comment on other provisions.

Att: Draft sign ordinance

CITY OF HOMER
HOMER, ALASKA

Planning

ORDINANCE 11-

AN ORDINANCE OF THE CITY COUNCIL OF HOMER, ALASKA, AMENDING HOMER CITY CODE 21.60.040, DEFINITIONS; HOMER CITY CODE 21.60.060, SIGNS ALLOWED ON PRIVATE PROPERTY WITH AND WITHOUT PERMITS; HOMER CITY CODE 21.60.070, PERMITS REQUIRED; HOMER CITY CODE 21.60.090, SIGNS IN THE PUBLIC RIGHT-OF-WAY; HOMER CITY CODE 21.60.100, SIGNS EXEMPT FROM REGULATION UNDER THIS CHAPTER; HOMER CITY CODE 21.60.130, TEMPORARY SIGNS-PRIVATE PROPERTY; HOMER CITY CODE 21.60.150, TIME OF COMPLIANCE-NONCONFORMING SIGNS AND SIGNS WITHOUT PERMITS; AND HOMER CITY CODE 21.60.170, ENFORCEMENT AND REMEDIES; AND REPEALING HOMER CITY CODE 21.60.095, ELECTORAL SIGNS; HOMER CITY CODE 21.60.120, GENERAL PERMIT PROCEDURES; HOMER CITY CODE 21.60.140, TEMPORARY SIGNS-PUBLIC RIGHTS-OF-WAY; AND HOMER CITY CODE 21.60.160, VIOLATIONS; REGARDING THE REGULATION OF SIGNS.

THE CITY OF HOMER ORDAINS:

Section 1. Homer City Code 21.60.040 Definitions, is amended to read as follows:

Comment [RA1]: Most changes to definitions are stylistic, where they improve substance I have provided an explanation.

21.60.040 Definitions. **In** ~~For the purpose of~~ this chapter, **in addition to terms defined in HCC §21.03.040,** the following words and phrases shall have the meanings set forth in this **section** ~~chapter~~.

"Abandoned sign~~.~~" **means a** ~~Any~~ sign ~~containing copy~~ that refers to a business or activity that is no longer being conducted or pursued.

"Animated sign." **means a** ~~Any~~ sign that uses flashing lights, movement or change of lighting to depict action or create a special effect or scene, **or that includes characters, letters, or illustrations whose message changes at least one time per day; provided that a changing**~~. A sign on which the only copy that changes is an~~ electronic or mechanical indication of time or temperature **does not cause a sign to be** ~~shall be considered a time and temperature portion of a sign and not~~ an animated sign ~~for purposes of this chapter~~.

"Banner." ~~means a Any sign of lightweight fabric or similar material that is attached to a rigid structure either at each corner or along its entire circumference, mounted to a post or a building by a permanent frame. Any banner not in compliance with HCC 21.60.090 shall not be considered a banner.~~

Comment [RA2]: Which is stunning for advertising. Consider concept from banner.

Comment [DH3]: Banners are temporary signs, and are treated differently under the sign code. Consider adding a definition for "rigid structure" and then treat it differently.

"Beacon~~.~~" **means a** ~~Any~~ sign **that emits** ~~with~~ one or more beams **of light**, capable of being directed in **one or more** ~~any director or~~ directions or ~~capable of being~~ rotated or moved.

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

C:\Users\dharness\Documents\DRAFT sign code tweeked for 6.15.11 dhf 2.docx

"Building marker~~.~~" **means a wall** ~~Any~~ sign cut or etched into masonry, bronze, or similar material that includes only the building name, date of construction, or historical data on historic site.

"Building sign~~.~~" **means a** ~~Any~~ sign **that is** attached to **and supported by** any part of a building, **but that is not a freestanding sign** unless it is supported in whole or in part by structures or supports that are placed on, or anchored in, the ground and that are independent from any building or other structure.

"Changeable copy sign." **means a** ~~A~~ sign **that includes** ~~or portion thereof with~~ characters, letters, or illustrations that can be changed or rearranged without altering the face or the surface of the sign**, and**~~. A sign~~ on which the message changes **less often than** ~~more~~ than one time per day ~~shall be considered an animated sign and not a changeable copy sign for purposes of this chapter.~~**; provided that a** ~~A~~ **changing** ~~sign on which the only copy that changes is an~~ electronic or mechanical indication of time or temperature **does not cause a sign to be** ~~shall be considered a time and temperature portion of a sign and not~~ a changeable copy sign ~~for purposes of this chapter~~.

"Commercial message~~.~~" **means letters, graphic material or a combination thereof** ~~Any sign wording, logo, or other representation~~ that, directly or indirectly, names, advertises, or calls attention to a business, brand, product, service or other commercial activity.

~~"Department." The Planning and Zoning division of department of the City.~~

~~"Electoral sign." Any sign used for the purpose of advertising or promoting a political party, or the election or defeat of a candidate, initiative, referendum or proposition at an election.~~

"Flag~~.~~" **means the flag** ~~Flags~~ of the United States, the State, the City, **a** foreign nations having diplomatic relations with the United States, and any other flag adopted or sanctioned by an elected legislative body of competent jurisdiction. ~~A flag shall not be considered a banner for purposes of this chapter.~~

"Freestanding sign~~.~~" **means a** ~~Any~~ sign supported, in whole or in part, by structures or supports that are placed on, or anchored in, the ground and that are independent from any building or other structure.

"Ground sign~~.~~" **means** ~~A ground sign is~~ a freestanding sign that is placed directly on the ground **with** having or appearing to have a foundation or solid base beneath 50 percent or more of the longest horizontal dimension of the sign.

~~"Handbill." Any flyer, notice or brochure advertising or promoting any product, business, cause, political candidate or issue, and intended for distribution to the general public.~~

"Incidental sign~~.~~" **means an** ~~A sign, generally~~ informational~~,~~ **or directional sign** that **incidental and subordinate** ~~has a purpose secondary~~ to **a principal** ~~the~~ use of the lot on which it is located, such as "no parking," "entrance," "loading only," "telephone~~,~~," ~~and other similar directives. No sign with a~~ **and that bears no** commercial message **that is** legible from **outside that** ~~a position off the~~ lot ~~on which the sign is located shall be considered incidental~~.

~~"Marquee." Any permanent roof-like structure projecting beyond a building or extending along and projecting beyond the wall of the building, generally designed and constructed to provide protection from the weather.~~

Comment [R4] Duplicate definition in HCC 21.03.040

Comment [R5] Is a minimal and definition is part of the event to eliminate content related categories in the ordinance

Comment [R6] Duplicate definition in HCC 21.03.040 and the cross reference is obsolete

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

"Marquee sign~~.~~" **means a** ~~Any~~ sign attached **in any manner** to, ~~in any manner,~~ or made a part of, a **permanent roof-like structure projecting beyond a building, generally designed and constructed to provide protection from the weather** ~~marquee.~~

~~"Non-conforming sign." Any lawfully pre-existing sign that does not conform to regulations of this chapter that became applicable after erection of the sign.~~

~~"Official traffic control device" means a sign not inconsistent with Alaska Statutes Title 28, placed or erected by authority of a state or municipal agency or official having jurisdiction, for the purpose of traffic regulating, warning and guiding.~~

"Off-premise sign~~.~~" **means a** ~~A~~ sign containing a ~~commercial or non-commercial~~ message drawing attention to goods or services, business or other activity not offered or conducted on the lot on which the sign is located.

"Pennant~~.~~" **means a** ~~Any~~ lightweight plastic, fabric, or other material, whether or not containing a message of any kind suspended from a rope, wire, or string, usually in series, designed to move in the wind.

"Permanent sign" means a sign that is not a temporary sign.

~~"Portable sign" means an Any sign not permanently attached to the ground or other permanent structure, or a sign designed to be transported, including signs designed to be transported by means of wheels; signs converted to A- or T-frames; menu and sandwich board signs; balloons used as signs; umbrellas used for advertising; and signs attached to or painted on vehicles parked and visible from the public right-of-way, unless said vehicle is used in the normal day-to-day operation of the business.~~

"Principal building~~.~~" **means a** ~~The~~ building in which ~~is conducted~~ the principal use of the lot **is conducted** ~~on which it is located~~. Lots with multiple principal uses may have multiple principal buildings, but storage buildings, garages, and other accessory structures shall not be considered principal buildings.

"Projecting sign~~.~~" **means a** ~~Any~~ **building** sign ~~affixed~~ to a ~~building or~~ wall **and that** ~~in such a manner that its leading edge~~ extends more than six inches beyond the surface of **the** ~~such building~~ or wall.

"Public Sign~~.~~" **means** ~~A Public Sign is~~ an **off-premise** ~~off-premises~~ sign **placed by a governmental agency to** ~~that~~ provides direction **or information, or** to **identify** ~~or identifies~~ public facilities such as parks, playgrounds, libraries, or schools or ~~to~~ a distinct area of the City, such as Pioneer Avenue, the Homer spit, Old Town and entrances to the City. ~~Public Signs may identify categories of services available, but may not carry any other commercial message.~~ Public Signs are non-regulatory.

"Residential sign~~.~~" **means a** ~~Any~~ sign located in the Rural Residential, Residential Office or Urban Residential zoning districts that contains no commercial message except for advertising for goods or services legally offered on the premises where the sign is located, if offering such services at such location conforms with all requirements of the zoning code.

"Roof sign, integral~~.~~" **means a** ~~Any~~ sign erected and constructed as an integral part of ~~a normal the~~ roof **of a building** ~~structure~~, such that no part of the sign extends vertically more than two feet above the highest portion of that roof of which it is a part.

[Bold and underlined added. ~~Deleted language stricken through.~~**]**

"Setback~~:~~" **means the** ~~The~~ distance between **a sign located on a lot and** the **closest** lot line ~~and the sign~~.

"Sign~~:~~" **means a** ~~Any~~ device, fixture, placard, or structure that uses any color, form, graphic, illumination, symbol, or writing to advertise, announce the purpose of, or identify the purpose of a person or entity, or to communicate information of any kind to the public.

"Suspended sign~~:~~" **means a** ~~A~~ sign that is suspended from the underside of a horizontal plane surface and is supported by such surface.

"Temporary sign~~:~~" **means a** ~~Any~~ sign that is used only temporarily and is not permanently mounted.

"Wall sign~~:~~" **means a** ~~Any~~ sign attached parallel to, but within six inches of, a wall, painted on the ~~wall~~ surface ~~of~~, or erected and confined within the limits of an outside wall of any building or structure, which is supported by such ~~wall or~~ building **or structure**, and which displays only one sign surface.

"Window sign~~:~~" **means a** ~~Any~~ sign, pictures, symbol, or combination thereof, designed to communicate information about an activity, business, commodity, event, sale, or service, that is placed inside a window or upon the window panes or glass and is visible from the exterior of the window.

Section 2. The title and subsection (a) of Homer City Code 21.60.060, Signs allowed on private property with and without permits, are amended to read as follows:

21.60.060 Signs ~~allowed~~ on private property ~~with and without permits~~. a. Signs shall be allowed on private property in the City ~~in accordance with, and~~ only in accordance with Table 1. If the letter **"A"** appears for a sign type in a column, such sign **type** is allowed without prior permit approval in the zoning district represented by that column. If the letter **"P"** appears for a sign type in a column, such sign **type** is allowed only with prior permit approval in the zoning districts represented by that column. Special conditions may apply in some cases. If the letter **"N"** appears for a sign type in a column, such ~~a~~ sign **type** is not allowed in the zoning districts represented by that column under any circumstances.

Comment [DH10]: More readable "A" for "Allowed without permit", "P" Permit required, "N" Not allowed. HCC 21.60.060 Table 1

Section 3. Homer City Code 21.60.060, Signs allowed on private property with and without permits, is amended by amending Table 1 by striking the row for the Portable sign type, striking note j, and amending the row for the Temporary sign type to read as follows:

Comment [DH11]: All restrictions on temporary signs on private property are addressed in HCC 21.60.130

	RR	UR	RO	INS(a)	CBD	TC	GBD	GC1	GC2	MC~~CM~~	MI	OSR	PS
Temporary (h)	A~~N~~	A~~N~~	A~~N~~	A~~N~~	A~~P~~	A~~P~~	A~~S~~	A~~P~~	A~~P~~	A~~P~~	A~~P~~	A~~N~~	A~~N~~

Section 4. Homer City Code 21.60.060, Signs allowed on private property with and without permits, is amended by amending Table 2, Maximum Total Sign Area Per Lot by Zoning District, Part B, to read as follows:

[Bold and underlined added. ~~Deleted language stricken through.~~]

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Table 2 Part B

In all other districts not described in Table 2 Part A, the maximum combined total area of all signs, in square feet, except incidental, building marker, and flags, shall not exceed the following:

Square feet of wall frontage (c):	Maximum allowed sign area per ~~lot~~ **principal building**
750 s.f. and over	150 s.f.
650 to 749	130 s.f.
550 to 649	110 s.f.
450 to 549	90 s.f.
350 to 449	70 s.f.
200~~0~~ to 349	50 s.f.
0 to 199	**30 s.f.**

In all districts covered by Table 2 Part B, on any lot with multiple principal buildings or with multiple independent businesses or occupancies in one or more buildings, the total allowed sign area may be increased beyond the maximum allowed signage as shown in Table 2 Part B, by 20%. This additional sign area can only be used to promote or identify the building or complex of buildings.

In all districts covered by Table 2 Part B, freestanding signs, when otherwise allowed, shall not exceed the following limitations:

Only one freestanding sign is allowed per lot, except one freestanding public sign may be additionally allowed. A freestanding sign may not exceed ten (10) feet in height. The sign area on a freestanding sign (excluding a public sign) shall be included in the calculation of maximum allowed sign area per lot and shall not exceed the following:

One business or occupancy in one building	36 s.f.
Two independent businesses or occupancies or principal buildings in any combination	54 s.f.
Three independent businesses or occupancies or principal buildings in any combination	63 s.f.
Four independent businesses or occupancies or principal buildings in any combination	72 s.f.

Section 5. Homer City Code 21.60.070, Permits required, is amended to read as follows:

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

~~21.60.070 Sign permits. Permits required.~~ a. **No person may place, construct, erect or modify a sign for which** ~~If a sign requiring~~ **a provision of this chapter requires** a permit **without first obtaining a permit for the sign** under **this section** ~~the provisions of this chapter is to be placed, constructed, erected, or modified on a lot, the owner of the lot shall secure a sign permit prior to the construction, placement, erection, or modification of such a sign in accordance with the requirements of HCC § 21.60.120~~.

b. Applications. An application for a sign permit shall be submitted to the Department on an application form or in accordance with application specifications published by the Department. An application for a permit for a sign that is not an off-premise sign shall be submitted by the owner of the lot where the sign is to be located, or by a tenant leasing all or part of the lot when the sign names, advertises, or calls attention to a business, brand, product, service or other commercial activity of the tenant.

c. Fees. An application for a sign permit shall be accompanied by the applicable fees established by the Homer City Council from time to time by resolution.

d. Action. Within seven working days after the submission of a complete application for a sign permit, the Department shall either:

1. Issue the sign permit, if each sign that is the subject of the application conforms in every respect with the requirements of this chapter; or

2. Reject the sign permit if a sign that is the subject of the application fails in any way to conform to the requirements of this chapter. In case of rejection, the Department shall specify in the rejection the section or sections of this chapter to which the sign does not conform.

Comment [R.L.]: Since HCC § 21.60.120 also deals with sign permits I have combined it into HCC § 21.60.070.

Section 6. Homer City Code 21.60.090, Signs in the public right-of-way, is amended to read as follows:

21.60.090 SSigns in ~~the~~ public rights-of-way. No **person may place, construct or erect a** sign ~~shall be allowed~~ in **a** ~~the~~ public right-of-way, except for the following:

~~a. Permanent Signs. Only the following permanent signs, including:~~

a~~1~~. **Official traffic control devices.**

b. Public signs erected by or on behalf of a governmental body to post legal notices, identify public property, convey public information, and direct or regulate pedestrian or vehicular traffic;

c~~2~~. Informational signs of a public utility regarding its poles, lines, pipes, or facilities; and

d~~3~~. Signs ~~containing commercial messages~~ **that have been** ~~must be~~ approved by the State of Alaska Department of Transportation~~, Tourist Oriented Directional Signing Program~~.

~~b. Temporary Signs. Temporary signs for which a permit has been issued in accordance with HCC § 21.60.140, which shall be issued only for signs meeting the following requirements:~~

~~1. The signs shall contain no commercial message; and~~

~~2. The signs shall be no more than two square feet in area each.~~

[Bold and underlined added. ~~Deleted language stricken through.~~]

~~3. Notwithstanding (1) and (2), such signs calling attention to civic events shall be no more than four square feet in area, if freestanding, or if street banner, may not exceed the width of traveled portion of road.~~

~~e. Emergency signs. Emergency warning signs erected by a governmental agency, a public utility company, or a contractor doing authorized or permitted work within the public right-of-way.~~

~~d. Other Signs Forfeited. Any sign installed or placed on public property, except in conformance with the requirements of this section, shall be forfeited to the City and subject to confiscation. In addition to other remedies hereunder, the City shall have the right to recover from the owner or person placing such a sign the full costs of removal and disposal of such sign.~~

~~Section 7. Homer City Code 21.60.095, Electoral signs, is repealed.~~

Comment [DH4]: This comment dated "mid-January" is actually meaningless, as they are authorized, temporary signs under HCC 21.60.130.

Section 8. Homer City Code 21.60.100, Signs exempt from regulation under this chapter, is amended to read as follows:

21.60.100 Signs exempt from regulation under this chapter. The following signs shall be exempt from regulation under this chapter:

a. Any **sign bearing only a** public notice or warning required by a valid and applicable federal, state, or local law, regulation, or ordinance.

b. **Any emergency warning signs erected by a governmental agency, a public utility company, or a contractor doing authorized or permitted work within a public right-of-way.**

c. Any sign inside a building, not attached to a window or door, that is not legible from a distance of more than three feet beyond the lot line of the lot or parcel on which such sign is located,

c. Works of art that do not contain a commercial message;

d. Holiday lights between October 15 and April 15;

e. Traffic control signs on private property, such as a stop sign, a yield sign, and similar signs, the face of which meet Department of Transportation standards and that contain no commercial message of any sort.

~~f. Signs in existence before February 17, 1995, but such signs shall not be replaced, moved, enlarged, altered, or reconstructed except in compliance with this chapter.~~

Comment [DH5]: [illegible]

Comment [DH6]: This directly contradicts HCC 21.60.130(b).

Section 9. Homer City Code 21.60.120, General permit procedures, is repealed.

Section 10. Homer City Code 21.60.130, Temporary signs-private property, is amended to read as follows:

21.60.130 Temporary signs-~~Private property~~. a. **All temporary signs are subject to the following requirements:**

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

1. Temporary signs shall not be illuminated, animated, or changeable copy signs.

2. Unless a smaller size is required by another provision of this chapter, the maximum size of a temporary sign is restricted to 16 square feet.

~~7. A temporary sign whose message pertains to a specific date, event, or time period shall not be displayed for more than seven days after that date, or the conclusion of the event or time period.~~

b. Temporary signs on private property shall be allowed **in all zoning districts** subject to the following requirements:

~~a. Term. A temporary sign shall not be displayed for more than 14 days in any 90-day period, except a sign offering for sale or lease the lot on which the sign is located, which is allowed as long as the property is for sale or lease.~~

~~b. Number. Only one temporary sign per lot is allowed.~~

1b. No temporary sign that bears a commercial message may be an off-premise sign. Only one temporary sign bearing a commercial message per lot is allowed and is limited to the following:

i. Advertising the property on which the sign is located for sale or for rent.

ii. Advertising a temporary sale of household goods on a property occupied by a dwelling.

2. Temporary signs that do not bear a commercial message are allowed in any number and shall be in addition to any other signs allowed under this chapter.

Comment [R16]: Regulations limiting the duration for which temporary signs may be displayed are [illegible] content based. Regulations requiring the removal of temporary signs within a reasonable time after the event for which they pertain have been upheld.

Comment [R17]: I have attempted to carry out the Commission's intent to limit temporary commercial signs on private property. If this is not [illegible]

Comment [R18]: Could other reasonable limitations on the number and content of non-commercial temporary signs on private property.

Section 11. Homer City Code 21.60.140, Temporary signs-Public right-of-way, is repealed.

Section 12. Subsection (e) of Homer City Code 21.60.150, Time of compliance-Nonconforming signs and signs without permits, is enacted to read as follows.

(e) Notwithstanding the remainder of this section, a temporary sign that does not conform to the current provisions of this chapter shall immediately be either brought into conformity to the provisions of this chapter or removed.

Comment [R19]: This allows the immediate enforcement of non-conforming temporary signs.

Section 13. Homer City Code 21.60.160, Violations, is repealed.

Comment [R20]: Violations are addressed in HCC 21.90.050.

Section 14. Homer City Code 21.60.170, Enforcement and remedies, is amended to read as follows:

21.60.170 Enforcement and remedies. In addition to the remedies provided in HCC Chapter 21.90, violations of this chapter are subject to the following remedies:

a. A person designated to enforce this title under HCC 21.90.020 may remove a temporary sign placed in a public right-of-way in violation of this chapter. The person

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

responsible for the illegal placement shall be liable for the cost incurred in removing the sign. Any violation of a temporary sign or of any condition or requirement adopted pursuant hereto may be abated, corrected, or prosecuted as the case may be, by injunction or other appropriate proceeding pursuant to law.

b. Notwithstanding any other provision of this title:

1. An appeal to the Planning Commission from an enforcement order that requires the abatement or removal of a temporary sign placed on private property in violation of this chapter must be filed within seven days after the date of distribution of the enforcement order to the person whose property is the subject of the enforcement order.

2. An appeal from a final decision of the Planning Commission regarding an enforcement order that requires the abatement or removal of a temporary sign placed on private property in violation of this chapter must be taken directly to the Superior Court. A violation of this chapter shall be considered a violation of the zoning code of the City, subject prosecution and upon conviction, subject to fines pursuant to HCC § 21.90.100.

c. The City shall have and may exercise all remedies provided for by allowed by City code or other law for the violation of the zoning code.

d. All remedies provided herein shall be cumulative. To the extent that state law may limit the availability of a particular remedy set forth herein for a certain violation or a part thereof, such remedy shall remain available for other violations or other parts of the same violation.

Comment [JR21]: This section authorizes the summary removal of illegal temporary signs in rights of way, and supplies the enforcement and appeal process for illegal temporary signs on private property.

Comment [JR22]: Other remedies for violations of this chapter are provided in HCC Chapter 21.90.

Section 15. Sections 1 through 14 of this Ordinance are of a permanent and general character and shall be included in the City Code.

Section 16. This Ordinance shall become effective on January 1, 2012.

ENACTED BY THE CITY COUNCIL OF HOMER, ALASKA, this _____ day of _____ 2011.

CITY OF HOMER

_____
JAMES C. HORNADAY, MAYOR

ATTEST:

_____
JO JOHNSON, CMC, CITY CLERK

[**Bold and underlined added.** ~~Deleted language stricken through.~~]

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YES:
NO:
ABSTAIN:
ABSENT:

First Reading:
Public Hearing:
Second Reading:
Effective Date:

Reviewed and approved as to form:

_____	_____
Walt E. Wrede, City Manager	Thomas F. Klinkner, City Attorney
Date: _____	Date: _____

[Bold and underlined added. ~~Deleted language stricken through.~~]

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City of Homer
Planning & Zoning
491 East Pioneer Avenue
Homer, Alaska 99603-7645

Telephone *(907) 235-8121*
Fax *(907) 235-3118*
E-mail *Planning@ci.homer.ak.us*
Web Site *www.ci.homer.ak.us*

STAFF REPORT PL 11-69

TO: Homer Advisory Planning Commission
FROM: Rick Abboud, City Planner
MEETING: June 15, 2011
SUBJECT: Draft HAPC Bylaws

INFORMATION
At the June 1st Regular Meeting, a motion was approved to amend the HAPC bylaws to adjust the meeting time from 7:00 p.m. to 6:30 p.m. and change adjournment time from 10:00 p.m. to 9:30 p.m.

STAFF COMMENTS/RECOMMENDATIONS:
Planning Commission receive comments and forward to the City Council for approval.

ATTACHMENTS
1. Draft bylaws

CITY OF HOMER
HOMER, ALASKA

City Clerk

RESOLUTION 11-

A RESOLUTION OF THE CITY COUNCIL OF HOMER, ALASKA AMENDING THE HOMER ADVISORY PLANNING COMMISSION BYLAWS TO AMEND THEIR MEETING TIME TO BEGIN AT 6:30 P.M. AND END AT 9:30 P.M.

WHEREAS, The Homer Advisory Commission voted unanimously at the June 1, 2011 regular meeting to amend their bylaws as follows:

C. Regular Meetings:

All Commission members should be physically present at the designated time and location within the City for the meeting. Teleconferencing is not permitted.

1. First and third Wednesday of each month at ~~7:00~~ **6:30** p.m.
2. Agenda deadline is two weeks prior to the meeting date at 5:00 p.m. Agenda items requiring public hearing must be received three weeks prior to the Commission hearing. However, conditional use applications may be scheduled for public hearing in accordance with HCC 21.94. Preliminary plats must be submitted the Friday two weeks before the Commission meeting.
3. Items will be added to the agenda upon request of staff, the Commission or a Commissioner.
4. Public notice of a regular meeting shall be made as provided in HCC Chapter 1.14
5. Meetings will adjourn promptly at ~~10:00~~ **9:30** p.m. An extension is allowed by vote of the Commission.
   Procedure: The Chair will entertain a motion to extend the meeting until a specific time. After the motion has been seconded, the Commission will vote. A yes vote will extend the meeting until the specified time. A no vote will require that the Chair conclude business at or before ~~10:00~~ **9:30** pm and immediately proceed to comments of the audience, the Commission and adjournment.

NOW, THEREFORE, BE IT RESOLVED that the City Council of Homer, Alaska hereby amends the Homer Advisory Planning Commission bylaws to amend their regular meeting time to begin at 6:30 p.m. and end at 9:30 p.m.

PASSED AND ADOPTED by the Homer City Council this 8th day of August, 2011.

CITY OF HOMER

_____
JAMES C. HORNADAY, MAYOR

ATTEST

_____
JO JOHNSON, CMC, CITY CLERK

Fiscal Note: None