MEETING NO. 2012-10: The Special Meeting of the City and Borough of Juneau Assembly, held in the Assembly Chambers of the Municipal Building, was called to order at 6:45 p.m. by Mayor Bruce Botelho.

I. ROLL CALL

Assembly Present: Mary Becker, Bruce Botelho, Karen Crane, Ruth Danner, Johan Dybdahl, Jesse Kiehl, Carlton Smith, David Stone, and Randy Wanamaker.

Assembly Absent: None.

Staff Present: Kim Kiefer, City Manager; John Hartle, City Attorney; Rob Steedle, Deputy City Manager; Laurie Sica, Municipal Clerk.

II. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS – None.

III. NEW BUSINESS

A. Assemblymember Request for Legal Opinion

Mayor Botelho said the meeting was called to discuss a request by Ms. Danner for a legal opinion from the Law Department to explain its recommendation to the Planning Commission regarding the permitting of a rock crusher in D3 zones. With one exception, requests for legal opinions from any Assemblymember would require the concurrence from other members. The exception was a request for the Attorney to review a potential conflict of interest. This was encouraged, and could be requested by any individual Assemblymember, and could be done privately.

Mayor Botelho said Ms. Danner shared email traffic with him over the weekend and he decided to call this special meeting. He had hesitations whether to go forward due to the propriety of the request itself. There are three issues: 1) the appropriateness of a request under the circumstances, 2) the merits of a specific request, and 3) decorum.

Regarding appropriateness, Mayor Botelho said the context is a permit being considered by the Planning and Zoning Commission. Such an action, once decided, was appealable to the Assembly, and in the normal course, the Assembly would be in the position to accept or reject the petition. The Charter requires the Assembly to be the final appellate body. The Assembly would be required to decide whether it would hear a matter or whether a hearing officer would be appointed. The reason for his concern is that part of staff’s recommendation was based on legal advice
rendered by the Department of Law. He had not looked at detailed minutes of what happened, but the Planning Commission made a decision, it was an appealable decision, and if appealed it would come before the Assembly. His concern is that if one member of the Assembly was seeking a legal explication of the advice provided to the Commission before an appeal process took place, the Assembly may have compromised its ability to hear the case and have intervened at the wrong time. The correct time is if an appeal is brought before the Assembly, and to have the ability to subject the decision of the Planning Commission to rigorous examination.

He asked the Assembly to comment on the appropriateness, generally, and if the Assembly decided it was appropriate, did the Assembly want the Attorney to render the advice now, and third, the issue of decorum.

Mayor Botelho asked Mr. Hartle to respond to the comments about the process, to be followed by an opportunity for Ms. Danner to speak.

Mr. Hartle said the Planning Commission made a final decision to grant a Conditional Use Permit. There was no notice of reconsideration given, to his knowledge, it is a final decision, and there is a 20-day period in which the decision may be appealed to the Assembly. There is a charter provision that final actions of boards may be appealed to the Assembly. That decision cannot be brought back up by the Planning Commission and the appeal filing window is open, so it is not an appropriate time for the Law Department to provide a legal opinion on the topic. It was not before the Assembly and may or may not come before the Assembly.

Mayor Botelho asked if, after all periods for appeal have expired and if no appeal is taken, would Mr. Hartle see any objection to consideration, if the body concurred with the request, to explain the department’s view on how the Conditional Use Permit fits within the regime in place.

Mr. Hartle said he did not have a problem in doing that as an academic exercise. Perhaps the Assembly would want to change the code, for one example.

Ms. Danner said she was surprised at what we are doing here. She said that from the beginning of Assembly service, the City Attorney has been forthcoming and told members to call if there are any questions about the code. She said the Assembly pledged to uphold the law and it is complicated work. She said she did not understand the rules and she was struggling to understand them. It was important to her that above all else the Assembly follows the rules. She said she did not care what the rules said or if they needed to be changed, that was fine, but it was important to do what was outlined in the rules. Ms. Danner said she did not ask the attorney to tell the entire group the reasoning of his determination, but it did not hurt her feelings if it was something that was appropriate for them to hear. She said Mr. Hartle did not tell the Assembly members that if they had questions to bring them to the Assembly to be addressed by the group. She said she no longer understood the rules of the group. Two things made her believe that her questions
of the City Attorney were appropriate to ask as an individual member. She referred
to a written opinion Mr. Hartle provided upon request to Mr. Cohen during the
Atlin Drive rezoning situation. Perhaps legal opinion was too strong a word and an
explanation was all that was needed of what Mr. Hartle must already know, if he
offered a legal opinion to the Planning Commission. The explanation looks like a
conflict to her regarding the ruling given and the Table of Permissible Uses

Mr. Hartle said he received a fair amount of email from Ms. Danner, which he
always tries to answer. This request made him uncomfortable, as he prefers to
respond, but this particular question made him feel uncomfortable as he did not feel
it was appropriate to do so. He had learned before getting to his email that Ms.
Danner had testified the prior night to the Planning Commission and had stated that
she was speaking in a private capacity as a neighborhood homeowner and not as an
Assemblymember, so he left this matter until this meeting.

Mayor Botelho said his understanding was that a member of the public could not
come to the Department of Law and ask for a legal opinion. The public can come
to the Department of Law for guidance on such topics as initiative petitions, but
generally, the City Attorney is limited to providing advice to the City and Borough
of Juneau.

Mr. Hartle said that was correct. He said he frequently gets requests from the
public for legal advice. Today’s request was for guidance regarding a
landlord/tenant situation, which he could not provide. His work was limited to
counsel for the CBJ and its staff. He could not give advice in conflict with CBJ and
he did not have insurance for matters outside of CBJ. It was a misunderstanding
that the City Attorney could give legal opinions to the public. Mr. Hartle disagreed
with the comment about providing Mr. Cohen with a legal opinion. Mr. Cohen had
a suggestion for how CBJ dealt with a unique situation and as colleagues, they
traded ideas about how the matter should have been handled at the time.

Mayor Botelho asked Mr. Hartle for a definition of a legal opinion. Mr. Hartle said
that what the Planning Commission does is apply the law to a set of facts when they
consider a permit. There are often questions about how the law should apply to the
facts, there are areas of the code that could be improved, so the Planning Staff
frequently ask for legal opinions, and we try to interpret the law as best we can. He
and Jane Sebens both provide guidance to the Community Development
Department.

Mr. Dybdahl asked if the Assembly would take action to determine if the matter
was appropriate or not, which could preclude discussing the merits of the request.
Mayor Botelho said his sense of the body was that if the Assembly understands its
role and there was consensus, that there would be no discussion of the merits. He
wanted to make sure there was consensus understanding.
Mr. Kiehl asked Mr. Hartle to speak more broadly about the advice the law department gives to other entities of city government and whether that is available to the public. If it is done in writing, is it a public document. Can the public find out what type of advice the law department gives.

Mr. Hartle said that sometimes the advice is confidential legal advice, which is privileged information, unavailable to the public, and sometimes it is not. If the departments need something that the public can have then he will structure what he gives them for that purpose. He gave an example of a memorandum to the Assembly, it will almost always be public. If there were litigation, he might write a memorandum or give legal advice to the Assembly that would not be public.

Mr. Kiehl asked when there was advice from the law department to city entities that could make appealable decisions, was that generally public or generally not. Mr. Hartle said in the specific case mentioned, the Planning Commission acted consistently with the Law Department’s advice. The Law Department did not write any document. Jane Sebens may have written an email on it and spoke with the Department Director as well. Had there been one, generally it would have become part of the record at the Planning Commission level.

Mr. Dybdahl asked if there were not a lot of decisions made at the Planning Commission level in which they sought no legal advice. Mr. Hartle said there were hundreds.

Ms. Danner said regarding Mr. Hartle’s comments about the Atlin rezoning and his correspondence with Mr. Cohen, there was correspondence back and forth. Mr. Cohen did some analysis and the City Attorney responded. The response was something she did not see until after the Assembly met and authorized the rezoning, based upon the legal opinion it had received. Mr. Hartle’s email was sent before the meeting and he did not speak up before the meeting that he agreed with Mr. Cohen that the Assembly’s actions could be illegal.

Mr. Hartle said that when the Assembly took action on the matter he was out of state. He had not reviewed the emails between Mr. Cohen and himself and he could do so if they had not been destroyed. Ms. Danner said she had the emails and it was the reason why she asked for executive session. That was the piece that caused the last executive session for the Assembly where she was surprised by the agenda.

Mayor Botelho said the thing most concerning to him he had called “decorum.” On Monday, he learned about an exchange that had taken place between Ms. Danner and the Planning Commission Chair, so he asked to have a transcript made and included in the packet. He said he was dismayed by Ms. Danner’s statement that the Commission had been previously misled by the Law Department. The choice of words, “misleads,” clearly means deceit. That may not have been what was intended, but what troubled him most was what that comment did to demean the Law Department. It also had the effect of undermining public confidence in the
integrity of staff and with the Commission itself. People are fallible and mistakes get made, but he was shocked by the formulation. Ms. Danner’s comments regarding Atlin Drive may have been the basis. Mayor Botelho said he did not believe it reflected people he knew to be of the highest integrity and character in the Department of Law.

Ms. Danner said the Assembly has a very difficult job and are representatives of the public. The Assembly comes without the benefit of professional knowledge or experience or understanding of how city government works. Staff is by and large excellent. Most of the work and the individuals are above reproach and it is still our responsibility to ask questions and look deeper. We represent the people. Staff represents what they understand to be the most expeditious and straight line to where they want to go. She said she would like to think that no one ever does anything deceitful or that is intentionally wrong. Nobody intentionally does wrong things. Mistakes are made, they happen. She said when she read the code she could easily see how mistakes were made, as it was complicated. She said she knew that she was being told that she had acted inappropriately. She said she could not apologize for what she had done because she was trying to represent the people and the people’s interest, and for that, she would not apologize.

Mr. Dybdahl said his thoughts or descriptions of city government and its management staff did not follow and he did not want to be included in Ms. Danner’s representations. He asked to get to the point of deciding by vote or somehow, about the appropriateness of the matter.

Mr. Stone said in his nine years on the Assembly he had never witnessed anything like this. The only times he had gone to the attorney for an opinion, which he did regularly, was whether or not it would be appropriate to vote/debate or discuss an issue. That was the only time he had gone to the City Attorney. If there needed to be an opinion requested it comes before the body and by majority the Assembly would make the request.

Mr. Kiehl said he is concerned at that representation. He had asked the attorney for interpretations of city code in the past, in terms of what certain definitions meant, in terms of who could serve on a board or commission, in terms of matters before the Assembly regarding the impacts of existing or proposed code. He hoped that getting an understanding of the city’s general laws was not overstepping his bounds.

Mr. Stone said he spoke to an opinion involved in a decision by another body that could be appealed to the Assembly. Mr. Kiehl was referring to matters of course and not an issue regarding a specific permit.

Mr. Smith said he was at that meeting and he said he considered it a classic case before the Commission to do its job, to seek balance in the dialogue. There was more than adequate fact finding present, substantial public testimony from a full audience, and the applicant was required to submit to numerous additional
restrictions in the permit discussed. In the end, the Commission ruled almost surgically and did a beautiful job, in his opinion, of putting this back together. Their ruling is appealable. On the other hand, the entire course of events is unfortunate, and we need to clarify the next steps.

Mayor Botelho said he had never been in this position before. He said it was appropriate for Ms. Danner to raise questions and challenge as she sees her job. He said he was deeply troubled that Ms. Danner was not prepared to apologize for the remark about the Law Department misleading the Commission. Absent that, Mayor Botelho asked the Assembly to censure Ms. Danner. He said he did not see another course, and before he called the question, he provided Ms. Danner with another opportunity to apologize for the remark.

Ms. Danner asked for an explanation of censure. Mayor Botelho said it was an expression of the body of its displeasure with that act.

Ms. Danner said she wanted to make it perfectly clear that anything she said was not said to avoid censure, however, she wanted to clarify what she meant when she said that she had no intention of apologizing. She has no intention to apologize for trying to do her job to the best of her ability. If she did it inelegantly, if the word that came out of her mouth, and she referred to the transcript in the packet, she must have said that. She asked to refer to the transcript.

Mayor Botelho called for a brief at-ease at 7:23 p.m.

Ms. Danner said the transcript was correct and read from it, “I am really disappointed in the Department of Law’s current interpretation. I know they have misled you in the past. I apologize for that.” Ms. Danner said that public speaking was not her forte. She said she did not say whether the law department misled them intentionally or unintentionally. Misled might be the wrong word.

Mayor Botelho said he looked for a direct apology from Ms. Danner to Mr. Hartle’s staff in terms of her expression of the department having misled the Commission in the past and with that he would consider the matter closed.

Ms. Danner said she wanted to address her apology to both the City Manager and the City Attorney, because she knew that the people of Juneau do have a great deal of faith in the work that you do and with good cause. By and large, we have a great deal to be proud of here. Now, to Mr. Hartle, to the degree that she had said anything that indicated any kind of bad behavior or intentional misleading, she truly did apologize. That was not at all what she was trying to convey.

Mayor Botelho said that barring further comment from the Assembly, this was the time to ask for an opinion. There was no comment.
Ms. Danner asked why Mayor Botelho did not have this conversation on the phone on Sunday night with her instead of calling this meeting. Mayor Botelho said he did not have the time to invest in the matter on the weekend and had told her that he would have the full body make the decision. When he subsequently found out the circumstances of Ms. Danner’s testimony to the Planning Commission on Monday, he asked to have it transcribed for confirmation. Mayor Botelho said it was a matter that troubled him a great deal. As an attorney, there are few things more valuable than reputation and integrity. If he had known more Sunday night, he might have jumped in earlier.

IV. EXECUTIVE SESSION – None.

V. ASSEMBLY COMMENTS AND QUESTIONS – None.

VI. ADJOURNMENT – 7:30 p.m.

Signed:_________________________    Signed:_____________________________

Laurie Sica, Municipal Clerk            Bruce Botelho, Mayor