

**BEFORE THE HEARING OFFICER OF THE  
CITY OF WASILLA, ALASKA**

IN THE MATTER OF THE APPEAL OF	)	
NOEL KOPPERUD AND ALEX KOPPERUD	)	
OF THE CITY OF WASILLA PLANNING	)	APPEAL CASE NO.15-01
COMMISSION RESOLUTION	)	
SERIAL 15-10(AM)	)	
_____	)	

**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL**

APPELLANTS hereby state as follows in support of their motion to compel production of documents from the City of Wasilla:

INTRODUCTION: Pursuant to the Hearing Officer’s order dated September 24, 2015, Appellants timely filed a Motion for Production of documents before noon on October 2, 2015. The request was for City of Wasilla (“City”) documents that fell within the scope of Alaska Civil Rule 26(b) and the Alaska Public Records Act (AS 40.25.110). Appellant’s request was simply to inspect documents. The City’s response was to upload various available documents to an online link, including the reproduction of many documents that were already a part of the Record on Appeal, such as the transcript and etc. The City also filed a pleading as a “Response to Appellant’s Request,” dated October 6, 2015. This confirmed that the City objected to the production of certain documents. At the Status Conference between the parties on October 6<sup>th</sup>, the Appellants confirmed that they still wish to physically inspect the Planning Department’s files on Variance 15-01 in some manner reasonably convenient for the City. It is Appellant’s understanding that there is no objection to such inspection, although the item is included in this request. Appellants would prefer to handle completion of discovery in such an informal manner, but are concerned that the record reflect that Appellants do not waive rights to review public records, by failing to file a Rule 37 motion.

THE CITY’S OBJECTION TO APPELLANT’S REQUEST FOR PRODUCTION:

1. The City’s response to Request for Production item numbers 10, 14, 15, 16, and 17, contained the following response:

“Objection. Documents responsive to this request are privileged attorney-client communication.”

2. Alaska Civil Rule 26(b)(5) specifically requires the following

*“Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation*

material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”

The City has not complied with the rule and Appellants hereby request an order compelling the City to comply with Alaska Civil Rule 26(b)(5).

3. The City does not deny that each and every document withheld and suppressed from the Request for Production is a document within the scope of the Alaska Public Records Act (AS 40.25.110). Moreover, the City fails to specify an exception to requirements of the Act that would otherwise allow Appellants and other members of the public to inspect public documents, including electronically stored information (ESI), in the possession of the City. Under the circumstances, Appellants request an order compelling the City to allow Appellants to inspect all legal communication and other documentation which the City describes in response to Appellant’s request under Alaska Civil Rule 26(b)(5), at paragraph 2 herein above.

#### DISCUSSION:

The City’s blanket objection takes the position that each and every communication between an attorney and the City is completely excluded from the definition of a “public record.” AS 40.25.110(a) provides, “Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.”

The City does not specify any provision of the Act that exempts every communication between every attorney and the City from the definition of a public record. By contrast, the Alaska Supreme Court has consistently held that, “In striking a proper balance the custodians of the records in the first instance, and the court in the next, should bear in mind that the legislature has expressed a bias in favor of public disclosure. Doubtful cases should be resolved by permitting public inspection.” *City of Kenai v. Kenai Peninsula Newspapers*, 642 P. 2<sup>nd</sup> 1316, at 1323 (Alaska 1982).

In the present case, the Planning Director and an attorney representing the City attended hearings provided for the public on Variance 15-01, and openly declared their opinions and directives to the Planning Commissioners as to the applicable law to be followed in deciding on the variance issues. The Planning Commission issued its final decision at a public hearing that was concluded July 14, 2015. Appellant’s request for documents simply asks to inspect public information related to the opinions on the laws that were applied in the granting of Variance 15-01.

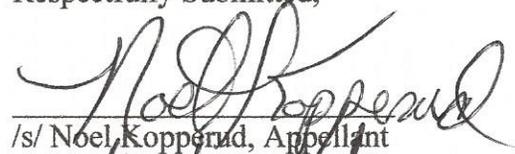
Instead of writing a further discussion of the attorney-client privilege or the case law that has developed with respect to the Alaska Public Records Act, it is enough in this Motion to Compel that the Hearing Officer recognize the Alaska Supreme Court’s instruction in *Municipality of Anchorage v. Anchorage Daily News* 794 P.2<sup>nd</sup> 584 (Alaska 1990) as follows:

“In balancing the interests referred to above, the scale must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen’s predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished.” *MacEwan v. Holm*, 226 Or. 27, 359 P.2<sup>nd</sup> 413, 421-22 (1961) (En Banc)(citations omitted) and quoted in *City of Kenai v. Kenai Peninsula Newspapers*, 642 P. 2<sup>nd</sup> 1316, at 1325 (Alaska 1982)

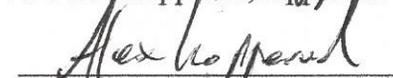
There is no good reason to suppress the information sought by Appellants for inspection.

Dated: October 8, 2015

Respectfully Submitted,



/s/ Noel Kopperud, Appellant

  
/s/ Alex Kopperud, Appellant