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- Email comments from Asia Freeman dated October 19, 2021 Re: Memo 21-64
- Appellant Frank Griswold's reply to the City of Homer Response to Motion for Reconsideration, Leave to Supplements Points on Appeal, and Proposed Revised Order dated October 9, 2021
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- Memorandum 21-201 Re: Motion for Leave to Supplement Points on Appeal by Frank Griswold from City Clerk dated October 15, 2021
- Memorandum 21-202 Re: Recommendation from Planning Commission on Appeal of CUP 20-15

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- Email from Frank Griswold to City Clerk Re: November 8th meeting scheduled Re: CUP 20-15
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- Memorandum 21-201 Re: Motion for Leave to Supplement Points on Appeal by Frank Griswold from City Clerk dated October 15, 2021
- Memorandum 21-202 Re: Recommendation from Planning Commission on Appeal of CUP 20-15

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- Application
- Site Photos
- Condo drawings and 2011 as-built
- Parking Calculations
- Public Notice
- Aerial Photograph

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- Memorandum PL 20-11 from Planning Staff
- Page 4 of CUP Application signed
- As-Built Exhibit
- Application site plan addressing roofed deck areas dated 10/2/2020
- Written public comments

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City of Homer
www.cityofhomer-ak.gov

Office of the City Clerk
491 East Pioneer Avenue
Homer, Alaska 99603
clerk@cityofhomer-ak.gov
(p) 907-235-3130
(f) 907-235-3143

November 25, 2020

Dear Parties of Record:

A **Notice of Appeal** has been filed Re: Planning Commission Decision – Conditional Use Permit 2020-15 for the reconstruction of a restaurant building at 106 W. Bunnell Avenue, Homer, Alaska, by Frank Griswold. Mr. Griswold has requested this appeal be decided by the Board of Adjustment in accordance with Homer City Code (HCC) 21.93.080(b)(7).

I find the Notice of Appeal to be compliant with HCC 21.93.070 and 21.93.080. A copy of the appeal is attached.

HCC 21.93.080 states-

> e. Any person with standing under HCC 21.93.050 or 21.93.060, whichever is applicable, may, within seven days after the date the City Clerk mailed copies of an accepted notice of appeal, file notice of cross appeal. Any notice of cross appeal shall, to the extent practical, comply with subsection (b) of this section.
>
> f. The City Clerk shall promptly give notice of the cross appeal to the appellant and all other parties who have filed a notice of appearance.

HCC 21.93.500 states-

> 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 or hearing officer; 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.

The appeal record will now be prepared in accordance with HCC 21.93.520 and you will be notified when the record is complete. A hearing date will be scheduled for the Board of Adjustment to hear the appeal.

A link to Homer City Code can be found on the City Clerk's webpage www.cityofhomer-ak.gov/cityclerk.

If you have any questions about this process please contact the City Clerk's Office.

Kind regards,

Melissa Jacobsen, MMC
City Clerk

Cc: Frank Griswold
Melody Livingston
Office of Administrative Hearings
City Manager Dumouchel
City Planner Abboud
Owners of Record noticed per HCC 21.94.030

Received
City Clerk's Office
NOV 15 2020
City of Homer

NOTICE OF APPEAL TO THE HOMER BOARD OF ADJUSTMENT RE: CUP 20-15

Pursuant to HCC 21.93.080, the Homer Advisory Planning Commission's October 22, 2020 final decision approving CUP 20-15 is hereby appealed by Frank Griswold whose address is 519 Klondike Avenue, Homer, Alaska. The subject property is located at 106 West Bunnell Avenue #2, Homer, Alaska and its legal description is Chamberlain & Watson No 4 Lot 1-A, and T 6S R 13W Sec 19 Seward Meridian HM 2011002 INLET TRADING POST CONDOMINIUMS UNIT 2. The owner of the subject property is Melody Livingston, 106 West Bunnell #2, Homer, Alaska. Mr. Griswold actively and substantially participated in the October 7, 2020 Commission proceedings by submitting extensive written testimony. Mr. Griswold owns eight lots within the same zoning district (CBD) as the subject property including his residence at 519 Klondike Avenue. The proposed 15-foot setback reduction and extreme relaxation of lot density requirements will diminish both the value of Mr. Griswold's real property in the CBD and his enjoyment of that property. "Because reduced setbacks could potentially harm every property owner in the [Central Business] district, every property owner in that zoning district *does* have standing to challenge their legality. As we explained in *Kanuk ex rel. Kanuk v. State, Department of Natural Resources*, 'even federal law recognizes that denying injured persons standing on grounds that others are also injured – effectively preventing judicial redress for the most widespread injury solely because it is widespread – is perverse public policy.'" *Griswold v. Board of Adjustment et al*, 440 P.3d 248 (citations omitted). The Commission's approval of CUP 20-15 should be reversed and CUP 20-15 should be denied.

Allegations of Error

1. The Commission did not have the authority to apply HCC 21.18.040(b)(4) to this application for conditional use permit because this provision violates the equal protection clause of the Fourteenth Amendment to the US Constitution. Standard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district and HCC 21.18.040(b)(4), by excluding properties fronting Lake Street and the Sterling Highway, clearly does not.

2. HCC 21.18.040(b)(4) conflicts with HCC 11.08.110 and CUP 20-15 violates both HCC 11.08.110 and HCC 11.08.050(a)(3).

3. The Commission's Findings are conclusionary and not supported by substantial evidence which constitutes a flagrant violation of procedural due process. "Findings cannot be merely conclusionary, but must be based on evidence." *Day v. Williams, 285 P.3d 256, 260 (Alaska 2012) quoting Ethelbah v. Walker, 225 P.3d 1082 at 1091 (Alaska 2009)*. The Commission's review of the application for CUP 20-15 was glaringly inadequate and its findings are unconstitutionally biased and arbitrary. If the Commission truly had carefully reviewed the record as it claims at page 2 of its Decision, it would not have approved Conditional Use Permit ***20-11*** to build more than one building containing a permitted principal use on a lot when Conditional Use Permit ***20-15*** was the application under consideration.

4. The Commission violated another cardinal primary requirement of procedural due process by merely rubber-stamping the biased findings of subordinate Planning Staff instead of acting on its own independent consideration of the law and facts of the controversy. See *Ang Tibay v. Court of Industrial Relations*, 69 Phil. 635 (Philippines, 1940). Planning staff judged the matter before considering the testimony and written evidence presented to the Commission at the September 2, 2020 public hearing.

5. On September 2, 2020, Chair Smith revealed that he is an advocate for CUP applicants; as such he is not an impartial adjudicator as required under HCC 1.18.048(a) and should have been disqualified from participation in this matter.

6. Applicant(s) did not produce evidence sufficient to enable meaningful review of the application as required under HCC 21.71.030.

7. The Application contains false and/or misleading information and does not include the owner's signed authorization granting applicant the authority to apply for the conditional use permit or bind the owner to the terms of the permit as required under HCC 21.71.020(9).

8. City Planner did not have the authority to sign the Commission's Decision and the Commission's Decision does not constitute the conditional use permit required under HCC 21.71.060 which is to be issued separately and solely by the City Planner.

9. The Commission misapplied the review criteria set forth in HCC 21.71.030 by erroneously focusing on the potential affects

of proposed permitted uses instead of focusing on the potential adverse affects of the 15-foot setback reduction and the relaxation of lot density requirements.

10. By approving CUP 20-15, the Commission granted multiple de-facto area variances thus illegally circumventing AS 29.40.040(b) and HCC 21.72.020 and violating HCC 1.04.070.

11. The Commission erred in considering and granting requests for three distinct conditional uses as one; the review criteria prescribed in HCC 21.71.030 should have been applied separately to (a) the proposed 15-foot setback reduction, (b) the proposed 47% lot coverage, and (c) the proposed second permitted principal use on the lot. Alternatively, the setback reduction and lot coverage exceptions should have been requested and considered as area variances under HCC 21.72 and only the second principal use on one lot exception should have been considered under HCC 21.71.030 review criteria.

12. The Comprehensive Plan Goal of "infill" is unconstitutionally vague. Furthermore, infilling per se is not a valid zoning objective. See *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9.

13. The Commission's approval of CUP 20-15 conflicts with and/or violates HCC 21.61.040(a)-(d). It is irrelevant that "the portion to be rebuilt will match the existing style and current front setback of the neighboring structures" because the existence of nonconforming (grandfathered) uses in a zoning district is not a legal precedent for allowing other similar establishments; the controlling legal precedent is the ordinance prohibiting such uses.

14. The Commission did not have the authority to waive, relax, or ignore parking space requirements, landscaping and myriad other applicable CDM requirements, Fire Marshal Certification requirements, HCC 21.18.050 (site plan and level two r-o-w access plan), HCC 21.50.030(f)(1) (retention of native vegetation and buffers), HCC 11.08.110, HCC 11.08.050(a)(3), HCC 21.61.040(a)-(d), HCC 21.71.060, or HCC 21.72.020; HCC 21.90.030 requires that no permit may be issued unless all structures on and uses of the property conform to the Homer Zoning Code.

DATED: November 13, 2020

By: Frank Griswold

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Staff Report 20-63

TO: Homer Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Julie Engebretsen, Deputy City Planner
DATE: October 7, 2020
SUBJECT: Conditional Use Permit (CUP) 20-15

Synopsis The applicant proposes to tear down the existing Wild Honey Bistro, and rebuild with a larger structure and expanded deck area. A Conditional Use Permit (CUP) is required per HCC 21.18.040(b)4, Building within the twenty foot building setback, HCC 21.18.040(d) building area in excess of 30 percent of the lot area.

Applicant: Melody Livingston, Land/restaurant owner (Wild Honey Bistro)
106 W Bunnell #2
Homer, AK 99603

Matt Early, Beachy Construction, Contractor
5243 Kachemak Dr
Homer, AK 99603

Location: 106 W Bunnell Ave. New construction …condo unit
Legal Description: Chamberlain & Watson No 4 Lot 1-A , and T 6S R 13W SEC 19 Seward Meridian HM 2011002 INLET TRADING POST CONDOMINIUMS UNIT 2

Parcel ID: 17516052 (parcel) 17516052C001 Unit 1, 17516052C002 Unit2
Size of Existing Lot: 11,441 square feet
Zoning Designation: Central Business District
Existing Land Use: Commercial mixed use
Surrounding Land Use:

North:	Residential condos and commercial
South:	RV park, hotel
East:	Mixed use residential and commercial
West:	Restaurant, parking and residential condos

Comprehensive Plan: Chapter 4 Goal 4 Objective A-2: Create an overlay zone of the "Old Town" section of the CBD, establishing general standards for building design and construction.

Aim for future buildings to continue in the style of the older buildings in the area as well as the several more recently constructed buildings that follow these traditions. Chapter 4 Goal 3: Encourage high quality buildings and site design that complements Homer's beautiful natural setting, and Goal 1 Objective D-3: Support planning and zoning regulations that promote land use strategies that include compact, mixed-use development, high density development, and infill.

Wetland Status:	Not within wetlands
Flood Plain Status:	Zone D, flood hazards not determined.
BCWPD:	Not within the Bridge Creek Watershed Protection District
Utilities:	Public utilities service the site.
Public Notice:	Notice was sent to 39 property owners of 66 parcels as shown on the KPB tax assessor rolls.

Introduction

NOTE: The applicant had previously hoped to include a second story apartment in this project. However the apartment has been removed from the project at this time. Staff wanted this to be clear in case any part of the application still refers to residential use within the new construction.

The applicant is proposing to tear down the existing Wild Honey Bistro (previously Maura's Café and Two Sister's Bakery). The owner would rebuild in approximately the same location. Most of the building would be single story, and a portion would be two story. The second story would contain a prep kitchen to support the restaurant. A portion of the main structure and a large deck area would be within the twenty foot setback area. A CUP is required per HCC 21.18.040(b)4, Building within the twenty foot building setback, HCC 21.18.040(d) building area in excess of 30 percent of the lot area.

Analysis

<u>Site and more than 30% lot coverage analysis</u>

106 W Bunnell Ave is the site of two buildings, and the property has been turned into a condominium form of ownership. Located at the northwest corner of Main Street and West Bunnell Ave, the three story Inlet Trading Post building post currently houses the Bunnell Street Arts Center, Old Town Bed and Breakfast, the Fringe consignment store, and has other office space in the basement. This building will remain unchanged and is not part of the proposed new construction. The second building to the west is the single story restaurant Wild Honey Bistro. (There are actually about three separate structures connected by hallways that make up the Bistro, but for simplicity they are being referred to as one structure). The proposed new construction applies only to the restaurant. When combined the two buildings have more

than 30% lot coverage, which requires a conditional use permit per HCC 21.18.040(d) building area in excess of 30 percent of the lot area. The site is already largely impervious and has little if any greenspace along lot lines, as the property was developed long before those requirements were adopted. Allowing the continuation and expansion of floor area over 30% meets the Comprehensive Plan goal of infill.

Floor Area:

Inlet Trading post Building Floor Area (1st ground floor) with decks:	2825 square feet
Wild Honey Proposed building area:	1706 square feet
Deck and patio area:	840 square feet
Total coverage:	**5,371 square feet**

The proposed total lot coverage is approximately 47%.

<u>Building within the 20 ft setback area</u>

The applicant stated in the cover letter dated 9/17/2020, "This construction serves to rehabilitate a fast-deteriorating business structure, which would otherwise become economically unviable to maintain…." If the new construction met the twenty foot building setback, it would be much further from the street and not align with the older buildings on either side: the AJ's restaurant to the west, and the Inlet Trading Post to the east. Allowing new construction within the twenty foot setback area would keep the character of the period architecture of this portion of Old Town, as recommended by the Comprehensive Plan.

There are three building components that will be within the 20 foot right of way building setback area: Eastern part of the restaurant, western part of the restaurant, and the porch.

Eastern portion of the restaurant: This part of the building currently matches the front wall of the Bunnell Gallery. When rebuilt, this portion will again match the existing facades; no significant changes are proposed here.

Western portion of the restaurant: The existing porch will be removed. That area will be constructed as new indoor dining space, and lie about one foot into the building setback area. The existing boardwalk will be removed, and a new porch constructed. This will preserve pedestrian access from the existing covered deck along Bunnell to the restaurant.

New porch: The new porch is in the same approximate location as the existing boardwalk. This old boardwalk will be replaced by a new porch, largely in the same location. The porch will lie about fifteen feet into the twenty foot setback area.

Deck on western lot line

The site plan shows a deck within the western side yard setback, up to the property line. The side yard setback is regulated by HCC 21.18.040 (b) 2, which states: "Nonresidential buildings shall be set back five feet from all other lot boundary lines except the minimum setback shall be two feet from all other boundary lines when firewalls are provided and access to the rear of the building is otherwise provided (e.g., alleyways) as defined by the State Fire Code and enforced by the State Fire Marshal."

Condition 1: Side yard setback on the western lot line shall meet the requirements of HCC 21.18.040(b)2.

Parking (see attachments for parking calculations)

Staff has calculated that sixteen parking spaces are required for the site. Only 10 onsite parking spaces are provided. Therefore six parking spaces must be provided prior to the approval of a zoning permit. This can be accomplished through an off-site parking agreement with another land owner. There is some on street parking along Bunnell Ave with approximately 6 spaces directly in front of the gallery and restaurant, and more across the street. However these spaces are partially in the right of way so they don't meet the requirement for on-site spaces. Staff notes the spaces are outside of the road travel lanes. There is a concrete curb that defines the traveled right of way, and parked cars are typically clear of the actual roadway. The Commission could consider reducing the number of required parking spaces because there is public parking available in front of the building (and partially on the subject property).

Commission needs to adopt either Condition 2, or Finding 1:

Condition 2, provide six offsite parking stalls thought a parking agreement with a private land owner

OR

Finding 1: The Commission hereby reduces the number of required spaces to 10 spaces. The additional six spaces required for this site can be accommodated by the public parking on the south portion of the property and the W Bunnell Ave right of way.

Please make a motion and adopt either the condition or the finding.

Landscaping

Due to the existing site design and small lot, there is not a lot of room for landscaping. The Main Street right of way has a boardwalk, attractive landscaping and seating. At the rear or north property line, the parking lot abuts the driveway and parking area for the neighbor cottages, and there are overhead power lines. Staff recommends leaving any decisions about landscaping and drainage to the affected property owners.

Any dumpster should be screened from view of the residential cottages at minimum on one side, by a fence or landscaping.

Condition 3: Screen any dumpster on at least one side, from view of the cottages located to the north.

The criteria for granting a Conditional Use Permit is set forth in HCC 21.71.030, Review criteria, and establishes the following conditions:

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

> **Analysis:** HCC 21.18.040(b)4, Building within the twenty foot building setback, HCC 21.18.040(d) building area in excess of 30 percent of the lot area can be allowed with an approved conditional use permit.
> HCC 21.18.020(a) authorizes retail business (Bunnell and the Fringe)
> HCC.21.18.020**:** HCC 21.18.020(cc) authorizes a rooming house (Old Town Bed and Breakfast), and HCC 21.18.020(d) authorizes restaurants.
>
> **Finding 2:** If approved by a Conditional Use Permit, more than 30% lot coverage and buildings within the twenty foot building setback area are allowed.

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

Applicant: The use will remain as a dine-in or carry-out restaurant service. The existing Wild Honey structures will be demolished and replaced by a new and larger structure. The top floor of the new structure will serve as a prep kitchen area.

Purpose statement: The purpose of the Central Business District is primarily to provide a centrally located area within the City for general retail shopping, personal and professional services, educational institutions, entertainment establishments, restaurants and other business uses listed in this chapter. The district is meant to accommodate a mixture of residential and nonresidential uses with conflicts being resolved in favor of nonresidential uses. Pedestrian-friendly designs and amenities are encouraged.

Analysis: The property includes a mixture of uses, and pedestrian amenities will be enhanced by a new deck on the front of the restaurant and a new ADA parking space and access at the rear of the building.

Finding 3: The purpose of the Central Business District includes providing for general retail shopping, restaurants, and encourages pedestrian-friendly design and amenities. The proposed development is compatible with the purpose statement of the 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: Many uses in the Central Business District have greater negative impacts than would be realized from a restaurant with a portion of the building and deck within the twenty foot building setback area, and a total lot coverage over thirty percent. Pipelines and railroads would have a greater impact on nearby property values. Assisted living, group care, religious, cultural and fraternal assembly could generate a good deal of traffic. The architectural and pedestrian qualities of this project will help maintain neighborhood character and maintain existing property values by reinvesting in the neighborhood and continuing a commonly visited restaurant.

Finding 4: Lot coverage over thirty percent and building within the twenty foot building setback area is not expected to negatively impact the adjoining properties greater than other permitted or conditional uses.

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

Analysis: Surrounding uses of land include AJ's restaurant and bar to the west, residential cottages of the north, mixed use commercial/residential to the east, and an RV park, private residence and hotel across the street. The site has included a restaurant for over twenty years, and the property has contained mixed uses for decades.

Finding 5: Redevelopment of the existing restaurant with the proposed site plan and lot coverage is compatible with existing mixed uses of 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 by municipal water, sewer, police and fire services, and two city maintained paved roads.

Finding 6: Existing public water, sewer, police and fire services are adequate to serve the site.

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: Use and traffic will remain consistent, but proposed building will better fit the design of adjoining buildings and be more attractive overall.

Purpose statement: The purpose of the Central Business District is primarily to provide a centrally located area within the City for general retail shopping, personal and professional services, educational institutions, entertainment establishments, restaurants and other business uses listed in this chapter. The district is meant to accommodate a mixture of residential and nonresidential uses with conflicts being resolved in favor of nonresidential uses. Pedestrian-friendly designs and amenities are encouraged.

Analysis: Desirable neighborhood character could be described by a portion of the Purpose statement for the district. The proposed project is centrally located within the City of Homer and continues the general retail and restaurant uses of the property. Replacing the existing porch and creating ADA access at the rear of the building is a pedestrian design and amenity. The proposed design aligns well with existing buildings and sustains the character promoted in the Comprehensive Plan.

Finding 7: The Commission finds the proposal will not cause undue harmful effect upon desirable neighborhood character as described in the purpose statement of the 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.

Analysis: Public services are adequate to serve the proposed use. Fire Marshal review of the project is required as part of the permitting process.

Finding 8: The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area and the city as a whole when all applicable standards are met as required by city code

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

Analysis: Gaining a CUP and subsequent zoning permit will require compliance with applicable regulations. Earlier conditions and findings in this report address side setback and parking requirements.

Finding 9: An approved CUP and zoning permit will ensure that the proposal will comply with applicable regulations and conditions specified in Title 21.

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

Analysis: Chapter 4 Goal 4 Objective A-2: Create an overlay zone of the "Old Town" section of the CBD, establishing general standards for building design and construction. Aim for future buildings to continue in the style of the older buildings in the area as well as the several more recently constructed buildings that follow these traditions. Goals of the Land Use Chapter of the Homer Comprehensive Plan include Chapter 4 Goal 3: Encourage high quality buildings and site design that complements Homer's beautiful natural setting, and Goal 1 Objective D-3: Support planning and zoning regulations that promote land use strategies that include compact, mixed-use development, high density development, and infill.

The restaurant replacement and deck expansion support mixed use development on the site, a density of uses and land coverage (47% lot coverage anticipated), and redevelopment of an existing commercial space. The building is in an architectural style that matches the existing construction and is generally considered to have a lot of Homer character. All of these considerations are in keeping with the applicable goals and objectives of the Comprehensive Plan.

Finding 10: The proposal is not contrary to the applicable land use goals and objects of the Comprehensive Plan. The proposal aligns Goal 1 Objective D-3, Goal 3 and Goal 4 Objective A-2 and no evidence has been found that it is not contrary to the applicable land use goals and objects of the Comprehensive Plan.

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

Analysis: The three sections of the CDM apply: Site Plan Review, Architecture and Site Design. The proposed project does not significantly change the existing site plan, architecture or site design. The CDM review will be commiserate with the scale of the restaurant and deck expansions.

Staff finds the project complies with the applicable provisions of the CDM in the following manner:

1. Pedestrian connectivity is improved by rebuilding the deck to the adjoining building and the right of way. An ADA parking space and access to the building is being added to the rear of the structure.
2. The new construction will match the existing architectural style, siding material and color for the Inlet Trading Post building. Matching this style will maintain visual compatibility between structures. (See Applicant cover letter 9.17.20 in the application)

Finding 11: Project complies with the applicable provisions of the CDM.

Condition 4: Outdoor lighting must be down lit per HCC 21.59.030 and the CDM

HCC 21.71.040(b). 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 specific conditions deemed necessary
2. Fences and walls: No specific conditions deemed necessary
3. Surfacing of parking areas: No specific conditions deemed necessary.
4. Street and road dedications and improvements: No specific conditions deemed necessary.
5. Control of points of vehicular ingress and egress: No specific conditions deemed necessary.
6. Special provisions on signs: No specific conditions deemed necessary.
7. Landscaping: No specific conditions deemed necessary.
8. Maintenance of the grounds, building, or structures: No specific conditions deemed necessary.
9. Control of noise, vibration, odors or other similar nuisances: No specific conditions deemed necessary.
10. Limitation of time for certain activities: No specific conditions deemed necessary.

11. A time period within which the proposed use shall be developed: No specific conditions deemed necessary.

12. A limit on total duration of use: No specific 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.

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.

PUBLIC WORKS COMMENTS: No comments received.

FIRE DEPARTMENT COMMENTS: No comments received.

PUBLIC COMMENTS: None.

STAFF COMMENTS/RECOMMENDATIONS:

Planning Commission approve CUP 20-15 with findings 2-11 and conditions 1, 3 and 4. In addition, the Commission also adopts either Finding 1, or Condition 2 regarding parking requirements:

> **Condition 2,** provide six offsite parking stalls thought a parking agreement with a private land owner
> OR
> **Finding 1:** The Commission hereby reduces the number of required spaces to 10 spaces. The additional six spaces required for this site can be accommodated by the public parking on the south portion of the property and the W Bunnell Ave right-of-way .

Attachments

Application
Site Photos
Condo drawings and 2011 as-built
Parking Calculations
Public Notice
Aerial Photograph

Broad Point LLC (d/b/a Wild Honey Bistro)
106 W Bunnell, Unit B, Homer, AK 99603 · (907) 942-5205
melodyliving@yahoo.com · eat@wildhoneybistro.com

September 17, 2020

Attn: Planning Commission
City of Homer

DEAR CITY PLANNING COMMISSION,

Attached please find the Conditional Use Permit (the "Permit") application, which I am submitting for approval.

Approval of the Permit is justified as:

- The proposed construction is in accordance with the as built survey previously approved by this body (an updated survey, including footprint overlay is also enclosed for review);
- The construction design is consistent and compatible with the existing shared structure (Bunnell Art Center) and the architecture of the Old Town district;
- New wood siding will match current siding on Bunnell Art Center. Color will exactly match current color as well.
- No trees will be removed, and existing landscape will either be left as is or improved.
- New portion of building will be completed with a flat-roof structure, consistent with current build and matching adjoining Bunnell Art Center.
- This construction serves to rehabilitate a fast-deteriorating business structure, which would otherwise become economically unviable to maintain; and
- Completion of the project will add value to the Old Town commercial district, provides additional variety and character to the existing neighborhood, and assists with the long-term economic viability of the community.

If there are any questions or additional information is required in order to process approval of the Permit, please contact me directly at the phone number or email address provided above.

Melody Livingston, Owner

Enclosure

City of Homer

www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

Applicant

Name: Beachy Construction, Inc. Telephone No.: (907) 235-8876

Address: 5243 Kachemak Dr. Email: matt@bcihomer.com

Property Owner (if different than the applicant):

Name: Melody Livingston Telephone No.: 907 942 5205

Address: 106 W Bunnell #2 Email: melodylivng@yahoo.com

PROPERTY INFORMATION:

Address: 106 W. Bunnell Lot Size: 0.26 acres KPB Tax ID # 17516052

Legal Description of Property: T6S R13W, Chamberlain & Watson N.4 Lot 1-A

For staff use:

Date:_____ Fee submittal: Amount_____

Received by:_____ Date application accepted as complete_____

Planning Commission Public Hearing Date:_____

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	EEMU	BCWPD
Level 1 Site Plan	x	x	x			x			x			x
Level 1 ROW Access Plan	x	x							x			
Level 1 Site Development Standards	x	x										
Level 1 Lighting			x	x	x	x	x	x	x	x	x	
Level 2 Site Plan			x	x	x		x	x		x	x	
Level 2 ROW Access Plan			x	x	x		x	x		x	x	
Level 2 Site Development Standards			x*	x	x	x	x	x			x	
Level 3 Site Development Standards									x	x		
Level 3 ROW Access Plan						x						
DAP/SWP questionnaire				x	x	x	x	x			x	

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

Y/N Are you building or remodeling a commercial structure, or multifamily building with more than 3 apartments? If yes, Fire Marshal Certification is required. Status: _____

Y/N Will your development trigger a Development Activity Plan?
Application Status: _____

Y/N Will your development trigger a Storm water Plan?
Application Status: _____

Y/N Does your site contain wetlands? If yes, Army Corps of Engineers Wetlands Permit is required. Application Status: _____

Y/N Is your development in a floodplain? If yes, a Flood Development Permit is required.

Y/N Does your project trigger a Community Design Manual review?
If yes, complete the design review application form. The Community Design Manual is online at: http://www.ci.homer.ak.us/documentsandforms

Y/N Do you need a traffic impact analysis?

Y/N Are there any nonconforming uses or structures on the property?

Y/N Have they been formally accepted by the Homer Advisory Planning Commission?

Y/N Do you have a state or city driveway permit? Status: Active

Y/N Do you have active City water and sewer permits? Status: Active

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

   1/2 of the property is used by a co-tenant for retail. Other section is used by current Wild Honey Bistro for a restaraunt location.

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).

   Use will remain as dine-in or carry-out restaraunt service. The existing Wild Honey structures will be demolished and replaced by a new & larger structure. The top floor of the new structure will serve as a prep kitchen area.

CONDITIONAL USE INFORMATION: Please use additional sheets if necessary. HCC21.71.030

a. What code citation authorizes each proposed use and structure by conditional use permit?

City code and the Comprehensive plan both encourage retail and restaurant usage in the applicable district, which is what this structure has been providing and will continue to provide.

b. Describe how the proposed uses(s) and structures(s) are compatible with the purpose of the zoning district.

This purpose centrally-located shopping and restaraunts among others, and this project would accomplish that. ~~The district is meant to accomodate some residential use~~

c. How will your proposed project affect adjoining property values?

Increase due to improved quality of adjacent buildings.

d. How is your proposal compatible with existing uses of the surrounding land?

Business use is same as current and residential use is compatible with adjoining structures.

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?

Use and traffic will remain consistent, but proposed building will better fit the design of adjoining buildings and be more attractive overall.

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?

The Comprehensive Plan are online,

Part of Goal One is to promote mix-use growth with moderate to high density, which this project accomplishes. Goal 3 encourages high quality structures, and this project would increase the quality of the existing structure.

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. Y/N Special yards and spaces.
2. Y/N Fences, walls and screening.
3. Y/N Surfacing of parking areas.
4. Y/N Street and road dedications and improvements (or bonds).
5. Y/N Control of points of vehicular ingress & egress.
6. Y/N Special provisions on signs.
7. Y/N Landscaping.
8. Y/N Maintenance of the grounds, buildings, or structures.

9. Y/N Control of noise, vibration, odors, lighting, heat, glare, water and solid waste pollution, dangerous materials, material and equipment storage, or other similar nuisances.
10. Y/N Time for certain activities.
11. Y/N A time period within which the proposed use shall be developed.
12. Y/N A limit on total duration of use.
13. Y/N Special dimensional requirements such as lot area, setbacks, building height.
14. Y/N Other conditions deemed necessary to protect the interest of the community.

PARKING

1. How many parking spaces are required for your development?_____

   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? _____
3. Are you requesting any reductions? No

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

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:

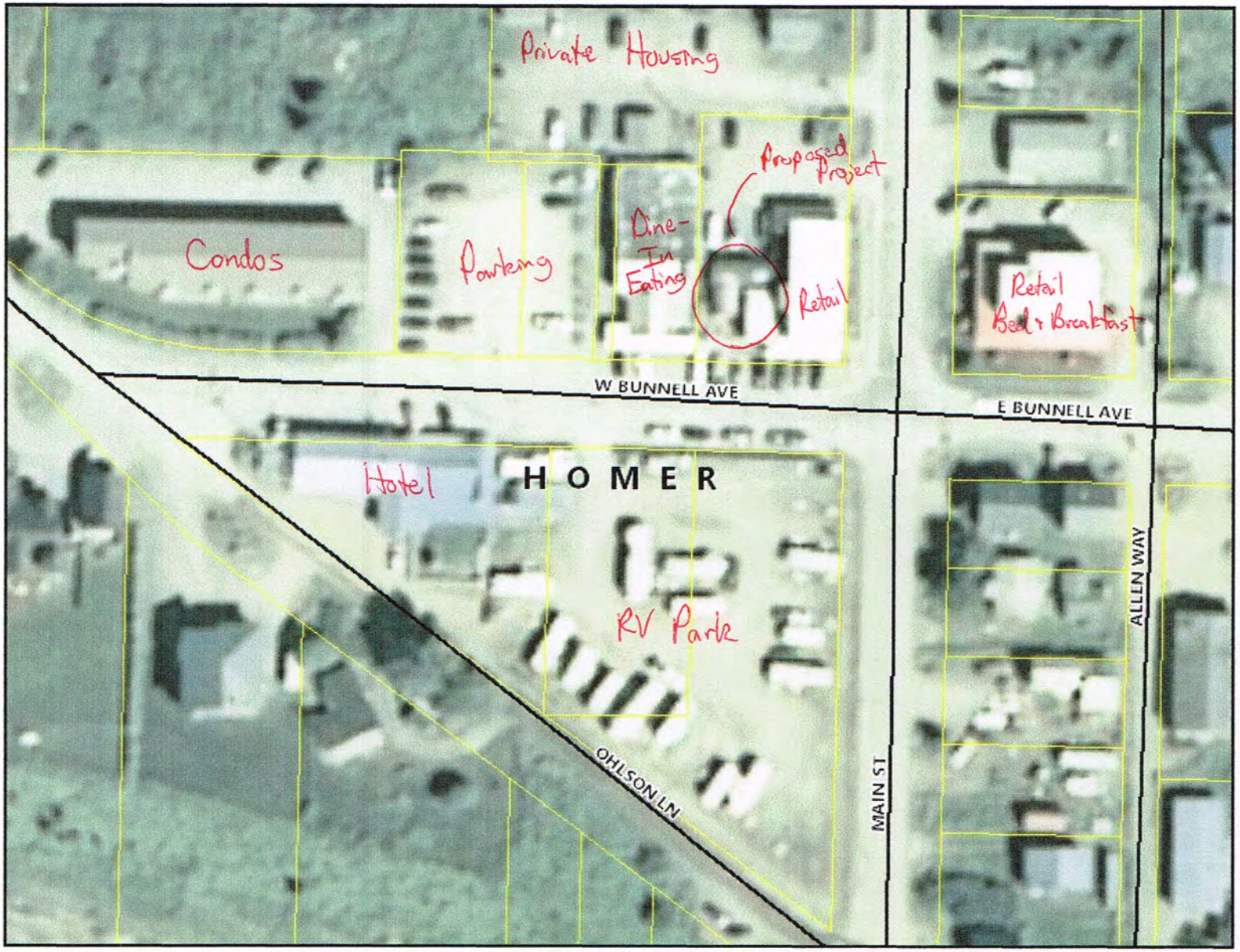
CIRCLE ONE: Owner of record Lessee Contract purchaser

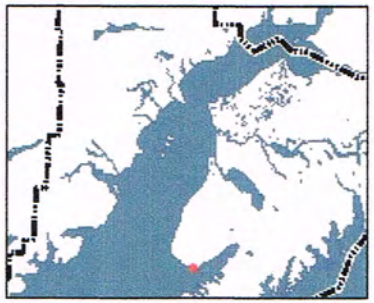
Applicant signature: _____ Date: 8/26/20

Property Owner's signature: _____ Date: _____

Geographic Information Systems
144 North Binkley Street, Soldotna, Alaska 99669

Map title goes here.





Legend
- Mileposts
- City Limits
- Highways
- Major Roads
- Roads
  - Town Medium Volume
  - Town Low/Seasonal; Other
  - Proposed
- Parcels

Notes
Enter map notes here.

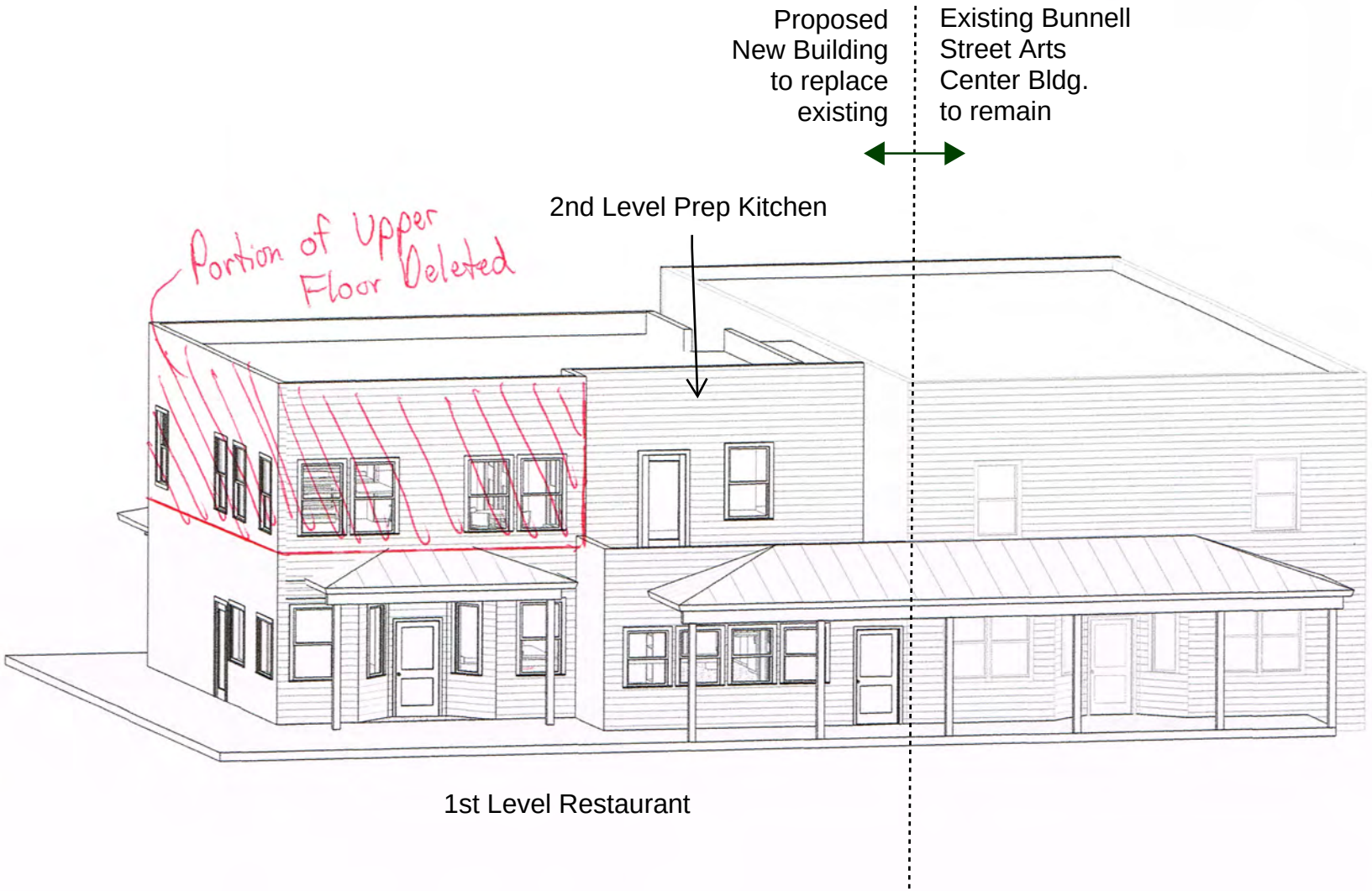
0.0 0 0.02 0.0 Miles

Coordinate System: NAD_1983_StatePlane_Alaska_4_FIPS_5004_Feet

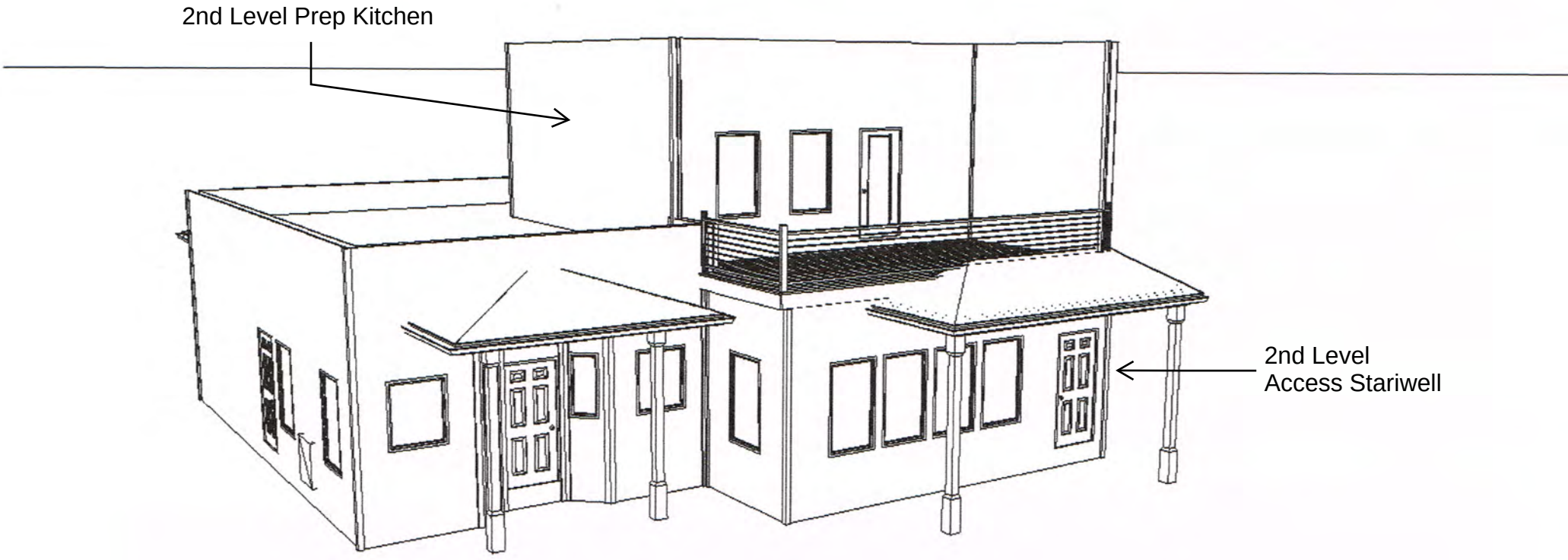
This map is a user generated static output from an Internet mapping site and is for reference only. Data layers that appear on this map may or may not be accurate, current, or otherwise reliable. Do not use for navigation.

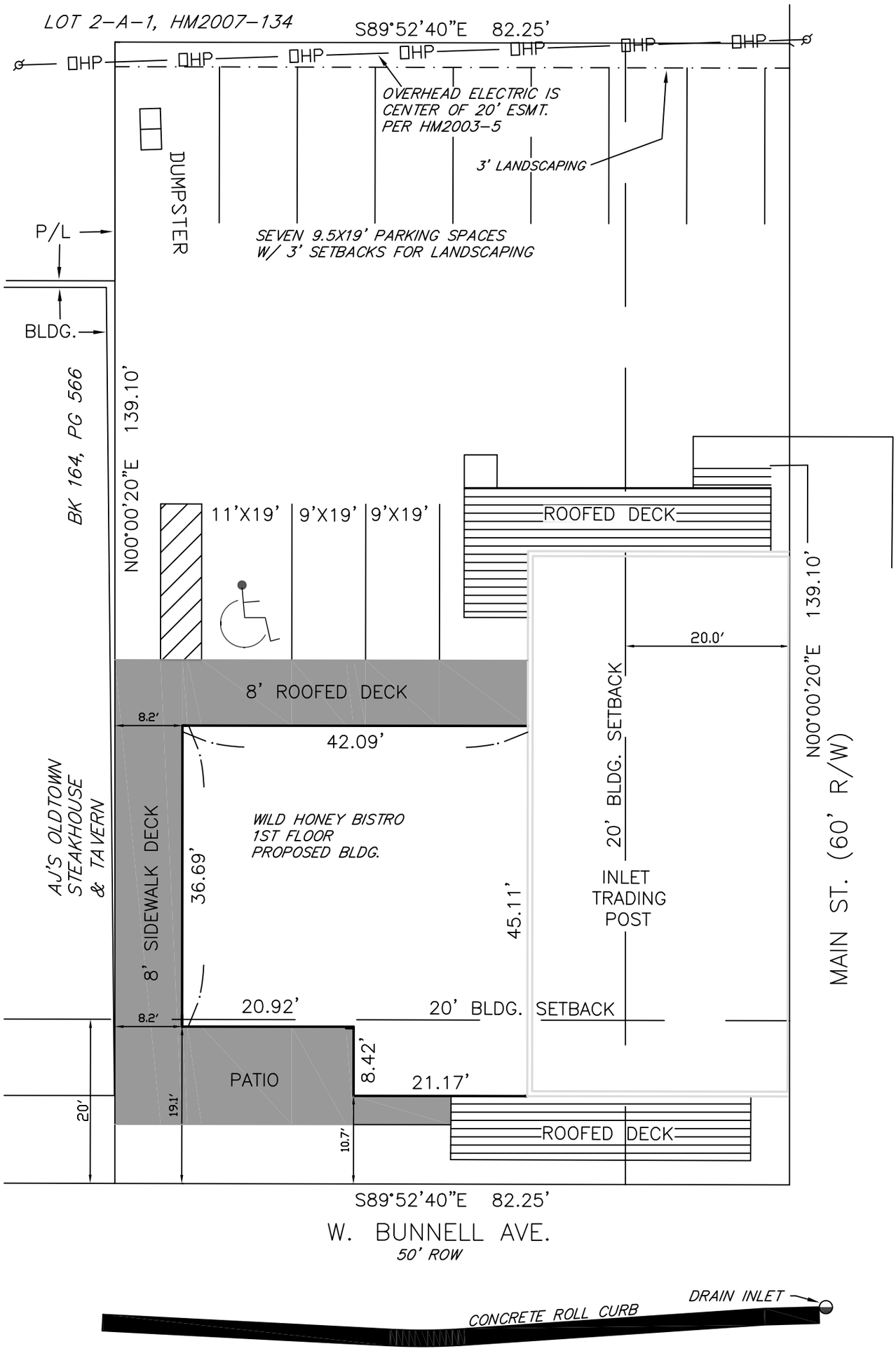
DATE PRINTED: 8/26/2020

"Elevation A"


Proposed
New Building
to replace
existing
Existing Bunnell
Street Arts
Center Bldg.
to remain
2nd Level Prep Kitchen
Portion of Upper
Floor Deleted
1st Level Restaurant

"Elevation B"


2nd Level Prep Kitchen
2nd Level
Access Stariwell
1st Level Restaurant



STATE OF ALASKA
49TH
Gary D. Nelson
Gary D. Nelson
NO. 7610-S
REGISTERED PROFESSIONAL LAND SURVEYOR

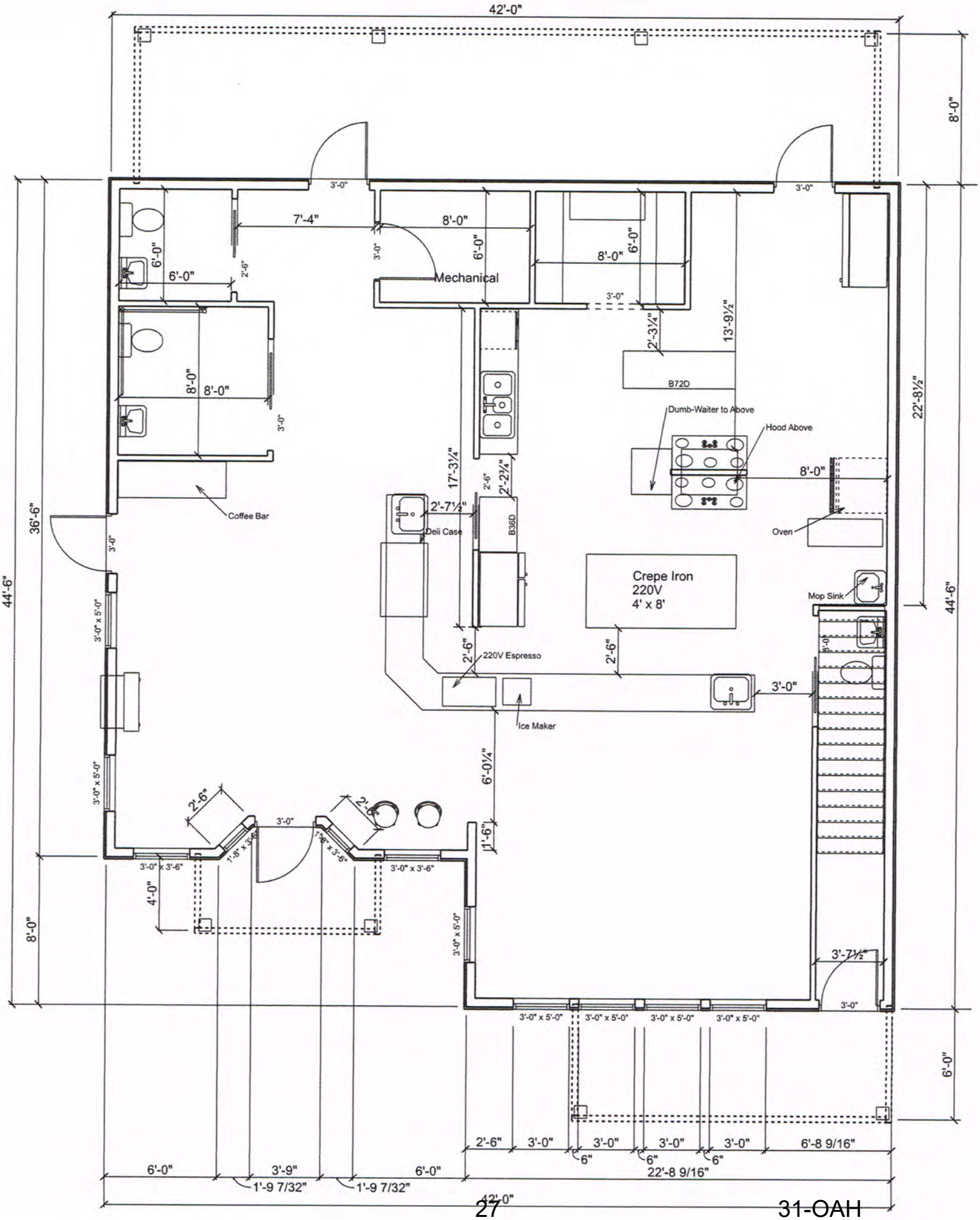
JOB No.	5225
DATE	09/14/2020
SCALE	1"= 15'
ADDRESS:	106 W. BUNNELL AVE
DRAWING	5225_5138_5169
TAX PARCEL	17516052
PLAT No.	2011-2
SECTION	SE-1/4, 19
TOWNSHIP	6S
RANGE	13W (SM)

PLOT PLAN
WILD HONEY BISTRO

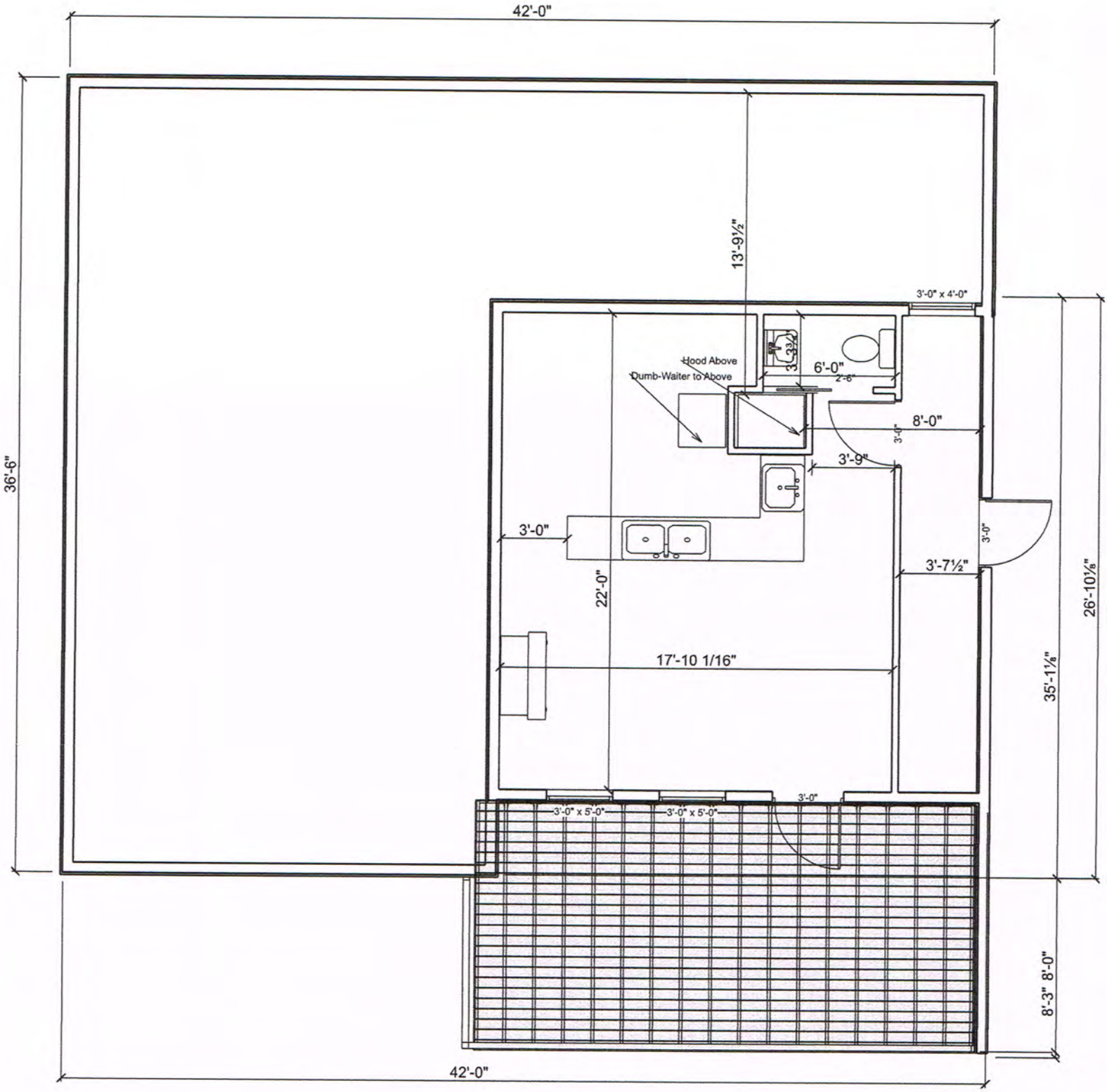
LOT 1-A CHAMBERLAIN & WATSON NO.4

WITHIN SE1/4 SEC 19, T 6S, R 13W (S.M.)
IN THE CITY OF HOMER
HOMER RECORDING DISTRICT

ABILITY SURVEYS
REGISTERED LAND SURVEYORS
(907) 235-8440
152 DEHEL AVE., HOMER, ALASKA 99603


42'-0"
8'-0"
3'-0"
7'-4"
8'-0"
6'-0"
2'-6"
Mechanical
8'-0"
6'-0"
3'-0"
2'-3¼"
13'-9½"
B72D
Dumb-Waiter to Above
Hood Above
8'-0"
22'-8½"
17'-3¼"
2'-2¾"
2'-7½"
Deli Case
B36D
Coffee Bar
Oven
Crepe Iron
220V
4' x 8'
Mop Sink
36'-6"
44'-6"
3'-0" x 5'-0"
2'-6"
220V Espresso
Ice Maker
6'-0¼"
1'-6"
2'-6"
1'-8" x 3'-6"
3'-0" x 3'-6"
4'-0"
3'-7½"
6'-0"
2'-6"
3'-0"
6'-8 9/16"
6"
22'-8 9/16"
6'-0"
3'-9"
1'-9 7/32"
42'-0"

31-OAH


42'-0"
13'-9½"
3'-0" x 4'-0"
Hood Above
Dumb-Waiter to Above
3'-3¼"
6'-0"
2'-6"
8'-0"
3'-0"
3'-9"
36'-6"
3'-0"
3'-0"
3'-7½"
22'-0"
26'-10⅛"
17'-10 1/16"
35'-1⅛"
3'-0"
3'-0" x 5'-0"
3'-0" x 5'-0"
8'-3"
8'-0"
42'-0"

TAKEOUT
PARKING
TWO
SPOTS
ONLY

EQUALS
BLACK LIVES
MATTER

CERTIFICATE OF COMPLETION

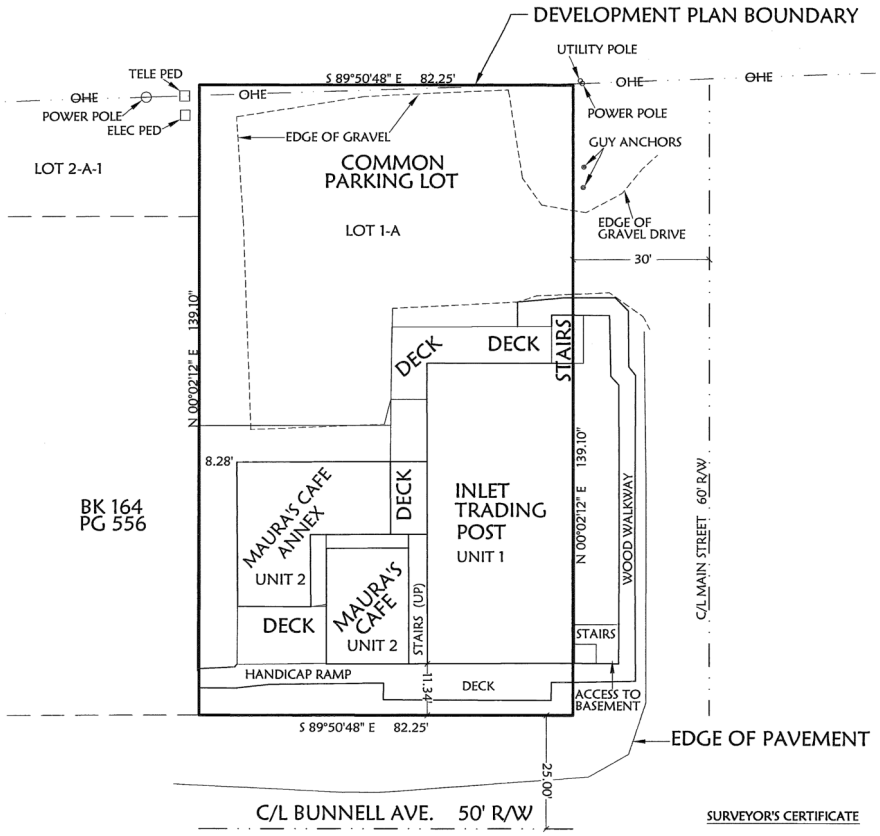
SECTION 34.08.090 OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT PROVIDES THAT A DECLARATION FOR A CONDOMINIUM MAY NOT BERECORDED AND A PLAT OR PLAN THAT IS PART OF THE DECLARATION FOR A CONDOMINIUM MAY NOT BE FILED UNLESS A CERTIFICATE OF COMPLETION IS RECORDED WITH THE DECLARATION AS EVIDENCE THAT THE STRUCTURAL COMPONENTS AND MECHANICAL SYSTEMS OF EACH BUILDING CONTAINING OR COMPRISING A UNIT OF THE CONDOMINIUM ARE COMPLETED SUBSTANTIALLY IN ACCORDANCE WITH THE PLANS.

THIS IS TO CERTIFY THAT TJE BUILDINGS SHOWN AS CONSTRUCTED ON THE INLET TRADING POST CONDOMINIUMS ARE EXISTING BUILDINGS AND THE STRUCTURAL COMPONENTS AND MECHANICAL SYSTEMS ARE COMPLETED SUBSTANTIALLY IN ACCORDANCE WITH THE PLANS.

Kenton T. Bloom DATE: FEB. 3, 2011
REGISTERED LAND SURVEYOR NO. 7968-S
KENTON T. BLOOM
1044 EAST ROAD SUITE A
HOMER, ALASKA 99603

NOTES:

1. SUBJECT STRUCTURES INCLUDE TWO SINGLE STORY STRUCTURES AND ONE THREE STORY STRUCTURE. THE THREE STORY STRUCTURE HAS A CONCRETE FOUNDATION AND CONCRETE WALLS ENCLOSING THE BASEMENT. THE UPPER TWO STORIES ARE FRAME CONSTRUCTION. THE TWO SINGLE STORY STRUCTURES ARE WOOD FRAME CONSTRUCTION ON WOOD FOUNDATIONS. ALL DISTANCES, DIMENSIONS AND ELEVATIONS ARE GIVEN FEET, TENTHS AND HUNDREDTHS (WHERE APPLICABLE) OF FEET. SHEET 1 DEPICTS THE THE EXTERIOR DIMENSIONS. SHEET S 2 AND 3 DEPICT INTERIOR DIMENSIONS.
2. BASIS OF BEARING FOR THIS ASBUILT SURVEY IS THE HOMER COORDINATE SYSTEM AS DESCRIBED IN THE HOMER CITY AREA RECORD OF SURVEY (2007-115 HRD).
3. THIS SURVEY IS VALID FOR THE ABOVE GROUND IMPROVEMENTS ONLY AND IS BASED ON THE RECORD PLAT LOT 1-A, CHAMBERLAIN & WATSON NO. 4, PLAT NO. 2003-005, LOCATED IN THE SW 1/4 SEC. 19, T. 6 S., R. 13 W., S.M., AND WITHIN THE CITY OF HOMER, KENAI PENINSULA BOROUGH, THIRD JUDICIAL DISTRICT, STATE OF ALASKA, HOMER RECORDING DISTRICT,
4. THIS ASBUILT SHALL NOT BE USED FOR ANY PURPOSE OTHER THAN THAT WHICH WOULD GIVE A GRAPHIC REPRESENTATION OF THE LOCATION OF IMPROVEMENTS ON THIS LOT. UNDER NO CIRCUMSTANCE SHOULD THE LOCATION OF FUTURE IMPROVEMENTS BE BASED ON THIS DRAWING.
5. IT IS THE RESPONSIBILITY OF THE OWNER TO DETERMINE THE EXISTENCE OF ANY EASEMENTS, RESERVATIONS OR RESTRICTIONS WHICH DO NOT APPEAR ON THE RECORDED SUBDIVISION PLAT.
6. THIS LOT IS SERVED BY CITY OF HOMER WATER AND SEWER.
7. EXISTING OVERHEAD POWER LINE IS CENTERLINE OF A 20' EASEMENT.
8. THE FRONT 10' ALONG THE RIGHT-OF-WAY AND THE 5' ADJACENT TO SIDE LOT LINES IS A UTILITY EASEMENT (PER THE PARENT PLAT).
9. ELEVATION DATUM MLLW= 0 FEET, BASED UPON TRI-STATION HOMAIR LOCATED AT THE SOUTHWESTERLY AREA OF THE HOMER AIRPORT.
10. IT IS THE RESPOSIBILITY OF THE OWNER(S) TO COMPLY WITH ALL APPLICABLE PORTIONS OF THE CITY OF HOMER ZONING CODE.



SCALE 1"= 20'

OWNER'S CERTIFICATE

THE UNDERSIGNED HEREBY CERTIFIES THAT IT IS THE OWNER OF LOT 1-A CHAMBERLAIN AND WATSON NO. 4, PLAT NO. 2003-005 HRD. LOCATED IN THE SW $\frac{1}{4}$ SECTION 19, TOWNSHIP 13 WEST, RANGE 6 SOUTH, WITHIN THE CITY OF HOMER, HOMER RECORDING DISTRICT, THIRD JUDICIAL DISTRICT, ALASKA.

THE UNDERSIGNED HEREBY CONSENTS TO THE PREPARATION AND RECORDING OF THIS CONDOMINIUM PLAN PURSUANT TO THE UNIFORM COMMON INTEREST OWNERSHIP ACT, AS 34.08.

Asia B. Freeman DATE 2/3/11
ASIA B. FREEMAN, MANAGER
INLET TRADING POST, LLC
106 WEST BUNNELL STREET, SUITE A
HOMER, ALASKA 99603

NOTARY'S ACKNOWLEDGEMENT

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS 3rd DAY OF February 2011

FOR: ASIA B. FREEMAN, MANAGING PARTNER
INLET TRADING POST, LLC

APRIL CHESEBRO NOTARY PUBLIC STATE OF ALASKA

NOTARY PUBLIC FOR ALASKA
MY COMMISSION EXPIRES: 09/2013

SURVEYOR'S CERTIFICATE

SECTION 34.08.170 OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT REQUIRES THAT CERTIFICATION BE MADE WHICH STATES THE PLAT AND PLAN CONTAINS THE INFORMATION AS SET FORTH IN SECTION 34.08.170.

I DO HEREBY CERTIFY THAT THIS PLAT IS A TRUE AND CORRECT LAYOUT OF UNITS ACCURATELY SURVEYED TO DEPICT AN ASBUILT SURVEY, AND THE INFORMATION AS REQUIRED BY ALASKA STATUTE 34.08.170 IS PROVIDED FOR ON THIS PLAT AND THE PLANS FILED HEREWITH.

Kenton T. Bloom DATE FEB. 3, 2011
KENTON T. BLOOM, P.L.S. 7968-S
1044 EAST ROAD SUITE A
HOMER, ALASKA 99603

STATE OF ALASKA 49TH Kenton T. Bloom LS-7968 Registered Professional Land Surveyor

Homer Recording District

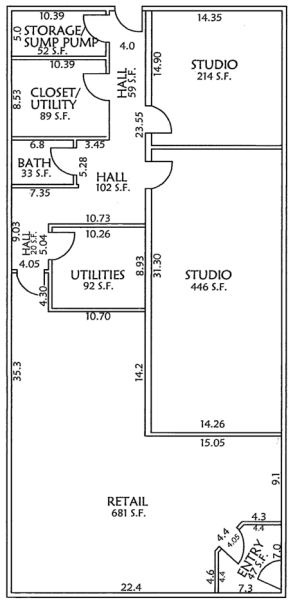
INLET TRADING POST
ASBUILT SURVEY
LOT 1-A CHAMBERLAIN AND WATSON NO. 4
RECORDED AS PLAT NO. 2003-005 H.R.D
LOCATED IN THE SW 1/4 SEC. 19., T. 6S., R. 13W., S.M. WITHIN THE CITY OF HOMER
KENAI PENINSULA BOROUGH, THIRD JUDICIAL DISTRICT, STATE OF ALASKA .
CONTAINING 0.26 ACRES MORE OR LESS

SEABRIGHT SURVEY + DESIGN
1044 EAST ROAD, SUITE A
HOMER ALASKA 99603
(907) 235-4247
EMAIL: seabrightz@gmail.com

DRAWN BY: KB	DATE: 1-23-2011	SCALE: 1" = 20'
CHK BY: KB	JOB # 2010-09	SHEET 1 OF 4

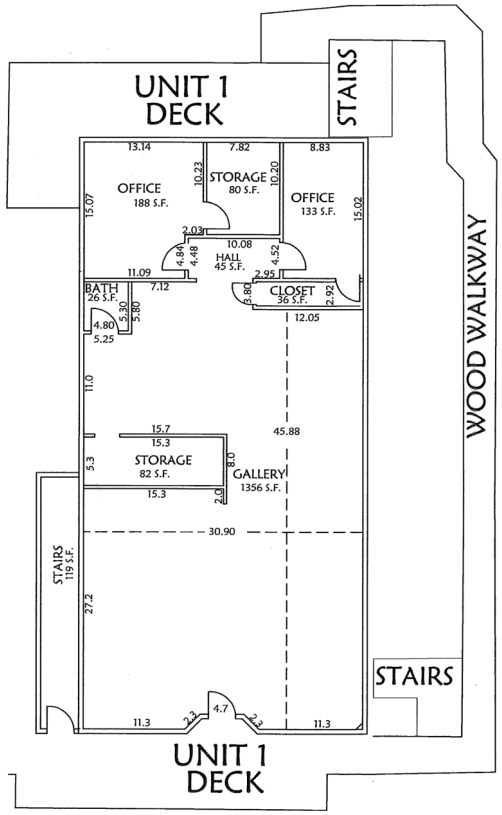
INLET TRADING POST
UNIT 1

UNIT 1 INTERIOR
BASEMENT 1815 SQ.FT.
FIRST FLOOR 2065 SQ. FT.
SECOND FLOOR 1858 SQ. FT.
TOTAL 5738 SQ. FT.



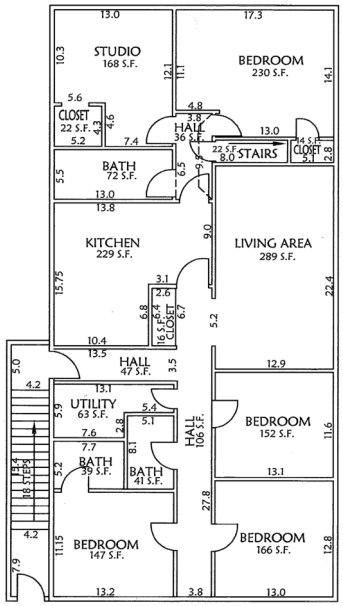
BASEMENT

DECLARANT RESERVES RIGHT TO ESTABLISH AS A SEPARATE UNIT.



GROUND FLOOR

DECLARANT RESERVES RIGHT TO ESTABLISH AS A SEPARATE UNIT.



SECOND FLOOR

DECLARANT RESERVES RIGHT TO ESTABLISH AS A SEPARATE UNIT.

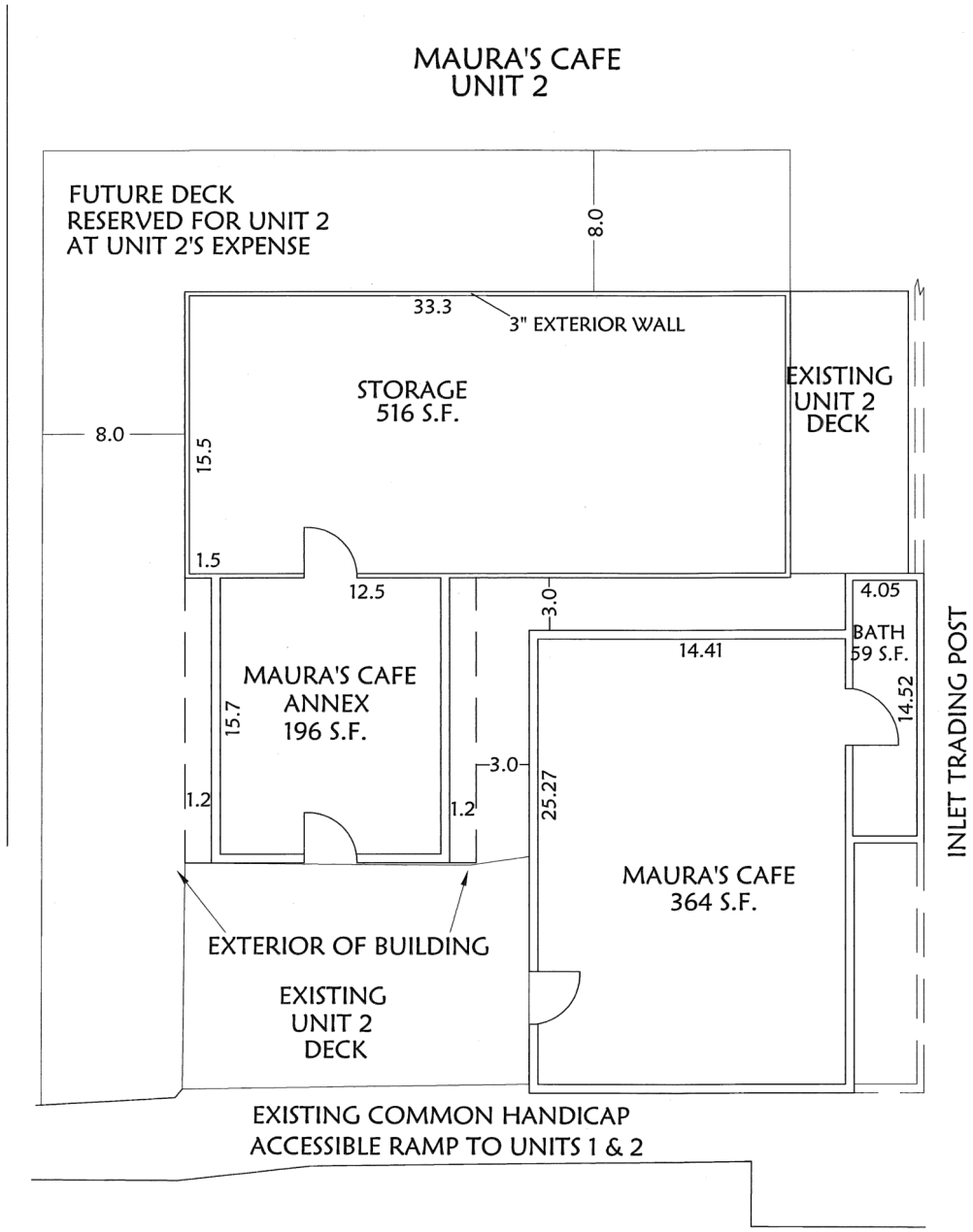
SCALE 1"= 10'

NOTE: 1. ALL AREAS SHOWN ARE NET INTERIOR.
AREAS DO NOT INCLUDE SPACE OCCUPIED BY INTERIOR WALLS

INLET TRADING POST
ASBUILT DRAWING
LOT 1-A CHAMBERLAIN AND WATSON NO. 4
RECORDED AS PLAT NO. 2003-005 H.R.D
LOCATED IN THE SW 1/4 SEC. 19., T. 6S., R. 13W., S.M. WITHIN THE CITY OF HOMER
KENAI PENINSULA BOROUGH, THIRD JUDICIAL DISTRICT, STATE OF ALASKA (H.R.D.).
CONTAINING 0.26 ACRES MORE OR LESS

SEABRIGHT SURVEY + DESIGN
1044 EAST ROAD, SUITE A
HOMER ALASKA 99603
(907) 235-4247
EMAIL: seabrightz@gmail.com

DRAWN BY: KB	DATE: 1-2011	SCALE: 1" = 10'
CHK BY: KB	JOB: 10-06	SHEET 2 OF 4



UNIT 2 INTERIOR
TOTAL 1076 SQ. FT.

SCALE 1"= 5'

NOTE: 1. ALL AREAS SHOWN ARE NET INTERIOR.
AREAS DO NOT INCLUDE SPACE OCCUPIED BY INTERIOR WALLS

INLET TRADING POST
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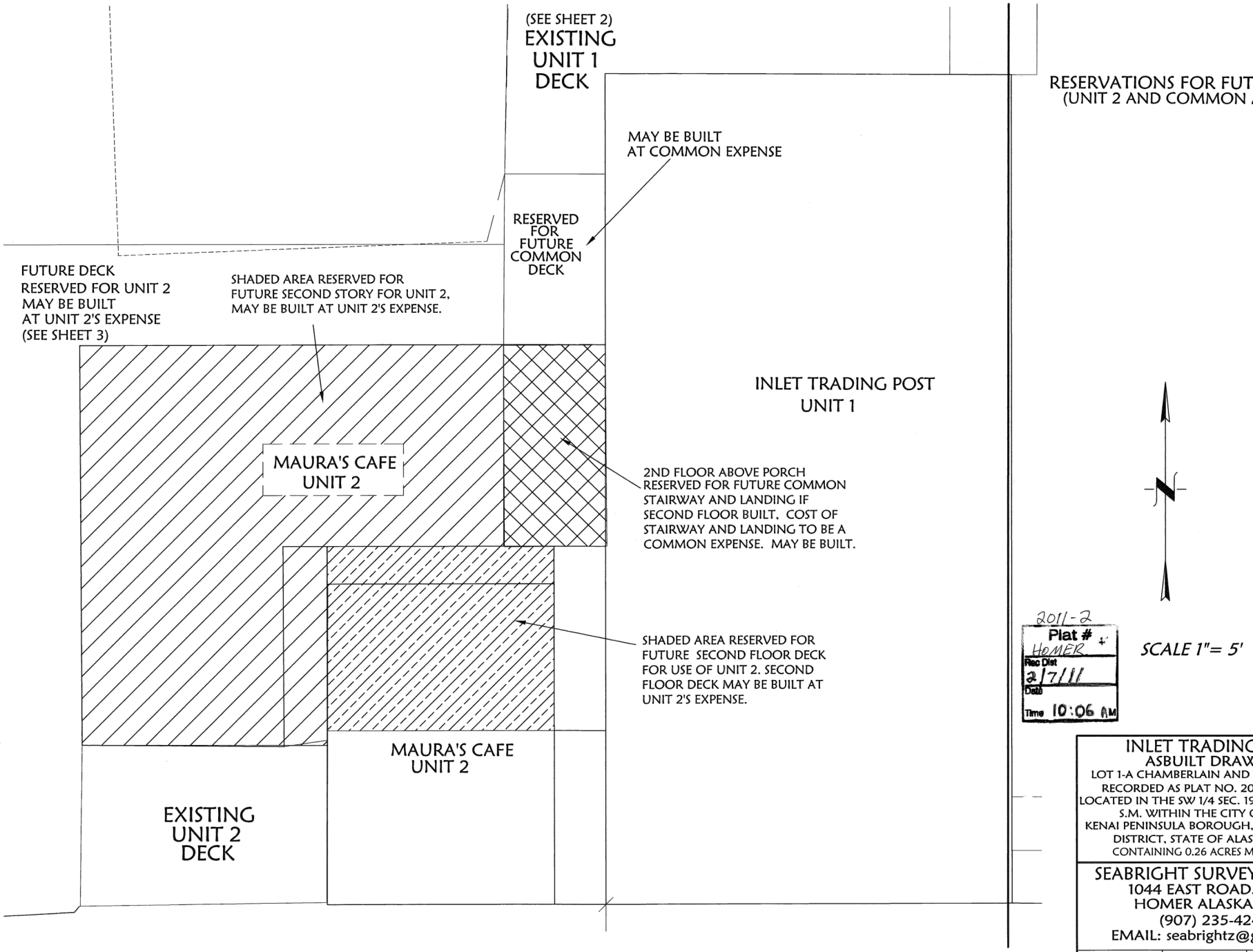
DRAWN BY: KB	DATE: 1-2011	SCALE: 1" = 5'
CHK BY: KB	JOB #10-09	SHEET 3 OF 4

HOMER 2011-2

38-OAH
page 3 of 4



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DRAWN BY: KB	DATE: 1-2011	SCALE: 1" = 5'
CHK BY: KB	JOB #: 10-09	SHEET 4 OF 4

Wild Honey and Bunnell parking calculations

Wild Honey:
18 interior restaurant seats: 1 space per 3 seats = 6 parking spaces
10 exterior seats: 1 space per 10 seats = 1 parking space
Total: 7 spaces

Old Trading Post/Bunnell Building
~calculations based on excluding mechanical, storage and utility spaces, data from condo drawings
Basement has 1,341 of habitable space
Ground floor has 1,677 square feet
1,341 + 1,677 = 3018 square feet. At 1 space per 300 square feet, this equates to **10.06 spaces**
Second Floor BnB
2 spaces (JE assigned to studio use as a dwelling unit) plus one per two guest rooms, of which there are four.
Total: 4 spaces required

Total spaces required
HCC 21.55.090 (c) allows for a reduction in parking as follows: "If more than one use is present on a lot, the number of required off-street parking spaces shall be equal to 75 percent of the sum of the number of required off-street parking spaces for each use computed separately, unless the Commission approves a lesser number."

7 (wild honey) + 10.06 (ground and first floor) + 4 (second floor) = 21.06 spaces x .75% parking reduction for multiple uses= 15.78 spaces, or 16 spaces total required for the site with current uses

PUBLIC HEARING NOTICE

Public notice is hereby given that the City of Homer will hold a public hearing by the Homer Planning Commission on Wednesday, October 7th, 2020 at 6:30 p.m. via a virtual meeting, on the following matter:

A request for Conditional Use Permit (CUP) 20-15 to allow the rebuild of the Wild Honey Bistro restaurant building at 106 W. Bunnell Ave., Lot 1-A Chamberlain & Watson No. 4, NE ¼, SE ¼, Sec. 19, T. 6 S., R. 13 W., S.M., HM 2003005. A CUP is required according to HCC 21.18.040(b)(4) for a reduced setback from a right-of-way & HCC 21.18.040(d) for a building area exceeding 30 percent of the lot area.

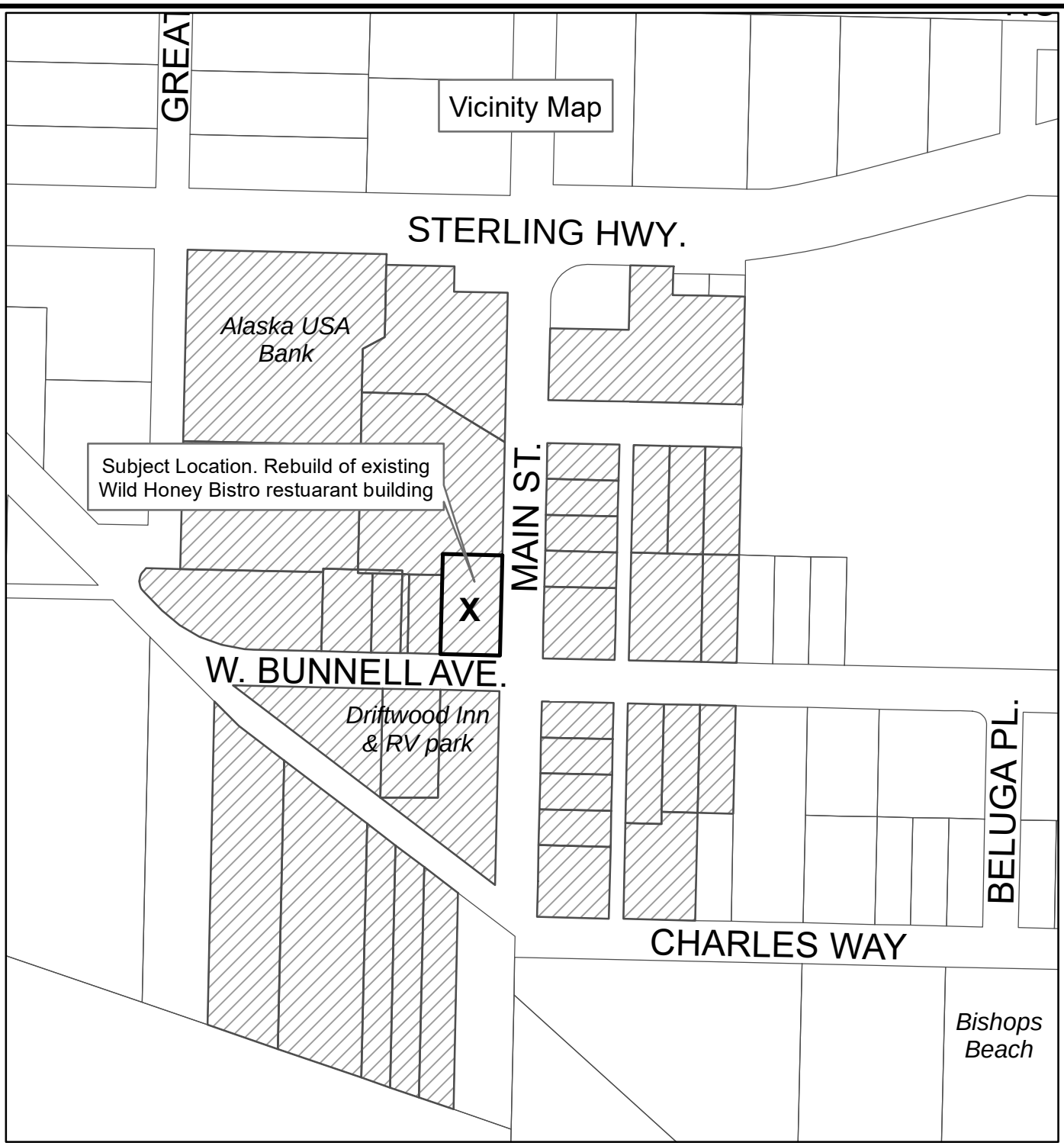
Anyone wishing to view the meeting packet, attend the virtual meeting, or participate in the virtual meeting may do so by visiting the Planning Commission Regular Meeting page on the City's online calendar at *https://www.cityofhomer-ak.gov/calendar*. This information will be posted by 5pm on the Friday before the meeting.

Visit the link above or call the City Clerk's Office to learn how to provide verbal testimony during the meeting via telephone or the Zoom online platform. Written comments can be emailed to *planning@ci.homer.ak.us* or mailed to Homer City Hall, 491 E. Pioneer Ave., Homer, AK, 99603. Comments may also be placed in the Homer City Hall drop box at any time. They must be received by 4pm on the day of the meeting.

If you have questions or would like additional information about the proposal, please contact Travis Brown with the Planning and Zoning Office at 235-3106. If you have questions about how to participate in the virtual meeting, please contact Renee Krause with the City Clerk's Office at 235-3130.

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

VICINITY MAP ON REVERSE



City of Homer
Planning and Zoning Department

9/24/20

Request for
Conditional Use Permit 20-15
106 W. Bunnell Ave.

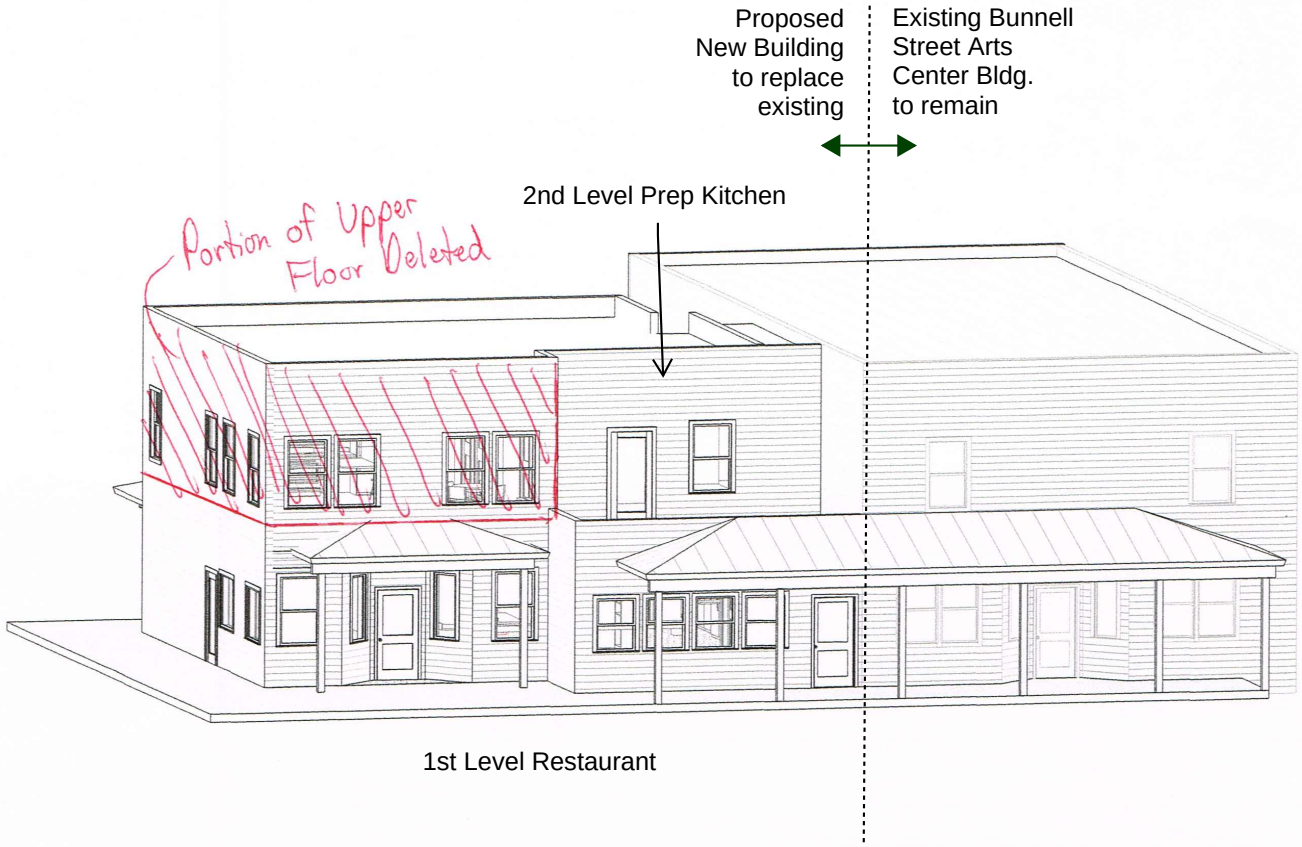
Marked lots are within 300 feet and property owners notified.

Feet
0 150 300

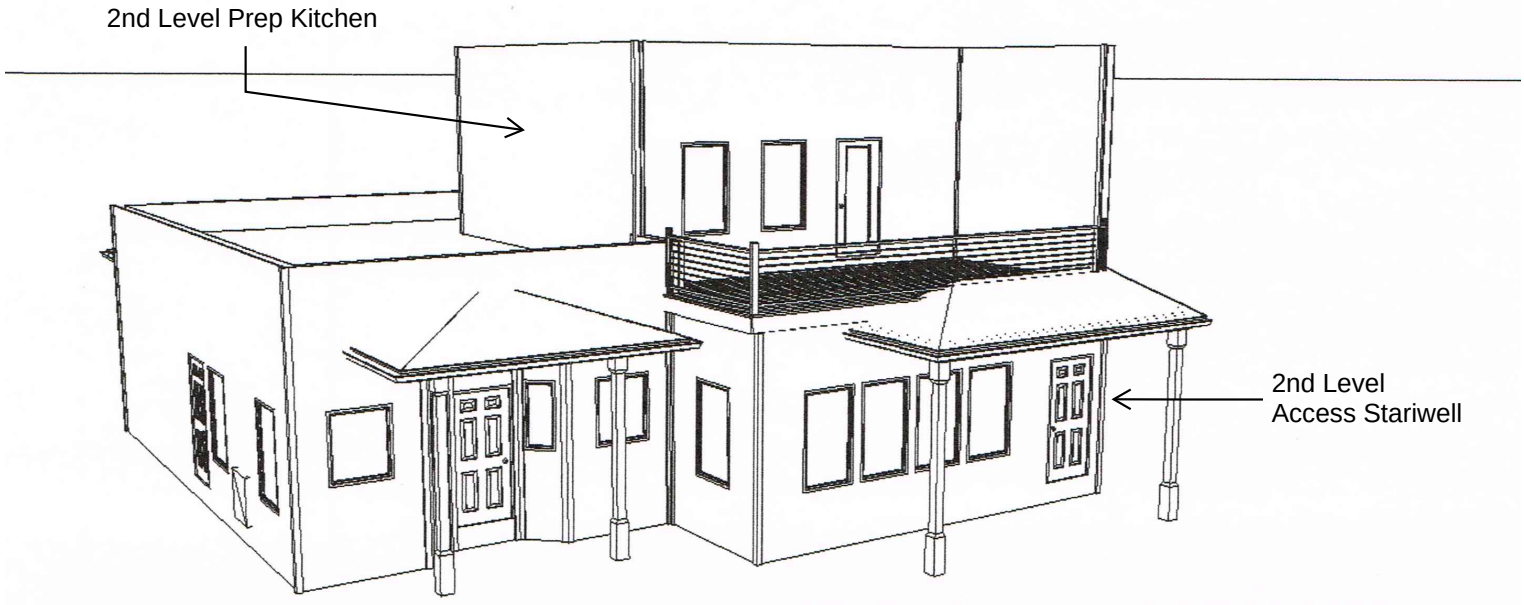
N

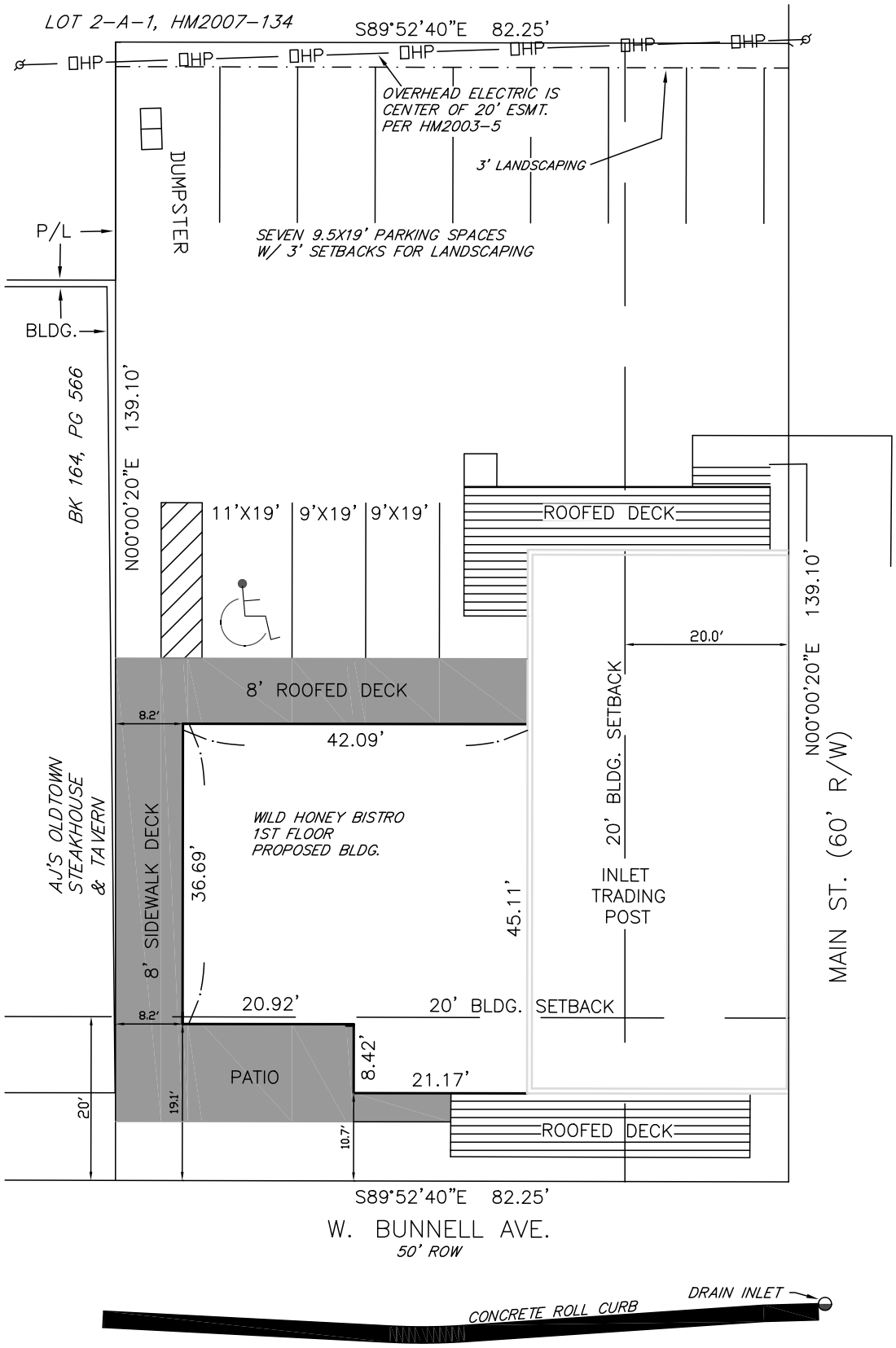
Disclaimer:
It is expressly understood the City of Homer, its council, board, departments, employees and agents are not responsible for any errors or omissions contained herein, or deductions, interpretations or conclusions drawn therefrom.

"Elevation A"



"Elevation B"





STATE OF ALASKA
49TH
Gary D. Nelson
Gary D. Nelson
NO. 7610-S
REGISTERED PROFESSIONAL LAND SURVEYOR

JOB No.	5225
DATE	09/14/2020
SCALE	1"= 15'
ADDRESS:	106 W. BUNNELL AVE
DRAWING	5225_5138_5169
TAX PARCEL	17516052
PLAT No.	2011-2
SECTION	SE-1/4, 19
TOWNSHIP	6S
RANGE	13W (SM)

PLOT PLAN
WILD HONEY BISTRO

LOT 1-A CHAMBERLAIN & WATSON NO.4

WITHIN SE1/4 SEC 19, T 6S, R 13W (S.M.)
IN THE CITY OF HOMER
HOMER RECORDING DISTRICT

ABILITY SURVEYS

REGISTERED LAND SURVEYORS
(907) 235-8440
152 DEHEL AVE., HOMER, ALASKA 99603

City of Homer
Planning and Zoning Department

9/30/20

Request for
Conditional Use Permit 20-15
106 W. Bunnell Ave.

0 150 300 Feet

N

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City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

Homer Planning Commission Meeting of October 7, 2020

Supplemental Packet (items not included in packet)

Consent Agenda

C. Decision and Findings for Conditional Use Permit 20-15 to allow a second mobile home at 541 Bonanza Avenue

Revised Finding 2 for clarity **p. 2**

Public Hearings

A. Staff Report 20-63, Conditional Use Permit 20-15 for the reconstruction of a restaurant building at 106 W. Bunnell Avenue

Memorandum PL 20-11 from Planning Staff **p. 6**

Page 4 of CUP application with property owner signature **p. 7**

As-Built Exhibit (application item that was inadvertently left out of packet **p. 8**

Applicant site plan addressing roofed deck areas, dated 10.2.20 **p. 9**

Comments from Sherry Thompson, Susan & Gary Miller **p. 10**

Comments from Melody Livingston, Applicant **p. 12**

Comments from Matt Early, Applicant **p. 14**

Comments from Don & Carolyn Meares **p. 15**

Comments from Asia Freeman **p. 16**

Comments from Gary and Susan Miller **p. 18**

Comments from Frank Griswold **p. 19**

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
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(p) 907-235-3106
(f) 907-235-3118

Memorandum PL 20-11

TO: Homer Planning Commission
THROUGH: Rick Abboud, City Planner
FROM: Julie Engebretsen, Deputy City Planner
DATE: October 7, 2020
SUBJECT: CUP 2020-15, Wild Honey

Background
Staff received a public comment that raised several concerns with the CUP. Specific concerns about the rear parking lot included dust, noise and visual impacts. Staff contacted the applicant to explore the idea of paving the rear parking lot, and building a fence between the parking lot and the adjacent residential cottages.

The applicant responded that paving the parking lot in the long term was one of their considerations, but did not have the timeframe or budget at this time. The applicant did not want a paving requirement as part of the CUP. The fence was also not well received as noted in one public comment.

Screening Requirements
Staff notes there is a code requirement for screening commercial parking lots from adjoining residential uses. Although the condos were constructed well after this parking lot was created, this code requirement still applies. Staff recommends the applicant have the flexibility to choose how they will screen the parking area.
HCC 21.55.020 (a)(4)(f) states:

"f. An area used for commercial or industrial parking, loading or servicing shall be screened from view from any adjoining residential zoning district or lot used for residential purposes by a wall, fence or planting of adequate height to screen the parking, loading or servicing area."

Staff Recommendation: To address the public comments concerning noise and visual impact, add a condition:

Condition 5: Screen the rear parking area along the north lot line per HCC 21.55.020 (a)(4)(f).

9. Y/N Control of noise, vibration, odors, lighting, heat, glare, water and solid waste pollution, dangerous materials, material and equipment storage, or other similar nuisances.
10. Y/N Time for certain activities.
11. Y/N A time period within which the proposed use shall be developed.
12. Y/N A limit on total duration of use.
13. Y/N Special dimensional requirements such as lot area, setbacks, building height.
14. Y/N Other conditions deemed necessary to protect the interest of the community.

PARKING

1. How many parking spaces are required for your development?_____

   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? _____
3. Are you requesting any reductions? No

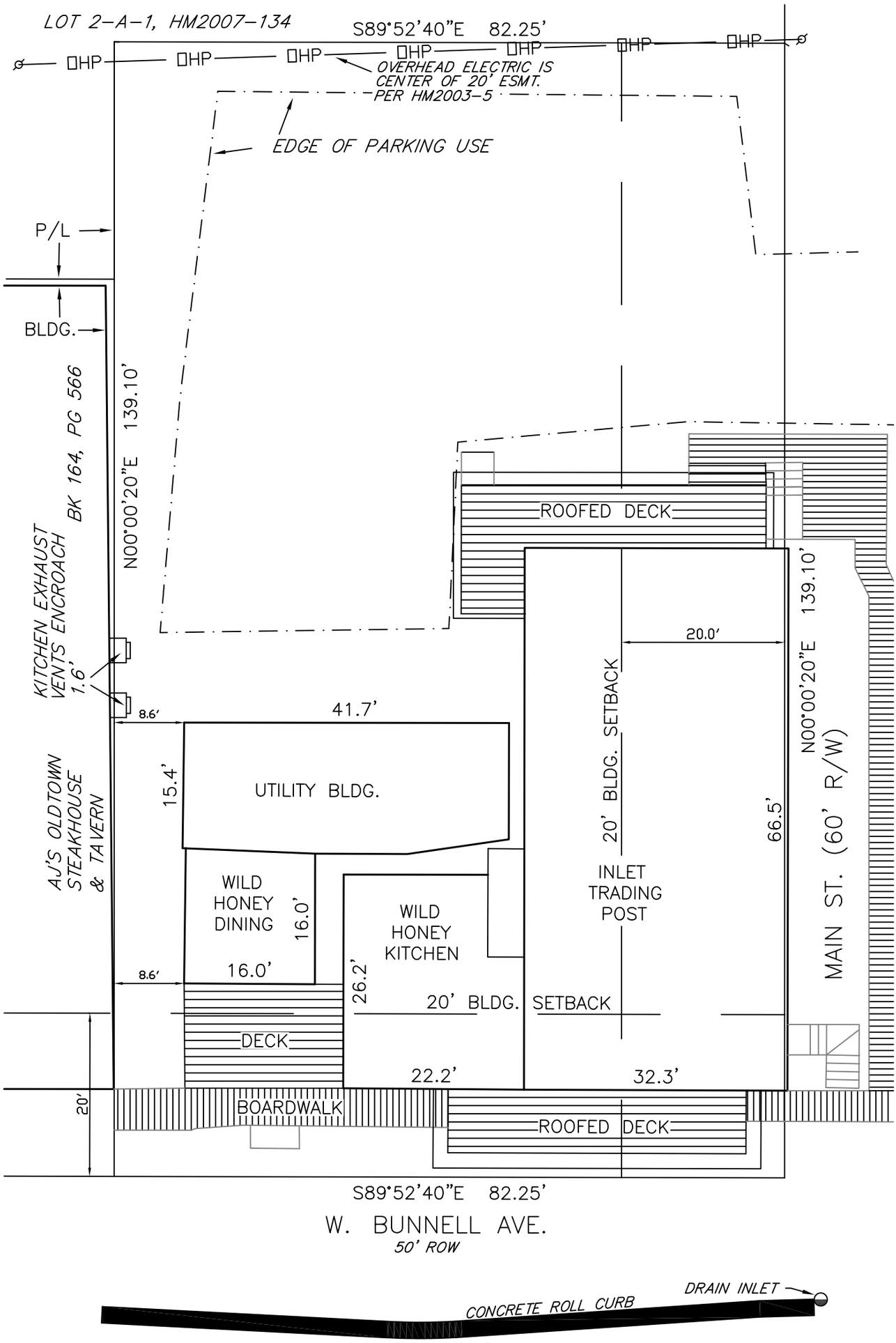
Include a site plan, drawn to a scale of not less than 1" = 20' which shows existing and proposed structures, clearing, fill, vegetation and drainage.

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: _____ Date: 8/26/20

Property Owner's signature: _____ Date: 9/14/20



STATE OF ALASKA
49TH
Gary D. Nelson
Gary D. Nelson
NO. 7610-S
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TAX PARCEL	17516052
PLAT No.	2011-2
SECTION	SE-1/4, 19
TOWNSHIP	6S
RANGE	13W (SM)

AS-BUILT EXHIBIT

LOT 1-A CHAMBERLAIN & WATSON NO.4

WITHIN SE1/4 SEC 19, T 6S, R 13W (S.M.)
IN THE CITY OF HOMER
HOMER RECORDING DISTRICT

ABILITY SURVEYS
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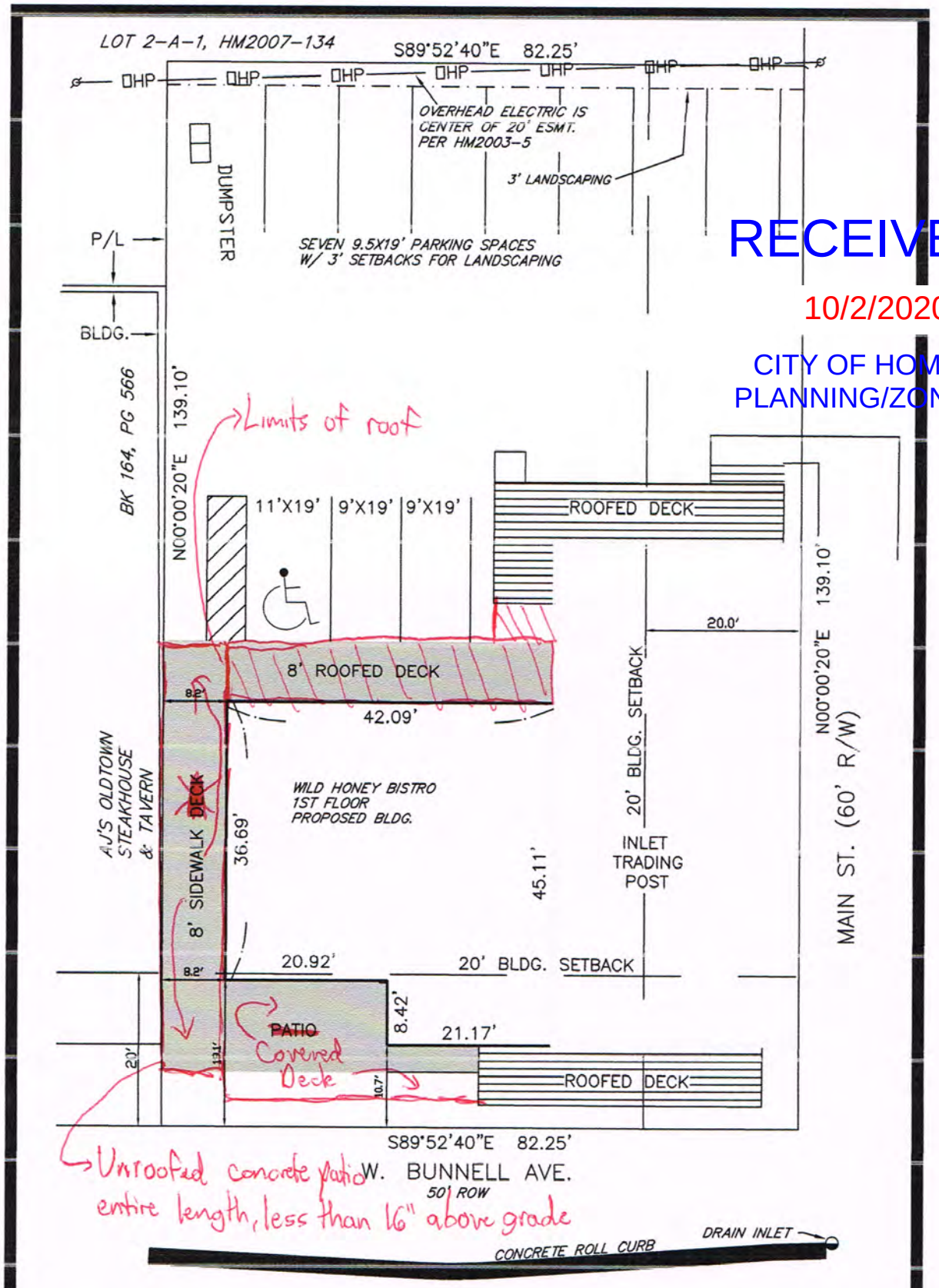

RECEIVED

10/2/2020

CITY OF HOMER
PLANNING/ZONING

STATE OF ALASKA
49TH
Gary D. Nelson
Gary D. Nelson
NO. 7610-S
REGISTERED PROFESSIONAL LAND SURVEYOR

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PLOT PLAN
WILD HONEY BISTRO

LOT 1-A CHAMBERLAIN & WATSON NO.4
WITHIN SE1/4 SEC 19, T 6S, R 13W (S.M.)
IN THE CITY OF HOMER
HOMER RECORDING DISTRICT

ABILITY SURVEYS
REGISTERED LAND SURVEYORS
(907) 235-8440
152 DEHEL AVE., HOMER, ALASKA 99603

Rick Abboud

From: Travis Brown
Sent: Monday, October 5, 2020 2:15 PM
To: Rick Abboud
Subject: FW: CUP for Wild Honey Bistro

From: Sherry Thompson <sherrytesl@gmail.com>
Sent: Monday, October 5, 2020 12:23 PM
To: Department Planning <Planning@ci.homer.ak.us>
Cc: Gary & Susan Miller <ak.miller.susan@gmail.com>
Subject: CUP for Wild Honey Bistro

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

A letter of concern to be read into the record on October 7, 2020

Dear Planning Commission:
We are the homeowners of Cottages #7 and #8 in Old Town Cottages which directly abut and view the back of the Wild Honey Bistro. We are concerned with this CUP for the proposed remodel and new entry from the parking lot for the following reasons:

- **Dust pollution**-the new entry to the Wild Honey through the proposed 8 foot Sidewalk Deck streamlines the use of what will now become a very busy gravel parking lot behind the building. Unless there is owner intent to pave their proposed parking spaces, there will no doubt be greater dust/debris created by the development and use of 10 parking spaces. (currently there is only a hidden dirt path leading to the front entry). The increased use of this parking lot, facilitated by the new sidewalk deck access, will certainly encourage higher use of the lot and thus adversely affect our cottage properties.
- **Noise pollution**-the creation of a new 8 foot Sidewalk Deck and a new 8 foot Roofed Deck, on the side and back of the building, will create spaces for gathering of customers. Are these named spaces specifically meant as walkways or will they be crammed with bistro tables creating a noisy environment for us as two of their closest residential neighbors? As our front porches look directly at the parking lot we are unfortunately positioned to hear customer voices interrupting our privacy.
- **Visual distraction**- a proposed three foot landscape barrier may not be adequate to shield our cottages from the activity of the parking lot and back decks. It may be necessary to create a future barrier hedge/fence to replace the existing low lying rose bushes. Whose responsibility is this and who bears the cost?
- **Property value**- We are concerned that our property value may be affected by having a busy parking lot almost in our front yards. Specifically we are concerned that an unknown **Future Owner** may develop a business which far exceeds what Wild Honey currently has, a breakfast and lunch business. We respect the right of the owner of this property to develop what is already a successful and much appreciated addition to Old Town's charm, but we also want our property NOT to be devalued because of commercial gain by our adjoining neighbor.

We would like to hear the owner/applicant respond to our above concerns about the requested conditional use permit before it is granted. Thank you.

Sincerely,

Sherry Thompson
Homeowner Cottage #7
Old Town Cottages
3459 Main Street
Homer Ak 99603

Susan and Gary Miller
Homeowners Cottage #8
Old Town Cottages
3459 Main Street
Homer Ak 99603

Rick Abboud

From: Julie Engebretsen
Sent: Tuesday, October 6, 2020 11:13 AM
To: Rick Abboud
Subject: FW: Wild Honey CUP

See response below. Lets chat after lunch?

From: (null) (null) <melodyliving@yahoo.com>
Sent: Tuesday, October 6, 2020 10:53 AM
To: Julie Engebretsen <JEngebretsen@ci.homer.ak.us>
Subject: Wild Honey CUP

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Please see below for my response. Contact me if you have any questions.
Thanks,
Melody Livingston
Wild Honey Bistro

1) As discussed, I am not necessarily opposed to paving the parking lot at some point in the future, but do not understand why making the paving mandatory should be required or would be fair. I would question why such a condition and associated expense would be imposed on Wild Honey (and consequently the Bunnell Arts Center, and other tenants of 106 W Bunnell, and it's shared owner). The requirement seems arbitrary and not justified by the minimal additional traffic that may result. As noted in the plans, the rear-covered decking and side pathway were added mostly for aesthetics consistency with the Bunnell Arts Center. The rear exit/entry are there due to the city's fire code requirements and will not be used as a primary entry/exit. Also, while the new construction is designed to improve and enhance the visual and long-term viability of the Wild Honey Bistro building, it is not providing significant increases in capacity or being done in anticipation of increased vehicle traffic.

2) I agree that there will not be room for growth of a hedge that would be able to act as a true barrier. I do not believe that a fence should be required either as, in addition to the overlapping points made above, it is anticipated that foot and vehicle traffic will continue to be almost exclusively by and through the main front entrance. There will also be no seating on the rear deck as the decking was included simply to keep the rear of the new construction consistent with the look of the other half of the building. Given this, there should be no or only minimal increases in noise. Also, the visuals from the residences will be highly improved by the existing plans without the addition of a hedge or fence as they currently look onto the rear of a deteriorating quonset hut, which will be replaced by the new construction that will be aesthetically consistent with the rear of the existing Bunnell Arts Center. The addition of a fence would actually work against the

aesthetic improvements and not be consistent with other buildings in Old Town. A fence or hedge would also create security concerns during early mornings and winter months where light is low.

Both 1 and 2 appear to be driven by a concern that the planned rear decking will attract car and/or vehicle traffic and/or that there will be a significant anticipated increase in business. I do not believe that this will be the case in any significant way, in order to address the concerns of the residential units, I would be willing to leave the rear decking out of the current building plans, if desired.

Sent from my iPhone

Travis Brown

From: Matt Early <matt@bcihomer.com>
Sent: Tuesday, October 6, 2020 2:18 PM
To: '(null) (null)'; Julie Engebretsen
Cc: Rick Abboud; Travis Brown
Subject: CUP for Wild Honey Bistro

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On Melody's comments below, I would just add that AJ's right next door currently has a gravel parking area adjacent to these cottages that has been in existence for some time, and no requirement has been made on them to either fence or pave that parking lot, which probably will see more vehicle traffic that the proposed parking area. It seems unfair to require additional work/costs from one property owner but not the other, particularly given that the Wild Honey project is already making a marked improvement to the area in terms of visual appear with the new building, and thus property value improvements for the Old Town Cottages.
Let me know if this needs to be addressed in any greater detail prior to the meeting,

Matt Early
Project Manager
Phone: (907) 235-8876
Fax: (907) 235-5521
Mobile: (907) 299-9900
matt@bcihomer.com

BCI BEACHY CONSTRUCTION, INC.

From: (null) (null) <melodyliving@yahoo.com>
Sent: Tuesday, October 06, 2020 10:45 AM
To: Matt <Matt@bcihomer.com>
Subject: Fwd: CUP for Wild Honey Bistro

Please see below for my response. Contact me if you have any questions.

1) As discussed, I am not necessarily opposed to paving the parking lot at some point in the future, but do not understand why making the paving mandatory should be required or would be fair. I would question why such a condition and associated expense would be imposed on Wild Honey (and consequently the Bunnell Arts Center, and other tenants of 106 W Bunnell, and it's shared owner). The requirement seems arbitrary and not justified by the minimal additional traffic that may result. As noted in the plans, the rear-covered decking and side pathway were added mostly for aesthetics consistency with the Bunnell Arts Center. The rear exit/entry are there due to the city's fire code requirements and will not be used as a primary entry/exit. Also, while the new construction is designed to improve and enhance the visual and long-term viability of

Rick Abboud

From: Julie Engebretsen
Sent: Tuesday, October 6, 2020 10:30 AM
To: Rick Abboud
Subject: FW: Condition Use Permit 20-15, Wild Honey Restaurant

-----Original Message-----
From: Don Meares <dcmeares@me.com>
Sent: Monday, October 5, 2020 6:45 PM
To: Department Planning <Planning@ci.homer.ak.us>
Cc: Meares Carol <ccmeares@gmail.com>
Subject: Condition Use Permit 20-15, Wild Honey Restaurant

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

From Don and Carolyn Meares
3459 Main Street, Unit 2
Homer, AK. 99603
907-322-2301

We are emailing this comment in support of the Wild Honey Conditional User Permit request as we are not likely able to attend the meeting.
Carol and I have a residence in the Old Town Cottages near the Wild Honey restaurant and we also enjoy the Old town living experience.

We encourage approval of the conditional use permit. We believe that improving the safety and quality of Old Town's businesses while maintaining the Old Town character is positive for the City of Homer. We applaud Ms. Livingston's design maintaining the look and feel of Old Town, the beach town atmosphere, and the living history aspect of authentic Alaska.

We do believe that in the case of the Bunnell Street businesses, the required parking numbers may be inconsistent with the stated goal of ensuring the CBD remain a pedestrian friendly area. While the street does get very busy, many customers (far far more than the normal at anywhere else in town that I am aware of) walk to Wild Honey. Within walking distance are several bed and breakfast establishments, the RV park, a hotel, and residential housing. We support the staff suggestion of reduced parking requirements.

thank you
Don Meares
Carolyn Meares

Sent from my iPad

Rick Abboud

From: Julie Engebretsen
Sent: Tuesday, October 6, 2020 12:12 PM
To: Rick Abboud
Subject: Fwd: For Planning Commission tonite

Sent from my iPhone

Begin forwarded message:

From: Asia Freeman <asia@bunnellarts.org>
Date: October 6, 2020 at 1:07:34 PM PDT
To: Julie Engebretsen <JEngebretsen@ci.homer.ak.us>, Renee Krause <RKrause@ci.homer.ak.us>
Subject: For Planning Commission tonite

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear City of Homer Planning Commission,

I am writing in regard to the permit for Wild Honey renovations. Wild Honey is physically attached to the Inlet Trading Post which houses Bunnell Street Arts Center on the main floor and Old Town Bed and Breakfast above.

I understand that the Planning Commission has made requests to the project permitting which include paving the parking lot and installing a fence along the north edge of the parking lot between Old Town Cottages and the Inlet Trading Post.

I am not opposed to paving the parking lot at some point in the future, but I do not understand why making the paving mandatory should be required. It is a very big expense (at least $20,000, last I checked) for Wild Honey (and consequently the Bunnell Art Center, and other tenants of 106 W Bunnell, and it's shared owner), but not other business owners in Old Town. Paving the parking lot seems to be an unfair request. Will AJ's Steakhouse also be required to pave its lot within the two-year period? Will the same requirement be imposed on the RV park across from Wild Honey. The requirement seems arbitrary and not justified by the minimal additional traffic that may result. As noted in the plans, the rear-covered decking and side pathway were added mostly for aesthetics consistency with the Bunnell Street Art Center. The rear exit/entry are there due to the city's fire code requirements and will not be used as a primary entry/exit. Also, while the new construction is designed to improve and enhance the visual and long-term viability of the Wild Honey Bistro building, it is not providing significant increases in capacity or being done in anticipation of increased vehicle traffic.

I agree that there will not be room for growth of a hedge that would be able to act as a true barrier. I do not believe that a fence should be required either as, in addition to the overlapping points made above, it is anticipated that foot and vehicle traffic will continue to be almost exclusively by and through the main front entrance. There will also be no seating on the rear deck as the decking was included simply to keep the rear of the new construction consistent with the look of the other half of the building. Given this, there should be no or only minimal increases in noise. Also, the view from the residences will be significantly improved by the renovation, without the addition of a hedge or fence. Old Town Cottages currently looks onto the rear of a deteriorating quonset hut, which will be replaced by the new construction that will be aesthetically consistent with the rear of the existing Bunnell Art Center and really very neat and attractive, and historic in appearance. The addition of a fence would actually work against the aesthetic improvements and not be consistent with other buildings in Old Town. A fence or hedge would also create security concerns during early mornings and winter months where light is low.

The request for paving and fencing appear to be driven by a concern that the planned rear decking will attract car and/or vehicle traffic and/or that there will be a significant anticipated increase in business. Wild Honey clientele parks in front of the building, which is most convenient, while the rear parking lot will continue to be used as it has since long before Old Town Cottages, for parking by all business occupants/staff for Bunnell, The Fringe and Old Town B&B.

Sincerely,

Asia

Asia Freeman
Artistic Director
Bunnell Street Arts Center
106 West Bunnell, Suite A
Homer, AK 99603
907.235.2662
asia@bunnellarts.org

Bunnell Street Arts Center is situated within the sovereign tribal boundaries of Ninilchik Village Tribe, lands that have been cared for for thousands of years, since time immemorial, by the Indigenous people of this region-- Dena'ina, Sugpiaq, Yup'ik and Kachemak Peoples before them. Chin'an, Chiqinik, Quyana, Thank you! We are committed to resisting colonialism by partnering with Indigenous artists and supporting Indigenous-led practices

Bunnell's land acknowledgement is a living document. We offer this statement with good intentions. It is not our intent to offend and we welcome feedback on how we can to continue to improve our efforts on this journey.

Travis Brown

From: Gary Miller <garymillerak@gmail.com>
Sent: Wednesday, October 7, 2020 3:37 PM
To: Department Planning
Cc: Sherry Thompson; Susan Miller
Subject: Wild Honey CUP hearing 10/7/2020

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Planning Commission

Re; Wild Honey Restaurant, Old Town, Homer

We live @ 3459 Main St, behind Wild Honey Restaurant and Bunnell Art Center, red cottage, #8. so we look directly into Wild Honey and AJ's Steakhouse, have lived there part time for 9 years, built the cottage.

We like what the Planning Committee has come up with in their report.

Only issue we would like to see would be possible restaurant venting go upward into the sky versus out back, so we wouldn't have to listen to sound of fans/or smell the cooking.
We have that now with AJ's Steakhouse, it's not good. sometimes wind drives it right into our front door or sound is loud.

Landscaping: so to conceal the rear of the building if possible with shrubs. and to seal the parking lot so dust doesn't come into our cottage with traffic. Since the rear parking area is for Bunnell Arts, the B&B, Vintage clothing store in building and Wild Honey, we'd appreciate limiting further parking back there.

Thank you,

Gary and Susan Miller
907.440/7167

winter address: 9578 E Ventaso Cir
Tucson AZ. 85715

Travis Brown

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 7, 2020 3:59 PM
To: Department Planning
Subject: CUP 20-15

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Commissioners,

The application for CUP 20-15 lists Beachy Construction, Inc. as the Applicant and is signed by contractor Matt Early who indicated on page 5 that he is the Owner of Record. The actual owner of record appears to be Melody Livingston who did not sign the Application and, contrary to Staff Report 20-63, is not listed as an applicant on the application form. HCC 21.71.020(a)(9) states: "If the applicant is not the owner of the subject lot, the owner's signed authorization granting the applicant the authority to (a) apply for the conditional use permit and (b) bind the owner to the terms of the conditional use permit, if granted." Because HCC 21.71.020(a)(9) has not been complied with, the application for CUP 20-15 should not even be considered by the Commission. The application form suggests that Level 1 lighting, Level 2 ROW Access Plan, and level 2 Site Development Standards apply; it is not clear that these have been adequately addressed. Applicant indicates that he is building or remodeling a commercial structure, or multifamily building with more than 3 apartments so Fire Marshal Certification is required. Where asked to state the status of Fire Marshal Certification, Applicant left it blank. If CUP 20-15 is approved, Fire Marshal Certification should be one of the conditions. HCC 21.71.030(j) requires that the proposal will comply with all applicable provisions of the Community Design Manual. Nonetheless, Applicant indicated on the Application that his project does not trigger a Community Design Manual review. Without a CDM review it cannot be determined which provisions are applicable or met. Applicant indicates that there are nonconforming uses or structures on the property and further indicates that they have been formally accepted by the Homer Advisory Planning Commission. There is no evidence in the record that any nonconforming uses or structures on the subject property have been formally accepted by the Homer Advisory Planning Commission. Applicant states that adjoining property values will "increase due to improved quality of adjacent buildings" but fails to acknowledge that decreasing setbacks and lot density requirements will likely have a deleterious effect on the values of adjoining properties. Applicant states that his proposal will not be detrimental to the health, safety or welfare of the surrounding area or the city as a whole but there is no evidence to support such a claim. The purpose of the Homer Zoning Code is listed under HCC 21.01.030:

The Homer Zoning Code is adopted as one means of implementing the general goals and policies of the Homer Comprehensive Plan. Its purpose is to enhance the public health, safety and welfare through land use regulations to:

a. Designate, regulate and restrict the location and use of buildings, structures and land;

b. Regulate the height, number of stories, and size of buildings and other characteristics of structures;

c. Regulate and determine the size of yards and other open spaces;

d. Regulate and limit the density of population;

e. Conserve and stabilize the value of property;

f. Provide adequate open spaces for light and air; and to prevent and fight fires;

g. Prevent undue concentration of population;

h. Lessen congestion on streets and highways;

i. Preserve and enhance the aesthetic environment of the community;

j. Promote health, safety and general welfare. [Ord. 08-29, 2008].

Building setbacks and lot density restrictions were enacted to promote health, safety and general welfare. Arbitrarily reducing setback requirements and lot density requirements is clearly detrimental to the health, safety and welfare of the surrounding area and city as a whole.

On page 4 of the application, Applicant failed to state how many parking spaces are required for his development or how many spaces are shown on his parking plan. He did state that he is not requesting any (parking space) reductions. However, Planning Staff calculated that 16 parking spaces are required and that only 10 on-site parking spaces are provided. Despite Applicant's certification that the above statements and other information submitted are true and accurate to the best of his knowledge and that he is the owner of record, on many accounts this does not appear to be the case.

HCC 21.71.010(b) states in relevant part as follows: "A conditional use permit may be granted to approve ***land uses and structures*** with special design or site requirements, operating characteristics, or potential adverse effects on surroundings." HCC 21.18.020(a), HCC 21.18.020(cc), and HCC 21.18.020(d) are all irrelevant to this application because all pertain to permitted uses for which no CUP is needed. The Commission should focus on the effects of the proposed setback reduction and lot density increase instead of the effects of permitted uses.

HCC 21.18.040(b)(4) and HCC 21.18.040(d) violate the equal protection clause of the US Constitution because they arbitrarily apply to some properties within the CBD but not to others. They also circumvent the variance procedures prescribed under AS 29.40 and HCC 21.72. Therefore, the Commission does not have the authority to approve CUP 20-15 as applied. This proposal should be considered under HCC 21.72 as a request for area variances where the review criteria apply to dimensional requirements, not under HCC 21.71 as a request for a conditional use permit where the review criteria apply to uses and structures. These issues are pending before the Alaska Supreme Court. It would be prudent for the Commission to seek independent, impartial legal counsel before deciding this matter.

Pipelines and railroads could admittedly have a greater negative impact on the value of adjoining property than the proposed setback reduction and increase in lot coverage but Planning Staff has deliberately misinterpreted the applicable standard. HCC 21.71.030(c) states: " 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." Neither pipelines nor railroads are listed as permitted uses within the CBD; both are listed as conditional uses. However, neither have been *conditionally permitted* via CUP and if they ever were, severe conditions would likely be imposed. Planning Staff has substituted "conditionally permitable" for "conditionally permitted" in order to lower the bar for approval so low as to render review criteria HCC 21.71.030(c) meaningless.

Planning Staff states that three sections of the CDM apply but fails to state why myriad other applicable sections do not. The CDM includes extensive landscaping requirements but Planning Staff states as follows: "Due to the existing site design and small lot, there is not a lot of room for landscaping. ... Staff recommends leaving any decisions about landscaping and drainage to the affected property owners." In granting a zoning permit, no City official or employee has authority to grant a waiver, variance, or deviation from the requirements of the zoning code and other applicable laws and regulations, unless such authority is expressly contained therein. HCC 21.70.030(c). If the subject lot is too small to support the proposed structure then the structure should be reduced so that it fits the lot. What is the point in having a zoning code if it is not adhered to?

Planning Staff states: "Allowing the continuation and expansion of floor area over 30% meets the Comprehensive Plan goal of infill." It is not a stated goal of the Comprehensive Plan to infill every square inch of every lot in the CBD. The subject lot is already infilled. In *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9 (Alaska 1996) the court said: "Not all of the goals articulated by the City can be considered legitimate per se. For example, any zoning change which eases restrictions on property use could be said to further the goal of "filling in vacant places."

Planning Staff found that "no evidence has been found that [the proposal] is not contrary to the applicable land use goals and objects [sic] of the Comprehensive Plan." Planning Staff did not look for any such evidence. Furthermore, the lack of evidence does not constitute evidence. The proposal is contrary to the following goals and objectives of the Comprehensive Plan:

Goal 2: Maintain the quality of Homer's natural environment and scenic beauty.
Objective A: Complete and maintain a detailed "green infrastructure" map for the City of Homer and environs that presents an integrated functional system of environmental features on lands in both public and private ownership and use green infrastructure concepts in the review and approval of development projects.

Implementation Strategies

- • Review how developments effect on- and off-site environmental functions
- • Support the preservation of green infrastructure.

1. **Objective B:** Continue to review and refine development standards and require development practices that protect environmental functions.

   Once a project has been identified for development, green infrastructure concepts can be used to consider what special conditions, if any, need to be incorporated into the project's layout and development. Guidelines for development such as setbacks from waterbodies or limits on development of steep slopes are covered through the City's zoning code. Homer's existing codes include many good environmental standards. Periodic review of the successes and failures of the existing standards will help identify opportunity for revisions.

   Appendix C-7 includes examples of how decisions about site clearing, grading, and impervious surfaces can create very different types of development. Homer is encouraged to continue practices that bring about Objective B.

   Implementation Strategies

   - o • Review the lessons learned from the implementation of site development standards
   - o • Consider revision of development standards in light of new information in relation to

environmental functions and best practices

Green Infrastructure Defined

Green infrastructure is defined as an interconnected network of natural areas and other open spaces that conserves natural ecosystem values and functions, sustains clean air and water, and provides a wide array of benefits to people and wildlife. In contrast to traditional approaches to open space conservation, green infrastructure is integrated with and linked to development. Green infrastructure is a way of conserving natural areas that function as city infrastructure. Definition and other information based on Green Infrastructure: Linking Landscapes & Communities.

Mark A. Benedict, Ph.D., Edward T. McMahon, J.D. Island Press, 2006

Objective C: Provide extra protection for areas with highest environmental value or development constraints.

Ideally, adopting more effective development standards will result in the preservation and protection of lands with high environmental value. However, there may be some areas identified that cannot easily be protected through standard means and are so important they should be preserved forever. References such as wetland, steep slope, and green infrastructure maps can help identify and prioritize these lands. Organizations, such as the Homer Soil and Water Conservation District and the Natural Resources Conservation Service of Alaska may be consulted in identifying specific local strategies. Examples of environmentally important areas might include a particular beach access corridor or a particular section of a lake or stream.

Implementation Strategies

- Support acquisition of environmentally sensitive land for preservation

GOAL 3: Encourage high quality buildings ***and site design*** that complements Homer's beautiful natural setting.

-

Planning Staff states: "If the new construction met the twenty foot building setback, it would be much further [sic] from the street and not align with the older buildings on either side: the AJ's restaurant to the west, and the Inlet Trading Post to the east. Allowing new construction within the twenty foot setback area would keep the character of the period architecture of this portion of Old Town, as recommended by the Comprehensive Plan." Many of the older buildings in Old Town are (grandfathered) nonconforming uses. Nonconforming uses do not set a legal precedent for the proliferation of similar uses; at some point they are supposed to be discontinued and be replaced by new uses/structures that conform to the city's comprehensive zoning scheme. In a memorandum to Councilmember Alan Parks dated April 3, 1998, Homer City Attorney Gordon Tans stated as follows: "Generally, the existence of a non-conforming "grandfathered" use in a zoning district is not a legal precedent that would allow other similar establishments to open in the zone. To the contrary, the ordinance serves as the legal precedent saying that such establishments are not to be allowed in the zoning district. Therefore, the controlling legal precedent is the ordinance that prohibits the use."

The applicant must produce evidence sufficient to enable meaningful review of the application. HCC 21.71.030. He did not. The application shall not be approved unless it is established that the proposal, with

conditions if necessary, satisfies the applicable criteria. (Which it does not). HCC 21.71.040(a). Nothing in the zoning code shall be construed to require the granting of a conditional use permit.

Frank Griswold

Commissioner Bentz complimented the details included in the report and inquired about Storm Water Master Plan and the development of a citywide plan or next steps.

Mr. Meyer responded that with the limited funding they were unable to go to the desired level but they do need to establish how much green infrastructure will required in developing the community so that it can be considered when developing the storm water master plan, noting the drainage basins around the city. He noted all the plans that have been developed and that they do need a storm water plan, but agreed that a green infrastructure plan would be developed at the same time.

Mr. Meyer responded that the Commission should consider the relation of all the plans when developing the Storm Water Master Plan and believes them to be all inter-related and that this Commission should be involved in the development. He further added that this should be considered by Council when consideration or review of the capital budget.

Commissioner Highland noted on page 5 of the report item C line 5 in the first paragraph should reflect Group C not Group B. She then inquired about Page 6 of the report regarding Steep Slopes and compared to the existing regulations should the Commission revisit the existing regulations to make adjustments.

Mr. Meyer provided an explanation that steep slopes would not be developed as other areas and believes that consideration of storm runoff and the brief presentation that was provided today on slope stability and bluff erosion during the worksession there should be further consideration on controls for development in those areas. He would like to see the Commission have a worksession on Green Infrastructure and Storm Water Master Plans.

REPORTS

A. Staff Report 20-62, City Planner's Report

City Planner Abboud provided a summary review of Staff Report 20-62 for the Commission.

Commissioner Venuti commented on the importance to submit the written reports but that there should be someone attending the meetings as well to report what the Commission is working on.

Commissioner Bentz requested clarification on the DGGS projects and the phasing process.

City Planner Abboud provided clarification on the process and project and timelines.

PUBLIC HEARING(S)

A. Staff Report 20-63, Conditional Use Permit 20-15 for reconstruction of a restaurant building at 106 W Bunnell Avenue

Chair Smith introduced the item by reading of the title into the record.

City Planner Abboud asked if everyone was able to review the laydown.

Chair Smith called for a recess at 7:20 p.m. to allow the Commission time to review materials provided as laydowns. He called the meeting back to order at 7:30 p.m.

City Planner Abboud provided a summary review of Staff Report 20-63 highlighting the following:

- Location is Central Business District in Old Town
- Complete tear down of the building
- Review of the Comprehensive Plan to continue design and style
- The second story is to be a prep kitchen
- Parking was calculated as 16 and 10 are currently onsite but requirement can be accomplished with offsite parking agreement
- Consideration can be made to reduce the requirement since there are other options available to provide the parking and the Commission is asked to adopt either Finding 1 or Condition 2

Commissioner Venuti declared that if the applicant is Beachy Construction he had a conflict of interest.

BENTZ/HIGHLAND MOVED THAT COMMISSIONER VENUTI HAD A CONFLICT.

Discussion ensued on clarifying the level and type of conflict that Commissioner Venuti had clarifying that he had a business relationship with Beachy Construction, and does not have an interest in this project but is paid over $1500.

VOTE. YES. HIGHLAND, PETSKA-RUBALCAVA, BENTZ, BARNWELL, SMITH

Motion carried.

Commissioner Venuti left the meeting by muting his mic and departing the room.

City Planner Abboud then addressed the issues outlined in the comments submitted by Mr. Griswold.

City Planner Abboud provided clarification on infill referenced in Mr. Griswold's comments.

City Planner Abboud then reviewed concerns from the additional comments received regarding dust, screening the parking lot, noise, paving the rear parking lot, venting and landscaping.

Melody Livingston, Wild Honey Bistro, questioned the requirement to screen the parking lot and requested clarification on the type of screening that would be required. She presented her design

concept noting that the back door was a Fire Marshall requirement and the rear porch would be consistent with the neighboring business. She is available for questions.

Chair Smith opened the Public Hearing.

Adrienne Sweeney, property/business owner, commented in support of the project noting the existing use of the rear parking, discussion she has had with the applicant regarding the parking agreement and recommended the Commission approve Finding 1 for reduced parking requirement noting the availability of nearby parking options.

Susan Miller, resident/property owner, commented on the proposed project and appreciated the ongoing improvement in the area. She expressed concerns with dust with increased use of the rear parking lot, they are not opposed to the project but want to protect their property and the use of their property.

Chair Smith closed the Public Hearing. He then opened the floor to questions from the Commission.

Chair Smith requested a motion as there were no questions from the Commission.

There was a brief discussion by the Commission on process to amending the findings and conditions or approving the staff report and findings with conditions and then make amendments.

BENTZ/HIGHLAND MOVED TO ADOPT STAFF REPORT 20-63 AND APPROVE CUP 20-15 WITH FINDINGS 1-11 AND CONDITIONS 1, 3, AND 4.

Discussion ensued clarifying that the Commission is reducing the parking requirement to 10 spaces and the 6 additional spaces would be accommodated by public parking, and whether the motion should be amended.

Further discussion on amending the motion to included Condition 5

HIGHLAND/BENTZ MOVED TO AMEND THE MOTION TO ADD CONDITION FIVE, SCREEN THE REAR PARKING AREA ALONG THE NORTH LOT LINE PER HCC 21.55.020 (A)(4)(f)

Discussion on the amendment ensued regarding the updates to city code that require the screening be implemented now versus before. Further discussion on an adequate height to screen parking and loading or service areas. This serves as a dual purpose since it would prevent some dust from affecting the neighboring properties.

A point of order was made regarding procedural process and at this time the Commission could not question the applicant.

Further discussion ensued on the screening requirement and height of screening landscape and the Commissioners expressed that the applicant could work it out with Planning Staff the landscape requirement.

VOTE.(Amendment). YES. BARNWELL, BENTZ, HIGHLAND, PETSKA-RUBALCAVA, SMITH

Chair Smith called for the vote on the main motion as amended.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Commissioner Venuti was invited back to the meeting.

PLAT CONSIDERATION

PENDING BUSINESS

NEW BUSINESS

A. Decisions and Findings for Conditional Use Permit 20-14 to allow a second mobile home at 541 Bonanza Avenue.

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide some clarification on changes.

City Planner Abboud provided clarification on Finding two to make sure it was tied to the criteria and wanted to make sure the Commission reviewed the document and does not have anything to amend.

Chair Smith requested a motion to adopt the Decisions and Findings as written.

BENTZ/VENUTI MOVED TO ADOPT THE DECISIONS AND FINDINGS FOR CONDITIONAL USE PERMIT 20-14 TO ALLOW A SECOND MOBILE HOME AT 541 BONANZA AVE AND ATTACHED FINDING TWO.

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

INFORMATIONAL MATERIALS

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

HOMER PLANNING COMMISSION

Approved CUP 2020-15 at the Meeting of October 7, 2020

RE: Conditional Use Permit (CUP) 20-15
Address: 106 W Bunnell Ave. #2
Legal Description: Chamberlain & Watson No 4 Lot 1-A , and T 6S R 13W SEC 19 Seward Meridian HM 2011002 INLET TRADING POST CONDOMINIUMS UNIT 2

DECISION

CUP 20-15

Introduction

Property owner Melody Livingston (the "Applicant") and the applicants representative, Matt Early applied to the Homer Planning Commission (the "Commission") for a conditional use permit (CUP) under Homer City Code (HCC) 21.18.040(b)(4), building within the twenty foot building setback and HCC 21.18.040(d), building area in excess of 30 percent of the lot area on a lot in the Central Business District (CBD).

The applicant wishes to demolish existing structures that support an active restaurant and rebuild in approximately the same location. The proposal affects a portion of the property located on the lot that is in a condominium form of ownership. The portion to be rebuilt will match the existing style and current front setback of the neighboring structures.

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on October 7, 2020. Notice of the public hearing was published in the local newspaper and sent to 66 property owners of 39 parcels.

Commissioner Venuti declared a conflict of interest, as he has exceeded the fiscal limits of transaction with the applicants' representative and is found to have a substantial financial interest. Commissioner Davis was excused from the meeting.

At the October 7, 2020 meeting of the Commission, the Commission voted to approve the request with five Commissioners participating. The Commission approved CUP 20-15 with unanimous consent.

Evidence Presented

Seven laydowns were presented to the commission, which took an aside to review. The laydowns included opposition from Frank Griswold. Concerns and suggestions were received from Sherry Thompson and Susan and Gary Miller. Letters of support were received from Don and Carolynn Meares and Asia Freeman.

City Planner Abboud reviewed the staff reports and addressed points made in the laydown material. The applicant made a presentation and was available to answer questions.

Adrienne Sweeney, owner of restaurant next door (AJ's Steakhouse) made comments in support of the proposal and reducing the parking requirements. Susan Miller expressed her concerns with the possibility of increased traffic and her appreciation for the ongoing improvements in the area.

Findings of Fact

After careful review of the record, the Commission approves Condition Use Permit 20-11 to build more than one building containing a permitted principal use on a lot.

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 2:** If approved by a Conditional Use Permit, more than 30% lot coverage and buildings within the twenty foot building setback area are allowed.

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 purpose of the Central Business District includes providing for general retail shopping, restaurants, and encourages pedestrian-friendly design and amenities. The proposed development is compatible with the purpose statement of the 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 4:** Lot coverage over thirty percent and building within the twenty foot building setback area is not expected to negatively impact the adjoining properties greater than other permitted or conditional uses.

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

> **Finding 5:** Redevelopment of the existing restaurant with the proposed site plan and lot coverage is compatible with existing mixed uses of surrounding land.

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

Finding 6: Existing public water, sewer, police and fire services are adequate to serve the site.

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 Commission finds the proposal will not cause undue harmful effect upon desirable neighborhood character as described in the purpose statement of the 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 8: The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area and the city as a whole when all applicable standards are met as required by city code.

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

Finding 9: An approved CUP and zoning permit will ensure that the proposal will comply with applicable regulations and conditions specified in Title 21.

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

Analysis: This proposal promotes Chapter 4 Land Use, 1-C-1: Promote infill development in all housing districts and 1-C-2, Encourage inclusion of affordable housing in larger developments and affordable housing in general.

Finding 10: The proposal is not contrary to the applicable land use goals and objects of the Comprehensive Plan. The proposal aligns Goal 1 Objective D-3, Goal 3 and Goal 4 Objective A-2 and no evidence has been found that it is contrary to the applicable land use goals and objects of the Comprehensive Plan.

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

Finding 11: Project complies with the applicable provisions of the CDM.

Condition 4: Outdoor lighting must be down lit per HCC 21.59.030 and the CDM

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 specific conditions deemed necessary
2. Fences and walls: See conditions
3. Surfacing of parking areas: No specific conditions deemed necessary.
4. Street and road dedications and improvements: No specific conditions deemed necessary.
5. Control of points of vehicular ingress and egress: No specific conditions deemed necessary.
6. Special provisions on signs: No specific conditions deemed necessary.
7. Landscaping: See conditions.
8. Maintenance of the grounds, building, or structures: No specific conditions deemed necessary.
9. Control of noise, vibration, odors or other similar nuisances: No specific conditions deemed necessary.
10. Limitation of time for certain activities: No specific conditions deemed necessary.
11. A time period within which the proposed use shall be developed: No specific conditions deemed necessary.
12. A limit on total duration of use: No specific 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.
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.

Conclusion: Based on the foregoing findings of fact and law, Conditional Use Permit 20-15 is hereby approved, with Findings 1-11 and Conditions 1-4.

Finding 1: Per HCC 21.55.090(c), the Commission hereby reduces the number of required spaces to 10 spaces. The additional six spaces required for this site can be accommodated by the public parking on the south portion of the property and the W Bunnell Ave right of way.

Condition 1: Side yard setback on the western lot line shall meet the requirements of HCC 21.18.040(b)2.

Condition 2: Screen any dumpster on at least one side, from view of the cottages located to the north.

Condition 3: Outdoor lighting must be downward directional and must not produce light trespass or glare per the CDM and HCC 21.59.030.

Condition 4: The rear parking area shall be screened along the north lot line per HCC 21.55.020(A)(4)(f).

Oct 22, 2020 _____

Date Chair, Scott Smith

10/22/2020 _____

Date City Planner, Rick Abboud, AICP

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 10/22 _____, 2020. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

10/22/2020 _____

Date Rick Abboud, AICP, City Planner

Applicant:

Melody Livingston
106 W Bunnell #2
Homer, AK 99603

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BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT FRANK GRISWOLD'S OPENING BRIEF

STANDARD OF REVIEW

"Findings cannot be merely conclusionary, but must be based on evidence." *Day v. Williams, 285 P.3d 256, 260 (Alaska 2012) quoting Ethelbah v. Walker, 225 P.3d 1082 at 1091 (Alaska 2009).* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Keiner v. City of Anchorage,* 378 P.2d 406, 411 (Alaska 1963). Whether evidence supporting a factual finding is substantial is a question of law that is reviewed de novo. *Button v. Haines Borough,* 208 P.3d 194, 200 (Alaska 2009). The reasonable and not arbitrary standard applies to claims that legislative enactments violate substantial due process. *Jager v. State,* 537 P.2d 1100, 1107 n.23 (Alaska 1975). Standing to file briefs and/or otherwise participate as a party in a judicial or quasi-judicial

matter is a jurisdictional issue. *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341 (Alaska 2011).

ARGUMENT

1. It was unconstitutional for the Commission to apply HCC 21.18.040(b)(4) to the application for CUP 20-15.

The Commission did not have the authority to apply HCC 21.18.040(b)(4) to the application for CUP 20-15 because this provision violates the equal protection clauses of the Fifth and Fourteenth Amendments to the US Constitution. Furthermore, setbacks promote and protect privacy which is recognized as a fundamental right by the Constitution of the State of Alaska. Due process pertains to the administration of justice and thus acts as a safeguard against the arbitrary denial of life, liberty, or property by the government and insures procedural due process, substantive due process, and protection from vague and arbitrary laws. HCC 21.48.040(b)(4) was enacted in 2004 as part of Ordinance 04-11(A) and re-codified in 2008 as HCC 21.18.040(b)(4). It states: "If approved by a conditional use permit, the setback from a dedicated right of way, except from the Sterling Highway or Lake Street, may be reduced." Because HCC 21.18.040(b)(4) arbitrarily excludes some CBD properties fronting Lake Street and the Sterling Highway, it is

unconstitutional "as applied."[1] "Standard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district." Erin Ryan, Zoning, Taking, and Dealing; The Problems and Promise of Bargaining in Land Use Conflicts, 7 Harv. Negot., L. Rev. 337, 352, n27. See also 1 Patrick J. Rohan, Zoning and Land Use Controls, Sect. 5.01 [1] 2004. Lake Street and Pioneer Avenue are both classified in the 2005 Homer Area Transportation Plan as Rural Major Collector Streets. See Plate 1 at 1-25. Equal protection requires that similar properties must be treated similarly. Arbitrarily allowing setback reductions for lots fronting Pioneer Avenue while denying them to lots fronting the Sterling Highway and Lake Street constitutes unwarranted discrimination. Many CBD property owners, including Mr. Griswold who owns lots on Klondike Avenue and Bonanza Avenue, have long enjoyed the privacy, open space, fire protection, and congestion relief insured by HCC 21.18.040(b)(1) and but are now arbitrarily being denied those protections under HCC 21.18.040(b)(4). In 2018 the Homer City

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[1] *State v. ACLU of Alaska*, 204 P.3d 364 at 372 (Alaska 2009) ("When statutes are found by a court to be unconstitutional, they may be found to be unconstitutional as applied or unconstitutional on their face . . . A holding that a statute is unconstitutional as applied simply means that under the facts of the case application of the statute is unconstitutional. Under other facts, however, the same statute may be applied without violating the constitution.").

Council considered reducing setbacks within some areas of the CBD from 20 feet to 10 feet via proposed Ordinance 18-39. The Homer City Attorney recommended against referencing streets, presumably including Lake Street and the Sterling Highway which are referenced in HCC 21.18.040(b)(4)), when applying CBD setback requirements. (See September 5, 2018 minutes of the Homer Advisory Planning Commission at page 11). On October 27, 2018, the Commission unanimously voted "that the Advisory Planning Commission does not support Ordinance 18-39 amending HCC 21.18.040 to reduce the setback permitted from 20 feet to 10 feet in the CBD." (See October 27, 2018 minutes of the Homer Advisory Planning Commission at pages 3-4). On November 26, 2018, the Homer City Council unanimously voted against the approval of Ordinance 18-29. (See November 26, 2018 minutes of the Homer City Council at pages 6-7). Simply rescinding HCC 21.18.040(b)(4) would have cured its arbitrary and discriminatory application.

2. The Commission's approval of CUP 20-15 constitutes an illegal, back-door, de-facto area variance.

By approving CUP 20-15, the Commission granted multiple de-facto area variances thereby violating and/or circumventing AS 29.40.040(b), HCC 21.72.020, and HCC 1.04.070. Notwithstanding HCC 21.18.040(b)(4), the Commission did not have the authority

to apply the conditional use permit review criteria prescribed in HCC 21.71.030 to the application for CUP 20–15 because the proposed setback reduction and lot coverage increase does not constitute a use. HCC 21.03.040 defines "use" as "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." The land and structure at the subject site were never occupied, arranged, designed, intended, or maintained for the purpose of setback reduction or relaxation of lot coverage requirements. The purpose for which the subject land and structure is occupied, arranged, designed or intended is a restaurant, retail store, and office space. [R. 8] The proposed porch is an appurtenance to the restaurant and therefore also constitutes restaurant use. Regardless of where on the subject lot the restaurant and its porch are constructed, they do not constitute a distinct use. Because the subject CUP application is one for relief from dimensional (bulk) requirements, it constitutes an area variance under the definition provided in the Alaska Planning Commission Handbook and is allowable via the variance procedures prescribed under AS 29.40.040(b). HCC 21.71.030 stipulates that prior to granting a conditional use permit, it shall be established that the ***use*** satisfies review criteria (a)-(j). But setback reduction

does not constitute a use. Restaurant use within the CBD is a permitted use per HCC 21.18.020(d) and does not magically transform into a conditional use when it or its appurtenances are constructed within a building setback or in excess of standard lot coverage requirements. All permitted uses listed under HCC 21.18.020 are presumed to be compatible with one another and otherwise appropriate within the CBD. Accordingly, no listed permitted use requires a conditional use permit. Note that Homer City Code addresses CBD setback reduction and lot coverage exemptions under HCC 21.18.040 (CBD dimensional requirements), not HCC 21.18.030 (CBD conditional uses). Conditional uses for the CBD are listed under HCC 21.18.030 and they include uses such as service station, greenhouse, homeless shelter etc., but not setback reduction or lot coverage exemptions. Applying the conditional use permitting analysis to a permitted use, setback reduction, or the relaxation of lot density requirements constitutes not only an exercise in absurdity but a violation of due process. The standards for granting variances from dimensional requirements were established in *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979). In *Fields v Kodiak City Council*, 628 P.2d 927 at n.8 the Alaska Supreme Court held as follows:

> Judicial review of grants of variances plays an important role in protecting both the interests of the applicant and the interests of nearby property owners. As the court in [Topanga Ass'n, 113 Cal. Rptr. at 843, 522 P.2d at 19] noted: "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare... . If the interest of these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests. Abdication by the judiciary of its responsibility to examine variance board decision-making when called upon to do so could very well lead to such subversion. Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual. ... The availability of careful judicial review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further, ... the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances. ... Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.

There is a fundamental difference between a variance and a conditional use permit. An area variance is an authority to legally vary/violate dimensional requirements of a land use ordinance, such as setback, lot density, and height restrictions, while a conditional use permit is an authority to put property to a use that is prohibited but conditionally allowable by a land use ordinance. The Alaska Planning

Commission Handbook states that area variances provide relief from setback requirements:

> Variances can be "use variances" or "area variances." As the name implies, a use variance permits a use otherwise prohibited in a given zoning district. AS 29.40.040(b)(2) prohibits use variances for general law municipalities; however, home rule municipalities are not prohibited from allowing them. **Area variances provide relief from setback**, frontage, height, density, and similar requirements and are permitted by AS 29.40. (APCH, Chapter 8, page 2)(emphasis added).

Wikipedia, the free encyclopedia, addresses the types of variances as follows:

> Two broad categories of variances generally are uses in the practice of local land use planning: **area** (or **bulk**) **variances** and **use variances**. (Citing Hoch, Charles J., ed. (2000). *The Practice of Local Government Planning* (Third ed.) ICMA Training Institute, p. 348). An **area variance** is the most common type. It can be requested by a builder or landowner when an odd configuration of the land, or sometimes the physical improvements (structures) on the land, requires a relaxation of the applicable regulations to avoid denying the landowner the same rights and use of the property enjoyed by owners of neighboring properties. A textbook example would be a house built on an oddly-shaped lot. If the odd shape of the lot makes it onerous for the landowner or builder to comply with the standard building setbacks specified in the code, a variance could be requested to allow a reduced setback. Another would be a house built on a sloping lot. If the slope of the lot makes it onerous to comply with the height limit – typically due to the way the municipality's code requires height to be measured – then a variance could be requested for a structure of increased height because of the special conditions of the lot. A **use variance** is a variance that authorizes a land use not normally permitted by the zoning ordinance. (Again citing

> Hoch). Such a variance has much in common with a special-use permit (sometimes known as a conditional use permit). Some municipalities do not offer this process, opting to handle such situations under special use permits instead. Grant of a use variance can also be similar, in effect, to a zone change. This may, in certain cases, be considered spot zoning, which is prohibited in many jurisdictions. In either case, the variance request is justified only if special conditions exist on the lot that create a hardship making it too difficult to comply with the code's normal requirements. Likewise, a request for a variance on a normal lot with no special conditions could judiciously be denied. The special conditions or hardship typically must arise from some physical configuration of the lot or its structures. The financial or personal situation of the applicant normally cannot be taken into consideration. Under most codes governing variances, approval of the variance must not result in a public health or safety hazard and must not grant special privilege to the property owner. In other words, when a variance is granted, any other property owner with similar site conditions should be able to obtain a similar variance; this criterion is often addressed by citing precedent.

Myriad court decisions confirm that dimensional requirements are subject to an area (or bulk) variance. See *In the Matter of Real Holding Corp. v. Alan Lehigh, et al,* 2N.Y.3d 297 (N.Y. 2004); *Corkery v. Municipality of Anchorage*, S-16684 (September 14, 2018). If the construction of a structure, or a portion thereof, within a setback constitutes a distinct use from that of a structure not constructed with a setback, then it might in some jurisdictions be eligible for a use variance permit/special permit/conditional use permit. However, a "use" variance

authorizes a land use not normally permitted by the zoning ordinance and granting it for a single parcel is, in effect, granting a zoning change for that parcel and thus constitutes spot zoning which, by definition, is illegal in Alaska. AS 29.40.040(b)(2) prohibits use variances for general law municipalities such as the City of Homer. Furthermore, HCC 21.72.020(e) expressly states: "A variance shall not be granted that will permit a land ***use*** in a district in which that ***use*** is otherwise prohibited." (Emphasis added). So while use variance permits, conditional use permits, and special permits may be used to grant ***use*** variances in jurisdictions where spot zoning is allowed, they can never be used to grant ***area*** variances. The Commission erroneously failed to make a finding as to whether it had the authority to apply HCC 21.18.040(b)(4) or HCC 21.18.040(d) to the application for CUP 20-15. Applying the conditional use review criteria to a permitted use is an exercise in absurdity because every permitted use listed under HCC 21.18.020 would meet the standards for approving any conditional use listed under HCC 21.18.030; otherwise they would not have been listed as permitted uses in the first place. Applying the standards for approving a conditional use to a non-use such as a setback reduction or lot density increase is equally absurd. The subject property has no special conditions

that would justify any area variance. Both AS 29.40.040 and HCC 21.72 severely restrict deviations from dimensional land use regulations. AS 29.40.040(b) provides that a variance may not be granted if: (1) special conditions that require the variance are caused by the person seeking the variance; (2) the variance will permit a land use in a district in which that use is prohibited; or (3) the variance is sought solely to relieve pecuniary hardship or inconvenience. HCC 21.72.010 provides that a variance may be granted by the Planning Commission to provide relief when a literal interpretation of the provisions of the Homer Zoning Code would deprive a property owner of the reasonable use of a lot. But no provision of the Homer Zoning Code deprives Melody Livingston of the reasonable use of her level, centrally located 11,441 square foot lot. HCC 21.72.020 provides that 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.

HCC 21.18.040(b)(4) circumvents the stringent standards of HCC 21.72, which apply to variances, by illegally substituting the dramatically less restrictive review criteria of HCC 21.71 which apply to conditional use permits. The City of Homer has substituted conditional use permitting procedures for use variance procedures in order to circumvent HCC 21.72 and AS 29.40. HCC 1.04.070 states: "No person shall violate any law of the State of Alaska nor any rule or regulation adopted by any duly authorized agency of the State of Alaska. Violations of the foregoing shall be violations of this code except where jurisdiction of the offense is reserved to the State of Alaska."

3. HCC 21.18.040(b)(4) conflicts with HCC 11.08.110 and CUP 20-15 violates both HCC 11.08.110 and HCC 11.08.050(a)(3).

10 as follows:

> a. To provide maximum protection to the public through the orderly control of traffic moving onto and off of a road or street;
> b. To provide a uniform practice in the design and construction of entrances and exits;
> c. To provide the necessary drainage.

Structures in close proximity to dedicated rights-of-way hamper snow removal operations and affect drainage to and from the streets. Setback reductions do not further the goal of providing "maximum protection to the public through the orderly control of traffic moving onto and off of a road or street." Staff Report 20-63 states as follows at page 5. "The [proposed] porch will lie about 15 feet into the 20 foot setback." [R. 11][2] HCC 11.08.110 (not to be confused with HCC 11.08.010) provides in relevant part that there shall be a minimum 20-foot building setback which shall apply to any property line abutting any dedicated road or street right-of-way. HCC 11.08.050(a)(3) mandates that all stands, buildings, gasoline pumps, and structures of any kind be placed at least 12 feet back on the property line. HCC 11.08.050(a)(3) conflicts with the Commission's approval of a 15-foot setback reduction but it does not conflict per se with HCC 21.18.040(b)(4) because HCC 21.18.040(b)(4) does not stipulate any minimum or maximum distance for the setback reduction and HCC 11.08.050(a)(3) allows some setback reduction. It must be presumed that the Homer City Council was aware of 11.08.050(a)(3) when it enacted HCC 21.18.040(b)(4) and therefore it must also be presumed that

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[2] Nowhere in the Application or Decision is the precise footage of this exceedingly large proposed setback reduction identified.

the Council intended that no setback reduction in excess of 8 feet be approved for "stands, buildings, gasoline pumps, and structures of any kind" (because they must be placed at least 12 feet back on the property line). HCC 11.08.110 conflicts with HCC 21.18.040(b)(4) because it would allow no setback reduction whatsoever. The Homer City Council has been aware of this conflict for many years but has not reconciled it. Three vital public purposes for HCC 11.08.110 are set forth in HCC 11.08.010. Providing the orderly control of traffic moving onto and off a road or street, providing a uniform practice in the design and construction of entrances and exits, and providing the necessary drainage are just as important along Pioneer Avenue as along Lake Street and the Sterling Highway. Enforcing HCC 11.08.110 is not discretionary, it is codified law. Approving an application for conditional use permit, on the other hand, is discretionary. See HCC 21.71.010(c). Mandatory regulations take precedent over discretionary ones. HCC 21.71.030(h) mandates that "[t]he proposal does or will comply with the applicable regulations and conditions specified in this title for such use." HCC 21.71.040(b)(13) provides in relevant part as follows: "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." HCC 21.70.030(c) states:

> In granting a zoning permit, no City official or employee has authority to grant a waiver, variance, or deviation from the requirements of the zoning code and other applicable laws and regulations, unless such authority is expressly contained therein. Any zoning permit that attempts to do so may be revoked by the City Manager as void. The applicant, owner, lessee, and occupant of the lot bear continuing responsibility for compliance with the zoning code **and all other applicable laws and regulations** (emphasis added).

The Board of Adjustment is bound to apply the plain language of HCC 11.08.110 and HCC 11.08.050(a)(3). Because these provisions are clear and unambiguous, rules of construction, timing, and legislative history are irrelevant. Any other readings of HCC 11.08.010 or HCC 11.08.050(a)(3) would run counter to the principles of statutory construction that "seemingly conflicting provisions must be harmonized unless such an interpretation would be at odds with statutory purpose." *Davis Wright Tremaine LLP v. State, Dept. of Administration* 324 P.3d 293, 299 (Alaska 2014)(citation omitted). Where there is a conflict of code, the provisions which frustrate a longstanding underlying public policy should be avoided. Front yard setbacks promote public safety and general welfare, especially where drainage, driveways, pedestrians, and heavy traffic are involved. A longstanding, general law which promotes public safety takes

precedent over a new, local law that promotes private interests to the detriment of the general public. Where there is a conflict in land use codes, the more restrictive code governs. *Bluett v. County of Cook*, 19 Ill. App. 2d 172, 153 N.E.2d 305 (1958); *City of Richiawn v. McMakin*, 313 Ky. 265, 230 S.W.2d 902 (1950); *Szilvasy v. Saviers*, 70 Ohio App. 34, 44 N.E.2d 732 (1942).

4. The Commission misapplied the review criteria set forth in HCC 21.71.030 by erroneously focusing on the potential affects of the restaurant, a permitted use, instead of focusing on the potential adverse affects of the 15-foot setback reduction and the increase in lot coverage from 30% to 47%.

The Public Hearing Notice did not specifically disclose that a 15-foot setback reduction was being applied for, nor did it specifically disclose that 47% lot coverage was being applied for. [R. 37] These unprecedented variances from standard dimensional requirements are monumental and consequential. The Commission never considered a lesser setback reduction or a lesser degree of lot coverage increase; it blindly embraced whatever dimensional deviations were applied for without giving any consideration to their potential harm to the neighbors or community. Nowhere in the Commission's decision is there any reference to a 15-foot setback reduction or 47% lot coverage. The Commission failed to consider or discuss the benefits of building setbacks and lot coverage requirements or the purposes

for them identified under HCC 21.28.020(f) which include providing adequate open spaces for light and air, preventing fires, stabilizing property values, and preventing congestion. Neither planning staff nor the Applicants presented statistics, analysis, or any tangible hard evidence regarding the potential effects of the proposed setback reduction or increased lot coverage on CBD property values, neighborhood character, privacy, or public safety etc. The Commission had a duty to weigh the effects of the reduced setback and increased lot coverage on adjoining property values, public safety, privacy, neighborhood character etc. but it failed to do so.

5. The Commission erred in considering and granting requests for two distinct conditional uses under one set of findings in one CUP and neglected to make findings regarding multiple permitted principal uses, their nonconforming status, and the requirement for separate findings and/or separate CUPs.

The review criteria prescribed in HCC 21.71.030 should have been applied separately to the proposed 15-foot setback reduction and to the proposed 47% lot coverage because the effects of one could be vastly different from the other. As argued above, the setback reduction and lot coverage variance should have been applied for and considered as area variances under HCC 21.72 instead of as conditional uses. Furthermore, the Commission erred in failing to require a CUP for a second permitted principal use on the lot which would also require a

distinct set of findings. The Inlet Trading Post houses the Bunnell Streets Art Center, Old Town Bed and Breakfast, the Fringe consignment store, and office space. To the west of the Inlet Trading Post is Wild Honey Bistro which consists of three separate structures connected by hallways. [R. 8] So there are currently a total of four structures and multiple principal uses on the subject lot. Applicant proposes to tear down three of those existing structures and build a new restaurant. [R. 8] More than one building containing a principal use on a lot requires a conditional use permit unless nonconforming use status applies. HCC 21.61.030 provides as follows: "A nonconforming structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

> a. A nonconforming structure may be enlarged or altered, but only if it does not increase its nonconformity;
> b. If a nonconforming structure is moved for any reason for any distance whatsoever it shall thereafter conform to the code provisions applicable in the zone in which it is located after it is moved;
> c. If a nonconforming structure or nonconforming portion of a structure is damaged by any means to an extent of more than 50 percent of its replacement cost at time of the damage, it shall not be reconstructed except in conformity with the provisions of Homer City Code.
> d. If at any time a nonconforming structure is abandoned or brought into conformity with this title, the structure shall thereafter conform to all the regulations of the zoning district in which it is located, and the nonconforming structure shall not be allowed to continue in use."

The Commission did not have the discretion to assume that nonconforming use status applies to the subject buildings; this would have required findings of fact and law based on substantial evidence and perhaps a separate quasi-judicial proceeding to decide whether to grant them formal recognition of nonconforming status. Even if nonconforming use status currently applies to the three existing structures comprising Wild Honey Bistro, that nonconforming status would cease to exist once those structures were torn down and the new replacement structure would require a CUP for that second permitted principal use because there is already one (presumably permitted) principal use on the lot i.e., the Inlet Trading Post. Having lost its nonconforming use status when Wild Honey Bistro was demolished, the Inlet Trading Post would then require modification or an additional CUP to authorize its encroachment into the 20-foot building setback.

6. The Commission's Findings are conclusionary, not supported by substantial evidence, and otherwise violate procedural due process.

"Findings cannot be merely conclusionary, but must be based on evidence." *Day v. Williams, 285 P.3d 256, 260 (Alaska 2012) quoting Ethelbah v. Walker, 225 P.3d 1082 at 1091 (Alaska 2009).* The Commission's review of the application for CUP 20-15 was glaringly inadequate and its findings are biased and arbitrary.

At page 2 of its Decision regarding CUP 20-15, the Commission states: "After careful review of the record, the Commission approves Condition [sic] Use Permit ***20-11*** to build more than one building containing a permitted principal use on a lot. [R. 66] One has to wonder what record, if any, the Commission reviewed. Building more than one building containing a permitted use on a lot was not at issue with regard to CUP 20-15 so it appears that the Commission simply recycled findings from an earlier decision. If Applicants had requested a 20-foot setback reduction and 100% lot coverage, the Commissions bogus rubber-stamped findings would have been the same. The landmark case of *Ang Tibay v Court of Industrial Relations*, 69 Phil. 635 (1940), enumerated the following "cardinal primary requirements" of procedural due process in administrative proceedings: "(1) The right to a hearing which includes the right to present one's case and submit evidence in support thereof; (2) The tribunal must consider the evidence presented; (3) The decision must have something to support itself; (4) The evidence must be substantial. Substantial evidence means such reasonable evidence as a reasonable mind accept as adequate to support a conclusion; (5) The decision must be based on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) The tribunal or body or any of its

judges must act on its own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate; (7) The Board or body should, in all controversial questions, render its decision in such manner that the parties to the proceeding can know the various issues involved, and the reason for the decision rendered." In this case, the Commission simply adopted the unsubstantiated, conclusionary findings of Staff Report 20-63 instead of acting on its own independent consideration of the law or facts of the controversy. Only one Commission finding (Finding 10) includes any analysis whatsoever.[3] Blindly adopting the unsubstantiated findings of a subordinate member of the Planning Department has long been the unconstitutional practice of the Commission. Circa 2013, KBBI described the Planning Commission as "one of the most powerful bodies in city government" and quoted (then) Planning Commissioner Larry Sloan as follows: "Most of the preliminary work is done by the staff. The staff has already reviewed it to make sure it complies with the ordinance . . . so that being the case, for the most part, all our job is as commissioners is to rubberstamp it." [See Exhibit 1 attached hereto). Particularly troublesome is the fact that Planning Department staff reports

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[3] Providing one original analysis in its Decision and excluding all analyses contained in Staff Report 20-63 indicates that the Commission rejected/abandoned planning staff's analyses.

with their customary recommendations for approval are prepared prior to the public hearing. In the instant case, Planning staff judged the matter before hearing or considering the public testimony or written evidence that was submitted to the Commission. The Commission ignored due process and dutifully rubber stamped all of the biased, conclusionary, unsubstantiated, fabricated findings contained in Staff Report 20-63. In doing so, the Commission rendered the city's elaborate CUP review process a total charade.

A. Finding 1 states: "Per HCC 21.55.090(c), the Commission hereby reduces the number of required (parking) spaces to 10 spaces. The additional six spaces required for this site can be accommodated by the public parking on the south portion of the property and the W Bunnell Ave right of way." HCC 21.55.090(c) states: "If more than one use is present on a lot, the number of required off-street parking spaces shall be equal to 75 percent of the sum of the number of required off-street parking spaces for each use computed separately, unless the Commission approves a lesser number." Nowhere in HCC does it state that the Commission may approve a reduction in the number of required parking spaces via conditional use permit. The only way the Commission may approve a reduction in the number of required parking spaces is via the variance procedures set forth in HCC

21.72. On page 4 of the application, Applicant failed to state how many parking spaces are required for his development or how many spaces are shown on his parking plan. He did state that he is not requesting any (parking space) reductions. However, Planning Staff calculated that 16 parking spaces are required and that only 10 on-site parking spaces are provided. The purpose of the conditional use permitting process is not to increase the deleterious effects of a conditional use, it is to decrease deleterious effects such that that the proposal comports with permitted uses. The Commission would have the authority to require under HCC 21.71.040, as a condition for its approval of CUP 20-15, that *more* than 16 parking spaces be provided, but it did not have the authority to reduce the number of required parking spaces to 6. Parking in the already overcrowded right-of-way would exacerbate existing congestion, endanger public safety, and set a bad precedent for other businesses in the immediate area and on the Homer Spit who lack sufficient parking spaces for their customers.

B. Finding 3 states: "The purpose of the Central Business District includes providing for general retail shopping, restaurants, and encourages pedestrian-friendly design and amenities. The proposed development is compatible with the purpose statement of the district." The purpose of the CBD is

not to provide general retail shopping and restaurants within setbacks or to allow 47% lot coverage and doing so is not pedestrian friendly. General retail shopping and restaurant use could take place on the subject property without encroaching 15 feet into the 20-foot setback and without exceeding the 30% lot coverage requirement.

C. Finding 4 states: "Lot coverage over thirty percent and building within the twenty foot building setback area is not expected to negatively impact the adjoining properties greater than other permitted or conditional uses." If this were the case, one would have to wonder why lot coverage in the CBD is limited to 30% and why there is a 20-foot building setback requirement. The Commission failed to identify what other permitted and/or conditional uses it used for comparison. The analysis provided in Staff Report 20-63 states: "Pipelines and railroads would have a greater impact on nearby property values." The prerequisite review criteria under HCC 21.71.030(c) states: "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." Planning staff repeatedly and erroneously considers "conditionally permitted uses" to mean "conditionally permittable uses." If the Commission adopted this reasoning, it

did so in error. Neither railroads nor pipelines are permitted uses in the CBD and neither has been conditionally permitted in the CBD. While pipelines and railroads are listed as conditional uses in the CBD, if they ever were to be permitted as conditional uses, substantial conditions would clearly need to be imposed to insure that they didn't adversely affect adjoining property values or neighborhood character; only then could they be used for comparison to other uses with regard to HCC 21.71.030(c). If a railroad truly is the standard by which all CUP applications are to be compared for compatibility etc. this is such a low bar that HCC 21.71.030(c) is rendered meaningless. The Homer City Council should amend/clarify HCC 21.71.030(c) to eliminate this pernicious "confusion."

D. Finding 5 states that the proposal is compatible with existing uses of surrounding land because: "Redevelopment of the existing restaurant with the proposed site plan and lot coverage is compatible with existing mixed uses of surrounding land." This is a circular conclusionary finding unsupported by any rational reasoning or analysis. It is because it is. The Commission failed to identify which uses of the surrounding land it considered or determine whether they were conforming uses or otherwise. Restaurant use is a permitted use within the CBD. HCC 21.18.020(d). The fact that there are other restaurants nearby

is irrelevant. The proposal is to conduct restaurant use 15-feet into the 20-foot building setback and cover 47% of the subject property. Old Town is not a zoning district, it is part of the CBD that happens to include many older structures that preexisted the implementation of municipal zoning regulation so some existing uses of the surrounding land are legal (grandfathered) nonconforming uses. The existence of nonconforming uses in a zoning district is not a legal precedent for allowing other similar establishments; the controlling legal precedent is the ordinance prohibiting such uses. Ultimately, nonconforming uses are supposed to transition into conforming uses but if they are allowed to proliferate and expand their degree of nonconformity, the zoning scheme crumbles along with the public purposes set forth in HCC 21.01.030 and HCC 21.61.040.

E. Finding 6 states: "Existing public water, sewer, police and fire service are adequate to serve the site." No Fire Marshal Certification was obtained or required as a condition for approval of CUP 20-15. No input from HVFD was sought or provided as to whether the 47% lot coverage and lack of separation between structures would negatively impact its ability to fight a fire at that site which hosts the Inlet Trading Post, a tinderbox. HCC 21.71.040(b) allows the

Commission to impose conditions to ensure the proposal does and will continue to satisfy the applicable review criteria. HCC 21.71.040(b)(14) allows the Commission to impose "[o]ther 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." Clearly, Fire Marshal Certification should have been one of the conditions imposed.

F. Finding 7 states: "The Commission finds that the proposal will not cause undue harmful effect upon desirable neighborhood character as described in the purpose statement of the district." This devious bait and switch finding deliberately evaded addressing the prerequisite review standard which states as follows: "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." HCC 21.71.030(f). Comporting with the purpose of the zoning district is a distinct review criteria with no relevance here. The Commission totally disregarded harmony in scale, bulk, coverage and density, generation or traffic, the nature and intensity of the proposed use, and public testimony opposing the proposal on these very grounds.

G. Finding 8 states: "The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area and the city as a whole ***when all applicable standards are met as required by code.***" One of the applicable standards that must be met *before* CUP 20-15 can be approved is HCC 21.71.030(g): "The proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area or the City as a whole." The Commission erroneously found via impermissible circular reasoning that the proposal will satisfy this standard when this standard is met. Clearly, Finding 8 is not supported by substantial evidence. The Commission totally evaded addressing HCC 21.71.030(g) because this prerequisite standard could not be met. HCC 21.01.030 identifies the purpose of the Homer Zoning Code:

> The Homer Zoning Code is adopted as one means of implementing the general goals and policies of the Homer Comprehensive Plan. Its purpose is to enhance the public health, safety and welfare through land use regulations to:
> a. Designate, regulate and restrict the location and use of buildings, structures and land;
> b. Regulate the height, number of stories, and size of buildings and other characteristics of structures;
> c. Regulate and determine the size of yards and other open spaces;
> d. Regulate and limit the density of population;
> e. Conserve and stabilize the value of property;
> f. Provide adequate open spaces for light and air; and to prevent and fight fires;
> g. Prevent undue concentration of population;
> h. Lessen congestion on streets and highways;

i. Preserve and enhance the aesthetic environment of the community;
j. Promote health, safety and general welfare.

Building setbacks and lot density restrictions were originally enacted to promote health, safety and general welfare. Arbitrarily reducing building setback requirements and lot density requirements is clearly detrimental to the health, safety and welfare of the surrounding area and the city as a whole. Setbacks and lot coverage restrictions allow property owners to shape their environment by creating pleasant facades and landscaping which create a feeling of community and openness. Setbacks are designed to protect things and people by providing a barrier between traffic and homes. A setback between a building and a road facilitates drainage and protects the road from snowdrifts and protects sight lines at driveways and intersections. Setbacks and lot coverage restrictions promote public safety, privacy, sunlight, ventilation, open space and greenery, and facilitate the safe placement and maintenance of pipelines and other public utilities. It would be virtually impossible to install or repair an underground utility line in just 5 feet of setback. Setbacks maintain and enhance an area's character by providing a consistent building line; they facilitate a continuous positive edge to the street that responds to the buildings on each side thereby creating an

organized and coherent transitional space between the public street and the private building. Not only do setback restrictions promote the community's health, safety, and welfare pursuant to the purposes listed under HCC 21.01.030, but they generate a "scarcity effect" as well. By increasing the scarcity of land available for particular uses in a particular location, the prices for those lands are bid up in the market. (*See* William Jaeger, The Effects of Land-use Regulations on Property Values, Environmental Law Vol. 36:105 at 106). Zoning waivers/exemptions/variances initially have economic value to the recipient so while reducing the 20-foot setback requirement and 30% lot coverage restriction via CUP 20-15 would have the initial effect of increasing the value of the subject property, this is contingent on setback requirements and lot coverage requirements remaining in place for most other adjacent properties. However, setback reduction and lot coverage increase via conditional use permit creates a slippery slope and as more and more exceptions/variances are inevitably granted within Homer's highly desirable but relatively small Central Business District, the land available for development increases thereby reducing its scarcity and market value. A Milwaukee Wisconsin study found that requiring an additional 10-foot setback was associated with a price increase of 6.1% – 7.8%. Richard K.

Green, Land Use Regulation and the Price of Housing in a Suburban Wisconsin County, 8 J. Housing Econ. 144.

H. Finding 9 states: "An approved CUP and zoning permit will ensure that the proposal will comply with applicable regulations and conditions specified in Title 21." Approving CUP 20-15 does not ensure that the proposal complies with all applicable regulations and conditions specified in Title 21; compliance with the applicable regulations and conditions specified in Title 21 must be ensured *prior* to the Commission's approval of the application for CUP 20-15. HCC 21.90.030 requires that no permit may be issued unless all structures on and uses of the property conform to the Homer Zoning Code. Thus, the Commission had a duty to identify all applicable regulations and conditions specified in Title 21 and determine whether they were met or would be met before it approved the application for CUP 20-15 but it failed to do so. Commission approval of the application for CUP 20-15 and a zoning permit are not the only applicable regulations with which the proposal is required to comply. The proposal clearly fails to meet parking space requirements and CDM requirements; HCC 21.71.060 requires the issuance of a conditional use permit by the City Planner; HCC 21.18.050 requires a site plan and level two r-o-w access plan; HCC 21.50.030(f)(1) requires retention of native vegetation and

buffers; HCC 21.61.040(a-d) mandates that no nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied as of the date it became nonconforming; no nonconforming use shall be moved in whole or in part to any other portion of the lot that was not occupied by the nonconforming use as of the date it became nonconforming; any new structure built in connection with the nonconforming use must be in full compliance will all applicable provisions of the zoning code and other laws then in effect; and if at any time a nonconforming use is abandoned, changed, discontinued, or ceases to be the primary use of a lot, the use of that lot shall thereafter conform to the code provisions applicable in the zone in which the lot is located, and the nonconforming use shall not thereafter be resumed or allowed to continue. Because nonconforming status no longer apply, building more than one building containing a permitted principal use on the subject lot requires a CUP per HCC 21.18.030(j). The Commission erroneously made no findings regarding the applicability of HCC 21.61.040(a-d) or HCC 21.18.030(j) to the proposal.

I. Finding 10 states: "The proposal is not contrary to the applicable land use goals and objects [sic] of the Comprehensive Plan. The proposal aligns Goal 1 Objective D-3, Goal 3 and 4 Objective A-2 and no evidence has been found that it is contrary

to the applicable land use goals and objects [sic] of the Comprehensive Plan." In "its" Analysis, the Commission states: "The proposal promotes Chapter 4 Land Use, 1-C-1: Promote infill development in all housing districts and 1-C-2, Encourage inclusion of affordable housing in larger developments and affordable housing in general." The applicable standard is not that the proposal merely comport with some objectives or goals of the Comprehensive Plan, it is that the proposal not be contrary to the applicable land use goals of the Comprehensive Plan. The fact that the proposal might align with some goals and/or objectives of the Comprehensive Plan is largely irrelevant. The obsequious "wild card" Homer Comprehensive Plan is designed to please everyone and therefore has many conflicting goals and objectives. The Commission's task was to investigate whether the proposal was contrary to the goals and objectives of the Comprehensive Plan, its task was not to just tout those goals and objectives with which it thought the proposal aligned. The Commission's "finding" that no evidence has been found that the proposal is contrary to the applicable land use goals and objectives is not surprising since no such evidence was ever looked for. A lack of evidence does not constitute substantial evidence to support a finding; it does not constitute evidence of any kind. The Commission erroneously

failed to identify what the applicable land use goals and objectives were. In the lone analysis included in its Decision, the Commission erroneously states: "This proposal promotes Chapter 4 Land Use, 1-C-1: Promote infill development in all housing districts and 1-C-2, Encourage inclusion of affordable housing in larger developments and affordable housing in general." [R. 67] The Commission failed to recognize that the proposal involved no housing, affordable or otherwise. Staff Report 20-63 clearly states: "The applicant had previously hoped to include a second story apartment in this project. However the apartment has been removed from the project at this time. Staff wanted this to be clear in case any part of the application still refers to residential use within the new construction." [R. 8] Planning Staff stated: "Allowing the continuation and expansion of floor area over 30% meets the Comprehensive Plan goal of infill." [R. 9] The subject lot is already infilled; it is not a stated goal of the Comprehensive Plan to infill every square inch of every lot in the CBD. In any event, the city's goal of "infill" is unconstitutionally vague and otherwise illegitimate. In *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9 (Alaska 1996) the court said: "Not all of the goals articulated by the City can be considered legitimate per se. For example, any zoning change which eases restrictions

on property use could be said to further the goal of "filling in vacant places." Planning Staff stated: "If the new construction met the twenty foot building setback, it would be much further from the street and not align with the older buildings on either side: the AJ's restaurant to the west, and the Inlet Trading Post to the east. Allowing new construction within the twenty foot setback area would keep the character of the period architecture of this portion of Old Town, as recommended by the Comprehensive Plan." [R. 9] Many/most of the historic buildings in "Old Town" are (grandfathered) nonconforming uses. Nonconforming uses do not set a valid legal precedent for the proliferation or expansion of similar uses; at some point they are supposed to be discontinued and be replaced by new uses/ structures that conform to the city's comprehensive zoning scheme. In a memorandum to Homer City Council member Alan Parks dated April 3, 1998, (then) Homer City Attorney Gordon Tans stated as follows: "Generally, the existence of a non-conforming "grandfathered" use in a zoning district is not a legal precedent that would allow other similar establishments to open in the zone. To the contrary, the ordinance serves as the legal precedent saying that such establishments are not to be allowed in the zoning district. Therefore, the controlling legal precedent is the ordinance that prohibits the use." (See Exhibit

2 attached hereto). In any event, the proposal is contrary to the following goals and objectives of the Comprehensive Plan:

Goal 2: Maintain the quality of Homer's natural environment and scenic beauty.

Objective A: Complete and maintain a detailed "green infrastructure" map for the City of Homer and environs that presents an integrated functional system of environmental features on lands in both public and private ownership and use green infrastructure concepts in the review and approval of development projects.

Implementation Strategies

- ? Review how developments effect on- and off-site environmental functions
- ? Support the preservation of green infrastructure.

Objective B: Continue to review and refine development standards and require development practices that protect environmental functions. Once a project has been identified for development, green infrastructure concepts can be used to consider what special conditions, if any, need to be incorporated into the project's layout and development. Guidelines for development such as setbacks from waterbodies or limits on development of steep slopes are covered through the City's zoning code. Homer's existing

codes include many good environmental standards. Periodic review of the successes and failures of the existing standards will help identify opportunity for revisions. Appendix C-7 includes examples of how decisions about site clearing, grading, and impervious surfaces can create very different types of development. Homer is encouraged to continue practices that bring about Objective B.

Implementation Strategies

- ? Review the lessons learned from the implementation of site development standards
- ? Consider revision of development standards in light of new information in relation to environmental functions and best practices

Green Infrastructure Defined

Green infrastructure is defined as an interconnected network of natural areas and other open spaces that conserves natural ecosystem values and functions, sustains clean air and water, and provides a wide array of benefits to people and wildlife. In contrast to traditional approaches to open space conservation, green infrastructure is integrated with and linked to development. Green infrastructure is a way of conserving natural areas that function as city infrastructure. Definition and other

information based on Green Infrastructure: Linking Landscapes & Communities.

Mark A. Benedict, Ph.D., Edward T. McMahon, J.D. Island Press, 2006

Objective C: Provide extra protection for areas with highest environmental value or development constraints. Ideally, adopting more effective development standards will result in the preservation and protection of lands with high environmental value. However, there may be some areas identified that cannot easily be protected through standard means and are so important they should be preserved forever. References such as wetland, steep slope, and green infrastructure maps can help identify and prioritize these lands. Organizations, such as the Homer Soil and Water Conservation District and the Natural Resources Conservation Service of Alaska may be consulted in identifying specific local strategies. Examples of environmentally important areas might include a particular beach access corridor or a particular section of a lake or stream.

Implementation Strategies

? Support acquisition of environmentally sensitive land for preservation.

GOAL 3: Encourage high quality buildings ***and site design*** that complements Homer's beautiful natural setting.

J. Finding 11 states: "Project complies with the applicable provisions of the CDM." The Commission imposed Condition 4 that outdoor lighting must be down lit per HCC 21.59.030 and the CDM but waived or simply ignored myriad other applicable provisions of the CDM, presumably because they were not simultaneously required by HCC. Applicant indicated that his project did not trigger a Community Design Manual review. [R. 20] Without a CDM review the Commission could not determine which provisions were applicable or met. Planning Staff stated that three sections of the CDM apply i.e., Site Plan Review, Architecture, and Site Design, but failed to explain why myriad other applicable sections did not. [R. 16] Planning Staff stated: "[t]he proposed project does not significantly change the existing site plan, architecture, or site design" and "[t]he CDM review will be commiserate with the scale of the restaurant and deck expansions." This is specious gibberish! The proposed project does significantly change the existing site plan, architecture, and site design, that's why a CUP is required. Even if the proposed project didn't significantly change the existing site plan, architecture, or site design, HCC 21.71.030(j) still requires compliance with those (unidentified) provisions. How

can a CDM review be commiserate with the scale of the restaurant and deck expansions if no CDM review occurs and what does this alleged commiseration have to do with complying with applicable provisions of the CDM? Without referencing any specific provisions of the CDM, Planning Staff found that the project complies with the applicable provisions of the CDM because pedestrian connectivity is improved by rebuilding the deck to the adjoining building and the right of way, an ADA parking space and access to the building is being added to the rear of the structure, and the new construction will match the existing architectural style, siding material and color of the Inlet Trading Post building. [R. 16] ADA parking was not imposed as a condition for the Commission's approval of CUP 20-15 and the property owner is not bound by the Applicant's proposal to provide ADA parking. It is irrelevant whether the proposed new construction matches the architectural style, siding material and color of the Inlet Trading Post, it is required to comply with the architectural style, siding material, and colors specified within the CDM. At 6-10 of the 2018 Homer Comprehensive Plan it states: "Currently, drainage needs for large parcel development are dealt with individually, by the developer. Homer's Design Criteria Manual for subdivisions does not address on-site storm water management. However, in the

city's denser commercial districts, the zoning code does have provisions requiring developers to prepare storm water management plans." The CDM includes extensive applicable landscaping and drainage requirements but Planning Staff stated as follows: "Due to the existing site design and small lot, there is not a lot of room for landscaping. . . . Staff recommends leaving any decisions about landscaping and drainage to the affected property owners." [R. 12] The 11,441 square foot subject lot is not small by CBD standards, it is just way overbuilt. There is no room for landscaping and drainage because 15 feet of the 20-foot building setback and 47% of the lot is to be crammed with multiple large structures. [R. 8] The Commission had no authority to leave decisions regarding landscaping and drainage to the property owners. The site design, landscaping, and drainage must comply with city code, not visa versa. HCC 21.70.030(c) states: "In granting a zoning permit, no City official or employee has authority to grant a waiver, variance, or deviation from the requirements of the zoning code and other applicable laws and regulations, unless such authority is expressly contained therein." Applicable CDM provisions include, but are not limited to, the following: Site and Access Plan, Existing Vegetation Plan, ***Landscaping Plan***, site selection drawing, Grading and ***Drainage Plan***, ***Utilities Plan***, description

of all pedestrian and vehicular elevation drawings, Sign Plan, architectural lighting details, screening details, color palette, light fixture details, accessory details, incorporate building design elements into ***landscaped areas***, building must be similar in height and scale to adjacent structures, apply all design criteria to prominent facade, provide visual terminus to top of building, reflect mass and scale of adjacent structures, siding and trim requirements, roofing requirements, building color requirements, outdoor leisure area required for primary structure, differentiate walkway surface and other walkway requirements, outdoor seating requirements, outdoor sales allowed one day per week, service and delivery bay requirements, use ***landscaping*** to screen parking lots and service areas, handicap parking requirements, and outdoor furnishings requirements.

7. Commission Chair Scott Smith was not an impartial adjudicator.

HCC 1.18.040(a) states: "A City official or the City Manager who has partiality concerning a quasi-judicial matter shall not advise on matter, adjudicate the matter or serve as a member of a body adjudicating the matter. HCC 1.18.020 states in relative part as follows: "Partiality" applies only in quasi-judicial proceedings and means:

> 1. The ability of a member of the quasi-judicial body to make an impartial decision is actually impaired; or
> 2. The circumstances are such that reasonable persons would conclude the ability of the member to make an impartial decision is impaired and includes, but is not limited to, instances in which:
> a. The member has a personal bias or prejudice for or against a party to the proceeding including a party's lawyer;
> b. The member or an immediate family member is a party, material witness to the proceeding or represents a party in the proceeding.

At the conclusion of the September 2, 2020 Commission meeting, Chair Smith addressed the applicants for CUP 20-14 (an unrelated, distinct proceeding) as follows: "I think you can see that we're trying to advocate for you, and balancing our lay down from Mr. Griswold with code and your desires was an interesting process. So we'll trust that you get back with the city planner and are able to move forward." Chair Smith clearly revealed his implicit bias in favor of development. An impartial adjudicator advocates for no party in a quasi-judicial proceeding and cares not whether the application under consideration moves forward. An impartial adjudicator sets his personal feelings aside and makes his decision based solely on the evidence. Implicit bias, by definition, pertains to attitudes and stereotypes that affect one's understanding, actions, and decisions in an unconscious manner. Nonetheless, it constitutes a bias/partiality that is prohibited under HCC

1.18.040(a) and HCC 1.18.020. The application to serve on the Homer Planning Commission asks: "Have you ever developed real property other than a personal residence"? [See Exhibit 4 attached hereto]. This inquiry inappropriately selects for Commissioners like Chair Smith who favor development thus fostering and perpetuating implicit and overt pro-development bias. The appropriate response to this question would be: "Whether I have developed real property is none of your damn business."

8. Applicant did not produce evidence sufficient to enable meaningful review of the application.

HCC 21.71.030 states in relevant part as follows: "The applicant must produce evidence sufficient to enable meaningful review of the application." Applicant failed to specify what % lot coverage was being requested or how many feet of setback reduction was being requested so planning staff and the Commission had to guesstimate these critical factors. The Application contains false and/or misleading information and did not include the owner's signed authorization granting applicant the authority to apply for the conditional use permit or bind the owner to the terms of the permit as required under HCC 21.71.020(9). The application for CUP 20-15 lists Beachy Construction, Inc. as the Applicant and is signed by contractor

Matt Early who indicated that he is the Owner of Record. [R. 22] The actual owner of record appears to be Melody Livingston who did not sign the Application and, contrary to Staff Report 20-63, is not listed as an applicant on the application form. HCC 21.71.020(a)(9) requires that if the applicant is not the owner of the subject lot, the following is required: "the owner's signed authorization granting the applicant the authority to (a) apply for the conditional use permit and (b) bind the owner to the terms of the conditional use permit, if granted." Because HCC 21.71.020(a)(9) had not been complied with, the application for CUP 20-15 should never have been considered by the Commission. The application form indicates that Level 1 lighting, Level 2 ROW Access Plan, and level 2 Site Development Standards apply [R. 15] but these were not submitted or addressed by the Applicant. Applicant indicated that he is building or remodeling a commercial structure, or multifamily building with more than 3 apartments which requires Fire Marshal Certification. Where asked on the Application to state the status of Fire Marshal Certification, Applicant left it blank. [R. 20] HCC 21.71.030(j) requires that the proposal will comply with all applicable provisions of the Community Design Manual but Applicant indicated on the Application that his project does not trigger a Community Design Manual review. [R. 20] Applicant

indicated that there are nonconforming uses or structures on the property and further indicated that they have been formally accepted by the Homer Advisory Planning Commission [R. 20] but there is no evidence in the record that any nonconforming uses or structures on the subject property have been formally accepted by the Homer Advisory Planning Commission. Applicant stated that adjoining property values will "increase due to improved quality of adjacent buildings" [R. 21] but failed to provide any evidence that the 15-foot setback reduction and 47% lot coverage would not have deleterious effects on the values of adjoining properties. Applicant stated that his proposal will not be detrimental to the health, safety or welfare of the surrounding area or the city as a whole [R. 21] but provided no evidence to support this claim.

9. Neither Planning Technician Julie Engebretsen nor City Planner Rick Abboud is a member of the Planning Commission and neither is a party to this appeal.

On January 8, 2021, Planning Technician Julie Engebretsen requested a time extension to file briefs. (See Exhibit 3 attached hereto). The Planning Department is not a captioned party to this appeal. No member of the Planning Department filed an appeal or cross-appeal. No member of the Planning Department has any ownership interest in the subject property or neighboring property. No member of the Planning Department is

aggrieved by the Commission's Decision. Accordingly, no member of the Planning Department has the legal authority to request time extensions or otherwise represent the Commission in these quasi-judicial appeal proceedings. HCC 21.93.060(b) states that the City Manager, the City Planner or the City Planner's designee or any governmental official, agency, or unit have standing to appeal an appealable action or determination of the Planning Commission to the Board of Adjustment or a hearing officer, but it does not authorize their participation as a party in administrative appeals filed by others. HCC 21.93.500(a) states that 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. Alaska Statutes and Homer City Code mandate that all parties to a zoning appeal must be "aggrieved." The fact that a member of the Planning Department may experience disappointment or hurt feelings when planning staff's recommendations are challenged does not make them an aggrieved person or otherwise give them standing to participate in an ensuing appeal. They are required to be impartial, objective advisors to the Commission which then has the discretion to accept or reject any or all of planning staff's recommendations. However, Mr. Abboud and his staff have consistently revealed a

strong bias in favor of approving CUP applications. HCC 1.18.048(a) states: "A City official or the City Manager who has partiality concerning a quasi-judicial matter shall not advise on [the] matter, adjudicate the matter or serve as a member of a body adjudicating the matter." Homer Personnel Regulation 8.7.3 states: "No employee shall use the implied authority of their position to unduly influence the decision of others or promote a personal interest in the community." A corporation is an artificial entity created by law that cannot represent itself. AS 22.20.040 provides that a corporation, either public or private, shall appear by an attorney in all cases unless an exception has been explicitly made by law. Neither Mr. Abboud nor Ms. Engebretsen are attorneys and therefore neither can legally represent the Commission or any other entity of the City of Homer in any quasi-judicial proceeding. Individuals may represent themselves pro se but this exception does not apply to corporations. A non-lawyer (officer, agent or employee) cannot represent a corporation in any judicial or quasi-judicial matter. See *Stone Street Partners LLC vs. The City of Chicago Dept. of Administrative Hearings*, 2014 IL App(1st) 123654 (Illinois, 2014). Any non-lawyer who represents a principal in a quasi-judicial proceeding engages in the unauthorized practice of law.

10. City Planner Rick Abboud is not a member of the Homer Planning Commission and therefore had no authority to sign the Commission's Decision.

The fact that City Planner Rick Abboud superfluously signed the Commission's Decision cannot be dismissed as harmless error because Mr. Abboud did so in order to circumvent HCC 21.71.060 which mandates as follows: "The City Planner shall promptly issue a conditional use permit in accordance with a decision of the Commission approving an application." By signing the Commission's Decision, Mr. Abboud apparently believes he is issuing the conditional use permit required under HCC 21.71.060. It would be inappropriate for the City Planner to issue a conditional use permit until after a Commission decision becomes final i.e., after all appeals are decided. The Commission's Decision in this case states in relevant part as follows: "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**" (emphasis added). [R. 69] Because the Commission's Decision was appealed, it is not yet final. By signing the Commission's Decision and, in effect, prematurely issuing the conditional use permit required under HCC 21.71.060, Mr. Abboud circumvented not only HCC

21.71.060 but the entire appeal process. The Commission's decision approving an application for conditional use permit is distinct from the ensuing conditional use permit which must be issued by the City Planner.

For all of the reasons above, CUP 20-15 cannot be sustained.

DATED: January 15, 2021.

By: Frank Griswold

Frank Griswold

Planning Commission Considers Rule Changes

The City of Homer Planning Commission is considering changes to its rules that would solidify a policy about how many meetings a commissioner could miss before losing their seat. Changes also could require fewer members to approve measures.

The Planning Commission is one of the most powerful bodies in city government. It approves and enforces things like zoning issues and conditional-use permits. So if there aren't enough people attending one of its regular meetings, delays happen. During the meeting Wednesday night, only four of the seven members were in attendance.

They also had to postpone a discussion about the city's definition of "discontinued" in its zoning code because Commission Chair Franco Venuti had a perceived conflict of interest with that issue. And the commission must actually approve his perceived conflict, but with only three members left to vote that wasn't even possible.

Changes to the number of required votes to approve items could make things run a little smoother. The commission is considering needing only four votes for variance requests or conditional-use permit approvals. Those items currently need a five-vote majority. During the commission's work session before the meeting, Planning Technician Julie Engebretsen mentioned the delays make life more difficult for applicants.

"I don't ever want to be in this position as staff having to tell an applicant 'I'm sorry, twice in a row we have to delay your conditional use permit for six weeks.' And we also in the past have had to schedule special meetings or work around time frames. And that's really hard on the applicant," she said.

Commissioner Larry Sloan said he thinks a four-vote, simple majority makes sense because the city Planning Department has already done most of the leg-work for an issue.

"Most of the preliminary work is done by the staff. The staff has already reviewed it to make sure it complies with the ordinance... so that being the case, for the most part, all our job is as commissioners is to rubberstamp it," he said.

There will be more discussion about this rule change during the commission's next regular meeting. Another amendment could change the number of unexcused absences allowed before a commissioner is voted off the board.

EXHIBIT 1

Support My Station

Contribute Now

On Air on KBBI 890AM

Paradigm Shift
Tune in: KBBI 890AM

Sign Up to Our Monthly E-Newsletter

Join KBBI's monthly e-newsletter to find out the latest on what's happening at the station, KBBI related events, highlights, programming changes, and much more. Sign up here.

Your Input

KBBI's Community Advisory Board (CAB) seeks your input on our programming and community engagement activities. Email them at cab@kbbi.org. Click

Sloan mentioned he would like to see a new rule that allows three consecutive unexcused absences or six missed meetings over the course of a calendar year before someone is possibly removed.

here for more info about our CAB.

"Really you're not conducting the public's business as well as you should if you've missed more than three. You need to make arrangements to organize your time so that you don't miss any more than three," he said.

Commissioner Roberta Highland was learning more toward allowing four absences. She said it's difficult to find people willing to fill vacancies.

"And so, to make it more difficult and to tell people if you miss so many then you're off, I think we would be possibly shooting ourselves in the foot," she said.

"But, there's the other side of it in that there's a responsibility with coming and take one of these seats," Planning Commission Chair Venuti said. "And I've been involved with this for four years and I've only missed one because I was too sick to attend.... It's a real responsibility and a commitment you have to make."

Commissioner Jennifer Sonneborn said some flexibility in attendance might be necessary for the future of the group.

"It's a volunteer position... people do it for years and years... the more flexible the commission can be, the more likely they are to keep functioning," she said.

The rule changes will come up again during the commission's next meeting, which is set for Dec. 4 at 6:30 p.m. A work session is scheduled for 5:30 that evening.

Rec'd 08-10/01

PERKINS COIE LLP

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Confidential
Released 4/10/98

Gordon J. Tans
tansg@perkinscoie.com

April 3, 1998

Mayor Jack Cushing
City Council
City of Homer
P. O. Box 3339
Homer, AK 99603

Re: Zoning -- Legitimate Objectives of Zoning

Dear Mayor Cushing and Members of the Council:

Council Member Parks recently asked two questions in the context of considering an amendment to the zoning code to allow car washes as conditional uses in the CBD:

1. Are any of the following objectives legitimate reasons to amend a zoning ordinance?

   a). Increase business competition;
   b). Build the tax base;
   c). Increase sales tax revenues;
   d). Create jobs.

2. Does a non-conforming ("grandfathered") use set a precedent, or serve as a valid reason to amend the code to allow similar establishments as conditional uses throughout the zone?

DISCUSSION

I. LEGITIMATE OBJECTIVES OF ZONING

In questioning the legitimate objectives of zoning legislation, a distinction must be drawn between the objective or purpose accomplished by the ordinance and the

EXHIBIT 2

These are typical zoning purposes, all of which are discussed in Chapter 7 of Anderson's American Law of Zoning.

The health objective includes such purposes as providing adequate light and air, relieving overcrowding of land or undue concentration of population, and providing adequate recreation areas. The safety objective includes such things as lessening congestion in the streets, traffic control, restriction of commercial uses, and avoidance of flood hazards, to name a few. Providing for the general welfare of the community is another legitimate objective, which includes the preservation of pleasing aesthetic values[1] and the avoidance of common law nuisance uses.

One section of the Standard State Zoning Enabling Act (a model act) states one objective of zoning is "conserving the value of buildings and encouraging the most appropriate use of land throughout the community." 1 Anderson's American Law of Zoning, § 7.12 at 753. This is generally accepted as a legitimate objective. In other words, zoning may prohibit uses that will have a tendency to destroy or diminish existing property values.

The use of zoning ordinances to achieve economic objectives, such as the four objectives cited in your question, presents a complex question. Courts generally disapprove of the use of zoning to regulate or restrict business competition. *Id.*, § 7.28 at 805. *See Earth Movers of Fairbanks, Inc., v. Fairbanks North Star Borough*, 865 P.2d 741, 744 (Alaska 1993) ("The prevention of competition is not a proper element of zoning.") However, almost all zoning regulation has some impact on competition, so it is difficult to isolate those regulations that are intended solely or primarily for the purpose of regulating business competition. Because of this, courts will approve zoning ordinances that serve some established purpose of zoning, and will not find them invalid simply because they have the additional effect of limiting competition. 1 Anderson's American Law of Zoning § 7.28 at 807. Anderson's cites several examples where the denial of permits for new businesses was held to be improper where the denial was based in large part on the existence of an ample number of like businesses in the vicinity. *Id* at 809.

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[1] *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1037 (Alaska 1989) cert. denied 493 U.S. 922. ("It is established that the government's interest in aesthetics is substantial and should be accorded respect.")

While the preservation of the value of property is generally accepted as a legitimate objective of zoning, there seems to be a tendency for courts to disapprove zoning ordinances whose sole or principal purpose is producing property or sales tax revenue. *Id.*, § 7.30 at 819-820. However, it may also be said that a zoning ordinance calculated to encourage sound community development seems bound to enrich the tax rolls; such a secondary effect on tax revenues does not render the measure invalid. *Id.* I think the distinction here is that a zoning ordinance that has as its apparent purpose the production of revenue at the expense of the community's general welfare will be invalid, while an ordinance that has as its purpose the advancement of the community's general welfare will be valid, even though it has a secondary effect of increasing the tax base or generating additional sales tax revenues.

Zoning for the purpose of creating jobs should be looked at in the same way. For example, zoning an area of the city for industrial uses in the hope that industry will locate in the city, create jobs, and add to the economic well-being and general welfare of the city, is a legitimate objective of zoning. However, changing existing zoning to put an industrial plant in the middle of a residential area may have a harmful effect on the general welfare of the community, even though it might generate the same number of jobs and economic activity in the city. Thus, the critical question is whether the zoning change promotes the general health, welfare and safety of the community, not whether it creates jobs, although the creation of jobs may be a beneficial effect that does help promote the general welfare of the community.

The decision of *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9 (Alaska 1996) discussed the legitimacy of economic purposes for zoning. Concerning the validity of the Homer Comprehensive Plan's objectives of filling in vacancies in the CBD and increasing the tax base and employment, the court said:

> Not all of the goals articulated by the City can be considered legitimate per se. For example, any zoning change which eases restrictions on property use could be said to further the goal of "filling in vacant places." Similarly, increasing the tax base and the employment of a community is not automatically a legitimate zoning goal. *See Concerned Citizens for McHenry, Inc. v. City of McHenry*, 76 Ill.App.3d 798, 32 Ill.Dec. 563, 568, 395 N.E.2d 944, 950 (1979) (an increase in the tax base of the community as the primary justification for a rezone is "totally violative of all

the basic principles of zoning"); *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J.Super. 11, 283 A.2d 353, 357 (1971) (finding that "fiscal zoning *per se* is irrelevant to the statutory purposes of zoning [although] 'alleviating tax burden is a permissible zoning purpose if done reasonably and in furtherance of a comprehensive plan) (citing *Gruber v. Mayor and Tp. Committee of Raritan Tp.*, 39 N.J. 1, 186 A.2d 489, 493 (1962))'"; *Chrobuck v. Snohomish County*, 78 Wash.2d 858, 480 P.2d 489, 497 (1971) (allowing industrial development on only one site would be arbitrary spot zoning despite the potential tax revenue the oil refinery would produce). Thus, the goal of increasing the tax base and employment opportunities is usually legitimate only if the ordinance is otherwise reasonable and in accordance with the comprehensive plan.

Some courts have allowed inconsistent small or single parcel rezoning in order to raise tax revenues or stimulate needed industry if the public receives higher tax revenue or employment industries. *Ziegler, supra*, § 28.04, at 28-20. Generally, the facility being built must be indisputably needed, and the city must have secured assurance as to the existence and amount of increased employment and tax revenue. For example, in *Information Please Inc. v. County Comm'rs of Morgan County*, 42 Colo.App. 392, 600 P.2d 86 (1979), the county rezoned agricultural area to industrial to accommodate an electric utility after determining the plant would add $46,000,000 to the tax base of the county, and provide approximately 250 jobs after it was completed. *Id.* 600 P.2d at 88. In *Watson v. Town Council of Bernalillo*, 111 N.M. 374, 805 P.2d 641, 647 (App. 1991), the county made findings that the rezone would employ eighty-seven people from the community and would produce tax revenues constituting twenty-five percent of the city's budget. In *Chrismon v. Guildord County*, 322 N.C. 611, 370 S.E.2d 579, 590 (1988), the court approved the rezoning of two continuous tracts from agricultural to conditional use industrial district to facilitate expansion of an already-operating grain elevator. The court stated that the "[e]vidence clearly shows that [the owner's]

> operation is beneficial to area farmers." *Id.* It also noted that spot zoning will be allowed even where the adjacent property owners object and the owner receives a greater benefit than others if there is a community-wide need for the rezone. *Id.*

Thus, economic purposes, if the primary objective of zoning, are viewed with considerable suspicion. However, if the zoning otherwise advances the community's health, safety, or general welfare, economic benefits from the zoning are usually welcome.

II. NON-CONFORMING USE AS PRECEDENT OR REASON TO ALLOW OTHER SIMILAR ESTABLISHMENTS

Generally, the existence of a non-conforming "grandfathered" use in a zoning district is not a legal precedent that would allow other similar establishments to open in the zone. To the contrary, the ordinance serves as the legal precedent saying that such establishments are not to be allowed in the zoning district. Therefore, the controlling legal precedent is the ordinance that prohibits the use.

However, that is not to say that changing conditions, [illegible], public policies, or other legitimate reasons might exist to change the code to allow a use that was once prohibited. In other words, in addressing the question of whether the law should be changed to allow the use within the zone, one may look to the presence of an existing car wash and the effect it has on the zone in considering whether car washes should or should not be generally allowed within the district.

Very truly yours,

Gordon J Tans

GJT:go

CITY OF HOMER

APPEAL TO THE BOARD OF ADJUSTMENT

FRANK GRISWOLD Appellant, v. CITY OF HOMER PLANNING COMMISSION, Appellee.	) Appeal of Conditional Use Permit 2020-15

CITY OF HOMER PLANNING COMMISSION'S REQUEST FOR A FIVE DAY EXTENSION TO FILE BRIEFS PURSUANT TO HOMER CITY CODE (HCC) 21.93.530(d)

COMES NOW the City of Homer Planning Commission and respectfully requests the City Clerk grant a five-day extension for the filing of the opening briefs in Conditional Use Permit (CUP) appeal 2020-15. Opening Briefs are currently due for filing on January 11, 2021.[1] HCC 21.93.530(d) provides:

> Upon written request, and for good cause shown and when it appears to the City Clerk that other parties will not be unduly prejudiced by the delay, the City Clerk may grant an extension of time not to exceed five days for the filing of any brief.

Good cause exists to grant the short extension requested based on the reduced business weeks during the holiday season, attention to other City planning matters, and the

[1] *See* December 22, 2020 Memorandum from Melissa Jacobsen, MMC, City Clerk, re Appeal Record Complete: Frank Griswold vs. Planning Commission Decision on Conditional Use Permit 20-15.

EXHIBIT 3

fourteen appeal points raised by the Appellant, which will take the City additional time to analyze and prepare a brief.

Neither party will be prejudiced by a five-day extension since each will have additional time to prepare their brief and the appeal hearing has not been set as of this date.

Respectfully submitted this 8th day of January, 2021.

City of Homer Planning Department

By: _____
Julie Engebretsen
Deputy City Planner

ORDER

The City of Homer Planning Commission's request for an extension is hereby granted based upon the reasons set forth above. Briefs in CUP Appeal 2020-15 are due by the close of business on January 18, 2021.

DATED THIS 8 day of January, 2021.

_____
Melissa Jacobsen, MMC, City Clerk

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CITY OF HOMER
APPLICATION TO SERVE ON ADVISORY BODY
COMMISSION, BOARD, COMMITTEE, TASK FORCE

The information below provides some basic background for the *Mayor and Council*
This information is public and will be included in the Council Information packet

Name: _____ Date: _____

Physical Address: _____

Mailing Address: _____

Phone #: _____ Cell #: _____ Work #: _____

Email Address: _____

The above information will be published in the City Directory and within the city web pages *if you are appointed by the Mayor and your appointment is confirmed by the City Council*

Please indicate the advisory body that you are interested in serving on by marking with an X.
You may select more than one.

☐ **ADVISORY PLANNING COMMISSION**

1ST & 3RD WEDNESDAY OF THE MONTH AT 6:30 PM
WORKSESSION PRIOR TO EACH MEETING AT 5:30 PM

☐ **PARKS ART RECREATION & CULTURE ADVISORY COMMISSION**

3RD THURSDAY OF THE MONTH AT 5:30 PM
NO MEETINGS IN JANUARY, JULY & DECEMBER

☐ **PORT & HARBOR ADVISORY COMMISSION**

4th WEDNESDAY OF THE MONTH
OCT-APRIL AT 5:00 PM
MAY - SEPT AT 6:00 PM

☐

☐

☐ **ECONOMIC DEVELOPMENT ADVISORY COMMISSION**

2ND TUESDAY OF THE MONTH AT 6:00 PM

☐ **CITY COUNCIL**

2ND & 4TH MONDAY OF THE MONTH
SPECIAL MEETINGS & WORKSESSIONS AT 4:00 PM
COMMITTEE OF THE WHOLE AT 5:00 PM
REGULAR MEETING AT 6:00 PM

☐ ***LIBRARY ADVISORY BOARD***

1ST TUESDAY OF THE MONTH AT 5:30 PM
NO MEETINGS IN JANUARY, JUNE AND JULY

☐ **OTHER - PLEASE INDICATE**

_____

EXHIBIT 4

I have been a resident of the city for _____ years. I have been a resident of the area for _____ years.

I am presently employed at _____

Please list any special training, education or background you may have which is related to your choice of advisory body.

_____

_____

_____

Have you ever served on a similar advisory body? If so please list when, where and how long:

_____

_____

Why are you interested in serving on the selected advisory body?

_____

_____

Please list any current memberships or organizations you belong to related to your selection(s):

_____

_____

Please answer the following only if you are applying for the Advisory Planning Commission:
Have you ever developed real property other than a personal residence, if so briefly explain:

_____

_____

Please answer if your are applying for the Port & Harbor Advisory Commission:
Do you use the Homer Port and/or Harbor on a regular basis?

Yes ☐ No ☐ What is your primary use? Commercial ☐ Recreational ☐

Please include any additional information that may assist the Mayor in his/her decision making:

_____

_____

_____

When you have completed the application please review and return to the City Clerk's Office. Y

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
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3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
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Attorneys for City of Homer

BEFORE THE HOMER BOARD OF ADJUSTMENT ON REFERRAL BY THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision.
	)	October 7, 2020

CITY OF HOMER'S OPENING BRIEF

On September 17, 2020, Homer property owner Melody Livingston and her representative Matt Early (collectively "the Applicants") applied to the Homer Planning Commission (the "Commission") for a Conditional Use Permit ("CUP") for Livingston's property at 106 West Bunnell Avenue (the "Property") in Homer's Central Business District ("CBD") (R. 18-36). The Applicants requested a CUP for a reduction in the setback from a dedicated right-of-way per HCC 21.18.040(b)(4) and approval of a building area in excess of 30 percent of the lot area per HCC 21.18.040(d) to rebuild a portion of a structure and expand the deck area up to 8.42 feet into the 20 foot building setback along Bunnell Avenue (R. 7; 18-36). The application included a cover letter describing the proposal, a completed application form, detailed maps and schematics depicting the proposal and its location, and photographs of the Property. *Id.* Following

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receipt of the application, Homer City Planning produced a detailed and thorough 10 page Staff Report ("SR 20-63") analyzing the application and its compliance with the factors listed in HCC 21.71.030 (R. 7-17). This expert analysis recommended approval of Conditional Use Permit 2020-15 ("CUP 20-15") (R. 17).

A Public Hearing on the application was set for October 7, 2020, and notice was sent to the owners of all properties within 300 feet of the Property (R. 37). Prior the hearing, the Commission received written comments from Frank Griswold, Sherry Thompson, Susan and Gary Miller, Melody Livingston, Matt Early, Don Mears, and Asia Freeman (R. 47-60). At the October 7 public hearing, the Applicant, Adrienne Sweeny, and Susan Miller provided testimony at the hearing, all of which was in support of the proposal (R. 63). The Commission adopted the factual findings in SR 20-63 and approved CUP 20-15 with four conditions (R. 61-64). On October 22, 2020, the Commission issued a detailed written Decision outlining its findings on each of the criteria listed in HCC 21.71.030 along with the four conditions imposed on CUP 20-15 (R. 65-69).

Appellant Frank Griswold filed a timely notice of appeal of the decision to approve CUP 2020-15, and requested that the appeal be heard by the Homer Board of Adjustment ("BOA") (R. 2).

STANDARD OF REVIEW

In reviewing the Commission's decision, the BOA will exercise independent judgment on the legal issues raised by the parties, including the interpretation or construction of the Homer zoning code, ordinances, or other provisions of law. HCC

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21.93.540(d). The BOA shall defer to the findings of the Commission regarding disputed issues of fact. HCC 21.93.540(e). Findings of fact adopted expressly or by necessary implication by the Commission shall be considered as true if they are supported by substantial evidence in the record. *Id*. "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id*. The BOA will make its decision on the basis of the record and will not consider new evidence or changed circumstances. HCC 21.93.510(a).

ARGUMENT

The Commission's Decision is supported by substantial evidence in the record, including the detailed application, the expert analysis in SR 20-63, written comments from the Applicants and other Homer residents, and testimony at the public hearing. The Commission reviewed all of the evidence in the record and issued a five-page written opinion that analyzed the evidence and made factual findings on each of the CUP criteria listed in HCC 21.71.030. The Commission's Decision should be upheld by the BOA.

Griswold asserts 14 meritless points on appeal. Many of Griswold's legal arguments have already been rejected by the Alaska Superior Court in prior cases. For the BOA's convenience those decisions are attached.[1] At this stage many of Griswold's arguments are conclusory and unclear, and the City reserves the right to address them more thoroughly in its reply brief. HCC 21.93.530(b). The City's response to each of Griswold's "Allegations of Error" is provided below:

[1] *See* the Superior Court's *Decision* dated October 17, 2019 in *Griswold v. Homer Advisory Planning Commission, et al.,* Case No. 3HO-18-00240CI, a copy of which is attached as Exhibit A; the Superior Court's *Decision and Order* dated December 14, 2020 in *Griswold v. Homer Board of Adjustment, et al.,* Case No. 3HO-14-00243CI, a copy of which is attached as Exhibit B.

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1. Equal Protection

HCC 21.18.040(b)(4) was duly adopted by the City of Homer. A duly enacted ordinance is presumed constitutional and should be construed to avoid a finding of unconstitutionality. *See Haggblom v. City of Dillingham*, 191 P.3d 991, 997 (Alaska 2008). Griswold's assertion that HCC 21.18.040(b)(4) violates the Equal Protection clause of the U.S. Constitution is meritless. First, Griswold cannot assert the constitutional rights of those that own property along the Sterling Highway or Lake Street, where setback reductions via CUP are not allowed under HCC 21.18.040(b)(4). In a case involving Griswold, the Alaska Supreme Court held that as a general rule a litigant lacks standing to assert the constitutional rights of others. *Griswold v. City of Homer*, 252 P.3d 1020, 1030 (Alaska 2011). Griswold does not own property along those roads and has no basis to assert that the distinction between those roads and the remainder of the CBD in HCC 21.18.040(b)(4) violates his equal protection rights.

Moreover, the distinction in HCC 21.18.040(b)(4) passes equal protection muster. The Alaska Supreme Court Has held that "[w]hen a zoning ordinance infringes on property rights [court will] apply the minimum level of scrutiny, under which the provision must bear a 'fair and substantial' relationship to a 'legitimate' government purpose. *Luper v. City of Wasilla*, 215 P.3d 342, 348 (Alaska 2009). The ordinance will be "upheld as long as (1) the statutory purpose is legitimate and within the police power of the state; (2) the means chosen substantially further the legislative purpose; and (3) the municipal interest in its chosen means outweighs the [affected interest]." *Barber v. Municipality of Anchorage,* 776 P.2d 1035, 1039 (Alaska 1989).

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Setback requirements serve many legitimate government purposes, including traffic safety, aesthetics, rest and recreation, and neighborhood character and appearance. *See Kohl v. Legoullon,* 936 P.2d 514, 520 n.10 (Alaska 1997). The Sterling Highway is an arterial that handles traffic at higher speeds and is not as conducive to granting a reduced setback. Lake Street has been the subject of improvement projects by the State of Alaska that identified the need to gain additional right-of-way to improve drainage and add non-motorized transportation options that could interfere with a decreased setback. Thus, Homer City Council could reasonably conclude that applying a different process for obtaining a setback on these roadways furthers these legitimate government purposes. These interests outweigh the property owners' interest in being allowed to employ the CUP process to address setback reduction requests. Accordingly, HCC 21.18.040(b)(4) does not violate the equal protection clause of the Alaska or U.S. Constitution.

2. HCC 11.08.110 and HCC 11.08.050(a)(3)

Griswold's argument that HCC 21.18.040(b)(4) conflicts with HCC 11.08, which involves applications for driveway permits, was rejected by the Superior Court in 2019. *See* Exhibit A, p. 14-15. The Superior Court reiterated that this issue had already been decided as a matter of law in December 2020. *See* Exhibit B, p. 22-23. The Commission has and continues to reasonably construe HCC 21.18.040(b)(4) to allow setback reductions in the CBD despite setback requirements discussed in HCC 11.08. Griswold's argument is meritless.

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3. The Commission's Decision is Supported by Substantial Evidence in the Record

The Commission's Decision is supported by substantial evidence in the record, including the detailed application and supporting materials, the expert analysis from City Planning staff in SR 20-63, written comments from Homer residents, and public testimony. This evidence is adequate to allow reasonable mind to accept the conclusion that CUP 20-15 should be granted. If Griswold maintains that any particular factual finding does not meet this standard, he should identify it and explain why that finding does not meet the substantial evidence standard. A typo in the Commission's Decision does not support Griswold's argument. Griswold's generalized argument that the "Commission's Findings are conclusionary" is itself conclusory and unsupported by the record. It should be rejected.

Moreover, Griswold's citation to *Day v. Williams,* 285 P.3d 256, 260 (Alaska 2012) is misplaced, as the quoted portion of that decision refers to findings of fact by a trial court related to the division of marital property. *Id*. at 260. It is entirely unrelated to the substantial evidence standard applicable to administrative factual determinations. The City has pointed this out to Griswold in prior cases and yet he continues to erroneously cite *Day*.

4. The Commission Appropriately Considered SR 20-63

SR 20-63 is a detailed expert analysis of the application of the CUP criteria in HCC 21.71.030 to the proposal and potential conditions that could be imposed by the Commission. The analysis and preparation of the Planning staff report is standard

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procedure and entirely appropriate for the Commission to review. The submission of a City Planning staff report and suggested factual findings is exactly what the Planning Department should do to assist the Commission in its CUP deliberations. The record is glaringly absent any evidence that SR 20-63 was "biased" or that the Commission "rubber-stamp[ed]" the findings in SR 20-63. To sustain these claims Griswold is required to cite evidence in the record supporting them. He has failed to do so. Contrary to Griswold's assertions, the record demonstrates that SR 20-63 is an unbiased, independent City Planning analysis of the proposal and the Commission based its Decision and factual findings on all of the evidence in the record, not just SR 20-63 (R. 7-17; 65-66). The Planning Department and the Commission acted properly in evaluating the merits of and granting CUP 20-15.

Griswold's assertion that the Commission violated a "cardinal primary requirement of procedural due process" by considering SR 20-63 is meritless. First, his conclusory assertion about the requirements of procedural due process is unsupported. Griswold's citation to an 80-year-old court decision from the Philippines is inappropriate and irrelevant because there is no Alaska case citing or adopting it nor is it controlling law in Alaska. Second, the Commission did not violate Griswold's procedural due process rights by considering SR 20-63, and Griswold provides no legal authority to support that assertion.

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5. Griswold's Assertion of Bias Against Commission Chair Smith is Not Supported By the Record

A Commission member who has partiality concerning a quasi-judicial matter may not serve as a member of the body adjudicating the matter. HCC 1.18.048(a). Partiality is defined as follows:

> 1. The ability of a member of the quasi-judicial body to make an impartial decision is actually impaired; or
> 2. The circumstances are such that reasonable persons would conclude the ability of the member to make an impartial decision is impaired and includes, but is not limited to, instances in which:
> a. The member has a personal bias or prejudice for or against a party to the proceeding including a party's lawyer;
> b. The member or an immediate family member is a party, material witness to the proceeding or represents a party in the proceeding.

HCC 1.18.020.

The record does not reflect that Commission Chair Smith was partial for or against any party when considering the subject CUP application. Other than handling procedural issues as Chair, Smith did not make any comments or take any action at the public hearing on this matter that could be construed as evidence of partiality (R. 61-64). Smith did vote in favor of granting CUP 20-15, but Commission's decision was unanimous, so Smith's vote is not evidence of partiality. There is simply no evidence in the record to support Griswold's assertion of bias.

Griswold's allegation is solely supported by his interpretation of Smith's alleged comment at a September 2, 2020 Commission hearing on another matter. This alleged comment cannot support Griswold's assertion of bias in this matter because it is not part of the record. HCC 21.93.510(a). Moreover even if Smith made this comment and it

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could be considered as evidence in this appeal, it is insufficient to demonstrate that Smith's ability to make an impartial decision on this application is impaired.

6. The Application for CUP 20-15 was Sufficient to Enable Meaningful Review

HCC 21.71.030(a) provides that the applicant for a CUP "must produce evidence sufficient to enable meaningful review of the application." The Applicants provided 18 pages of materials in support of their application for CUP 20-15, including a cover letter describing the proposal, a completed application form, detailed maps and schematics depicting the proposal and its location, and photographs of the Property (R. 18-36). The fact that City Planning and the Commission were able to undertake a detailed review and analysis of the application undercuts Griswold's argument that the application materials were insufficient.

Griswold raised this argument with regard to a different application. In response, the Superior Court noted that because the application included "surveys, maps, drawings, and aerial photographs," and because the Commission adopted the factual findings in the City Planning Staff Report, Griswold's argument regarding the sufficiency of the application was meritless. *See* Exhibit B, p. 23-25. Similarly, in this case the application includes maps, schematics, and photographs in addition to the application form, and the Commission adopted the factual findings in SR 20-63. These materials provided a reasonable basis for the Commission to conclude that it was able to meaningfully review the application before approving it. Griswold's argument to the contrary is meritless.

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7. The Property's Owner Signed the Application

There is no evidence in the record to support Griswold's assertion that the application for CUP 20-15 "contains false or misleading information." It is impossible to respond to Griswold's assertion without more information about what he believes was "false or misleading." The application was signed by the Property's owner as required by HCC 21.71.020(a)(9) (R. 44).

8. City Planner Abboud Appropriately Signed the Commission's Decision and the Decision Constitutes Issuance of CUP 20-15

Griswold has raised this argument with regard to a different application. The Superior Court rejected the argument as follows:

> Mr. Griswold claims that the Planning Commission did not lawfully issue Mr. Yager's CUP. He argues that the Homer City Code requires the Planning Commission to issue CUPs as separate physical documents, and that the Planning Commission therefore erred when it merely issued a decision that was signed by the Commission Chairman, Mr. Venuti, and the City Planner, Mr. Abboud.
>
> Mr. Griswold's main argument is that because the relevant provision of the Homer City Code does not say that the City Planner "shall contemporaneously sign the Commission's decision and that the Commission's decision then becomes the conditional use permit," the Code "clearly" requires a CUP to be a distinct document.
>
> This argument lacks any legal basis. The Code provides: "The City Planner shall promptly issue a conditional use permit in accordance with a decision of the Commission approving an application. The Planning Commission interprets a properly signed decision approving a CUP issued soon after the Commission's meeting and vote to constitute a valid permit. Mr. Griswold provides no legal authority against such an interpretation, and therefore cannot hope to overcome the deference the court is bound to give a zoning board's interpretation of the zoning ordinances.

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See Exhibit B, p. 23. For the reasons noted by the Superior Court, Griswold's attempt to reargue this issue before the BOA should be rejected. The issuance of CUP 20-15 was in accord with the Homer City Code.

9. The Commission Appropriately Considered the CUP Criteria in HCC 21.71.030

HCC 21.71.030(a)-(j) provides the criteria under which an application for a CUP must be considered. The Superior Court rejected a similar argument from Griswold because the Commission, by adopting the analysis and factual findings from the City Planning Staff Report and making a finding for each review criterion in its written decision, appropriately followed "the standard chosen by Homer to approve setback reductions in the CBD." *See* Exhibit A, p. 17-18. Similarly, in this case the Commission adopted the analysis and factual findings from SR 20-63 and made written findings on each of the review criteria. In doing so, it followed the procedure set forth the Homer City Code. Griswold does not provide any authority suggesting that the Commission erred in applying the review criteria to the application for CUP 20-15. He simply disagrees with the Commission's analysis and decision.

Moreover, Griswold's assertion that the Commission did not consider the effects of the setback reduction is incorrect. SR 20-63 discusses and analyzes possible impacts of the setback request on property values, pedestrian access, street parking, and neighborhood character (R. 7-17). Griswold's disagreement with this analysis does not support his assertion that the Commission "misapplied the review criteria." No evidence in the record suggests that the proposal would have adverse effects, and it is noteworthy

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that in his written comments to the Commission, Griswold does not discuss any reasons that this particular proposal would have "adverse effects" (R. 56-60).

10. The Commission Did Not Grant "De-Facto Area Variances"

Griswold's argument that granting a setback reduction via HCC 21.18.040(b)(4) is a "de-facto area variance" was rejected by the Superior Court in 2019. *See* Exhibit A, p. 8-10. The Superior Court reiterated that this issue had already been decided as a matter of law in December 2020. *See* Exhibit B, p. 20-22. HCC 21.18.040(b)(4) specifically allows for setback reductions via CUP, so granting such a request cannot be a variance as a matter of law. Griswold's argument is meritless.

11. It Was Appropriate for the Commission to Consider and Grant CUP 20-15 as a Single CUP Authorizing Multiple Conditional Uses for the Property

Under Alaska law, zoning board interpretations of zoning ordinances "should be given great weight and should be accepted whenever there is a reasonable basis for the meaning given by the board." *Griswold v City of Homer*, 55 P.3d 64, 67-68 (Alaska 2002). In this case, the Commission reasonably interpreted HCC 21.71 to allow consideration of multiple proposed conditional uses for the Property under a single CUP. Under HCC 21.71.020(a)(4), an application for a CUP shall include "[a] narrative description of *all proposed uses and structures*, specifically identifying those that require conditional use permit approval." HCC 21.71.030 provides review criteria for "the application." HCC 21.71.040(a) provides that the Commission "will review and may approve, approve with conditions, or deny *an application* for a conditional use permit."

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Read together, the clear and unambiguous intent of HCC 21.71 is for a CUP applicant to submit a single application covering each proposed use and structure requiring CUP approval. The Commission then reviews and decides upon the application as a whole. The Commission appropriately followed this procedure based upon its reasonable interpretation of the zoning code. Griswold's assertion that the Commission should have separately considered and decided upon each proposed conditional use is woven out of whole cloth – there is no support in the Zoning Code for Griswold's interpretation. Rather, HCC 21.71.020(a)(4) requires a single application including each proposed use and structure that requires CUP approval.

Griswold's assertion that the requested setback reduction and lot coverage proposal should have been considered under a variance procedure pursuant to HCC 21.72 is meritless. In the CBD, both setback reductions and building area coverage in excess of 30 percent of the lot area are subject to a CUP procedure. *See* HCC 21.18.040(b)(4) and HCC 21.18.040(d). Since the Zoning Code provisionally permits both types of requests subject to a CUP procedure, the proposal in this case is not a request for a variance as a matter of law. *See* Exhibit A, p. 8-10; Exhibit B, p. 20-22.

12. The Homer Comprehensive Plan is Not Unconstitutionally Vague

This appeal is not the appropriate venue for Griswold's constitutional challenge to the 2018 Homer Comprehensive Plan. It is well-established that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures." *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 270 n.90 (Alaska 2004) (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

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The Comprehensive Plan's reference to "infill" is not unconstitutionally vague. The Homer City Council adopted the 2018 Homer Comprehensive Plan pursuant to a duly enacted ordinance. *See* Homer Ordinance 18-47. A duly enacted ordinance is presumed constitutional and should be construed to avoid a finding of unconstitutionality. *Haggblom*, 191 P.3d at 997. Under Alaska law, an ordinance is unconstitutionally vague "when: (1) it does not give adequate notice of the prohibited conduct, or (2) its language is so imprecise as to encourage arbitrary enforcement." *Id*. The Comprehensive Plan's reference to "infill" is in the larger context of Homer's goal to "[p]romote a pattern of growth characterized by a concentrated mixed-use center" (Goal 1, Objective A) and "[e]ncourage a concentrated, pedestrian oriented, attractive business/commerce district in the Central Business District" (Goal 4, Objective A). *See* 2018 Homer Comprehensive Plan, p. 4-4; 4-8). The Comprehensive Plan provides a detailed explanation of these zoning and planning goals. *Id.* Viewed in this context, the Comprehensive Plan's reference to "infill" is not "so imprecise as to encourage arbitrary enforcement." *Haggblom*, 191 P.3d at 997.

Griswold misunderstands the holding in *Griswold v. City of Homer*, 925 P.2d 1015, 1022-23 n.9 (Alaska 1996). In *Griswold*, the Alaska Supreme Court noted that the ordinance in question "will result in genuine benefits of the City of Homer" including "encouraging filling in vacant places in the CBD." *Id*. at 1022. The Court then noted in dicta that the goal of "filling in vacant places" is not legitimate per se, but that the goals noted by the City in that case are "usually legitimate only if the ordinance is otherwise reasonable and in accordance with the comprehensive plan." *Id*. at 1023, n.9. The

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Comprehensive Plan discusses infill in the context of its detailed explanation of its planning and zoning goals for the CBD. Neither *Griswold* nor any other Alaska decision holds that a zoning and planning goal of "infill" is illegitimate in this context.

13. The Commission's Approval of CUP 20-15 does not Conflict With or Violate HCC 21.61.040(a)-(d)

Griswold's argument regarding HCC 21.61.040 is irrelevant to this appeal. HCC 21.61.040 allows the continuation of a non-conforming use of property under certain conditions. However, the Applicants are not seeking to continue a non-conforming use of the Property. Rather, they appropriately requested a CUP for their proposed modifications to the property. Since the Commission granted CUP 20-15, the Property complies with the Zoning Code. As SR 20-63 correctly noted, the compatibility of the proposal with the architectural style of the neighboring structures is relevant to the Commission's consideration of HCC 21.71.030(i), whether the proposal is contrary to the applicable goals and objectives of the Comprehensive Plan.

14. The Commission Did Not Waive or Relax the Zoning Code

In granting CUP 20-15, the Commission did not waive or relax any provision of the Zoning Code, nor did it violate any other HCC provision. It is impossible to respond to Griswold's scattershot Point #14 without further explanation from Griswold about why he believes the Commission waived, relaxed, or ignored the listed provisions.

CONCLUSION

The Commission properly granted CUP 20-15. The Commission's Decision is supported by substantial evidence in the record and fully complies with the Homer

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Zoning Code. Most of Griswold's legal challenges have already been rejected by the Homer Superior Court. Griswold's remaining arguments are meritless. Accordingly, the BOA should uphold the Commission's grant of CUP 20-15.

DATED this 18th day of January, 2021, at Anchorage, Alaska.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT HOMER

FRANK GRISWOLD, Appellant, vs. HOMER ADVISORY PLANNING COMMISSION, DEREK REYNOLDS, CATRIONA REYNOLDS, and RICK ABBOUD, Appellees.	CASE NO. 3HO-18-00240CI

DECISION

I. INTRODUCTION

Derek and Catriona Reynolds own property on Pioneer Avenue in the Central Business District in Homer, Alaska. The Reynolds run a bicycle rental shop out of the building, and sought permission from the city of Homer to build an awning on the front of their building. The awning would stretch into the 20-foot setback required between any structure and right-of-way in that zoning district. The Reynolds' application, Conditional Use Permit (CUP) 18-02, was addressed in a public hearing before the Homer Advisory Planning Commission (Commission) on March 7, 2018. Frank Griswold objected in writing to the granting of the CUP. The Commission approved the application, and Mr. Griswold appealed on legal, procedural, and factual grounds.

The appeal of the CUP application was heard by Judge Pederson of the Alaska Office of Administrative Hearings, and he affirmed the Commission's granting of the permit on August 14, 2018. Mr. Griswold appealed again to the Superior Court in September 2018, citing nearly identical legal, procedural, and factual grounds for his appeal.

The Planning Commission had the authority to consider and grant the Reynolds' application. Alaska state laws allow municipalities to adopt code that includes mechanisms for making setback reductions like the one contemplated in CUP 18-02, and the Homer City Code allows setback reductions to be sought via the CUP process. The Commission's decision to grant the Reynolds' CUP is supported by substantial evidence. Accordingly, the Commission's decision to grant CUP-2018-02 is AFFIRMED.

II. FACTS AND PROCEEDINGS

a. Homer's Conditional Use Permit Procedure

In Homer, applications for Conditional Use Permits are submitted to the City Planner.[1] The application is reviewed, and if complete, the application is set to be heard in a public hearing in front of the Commission.[2] Following the hearing, the Commission must issue a decision containing its written findings and reasoning supporting the decision.[3]

A person who "actively and substantively participated" in a matter before the Commission may appeal the decision of the Commission to grant or deny a CUP.[4] The appeal may be heard by either the Board of Adjustment or a hearing officer appointed by the City Manager.[5]

Appeals are heard solely on the established record, unless there are allegations involving new evidence or changed circumstances, in which case the body hearing the appeal may remand the matter to the lower administrative body that issued the appealed decision.[6] After briefing, an appeal hearing is held, and a decision is issued.[7]

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[1] HCC 21.71.020.
[2] HCC 21.71.030, HCC 21.050(a).
[3] HCC 21.71.050(b)
[4] HCC 21.93.030(a), HCC 21.92.500(a).
[5] HCC 21.93.030, HCC 21.93.500(a).
[6] HCC 21.93.510(a).
[7] HCC 21.93.530-550.

The decision of the Board of Adjustment or hearing officer may be appealed within 30 days to the superior court.[8]

b. The Conditional Use Permit Application

The Reynolds own a building located on 302 E. Pioneer Avenue in Homer, Alaska. The lot on which the building sits is located in Homer's Central Business District (CBD). The CBD requires that "[b]uildings shall be set back 20 feet from all dedicated rights-of-way, except as allowed by subsection (b)(4) of this section."[9] The Reynolds' building is simple and rectangular, with a small arctic entry along Pioneer Avenue. The door in the arctic entry opens to the west, at a right angle to Pioneer Avenue. [10]

The Reynolds operate a bicycle rental business out of the building, which had been vacant for 5 years when they purchased it. The Reynolds sought a CUP which would allow them to build an awning over the front of their building that would expand the existing entryway and facilitate rental bike storage along the Pioneer Avenue face of the building. The existing arctic entry already encroached into the setback, but the proposed awning would leave 12 feet remaining of the setback between the sidewalk along Pioneer Avenue and the Reynolds' building.[11]

The Reynolds included in their application a description of the property, as well as a scale drawing of the proposed awning, photographs of the building before they bought it and since they started operating their store, as-built surveys depicting the building on its lot and the current state of the setback, and how far the building would encroach if granted the permit.[12]

c. The Planning Commission Hearing

The Reynolds' application was heard by the Planning Commission on March 7, 2018. The Homer City Planner's office issued their required written report which recommended approval of the application with ten factual findings:

[8] HCC 21.91.130.
[9] HC 21.18.040(b)(1).
[10] Administrative Record (AR) 26,27,32.
[11] AR 16-33
[12] AR 16-33

1. "The relevant ordinance allows a setback reduction if approved through the CUP process.
2. "The proposal is compatible with the purpose of the zoning district."
3. "The proposal will not negatively affect adjoining property values more than other permitted or conditionally permitted uses in the district."
4. "The proposal is compatible with existing uses of surrounding land."
5. "Existing public, water, sewer, and fire services are adequate to serve the structure."
6. "The proposal will not cause undue harmful effect upon desirable neighborhood character."
7. "The covered outdoor space and entry way will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole."
8. "Following CUP approval and issuance of a zoning permit, this proposal will comply with applicable regulations of HCC Title 21."
9. "No evidence has been found that the proposal is contrary to the applicable land use goals and objectives of the Comprehensive Plan."
10. "The proposal will comply with the applicable provisions of the Community Design Manual."[13]

The Homer Bookstore is adjacent to the Reynolds' building, and on March 5, 2018, Ms. Post from the Homer Bookstore contacted the Planning Department and offered her support for the Reynolds' application:

> We at the Homer bookstore would like to express our support of the proposed building frontage for Cycle Logical [the Reynolds' business]. We are thrilled to be seeing this eyesore of a building cleaned up. We feel this will be a great addition to this neighborhood and we look forward to the

[13] AR 10-15.

> improvements that we expect to see. We do not have a problem with the proposed frontage.[14]

The City Planner and the Reynolds spoke in support of the application of the application at the public hearing.[15] At the hearing, the City Planner recommended that the Commission add another finding: "[t]hat the proposed activity will enhance the aesthetic environment of the community, providing gracious human scale entry ways and public ways, orienting the entry way toward the street."[16]

Three other individuals spoke at the public hearing in support of granting the application. Their comments centered on the improvements the applicants had made to what had previously been an "eyesore."[17] Mr. Griswold registered his disapproval of the application by email to the Planning Commission on March 6, 2018, and filed additional objections the next day. [18] Mr. Griswold did not speak at the public hearing, and was the only citizen who objected to the Reynolds' application.

The Planning Commission unanimously voted to "approve the staff report PL 18-14 and CUP 2018-02" with the additional finding suggested by the City Planner.[19] The meeting lasted just over an hour and included several other agenda items.[20] The Commission issued their written decision on March 22, 2018.[21]

d. The Appeals

Mr. Griswold timely appealed the Commission's decision on CUP 2018-02 on April 3, 2018. Mr. Griswold requested that the appeal be heard by a hearing officer, instead of

[14] AR 37, *see also* Arial Map, AR 36.
[15] AR 37.
[16] AR 49.
[17] AR 37, 59.
[18] AR 42-48.
[19] AR 52.
[20] AR 9, 58-59.
[21] AR 53.

the Homer Board of Adjustment.[22] In accordance with HCC 21.93.030, the Homer City Manager appointed an administrative law judge employed by the Alaska Office of Administrative Hearings to serve as the hearing officer.

Mr. Griswold and Mr. Abboud, the City Planner, both filed hearing briefs, and the Reynolds did not. Oral argument was held on June 15, 2018. The Reynolds, Mr. Abboud, and Mr. Griswold all participated in the argument.

Judge Pederson issued his Decision on Appeal affirming the Commission's decision to grant the CUP on August 14, 2018. As permitted by HCC 21.91.130, Mr. Griswold timely appealed to the superior court in Homer on September 10, 2018.

III. STANDARD OF REVIEW

The court applies four standards of review when analyzing an administrative board's decisions: (1) substantial evidence, (2) reasonable basis, (3) substitution of judgment, and (4) reasonable and not arbitrary.[23]

The substantial evidence standard applies to questions of fact.[24] "Judicial review of zoning board decisions is narrow, and board decisions are accorded a presumption of validity. A zoning body's decision shall not be reversed if it is supported by substantial evidence."[25] Substantial evidence is what a "reasonable mind might accept as adequate to support a conclusion."[26]

The reasonable basis standard applies to questions of law "implicat[ing] agency expertise or the determination of fundamental policies within the scope of the agency's

[22] AR 4.
[23] *Rubey v. Alaska Comm'n on Postsecondary Educ.*, 217 P.3d 413, 415 (Alaska 2009); *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979).
[24] *Rubey*, 217 P.3d at 415.
[25] *Griswold v. City of Homer*, 55 P.3d 64, 67 (Alaska 2002).
[26] *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000) (quoting *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978)).

statutory functions."[27] This standard requires the court to give "deference to the agency's interpretation so long as it is reasonable."[28]

The substitution of judgment standard applies to questions of law that do not implicate agency expertise "or the formation of fundamental policies."[29] This standard enables the court to "substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law."[30]

The reasonable and not arbitrary standard applies to claims that legislative enactments violate substantial due process.[31]

IV. DISCUSSION

Mr. Griswold raised 18 points on appeal from Judge Pederson's administrative decision.[32] Only those points substantively raised in the briefing are addressed; the rest are considered waived.[33]

A. Legal Arguments

Mr. Griswold makes several arguments challenging the legal foundation of the conditional use process in Homer, the law surrounding variances in the state of Alaska, as well as legal arguments going to the process of appealing CUP 2018-02. For the reasons stated below, Mr. Griswold's arguments are without merit.

a. The Commission properly used the conditional permitting process to determine whether or not to approve the Reynolds' setback reduction.

Mr. Griswold argues that the Commission "did not have the authority to apply the conditional use permitting process to a (non-use) setback reduction and its approval of a

[27] *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).
[28] *Id.*
[29] *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 254 (Alaska 2000).
[30] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).
[31] *Jager v. State*, 537 P.2d 1100, 1107 n. 23 (Alaska 1975); *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974).
[32] Statement of Points on Appeal, September 10, 2018.
[33] *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 608 (Alaska 2003).

de-facto variance violated A.S. 29.40, HCC 21.72, and due process."[34] Mr. Griswold raises three separate issues, which will be addressed individually: the Alaska code on variances AS 29.40, Homer's code on variances HCC 21.72, and due process.

i. Does the setback reduction requested in CUP 18-02 constitute a variance?

The Alaska legislature has not defined the term "variance" for the purposes of zoning decisions, but the Alaska Supreme Court has described a variance as "a sort of 'escape hatch' or safety valve' function for the individual landholder who would suffer special hardships from the literal application of the terms of a particular zoning ordinance."[35] "It may be said that a variance grants permission to engage in a use that an appropriate legislative authority has otherwise proscribed."[36]

Generally, variances fall into two categories: use variances and area variances. Use variances allow a lot to be used for a purpose not otherwise allowed by the zoning code (a gas station in a residential neighborhood), while area variances permit dimensional deviations from the zoning code (a four-story building in a neighborhood of single-family homes).[37] Depending on the structure of the zoning code in each municipality, area variances may be required to make adjustments to dimensional standards, like setbacks, or height and square footage requirements.[38] Generally, because they allow what is usually forbidden by law within a particular jurisdiction, variances are not haphazardly granted, but will be permitted when failing to grant the variance would cause undue hardship or practical difficulties. [39]

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[34] Appellant's Brief (AB) 4.
[35] *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 632 (Alaska 1979), overruled on other grounds by *State v. Alex*, 646 P.2d 203 (Alaska 1982).
[36] C.J.S. Zoning and Land Planning § 305 Variance Defined.
[37] *See* C.J.S. Zoning and Planning § 304 Use and Area Variances Distinguished.
[38] *Id.*
[39] *See* HCC 21.72.020; *see also* 2 Am. Law. Zoning § 13:3 Statutory Variance Provisions.

Many of Mr. Griswold's arguments are based on the assumption that a setback reduction by definition will always require a variance.[40] While this may frequently be the case in other localities because of how many municipal ordinances are structured, it is not the necessarily case for Homer. Previously, a variance would have been required to obtain a setback reduction in the CBD. [41] However, the Homer City Council updated the Homer Zoning Code in 2008, and elected the CUP mechanism for reducing setbacks in the Central Business District.[42]

HCC 21.18.040 (b)(1) sets the standard setback in the CBD at 20 feet from all dedicated rights-of-way.[43] HCC 21.18.040(b)(4) specifically permits the setback to be reduced by a conditional use permit.[44] A variance, by definition, is an excused violation of the zoning code in a municipality. Because the setback as requested by CUP 2018-02 is directly addressed and permitted by a section of the Homer code, it cannot constitute a variance and does not require the heightened requirements imposed for the approval of variances.

ii. Does HCC 21.18.040 violate AS 29.40.040?

Homer's Zoning Code provisions do not violate AS 29.40.040. AS 29.40.040 requires that municipalities adopt a comprehensive plan that may include zoning regulations restricting use of land and improvements by geographic districts, and other

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[40] AB 4-10,

[41] In his Reply, Mr. Griswold references CUP 2018-07, another CUP application filed with the Commission seeking a setback reduction in the CBD, which was withdrawn over a question as to whether or not a variance was required, rather than a CUP. The lot in question in CUP 2018-07 was granted a variance in 1988, which removed the need for the 2018 application. *See* Appellant's Reply at 3., Minutes of Commission's June 20, 2018 meeting at 2, available at https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/advisory_planning_commission/meeting/33161/pc_062018.pdf; *see also* Minutes of Commission's July 18, 2018 Meeting at 47, available at https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/advisory_planning_commission/meeting/packets/33181/packet_reduced.pdf (last visited Oct. 15, 2019).

[42] Homer Ordinance 08-40, https://www.cityofhomer-ak.gov/sites/default/files/archives/clerk/ordinance/ord0840.htm (last visited Oct. 15, 2019).

[43] HCC 21.18.040(b)(1).

[44] HCC 21.18.040(b)(4).

measures to further the goal of the plan.[45] AS 29.40.040(b) sets the requirements for granting "a variance from a land use regulation adopted under this section." The section leaves all other decisions regarding how zoning laws are to be structured in a municipality up to the citizens of that municipality in their elected officials.[46] AS 29.40.040 does not define "variance", or indicate if the section is intended to apply to any variance, or simply one for the *use* of the lot (versus a dimensional restriction).[47]

Regardless of whether or not the variances limited in AS 29.40.040(b) are strictly for use or also for dimensions, section (b) would only apply when the landowner's request violates the zoning code adopted by the municipality, and that is not the case here. Homer chose to adopt a zoning code that allows property owners to request a setback reduction on their CBD lot by using the CUP process and standards, so following that procedure and granting that request does not violate Homer law.[48]

Other zoning districts in Homer have different standard setbacks and standards for approving and allowing setback reductions, and a variance may be required to reduce a setback in those districts, but a variance is not required to reduce a setback in Homer's CBD.[49]

iii. In light of Alaska and Homer's law on variances, did Homer violate Mr. Griswold's right to due process by using the CUP process to approve the setback?

The City of Homer did not violate Mr. Griswold's right to due process by using the CUP application process to approve the Reynolds' CUP. The city of Homer is authorized by the state of Alaska to develop the procedure and standards used within the city for granting deviations from its own code with limited exceptions, and Homer followed its own procedure.

[45] *See* AS 29.40.040.
[46] *Id.*
[47] *See* AS 29.40.040.
[48] HCC 21.18.040.
[49] *See* HCC 21.28.00 Marine Commercial District; *see also* Chapter HCC 21.20, Town Center District.

"Substantial due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people. The constitutional guarantee of substantial due process assures only that a legislative body's decision is not arbitrary but instead based upon some rational policy."[50]

Homer's decision to approve setback reductions through the CUP process in the Central Business District is not detached from all reason. HCC 21.72.040 instructs the Planning Commission to follow the conditional use permit application process for a granting a variance, and to apply the more stringent variance standards at the appropriate stages of the process. Homer appears to have chosen that it is best for Homer to streamline the application process for variances and CUPs by using the same method but applying the applicable standards in each case. This appears to simplify and clarify the process for property owners and neighbors alike. Homer does not violate the due process rights of its citizens by choosing the CUP procedure to grant setback reductions as it considers appropriate, and did not in granting CUP 2018-02.

b. Staff Report 18-14 was not biased and did not prejudice the proceedings.

Mr. Griswold alleges that "Staff Report 18-14 is biased and unduly prejudiced the Commissioners thereby violating due process which requires that quasi-judicial proceedings be objective, fair, and impartial." [51]

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[50] *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974); *Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996).
[51] AB 15.

Mr. Griswold raises two issues.

First, he argues that Staff Report 18-14 is biased and improperly influenced the Commissioners because it was written by a new and inexperienced planning staff member, and failed to include several sections of the Homer code on conditional use permits.[52]

However, Staff Report 18-14 does discuss requirements the proposal did not meet, as well as setting a condition for approval, and indicates where a component of the application was missing, namely a lighting plan.[53] The fact that Mr. Griswold himself may have believed CUP 2018-02 conflicted with other, additional provisions is not evidence of bias in the report.

Second, Mr. Griswold asserts that bias in the staff report and the timing of its production negatively affected his due process rights.[54] "Substantial due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose."[55]

HCC 2.58.050 outlines procedures for municipal boards and commissions in Homer. Section (f) addresses staff reports, and does not require that a staff report be generated after a hearing, and directs that the weight of the report be given the same as any other testimony offered. Additionally, the bylaws of the Commission include provisions for hearing and potentially adopting the staff report as part of the draft hearing agenda at a meeting of the commission.[56]

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[52] AB 15-16; HCC 21.71.010(c); HCC 21.71.040(a).
[53] AR 14.
[54] AR 15
[55] *Concerned Citizens of S. Kenai Peninsula*, 527 P.2d at 452. *Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996).
[56] HCC 2.58.050(f); Homer Advisory Planning Commission Bylaws 7, https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/boards_and_commissions/page/8446/bylaws_adopted_may_13_2013.pdf (last visited Oct. 15, 2019).

The structure of the bylaws indicates that the Homer City Council expected that the common practice would be to generate the staff report before, not after, a hearing and considered what weight the Commission should give the report before hearing other evidence, choosing to adopt the findings of the report, or to incorporate them into another decision. While the testimony heard at the hearing may not be included in the report at first, Homer had a legitimate governmental purpose when it adopted the staff report procedure and Commission bylaws, and the Commission followed the procedure regarding CUP 2018-02. Accordingly, Mr. Griswold's due process rights were not violated by the Commission's handling of Staff Report 18-14 or the report itself.

c. The Commission did not err by not including the bicycle screening condition from the conclusion of its decision granting CUP 2018-02.

Mr. Griswold asserts that the Commission erred by not including in the Conclusion of its Decision its previously adopted condition that "[r]ental bicycles displayed outdoors must be screened from public view when remaining outdoors outside of open business hours, per HCC 21.18.080(b)."[57] The Planning Staff's report discusses this code, which requires that products for sale are screened from view outside business hours, under the possible conditions for approval of the CUP.[58] The Commission's decision did not explicitly require such screening as a condition of approval, and Mr. Griswold argues that this was error.[59]

Failure to include an applicable section of the Homer Zoning Code as a condition of granting the application does not undermine the granting of the application as a whole. The screening requirement is generally applicable to all citizens of Homer, and accordingly the applicants would still be required to comply with the requirement and be subject to enforcement if they fail to do so, even if it is not specifically included in the

[57] AB 21.
[58] AR 14.
[59] AR 55-56.

conditions for approving the permit.[60] It was not error to omit a requirement that the Reynolds were already required to obey, whether or not their permit was granted.

d. The Commission did not err by failing to address HCC 11.08.110 (Driveway Construction Permits) in its Decision.

Mr. Griswold argues that "CUP 18-02 conflicts with HCC 11.08.110 (Driveway Construction Permits) and therefore cannot be sustained." [61] Mr. Griswold adds that structures near the roadway prevent effective snow removal and drainage, and do not properly protect the public.[62] HCC 11.08.110 sets a minimum setback requirement of 20 feet to any property line abutting a road or right-of-way.[63]

"Where the agency's expertise or questions of fundamental policy are involved, an agency's interpretation of a zoning ordinance should be reviewed under the deferential "reasonable basis" standard and should be accepted whenever reasonable."[64] When two statutes conflict, "the more specific controls the general."[65]

Mr. Griswold registered his concerns about snow removal and drainage in writing before the meeting, where Mr. Abboud addressed Mr. Griswold's concerns about snow removal.[66] These seem to be the same concerns contemplated by the Homer City Council when they adopted HCC 11.08.110. However, Mr. Abboud shared that he had visited the site himself, which had alleviated his concerns.[67]

While it does involve reducing a setback along a road, CUP 2018-02 is not an application for a driveway. Members of the Commission were able to view as-built surveys, as well as aerial photos of the Reynolds' building that were included in their application, which show where cars and people would move around the building.[68]

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[60] HCC 21.90 "Administration and Enforcement."
[61] AB 22.
[62] *Id.*
[63] HCC 11.08.110.
[64] *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 254 (Alaska 2000).
[65] *Allen v. Alaska Oil and Gas Conservation Com'n*, 147 P.3d 664, 668 (Alaska 2006).
[66] AR 50.
[67] AR 50.
[68] AR 39-42.

Mr. Abboud visited the location and offered testimony at the hearing, and each of the Commissioners was familiar with the site of the application. Based on Mr. Abboud's testimony and their own review of the surveys and maps provided by the Reynolds, a reasonable person could agree with the Commissioners' construction of applicable sections of Homer's code.

e. *It was appropriate for City Planner Rick Abboud to submit a brief and participate in the appeal proceedings below. City Planning Department employees may fully participate in appeals to a hearing officer, and Mr. Abboud did not commit the unauthorized practice of law.*

Mr. Griswold asserts that it was inappropriate for City Planner Rick Abboud to submit a brief and participate in the appeal proceedings below. However, under HCC 21.93.060 and 21.93.500, a City Planner or the City Planner's designee may be a party to an appeal to the Board of Adjustment or a hearing officer. HCC 21.93.530(a) and 21.93.540(b) specifically allow a party to file a brief and make oral argument. Further, the custom in Alaska allows this practice.[69] Therefore, the City Planner could be a party, file a brief, and make oral argument.

Mr. Griswold also argues that Mr. Abboud unauthorized practice of law by appearing before the hearing officer. The unauthorized practice of law occurs when: (1) someone "represent(s) oneself by words or conduct to be an attorney"; and "either (i) represent(s) another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii), for compensation, provide(s) advice or prepar(es) documents for another which affect legal rights or duties."[70]

[69] 1979 WL 22915 (Alaska A.G. Sept. 11, 1979).
[70] Alaska Bar R. 63(b); AS 08.08.230.

The City Planner's briefing to Judge Pederson never claims that the City Planner was acting as an attorney on behalf of the City.[71] Mr. Griswold's assertion fails the first prong of the unauthorized practice of law test. Therefore, the court will not address the second prong. The court finds that the City Planner was not committing unauthorized practice of law.

B. Factual Arguments

Mr. Griswold makes several arguments concerning the sufficiency of the evidence before the Planning Commission, what evidence the Commission considered, and whether or not the Commission erred in making specific findings.

As outlined below, Mr. Griswold's arguments are unfounded.

a. The Commission's findings of fact are supported by substantial evidence in the record and Judge Pederson properly reviewed the entire record before him in assessing the Commission's decision and findings of fact.

Mr. Griswold asserts that "[t]he Commission's findings of fact are not supported by substantial evidence and Judge Pederson did not have the authority to make factual findings on behalf of the Commission."[72] The court understands Mr. Griswold's argument to mean that the numbered findings in the Commission's decision are not followed by specific factual bases for each finding, and that Judge Pederson's citation to points in the record that support the Commission's determinations amounts to finding facts on behalf of the Commission.

In Alaska, "[a] decision of the board may not be overturned unless it is unsupported by substantial evidence on the record taken *as a whole*. It is not important that the particular situation before the board is subject to more than one inference. What matters is whether the determination of the board is supported by substantial evidence on

[71] See AR 124-135, 159-162.
[72] AB 12.

the whole record."[73] Further, the Supreme Court of Alaska has upheld administrative decisions that included otherwise "relatively conclusory" findings when they were consistent with the decision affirmed by the reviewing body, and explained that the court may "safely assume that the board accepted" those findings.[74]

The Commission specifically referenced the Staff Report, application, and the public hearing in drafting its Decision.[75] Accordingly, Judge Pederson was not limited to the numbered factual findings outlined in the Commission's decision when considering whether or not the Commission erred in granting CUP 2018-02. Judge Pederson's process of surveying the record and pointing out evidence that supported the Commission's decision does not amount to findings of fact on the Commission's behalf, but merely underscores the Commission's decision.

Finally, the Commission made its decision based on a record that included a public hearing with in person and previously submitted written testimony, photographs and scale drawings of the building, as well as a site visit and personal knowledge of the area from the Commissioners.[76] Even though Mr. Griswold may disagree with the Commission and Judge Pederson's decision, a reasonable person could find that their decisions were based on substantial evidence, and accordingly the Commission did not err.

b. The Commission gave suitable weight to the evidence before it in determining whether granting the CUP to reduce a setback was proper.

Mr. Griswold argues that "the Commission erroneously considering (sic) the effects of the retail bicycle store and its proposed appurtenances on neighborhood character, property values, etc., instead of focusing on the effects of the proposed setback reduction."[77] Functionally, Mr. Griswold asserts that the Commission did not give

[73] *Anderson v. Employers Liab. Assur. Corp.*, 498 P.2d 288, 289–90 (Alaska 1972) (emphasis added).
[74] *See Brown v. Personnel Bd. For City of Kenai*, 327 P.3d 871, 876 (Alaska 2014).
[75] AR 53.
[76] *Id.*
[77] AB 10.

sufficient weight to the negative impacts of shrinking the setback that he anticipates versus the positive effects offered by the applicants and the other supporters of the CUP.

In Staff Report 18-14, Homer planning staff outlined findings addressing each 10 criteria required in HC 21.71.030 for approving a conditional use application, which is the standard chosen by Homer to approve setback reductions in the CBD.[78] Additionally, the Decision itself makes a finding for each criterion and explicitly references the Staff Report and the meeting held to address the application.

Further, the Commission specifically addressed concerns generated by the setback reduction itself, including sight lines for cars pulling out, as well as traffic pattern concerns, and potential adverse impacts on drainage and snow removal.[79] Mr. Abboud made a visit to the site of the CUP, and explained during the hearing that he also had concerns about visibility until he went and visited the location.[80] The fact that the Commission did not perform a comprehensive, data-driven analysis of potential impacts to property values in the CBD is not fatal to the application, or the Commission's decision. A reasonable person could find that the remarks from the site visit and neighbors, as well as the drawings provided by the Reynolds in their application provide a sufficient evidence to support granting the CUP and reducing the Pioneer Avenue setback on the Reynolds' lot.

c. The Commission did not err in finding that the proposal is compatible with the purpose of the zoning district as required by HCC 21.71.030(b).

HCC 21.71.030(b) requires that the proposed use and structure are compatible with the purpose of the zoning district in which the lot is located. Mr. Griswold provided little argument and no evidence to support his argument that "[t]he Commission erred in

[78] AR 19-24.
[79] AR 59.
[80] *Id.*

finding that the proposal is compatible with the purpose of the zoning district per HCC 21.71.030(b)."[81]

The purpose of the Central Business District in Homer is:

> "to provide a centrally located area within the City for general retail shopping, personal and professional services, educational institutions, entertainment establishments, restaurants and other business uses listed in this chapter. The district is meant to accommodate a mixture of residential and nonresidential uses with conflicts being resolved in favor of nonresidential uses. Pedestrian-friendly designs and amenities are encouraged."[82]

CUP 2018-02 was submitted by the Reynolds to improve their bicycle rental storefront by adding an awning that would encroach into the setback. At the hearing addressing the application, multiple Homer citizens specifically addressed the goals of the CBD and supported the Reynolds' application, even stating specifically that the application will further the goal to be more pedestrian-friendly.[83] A neighboring business operator also registered her support via email before the meeting.[84] Accordingly, a reasonable person could find (and several did) that there is sufficient evidence that CUP 2018-02 aligns with the goals of the Central Business District, and accordingly the Commission did not err in making that finding.

d. The Commission did not err in finding that the proposal will not cause undue harmful effect upon the neighborhood character as required by HCC 21.71.030(f).

Mr. Griswold contends that "[t]he Commission erred in finding that the proposal will not cause undue harmful effect upon desirable neighborhood character per HCC

[81] AR 16.
[82] HCC 21.18.010.
[83] AR 49-52.
[84] AR 37.

21.71.030(f) and failed to identify what effects were considered and whether they were desirable or undesirable."[85]

Mr. Griswold argues that the 20-foot setbacks in the CBD were installed to benefit the neighborhood character, and that as a result, reducing them would automatically detriment it.[86] However, multiple other Homer citizens testified to exactly the opposite, including the belief that "walkability and friendliness" would be improved by the awning.[87]

There is substantial evidence in the record to support the commission's finding in the testimony of the individuals who own property nearby to the lot in question.[88] A reasonable person could, and several spoke up to find that the proposed awning will not cause undue harmful effect on the neighborhood character within Homer's Central Business district, and accordingly the Commission did not err.

e. The Commission did not err in finding that the proposal is not contrary to the applicable goals and objectives as required by HCC 21.71.030(i).

Mr. Griswold argues that the Commission erred in finding that the proposal is "not contrary" to the applicable land use goals and objectives of the Comprehensive Plan as required by HCC 21.71.030(i). [89] The Homer Code on conditional use permits or variances does not require CUP applicants to affirmatively demonstrate compliance to each goal in the Comprehensive Plan.

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[85] AB 17.
[86] *Id.*
[87] AR 51.
[88] AR 59.
[89] AB 18.

Homer's Comprehensive Plan (Plan) "identifies a broad, long-term vision for Homer's future, and establishes goals and standards" for land use.[90] Mr. Griswold cites to several of the goals set out in Homer's Comprehensive Plan, which emphasize low density development "particularly in residential areas."[91] However, the Plan also states that it seeks to encourage "a concentrated, pedestrian oriented, attractive business/commerce district in the CBD" and multiple individuals testified at the hearing directly addressed the benefit to walkability created by CUP 2018-02. [92] A reasonable person could find that the encroaching awning described in CUP 18-02 not being contrary to the broad land use goals and objectives of the Comprehensive Plan is supported by substantial evidence, especially those applicable strictly to the Central Business District.

f. The Commission did not err in finding that CUP 18-02 complies with the Community Design Manual.

Mr. Griswold argued that the Commissioned "erred by finding that the proposal will comply with the applicable provisions of the Community Design Manual per HCC 21.71.030(j) and failed to identify what provisions of the CDM were applicable." [93] HCC 21.72.030(j) requires that a CUP must comply with all applicable provisions of the Community Design Manual.

Homer has developed an extensive Community Design Manual (Manual) in order to "[m]aintain and improve the overall quality of the built environment" in Homer.[94] The Manual applies to the CBD, and states that "quality design is more important than strict

[90] Homer Comprehensive Plan, Executive Summary viii, https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/planning/page/30781/2018_homer_comprehensive_plan_final_adopted_version.pdf (last visited on Oct. 15, 2019) (Comprehensive Plan).
[91] AB 19.
[92] Comprehensive Plan at 4 – 8, AR 19.
[93] AB 19.
[94] Community Design Manual 1, https://www.cityofhomer-ak.gov/planning/community-design-manual (last visited Oct. 15, 2019).

conformance."[95] The Commission is only required to review applicable provisions of the Manual when reviewing a CUP.[96] CUP 2018-02 was narrowly focused and only addressed the awning set to be built in the setback, not a re-build of the entire building, or addition of landscaping or parking lot. Homer does not require the Commission to impose additional requirements that are not relevant to the scope of the application.

A reasonable person could find that based on the limited nature of the Reynolds' application, the detailed drawings provided in their application, and thorough review of the application by planning staff, CUP 2018-02's conformity with the applicable portions of the Manual is supported by substantial evidence.

g. The Commission's Finding 11 is not prejudicial and does not undermine the Decision as a whole.

Mr. Griswold asserts that "[t]he Commission's Finding 11 is excessively vague, subjective, and prejudicial," but provides little argument to support the assertion.[97]

At the hearing on March 7, 2018, Planner Abboud outlined Staff Report 18-14 to the Commission and recommended adding Finding 11, that "the proposed activity will enhance the aesthetic environment of the community, providing gracious human-scale entryways and public ways orienting the entry way toward the street"[98] After hearing the testimony at the meeting and asking a few clarifying questions, the Commission unanimously adopted the finding.[99]

While the language in Finding 11 is broad, it is no more flowery than provisions and goals in the Homer code, Manual, and Plan cited elsewhere in this Decision. Further, the Commission voted unanimously to adopt the finding after hearing the analysis of the planning staff, as well as the testimony Mr. Griswold submitted and that offered by those

[95] *Id.* at 3.
[96] HCC 21.72.030(j).
[97] AB at 21
[98] AR at 61.
[99] *Id.*

in attendance at the meeting. There is no indication in the record that the finding carried any improper weight with the Commissioners, or inappropriately impacted their ability to make a reasonable decision, and Mr. Griswold does not raise such arguments.

A reasonable person could find that there is substantial evidence in the record in both the staff report and from testimony to support the finding that that the awning would improve the appearance of the storefront on Pioneer Avenue.

V. Conclusion

> "The evidence presented to the board was sufficient for them to reasonably conclude that the proposed use would not be more appropriate. If appellant was dissatisfied with the nature or amount of the evidence (the lack of 'impact studies', for instance), it was incumbent upon appellant to object and to provide the additional evidence desired. The burden of proof in a case such as this is on the appellant."[100]

As outlined above, Appellant has failed to demonstrate that Homer's system of granting setbacks and conditional use permits violates Alaska law, or that CUP 2018-02's approval is not supported by substantial evidence. Further, Homer's process of approving CUPs is not so detached from reason that it violates the Appellant's due process rights.

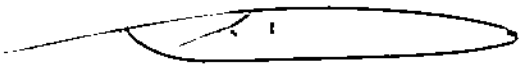
After reading through this two-inch high file (including the agency record and the court file), the court is left with the numb feeling that some old grudge is actually behind this litigation. Although there are generalized issues raised, the court sees no genuine issue that Mr. Griswold has with this particular bicycle shop's awning; the attack is on the City of Homer. Catriona and Derek Reynolds appear to be collateral damage in that attack. To be sure, ensuring that government honors due process and the rule of law is consistent with being a good citizen. But so are civility, neighborliness and kindness.

For all of the above reasons, in addition to any reasoning the court may have missed in ALJ Peterson's decision, which is adopted by reference here, the decision of

[100] *Kelly Supply Co. v. City of Anchorage*, 516 P.2d 1206, 1210–11 (Alaska 1973).

the hearing officer and the Homer Advisory Planning Commission to approve CUP 2018-02 is AFFIRMED.

DATED this 17th day of October, 2019, at Kenai, Alaska



LANCE JOANIS
SUPERIOR COURT JUDGE

I certify that a copy of the forgoing was
✓ mailed to Griswold, Reynolds (2)
___ placed in court box to ___
___ faxed to ___
✓ scanned to Wells
JSD 10-17-19
Judicial Assistant Date

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT HOMER

FRANK GRISWOLD, Appellant, v. HOMER BOARD OF ADJUSTMENT, JOHN SMITH, NORMA SMITH, TERRY YAGER, JONNIE YAGER, and RICK ABBOUD, Appellees.	Case No. 3HO-14-00243CI

DECISION AND ORDER

This case involves Appellee Homer Board of Adjustment's affirmation of the Homer Advisory Planning Commission's 2014 issuance of a Conditional Use Permit to Homer residents John Smith and Terry Yager. The permit allowed them to build a covered deck on the side of their hotel, the Windjammer Suites, which would extend 10 feet into the 20-foot setback that Homer zoning ordinances prescribe along Pioneer Avenue in the city's Central Business District.

Appellant Frank Griswold, who lives and owns property in the area, challenges the permit's legality. He appealed the Planning Commission's decision to an administrative law judge, who issued a decision on the merits upholding the decision. Mr. Griswold then appealed to this court. The Planning Commission's decision is affirmed.

I. Background

A. Factual and Procedural History

Appellees John Smith[1] and his wife Norma Smith live in Homer, where they own and run a small hotel called the Windjammer Suites.[2] The Smiths' daughter, Jonnie Yager, and her husband, Terry Yager, are also involved with the business. The hotel is at 320 West Pioneer Avenue, and is in an area of Homer known for zoning purposes as the "Central Business District" (CBD). The hotel is a two-story rectangular building that sits at an angle to Pioneer Avenue, which runs roughly northwest-southeast at that point, and one of its shorter sides faces east toward the road.[3]

The Smiths and Mr. Yager wanted to improve the building and install a covered deck onto the side of the building that faces the road. But the deck's design would have it encroach ten feet into the twenty-foot building setback that Homer zoning ordinances prescribe along Pioneer Avenue in the CBD. On March 26, 2014, Mr. Yager applied to the Homer City Planning Department for a Conditional Use Permit (CUP) that would allow him and the Smiths to build the deck without violating the setback ordinance. His application included descriptions of the property and surrounding area, a drawing of the planned deck, an aerial photograph of the surrounding neighborhood, and surveys of the property. Mr. Yager signed the form as the applicant, and Mr. Smith signed it as the property's owner.[4]

The Planning Department's staff evaluated Mr. Yager's application and concluded that it met the criteria specified in the zoning ordinances for issuing CUPs. They set forth their

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[1] Mr. Smith died in April 2018 at age 92. *John Smith (Obituary)*, HOMER NEWS (Apr. 19, 2018), https://www.homernews.com/obituaries/john-smith/. He was originally a party to this case, but since no motion for substitution has been made for him, and because the other appellees include parties who would be entitled to prosecute or defend in the proceeding below and can maintain appellate review without affecting the appeal, the court hereby dismisses him from this action per Civil Rule 25(a) and Appellate Rule 516(a).

[2] The hotel's name has since changed to the "Seafarer Suites."

[3] (R. at 9–23.)

[4] (*Id.*)

findings and analysis in Staff Report 14-33.[5] The staff report describes the property, briefly recounts its history, and then evaluates the permit request by going through each provision of the relevant zoning ordinance criteria.[6] It found that each provision was met, and imposed only two relatively minor conditions upon its approval, one of which was that the deck must have flower box plantings along its outside edge for landscaping purposes.[7]

The Planning Department then forwarded the staff report to the Homer Advisory Planning Commission for a public hearing and vote on final approval. After giving notice to nearby property owners and the general public, the Planning Commission held a public hearing on Yager's CUP application on April 16, 2014.[8] The hearing began with Julie Engebretsen, Homer's deputy city planner, presenting the Planning Department's staff report to the Planning Commission and reviewing its findings for the commissioners.[9] Smith and Yager then testified and explained that they wished to add the deck because they wanted a "better presence and nicer façade" for the hotel.[10]

Before the Planning Commission could vote on Yager's application, Planning Commission Chairman Franco Venuti and Commissioner Shelly Erickson each disclosed that they had business relationships with Mr. Yager. The other commissioners asked for clarification on the nature of these relationships. Mr. Venuti and Mrs. Erickson explained that their business relationships with Mr. Yager did not involve the Windjammer Suites, and both said that the relationships would not affect their decisions on his CUP application. The disinterested

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[5] (R. at 3–8.)
[6] (*Id.*)
[7] (R. at 7.)
[8] (R. at 39–40, 46–48.)
[9] (R. at 39.)
[10] (*Id.*)

commissioners then voted that Venuti's and Erickson's business relationships with Mr. Yager did not constitute conflicts of interest that would have required their recusal.[11]

Having resolved the conflict of interest matters, the Planning Commission then opened the hearing to the public, though no one appeared. But there was one objector. Appellant Frank Griswold, who lives and owns property in the nearby area, opposed Mr. Yager's CUP permit. Although Mr. Griswold did not testify at the hearing, he had submitted written comments to the Planning Commission in advance. In his comments, Mr. Griswold had argued that the CUP Mr. Yager sought was not lawful, and that if granted it would be a zoning variance of a type prohibited by Alaska law.[12] In response, the Planning Department had asked the law firm of Birch Horton Bittner & Cherot, which served as Homer's city attorney, for a legal opinion on the question. After analyzing the question, the city attorney concluded that a Conditional Use Permit was the appropriate form for Mr. Yager's application and would be legally valid if granted.[13] The deputy city planner had forwarded the city attorney's opinion to the Planning Commission along with the staff report.

The Planning Commission recessed for about five minutes to give the commissioners time to consider Mr. Griswold's arguments and the city attorney's response.[14] After reconvening, the commissioners decided to follow the city attorney's legal guidance.[15] They held a vote and unanimously approved Mr. Yager's Conditional Use Permit application and issued the Conditional Use Permit.[16] The Planning Commission adopted the staff report's

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[11] (R. at 39–40.)
[12] (R. at 25–26.)
[13] (R. at 38.)
[14] (R. at 40.)
[15] (*Id.*)
[16] (*Id.*)

findings as its own and issued a written decision signed by Mr. Venuti, as the Planning Commissioner's chairman, and by Rick Abboud, Homer's city planner.[17]

Mr. Griswold appealed the Planning Commission's decision to the Homer Board of Adjustment. The Board met on September 29, 2014, to consider his appeal. After addressing some procedural issues, the Board turned to the question of whether Mr. Griswold had standing to appeal the Planning Commission's decision.[18] It concluded that he did not, because he was neither a party to nor an aggrieved participant in the permit application process, as the Homer City Code requires.[19]

The superior court affirmed the Board's determination.[20] But in April 2019, the Supreme Court ruled that Mr. Griswold did have standing and remanded the case to the Board for a decision on the merits of Mr. Griswold's arguments.[21]

At Mr. Griswold's request, the Board transferred his remanded appeal to the State of Alaska's Office of Administrative Hearings for hearing by an administrative law judge (ALJ).[22] The ALJ took briefing and heard oral arguments, and on September 9, 2019, issued a decision affirming the Planning Commission's permit grant.[23]

Mr. Griswold then appealed to this court. The court took briefing and, at Mr. Griswold's request, held oral argument on October 27, 2020.

B. Points on Appeal

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[17] (R. at 40–45.)
[18] (R. at 162–208.)
[19] (R. at 209–23.)
[20] *Griswold v. Homer Bd. of Adjustment*, No. 3HO-14-00243CI (Alaska Super. Ct. Jan. 22, 2016).
[21] (R. at 232–36.) *See generally Griswold v. Homer Bd. of Adjustment*, 440 P.3d 248 (Alaska 2019).
[22] (R. at 241.)
[23] (R. at 310–31); *In the Matter of Conditional Use Permit 14-05*, No. 19-0355-MUN (Off. of Admin. Hearings Sept. 9, 2019).

Mr. Griswold's Statement of Points on Appeal lists thirty-one separate points.[24] The court only reviews fourteen of them for the following reasons.

First, it is well established in appellate law that a party to an administrative agency decision waives any arguments he or she did not raise on initial agency appeal, and so it is "inappropriate" for a court to review them.[25] *Pro se* appellants are not exempt from this rule, but are held to a "less demanding" form of it.[26] Alaska courts may consider an issue a *pro se* appellant did not explicitly raise in their lower proceeding only if "the issue is (1) not dependent on any new or controverted facts; (2) closely related to the appellant's trial court arguments; and (3) could have been gleaned from the pleadings."[27] This test applies regardless of whether the lower proceeding was an administrative appeal or a trial.[28] Points #1,[29] #2, #4, #19, #25, and #30 of Mr. Griswold's appeal do not meet this standard, since they are either significantly different than his administrative appeal arguments or else could not have been gleaned from his administrative appeal brief. They are therefore waived on appeal to this court.

Second, it is an equally well-established rule of appellate law that an appellant waives any arguments that he or she either does not brief, gives only cursory briefing, or raises for the first time in a reply brief.[30] This rule applies to *pro se* appellants, too, just not as strictly as to

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[24] (Appellant's Statement of Points on Appeal *1–7.)

[25] *West v. Alaska Mental Health Tr. Auth.*, 467 P.3d 1064, 1071–72 & n.36 (Alaska 2020) (quoting *Walker v. State, Dep't of Corr.*, 421 P.3d 74, 78 (Alaska 2018)).

[26] *Thoeni v. Consumer Elec. Servs.*, 151 P.3d 1249, 1257 (Alaska 2007).

[27] *Id.* (quoting *McConnell v. State, Dep't of Health & Soc. Servs., Div. of Med. Assistance*, 991 P.2d 178, 183 (Alaska 1999)).

[28] *See id.*

[29] Point #1 is Mr. Griswold's argument that HCC 21.71.040(b)(4) is unconstitutional. He made a cursory statement in the proceeding below that this statute was "unconstitutional as applied," but made no reference to due process or equal protection claims, and did not develop a coherent legal argument. (R. at 272–74.)

[30] *Wright v. Anding*, 390 P.3d 1162, 1175 (Alaska 2017); *Alyeska Pipeline Serv. Co. v. State*, 288 P.3d 736, 743 (Alaska 2012).

parties represented by lawyers.[31] *Pro se* appellants still "must cite authority and provide a legal theory" for each of their points on appeal to avoid waiving them,[32] and the court will not consider any of their points on appeal that are "given only a cursory statement in the argument portion of a brief."[33] For Points on Appeal #6, #7, #10, #11, #14, #16, #17, #22, #23, #29, and #31, Mr. Griswold either gave no briefing, gave only cursory briefing in the argument portion of his brief, or raised them for the first time in his reply brief. They are therefore also waived on appeal to this court.

This leaves Mr. Griswold with fourteen points on appeal for the court to consider. Re-ordered for purposes of consideration on appeal, they are:

1.) The Planning Commission erroneously found that approving the Conditional Use Permit application would not negatively affect the value of adjoining property.[34]
2.) The Planning Commission erroneously found that the Conditional Use Permit's proposed deck would be compatible with other buildings along Pioneer Avenue.[35]
3.) The Planning Commission erroneously found that granting the Conditional Use Permit would not cause an undue harmful effect on the neighborhood's character.[36]
4.) The Planning Commission erroneously found that the Conditional Use Permit's proposed deck would comply with the applicable provisions and regulations in Title 21 of the Homer City Code.[37]
5.) The Planning Commission erroneously found that the Conditional Use Permit's proposed deck was not contrary to applicable land use goals and the objectives of Homer's Comprehensive Plan.[38]

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[31] *Wright*, 390 P.3d at 1175.
[32] *Id.* (quoting *Casciola v. F.S. Air Serv., Inc.*, 120 P.3d 1059, 1063 (Alaska 2005)).
[33] *Id.* (quoting *Hagen v. Strobel*, 353 P.3d 799, 805 (Alaska 2015)).
[34] (Statement of Points on Appeal ¶ 18.)
[35] (Statement of Points on Appeal ¶ 20.)
[36] (Statement of Points on Appeal ¶ 21.)
[37] (Statement of Points on Appeal ¶ 24.)
[38] (Statement of Points on Appeal ¶ 26.)

6.) The Conditional Use Permit Mr. Yager sought was actually a variance, and so could not have been lawfully granted by the Planning Commission.[39]

7.) Homer City Code (HCC) 21.18.040(b)(4),[40] which allows setback reductions in the Central Business District, directly conflicts with HCC 11.08.110, which requires a minimum 20-foot setback on any property line that abuts a road or right-of-way.[41]

8.) The Conditional Use Permit was never actually issued, since although the Planning Commission approved Smith and Yager's application, it never issued a separate permit document.[42]

9.) Mr. Yager's application failed to provide the Commission with sufficient evidence to enable meaningful review.[43]

10.) The Planning Commission erroneously did not conclude that the Conditional Use Permit needed to meet all relevant provisions of the Community Design Manual.[44]

11.) Mr. Yager's participation before the Planning Commission constituted the unauthorized practice of law.[45]

12.) Mr. Abboud's appearance before the ALJ was not lawful because he is neither a lawyer nor other allowed to represent the Planning Commission.[46]

13.) Planning Commission commissioners Erickson and Venuti's participation in the hearing was unlawful because they each had business relationships with Yager that constituted conflicts of interest requiring recusal.[47]

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[39] (Statement of Points on Appeal ¶ 3.)

[40] Mr. Griswold's Statement of Points on Appeal lists this as "HCC 21.48.040(b)(4)." HCC Chapter 21.18 currently covers the Central Business District, but was formerly found under Chapter 21.48.

[41] (Statement of Points on Appeal ¶ 5.) Mr. Griswold also argues that the setback reduction provision conflicts with HCC 11.08.050(a)(3), which requires buildings and structures to be at least 12 feet back from any property line abutting a road. But he did not raise this argument at his administrative appeal and has therefore waived it. *West*, 467 P.3d at 1071–72 & n.36.

[42] (Statement of Points on Appeal ¶ 8.)

[43] (Statement of Points on Appeal ¶ 15.) Mr. Griswold's brief lists this as variants of "the Commission's findings were not supported by substantial evidence," but that overlaps with his other challenges of its factual findings, and an analysis of his arguments shows that the section on sufficiency of the application is the core of his argument.

[44] (Statement of Points on Appeal ¶ 28.)

[45] (Statement of Points on Appeal ¶ 12.)

[46] (Statement of Points on Appeal ¶ 9.)

14.) The ALJ applied the wrong standard of review to the Planning Commission's finding in point #5 above.[48]

II. Jurisdiction

The Homer Board of Adjustment had administrative jurisdiction over the appeal of the Planning Commission's decision per Homer City Code ("HCC") 21.91.110(a). This court has appellate jurisdiction over this matter under Alaska Stat. ("AS") § 22.10.020(d), which gives a superior court "jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law,"[49] and by HCC 21.91.130(a), which provides that the Board's final decisions are appealable directly to the superior court.

III. Standard of Review

In Alaska, four primary standards of review apply when courts review administrative agency decisions on appeal:

(1) For an agency's factual findings, the "substantial evidence" standard applies;

(2) For an agency's conclusions of law on questions that involve agency expertise, the "reasonable basis" standard applies;

(3) For an agency's conclusions of law on questions that do not involve agency expertise, the "substitution of judgment" standard applies; and

(4) For an agency's interpretation of its own regulations, the "reasonable and not arbitrary" standard applies.[50]

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[47] (Statement of Points on Appeal ¶ 13.)
[48] (Statement of Points on Appeal ¶ 27.)
[49] *See also* Appellate Rule 601(b) ("An appeal may be taken to the superior court . . . from a final decision of an administrative agency").
[50] *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

Courts are particularly constrained when using these standards to review zoning boards. The Alaska Supreme Court has repeatedly emphasized that judicial review of zoning board decisions is "narrow" and that "a presumption of validity is accorded these decisions."[51]

A. Factual Findings

Mr. Griswold's points #1–#5 involve challenges to the Planning Commission's factual findings, and so are reviewed under the "substantial evidence" standard. This standard simply requires the findings to have been based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[52] The substantial evidence standard is "highly deferential," and courts merely "review the entire record to ensure that the evidence *detracting* from the agency's decision is not *dramatically* disproportionate to the evidence supporting it."[53]

B. Questions of Law Involving Agency Expertise

Mr. Griswold's points #6–#10 are questions of law that involve agency expertise, and so are reviewed under the "reasonable basis" standard. Under this standard, the court determines "whether the agency's decision is supported by the facts and has a reasonable basis in law, even if we may not agree with the agency's ultimate determination."[54] This standard is especially deferential when the agency is a zoning board: "Zoning board interpretations of zoning

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[51] *E.g.*, *Corkery v. Municipality of Anchorage*, 426 P.3d 1078, 1083 (Alaska 2018) (quoting *Native Village of Eklutna v. Bd. of Adjustment for Municipality of Anchorage*, 995 P.2d 641, 643 (Alaska 2000)).

[52] *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978).

[53] *Pub. Safety Emps. Ass'n, AFSCME Local 803, AFL-CIO v. City of Fairbanks*, 420 P.3d 1243, 1248 (Alaska 2018) (emphasis in original) (quoting *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 267 P.3d 624, 634 n.40 (Alaska 2011)).

[54] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014) (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

ordinances 'should be given great weight and should be accepted whenever there is a reasonable basis for the meaning given by the board.'"[55]

C. Questions of Law Not Involving Agency Expertise

Points #11–#14[56] are questions of law that do not involve the Planning Commission's expertise, and so are reviewed under the "substitution of judgment" standard. Under this standard, the court "substitute[s] its own judgment for that of the agency even if the agency's decision had a reasonable basis in law,"[57] but still "[gives] some weight to what the agency has done, especially where the agency interpretation is longstanding."[58]

IV. Discussion

A. Factual Findings Reviewed Under the Substantial Evidence Standard

i. Point #1 — The Planning Commission Erroneously Found that the Proposed Deck Would Not Negatively Affect the Value of Adjoining Property

Mr. Griswold argues that the Planning Commission erroneously found that the proposed deck in Mr. Yager's Conditional Use Permit application would not negatively affect the value of

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[55] *Griswold v. City of Homer*, 55 P.3d 64, 67–68 (Alaska 2002) (quoting *S. Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 173 n.12 (Alaska 1993)). *See also Native Village of Eklutna*, 995 P.2d at 643 (quoting *Coffey*, 862 P.2d at 173 n.12) ("In a case that involves a zoning board's interpretation of zoning ordinances and planning documents, this court will give such interpretations 'considerable deference'").

[56] Point #14 is essentially an assertion that the ALJ affirmed the Planning Commission's findings on incorrect legal grounds. This is not a question that involves agency expertise. *Cf. S. Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768, 771 (Alaska 2007) (finding that the question of whether a Board of Adjustment correctly interpreted and applied a procedural ordinance did not implicate its expertise).

[57] *Tesoro Alaska*, 746 P.2d at 903.

[58] *Davis Wright Tremaine*, 324 P.3d at 299 (quoting *Palmer v. Municipality of Anchorage, Police & Fire Retirement Bd.*, 65 P.3d 832, 837 n.7 (Alaska 2003)).

adjoining property. This is one of the criteria the Homer City Code prescribes for reviewing CUP applications.[59]

The Planning Commission adopted the Planning Department's finding that the adjoining properties' values would not be negatively affected "because this proposal improves the exterior façade of an existing building."[60] Mr. Griswold argues that: (1) the Planning Commission "failed to consider the deleterious effects" of the ten-foot encroachment into the setback; (2) it failed to consider the possibility that the façade could have been improved without encroaching into the setback; and (3) the setback reduction "certainly would" have a negative impact on adjoining property values.[61]

The conclusion that an improvement to a building is likely to improve the values of it and the surrounding properties is logically simple and reasonable, especially when made by experts in that subject. Hence, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[62]

Mr. Griswold's arguments do not undermine this conclusion. Argument (1) assumes that an encroachment into a setback will have a negative effect on adjoining property values, and (3) merely asserts the same without support. The record does not contain credible evidence supporting these assertions that would contradict the Planning Department's finding, let alone be "*dramatically* disproportionate" to its reasoning.[63]

Second, it is true that the Planning Department's report did not mention the possibility described in (2). But given the existence of a basic reason to support the Planning Department's finding, the mere existence of an alternative consideration against does not overcome that

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[59] HCC 21.71.030(c).
[60] (R. at 42.)
[61] (Appellant's Br. 32.)
[62] *Miller*, 577 P.2d at 1046.
[63] *Pub. Safety Emps. Ass'n,* 420 P.3d at 1248 (emphasis in original).

conclusion, especially when the conclusion is warranted a high degree of deference, as a zoning board's is under Alaska law.

ii. Point #2 — The Planning Commission Erroneously Found that the Proposed Deck Would Be Compatible with Other Buildings Along Pioneer Avenue

Mr. Griswold argues that the Planning Commission's conclusion that the proposed deck would be compatible with the existing uses of the surrounding land—here, the neighboring buildings on Pioneer Avenue—was erroneous. This is one of the criteria the Homer City Code prescribes for reviewing CUP applications.[64]

The Planning Commission adopted the Planning Department's finding that the proposed deck would be compatible with surrounding land uses because "[w]ithin 250 feet there are three buildings that have reduced setbacks to Pioneer Avenue and offer decks similar to the proposed deck," and specifies those buildings.[65] The existence of other setback-encroaching decks in the area is reasonably "adequate to support a conclusion" that such decks are compatible with surrounding land uses.[66]

Mr. Griswold's arguments to the contrary do not overcome the agency's conclusion. He argues that: (1) most of the surrounding areas do not encroach into the setback; (2) some of the surrounding CBD plots of land do not face Pioneer Avenue and so are not subject to the setback reduction provision; (3) the Planning Commission did not determine whether the three other buildings on Pioneer Avenue with setback-encroaching decks themselves were approved by appropriate permits or are "nonconforming" or "illegal structures" that "are not valid precedents for establishing compatible use."[67]

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[64] HCC 21.71.030(d).
[65] (R. at 42–43.)
[66] *Miller*, 577 P.2d at 1046.
[67] (Appellant's Br. 33.)

The existence of three similar decks in the surrounding area demonstrates a basic level of compatibility between buildings with decks and those without them. The fact that they are relatively few in number does not detract from the compatibility analysis. Argument (2) fails for the same reason: the three existing buildings are also on Pioneer Avenue, and so demonstrate compatibility of a setback-encroaching deck with buildings in the surrounding area, regardless of whether they are on Pioneer Avenue or on other streets.

Mr. Griswold's argument (3) is slightly more persuasive. If the three other setback-encroaching decks along Pioneer Avenue lacked appropriate permits, it might undermine the Planning Commission's compatibility conclusion. But it would do so only if the "existing uses of surrounding land" with which Conditional Use Permit applications must be compatible need to be officially permitted. The City Code does not say this expressly. But the Planning Commission's finding here is based on an underlying question of statutory or regulatory interpretation, and Alaska case law holds that courts are to give "considerable deference" to zoning boards' interpretations of zoning ordinances.[68] Although such an inference in the City Code might be plausible, the existence of the three other setback-encroaching decks in the surrounding area plus the deference due to the Planning Commission is substantial enough to uphold its determination of compatibility.

iii. Point #3 — The Planning Commission Erroneously Found that the Proposed Deck Would Not Cause an Undue Harmful Effect on Desirable Neighborhood Character

Mr. Griswold argues that the Planning Commission's erroneously concluded that the proposed deck would not cause an undue harmful effect on the neighborhood's desirable

[68] *Native Village of Eklutna*, 995 P.2d at 643 (quoting *Coffey*, 862 P.2d at 173 n.12)).

character in light of "harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects."[69]

The Planning Commission adopted the staff report's finding that "[t]he scale, bulk, coverage and density of the proposed covered porch will be in harmony with other facades along Pioneer Avenue," and that it would have no harmful effect upon the Avenue's character.[70]

Mr. Griswold argues that: (1) this finding was "subjective, conclusionary, and not supported by substantial evidence", and failed to consider "disharmonious" effects; (2) the Planning Commission misinterpreted the City Code's review criteria to apply to the proposed deck, when it actually applied to the setback reduction; (3) the Planning Commission did not make findings about what constitutes "desirable" or a "neighborhood" under the criteria.[71]

Regarding argument (1), it is true that the report states its findings on this point without specific reference or explanation. But the report itself is the result of an evaluation of Mr. Yager's application and the surveys, drawings, and photographs it contained by an administrative agency to which the state government has delegated regulatory power over a specialized field. When viewed from that perspective, the court finds it reasonable that zoning experts could conclude from the application's materials that the proposed deck would not have the relevant harmful effects. Moreover, it is not clear that the criteria require consideration of "disharmonious" effects, and even if they did, it is reasonable to assume that the staff considered such effects before making its finding.

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[69] HCC 21.71.030(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."

[70] (R. at 43.)

[71] (Appellant's Br. 35–36.)

Mr. Griswold does not point to any evidence in the record that might contradict the Planning Department's finding, let alone be "*dramatically* disproportionate" to its reasoning.[72] He only points to the City's argument before the ALJ that an undue harmful effect "may be difficult to quantify, one might just say 'I know it when I see it.'"[73] Mr. Griswold argues that this "is the antithesis of decision-making based on substantial evidence and is therefore legally insufficient to support any quasi-judicial finding."[74] First, Mr. Griswold provides no authority for the proposition that an Alaska zoning board cannot consider and make findings on criteria that are difficult to quantify. But second, and more significantly, Mr. Griswold mischaracterizes the substantial evidence standard. The record shows that Mr. Yager's application provided maps, photographs, and other information on the Windjammer Suites to augment the agency's own knowledge of the area. The conclusion that this evidence was substantial enough for a zoning board to determine harmony with other facades in the area is a reasonable one, especially in light of the substantial evidence standard's "highly deferential" nature.[75] Hence, Mr. Griswold's argument (1) cannot succeed.

Regarding argument (2), it is clear that the Planning Department's report and the Planning Commission's findings address Mr. Yager's application as one involving a covered deck that encroaches ten feet into the twenty-foot setback. The Planning Commission's decision states this at the outset: "the Commission determined that Condition [*sic*] Use Permit 14-05 to build a covered deck which will extend 10 feet into the 20 foot building setback along Pioneer

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[72] *Pub. Safety Emps. Ass'n,* 420 P.3d at 1248 (emphasis in original).
[73] (R. at 297.)
[74] (Appellant's Br. at 36.)
[75] *Pub. Safety Emps. Ass'n*, 420 P.3d at 1248.

Avenue satisfies the review criteria . . . ."[76] Mr. Griswold's assertion that they address only the deck is without merit.

Argument (3) is even weaker: Mr. Griswold provides no authority for any law that would require the Planning Commission to make such findings. To the extent that this argument involves the Planning Commission's interpretation of HCC 21.71.030(f), it transforms the issue into a question of law involving a zoning board's expertise on zoning ordinances. This requires the court to apply the "reasonable basis" standard, under which the Planning Commission's interpretation is given "great weight."[77] Mr. Griswold makes no legal arguments as to why this criterion would require the Planning Commission to make express determinations of what constitutes "desirable" neighborhood character, and so the court upholds the agency's determination.

iv. Point #4 — The Planning Commission Erroneously Found that the Proposed Deck Would Comply With Applicable Provisions of Title 21 of the Homer City Code

The Planning Commission found that Mr. Yager's proposed deck "will comply with the applicable regulations and conditions specified in HCC Title 21."[78]

Mr. Griswold argues that: (1) the Planning Commission offers no basis for its conclusion; and (2) the Windjammer Suites itself might not comply with various Title 21 provisions.[79] Regarding argument (1), just as in subsection (E) above on Point #3, it is true that here the staff report and the Planning Commission's finding do not make specific findings on any particular provisions. But as with Point #3, the Planning Department's report itself is the result of an evaluation of Mr. Yager's application and the surveys, drawings, and photographs it contained

[76] (R. at 42.)
[77] *Griswold*, 55 P.3d at 67–68.
[78] (R. at 43.); HCC 21.71.030(h).
[79] (R. at 36–38.)

by an administrative agency to which the state government has delegated regulatory power over a specialized field. The court's review of a zoning board's findings is "highly deferential," and Mr. Griswold points to no facts in the record that would be "*dramatically* disproportionate" to those in favor of its conclusions.[80]

Argument (2) raises issues involving the current zoning compliance of the Windjammer Suites itself. These are outside the scope of the record, and Mr. Griswold did not argue these points in his administrative appeal.[81] They are therefore waived, and it would be "inappropriate" for the court to consider them.[82]

v. Point #5 — The Planning Commission Erroneously Found that the Proposed Deck Was Not Contrary to Applicable Land Use Goals and the Objectives of Homer's Comprehensive Plan

Mr. Griswold argues that the Planning Commission erroneously found that Mr. Yager's proposed deck was "not contrary to the applicable land use goals and objectives of" Homer's Comprehensive Plan. [83]

The staff report concluded that that the proposal was not contrary to the Comprehensive Plan's applicable land use goals and objections. It found that "[t]he commercial streetscape of Pioneer Ave. will be enhanced by the construction of the covered porch and by the provision of direct pedestrian access from the sidewalk to the business."[84] It quoted one of the Comprehensive Plan's goals: "Encourage a concentrated, pedestrian oriented, attractive business/commerce district in the Central Business District (CBD) following the guidelines

[80] *Pub. Safety Emps. Ass'n,* 420 P.3d at 1248 (emphasis in original).
[81] *See* (R. at 267–90.)
[82] *West*, 467 P.3d at 1071–72 & n.36.
[83] *See* HCC 21.71.030(j).
[84] (R. at 43.)

found in the Town Center Plan."[85] The Planning Commission adopted these findings in its decision.[86]

Mr. Griswold argues that the Planning Commission erred because: (1) providing direct pedestrian access from the sidewalk to a business and enhancing commercial streetscapes are not goals or objectives of Homer's Comprehensive Development plan; (2) the Comprehensive Plan's reference to "following the guidelines found in the Town Center Plan" cannot apply to the Central Business District; (3) the CUP provision allows for both increasing and decreasing the setback; (4) the Planning Commission needed to identify all relevant land use goals and objectives in the Comprehensive Plan in order to show that the proposed deck was not contrary to them.[87]

Argument (1) is flawed. Mr. Griswold's wording makes it appear as if a proposed CUP must fulfill at least some certain goals in the Comprehensive Plan, which is false. A proposed CUP must merely be "not contrary to" the Comprehensive Plan's relevant goals and objectives. The Planning Commission found that "providing pedestrian access from a sidewalk to a business" was not only not contrary to the Comprehensive Plan, but was even harmonious with it, as it would encourage "pedestrian orient[ation]." It is reasonable to think that allowing pedestrians to more easily walk up to a business is concordant with this goal. Mr. Griswold provides no logical arguments to the contrary.

Mr. Griswold did not raise argument (2) below. It is significantly different than his arguments before the ALJ, and so is waived here. Additionally, Mr. Griswold's argument (3) is not persuasive. The fact that the Planning Commission can use CUPs to increase setbacks and

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[85] (R. at 6.)
[86] (R. at 43.)
[87] (Appellant's Br. 38–40.)

the fact that establishing maximum setbacks is an objective of the 2008 Comprehensive Plan would only be relevant if the Planning Commission had claimed otherwise, and it did not.

Mr. Griswold's argument (4) is inconsistent with the law. The City Code merely requires the Planning Commission review a CUP application in accordance with the criterion that the proposal be "not contrary to" the Comprehensive plan. Moreover, as with previous points, the Planning Department's report itself is the result of an evaluation of Mr. Yager's application and the surveys, drawings, and photographs it contained by an administrative agency to which the state government has delegated regulatory power over a specialized field. The court's review of a zoning board's findings is "highly deferential," and Mr. Griswold points to no facts in the record that would be "*dramatically* disproportionate" to those in favor of the agency's conclusions.[88]

B. *Questions of Law Involving Agency Expertise Reviewed Under the Reasonable Basis Standard*

i. Point #6 — The Conditional Use Permit Constituted an Illegal Variance

Mr. Griswold argues that the Planning Commission erred by considering Mr. Yager's application to be one for a Conditional Use Permit when it was actually a "*de facto* area variance" that would be illegal under Alaska law. This is a question of law involving a zoning board's expertise, and so would normally be reviewed under the reasonable basis standard, with the court giving great weight and considerable deference to the agency's decision.

But Mr. Griswold already raised this issue in a prior case in which he challenged the Planning Commission's issuance of a CUP to allow an applicant to expand a building—specifically, by adding an awning—that would encroach into the setback along Pioneer Avenue

[88] *Pub. Safety Emps. Ass'n,* 420 P.3d at 1248 (emphasis in original).

in the CBD.[89] In that case, the Kenai Superior Court ruled against Mr. Griswold's arguments that CBD setback reductions per HCC 21.18.040(b)(4) constituted variances and were unlawful. The Board argues that Mr. Griswold should be collaterally estopped from litigating this issue here.[90]

The doctrine of collateral estoppel (or "issue preclusion") bars a party to a previous action from litigating in a later action any factual or legal issue that was "actually litigated and necessarily decided" in the first action, even if the subsequent action is based on a different claim.[91] It requires that: (1) the doctrine is asserted against a party to the first action or one in privity to him or her; (2) the issue in question is identical to the one decided in the first action; and (3) the first action was resolved by a final decision on the merits.[92] For the purposes of requirement (3), a final decision that is under appeal continues to exert preclusive effect until it is actually reversed.[93]

Here, Homer asserts the doctrine against Mr. Griswold, who was the plaintiff in the previous action. He is attempting to raise an issue identical to one that the Kenai Superior Court determined and disposed of by a final decision on the merits. Mr. Griswold has appealed that decision to the Alaska Supreme Court, but no decision either affirming or reversing the Kenai

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[89] *Griswold v. Homer Advisory Planning Comm'n*, No. 3HO-18-00240CI (Alaska Super. Ct. Oct. 17, 2019), *included as* (Appellee's Ex. 1.)

[90] (Appellee's Br. 29–31.) The Kenai Superior Court's decision occurred the month after the ALJ's decision in the proceeding below, and thus the appellees could not have raised collateral estoppel below.

[91] *Campion v. State, Dep't of Cmty. & Reg'l Affairs*, 876 P.2d 1096, 1098 (Alaska 1994) (quoting *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985)).

[92] *Rapoport v. Tesoro Alaska Petroleum Co.*, 794 P.2d 949, 951 (Alaska 1990) (quoting *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989)).

[93] *Id.* at 951–52.

Superior Court has yet been issued.[94] Therefore, the decision must remain final for the purposes of preclusion. Accordingly, the court concludes that Mr. Griswold is collaterally estopped from litigating the issue in the present case.

Mr. Griswold urges the court to stringently review the Planning Commission's decision following Alaska Supreme Court precedent on review of variances.[95] The court recognizes the validity of these precedents, but the rules from those cases apply to variances, not conditional uses, and so are inapposite here.

Mr. Griswold's other arguments involve constitutional claims about due process, equal protection, and the Alaska state constitutional right to privacy, but he waived these by not arguing them below.[96]

ii. Point #7 — The Setback Reduction Provision Conflicts with Other Homer City Code Provisions

Mr. Griswold argues that it was unlawful for the Planning Commission to grant Mr. Yager's CUP application because the CBD setback provision conflicts other provisions in the Homer City Code.

But as with Point #6 above, this identical issue was litigated before and determined by the Kenai Superior Court in its 2019 decision against Mr. Griswold.[97] For the same reasons described above, Mr. Griswold is collaterally estopped from litigating it here. Accordingly, the

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[94] *Griswold v. Homer Advisory Planning Comm'n*, Alaska Sup. Ct. No. S-17669, filed December 16, 2019. Alaska Court System records show the appeal is currently ripe for decision but has not yet been decided.

[95] (Appellant's Br. 8), *citing Fields v. Kodiak City Council*, 628 P.2d 927 (Alaska 1981); *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979), *overruled in part on other grounds by State v. Alex*, 646 P.2d 203 (Alaska 1982).

[96] (Appellant's Br. 6–8.)

[97] (Appellee's Ex. 1.)

court upholds the Planning Commission's granting of Mr. Yager's CUP and its reduction of the twenty-foot setback for the covered deck.

iii. Point #8 — The Conditional Use Permit Was Never Properly Issued

Mr. Griswold claims that the Planning Commission did not lawfully issue Mr. Yager's CUP. He argues that the Homer City Code requires the Planning Commission to issue CUPs as separate physical documents, and that the Planning Commission therefore erred when it merely issued a decision that was signed by the Commission Chairman, Mr. Venuti, and the City Planner, Mr. Abboud.[98]

Mr. Griswold's main argument is that because the relevant provision of the Homer City Code does not say that the City Planner "shall contemporaneously sign the Commission's decision and that the Commission's decision then becomes the conditional use permit," the Code "clearly" requires a CUP to be a distinct document.[99]

This argument lacks any legal basis. The Code provides: "The City Planner shall promptly issue a conditional use permit in accordance with a decision of the Commission approving an application."[100] The Planning Commission interprets a properly signed decision approving a CUP issued soon after the Commission's meeting and vote to constitute a valid permit. Mr. Griswold provides no legal authority against such an interpretation, and therefore cannot hope to overcome the deference the court is bound to give a zoning board's interpretation of the zoning ordinances.

iv. Point #9 — The Planning Commission Lacked Sufficient Evidence to Enable Meaningful Review

[98] (Appellant's Br. 22–23.)
[99] (*Id.*)
[100] HCC 21.71.060.

Mr. Griswold argues that Mr. Yager's application provided insufficient evidence for the Planning Commission to meaningfully review it.

The Homer Code's chapter on CUPs prescribes: "The [CUP] applicant must produce evidence sufficient to enable meaningful review of the application."[101] It does not specify how much evidence suffices to enable meaningful review. Mr. Griswold focuses on various points of Mr. Yager's CUP application form in which he sees deficiencies. For example, he points out that several of Mr. Yager's answers to the form's questions were merely short sentences or phrases.[102] He objects to Mr. Yager's characterization of the building work as involving "[n]o major changes to egress," and to his negative answer to the question of whether there were any "nonconforming structures" on the property.[103]

But other than these references, Mr. Griswold's only direct attack on the actual sufficiency of Mr. Yager's evidence is a statement that "[n]one of the evidence produced by the applicant pertained to setback reduction."[104] Mr. Griswold's argument would be stronger if the only evidence the Planning Commission had reviewed was Mr. Yager's CUP application form. But that is not so. The Planning Commission reviewed the Planning Department's staff report and adopted its findings.[105] The staff report evaluated not only Mr. Yager's application form, but also the surveys, maps, drawings, and aerial photographs he provided.[106] These contained detailed information on the property's boundaries and buildings and the neighboring road and its setback. When viewed in conjunction with the great deference given to zoning boards and their expertise, this is more than sufficient to provide a reasonable basis for the Planning Commission

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[101] HCC 21.71.030 (flush language).
[102] (Appellant's Br. 25–28.)
[103] (*Id.*)
[104] (Appellant's Br. 25.)
[105] (R. at 41–45.)
[106] (R. at 3–8.)

to conclude that it had been able to meaningfully review Mr. Yager's application before approving it.

v. Point #10 — The Planning Commission Erroneously Concluded that the Proposed Deck Did Not Need to Meet All Relevant Provisions of the Community Design Manual

Mr. Griswold claims that the Planning Commission erred in its identification of the provisions of the Homer Community Design Manual with which Mr. Yager's CUP application needed to comply. This involves the Planning Commission's interpretation and application of one of the CUP review criteria to Mr. Yager's application. It is therefore a question of law involving a zoning board's interpretation of zoning ordinances—though perhaps with factual elements mixed in—and so is reviewed under the reasonable basis standard, with the court giving great weight and considerable deference to the agency's decision.

The final criterion the Homer City Code provides under which CUP applications are to be reviewed is: "The proposal will comply with all applicable provisions of the Community Design Manual."[107] Mr. Griswold argues that the Planning Commission omitted many provisions of the Community Design Manual that were applicable to Mr. Yager's application, and therefore erred when it reviewed the application.[108]

As described in other sections of this decision, Alaska courts must give great deference to zoning boards' interpretations of zoning ordinances and regulations. Here, it is true that although the Planning Commission found that Mr. Yager's CUP application would comply with applicable Community Design Manual provisions, it did not list any of them in its decision. But after evaluating Mr. Yager's CUP application form and the surveys, maps, drawings, and aerial photographs he provided, the Planning Department found—and listed in its staff report—nine

[107] HCC 21.71.030(j).
[108] (Appellant's Br. 41–42.)

Community Design Manual criteria applicable to his application.[109] It concluded the applicable provisions included those such as "provid[ing] consistent architectural interest to all prominent facades," "provid[ing] direct access to common areas with pedestrian walkways," "provid[ing] covering over walkways where appropriate," and the like.[110] The Planning Commission listed these nine provisions in its decision, and during its hearing on Mr. Yager's application the Planning Commission expressly adopted the findings of the Planning Department's staff report as its own.[111]

Given the high degree of deference the court must give to the zoning board and the evidence Mr. Yager submitted to the Planning Department with his application, Mr. Griswold would need to make a very strong showing to overcome the agency's conclusions. He has not done so. Mr. Griswold lists various topics addressed in the Community Design Manual, and argues that the Planning Commission only imposed "two meager conditions" on their approval of Mr. Yager's application.[112] Several of the criteria Mr. Griswold lists are among those the Planning Department listed in its staff report and which the Planning Commission adopted. His only other arguments are repeats of arguments in other sections involving issues he is collaterally estopped from litigating.[113]

C. *Questions of Law Not Involving Agency Expertise Reviewed Under the Substitution of Judgment Standard*

i. Point #11 — Mr. Yager's Appearance and Testimony Before the Planning Commission Constituted the Unauthorized Practice of Law

[109] (R. at 6–7.)
[110] (*Id.*)
[111] (R. at 40.)
[112] (Appellant's Br. 41.)
[113] (*Id.* at 41–42.)

Mr. Griswold claims that Mr. Yager engaged in the unauthorized practice of law by appearing at the Planning Commission hearing as the CUP applicant.

Mr. Griswold argues that Mr. Yager engaged in the unauthorized practice of law because he "represent[ed] the property owners [Mr. and Mrs. Smith] in a quasi-judicial proceeding."[114] This argument lacks merit. In Alaska, committing the unauthorized practice of law requires a person to both (1) represent himself or herself "by words or conduct" to be an attorney, and (2) either (a) represent someone before a court or adjudicative governmental body, or (b) provide someone with legal advice or document preparation for compensation.[115] Mr. Griswold has not identified any point in the record at which Mr. Yager represented by word or conduct that he was an attorney. The record contains no evidence of Mr. Yager claiming that he was an attorney or that he legally represented Mr. and Mrs. Smith. Because Mr. Griswold has not established the first element of committing the unauthorized practice of law, his arguments about Mr. Yager "representing" Mr. and Mrs. Smith before the Planning Commission are moot.

Mr. Griswold cites two cases from other jurisdictions in which the courts held that a power of attorney instrument cannot authorize a designee to represent and file papers in court on the designator's behalf.[116] But the record does not contain any indication that Mr. Yager ever held power of attorney for Mr. or Mrs. Smith. Therefore, these cases are not applicable to the present case.

The record indicates that Mr. Yager appeared in front of the Planning Commission not as an attorney, but as the applicant for the CUP which the Commission was considering. The Homer City Code expressly allows for one other than a property's owner to apply for a CUP

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[114] (Appellant's Br. 17).

[115] Bar Rule 63; *see also* AS § 08.08.230(a).

[116] (Appellant's Br. 18), *citing Ohio State Bar Ass'n v. Jackim*, 901 N.E.2d 792 (Ohio 2009) *and Matter of Friedman*, 482 N.Y.S.2d 686 (N.Y. Sur. Ct. 1984).

permit regarding it. It provides that "[i]f the [CUP] applicant is not the owner of the subject lot," then the CUP application is to include "the owner's signed authorization granting applicant the authority to (a) apply for the conditional use permit and (b) bind the owner to the terms of the conditional use permit, if granted."[117] The CUP application for the Windjammer Suites lists Mr. Yager as the applicant,[118] and Mr. Smith signed it as the property's owner.[119] This is not the unauthorized practice of law.

ii. Point #12 — Mr. Abboud's Participation in the Administrative Appeal Below Was Unlawful

Mr. Griswold claims that Mr. Abboud's participation in the administrative appeals below was unlawful. He argues that Mr. Abboud could not lawfully have participated in the appeal because he was not a party to the dispute.[120] But as with Points #6 and #7 above, this identical issue was litigated before and determined by the Kenai Superior Court in its 2019 decision against Mr. Griswold.[121] For the reasons described above, Mr. Griswold is collaterally estopped from litigating it here. Accordingly, the court concludes that Mr. Abboud's participation in the administrative appeals below was lawful.

iii. Point #13 — Commissioners Erickson and Venuti Had Bias And/Or Conflicts of Interest That Should Have Required Their Recusal

Mr. Griswold claims that the Planning Commission erred when it determined that commissioners Venuti and Erickson did not need to be excused from participating in the consideration of Mr. Yager's CUP application due to having substantial conflicts of interest

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[117] HCC 21.71.020(a)(9).

[118] (R. at 3, 9.) Mrs. Yager is also listed on the application, but she seems to have taken no active part in the application process. Although she is occasionally listed in subsequent documents, the Planning Commission's minutes and decision seem to treat Mr. Yager as if he was the sole applicant. (R. at 40–45.) If this was error, it was harmless.

[119] (R. at 12.)

[120] (Appellant's Br. 19–21.)

[121] (Appellee's Ex. 1.)

and/or bias in favor of Mr. Yager.[122] This is a question of law that does not involve agency expertise, and so is reviewed under the substitution of judgment standard.

The court first considers Mr. Griswold's conflict of interest claims. Chapter 1.18 of the Homer City Code prohibits city officials from participating in official actions in whose subject they have a substantial financial interest.[123] If a city official potentially has such an interest, they must disclose this to the governmental body of which they are a member before it takes the official action in question.[124] The other members may question the city official on facts relevant to the potentially conflicting interest.[125] The city official may recuse himself or herself directly.[126] If he or she chooses not to self-recuse, the governmental body then rules by a majority vote whether or not the city official must be excused from participating.[127]

But although Mr. Griswold alleges violations of these provisions, the court does not have appellate jurisdiction over this claim. The Homer City Code provides that when one of its governmental bodies rules on a city official's potential conflict of interest under Chapter 1.18, "[t]here is no appeal from the ruling of the body."[128] Because an Alaska superior court only has appellate jurisdiction over administrative agency matters "when appeal is provided by law,"[129] the Code's denial of appeal provision strips the court of appellate jurisdiction on this point, and the court cannot consider it.

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[122] (Appellant's Br. 45–50.)
[123] HCC 1.18.030(b).
[124] HCC 1.18.045(a).
[125] *Id.*
[126] HCC 1.18.045(c).
[127] *Id.*
[128] *Id.*
[129] AS § 22.10.020(d).

As to Mr. Griswold's bias claims, Chapter 1.18 of the Homer City Code refers to bias as "partiality" and has distinct provisions for it.[130] But Mr. Griswold's arguments in his administrative appeal below dealt solely with conflicts of interest.[131] He did not raise or brief issues dealing with bias. He has therefore waived them on appeal to this court.

iv. Point #14 — The Administrative Law Judge Applied the Wrong Standard of Review to the Question of Whether the Proposed Deck Met Applicable Provisions of the Comprehensive Plan (Point #11)

Mr. Griswold argues that the ALJ applied the incorrect standard to his review of the Planning Commission's determination that Mr. Yager's proposed deck complied with applicable provisions of Homer's Comprehensive Plan.

Mr. Griswold's briefing on this point is somewhat cursory.[132] But the court will consider this point in light of the liberality with which we are charged with interpreting the filings of *pro se* litigants,[133] even though the Alaska Supreme Court has recognized Mr. Griswold as a "frequent litigant in matters of land use and zoning."[134]

Mr. Griswold argues: "The hearing officer erred in finding that the proposal was not contrary to the applicable land use goals and objectives of the Comprehensive Plan simply because '[n]o evidence was presented to the Commission that the proposal was contrary to the Comprehensive Plan.'"[135] He argues that although "[t]he Applicant had the burden to provide evidence that his proposal was not contrary to the land use goals and objectives of the

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[130] *E.g.*, HCC 1.18.048.
[131] (R. at 288–90.)
[132] (Appellant's Br. 40–41.) *See also* (Appellant's Statement of Points on Appeal ¶ 27.)
[133] *E.g.*, *Robinson v. Alaska Housing Fin. Corp.*, 442 P.3d 763, 768 (Alaska 2019).
[134] *Griswold v. City of Homer*, 252 P.3d 1020, 1023 (Alaska 2011).
[135] (Appellant's Br. 40–41 (quoting R. at 327.))

Comprehensive Plan."[136] Thus, he argues, the ALJ should not have upheld the Planning Commission's determination.[137]

Mr. Griswold's characterization of the Code as placing a burden upon a CUP applicant to provide specific evidence of his or her proposal's compliance with applicable provisions of the Comprehensive Plan is incorrect. The Code requires CUP applicants to "produce evidence sufficient to enable meaningful review of the application."[138] Compliance with applicable provisions of the Comprehensive Plan is merely one of the criteria under which "the [CUP] application will be reviewed" by the Planning Commission.[139]

The ALJ's review on this point consisted of assessing whether there was substantial evidence for the Planning Commission's finding, and he found that "[g]iven the evidence in this case, including the Planning Staff report, and the information presented regarding the proposed covered porch, there was substantial evidence supporting this finding."[140] Because this was a finding of fact, the ALJ applied the correct standard of review,[141] and the court upholds his determination.

V. Conclusion

The court either upholds or finds no reversible error in the fourteen properly preserved points on appeal. The judgments of the Homer Advisory Planning Commission and the Office of Administrative Hearings' Administrative Law Judge are therefore AFFIRMED.

DATED December 14, 2020.

Bride Seifert, Superior Court Judge

[136] (Appellant's Br. 41.)
[137] (*Id.*)
[138] HCC 21.71.030 (flush language).
[139] *Id.*
[140] (R. at 327.)
[141] *E.g.*, *Handley*, 838 P.2d at 1233.

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BEFORE THE HOMER BOARD OF ADJUSTMENT ON REFERRAL BY THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision.
	)	October 7, 2020

ENTRY OF APPEARANCE

COMES NOW, Jermain Dunnagan & Owens, P.C., and enters their appearance on behalf of Appellee, the City of Homer. Copies of all pleadings and other documents, excluding service of process, are to be served at 3000 A Street, Suite 300, Anchorage, AK 99503.

DATED this 18th day of January, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee
City of Homer

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BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT FRANK GRISWOLD'S REPLY BRIEF

Contrary to the assertion in City of Homer's Opening Brief, the Commission's decision is not supported by substantial evidence. The "detailed" application lacks critical information, the "expert" analysis contained in Staff Report 20-63 is gibberish, and Staff Report 20-63 was written before comments from Homer residents and their testimony at the public hearing were received. In most cases, the Commission made no factual findings regarding the individual CUP criteria listed in HCC 21.71.030 but instead simply stated that the criteria was met. While some of Mr. Griswold's arguments have been rejected by the Alaska Superior Court, they may ultimately be upheld by the Alaska Supreme Court.

1. Equal Protection

At no time did Mr. Griswold assert the constitutional rights of those who own property along the Sterling Highway or Lake Street where setback reductions via CUP are not allowed under HCC 21.18.040(b)(4). Mr. Griswold asserts his right to the protections afforded him and others in the CBD by the longstanding 20-foot setback requirement in effect before they were abrogated by HCC 21.18.040(b)(4). This appeal does not constitute a direct facial challenge HCC 21.18.040(b)(4), it challenges this provision "as applied" to the Commission's approval of CUP 20-15. The statutory purpose for enacting HCC 21.18.040(b)(4) is not legitimate, the means chosen does not substantially further the legislative purpose, and the municipal interest in its chosen means does not outweigh the affected interests which include traffic safety, aesthetics, rest and recreation, and neighborhood character and appearance. *See Kohl v Legoullon*, 936 P.2d 514, 520 n.10 (Alaska 1997). Just as Lake Street has been the subject of improvement projects to improve drainage and add non-motorized transportation options that could interfere with a decreased setback, so too could Bunnell Avenue and other CBD thoroughfares. HCC 21.18.040(b)(4) was enacted in 2004, approximately 16 years before the Lake Street improvement projects were contemplated. One can only wonder what CBD road

improvement projects will be needed 16 years from now but right-of-way acquisition, drainage, and non-motorized transportation options may no longer be feasible if myriad structures occupy the 20-foot setbacks along dedicated rights-of way. The Commission gave no consideration whatsoever to the potential effects of setback reduction.

2. HCC 11.08.110 and HCC 11.08.050(a)(3).

The City Attorneys erroneously assert that HCC 11.08 only pertains to applications for driveway permits. HCC 1.04.040 addresses Section catchlines as follows: "The words printed at the beginning of the several sections of this code are intended as mere catchlines or catchwords to indicate the general content of the particular section, and shall not be deemed or taken to be the titles of such section nor as any part of the section, nor shall they be so deemed when any of the sections, including the catchlines, are amended or reenacted unless expressly so provided." The fundamental objectives of HCC 11.08 are threefold:

a. To provide maximum protection to the public through the orderly control of traffic moving onto and off of a road or street;

b. To provide a uniform practice in the design and construction of entrances and exits;

c. To provide the necessary drainage.

These objectives and the regulations which follow in this chapter constitute the City's policy concerning entrances and exits on road and street rights-of-way, and include the requirements for the construction of such entrances and exits, or any construction within a dedicated right-of-way. HCC 11.08.010.

The requirements of HCC 11.08 are applicable to all commercial and industrial establishments, service areas, and private residences having access to and/or through the right-of-way of a City right-of-way, insofar as the requirements for drainage, geometric design, signs, type and quality of workmanship, material used and the work performed in the areas providing ingress and egress to the property are concerned. HCC 11.08.030. The Board of Adjustment is not bound by the prior decisions of the Superior Court conveniently provided to the Board as exhibits by the City Attorneys. CUP 18-02 is on appeal in the Alaska Supreme Court and the superior court's decision in that case may soon be remanded or reversed. Superior Court Judge Seifert's decision regarding CUP 14-05 may yet be modified by Judge Seifert or remanded and/or reversed by the Alaska Supreme Court on appeal.

3. The Commission's Decision is not Supported by Substantial Evidence in the Record.

SR 20-63 contains no expert analysis, and any written comments from Homer residents or public testimony that opposed CUP 20-15 were ignored. The City Attorneys chastise Mr. Griswold

for not identifying the particular factual findings he claims to be deficient. In so doing, they apparently fail to realize that they were merely responding to Mr. Griswold's generalized Points on Appeal and that a more detailed discussion would ensue in Appellant's Opening Brief. Simultaneous briefing is not the practice of the superior court and should be abandoned by the City of Homer because it produces two virtually worthless briefs and denies Appellants the opportunity to respond to any meaningful Appellee brief. It is immaterial that *Day v Williams* refers to a trial court's findings of fact related to the division of marital property. Conclusionary findings are conclusionary findings and the trial court's ruling in *Day v Williams* that conclusionary findings are insufficient has applicability here. HCC 21.71.050(b) states in relevant part as follows: "The Commission shall promptly issue written findings ***and reasons supporting its decision."*** (Emphasis added). Most of the Commission's written findings simply restate the prerequisite review criteria without providing the reasoning behind them i.e., they are conclusionary and insufficient. The Commissioners swore an Oath of Office to defend and support the Ordinances of the City of Homer, including HCC 21.71.050(b). Their failure to provide reasons to support their written findings constitutes a violation of their Oath of Office. The

League of California Cities' Planning Commission Handbook states in relative part as follows: "Findings are written explanations of why - legally and factually - the planning commission made a particular decision. They map how the commission applied the evidence presented to reach its final conclusion. Findings should be developed with at least five audiences in mind: the general public, interested parties, the governing body, other governmental entities, and courts. Sometimes you may hear staff say that findings must "bridge the analytical gap." This refers to a leading court decision that stated that findings must bridge the analytical gap between the evidence presented and the agency's ultimate decision. (*Citing Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974)."

4. The Commission Failed to Appropriately Consider SR 20-63

CUP 20-15 is the 15th CUP applied for in 2020. All 15 associated staff reports found that all review criteria was met and recommended Commission approval of the CUP applications. In most cases, the only significant condition recommended by staff was downward lighting, even in situations where no outdoor lighting was being proposed. On September 2, 2020, the Commission uncharacteristically voted to deny CUP 20-14 despite the traditional glowing but totally fabricated staff report.

When a Commissioner asked Deputy Clerk Renee Krause whether additional findings were necessary to support its denial, she indicated she didn't know because "I have not come across that question." When a Commissioner such as Larry Sloan publicly states that the Commission rubber stamps Commission findings, it can no longer be denied. If the Commission truly had based its findings on evidence in the record it would not have determined that the proposed ***restaurant*** meets the Comprehensive Plan goal of "encouraging inclusion of affordable housing in larger developments and affordable housing in general." [R. 67] The Homer City Council and Mayor recently noted that virtually all CUP applications are unconditionally approved and consideration was given to abandoning the elaborate but largely disregarded CUP review criteria and making all conditional uses permitted uses. The public interest would better be served by insisting that all prerequisite CUP review criteria in HCC 21.71.030 be met and that Commission Findings be objective and supported by substantial evidence instead of being biased, fanciful conjecture designed to support the application regardless of its impact on the neighborhood and/or community. The landmark case of *Ang Tibay v Court of Industrial Relations*, 69 Phil. 635 (1940) setting forth requirements for procedural due process is relevant because the first rights guaranteed in the Philippine

Bill of Rights are the rights to due process and equal protection of the law. Mr. Griswold never asserted or implied that this case is controlling law in Alaska. Simply because a case was decided 80 years ago does not mean it is no longer relevant or valid; relevant case law that has withstood the test of time and should be heeded. In any event, the rubber stamped findings in Staff Report 20-63 did not reflect the entire record because they were written before any public testimony or written comments were given. Staff Report 20-63 states: "Public Comments: No comments received." [R. 17] By rubber stamping planning staff's findings the Commission not only accepted the views of a subordinate but, in so doing, disregarded the public comments and written materials presented at the October 7, 2020 public hearing. While the Commission is not always bound by the strict requirements of judicial due process set forth in the Alaska Rules of Court, it is required to respect the due process clauses of our State and Federal Constitutions. Due process requires that the Commission's Decision be based on *all* of the evidence presented at the hearing. Disregarding the public comments and written materials presented at the October 7, 2020 public hearing constitutes a blatant violation of due process.

5. Chair Smith's Partiality/Bias

During the September 2, 2020 meeting, Chair Smith revealed a bias in favor of applicants for zoning permits in general and an animosity towards Mr. Griswold due to his history of litigation against the city. The Board has the right to take judicial notice of the September 2, 2020 Commission meeting. Had Chair Smith's ability to render an impartial decision not been impaired he might very well have voted against the approval of CUP 20-15 or at least questioned the nebulous, fabricated findings in Staff Report PL 20-63. Chair Smith's ability to render a fair decision regarding CUP 20-15 was clearly impaired, as was his ability to conduct a fair hearing. An impartial chairman would have fostered a more robust discussion of the evidence instead of leading the Commission to simply rubber stamp the unsubstantiated findings contained in Staff Report PL 20-63.

6. The Application for CUP 20-15 was Insufficient

There is no evidence in the record that the Commission undertook a detailed review and analysis of the Applicants' 18 pages of materials; during the October 7, 2020 HPC meeting there was very little discussion about that 18 pages of information. [R. 61-64] Furthermore, just because the Applicants provided 18 pages of materials does not mean that the application contained

all of the information necessary for a meaningful review thereof. The missing materials are thoroughly discussed under Point 8 of Appellant's Opening Brief and therefore need not be repeated here. Due process requires that the Commission make its own findings and not rely on the findings made by Planning Staff. "The tribunal or body or any of its judges must act on its own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate." *Ang Tibay v. Court of Industrial Relations*, 69 Phil. 625.

7. Property Owner's Signature

The record contains two different page 4s of the Application. The page 4 that appears at [R. 22] is accompanied by pagea 1-3 of the Application and is dated August 26, 2020. This page 4 was signed only by Applicant Matt Early who circled the text indicating that he is also the property owner. At [R. 44] is a page 4 signed by Applicant Matt Early on August 26, 2020 and beneath his signature are the initials of Property Owner Melody Livingston who signed it on September 14, 2020. This apparent update to page 4 is not accompanied by pages 1-3 of the Application. Taken together at face value, these signature pages indicate that Melody Livingston is a property owner and Matt Early is both an owner and the Applicant. But Matt Early is not the owner of the property and should not have

indicated that was. As argued in Appellant's Opening Brief, HCC 21.71.020(a)(9) requires that if the applicant is not the owner of the subject lot, the following is required: "he owner's signed authorization granting the applicant the authority to (a) apply for the conditional use permit and (b) bind the owner to the terms of the conditional use permit, if granted." While it may be reasonable to assume that Ms. Livingston's signature on the ancillary page 4 authorized Mr. Early to apply for CUP 20-15, there is no document in the record that specifically states that she agreed to be bound to the terms of the CUP if approved. Even if Ms. Livingston signed a document agreeing to be bound by the terms agreed to by Mr. Early, that document would be invalid and unenforceable because Mr. Early is not an attorney and therefore has no authority to represent Ms. Livingston in any judicial or quasi-judicial proceeding. AS 08.08.230 (a) provides that a person not an active member of the Alaska Bar and not licensed to practice law in Alaska who engages in the practice of law or holds out as entitled to engage in the practice of law as that term is defined in the Alaska Bar Rules is guilty of a class A misdemeanor.

8. City Planner Abboud had no authority to sign the Commission's Decision

The superior court determination cited by the City Attorney is not only erroneous, but non-controlling. A properly signed ***Commission*** approval of an application for conditional use permit is not the same as the ensuing conditional use permit itself. If it were, there would be no need for HCC 21.71.060 which states: "The City Planner shall promptly issue a conditional use permit in accordance with a decision of the Commission approving an application." HCC 21.71.060 does not state that the City Planner shall co-sign a Commission decision approving a conditional use permit. The approval or denial of an application for CUP is the sole duty of the Commission and once approved, it becomes the sole duty of the City Planner to issue the actual permit. The City Planner has no authority to approve an application for CUP and no Commissioner has the authority to issue a zoning permit.

9. The Commission failed to appropriately consider the CUP criteria in HCC 21.71.030

The standard chosen by Homer to approve setback reductions in the CBD is not to rubber stamp conclusionary findings made by planning staff before public testimony and other evidence is received. Furthermore, there is no standard that requires that requests for setback reduction be approved at all. HCC

21.71.010(c) states: "Nothing in the zoning code shall be construed to require the granting of a conditional use permit." SR 20-63 discusses the effects of the proposed restaurant, a permitted use, but does not discuss the possible impacts of the proposed 15-foot setback reduction, 47% lot coverage, or second permitted primary use on the lot on property values, pedestrian access, street parking, or neighborhood character. In his comments to the Commission, Mr. Griswold stated: "Building setbacks and lot density restrictions were enacted to promote health, safety and general welfare. Arbitrarily reducing setback requirements and lot density requirements is clearly detrimental to the health, safety and welfare of the surrounding area and city as a whole." [R 20] Mr. Griswold was not required to conculsively prove to the Commission all of the possible impacts of the proposal, nor is he required to do so now. It was the Commission's duty to determine whether all of the prerequisite review criteria prescribed in HCC 21.71.030(a)-(j) were met regardless of Mr. Griswold's comments. This would have required specific discussions about the impact to property values, neighborhood character etc. of the proposed 15-foot setback reduction, 47% lot coverage, and second principal permitted use but no such discussions ever took place. If the Applicant had requested a 20-foot setback reduction and 100% lot coverage

there is no reason to believe the Commission would have reached a different decision because it never considered the impacts of setback reduction and relaxation of lot coverage requirements at all.

10. The Commission granted de-facto area variances

The superior court's 2019 determination that granting setback reduction via HCC 21.18.040(b)(4) does not constitute a de-facto variance was appealed to the Alaska Supreme Court (case S-17669). The superior courts' rulings regarding this issue will not reflect controlling law unless the Alaska Supreme Court upholds their rulings.

11. It was inappropriate for the Commission to consider and grant CUP 20-15 as a single CUP

"CUP" stands for conditional ***use*** permit, not conditional ***uses*** permit. **Just** because HCC 21.71.020(a)(4) states that an application for a CUP shall include a narrative description of all proposed uses and structures, specifically identifying those that require conditional use approval does not mean that all of the uses and structures requiring conditional use approval described are to be considered "as a whole" and collectively approved or denied under that single CUP application. No provision of HCC states that multiple requests for CUP are to be decided as a whole; if this were the intent of the Homer City

Council it would have said so legislatively. HCC 21.71.040(b) clearly states: "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." HCC 21.71.050(d) clearly states: "Approval of ***the*** conditional ***use*** shall require the affirmative vote of four members of the Commission." In any event, each use and/or structure for which a CUP is applied must satisfy the review criteria set forth under HCC 21.71.030(a)-(j). If two conditional uses simultaneously applied for satisfy that prerequisite criteria and a third does not, the Commission does not have the discretion to consider and approve all three conditional uses "as a whole." Conversely, if one of the proposed conditional uses applied for meets the review criteria and two others do not, the Commission cannot deny all three conditional uses "as a whole" because it would have no legal grounds for denying the proposed conditional use that meets all of the review criteria. Requiring the applicant to specifically identify other uses on the property that require separate conditional use approval allows the Commission to make its approval of those other conditional uses/structures a condition for its approval of the proposal as a whole. Conditional uses such as HCC 21.18.030(j) (more than one building containing a

building containing a permitted principal use on a lot) can involve multiple structures, in which case all proposed buildings must be identified in the application (obviously). Case in point: CUP 20-11 where three additional single family dwelling units were simultaneously applied for and approved as one conditional use via one CUP. Other conditional uses possibly involving multiple structures and/or uses include HCC 21.12.030(g) (public utility facilities and structures) and HCC 21.28.030(c) (hotels and motels). It should be noted that HCC 21.03.040 defines "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. 'Hotel' or 'motel' also means ***any building or group of buildings*** containing five or less guest rooms that are used, rented or hired out to be occupied for sleeping purposes by more than 15 guests."

Restaurant use is distinct from whatever uses are taking place within the Inlet Trading Post which occupies the same lot, so if/when its nonconforming status ceases it requires a CUP. The application for CUP 20-15 failed to identify the proposed use of more than one building containing a permitted principal use on a lot, which is allowable as a CUP under HCC 21.18.030(j). The Commission's Decision regarding CUP 20-15

states: "After a careful review of the record, the Commission approves Conditional Use Permit 20-11 to build more than one building containing a permitted primary use on a lot." [R. 66] If one were to assume this reference to CUP 20-11 is merely a clerical error and that the Commission actually intended to approve more than one building containing a permitted principal use on the subject lot via CUP 20-15, no discussions about this took place during the September 2, 2020 public hearing and no analysis was provided by planning staff or the Commission. It is noteworthy that the actual application for CUP 20-11 was found to meet Goal 1.3 Objective 1 of the Homer Spit Comprehensive Plan identified in the Commission's analysis as follows: "Provide amenities that aid visitors and residents", and the corresponding strategy states: "identify locations and needs for restrooms/showers." (See page 3 of the Commission's Decision regarding CUP 20-11 attached hereto as Exhibit 1). Note that CUP 20-11 applied to development at 4936 Clover Lane which is nowhere near the Homer Spit. This is a random example of how ridiculous the Commission's CUP analysis and findings always are. As Jon Lovitz of Saturday Night Live fame would say while playing the role of pathological liar Tommy Flanagan, "Yeah! That's the ticket."

12. The Homer Comprehensive Plan goal of "infill" is unconstitutionally vague

Contrary to the City Attorney's assertion, Mr. Griswold is not making a direct constitutional challenge to the City of Homer Comprehensive Plan. He is challenging the application of a specific portion of the Comprehensive Plan to the application for CUP 20-15 i.e., "as applied." Every duly enacted ordinance and provision therein is not automatically and undeniably constitutional. The Comprehensive Plan's goal of "infill" is so imprecise as to encourage arbitrary enforcement and implementation. The Alaska Supreme Court stated as follows in *Griswold v City of Homer*, 925 P.2d 1015, 1023 at n.9: "Not all of the goals articulated by the City can be considered legitimate *per se*. For example, any zoning change which eases restrictions on property use could be said to further the goal of "filling in vacant places." The subject lot is far from vacant. Staff Report 20-62 cites Goal 1, Objective D-3 as follows: "Support planning and zoning regulations that promote land use strategies that include compact, mixed-use development, high density development, and ***infill***." This reference to "infill" is far more vague than "filling in of vacant places" which was first embraced and then scorned as illegitimate by the

Alaska Supreme Court in 1996.[1] It is difficult to imagine a more vague planning goal than simply "infill." This goal turns the Comprehensive Plan into a wild card that supports any and all development thus defeating the whole purpose for having a comprehensive plan in the first place. No Alaska decision holds that a zoning and planning goal of just "infill" is legitimate.

13. The Commission's approval of CUP 20-15 conflicts with and/or violates HCC HCC 21.61.040(a)-(d)

HCC 21.61.040 is clearly relevant to this appeal. The Inlet Trading Post appears to be a "grandfathered" nonconforming use. As such, it and/or its appurtenances cannot justify the subject 15-foot setback encroachment. Furthermore, if/when the existing Wild Honey Bistro structure is demolished, the Inlet Trading Post will lose its nonconforming use status and require modification or an additional CUP to authorize its encroachment into the 20-foot building setback. HCC 21.71.020(a)(4) requires that the application for CUP 20-15 include a narrative description of all proposed uses and structures, specifically

---

[1] Among the "genuine benefits" allegedly bequeathed to the City of Homer via the Main Street (Rosie) rezone, the Alaska Supreme Court determined that it would "increase convenience and accessibility for local and regional customers for vehicle repairs or purchases." Ironically, no auto sales facility ever opened on Main Street following the court's 1996 decision and no vehicle repair services are currently available on Main Street.

identifying those that require conditional use approval including the Inlet Trading Post.

14. The Commission impermissibly waived/relaxed the zoning code

This issue has been discussed throughout Appellant's Opening Brief and above. Of particular concern are the Commission's waiving of the HCC 21.55.090(c) parking requirements, HCC 21.71.030(j) CDM requirements, and its failure to issue reasons supporting its Decision per HCC 21.71.050(b).

CONCLUSION

Friends, either you're closing your eyes to a situation you do not wish to acknowledge or you are not aware of the caliber of disaster indicated by the presence of arbitrary zoning in your community. It takes judgment, brains, and maturity to zone in the CBD. I say that any boob can take and approve a CUP. Remember the Plymouth Rock and the Golden Rule! Oh, we've got trouble. We're in terrible, terrible trouble. That arbitrary zoning is a devil's tool! Oh yes we got trouble, trouble, trouble! With a capital "T"! Gotta rhyme it with "Z"! And that stands for zoning![2]

DATED: February 1, 2021.

By: Frank Griswold
Frank Griswold

[2] Apologies to The Music Man.

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HOMER PLANNING COMMISSION

Approved CUP 2020-11 at the Meeting of August 5, 2020

RE:	Conditional Use Permit (CUP) 20-11
Address:	4936 Clover Lane
Legal Description:	Bunnell's Sub No 17 Lot 26-A1

DECISION

CUP 20-11

Introduction

Property owner Adam Barrowcliff (the "Applicant") applied to the Homer Planning Commission (the "Commission") for a conditional use permit under Homer City Code HCC 21.12.030(m) which allows more than one building containing a permitted principle use on a lot in the Rural Residential District.

The applicant proposes to build three additional single family homes, for a total of six dwelling units on the property. The property already contains a duplex and one single family home.

The application was scheduled for a public hearing as required by Homer City Code 21.94 before the Commission on August 5, 2020. Notice of the public hearing was published in the local newspaper and sent to 49 property owners of 37 parcels.

At the August 5, 2020 meeting of the Commission, the Commission voted to approve the request with seven Commissioners present. The Commission approved CUP 20-11 with unanimous consent.

Evidence Presented

Acting City Planner Engebretsen reviewed the staff report. The applicant's wife was available to answer any questions.

There was no public testimony.

EXHIBIT 1

Findings of Fact

After careful review of the record, the Commission approves Condition Use Permit 20-11 to build more than one building containing a permitted principal use on a lot.

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:** More than one single family dwelling on a lot is authorized by conditional use permit.
>
> **Finding 2:** The 1.4 acre lot served by public water and sewer per HCC 21.12.040(a)(3), may have up to six dwelling units based on dimensional requirements of the code.

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 proposal is compatible with the purpose of the district by meeting density requirements and providing residential development in the City.

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 affected greater than a conditionally permitted kennel or a commercial greenhouse.

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

> **Finding 5:** The proposal is compatible with the existing uses of surrounding land.

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

> **Finding 6:** Existing public, water, sewer, and fire services will be adequate to serve the proposed development.

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: 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.

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 proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area and the city as a whole when all applicable standards are addressed as required by city code.

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

Finding 9: The proposal will comply with all applicable regulations and conditions when the permitting process is successfully navigated as provided in the CUP and permitting process.

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

Analysis: Goals of the Homer Spit Comprehensive Plan include Goal 1.3 Objective 1 states: "Provide amenities that aid visitors and residents", and the corresponding strategy states: "Identify locations and needs for restrooms/showers."

Finding 10: The proposal does not appear to contradict any applicable land use goals and objectives of the Comprehensive Plan. The proposal aligns Goal 1 Objective C and no evidence has been found that it is contrary to the applicable land use goals and objects of the Comprehensive Plan.

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

Condition 1: Outdoor lighting must be downward directional and must not produce light trespass or glare per the CDM and HCC 21.59.030.

Finding 11: Condition 1 will assure that the proposal complies with level one lighting standards and the Community Design Manual

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. 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.**

Conclusion: Based on the foregoing findings of fact and law, Conditional Use Permit 20-11 is hereby approved, with Findings 1-11 and Condition 1.

Condition 1: Outdoor lighting must be downward directional and must not produce light trespass or glare per the CDM and HCC 21.59.030.

Date	Chair, Scott Smith
Date	Acting City Planner, Julie Engebretsen

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 _____ _____, 2020. A copy was also delivered to the City of Homer Planning Department and Homer City Clerk on the same date.

_____ _____

Date Travis Brown, Planning Technician

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Attorneys for City of Homer

BEFORE THE HOMER BOARD OF ADJUSTMENT

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision.
	)	October 7, 2020

CITY OF HOMER'S REPLY BRIEF

In his 50-page Opening Brief, Griswold raises at least 22 distinct arguments in support of his appeal of CUP 20-15. The Alaska Superior Court has already rejected several of those arguments in prior cases, but Griswold has cut and pasted his prior briefing on those issues in an apparent attempt to have the BOA decide them differently. With regard to those issues, the City refers the BOA to the Superior Court decisions attached as Exhibits A and B to the City's Opening Brief. For brevity's sake, this brief will focus on issues that were not analyzed in the City's Opening Brief.

1. No Additional CUP Under HCC 21.18.030(j) is Required

In the CBD, HCC 21.18.030(j) requires a CUP when there is "[m]ore than one building containing a permitted principal use on the lot." Although City Planning Staff Report 20-63 ("SR 20-63") describes the Property as having two "buildings," in fact the

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Inlet Trading Post and the Wild Honey Bistro are currently part of a single structure.[1] [R. 8] The application describes the Inlet Trading Post and the Wild Honey Bistro as a "shared structure." [R. 18] Asia Freeman of the Bunnell Street Arts Center (in the Inlet Trading Post) noted that the Wild Honey Bistro "is physically attached to the Inlet Trading Post…" [R. 53] Photographs of the Property confirm these descriptions. [R. 29-31] When the project is complete, they will share a load-bearing wall, front porch, and awning, and will be connected by an interior staircase on the second level. [R. 24-28] Since the Inlet Trading Post and the Wild Honey Bistro are part of a single shared structure, this proposal does not include two buildings containing a permitted principal use on the Property. Accordingly, there is no non-conforming use[2] and no CUP is required under HCC 21.18.030(j).

2. It Was Appropriate for the Commission to Reduce the Number of Required Parking Spaces for the Property

HCC 21.55.090(a) provides a table by which required number of off-street parking spaces is calculated based upon the use of the property. This calculation changes when there are multiple uses present on the same property. HCC 21.55.090(c) states:

> If more than one use is present on a lot, the number of required off-street parking spaces shall be equal to 75 percent of the sum of the number of required off-street parking spaces for each use computed separately, unless the Commission approves a lesser number.

[1] Homer City Planning ("HCP") may have referred to the structure as two buildings because the Inlet Trading Post and the Wild Honey Bistro are different sizes and heights, and have traditionally housed different businesses. [R. 8] However, the record clearly demonstrates that they comprise a single shared structure.

[2] In his discussion of non-conforming uses, Griswold improperly cites HCC 21.61.030, which relates to non-conforming structures. HCC 21.61.040 regulates non-conforming uses. Regardless, the current and proposed use of the Property conforms with the zoning code because a single structure with multiple permitted uses does not require a CUP.

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In this case, HCP calculated that under HCC 21.55.090(c), the Property requires 16 off-street parking spaces. [R. 36] However, the proposal only provided for 10 onsite parking spaces because that is all the Property could accommodate. [R. 11] SR 20-63 advised that the Commission could either adopt a condition requiring the provision of six offsite parking stalls through a parking agreement with another land owner or find that 10 parking spaces are sufficient in light of the available street parking. [R. 11-12] The Commission's Finding 1 states, "Per HCC 21.55.090(c), the Commission hereby reduces the number of required spaces to 10 spaces. The additional six spaces required for this site can be accommodated by the public parking on the south portion of the property and the W[est] Bunnell Ave right of way." [R. 68] This finding is supported by substantial evidence in the record, including HCP's conclusion that street parking is sufficient to the Property's parking needs and maps and photographs showing the availability of street parking[3] around the Property. [R. 11; 23; 29-31]

It was appropriate for the Commission to reduce the number of required parking spaces via CUP. HCC 21.55.090(c) expressly allows the Commission to approve a lesser number of off-street parking spaces than would otherwise be required. HCC 21.71.010(b) allows the Commission to grant a CUP "to approve land uses and structures with special design or site requirements, operating characteristics, or potential adverse effects on surroundings." The Commission reasonably interpreted these provisions to

[3] Photographs of the Property show parking spaces directly in front of the Property. While these parking spaces are considered street parking because they are in the right of way, cars parked in those spaces are clear of the roadway. [R. 11; 29-31]

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allow it to reduce the number of required off-street parking spaces through its grant of CUP 20-15. The Commission's interpretation of the Zoning Code should be given great weight and accepted because there is a reasonable basis for the Commission's interpretation. *Griswold v. City of Homer*, 55 P.3d 64, 67-68 (Alaska 2002).

The reduction of required parking spaces under HCC 21.55.090(c) is not subject to the variance procedure in HCC 21.72. A variance can only be granted "to provide relief when a literal enforcement of the Homer Zoning Code would deprive a property owner of the reasonable use of a lot." HCC 21.72.010. In other words, a variance "grants permission to engage in a use that an appropriate legislative authority has otherwise proscribed." 101A C.J.S. Zoning and Land Planning § 305. However, the Zoning Code expressly allows the Commission to reduce the number of parking spaces allowed.[4] Since the Zoning Code does not prohibit reducing the number of parking spaces, that determination it is not subject to a variance procedure as a matter of law.

3. The Proposal is Compatible with the Purpose of the CBD

Under HCC 21.71.030(b), the Commission must determine whether the proposed use(s) and structure(s) are compatible with the purpose of the zoning district in which the lot is located. HCC 21.18.010 states:

> The purpose of the [CBD] is primarily to provide a centrally located area within the City for general retail shopping, personal and professional services, educational institutions, entertainment establishments, restaurants

[4] This provides additional support for the Commission's interpretation that CUP is the appropriate procedure to reduce the parking space requirement. CUPs "are distinguishable from variances because while a variance authorizes a use that would otherwise be prohibited in a zoning district, a special permit authorizes a use that is provisionally permitted, but subject to prior administrative review and approval." 2 Am. Law Zoning § 14.1 (5th Ed.)(citations omitted).

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> and other business uses listed in this chapter. The district is meant to accommodate a mixture of residential and nonresidential uses with conflicts resolved in favor of nonresidential uses. Pedestrian-friendly designs and amenities are encouraged.

The Commission's Finding 3 states, "[t]he purpose of the [CBD] includes providing for general retail shopping, restaurants, and encourages pedestrian friendly design and amenities. The proposed development is compatible with the purpose statement of the zoning district." [R. 66] This finding is supported by substantial evidence in the record. SR 20-63 noted that the property includes a mixture of uses (all of which are encouraged in the CBD purpose statement) and that pedestrian amenities would be enhanced by a new front deck and additional parking at the rear of the building. [R. 13] The application also notes that the proposal is in accord with the CBD's preference for centrally located shopping and restaurants. [R. 21]

Griswold's assertion that the Commission should have focused solely on the effects of the setback reduction and lot coverage is at odds with HCC 21.71.030(b), which requires that the proposed "use(s) and structure(s)" are compatible with the purpose of the CBD. The Commission properly focused on whether the remodeled Wild Honey Bistro to be built within a portion of the setback and which would cover more than 30% of the lot was compatible with the purpose of the CBD. Griswold's assertion that the proposal is not pedestrian-friendly is conclusory and unsupported by the record.

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4. The Commission Correctly found that the Value of Adjoining Property will not be Negatively Affected

HCC 21.71.030(c) requires the Commission to consider whether "[t]he value of adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in [the CBD]." The Commission's Finding 4 states, "[l]ot coverage over thirty percent and building within the twenty foot building setback area is not expected to negatively impact the adjoining properties greater than other permitted or conditional uses." [R. 66] This finding is supported by substantial evidence in the record. SR 20-63 analyzed the issue as follows:

> Many uses in the [CBD] have greater negative impacts than would be realized from a restaurant with a portion of the building and deck within the twenty foot building setback area, and a total lot coverage over thirty percent. Pipelines and railroads would have a greater impact on nearby property values. Assisted living, group care, religious, cultural and fraternal assembly could generate a good deal of traffic. The architectural and pedestrian qualities of this project will help maintain neighborhood character and maintain existing property values by reinvesting in the neighborhood and continuing a commonly visited restaurant.

[R. 13] This is precisely the type of analysis called for by HCC 21.71.030(c) – a comparison between the possible negative impact to adjoining properties by this proposal and by other permitted[5] or conditionally permitted[6] uses in the CBD. The Applicants note that the proposal "will add value to the Old Town commercial district, provides additional variety and character to the existing neighborhood, and assists with the long-term economic viability of the community." [R. 18] Multiple nearby property owners or lessors supported the proposal and stated that it would be a positive addition to the

[5] *See* HCC 21.18.020.
[6] *See* HCC 21.18.030.

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neighborhood. [R. 52-54] This evidence supports the Commission's conclusion that the proposal would not negatively affect the value of adjoining property more than other permitted or conditionally permitted uses.

Mr. Griswold's argument that the Commission can only consider uses that have previously been permitted or conditionally permitted in the CBD in an analysis under HCC 21.71.030(c) is unsupported and incorrect. Each zoning district in Homer has permitted uses and conditionally permitted uses.[7] In the CBD, permitted uses are listed in HCC 21.18.020 and conditionally permitted uses are listed in HCC 21.18.030. HCC 21.71.030(c) asks the Commission to compare the negative effects on adjoining property between the proposal being considered and other possible permitted or conditionally permitted uses in the zoning district. SR 20-63 did just that. Pipelines, railroads, assisted living, and group care homes are conditionally permitted in the CBD. HCC 21.18.030(f) and (k). Religious, cultural, and fraternal assembly are permitted outright. HCC 21.18.020(q). While Griswold may disagree with the Commission's analysis, the record reveals that the Commission properly applied HCC 21.71.030(c) and its finding is supported by substantial evidence in the record.

5. The Commission Properly found that the Proposal is Compatible with Existing Uses of Surrounding Land

HCC 21.71.030(d) requires the Commission to consider whether "[t]he proposal is compatible with existing uses of surrounding land." The Commission's Finding 5 states, "Redevelopment of the existing restaurant with the proposed site plan and lot coverage is

[7] *See, e.g.,* HCC 21.16.020-030 (Residential Office District); HCC 21.20.020-030 (Town Center District); HCC 21.22.020-030 (Gateway Business District).

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compatible with existing mixed uses of surrounding land." [R. 66] Finding 5 is supported by substantial evidence in the record. SR 20-63 states:

> Surrounding uses of land include AJ's restaurant and bar to the west, residential cottages to the north, mixed use commercial/residential to the east, and an RV park, private residence and hotel across the street. The site has included a restaurant for over twenty years, and the property has contained mixed uses for decades.

[R. 13] The Applicants echoed this analysis, noting that the uses would remain the same and would be compatible with adjoining structures, and that the proposal is intended to be consistent and compatible with the surrounding properties. [R. 18; 21] Multiple nearby residents and property users commented in support of the proposal specifically because it is compatible with and maintains the character of the "Old Town" neighborhood. [R. 52-54] This substantial evidence supports the Commission's finding that the proposal is compatible with existing uses of surrounding land.

Griswold's objection that Finding 5 is "circular" is specious. The Commission reviewed the entire record when making Finding 5 and it expressly adopted the analysis in SR 20-63. [R. 63; 66] There is no requirement that the finding itself restate all of that evidence. The Commission properly considered whether the proposal is consistent with surrounding uses of land, which includes restaurants.

Griswold's argument regarding non-conforming uses[8] misses the point. Griswold states, "The existence of nonconforming uses in a zoning district is not a legal precedent for allowing other similar establishments; the controlling legal precedent is the ordinance

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[8] Griswold does not identify the non-conforming properties to which he is referring.

prohibiting such uses."[9] However, "the ordinance" does not prohibit setback reductions and lot coverage over 30% in the CBD; rather, the Zoning Code expressly allows them subject to the CUP procedure. *See* HCC 21.18.040(b)(4) and HCC 21.18.040(d). To the extent the Commission agrees with the desire of the Applicants and nearby residents to maintain the character of the "Old Town" neighborhood, the Code authorizes it to do so by approving setback reductions or lot coverage exceptions. The Commission is only required to analyze the CUP application in accord with HCC 21.71 and the record reflects that it did.

6. The Commission Properly found that Public Services and Facilities are Adequate to Serve the Proposed Use and Structure.

HCC 21.71.030(e) requires the Commission to consider whether "[p]ublic services and facilities are or will be, prior to occupancy, adequate to serve the proposed use and structure." The Commission's Finding 6 states, "Existing public water, sewer, police, and fire services are adequate to serve the site." [R. 67] This finding is supported by substantial evidence in the record. SR 20-63 notes that the site is already served by municipal water, sewer, police, and fire services, as well as two city-maintained paved roads. [R. 14] There is no evidence in the record suggesting that existing public services are inadequate to serve the proposed renovated Wild Honey Bistro.

Griswold's arguments regarding Fire Marshal certification or input from the Homer Volunteer Fire Department are meritless. Griswold fails to identify any evidence in the record that the Applicants did not obtain Fire Marshal approval for the project.

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[9] Griswold's Opening Brief, p. 26.

Fire Marshal approval is a matter of state law and is outside the Commission's purview. *See* 13 AAC 50.027(a). While the Commission may impose conditions related to protecting health, safety, and welfare of persons residing or working in the vicinity of the subject lot, it is not required impose such conditions. HCC 21.71.040(b)(14). The Commission did address fire safety by imposing Condition 1, requiring the side yard setback on the western lot to meet the requirements of HCC 21.18.040(b)(2). [R. 68] The fact that the Commission did not impose Griswold's preferred conditions regarding fire safety is irrelevant to the legality of CUP 20-15.

7. The Commission Properly found that that the Proposal will not Cause Undue Harmful Effect upon Neighborhood Character

HCC 21.71.030(f) requires the Commission to consider whether "[c]onsidering 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." The Commission's Finding 7 states, "The Commission finds the proposal will not cause undue harmful effect upon desirable neighborhood character as described in the purpose statement of the district." [R. 67] This finding is supported by substantial evidence in the record. SR 20-63 states:

> Desirable neighborhood character could be described by a portion of the Purpose statement for the district. The proposed project is centrally located within the City of Homer and continues the general retail and restaurant uses of the property. Replacing the existing porch and creating ADA access at the rear of the building is a pedestrian design and amenity. The proposed design aligns well with existing buildings and sustains the character promoted in the Comprehensive Plan.

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[R. 14] The Applicants noted that the attractive design of the renovated Wild Honey Bistro is consistent and compatible with the Bunnell Art Center and the architecture of the Old Town District. [R. 18; 21]. The Applicants also expect the use and traffic to the Property to remain consistent. [R. 21] Nearby residents Don and Carolyn Meares stated, "We applaud Ms. Livingston's design maintaining the look and feel of Old Town, the beach town atmosphere, and the living history aspect of authentic Alaska." [R. 52] Asia Freeman said, "Also, while the new construction is designed to improve and enhance the visual and long term viability of the Wild Honey Bistro building, it is not providing significant increases in capacity or being done in anticipation of increased vehicle traffic." [R. 53] This substantial evidence supports the Commission's finding that the proposal will not cause undue harmful effect upon desirable neighborhood character.

No evidence in the record supports Griswold's assertion that the Commission "totally disregarded harmony in scale, bulk, coverage and density, generation [of] traffic, [and] the nature and intensity of the proposed use,"[10] and he cites none. Griswold predicates this argument solely on the Commission's choice not to quote the entirety of HCC 21.71.030(f) in Finding 7. The record reflects that the Commission considered the entire record, including those issues.

8. The Commission Properly Found that the Proposal will not be Unduly Detrimental to Health, Safety, or Welfare

HCC 21.71.030(g) requires the Commission to consider whether "[t]he proposal will not be unduly detrimental to the health, safety or welfare of the surrounding area of

[10] *Id*. at 27.

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the City as a whole. The Commission's Finding 8 says, "The proposal will not be unduly detrimental to the health, safety, or welfare of the surrounding area and the city as a whole when all applicable standards are met as required by city code." [R. 67] This finding is supported by substantial evidence in the record. SR 20-63 states, "Public services are adequate to serve the proposed use. Fire Marshal review of the project is required as part of the permitting process."[11] [R. 15] The Applicants noted that the renovations to the Wild Honey Bistro would serve "to rehabilitate a fast-deteriorating business structure, which would otherwise become economically unviable to maintain."[12] [R. 18] Don and Carolyn Mears opined that the proposal would improve the safety and quality of the Wild Honey Bistro. [R. 52] This substantial evidence supports the Commission's finding that the proposal will not be unduly detrimental to health, safety, and welfare.

Contrary to Griswold's assertion, the Commission did address health, safety, welfare of the surrounding area and the City as a whole. [R. 67] An abbreviated version of Griswold's argument on this issue was included in his public comment on the proposal.[13] [R. 56-57] It is apparent that in its review of the entire record the Commission simply disagreed with Griswold's analysis. Griswold now makes additional

[11] The "permitting process" refers to the zoning permit process under HCC 21.70, not the CUP procedure under HCC 21.71.

[12] It is difficult to imagine how rebuilding an aging and deteriorating structure would be unduly detrimental to health, safety, and welfare. If anything, this proposal improves health, safety, and welfare.

[13] Griswold's unsupported argument in his written comments to the Commission does not constitute evidence detracting from the Commission's decision that is "dramatically disproportionate to the evidence supporting it" such that the evidence in support of the Commission's Finding 8 cannot be considered substantial. *See Public Safety Employees Ass'n, AFSCME Local 803, AFL-CIO v. City of Fairbanks*, 420 P.3d 1243, 1248 (Alaska 2018) (citations omitted).

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policy arguments regarding setback requirements and cites to journal articles about the effect of land use regulations on property values that he alleges support his position.[14] However, the BOA cannot consider these arguments in this appeal because they are not part of the record. HCC 21.93.510(a).

9. The Commission correctly found that the Proposal will comply with the Zoning Code

HCC 21.71.030(h) requires the Commission to consider whether "[t]he proposal does or will comply with the applicable regulations and conditions specified in this title for such use." The Commission's Finding 9 says, "An approved CUP and zoning permit will ensure that the proposal will comply with applicable regulations and conditions specified in Title 21." [R. 67] This finding is supported by substantial evidence in the record. SR 20-63 notes that to obtain CUP 20-15 and a zoning permit the proposal would be required to comply with the applicable regulations of the Zoning Code. [R. 15] SR 20-63 also addresses compliance with Title 21 provisions relating to off-street parking, side setback requirements, and outdoor lighting. [R. 11] The fact that the HCP's expert analysis concluded that the proposal would comply with the applicable provisions of the Zoning Code is itself substantial evidence on this point.

HCC 21.71.030(h) does not require the Commission to include an analysis of the proposal's compliance with every Zoning Code provision in its written decision. Rather, the Commission appropriately referenced the applicable provisions and relied upon HCP's expertise in Homer's Zoning Code to find that the proposal complies with the

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[14] Griswold's Opening Brief, p. 29-30.

remaining provisions of the Code. No evidence in the record suggests that with an approved zoning permit and CUP the proposal does not comply with the Zoning Code.

Griswold provides a laundry list of Zoning Code provisions with which he asserts the proposal does not comply, but his arguments are meritless. HCC 21.90.030 does not prohibit the Commission's issuance of CUP 20-15 or any other permit, but instead merely allows the City Planner or City Manager to void a permit issued in violation of Title 21 or condition the issuance of a permit upon the correction of code violations. The Commission addressed parking and Community Design Manual ("CDM") requirements in its Decision. [R. 67-68] HCC 21.18.050 relates to zoning permits and is not applicable to this CUP appeal. Griswold's assertion regarding compliance with HCC 21.50.030(f)(1) is conclusory and not supported by any argument; it should be considered waived.[15] Griswold's argument regarding HCC 21.61.040 is addressed in the City's Opening Brief[16] and his argument regarding HCC 21.18.030(j) is addressed above.[17]

10. The Commission correctly found that the Proposal is not Contrary to the Applicable Provisions of the Homer Comprehensive Plan

HCC 21.71.030(i) requires the Commission to determine whether "[t]he proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan." The Commission's analysis states:

> **Analysis:** This proposal promotes Chapter 4 Land Use, 1-C-1: Promote infill development in all housing districts and 1-C-2, Encourage inclusion

[15] *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 608 (Alaska 2003); *Manning v. State, Dep't of Fish and Game*, 355 P.3d 530, 538 (Alaska 2015) (conclusory and inadequately developed arguments are considered waived).
[16] City of Homer's Opening Brief, p. 15.
[17] *Supra*, section 1.

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> of affordable housing in larger developments and affordable housing in general.
>
> **Finding 10:** The proposal is not contrary to the applicable land use goals and [objectives] of the Comprehensive Plan. The proposal aligns [with] Goal 1 Objective D-3, Goal 3 and Goal 4 Objective A-2 and no evidence has been found that it is contrary to the applicable land use goals and [objectives] of the Comprehensive Plan.

[R. 67] Finding 10 is supported by substantial evidence in the record. SR 20-63 analyzes the proposal's compliance with the Comprehensive Plan as follows:

> Chapter 4 Goal 4 Objective A-2: Create an overlay zone of the "Old Town" section of the CBD, establishing general standards for building design and construction. Aim for future buildings to continue in the style of the older buildings in the area as well as the several more recently constructed buildings that follow these traditions. Goals of the Land Use Chapter of the Homer Comprehensive Plan include Chapter 4 Goal 3: Encourage high quality buildings and site design that complements Homer's beautiful natural setting, and Goal 1 Objective D-3: Support planning and zoning regulations that promote land use strategies that include compact, mixed-use development, high density development, and infill.
>
> The restaurant replacement and deck expansion support mixed use development on the site, a density of uses and land coverage (47% lot coverage anticipated), and redevelopment of an existing commercial space. The building is in an architectural style that matches the existing construction and is generally considered to have a lot of Homer character. All of these considerations are in keeping with the applicable goals and objectives of the Comprehensive Plan.

[R. 15] In other words, HCP determined that the proposal is not only not contrary to the Comprehensive Plan, but is even harmonious with several goals of the Comprehensive Plan, some of which are specifically directed at the CBD and/or the Old Town neighborhood. This evidence in the record easily meets the substantial evidence standard.

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Griswold's complaint that the Homer Comprehensive Plan is an "obsequious wild card" that is "designed to please everyone"[18] is irrelevant to this appeal. The City Council adopted the Comprehensive Plan by ordinance[19] and any modifications to it are a political issue beyond the scope of this appeal. Griswold's assertion that the Commission did not "look for" goals and objectives that are contrary to the proposal is unsupported.[20] The Commission's finding that "no evidence has been found that [the proposal] is contrary to the applicable land use goals and [objectives] of the Comprehensive Plan" contradicts Griswold's assertion. [R. 67] The Commission's Decision and the expressly adopted SR 20-63 identify the relevant Comprehensive Plan goals and objectives. [R. 15; 67] Contrary to Griswold's identified goals and objectives, those identified by the Commission are actually relevant to this proposal as they deal specifically with the Old Town neighborhood and the CBD. Griswold identifies goals and objectives that he claims are contrary to the proposal, but he does not explain why they are contrary.[21] The BOA is not required to guess at the substance of Griswold's argument – rather, this conclusory and inadequately briefed argument is waived.[22]

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[18] Griswold's Opening Brief, p. 33.
[19] *See* Homer Ordinance 18-47.
[20] Griswold cited these allegedly "contrary" goals and objectives in his written comments to the Commission. [R. 58-59] The Commission simply did not agree with Griswold's analysis.
[21] Griswold's Opening Brief, p. 36-39.
[22] *Supra*, n. 13.

11. The Commission correctly found that the Proposal Complies with the Applicable Provisions of the Community Design Manual

HCC 21.71.030(j) requires the Commission to consider whether "[t]he proposal will comply with the applicable provisions of the CDM. The Commission's Finding 11 states, "Project complies with the applicable provisions of the CDM." [R. 67] The Commission also imposed Condition 3 which requires screening for any dumpster in the parking lot and Condition 4 which requires down lit outdoor lighting as required by the Zoning Code and the CDM. [R. 67-68] The Commission's Finding 11 is supported by substantial evidence in the record. SR 20-63 states:

> The three sections of the CDM apply: Site Plan Review, Architecture and Site Design. The proposed project does not significantly change the existing site plan, architecture or site design. The CDM review will be commiserate with the scale of the restaurant and deck expansions.
>
> Staff finds the project complies with the applicable provisions of the CDM in the following manner.
> 1. Pedestrian connectivity is improved by rebuilding the deck to the adjoining building and the right of way. An ADA parking space and access to the building is being added to the rear of the structure.
> 2. The new construction will match the existing architectural style, siding material and color for the Inlet Trading Post building. Matching this style will maintain visual compatibility between structures. (See Applicant cover letter 9.17.20 in the application).

[R. 16] With regard to landscaping requirements, SR 20-63 states:

> Due to the existing site design and small lot, there is not a lot of room for landscaping. The Main Street right of way has a boardwalk, attractive landscaping and seating. At the rear or north property line, the property abuts the driveway and parking area for the neighbor cottages, and there are overhead power lines. Staff recommends leaving any decisions about landscaping and drainage to the affected property owners.

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[R. 12] The application demonstrates that the proposal will improve pedestrian connectivity and the design is compatible with both the Inlet Trading Post and the surrounding neighborhood. [R. 18; 24-31] The Wild Honey Bistro's neighbors agreed. [R. 52-54]

Griswold's argument regarding Finding 11 appears to be premised on Griswold's misunderstanding of the CDM and scope of the Commission's review under HCC 21.71.030(j). The CDM is not intended to be a set of rigidly enforced design requirements, but rather provides policies to be applied to a "flexible" design review process by the Commission.[23] The Commission has the authority to waive specific CDM requirements and states prominently that "quality design is more important than strict conformance."[24] Where design review occurs in connection with a CUP application, HCC 21.71.030(j) only requires the Commission to review applicable provisions of the CDM.[25] With HCP's guidance that the "CDM review will be commiserate with the scale of the restaurant and deck expansions," that is precisely what the Commission did. [R. 16] Although Griswold asserts in conclusory fashion that the proposal does not comply with several applicable CDM provisions, he provides no argument or analysis to support his conclusions that (1) those provisions are applicable and (2) the proposal did not comply with them.[26] Accordingly, that argument is waived.[27]

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[23] Community Design Manual for the City of Homer, p. 1, 3, https://www.cityofhomer-ak.gov/planning/community-design-manual.
[24] *Id.*, p. 3.
[25] HCC 21.71.030(j).
[26] Griswold's Opening Brief, p. 41-42.
[27] *Supra* n. 13.

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12. Griswold's Argument regarding HCP's Participation in this Appeal is Moot

The City is represented by counsel in this appeal.[28] The City may participate in the appeal under HCC 21.93.060(b) and HCC 21.93.500(a) as the City Planner actively and substantively participated in the Commission's consideration of CUP 20-15.[29] Griswold's argument regarding the unauthorized practice of law is moot because the City is represented by counsel.

CONCLUSION

The Commission properly granted CUP 20-15. The Commission's Decision is legally sound and supported by substantial evidence in the record. Griswold's legal and factual arguments are meritless. The BOA should uphold the Commission's grant of CUP 20-15.

DATED this 1st day of February, 2021, at Anchorage, Alaska.

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Attorneys for Appellee City of Homer

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[28] *See* Entry of Appearance dated January 18, 2021. The Commission has no legal existence apart from the City, so the City is the appropriate Appellee in this case.
[29] HCP is a department of the City.

Session 21-05 a Special Meeting of the Homer City Council sitting as Board of Adjustment was called to order on February 11, 2021 by Mayor Ken Castner at 4:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBER ADERHOLD, EVENSEN, HANSEN-CAVASOS, LORD, SMITH, VENUTI

STAFF: CITY CLERK JACOBSEN
ATTORNEY BRANDT-ERICHSEN

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

APPROVED without discussion.

NEW BUSINESS

a. Appeal to the Board of Adjustment of the Homer Advisory Planning Commission Decision of October 7, 2020 for Approval of Conditional Use Permit 20-15 Conditional Use Permit 2020-15 under HCC 21.18.040(b)(4) a building within the twenty foot building setback and HCC 21.18.040(d) building area in excess of 30 percent of the lot area on a lot in the central business district on Chamberlain & Watson No. 4, Lot 1-A and T 6S R 13W SEC 19 Seward Meridian HM 2011002 Inlet Trading Post Condominiums Unit 2, at 106 W. Bunnell Avenue, Homer, Alaska.

City Clerk Jacobsen identified the following people were in attendance:

- Frank Griswold - Appellant
- Attorney Max Holmquist – representing City as Appellee
- City Planner Rick Abboud
- Larry Slone

Mayor Castner opened the floor to address preliminary issues and asked if there were any conflict of interest to be disclosed.

Councilmember Venuti stated she has a conflict of interest.

LORD/ADERHOLD MOVED THAT COUNCILMEMBER VENUTI HAS A CONFLICT OF INTEREST.

Councilmember Venuti explained her husband has a working relationship with the applicant that meets the conditions of a substantial financial interest as outlined in city code.

VOTE: YES: ADERHOLD, EVENSEN, LORD, SMITH, HANSEN-CAVASOS

Motion carried.

Councilmember Venuti left the meeting.

Mayor Castner asked if there were any ex-parte communications to be disclosed.

No Councilmember had and ex-parte communications to disclose.

Mayor Castner asked if there were any other preliminary issues to be taken up.

Frank Griswold commented in addition to disclosures for conflict of interest, bias is also an issue so it's possible someone believes they are either partial or their ability to render an impartial decision is impaired that would be grounds for disqualification also.

Mayor Castner noted the comment and asked if anyone on the Board of Adjustment who feels they cannot fairly sit and provide an equitable passage of the arguments presented in the appeal. There were no responses.

Mr. Griswold raised issue regarding potential conflict of interest of the Homer City Attorneys Gatti and Holmquist. He thinks their representation role is ambiguous at best, prejudicial, and they're representing in this appeal is contrary to their prescribed duties which creates the conflict of interest.

Mayor Castner responded with the assurance that's why Attorney Brandt-Erichsen is sitting as separate counsel for the Board of Adjustment. It was recognized going into this that there's a duality of duty here and we wanted only to receive legal advice from someone who didn't have an advocacy position. He asked if Attorney Brandt-Erichsen had anything to add.

Attorney Brandt-Erichsen commented for the purposes of the Board of Adjustment hearing he's acting in the role of City Attorney as advisor to the Board of Adjustment and he has no connection with the law firm representing the City in this matter.

Mr. Griswold referenced the reply brief where the City Attorney state "the City is represented by Counsel in this appeal." They also state "the Commission has legal existence apart from the City so the City is the appropriate appellee in this case." Instead of representing the Commission, he thinks the City Attorney is representing the City Planner and Planning Department on the grounds Mr. Abboud actively and substantively participated in the Commissions consideration of Conditional Use Permit (CUP) 20-15. The City administration are not appropriate appellees because they aren't members of the Commission, they aren't aggrieved, and did not file an appeal or cross appeal. He explained how he sees the City Planner and City Administration constitute one entity, the Planning Commission is another entity, and the Homer City Council/Board of Adjustment is another entity as well. He cited Homer City Code regarding the establishment of the Planning Commission, noted they are a separate entity, and would have been a more appropriate appellee. He reviewed how the Borough, City, and Planning Commission derive their planning powers and reiterated the separate entities of the City in relation to this appeal.

Mayor Castner noted Mr. Griswold requested his appeal be heard by the Board of Adjustment and their legal opinions will come from an outside attorney and if it's an appealable event that the law firm has some conflict, that's something he can pursue, but not something for them to take up here.

Mr. Griswold raised an issue regarding notice to surrounding property owners being misleading and deficient. He believes this hearing needs to continue until the neighboring property owners are provided with a proper public notice. The January 26, 2021 notice to surrounding property owners doesn't include information regarding the specific issues under appeal and a complete statement that the complete proposal is available to review at an identified location. This is required by HCC 21.94.020 (b)(4).

There were brief comments from Mayor Castner and Attorney Brandt-Ericshen who noted Mr. Griswold had access to the information and there are no other parties involved so he doesn't see the connection.

Mr. Griswold clarified is argument that the surrounding property owners weren't provided provide proper notice.

City Clerk Jacobsen noted under 21.93.100 general appeals procedure there is a requirement to notify neighboring property owners of the time and place of the appeal hearing and that it's to be done in accordance with 21.94.030, not 21.94.020. She stated she did meet the requirements of 21.94.030.

Attorney Brandt-Erichsen concurred with the Clerk regarding notice. The notice 21.94.020 is for public hearings, and this is not a public hearing matter.

No further preliminary matters were raised and Mayor Castner moved on to oral arguments.

Mayor Castner reminded parties this is not a time to offer new evidence, per HCC 21.93.510 cases must be based on evidence in the record from the Planning Commission. He explained each side has 30 minutes and the appellant can split and reserve time for rebuttal.

Mr. Griswold argued he received notice 48 hours ago that he gets first notice of a 30 minute time limit. It also suggests it's debatable. It would have been helpful to know 15 days ago, this is prejudicial to him. He pointed out recently in one of his court hearings, the Homer Superior Court allocated 1 hour to each party for oral arguments involving a similar and complex zoning appeal. He feels one hour for each side is an appropriate amount of time for presenting oral argument and rebuttal here.

Attorney Holmquist commented he doesn't believe it will take 30 minutes from their perspective, but he's available as long as needed and defers to Board for the appropriate length of oral argument.

Mayor Castner asked how much time Mr. Griswold has received when doing this before the Board or a Hearing officer, because it's his understanding that 30 minutes is customary at this level.

Mr. Griswold responded to arbitrarily set a specific time, regardless of the complexity of the matter is irresponsible and it's been a long time since he's presented oral argument and thinks it has varied in the past. He could probably do it in 45 minutes if he cuts out rebuttal but shouldn't have to.

Mayor Castner explained he had looked to the Supreme Court and that's a 15 minute oral argument, so he thought they were doing well expanding to 30 minutes. Mayor Castner conceded to 45 minutes total, and opened the floor to Mr. Griswold to present his arguments and advised he could reserve time for rebuttal at the end.

Mr. Griswold's oral argument addressed the following points based on the City's reply brief-

1. The proposal does not comply with the applicable provisions of the Community Design Manual (CDM) as stated in Commission finding 11. No provision of Homer City Code provides that the Commission has the authority to waive specific CDM requirement in the course of considering an application for CUP. He cited HCC 21.71.030(j) clearly states the proposal will comply with all applicable provisions of the CDM. There is no evidence in the record that the Commission undertook any review of the CDM. HCC 21.71.050(b) directs the Commission shall within 45 days of the close of the public hearing, approve, approve with conditions, or disapprove the application. The Commission shall promptly issue written findings and reasons supporting its decision. The Commission voted to approve CUP 20-15 on the very day of the public hearing.

2. An additional CUP under HCC 21.18.030(j) is required. The reply brief addresses since the Inlet Trading Post and Wild Honey Bistro are part of a single shared structure, this proposal doesn't include two buildings containing a permitted principal use on the property. This contradicts staff report 20-63 that says it's the site of two buildings and the second building, Wild Honey Bistro consists of three separate structures connected by hallways. He reviewed status of non-conformity, city code relevant to the destruction of non-conforming structures, requirement to rebuild in conformity, and restrictions of expanding non-conforming uses or structures.

3. The Commission had no authority to reduce the number of required parking spaces as suggested in Staff Report 20-63. He reviewed required number of parking spaces and that the applicant said no reduction in parking spaces were being requested. He reviewed code citations related to parking, fence permits, variance procedures, also special conditions of approval for a CUP, and land uses and structures with potential adverse effects on surroundings.

4. The proposal is not compatible with the purpose of the central business district (CBD). Restaurants are allowed in the central business district (CBD) and don't require a CUP, but not those that involve 15 foot setback reductions or 47% lot coverage. Focusing on the restaurant use, which is permitted, but ignoring the deleterious effects of the 15 foot setback encroachment and 47% lot coverage defeats the purpose of the CUP review criteria. Setback reduction adversely effects traffic safety, aesthetics, rest, recreation, and neighborhood character and appearance.

5. The value of adjoining property would be negatively affected. Setback reduction adversely affects traffic safety, aesthetics, rest, recreation, and neighborhood character and appearance, so too does excessive lot coverage. Comparing any proposed use to non-existent railroad use, as in the appellees reply brief is ridiculous and sets such a low bar as to nullify the review standard.

6. The proposal is not compatible with the existing uses of the surrounding land. The proposed encroachment and lot coverage is not compatible, there are very few historic structures remaining in old town. Many neighboring structures are fairly new and comport with current zoning standards. The fact that the subject site has contained mixed use for decades is irrelevant since the subject site doesn't its own surrounding land. The surrounding properties contain single uses not mixed uses, and the single uses don't cover 40% of their lots or encroach 15 feet into their 20 foot setbacks. Old Town is part of the CBD and property owners are required to comply with CBD zoning regulations. Mr. Griswold cited HCC 21.18.040(b)(1) regarding building setbacks noting it constitutes established law, and noted where allowable exceptions are not guaranteed. He also cited HCC 21.18.040(d) regarding building area in excess of total lot area, also constitutes established law and noted where exceptions are allowable but not guaranteed. The application could have applied for a variance, but chose not to do so. Maintaining and expanding the non-conforming character of the Old Town neighborhood does not justify violating current CBD zoning requirements. Perpetuating and expanding them constitutes poor public policy and contradicts the purpose for creating them in the first place. HCC 21.71.050(b) required the Commission to issue written and findings and reasons supporting its decision, not simply adopt the staff report.

7. Public services and facilities are not adequate to serve the proposed uses and structures. Mr. Griswold said he's not required to prove the applicant didn't obtain Fire Marshall Certification, the applicant's required to prove they did and they didn't state the status of it on the application. The applicant did not produce sufficient evidence to enable meaningful review of the application. The side yard setback on the western lot line to meet the requirements of HCC 21.18040(b)(4), condition 1, does nothing to alleviate the potential fire danger of having no separation between the proposed restaurant structure and Inlet Trading Post. Conditions 1,3, and 4 are superfluous and devious because they merely require compliance with existing code while giving the illusion special conditions were imposed, when they were not.

8. The proposal will cause harmful effect on neighborhood character. The CBD describes desirable uses not desirable neighborhood character, and it encourages pedestrian friendly

designs and amenities, not setback reduction and rampant overbuilding of lots. Replacing the existing porch and creating ADA access at the rear of the building can be done without encroaching 15 feet into the setback and without exceeding the 30% lot coverage requirement. Rather than address the effects of setback reduction and excessive lot coverage staff report 20-63 readdressed the restaurants alleged compatibility with the CBD purpose and Comprehensive Plan. The restaurants permitted use and its basic design may not cause harmful effect on neighborhood character but its 15 foot encroachment into the setback, 47% lot coverage, and lack of parking will. The record reflects the Planning staff and Commission disregarded harmony, scale, bulk, coverage, density, generation of traffic, parking issues, nature and intensity of the proposed use, and the effects of the setback reduction.

9. The proposal will be unduly detrimental to the health, safety, and welfare of the surrounding area, and to the City as a whole. If all applicable standards were met the proposal would presumably not be. But stating this as a finding does not address the review criteria. Fire Marshall review of the project is irrelevant because it didn't happen. Improving the safety and quality of the Wild Honey Bistro doesn't mean the proposal will not be unduly detrimental to the health, safety, and welfare of the surrounding area, or to the City as a whole. He pointed out to the Commission the reasons for setback and lot density restrictions were enacted to promote unduly detrimental to the health, safety, and general welfare, and that arbitrarily reducing those requirements is therefore detrimental. The Commission did not consider or discuss any of his public comments but simply ignored them. No evidence was presented to show the setback reduction and increased lot coverage would not be detrimental.

10. The mere approval of CUP 20-15 and a zoning permit does not ensure the proposal complies with the zoning code. The Planning departments allegedly expert analysis concluded the proposal would comply with the applicable provisions of the zoning code does not constitute substantial evidence proving that is the cases. HCC 21.71.030(h) does not require the Commission to include an analysis supporting its findings, but HCC 21.71.050(b) does. The Commission illegally waived parking, landscaping, drainage, and myriad CDM requirements. Mr. Griswold noted relevant zoning code related to landscaping requirements and where Planning staff analysis was deficient in recommendations and suggests leaving it up to effected property owners.

11. The proposal is contrary to myriad goals and objectives of the Comprehensive Plan. The fact the plan comports with some goals and objectives doesn't mean it it's not contrary to others. The Commission's analysis states the proposal will promote infill development in all housing districts and encourage affordable housing, but the proposal has nothing to do with housing. It's also located in the CBD where conflicts between residential and non-residential uses are to be resolved in favor of non-residential uses. The goals this proposal is contrary to are relevant but none of the areas where the proposal may not comport were not addressed. Planning staff has a pro development bias and never finds evidence is contrary to goals and objectives of the Comprehensive Plan. If one fails to look for evidence one will generally not find it.

With that, Mr. Griswold concluded his oral argument and reserved his remaining time for rebuttal.

City Clerk Jacobsen noted property owner Melody Livingston joined the meeting at 4:41 p.m. and that Larry Slone joined as an audience member.

Mayor Castner acknowledged Mr. Griswold's time remaining 12 minutes of time for rebuttal and opened the floor to Attorney Holmquist.

Attorney Holmquist addressed that the issuance of CUP 20-15 was legal and appropriate in all respects. The Commission appropriately followed City Code 21.18 regarding setbacks and lot coverage in the CBD as long as the applicant obtains a CUP. The Commission followed procedure in HCC 21.71 and made factual findings on each of the CUP application criteria. The Commission's findings are supported by substantial evidence in the record. For those reasons the Commission's decision should be upheld.

Attorney Holmquist reviewed legal issues which have already been decided by the Alaska Superior Court in other appeal, noting Mr. Griswold has recently challenged two other Planning Commission discussions to issue CUP's for properties in the CBD. He explained both of the appeals have been decided by the Superior Court, many of the arguments were the same, the Court denied the appeals and rejected the arguments. Some issues already decided include:

- HCC 21.18.040(b) which allow setback reductions by CUP in the CBD is legal.
- HCC 21.18.040(b)(4) does not violate state statutes related to variances.
- HCC 21.18.040(b)(4) does not conflict with HCC 11.08.110 or 11.08.050 (driveway permitting).

He added Mr. Griswold has been barred from arguing these same issues again in a different case. It's called "collateral estoppel" and the goal is finality and is in place to prevent a party from repeatedly trying to reargue the same issue when it's already been decided. The Alaska Supreme Court has held this applies to administrative proceedings.

Not all of the arguments raised are barred by collateral estoppel but it's worth noting they've already been rejected by the Superior Court and would likely be barred if attempted again. Some of those decisions include:

- The City Planner is allowed to sign the Commission's decision and constitutes issuance of a CUP.
- HCC 21.71.030(a) which requires the applicant to produce sufficient evidence for review. The Commission looks at all the materials submitted with the application, not just the form itself.

Regarding the Equal Protection Clause, Attorney Holmquist explained it's a State and Federal Constitutional issue, and issuing a CUP for setback reduction does not violate the Equal Protection Clause. He cited HCC 21.18.040(b)(4) allowing setback reductions by CUP in the CBD

with exception of Lake Street and Sterling Highway. He explained the exception for those two areas and that it does not infringe or restrict what Mr. Griswold's can do on properties because he is not a property owner on Lake Street or Sterling Highway.

It was appropriate for the Planning Commission to consider the City Planning Staff Report 20-63 when reviewing the application. It's standard procedure for considering CUP's. Nothing prevents the Commission from disagreeing with the conclusion of the staff reports. When adopting the staff report findings, it only does so after the public hearing and after first reviewing the applications, written public comments, and testimony at the hearing. The Commission looks at the entire record before making a determination. This is not illegal in any way, as has been suggested.

Regarding the bias allegation against Commission Chair Smith, Attorney Holmquist said the allegation is not supported by the record. It appears to be based off of another hearing, not related to this one, and is not part of the record in this case.

Considering the application and granting CUP 20-15 as a single CUP authorizing multiple conditional uses on the property, setback reduction and lot coverage over 30%, was appropriate. In the argument of either requiring two separate applications and permits, or to separate sets of factual findings, the zoning code calls for a single application for all proposed uses and structures.

Discussion in Mr. Griswold's briefing arguing the Comprehensive Plan's reference to infill is unconstitutionally vague, and his clarifying comment the plan is unconstitutional as applied. In his reply brief he doesn't explain why the reference to infill is unconstitutionally vague as it was used in the Commission's decision specifically and doesn't meeting the burden of proof for a constitutional challenge.

Mr. Griswold argues a third reason for a CUP in this case is that a property would have more than one building containing a permitted principal use on the lot. Attorney Holmquist explain no CUP was required because Wild Honey and Inlet Trading are part of the same shared structure. He reviewed definitions in the zoning code and definitions related to this.

It was appropriate for the Commission to reduce the number of parking spaces for the property in the CUP process. The zoning code allows for the Commission to do this as special design or site requirements.

Regarding the Commissions factual findings, Attorney Holmquist noted in zoning code appeals the Board of Adjustment is supposed to defer to the Commission's findings on disputed factual issues. Factual findings are considered true if they're supported by substantial evidence. Substantial evidence is enough evidence for a reasonable person to accept as adequate to support a conclusion. He reviewed evaluation criteria, several of the Commission's findings, and information in the record that constitute substantial evidence to support those findings.

In closing, Attorney Holmquist commented the record reveals the Commission properly granted CUP 20-15, they properly followed the Zoning Code in considering the application, and their decision and factual findings are supported by substantial evidence of record. Most of Mr. Griswold's legal arguments are barred or have already been rejected by the Superior Court, and the others have no merit as is established in their briefing. The City respectfully requests the Board of Adjustment uphold the Commission's grant of CUP 20-15.

Mayor Castner opened the floor to Mr. Griswold for rebuttal.

Mr. Griswold expressed Attorney Holmquist's explanation of code compliance and that it relieves the Commission of doing any analysis. In addressing how this proposal meets goals for a renovated restaurant, which is a fully permitted use. There was no discussion tonight or in the staff report and Commission hearing about the setback reduction or 47% lot coverage. It was only mentioned on one line in the staff report as an approximation. All they did was analyze the restaurant expansion, which is a permitted use and it wouldn't have mattered because it would need a CUP if that's all it was. It ignored what was really being applied for. He questioned if it's inconceivable that Bunnell Street area will someday be reconstructed and drainage put in.

His main concern is the comments that all his arguments are barred. He thinks collateral estoppel applies in Superior Court proceedings, and he doesn't think it's applicable at this level. What wasn't addressed is that one of his appeals that set the precedence for collateral estoppel is long overdue for a decision by the Alaska Supreme Court. Once it's issued it could set the reversal precedent that would allow him to file to have those issues re-litigated. It's not a done deal.

Everyone's wringing their hands over parking issues and asking how they came about, it came about because developer were allowed to develop irresponsibly and not allow for adequate parking. It's easier to address these issues before they happen.

The staff report was prepared before any public testimony was received. It's always that way and it's wrong. It violates due process and unduly influences the Commission.

He addressed references in the staff report to two separate buildings, multiple CUP's, infill and constitutional challenge of the Comprehensive Plan but as it's applied. He questions what possible reasonable basis there could be for reducing parking spaces in an already congested area.

He explained the Board has full authority to remand to the Commission and impose additional conditions, he further noted that the criteria for a CUP has to be reviewed and met to be approved.

Mayor Castner announced oral arguments are concluded and opened the floor to question from the Board of Adjustment. No questions were raised.

COMMENTS OF THE AUDIENCE

There were no comments.

Mayor Castner asked for a motion to recess into executive session.

LORD/ADERHOLD MOVED THAT THE BOARD OF ADJUSTMENT RECESS INTO EXECUTIVE SESSION FOR THE PURPOSE OF DELIBERATING THIS APPEAL.

VOTE: YES: ADERHOLD, HANSEN-CAVASOS, LORD, SMITH, EVENSEN

Motion carried.

Council recessed into executive session at 6:00 p.m.

Mayor Castner reconvened the meeting at 7:21 p.m.

Councilmember Lord announced the Board of Adjustment met in executive session to deliberate this matter and provide input to the Board's Counsel.

Mayor Castner explained that a written decision will be prepared and issued to the parties at a later date after deliberations are completed. Copies of the written decision of the Board will be mailed to the appellant and all other parties who entered an appearance in the appeal pursuant to Homer City Code 21.93.110(c). Once a final decision has been entered by the Board, an appeal from that decision 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 or City Planner or any governmental official, agency, or unit. That appeal must be filed within 30 days of the date of distribution of the final decision. HCC 21.91.130(a)(b).

ADJOURN

There being no further business to come before Council Mayor Castner adjourned the meeting at 7:23 p.m. The next Regular Meeting is Monday, February 22, 2021, at 6:00 p.m. Committee of the Whole at 5:00 p.m. All meetings scheduled to be held via Zoom Webinar in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Approved: March 22-2021

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

City Council Special Meeting as Board of Adjustment
Tuesday, March 09, 2021 at 5:30 PM
City Hall Cowles Council Chambers via Zoom Meeting
Dial: +1 669 900 6833 or +1 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099
Meeting ID: 990 5235 7397 Passcode: 401884

CALL TO ORDER

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

PUBLIC COMMENT ON MATTERS ALREADY ON THE AGENDA (3 minute time limit)

PENDING BUSINESS

a. Memorandum from City Clerk Re: Appellant Request for Consideration of New Evidence and Vitiation in the appeal to the Board of Adjustment by Frank Griswold regarding the Planning Commission Decision on Conditional Use Permit 20-15 under HCC 21.18.040(b)(4) a building within the twenty foot building setback and HCC 21.18.040(d) building area in excess of 30 percent of the lot area on a lot in the central business district on Chamberlain & Watson No. 4, Lot 1-A and T 6S R 13W SEC 19 Seward Meridian HM 2011002 Inlet Trading Post Condominiums Unit 2 at 106 W. Bunnell Avenue, Homer, Alaska.

b. Adjourn to Executive Session for the Purpose of Continuing Deliberation of the Appeal of CUP 20-15.

NEW BUSINESS

COMMENTS OF THE AUDIENCE

ADJOURNMENT

Next Regular City Council Meeting is Monday, March 22, 2021, at 6:00 p.m. Committee of the Whole at 5:00 p.m. All meetings are scheduled to be held via Zoom Webinar in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

City of Homer
www.cityofhomer-ak.gov

Office of the City Clerk
491 East Pioneer Avenue
Homer, Alaska 99603
clerk@cityofhomer-ak.gov
(p) 907-235-3130
(f) 907-235-3143

Memorandum

TO: Board of Adjustment

FROM: Melissa Jacobsen, MMC, City Clerk

DATE: February 27, 2021

SUBJECT: Appellant Request for Consideration of New Evidence and Vitiation the appeal to the Board of Adjustment by Frank Griswold regarding the Planning Commission Decision on Conditional Use Permit 20-15 under HCC 21.18.040(b)(4) a building within the twenty foot building setback and HCC 21.18.040(d) building area in excess of 30 percent of the lot area on a lot in the central business district on Chamberlain & Watson No. 4, Lot 1-A and T 6S R 13W SEC 19 Seward Meridian HM 2011002 Inlet Trading Post Condominiums Unit 2 at 106 W. Bunnell Avenue, Homer, Alaska.

Attached for the Board of Adjustment's consideration is an email from Appellant Frank Griswold submitted to the City Clerk's office February 13, 2021 entitled *CUP 20-15 Undisclosed Property Owners; Motion for Remand/Vitiation.*

From: Frank Griswold
To: Melissa Jacobsen
Subject: CUP 20-15 Undisclosed Property Owners; Motion for Remand/Vitiation
Date: Saturday, February 13, 2021 9:38:04 PM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Melissa,

The Application for CUP 20-15 identifies the KPB Tax ID # of the subject property as 17516052 and the property owner as Melody Livingston. [R. 19] Staff Report 20-63 identifies Melody Livingston as "Land/restaurant owner (Wild Honey Bistro)" and identifies the subject Parcel ID as: "17516052 (parcel) 17516052CO01 Unit 1, 17516052CO02 Unit 2." [R. 7] KPB records indicate that Lewis Morris is co-owner of Wild Honey Bistro as does an article in the July 14, 2014 edition of the Homer Tribune entitled "Kodiak couple opens creative creperie." KPB records further indicate that Parcel 17516052 is owned by Inlet Trading Post LLC and contains no improvements while (condo) Parcel 17516052CO01 pertains to the Inlet Trading Post and (condo) Parcel 17516052CO02 pertains to Wild Honey Bistro, both which have improvements. The Alaska Division of Corporations website indicates that Inlet Trading Post LLC is 60% owned by Asia Freeman and 40% owned by Michael Walsh. In her letter to the Commission, Asia Freeman identified herself as Artistic Director of Bunnell Street Arts Center [R. 54]. The true ownership interests in the subject property were clearly not disclosed and this cannot now simply be dismissed as harmless error. When the Commission considered what proved to be the highly influential comments of Asia Freeman, it had the right to know that she was more than just the director of an adjoining art studio. Planning Commissioners and/or members of the Board of Adjustment might have disqualifying financial conflicts of interest or conflicts of bias due to their personal or business relationships with Michael Walsh, Asia Freeman, and/or Lewis Morris. Pursuant to HCC 21.93.510(c), I hereby request that the Board of Adjustment consider this new evidence for the purposes of conflict of interest, ex parte contact, and/or partiality disclosures and remand to the Commission so that it can consider it for these disclosures as well. Alternatively and pursuant to HCC 21.93.570, I hereby request that CUP 20-15 be summarily vitiated due to the gross insufficiency and deception of the Application and the irreparable effects the deliberate nondisclosure of the above-referenced property owners had on the Commission's Decision.

Frank

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
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Telephone: (907) 563-8844
Facsimile: (907) 563-7322
mgatti@jdolaw.com
mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER BOARD OF ADJUSTMENT

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision.
	)	October 7, 2020

CITY OF HOMER'S OPPOSITION TO MOTION FOR REMAND/VITIATION

The City of Homer (the "City"), by and through its counsel of record, Jermain, Dunnagan & Owens, P.C., hereby opposes Appellant Frank Griswold's Motion for Remand/Vitiation.[1] There is no basis for the Homer Board of Adjustment ("BOA") to remand this matter to the Commission or "vitiate[]" CUP 20-15. The public records to which Griswold refers are not "new evidence" and the BOA should exercise its discretion under HCC 21.93.510(a) to decide the appeal without considering them. If the BOA determines that it will take additional evidence regarding the issues discussed in Griswold's motion, it should only consider that evidence for the limited purposes set forth in HCC 21.93.510(c).

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[1] Filed with the City Clerk on February 13, 2021. The City was not served with a copy of the motion until February 27, 2021.

106 West Bunnell Avenue (the "Property") is organized as a condominium form of ownership with two separate units. [R. 7-8] The two units, while part of the same structure, are considered separate parcels by the Kenai Peninsula Borough ("KPB"). [R. 7] Applicant Melody Livingston is a co-owner of 106 West Bunnell Avenue #2, one of the condominium units on the Property. [R. 7] Unit 2, the Wild Honey Bistro restaurant, is the subject of CUP 20-15. [R. 7] Unit 1 is the Inlet Trading Post, a separate parcel under different ownership. [R. 7-8] KPB records indicate that Melody Livingston and Morris Lewis Jr. own Unit 2.[2] Its assessed value includes both the land and portion of the shared structure that are part of Unit 2.[3] Michael Walsh, Asia Freeman, and Inlet Trading Post, LLC have no ownership interest in Unit 2.[4]

The public records to which Griswold's motion refers (KPB real property assessment records and Alaska Division of Corporations records) are not "new evidence" requiring remand under HCC 21.93.510. Although the zoning code does not define "new evidence," the Alaska Supreme Court has stated that new evidence must "be of such a nature that it could not have been discovered before trial by due diligence."[5] Griswold has not explained why public records which existed prior to and during the Commission's consideration of the application and this appeal could not have been discovered by due diligence. The fact that Griswold recently discovered these records does not make them "new evidence."

---

[2] *See* KPB Real Property Assessment records for Parcel 17516052CO02, attached hereto as Exhibit A. These materials are not part of the appeal record and the City offers them solely to clarify the issues raised in Griswold's motion.
[3] *Id.*
[4] *Id.*
[5] *Babinec v. Yabuki*, 799 P.2d 1325, 1332-33 (Alaska 1990).

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Even if the records were "new evidence," they do not provide a reason for the BOA to remand this matter to the Commission. HCC 21.93.510(a) requires the BOA to make its decision solely on the closed Commission record. If "new evidence or changed circumstances are alleged," the BOA has the discretion to either hear the appeal without considering the allegations or remand the matter to the Commission for rehearing.[6] Remand would be inappropriate here. Alaska has a "sound policy of having finality in litigation."[7] In light of this policy, the BOA should exercise its authority to remand sparingly and only under circumstances where truly new evidence may materially affect the outcome. In this case, the fact that Asia Freeman is part owner of Unit 1 is not "new" evidence and it has no bearing her comments in support of the application. Neither Ms. Freeman nor the co-owner of Unit 1 have any ownership interest in Unit 2, the subject of CUP 20-15.[8] There is also no suggestion in the record that Ms. Freeman's comments were any more "influential" than other public comments or materials in the record. There is no support for Griswold's assertion that the application was deceptive or insufficient. In short, there is no reason for the BOA to remand this matter to the Commission.

The BOA cannot, as Griswold suggests, "summarily vitiate[]" CUP 20-15 due to alleged "new evidence." HCC 21.93.570 only applies in the absence of a specific

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[6] HCC 21.93.510(a).
[7] *Love v. Severance*, 564 P.2d 1222, 1224 (Alaska 1977). *See also Cook v. Cook*, 249 P.3d 1070, 1083 (Alaska 2011 (interest in finality prevents relitigation of issues that have already been resolved).
[8] *See* Exhibit A.

procedure prescribed by the Code. The BOA considers allegations of new evidence in accord with HCC 21.93.510, which does not allow the BOA to "vitiate" a CUP.

HCC 21.93.510(c) allows the BOA to take additional evidence for the limited purpose of addressing an alleged conflict of interest, ex parte contact, or partiality for a member of the BOA. If the BOA takes additional evidence for this reason, it should only consider that evidence for the limited purposes outlined in HCC 21.93.510(c).

CONCLUSION

The public records referenced in Griswold's motion are not "new evidence" requiring this matter to be remanded to the Commission under HCC 21.93.510(a). Nothing in Griswold's motion establishes a need or reason for the BOA to remand this matter to the Commission. The BOA cannot "vitiate" the CUP as Griswold suggests. Accordingly, the BOA should deny Griswold's requests to remand this matter or "vitiate[]" CUP 20-15. If the Commission decides to take additional evidence under HCC 21.93.510(c), it should only consider that evidence for the limited purposes outlined therein.

DATED this 2nd day of March, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee City of Homer

By: s/*Michael R. Gatti*/
Michael R. Gatti
Alaska Bar No. 8306033
Max D. Holmquist
Alaska Bar No. 0011057

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Mar 1 2021 7:59PM

Kenai Peninsula Borough

Assessing Department
144 N. Binkley Street
Soldotna AK 99669

General Information

MORRIS REYNOLD LEWIS Jr	**Property ID**	17516052CO02
LIVINGSTON MELODY D	**Address**	106 W BUNNELL AVE UNIT CO02
106 W BUNNELL AVE STE B	**Document / Book Page**	20170005930
HOMER, AK 99603-7851	**Acreage**	0.0000

Owners

Property ID	Display Name	Address
17516052CO02	LIVINGSTON MELODY D	106 W BUNNELL AVE STE B
17516052CO02	MORRIS REYNOLD LEWIS Jr	106 W BUNNELL AVE STE B

Legal Description

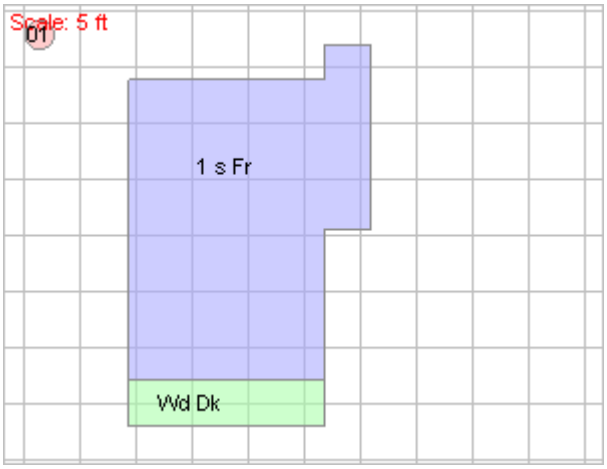
Description
T 6S R 13W SEC 19 Seward Meridian HM 2011002 INLET TRADING POST CONDOMINIUMS UNIT 2

Value History

Year	Reason	Assessed		
		Land	Structures	Total
2021	Main Roll Certification	$36,300	$18,000	**$54,300**
2020	Main Roll Certification	$36,300	$19,200	**$55,500**
2019	Main Roll Certification	$36,300	$21,500	**$57,800**
2018	Main Roll Certification	$36,300	$23,700	**$60,000**
2017	Main Roll Certification	$52,800	$25,200	**$78,000**
2016	Main Roll Certification	$28,300	$21,100	**$49,400**
2015	Main Roll Certification	$28,300	$23,500	**$51,800**
2014	Main Roll Certification	$28,300	$25,700	**$54,000**
2013	Main Roll Certification	$28,300	$27,300	**$55,600**
2012	Main Roll Certification	$28,300	$26,800	**$55,100**

C01 - Extension Details

Address 106 W BUNNELL AVE UNIT CO02
Grade L
Year Built 1937
Value $10,800



Attribute

Story	Use	Attribute	Code	Detail
	0	Class	1	Wood frame
	0	Roofing Cover	1	Built-up
	0	Stories	1	
1	SNACK	Exterior Wall	100	Stud Walls-Wood Siding

Floor Areas

Code	Description	Story	Gross	Heated	AC
SNACK	Snack Bar	1	506	506	0
Total			506	506	0

Exterior Features

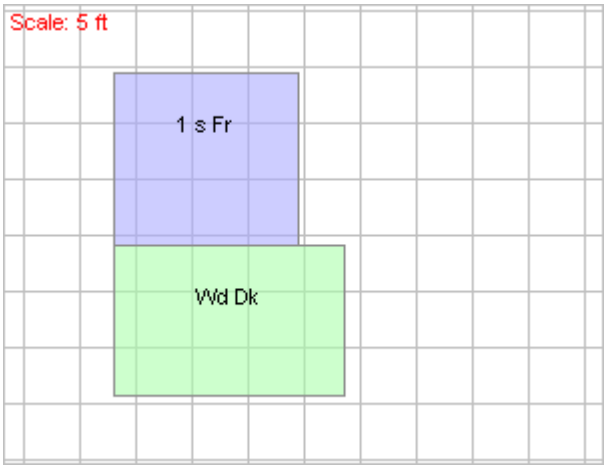
Code	Description	Story	Size	Heated	AC
WDDK	Wood deck		68.00	0	0

Structures

Code	Year	Bldg	Length	Width	Units	Unit Type	Value
SHEDGP	1950	C01	42.00	15.00	630	SF	$1,100

C02 - Extension Details

Address 106 W BUNNELL AVE UNIT CO02
Grade L-
Year Built 1990
Value $6,100



Attribute

Story	Use	Attribute	Code	Detail
	0	Roofing Cover	4	Shingle
	0	Stories	1	
1	DATRIUM	Exterior Wall	62	Stud Walls-Wood Siding

Floor Areas

Code	Description	Story	Gross	Heated	AC
DATRIUM	Dining Atrium	1	240	240	0
Total			240	240	0

Exterior Features

Code	Description	Story	Size	Heated	AC
WDDK	Wood deck		260.00	0	0

Land Details

Primary Use	Land Type	Acres	Eff Frontage	Eff Depth	Asd Value
	Commercial City/Farm Acreage	0.0600	0.00	0.00	$36,300

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Attorneys for City of Homer

BEFORE THE HOMER BOARD OF ADJUSTMENT

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision.
	)	October 7, 2020

[PROPOSED] ORDER DENYING MOTION FOR REMAND/VITIATION

The Homer Board of Adjustment, having reviewed Appellant Frank Griswold's Motion for Remand/Vitiation, as well as the City of Homer's opposition thereto, hereby DENIES the same.

DATED:_____ _____

MAYOR KEN CASTNER
HOMER BOARD OF ADJUSTMENT

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BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT'S REPLY TO CITY'S OPPOSITION TO MOTION FOR REMAND/ VITIATION

The City Attorneys base their objection to Appellant's Motion for Remand/Vitiation on the premise that the public records referred to do not constitute "new evidence" (citing *Babinec v. Yabuki*, 799 P.2d 1325, 1332-33 (Alaska 1990). *Babinec v Yabuki* involved a personal injury claim, a civil trial, and an assertion of fraud, misrepresentation or misconduct as a ground for relief under Civil Rule 60(b)(3), it did not involve an administrative appeal of a planning commission's zoning determination. Civil Rule 60(b)(2) provides for relief from final judgment where there is newly discovered evidence which by due diligence ***could not have been discovered in time to move for a new trial under Rule 59(b).*** In the instant case, the newly discovered property ownership evidence was discovered in time

for a remanded proceeding. If this previously undisclosed ownership evidence does not constitute "new" evidence, what kind of evidence is it?

An application for a conditional use permit requires the name and address of all owners of the subject lot. HCC 21.71.020(a)(1). A CUP application must include the applicant's signed certification that all the information contained in the application is true and correct. HCC 21.71.020(a)(10). The City Planner will determine if the application is complete. If not complete, the City Planner will advise the applicant what corrective actions should be taken to complete the application. HCC 21.71.020(b). The reason why public records which existed prior to and during the Commission's consideration of the application were not discovered by due diligence is because neither planning staff nor the Commissioners exercised due diligence in their consideration of CUP 20-15. The City Attorneys fail to explain why the public records showing ownership interests in the subject property which existed prior to and during the Commission's consideration of the application were not discovered via due diligence by the allegedly expert planning staff and/or the Commission.

Staff Report 20-63 identifies the subject parcel as 17516052. [R. 7] KPB records show that this parcel is solely

owned by Inlet Trading Post LLC which, in turn, is owned by Asia Freeman and Michael Walsh. The rear parking lot is used for "parking by all business occupants/staff for Bunnell, The Fringe and Old Town B&B." [R. 54] Asia Freeman didn't want to incur the expense of paving that potentially dusty parking lot: "It is a very big expense (at least $20,000, last I checked) for Wild Honey (and consequently the Bunnel Art Center, and other tenants of 106 W Bunnell, ***and it's [sic] shared owner***) but not other business owners in Old Town." [R. 53] She also objected to the imposition of landscaping and fencing requirements. [R. 54]

The fact that the KPB Real Property Assessment records showing who owns the subject property were not previously included in the record clearly qualifies them as "new evidence." Identifying all property owners involved is essential for any CUP application. Furthermore, all property owners are indispensable parties to this appeal. The deliberate concealment of multiple ownership interests is fatal to the application for CUP 2020-15. Where an intent to deceive exists, the burden may shift to the non-moving party to prove that the misconduct did not interfere with the full and fair presentation of the case. *Anderson v. Cryovac Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) (quoting *Bros Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir. 1965)).

At page 2 of City's Reply Brief it states as follows:

> Although City Planning Staff Report 20-63 describes the Property as having two "buildings," in fact the Inlet Trading Post and the Wild Honey Bistro are currently part of a single structure. [R. 8] The application describes the Inlet Trading Post and the Wild Honey Bistro as a "shared structure." [R. 18] Asia Freeman of the Bunnell Street Arts Center (in the Inlet Trading Post) noted that the Wild Honey Bistro "is physically attached to the Inlet Trading Post..." [R. 53] Photographs of the Property confirm these descriptions. [R. 29-31] When the project is complete, ***they will share a load-bearing wall, front porch, and awning, and will be connected by an interior staircase on the second level.*** [R. 24- 28] Since the Inlet Trading Post and the Wild Honey Bistro are part of a single shared structure, this proposal does not include two buildings containing a permitted principal use on the Property.
>
> Accordingly, there is no non-conforming use and no CUP is required under HCC 21.18.030(j).

So when arguing that no additional CUP is required for more than one building containing a permitted principal use on the subject lot, the City Attorneys argue that the Inlet Trading Post structure and the Wild Honey Bistro structure will share a load-bearing wall, front porch, awing, and interior staircase. But when arguing that the ownership of the Inlet Trading Post is immaterial to the application for CUP 20-15, they claim that "Michael Walsh, Asia Freeman, and the Inlet Trading Post, LLC have no ownership interest in Unit 2."[1] When the Commission issued its Decision, it relied on Staff Report 20-63 (stating that the Property had two buildings). The Commission approved

[1]Page 2 of City's Opposition.

Staff Report 20-63 [R. 63-64]; it did not approve the City Attorney's Reply Brief. The new and old evidence indicates that the proposal involves two abutting condominium buildings with some portions thereof and elsewhere on the subject lot shared in common among four property owners. It seems highly unlikely that Fire Marshal Certification for the proposed construction could be obtained without there being a substantial separation/fire break between the two buildings. Note that connecting the three existing Wild Honey Bistro structures did not transform them into one building.

At page 3, the City Attorneys claim that the fact that Asia Freeman is part owner of Unit 1 is not "new" evidence but fail to point out where in the record her ownership interest in Unit 1 is disclosed. The City Attorneys further claim: "There is also no suggestion in the record that Ms. Freeman's comments were any more "influential" than other public comments or materials in the record. The record clearly demonstrates that Ms. Freeman's comments were more influential than those regarding dust pollution, noise pollution, visual distraction, ventilation of cooking smells, landscaping, decreased property values, and parking issues submitted by adjacent property owners Sherry Thompson, Susan Miller, and Gary Miller which were totally ignored after Ms. Freeman weighed in. [R. 47-48; 55]

CONCLUSION

The public records referenced in Appellant's motion clearly constitute "new evidence" in the context of HCC 21.93.510. Pursuant to HCC 21.93.570 and Civil Rule 60(b)(2), the deliberate misrepresentation of ownership interests is grounds for vitiation of CUP 20-15 by the Board of Adjustment. Alternatively, remand to the Commission in accordance with HCC 21.93.510(c) would be appropriate.

DATED: March 8, 2020.

By: s/*Frank Griswold*/
Frank Griswold

Session 21-08 a Special Meeting of the Homer City Council sitting as Board of Adjustment was called to order on March 9, 2021 by Mayor Ken Castner at 5:30 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBER ADERHOLD, EVENSEN, HANSEN-CAVASOS, LORD, SMITH, VENUTI

ABSENT: VENUTI (excused)

STAFF: CITY CLERK JACOBSEN
ATTORNEY BRANDT-ERICHSEN

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

Mayor Castner note the public comment portion at the beginning of the agenda was improperly noticed and will not be accepted before the Board of Adjustment meeting.

The agenda was approved by consensus.

PUBLIC COMMENT

PENDING BUSINESS

a. Memorandum from City Clerk Re: Appellant Request for Consideration of New Evidence and Vitiation in the appeal to the Board of Adjustment by Frank Griswold regarding the Planning Commission Decision on Conditional Use Permit 20-15 under HCC 21.18.040(b)(4) a building within the twenty foot building setback and HCC 21.18.040(d) building area in excess of 30 percent of the lot area on a lot in the central business district on Chamberlain & Watson No. 4, Lot 1-A and T 6S R 13W SEC 19 Seward Meridian HM 2011002 Inlet Trading Post Condominiums Unit 2 at 106 W. Bunnell Avenue, Homer, Alaska.

Mayor Castner announced the Board received a motion from Mr. Griswold that has been opposed by the City's attorney, and Mr. Griswold has responded. The Councilmembers have all seen the information. In light of that information, Mayor Castner asked if any members have any conflict of interest or ex-parte communication since the last hearing.

No disclosures were made.

Mayor Castner asked if any Councilmembers want to hear additional oral testimony. There were no requests for addition testimony. He explained they will take up the motion as the first order of business in executive session then move on to any other matters that need to be addressed.

b. Adjourn to Executive Session for the Purpose of Continuing Deliberation of the Appeal of CUP 20-15.

LORD/ADERHOLD MOVED TO ADJOURN TO EXECUTIVE SESSION FOR THE PURPOSE OF CONTINUING DELIBERATION OF THE APPEAL OF CUP 20-15.

There was no discussion.

VOTE: YES: SMITH, ADERHOLD, LORD, EVENSEN, HANSEN-CAVASOS

Motion carried.

Council went into executive session at 5:46 p.m.

Mayor Castner called the meeting back to order at 6:24 p.m.

LORD/ADERHOLD MOVED TO ADOPT THE DECISION OF THE BOARD OF ADJUSTMENT AS SET FORTH IN THE DECISION AND ORDER, REMANDING TO THE PLANNING COMMISSION.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

Mayor Castner explained copies of the decision will distributed by the City Clerk.

COMMENTS OF THE AUDIENCE

Frank Griswold, city resident, expressed his dissatisfaction at not being able to comment at the beginning of the meeting.

Larry Slone, city resident, also expressed his dissatisfaction at not being able to comment at the beginning of the meeting.

ADJOURNMENT

There being no further business to come before Council Mayor Castner adjourned the meeting at 6:30 p.m. The next Regular Meeting is Monday, March 22, 2021, at 6:00 p.m. Committee of the Whole at 5:00 p.m. All meetings scheduled to be held via Zoom Webinar in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Approved: March 22, 2021

031821 MJ

BEFORE THE CITY OF HOMER

BOARD OF ADJUSTMENT

In the Matter of		
	)	
	)	On Appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision of
	)	October 7, 2020.

DECISION AND ORDER REMANDING TO THE PLANNING COMMISSION

The Board of Adjustment met in open session on February 11, 2021 and heard arguments in the above referenced matter. At the conclusion of the hearing, the BOA recessed into executive session to deliberate. The Board of Adjustment met again on March 9, 2021 to deliberate and considered the Appellant's Motion for Consideration of Additional Evidence and for Remand due to the ownership to the property. The Board of Adjustment met in executive session and deliberated concerning the Motion for Consideration of Additional Evidence and for Remand based upon new information and decided the matter. Participants in this proceeding and decision included Mayor Ken Castner as chair, who was a non-voting participant, and council members Donna Aderhold, Heath Smith, Storm Hansen-Cavasos, Rachel Lord and Joey Evensen. Council Member Caroline Venuti did not participate in the hearing or decision due to conflict of interest as determined by vote of the balance of the Board of Adjustment. After deliberation and consideration of the record and the arguments of the parties, the Board of Adjustment decision is as set forth herein.

Upon review of the Appellant's February 13, 2021 Motion for Consideration of Additional Evidence and to Remand and Plaintiff's Opposition, the Motion to Remand is GRANTED. The new evidence is admitted to the record and the matter is remanded to the Homer Planning Commission for further review under HCC 21.93.510 (a) and (c) to address the following issues:

1. Whether any members of the Planning Commission had disqualifying financial interests or bias due to the ownership of the Inlet Trading Post, LLC, and the three individuals identified in the motion, Lewis Morris, Michael Walsh, and Asia Freeman;
2. Whether the subject property involved in the project is a single structure and involves the entire parcel identified as Tax ID # 17516052, specifically,
    a. Whether the project is a single building and thus exempt from the requirement for a Conditional Use Permit (CUP) for a second building containing a permitted principal use on a single lot under HCC 21.18.030(j);
    b. Whether the project is two buildings but is exempt from getting a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) because the particular use here has an existing non-conforming use right which is not lost by the reconstruction;
    c. Whether the project is two buildings and requires a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) and the CUP

application here was treated as including that CUP request and the request was granted; or

d. Whether the project here is two buildings and requires a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) and the CUP application did not include that request.

3. Whether, if the Planning Commission determines that the project includes or affects attributes such as parking involving the entire parcel or condominium association, the application was incomplete or defective for the lack of signature of the representatives of the condominium association or the owners of both units on the parcel identified as Tax ID # 17516052 showing consent of the owner and authority to bind the owners of the entire lot involved in the project as required under HCC 21.71.020(a)(9).

The Board of Adjustment finds that the Planning Commission's findings of fact on these issues is inadequate for review. The Board of Adjustment recognizes that it has the discretion to either remand to address these issues to the Planning Commission or make its own findings of fact under HCC 21.93.540(e). Due to the allegation of conflict, and the central role that the allegation regarding building ownership has in the determination of these questions of fact which are not reflected in the record, the Board of Adjustment determines that remand to the Planning Commission for further proceedings is the most appropriate course of action.

DATED: 09 March, 2021.

KEN CASTNER, MAYOR
HOMER BOARD OF ADJUSTMENT

Certification of Distribution

I certify that a copy of the Board of Adjustment decision in the matter of Conditional Use Permit 2020-15 on Appeal from Planning Commission Decision of October 7, 2020 was mailed to the recipients listed below on March 10, 2021. A copy was delivered to the City of Homer Planning Department on the same date.

3·10·21
Date

Melissa Jacobsen, MMC, City Clerk

Frank Griswold
519 Klondike Ave.
Homer, AK 99603

Melody Livingston
106 W. Bunnell #2
Homer, AK 99603

Matt Early, Beachy Construction
5243 Kachemak Dr.
Homer, AK 99603

Michael Gatti and Max Holmquist
Jermain, Dunnagan & Owens
3000 A Street, Suite 300
Anchorage, AK 99503

Robert Dumouchel, City Manager
491 E. Pioneer Avenue
Homer, AK 99603

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

Planning Commission Regular Meeting
Wednesday, June 02, 2021 at 6:30 PM
Council Chambers via Zoom Webinar
Webinar ID: 979 8816 0903 Password: 976062
Dial 669 900 6833 or 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099

CALL TO ORDER, 6:30 P.M.

AGENDA APPROVAL

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

RECONSIDERATION

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.

A. Planning Commission Regular Meeting Minutes of May 19, 2021

B. Decisions and Findings Conditional Use Permit (CUP) 21-05 to expand a deck for outdoor seating at the Harbor Grill restaurant, 4262 Homer Spit Rd.

C. Memo from City Clerk, Re: Motion to Dismiss Appeal in the Matter of Conditional Use Permit 2020-15 and Order Granting Motion to Dismiss Appeal

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-34, City Planner's Report

B. Public Works Task Force

PUBLIC HEARINGS

A. Staff Report 21-35, An Ordinance to add onsite consumption endorsement for marijuana retail facilities as an allowed use

PLAT CONSIDERATION

PENDING BUSINESS

NEW BUSINESS

A. Memo from City Clerk, Re: Introduction of an Ordinance amending the administrative appeals process for City Planning decisions under Homer City Code 21.91 and 21. 93

B. Staff Report 21-36, Ordinance 21-26 Extending the No Wake Zone in City Tidelands, Closing Areas to Motorized Vessels & Funds for Regulation Changes

INFORMATIONAL MATERIALS

A. City Manager's Report for May 24, 2021 City Council Meeting

B. Planning Commission Calendar

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

COMMENTS OF THE STAFF

COMMENTS OF THE COMMISSION

ADJOURNMENT

Next Regular Meeting is Wednesday, June 16, at 6:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska. Meetings will adjourn promptly at 9:30 p.m. An extension is allowed by a vote of the Commission

City of Homer
www.cityofhomer-ak.gov

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491 East Pioneer Avenue
Homer, Alaska 99603
clerk@cityofhomer-ak.gov
(p) 907-235-3130
(f) 907-235-3143

Memorandum

TO: CHAIR SMITH AND THE HOMER PLANNING COMMISSION

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: MAY 27, 2021

SUBJECT: MOTION TO DISMISS APPEAL IN THE MATTER OF CONDITIONAL USE PERMIT 2020-15 AND ORDER GRANTING MOTION TO DISMISS APPEAL

A motion to dismiss the appeal in the matter of Conditional Use Permit 2020-15 and an order granting motion to dismiss appeal was submitted by the City through its counsel of record Jermain, Dunnagan & Owens P.C. This is prompted by the applicant in the matter withdrawing her conditional use permit application for 106 W. Bunnell Avenue.

Attachments:
- Motion to dismiss appeal
- Order granting motion to dismiss appeal

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322
mgatti@jdolaw.com
mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

MOTION TO DISMISS APPEAL

The City of Homer (the "City"), by and through its counsel of record, Jermain, Dunnagan & Owens, P.C., hereby moves to dismiss the above-captioned appeal because the applicant for Conditional Use Permit 2020-15, Melody Livingston (the "Applicant"), has withdrawn her application.

On March 9, 2021, the Homer Board of Adjustment ("BOA") remanded the above-captioned appeal to the Homer Planning Commission (the "Commission") for further review under HCC 21.93.510(a).[1] On April 20, 2021, the Applicant emailed the City notifying it that she has withdrawn her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue that is the subject of this appeal.[2] The Applicant's withdrawal of her conditional use permit application voids CUP 20-15.

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A PROFESSIONAL CORPORATION
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ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

[1] *See* Decision and Order Remanding to the Planning Commission dated March 9, 2021.
[2] *See* emails between Melody Livingston and the City, copies of which are attached hereto as Exhibit A.

The Commission should dismiss this appeal due to the Applicant's withdrawal of her application for two reasons. First, the withdrawal of the CUP application that is the basis of this appeal moots the claims on appeal. The Alaska Supreme Court has held that "a claim is moot if it has lost its character as a present, live controversy."[3] In this appeal, the relief sought by the Appellant is the denial of CUP 20-15. Since CUP 20-15 is voided by the withdrawal of the CUP application, the issues raised in this appeal are moot.

Second, the Commission and the BOA no longer have jurisdiction to decide any issues raised in this appeal. The Commission's jurisdiction to consider and decide upon a CUP application depends upon the existence of a CUP application.[4] The BOA's appellate jurisdiction only extends to the grant or denial of a CUP.[5] Neither body has jurisdiction to decide legal issues related to a CUP appeal after a CUP applicant has withdrawn her application and is no longer seeking a CUP.

Accordingly, the City respectfully requests that the Commission dismiss the above-captioned appeal.

DATED this 14th day of May, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee
City of Homer

By: s/*Michael R. Gatti*/
Michael R. Gatti
Alaska Bar No. 8306033
Max D. Holmquist
Alaska Bar No. 0911057

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[3] *Akpik v. State, Office of Management and Budget*, 115 P.3d 532, 535 (Alaska 2005).
[4] HCC 21.71.040(a).
[5] HCC 21.93.030(a).

Sherry Sims

From: Rick Abboud <RAbboud@ci.homer.ak.us>
Sent: Thursday, April 29, 2021 4:10 PM
To: Michael Gatti
Cc: Max D. Holmquist
Subject: FW: remand

fyi

From: Rick Abboud
Sent: Tuesday, April 20, 2021 7:34 AM
To: Melissa Jacobsen <MJacobsen@ci.homer.ak.us>
Subject: FW: remand

Melissa,

Melody has requested to withdraw CUP 20-15 regarding the Wild Homey proposal.

Rick

From: (null) (null) <melodyliving@yahoo.com>
Sent: Tuesday, April 20, 2021 6:14 AM
To: Rick Abboud <RAbboud@ci.homer.ak.us>
Subject: Re: remand

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Sorry about the delay. I am now in Chicago. The move was demanding ☹.
Please withdraw my current application. We will resubmit in a year or two.
Thank you for your efforts on this.
Melody Livingston

Sent from my iPhone

> On Apr 15, 2021, at 7:32 PM, Rick Abboud <RAbboud@ci.homer.ak.us> wrote:
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> Just wanted to follow up on our last conversation regard the remand of your CUP for Wild Honey. If you wish to regroup and reapply at a later, please respond with an email stating your intent to withdraw your current application.
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> Thanks,
>
> Rick

RICK ABBOUD, AICP
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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

[PROPOSED] ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: _____ _____

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
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DATED this 14th day of May, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee
City of Homer

By: s/*Michael R. Gatti*/
Michael R. Gatti
Alaska Bar No. 8306033
Max D. Holmquist
Alaska Bar No. 0911057

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

	)	
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[PROPOSED] ORDER GRANTING MOTION TO DISMISS APPEAL

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HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: _____ _____

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

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Session 21-14, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:32 p.m. on June 2, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, via Zoom Webinar. One seat remains vacant. There was no worksession conducted prior to the regular meeting.

PRESENT: COMMISSIONERS VENUTI, HIGHLAND, CONLEY, BARNWELL, AND SMITH

ABSENT: COMMISSIONER BENTZ (EXCUSED)

STAFF: CITY PLANNER ABBOUD
DEPUTY CITY CLERK KRAUSE
PORT DIRECTOR/HARBORMASTER HAWKINS

APPROVAL OF THE AGENDA

Chair Smith requested a motion to approve the agenda.

VENUTI/ HIGHLAND– MOVED TO APPROVE THE AGENDA PRESENTED.

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of May 19, 2021
B. Decisions and Findings Conditional Use Permit (CUP) 21-05 to expand a deck for outdoor seating at the Harbor Grill restaurant, 4262 Homer Spit Rd
C. Memo from City Clerk, Re: Motion to Dismiss Appeal in the Matter of Conditional Use Permit 2020-15 and Order Granting Motion to Dismiss Appeal

Chair Smith read the Consent Agenda into the record and requested a motion.

HIGHLAND/CONLEY – SO MOVED.

There was no discussion.

VOTE. NON- OBJECTION. UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-34, City Planner's Report

Chair Smith introduced the item by reading of the title and requested City Planner Abboud to present his report to the Commission.

City Planner Abboud provided a summary of Staff Report 21-34 that was provided in the packet. He did note that he had some correspondence from the Kenai Peninsula Borough regarding the lots that were owned by the Borough next to and neighboring the Homer Boatyard. They would like to have them designated Commercial. He reported on the conversations he had with the Corps of Engineers and the lots closest to the Homer Boatyard were not high-valued wetlands. City planner Abboud also noted the potential value for stormwater management.

Commissioner Highland volunteered for June 28, 2021 Council Meeting and Chair Smith volunteered for the June 14, 2021 Council meeting.

City Planner Abboud responded and facilitated discussion on the Homer Boatyard expansion, the travel lift and the previous decisions from the Planning Commission to allow building heights to 75 feet. Points and comments made during the ensuing discussion covered the drainage mitigation efforts that may be required, and the impact with future development that the Boatyard expansion will bring to the area.

B. Public Works Campus Task Force Report

Chair Smith introduced the item and asked for Commissioner Barnwell to provide his report.

Commissioner Barnwell stated that he did not attend that meeting.

Deputy City Clerk Krause reported that she provided a written report for the packet and would be happy to answer questions.

There was no discussion on the report provided.

PUBLIC HEARINGS

A. Staff Report 21-35, An Ordinance to add onsite consumption endorsement for marijuana retail facilities as an allowed use

Chair Smith introduced the item by reading of the title. He invited City Planner Abboud to provide his report.

City Planner Abboud provided a summary of Staff Report 21-35.

Chair Smith opened the public hearing.

Chris Logan, owner of Cosmic Seaweed located in Old Town, commented in support of the proposed ordinance and noted the State regulations required to conduct onsite consumption.

Chair Smith closed the public hearing seeing no further audience members wishing to provide testimony. He opened the floor to questions from the Commission.

There was discussion on the following:

- Smoke and ventilation requirements and concerns for inebriated patrons driving
- Exposure of employees to the smoke from patrons
- Number of businesses in Homer (there are two) that could be allowed to provide onsite consumption
- Location of a proposed onsite consumption is near Bishop's Beach which is considered a destination for families with children and young teenagers
- The effect of prevailing winds on neighboring businesses and residents

Chair Smith hearing no further questions requested a motion.

VENUTI/HIGHLAND MOVE THAT THE PLANNING COMMISSION RECOMMENDS CITY COUNCIL APPROVE THE ORDINANCE TO AMEND HOMER CITY CODE TO ALLOW ONSITE CONSUMPTION.

Discussion ensued regarding the concept of allowing the consumption of marijuana; effects to neighboring property owners; not allowing onsite consumption in the Central Business District where most of the younger population congregates; concerns for public safety and increased threats to life safety; City Council is the final authority; alcohol has higher safety issues and concerns; not many local examples as there are only three onsite consumption businesses in the state; process in presenting draft ordinances to the Commission and that all amendments to Title 21 are required to come before the Commission and for them to hold a public hearing; additional opportunity at the Council level for public input; the State has final approval of permitting but each permit comes to the City for review and input prior to approval.

VENUTI/HIGHLAND MOVED TO SUSPEND THE RULES TO ALLOW CHRIS LOGAN OF COSMIC SEAWEED TO PARTICIPATE IN THE DISCUSSION.

There was no discussion.

VOTE. NON-OBJECTION. UANNIMOUS CONSENT.

Motion carried.

Chair Smith facilitated discussion and questions from the Commission with Ms. Logan on the following:

- Conducting tours for City Law Enforcement officials and members of City Council on the proposed onsite consumption operation (this was an undocumented and informal tour).
- Benefits to the existing business in the increase in business revenue, employees, additional activities such as paint night, pop-up dinners with a visiting chef, etc.
- COVID 19 precautions and preventions.

City Planner Abboud commented on other options for onsite consumption for the general public that are being discussed at this time by City Council, and how there were none. He stated that it would not be allowed on city property in regards to leased lands. The City cannot declare something that conflicted with state statutes.

Chair Smith reviewed the motion on the floor.

Commissioner Venuti called for the vote.

VOTE. YES. HIGHLAND, BARNWELL

VOTE. NO. CONLEY, SMITH, VENUTI

Motion failed.

PLAT CONSIDERATION

PENDING BUSINESS

NEW BUSINESS

A. Memo from City Clerk, Re: Introduction of an Ordinance amending the administrative appeals process for City Planning decisions under Homer City Code 21.91 and 21.93

Chair Smith introduced the item into the record and invited the City Planner to provide input on the matter.

City Planner Abboud provided a summary review of what and how the draft ordinance would be applied referencing the information provided in the memorandum from City Clerk Jacobsen.

Commissioner Highland requested a brief recess.

Chair Smith called for a recess at 7:55 p.m. The meeting was called back to order at 8:01 p.m.

City Planner Abboud finalized his review of the proposed changes to Title 21.91 and 21.93.

Commissioner Highland requested clarification on page 49 in the packet, section 21.93.300, regarding how items would not come before the Commission and the qualifications of a Hearing officer since they would not necessarily have the experience that the Planning Commission would have.

Chair Smith commented that he reviewed the draft and believed it to be incredibly thorough and very timely.

VENUTI/HIGHLAND MOVE TO RECOMMEND THE DRAFT ORDINANCE AMENDING HOMER CITY CODE 21.91 TO REMOVE BOARD OF ADJUSTMENT AND HOMER CITY CODE 21.93 ADMINISTRATIVE APPEALS, ESTABLISHING THAT ADMINISTRATIVE APPEALS FROM CERTAIN FINAL CITY PLANNING DECISIONS SHALL BE FILED BEFORE A HEARING OFFICER AND SUPPLEMENTING NOTICE REQUIREMENTS BE MOVED TO PUBLIC HEARING.

There was no further discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

B. Staff Report 21-36, Extending the No Wake Zone in City Tidelands, Closing Areas to Motorized Vessels & Funds for Regulation Changes.

Chair Smith introduced the item by reading of the title and noted that they received public comment and confirmed with the Commission that they had a chance to review the comments received

The Commissioners present did not indicate that they needed additional time for review of public comment.

City Planner Abboud reviewed Staff Report 21-36 for the Commission and noted that Port Director Hawkins was present to answer any questions.

Port Director Hawkins facilitated discussion and responded to the following topics:

- This went before the Port and Harbor Advisory Commission and they supported it as written.
- The previous action taken by the Parks, Art, Recreation and Culture Advisory Commission to prohibit personal watercraft from being launched from city beaches and in fact widen it to encompass any motorized watercraft to launch from city beaches without the harbormaster's approval.
- Limited the launching of watercraft to the Load and Launch Ramp in the Harbor.
- City Council is directing this change to Title 10.08.210 regarding the vessel speed and no wake zones.
- There has only been one recent incident of some horseplay that was immediately handled by Harbor staff.
- Contact with the Harbormasters in Seward, Whittier, Valdez regarding personal watercraft use since they have always been allowed there and they have rental companies in their communities. Seward reported having an issue with one private operator and he put a boot on the trailer and dealt with the issue.
- Clarifying the areas, using the map provided in the packet where vessels could be operated. It was noted that the map was for discussion purposes only.

City Planner Abboud responded that the purpose and intent was preemptive in nature and the issue was new for him.

Commissioner Conley questioned whether they were solving a problem or not.

VENUTI/HIGHLAND MOVED THAT THE PLANNING COMMISSION RECOMMENDS APPROVAL OF ORDINANCE 21-26 AS WRITTEN.

Discussion ensued on the nature of the ordinance addressing the issue of prohibiting motorized watercraft in these sensitive areas are a good idea; addressing the amendments proposed at the Council level; safety issues do promulgate regulations; will not negatively affect anyone to promote lower speed limits in city waters; and this is a form of zoning and planning and makes sense.

HIGHLAND/BARNWELL MOVED TO AMEND THE MOTION TO RECOMMEND CITY COUNCIL INCLUDE IN ORDINANCE CLOSING THE SLOUGH BEHIND MARINER PARK, THE AREA OF MUD BAY CLOSEST TO SHORE, AND THE NICK DUDIAK FISHING LAGOON TO MOTORIZED VESSELS.

There was a brief discussion on the verbiage in the motion as this was a recommendation to City Council and including the map for reference; and review of the amendments that were proposed by Councilmember Aderhold and Evensen.

Deputy City Clerk Krause read the proposed amendment on the floor.

Chair Smith called for further questions.

Port Director Hawkins responded to Commissioner Conley that in comparison to other harbors, Homer is different in that Kachemak Bay is a critical habitat area and the other harbors do not have anything specific as far as wake speed to his knowledge. He then addressed enforcement and acknowledged that their limits are ¼ mile outside the harbor entrance and it will be difficult to have harbor employees enforce wake speed; age limits of vessel operators. He stated that he was supportive of the ordinance.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

INFORMATIONAL MATERIALS

A. City Manager's Report for May 24, 2021 City Council Meeting

Chair Smith commented in support of having the inbound EMS Patient Loading at Ramp 7 stating that he has had several incidents over the last 10 years with people overboard and expressing that this was a great asset.

B. Planning Commission Calendar

City Planner Abboud commented on getting Public Works Director Keiser on the agenda to talk to them about the storm water planning and to get information from Port Director Hawkins on the Spit Parking Study.

COMMENTS OF THE AUDIENCE

COMMENTS OF THE CITY STAFF

Deputy City Clerk Krause commented that it was an interesting meeting with a variety of topics and opined that it may be time for the City to start thinking about funding for a harbor patrol or HPD in boats similar to other communities. Homer is growing and with the popularity of the beaches and such it gets more crowded each year.

COMMENTS OF THE COMMISSION

Commissioner Highland commented interesting topics and thoughtful comments.

Commissioner Venuti expressed his appreciation also for the topics and addressing the appeals process.

Commissioner Conley commented it was an interesting meeting.

Commissioner Barnwell commented that he was not a fan of PWCs and great discussions.

Chair Smith commented that he appreciated the discussions tonight, the efforts of staff and related an incident he experienced with the Coast Guard and Troopers being able to board his boat to check out his licenses.

ADJOURN

There being no further business before the Commission the meeting was adjourned at 9:00 p.m. Next Regular Meeting is Wednesday, June 16, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held virtually by Zoom Webinar from the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Renee Krause
RENEE KRAUSE, MMC, DEPUTY CITY CLERK

Approved: June 16, 2021

060321 rk

This meeting was canceled due to lack of quorum of Commissioners available to attend.

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

Planning Commission Regular Meeting
Wednesday, July 21, 2021 at 6:30 PM
City Hall Cowles Council Chambers
Webinar ID: 979 8816 0903 Password: 976062
Dial 669 900 6833 or 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099

CALL TO ORDER, 6:30 P.M.

AGENDA APPROVAL

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

RECONSIDERATION

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.

A. Planning Commission Regular Meeting Minutes of June 16, 2021

B. Decisions and Findings for Conditional Use Permit 21-06 at 1308 Lakeshore Dr.

PRESENTATIONS / VISITORS

A. Aaron Fleenor, Yard Manager for Northern Enterprises Boat Yard

REPORTS

A. Staff Report 21-40, City Planner's Report

B. Public Works Task Force

PUBLIC HEARINGS

PLAT CONSIDERATION

A. Staff Report 21-41, James Waddell Homestead 2021 Replat Preliminary Plat

PENDING BUSINESS

A. Staff Report 21-43, Marijuana Consumption Endorsement

NEW BUSINESS

A. Subsequent Filings related to Conditional Use Permit 20-15 Motion to Dismiss Appeal

B. Memorandum from Deputy City Clerk Re: Planning Commission Declaration of Vacancy

C. Staff Report 21-42, Large Retail and Wholesale Stores

INFORMATIONAL MATERIALS

A. City Manager's Report for June 28, 2021 City Council Meeting

B. Planning Commission Calendar

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

COMMENTS OF THE STAFF

COMMENTS OF THE COMMISSION

ADJOURNMENT

Next Regular Meeting is Wednesday, August 4 at 6:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska. Meetings will adjourn promptly at 9:30 p.m. An extension is allowed by a vote of the Commission

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

Planning Commission Regular Meeting
Wednesday, August 04, 2021 at 6:30 PM
City Hall Cowles Council Chambers
Webinar ID: 979 8816 0903 Password: 976062
Dial: 1 253-215-8782 or 1 669-900-6833 Toll Free 888-788-0099 or 877-853-5247

CALL TO ORDER, 6:30 P.M.

AGENDA APPROVAL

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

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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.

A. Planning Commission Regular Meeting Minutes of June 16, 2021 **p. 3**

B. Decisions and Findings for Conditional Use Permit 21-06 at 1308 Lakeshore Dr. **p. 8**

PRESENTATIONS / VISITORS

A. Aaron Fleenor, Yard Manager for Northern Enterprises Boat Yard **p.**

REPORTS

A. Staff Report 21-48, City Planner's Report **p. 13**

B. Public Works Task Force

PUBLIC HEARINGS

PLAT CONSIDERATION

A. Staff Report 21-41, James Waddell Homestead 2021 Replat Preliminary Plat **p. 16**

B. Staff Report 21-44, Barnett's South Slope, Evans Addition, Preliminary Plat **p. 26**

PENDING BUSINESS

A. Staff Report 21-43, Marijuana Onsite Consumption Endorsement **p. 36**

NEW BUSINESS

A. Motion from City to Dismiss Appeal of the Planning Commission Decision on Conditional Use Permit (CUP) 20-15 for the reconstruction of a restaurant building at 106 W. Bunnell Avenue, Homer, Alaska **p. 63**

B. Memorandum Re: Planning Commission Declaration of Vacancy **p. 90**

C. Staff Report 21-46, Election of Officers **p. 92**

D. Staff Report 21-45, Parking Code **p. 93**

E. Staff Report 21-42, Large Retail and Wholesale Stores **p. 95**

F. Memorandum Re: City of Homer Draft 2022-27 Capital Improvement Plan (CIP) **p. 104**

INFORMATIONAL MATERIALS

A. City Manager Reports for June 28 & July 26, 2021 City Council Meetings **p. 176**

B. Planning Commission Calendar **p. 188**

C. Kenai Peninsula Borough Notice of Decision **p.189**

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

COMMENTS OF THE STAFF

COMMENTS OF THE COMMISSION

ADJOURNMENT

Next Regular Meeting is Wednesday, August 18 at 6:30 p.m. All meetings scheduled to be held virtually by Zoom Webinar from the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska. Meetings will adjourn promptly at 9:30 p.m. An extension is allowed by a vote of the Commission.

City of Homer
www.cityofhomer-ak.gov

Office of the City Clerk
491 East Pioneer Avenue
Homer, Alaska 99603
clerk@cityofhomer-ak.gov
(p) 907-235-3130
(f) 907-235-3143

NOTICE OF MOTION TO DISMISS

July 6, 2021

To Parties of Record: Frank Griswold, Appellant
Melody Livingston, Applicant
Matt Early, Applicant's Representative
Rick Abboud, City Planner

A motion to dismiss the appeal of Conditional Use Permit 20-15 was issued by the City, through its counsel of record, Jermain, Dunnagan and Owens, P.C., based on the applicant's withdrawal of their application for the conditional use permit. A copy of the motion is attached.

This was matter was addressed by the Planning Commission at their June 6, 2021 regular meeting and it was discovered after the fact that the parties had not received notice of the motion to dismiss. This matter will be taken up again by the Planning Commission at their July 21, 2021 regular meeting to allow parties the opportunity respond to the motion.

If you wish to provide written comments to the Planning Commission, please deliver them to the City Clerk's office or email them to rkrause@ci.homer.ak.us. Written comments must be received by Wednesday, July 14, 2021 at 5:00 p.m. to be include in the meeting packet, or by Wednesday, July 21, 2021 at 4:00 p.m. to be provided as a laydown item to the Commission.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Cc: Attorney Gatti, City Manager

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322
mgatti@jdolaw.com
mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

MOTION TO DISMISS APPEAL

The City of Homer (the "City"), by and through its counsel of record, Jermain, Dunnagan & Owens, P.C., hereby moves to dismiss the above-captioned appeal because the applicant for Conditional Use Permit 2020-15, Melody Livingston (the "Applicant"), has withdrawn her application.

On March 9, 2021, the Homer Board of Adjustment ("BOA") remanded the above-captioned appeal to the Homer Planning Commission (the "Commission") for further review under HCC 21.93.510(a).[1] On April 20, 2021, the Applicant emailed the City notifying it that she has withdrawn her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue that is the subject of this appeal.[2] The Applicant's withdrawal of her conditional use permit application voids CUP 20-15.

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

[1] *See* Decision and Order Remanding to the Planning Commission dated March 9, 2021.
[2] *See* emails between Melody Livingston and the City, copies of which are attached hereto as Exhibit A.

The Commission should dismiss this appeal due to the Applicant's withdrawal of her application for two reasons. First, the withdrawal of the CUP application that is the basis of this appeal moots the claims on appeal. The Alaska Supreme Court has held that "a claim is moot if it has lost its character as a present, live controversy."[3] In this appeal, the relief sought by the Appellant is the denial of CUP 20-15. Since CUP 20-15 is voided by the withdrawal of the CUP application, the issues raised in this appeal are moot.

Second, the Commission and the BOA no longer have jurisdiction to decide any issues raised in this appeal. The Commission's jurisdiction to consider and decide upon a CUP application depends upon the existence of a CUP application.[4] The BOA's appellate jurisdiction only extends to the grant or denial of a CUP.[5] Neither body has jurisdiction to decide legal issues related to a CUP appeal after a CUP applicant has withdrawn her application and is no longer seeking a CUP.

Accordingly, the City respectfully requests that the Commission dismiss the above-captioned appeal.

DATED this 14th day of May, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee
City of Homer

By: s/*Michael R. Gatti*/
Michael R. Gatti
Alaska Bar No. 8306033
Max D. Holmquist
Alaska Bar No. 0911057

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[3] *Akpik v. State, Office of Management and Budget*, 115 P.3d 532, 535 (Alaska 2005).
[4] HCC 21.71.040(a).
[5] HCC 21.93.030(a).

Sherry Sims

From: Rick Abboud <RAbboud@ci.homer.ak.us>
Sent: Thursday, April 29, 2021 4:10 PM
To: Michael Gatti
Cc: Max D. Holmquist
Subject: FW: remand

fyi

From: Rick Abboud
Sent: Tuesday, April 20, 2021 7:34 AM
To: Melissa Jacobsen <MJacobsen@ci.homer.ak.us>
Subject: FW: remand

Melissa,

Melody has requested to withdraw CUP 20-15 regarding the Wild Homey proposal.

Rick

From: (null) (null) <melodyliving@yahoo.com>
Sent: Tuesday, April 20, 2021 6:14 AM
To: Rick Abboud <RAbboud@ci.homer.ak.us>
Subject: Re: remand

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Sorry about the delay. I am now in Chicago. The move was demanding ☹.
Please withdraw my current application. We will resubmit in a year or two.
Thank you for your efforts on this.
Melody Livingston

Sent from my iPhone

> On Apr 15, 2021, at 7:32 PM, Rick Abboud <RAbboud@ci.homer.ak.us> wrote:
>
> Melody,
>
> Just wanted to follow up on our last conversation regard the remand of your CUP for Wild Honey. If you wish to regroup and reapply at a later, please respond with an email stating your intent to withdraw your current application.
>
> Thanks,
>
> Rick

RICK ABBOUD, AICP
City Planner
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Homer, AK 99603
(o) 907-235-3106
(f) 907-235-3118

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

[PROPOSED] ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: _____ _____

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

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ANCHORAGE, ALASKA 99503
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FAX (907) 563-7322

JUL 07 2021 AM10:56 RK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

Although technically rendered moot as a result of the withdrawal of the application for CUP, this appeal should not be dismissed because the public interest exception to the mootness doctrine applies. A claim is moot if it is no longer a present live controversy or if the adjudicatory body cannot provide the relief sought by the appellant. But there is a public interest exception to the mootness doctrine which requires considering and weighing three factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeated circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Kodiak Seafood Processors*, 900 P.2d 1191 at 1196 (Alaska 1995). There can be no doubt that the disputed

313-OAH

issues in this appeal are capable of repetition. On April 20, 2021, property owner/applicant Melody Livingston stated as follows in an email to City Planner Rick Abboud: "Please withdraw my current application. We will resubmit in a year or two." Meanwhile, the Commission will likely be considering other CUP applications seeking reductions in setback requirements, lot density requirements, parking space requirements, and nonconforming use requirements, all which were at issue in the instant appeal. The city has consistently applied and interpreted its regulations incorrectly and arbitrarily and is now attempting to circumvent a review of these issues that are likely to be repeated so that it can continue to do so. The city is in the process of making monumental amendments to its appeal procedures designed to make it more difficult or impossible for Mr. Griswold to appeal Ms. Livingston's new application and/or prevail thereby trampling his due process rights. Having encountered stiff opposition to her proposal and seeing the writing on the wall after extensive briefing has been completed, Ms. Livingston has strategically withdrawn her application with the intention of resubmitting it after the city adopts its amended appeal procedures. Mr. Griswold is a lay pro se public interest litigant who, without compensation or hopes of compensation, has invested a bucket of

sweat in this appeal; he should not be forced to start over every time things do not bode well for Ms. Livingston. The third prong of the public interest exception is met when a case involves "concepts of fairness underlying the right to procedural due process." *Greenpeace Inc.,* 96 P.3d 1056 at 1062-63 (Alaska 2004). The myriad points on appeal in this case involve threshold issues, due process issues, and agency interpretations of law that are extremely important to the public interest. Mr. Griswold challenged the Commission's authority to apply HCC 21.18.040(b)(4) to the application because it violates the equal protection clause of the Fourteenth Amendment to the US Constitution; he claimed the Commission violated a cardinal primary requirement of procedural due process by merely rubber-stamping the biased findings of subordinate Planning Staff instead of acting on its own independent consideration of the law and facts of the controversy; and he alleged that the Comprehensive Plan Goal of "infill" is unconstitutionally vague. Though not a constitutional issue, he claimed that the Commission did not have the authority to waive, relax, or ignore parking space requirements; a ruling on this issue could have widespread effects on the community. Mr. Griswold's allegation that the Applicants did not produce evidence sufficient to enable

meaningful review of the application as required under HCC 21.71.030 constitutes an important threshold issue that could affect numerous future applications for conditional use permits. The Commission's acknowledgment and application of the public interest exception to the mootness doctrine and non-dismissal of this appeal will avoid another unnecessary round of contentious and time-consuming appeal proceedings next year when Ms. Livingston resubmits her CUP application.

DATED: July 7, 2021

By: *s/Frank Griswold/*
Frank Griswold

JUL 07 2021 AM 10:56 RK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR DEFAULT JUDGMENT

During the time this matter has been under consideration, Mr. Abboud has repeatedly emailed Ms. Livingston about this appeal and communicated with the Commission about those emails without notice and opportunity for all parties to participate in those communications. (See emails between Mr. Abboud and Ms. Livingston dated April 15, 2021 and April 20, 2021 attached as Exhibit A to city's Motion to Dismiss Appeal; see also April 15, 2021 Commission minutes). HCC 21.93.710(a) prohibits members of the Commission from having ex parte communication with any person. HCC 21.93.710(b)(2)(a) allows communications between municipal staff and Commission members where such staff members are not themselves parties to the appeal but the July 6, 2021 Notice of Motion to Dismiss identifies City Planner Rick Abboud as a party to this appeal so the exception under HCC

21.93.710(b)(2)(a) does not apply to Mr. Abboud. Pursuant to HCC 21.93.710(a) and HCC 21.93.710(b)(2)(a), Mr. Abboud and the Commission have therefore been engaging in ex parte communications. HCC 21.93.710(e) provides that the Commission may impose appropriate sanctions, including default, against a party to an appeal for any violation of this section and HCC 21.93.710(f) provides that it is a violation for any person to knowingly have or attempt to have ex parte communication with a Commission in violation of subsection (a) of this section. Accordingly, the Commission should grant default judgment to Mr. Griswold prior to and in lieu of ruling on the city's Motion to Dismiss Appeal which would then be rendered moot.

DATED: July 7, 2021

By: *s/Frank Griswold/*
Frank Griswold

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mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

REPLY TO OPPOSITION TO MOTION TO DISMISS APPEAL AND OPPOSITION TO MOTION FOR DEFAULT JUDGMENT

The Homer Planning Commission (the "Commission") must dismiss the above-captioned appeal because it lacks authority and jurisdiction to decide any issues raised in this appeal. The Commission's authority is limited that which the Homer City Council has expressly delegated to it.[1] The Commission's jurisdiction to consider and decide upon a CUP application (and any related legal issues) depends upon the existence of a CUP application.[2] Absent a CUP application, the Commission cannot issue advisory legal opinions with regard to moot issues.

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[1] HCC 2.58.010; HCC 2.72.030; HCC 21.91.020. *See also Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim").
[2] HCC 21.71.040(a).

Griswold agrees with the City that the Applicant's withdrawal of her CUP application moots the issues remaining in this appeal.[3] The Commission cannot apply the public interest mootness exception. The public interest exception is a doctrine applied by the Alaska Supreme Court to consider recurrent matters of public concern that are capable of repetition if the mootness doctrine is applied.[4] However, the Commission is not a court. It cannot issue generally applicable legal opinions.[5] Rather, in the context of a CUP application, its authority is limited to reviewing and deciding upon the application. Since the application has been withdrawn,[6] the Commission lacks authority to proceed with this appeal.

Griswold's assertion regarding alleged ex-parte comments by City Planner Abboud to the Commission is also moot.[7] Without a CUP application to review, the Commission has no authority to impose sanctions against the City for alleged ex-parte communications.

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[3] Appellant's Opposition to Motion to Dismiss Appeal, p. 1.

[4] *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985).

[5] Griswold fails to cite any authority in the Homer City Code that would allow the Commission (or the Homer Board of Adjustment) to consider legal issues related to a CUP appeal in the absence of a CUP application.

[6] Contrary to Griswold's assertion, the applicant's apparent intention to submit a new CUP application in the future supports dismissal of this appeal. A future application may materially differ from the now-withdrawn application such that the legal issues associated with the initial application may no longer be relevant.

[7] *See* Griswold's Motion for Default Judgment. Griswold's allegation about City Planner Abboud's communication with the Commission at the April 15, 2021 Commission meeting is unclear. Abboud did not participate in the April 15 meeting and made no comments to the Commission about this appeal nor any other subject. *See* Homer Planning Commission, Special Meeting Minutes, p. 1-2 (April 15, 2021), https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/planning_commission/meeting/72623/pc_041521_special_minutes_approved.pdf (accessed July 9, 2021).

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Accordingly, the Commission should dismiss this appeal and deny Griswold's Motion for Default Judgment.

DATED this 14th day of July, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee City of Homer

By: s/*Michael R. Gatti*/
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JUL 21 2021 PM02:58 RK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR THE APPOINTMENT OF IMPARTIAL, INDEPENDENT LEGAL COUNSEL TO REPRESENT THE PLANNING COMMISSION

Appellant Frank Griswold hereby moves that the Planning Commission be represented by impartial, independent legal counsel for all future proceedings regarding this matter, including the city's pending Motion to Dismiss Appeal. The lay Commission is not qualified to make findings of law pertaining to mootness and/or dismissal and, unless independent legal counsel is hired to represent and advise the Commission, the Commission will be inclined to rely on and adopt the highly partisan legal advice proffered by City Attorney Holmquist; its doing so would be prejudicial to the Appellant. City Planner Rick Abboud is not a member of the Commission and has no property interest in Wild Honey Bistro. Nonetheless, he made himself a party to this appeal so that the Administration could

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hire Mr. Holmquist to represent him and the property interests of the Applicants. A funding source was apparently readily available for the hiring of Mr. Holmquist to represent Mr. Abboud. However, in a parallel but unrelated appeal action involving Zoning Permit 1020-782, the Commission was informed that no funding source was readily available for providing professional services to the Commission. HCC 21.93.540(a) states in relevant part as follows: "The City Attorney or another attorney acting as legal counsel to the Board shall be present at appeals before the Board of Adjustment." One has to wonder why legal counsel is mandatory for the Board but denied to the Commission which is often tasked with making complex findings of law. It would be both helpful and prudent for the Commission to deliberate in consultation with an impartial attorney as allowed by HCC 21.93.300(e) and have the assistance of impartial legal counsel in the preparation of its ensuing decision and findings as allowed by HCC 21.93.300(g). In light of the fact that HCC 21.93.300 expressly entitles the Commission to professional services, the city now has an obligation to locate or create a funding source for providing competent, independent, impartial, legal counsel to the Commission if it requests it.

DATED: July 21, 2021

By: *s/Frank Griswold/*

JUL 26 2021 AM 10:21 PC

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO CANCEL OR CONTINUE THE AUGUST 4, 2021 COMMISSION PROCEEDING REGARDING MOTION TO DISMISS APPEAL

In accordance with HCC 21.93.560(c), Appellant Frank Griswold hereby requests that the August 4, 2021 proceeding regarding the city's Motion to Dismiss Appeal be canceled due to the fact that the Commission lacks jurisdiction/authority to act on that motion or take new evidence pertaining to it. HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." HCC 21.93.560(c) states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand ***in accordance with the decision of the Board of Adjustment.***" Thus, the Commission is prohibited from acting on

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or taking further evidence on any issue not specifically described in the Board's decision/remand order. The record in this appeal is closed and does not include Ms. Livingston's correspondence with Mr. Abboud regarding her intention to temporarily suspend her CUP application. If new evidence or changed circumstances are alleged, ***the Board of Adjustment*** may, at its discretion, either hear the appeal without considering the allegations or may remand the matter to the Commission to rehear the matter, if necessary. HCC 21.93.510(a). However, the Commission has no authority to sua sponte consider allegations of new evidence or changed circumstances or consider any issue not expressly remanded to it by the Board of Adjustment. Furthermore, no evidence received under HCC 21.93.510(c) shall be considered for purposes other than determining disqualification. HCC 21.93.510(c). Alternatively and in accordance with HCC 21.93.100(b), HCC 21.94.020, and HCC 21.94.030, Appellant Frank Griswold requests that the August 4, 2021 proceeding regarding the city's Motion to Dismiss Appeal be continued to such a time that it can be scheduled for a public hearing and neighboring property owners properly notified.

DATED: July 26, 2021

By: *s/Frank Griswold/*

JUL 26 2021 AM10:21 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO CORRECT/CLARIFY APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby moves to correct/clarify the first two sentences of Appellant's Opposition to Motion to Dismiss Appeal which state as follows: "Although technically rendered moot as a result of the withdrawal of the application for CUP, this appeal should not be dismissed because the public interest exception to the mootness doctrine applies. A claim is moot if it is no longer a present live controversy or if the adjudicatory body cannot provide the relief sought by the appellant." Mr. Griswold did not intend to state or imply that the application for CUP 20-15 is moot, technically or otherwise. Because the property owner voluntarily withdrew CUP 20-15 with the intention of resubmitting it within a year or two, it constitutes a present live controversy and

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therefore is unequivocally not moot. Accordingly, the Commission must deny the city's Motion to Dismiss Appeal.

DATED: July 26, 2021

By: *s/Frank Griswold/*

JUL 26 2021 AM 10:21 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO STRIKE NEW EVIDENCE

Email correspondence between City Planner Rick Abboud and subject property owner Melody Livingston was recently submitted in support of the city's Motion to Dismiss Appeal. In accordance with HCC 21.93.560(b), Appellant Frank Griswold hereby requests that this new evidence be stricken from the record. HCC 21.93.560(b) states: "A decision remanding a case ***shall describe any issue upon which further evidence should be taken***, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board of Adjustment's January 9, 2021 Decision and Order Remanding to the Planning Commission says nothing about Ms. Livingston's temporary withdrawal of her application for CUP 20-15 or any other issue pertaining to the potential dismissal of this appeal. The appeal record for this matter is closed

except for the taking of evidence pertaining to the ownership of the subject property and potential Commissioner disqualifying financial conflicts of interest/partiality related thereto. No evidence received under HCC 21.93.510(c) shall be considered for purposes other than determining disqualification. HCC 21.93.510(c). The closed appeal record does not include Ms. Livingston's recent correspondence with Mr. Abboud and the Commission does not have the authority to consider allegations of new evidence sua sponte. Accordingly, the recent email correspondence between Ms. Livingston and Mr. Abboud and any other newly submitted evidence not directly related to the ownership of the subject property should be stricken from the record.

DATED: July 26, 2021

By: *s/Frank Griswold/*

JUL 28 2021 AM 11:22

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

ARGUMENT REGARDING MOTION TO DISMISS APPEAL

On March 9, 2021, the Homer Board of Adjustment remanded this matter to the Commission under HCC 21.93.510(a) and (c) to address and decide three issues for which the Commission's findings of fact were deemed to be inadequate. HCC 21.93.560(c) states: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer. A case on remand has priority on the agenda of the lower administrative body, except cases remanded under HCC 21.93.510(a) are not entitled to priority. The applicant or owner of the property in question may waive the priority given by this subsection." The issues remanded under HCC 21.93.510(a) are not entitled to priority on the Commission's agenda but they must nonetheless be promptly acted upon by the Commission. They clearly were not promptly acted on

by the Commission. Because the applicants and/or property owners never waived priority, the issues remanded under HCC 21.93.510(c) ***were*** entitled to priority on the Commission's agenda but now, nearly 5 months following the Board's remand, the Commission has still not considered or acted on the Board's Decision and Order. Instead, City Planner Rick Abboud, who claims to be a party in this matter, has over the course of many months colluded with Melody Livingston and initiated multiple ex parte communications with the Commission to secure the dismissal of this appeal while she "regroups" before resubmitting her CUP application within a year or two.[1] It is no coincidence that the city's appeal procedures are currently being amended to facilitate approval of Ms. Livingston's regrouped CUP.

A claim is moot if it has lost its character as a present, live controversy. *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 523 (Alaska 1993) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)). An action is not moot if respondent has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union Local 1000,* 567 U.S. 298, 307-08 (9th Cir. 2012). The *Knox* court further stated: "The voluntary cessation of challenged conduct does not render a case

[1] While it is not illegal for a party to communicate with another party, it is illegal for a party to have ex parte communications with the Commission. HCC 21.93.710(a).

moot because the conduct could be resumed as soon as the case is dismissed" (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283). In 1995, the Alaska Supreme Court held as follows in *Kodiak Seafood Processors v. State*, 900 P.2d 1191:

"No scallop harvesting presently takes place in closed Alaska waters. Therefore, KSPA's claims seeking declaratory and injunctive relief are technically moot. Nevertheless, we may choose to address certain issues if they fall under the public interest exception to the mootness doctrine. The public interest exception requires the consideration of three main factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Peloza v. Freas*, 871 P.2d 687, 688 (Alaska 1994); *Brandon*, 865 P.2d at 92 n. 6. None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue. *Hayes*, 693 P.2d at 834. Ultimately, the determination of whether to review a moot question is left to the discretion of the court. *Id.; Brandon*, 865 P.2d at 92. n. 6. . . . Because the Permit has been revoked, the question of the Commissioner's authority to issue the Permit is also technically moot. Nonetheless, the issue presents a live controversy. KSPA argues that by allowing a private fisher to sell fish obtained during a research trip, the Commissioner exceeded his authority by allowing "commercial fishing" in closed waters. ADF&G argues that it has the authority to finance an exploratory fishing operation by allowing a private contractor to sell the catch. This issue falls within the public interest exception to the mootness doctrine. First, the issue is capable of repetition. The State has not disavowed this type of financial arrangement for future test-fisheries. Second, because research fishing may be of limited duration, it is likely that, as in this case, an individual permit would expire before the issue could be litigated. Third, the scope of the Commissioner's power is an issue of public interest. Having determined that the commercial fishing issue satisfies the requirements of the public interest exception, and that the procurement issue does not, we turn to the merits of the trial court's decision."

Unlike the fishing permit at issue in the Kodiak Seafoods case, CUP 20-15 was not revoked, it was voluntarily and temporarily withdrawn by Ms. Livingston who indicated her intent to resubmit it, presumably under a different CUP designation (which is irrelevant) in a year or two. Accordingly, Ms. Livinston still has a huge interest in the outcome of this appeal. Because live controversies remain, this appeal is not moot, technically or otherwise. Even if this matter were technically moot, the public interest exception to the mootness doctrine would apply for the following reasons: 1. the disputed issues are capable of repetition; 2. if this appeal were to be dismissed as moot, review of the issues on appeal would be repeatedly circumvented; and 3. the issues presented in this appeal, including threshold constitutional issues, are so important to the public interest as to justify overriding the mootness doctrine. No provision of HCC gives the Commission the authority to dismiss an appeal on remand from the Board of Adjustment and, even if it had that authority, the Commission cannot retroactively dismiss issues on appeal that it previously decided and are no longer before it.

DATED: July 28, 2021

By: *s/Frank Griswold/*

Session 21-17, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:33 p.m. on August 4, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, via Zoom Webinar. There is one vacancy on the Commission.

PRESENT: COMMISSIONERS BARNWELL, VENUTI, SMITH, CONLEY, HIGHLAND, CHIAPPONE

STAFF: CITY PLANNER ABBOUD
DEPUTY CITY CLERK KRAUSE

The Commission met prior to the regular meeting at 5:30 p.m. for a worksession. On their agenda was discussion on the 2022-2027 Capital Improvement Plan and Homer City Code 21.57 Large Retail and Wholesale Stores.

APPROVAL OF THE AGENDA

Chair Smith read the agenda changes and supplemental items into the record and requested a motion.

HIGHLAND/VENUTI MOVED TO APPROVE THE AGENDA WITH THE CHANGES AND SUPPLEMENTAL ITEMS

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of June 16, 2021
B. Decisions and Findings for Conditional Use Permit 21-06 at 1308 Lakeshore Dr

Chair Smith read the Consent Agenda into the record and requested a motion of approval.

HIGHLAND/VENUTI MOVED TO APPROVE THE CONSENT AGENDA AS PRESENTED.

There was no discussion.

VOTE. NON-OBJECTION.UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

Aaron Fleenor, Yard Manager, Northern Enterprises Boat Yard made a presentation to the Commission on the recent improvements to their facility and the proposed plan to increase their footprint with the purchase of available property.

Mr. Fleenor responded to questions from the Commission on the following:
-Traffic crossing concerns regarding Kachemak Drive
- Long term prediction of increased need for large vessel haul out facilities
- Increase in large boats coming to Homer over the last 13 years
- Influx of boats from northern communities in Alaska
- Kodiak has the infrastructure but is limited in space and difficulties in getting supplies
- Seward does not have the infrastructure
- Homer does have tidal issues
- Large economic driver for the community
- Community concerns over wetland use and moose habitat
- Current land holdings have some dedication to wetlands and there is currently 35 acres dedicated to moose habitat along Kachemak Drive
- Moose and wildlife are still able to access Northern Enterprises property
- Estimated number of vessels that will increase use of their services
- Diversity of Marine Trades available in Homer
- Permitting is currently in place by the Corps of Engineers allowing Northern Enterprises to dredge materials from the specific area but they do not, by practice, remove the dredge materials. They just push them to the sides to provide additional depth needed when bringing vessels out of the water for services.

The Commission expressed their appreciation for the presentation.

REPORTS

A. Staff Report 21-48, City Planner's Report

Chair Smith introduced the item and deferred to City Planner Abboud.

City Planner Abboud spoke to his written staff report, highlighting the following:
Tsunami response on Wednesday, July 21, 2021
Siren control and volume

City Planner Abboud facilitated discussion on the scheduling of a future agenda item on use of connexes as structures in Homer City Limits and getting public input on the use of those structures and meeting in person in the Council Chambers and or via teleconference.

B. Public Works Campus Task Force Report

Chair Smith introduced the item and asked for Commissioner Barnwell to provide his report. He additionally noted the minutes provided in the Supplemental Packet of the July 14th and 28th regular meetings.

Commissioner Barnwell reported on the Task Force progress refining their final report to City Council. He responded to questions of the Commission on use of a phased approach, availability of commercial real estate, inclusion in the Capital Improvement Plan.

PUBLIC HEARINGS

PLAT CONSIDERATION

A. Staff Report 21-41, James Waddell Homestead 2021 Replat Preliminary Plat

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide his report.

City Planner provided a summary of Staff Report 21-41 for the Commission.

There was no applicant present.

Chair Smith opened the public comment period and having no members of the public requesting to comment closed the public comment period.

VENUTI/HIGHLAND MOVED TO ADOPT STAFF REPORT 21-41 AND RECOMMEND APPROVAL OF THE JAMES WADDELL HOMESTEAD 2021 REPLAT PRELIMINARY PLAT TO VACATE A LOT LINE.

There was a brief comment on this action being clear and straight forward.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

B. Staff Report 21-44, Barnett's South Slope, Evans Addition, Preliminary Plat

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide his report to the Commission.

City Planner Abboud provided a summary of Staff Report 21-44.

Tom Latimer, representing the applicant reported that he was available for questions.

Chair Smith opened the public comment period and having no members of the public requesting to comment closed the public comment period.

HIGHLAND/VENUTI MOVED TO ADOPT STAFF REPORT 21-44 AND RECOMMEND APPROVAL OF THE BARNETT'S SOUTH SLOPE EVANS ADDITION PRELIMINARY PLAT TO REMOVE A LOT LINE BETWEEN TWO LOTS WITH THE FOLLOWING COMMENTS:

1. INCLUDE A PLAT NOTE STATING "PROPERTY OWNER SHOULD CONTACT ARMY CORPS OF ENGINEERS PRIOR TO ANY ON-SITE DEVELOPMENT OR CONSTRUCTION ACTIVITY TO OBTAIN THE MOST CURRENT WETLAND DESIGNATION (IF ANY) PROPERTY OWNERS ARE RESPONSIBLE FOR OBTAINING ALL REQUIRED LOCAL STATE AND FEDERAL PERMITS.
2. COMMISSION TO CONCUR WITH MAINTAINING EAST TASMANIA COURT AS A 50 FOOT RIGHT OF WAY WITH THE INCLUSION OF PLAT NOTE AND DEPICTION DESIGNATING THE ADJACENT 15 FOOT UTILITY EASEMENT AS A UTILITY AND SLOPE EASEMENT.
3. CORRECT THE STREET NAME TO EAST TASMANIA COURT.

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Chair Smith called for a recess at 7:45 pm. The meeting was called back to order at 7:50 p.m.

PENDING BUSINESS

A. Staff Report 21-43, Marijuana Onsite Consumption Endorsement

Chair Smith introduced the item by reading of the title.

City Planner Abboud provided a summary and explanation of why this item was back before the Commission noting that they could not take further action or recommendations. He noted that the Commission could provide, and what City Council was requesting, was further clarification on the reasons for not supporting on site consumption regulation.

Commissioner Barnwell and Highland commented that in further consideration of the subject if they could change or vote again on the issue they would vote it down.

Chair Smith provided clarification on why he could not support allowing onsite consumption was the location in the Central Business District in the middle of an area that is highly frequented by families and children and with the wind blowing the odor would be in his opinion advertisement for the product.

City Planner Abboud responded that if any smell was detected outside the location the business would be shut down in accordance with state regulations.

NEW BUSINESS

A. Motion to Dismiss Appeal by Frank Griswold of the Planning Commission Decision on Conditional Use Permit 20-15 for the reconstruction of a restaurant building at 106 W. Bunnell Avenue, Homer, Alaska

Chair Smith introduced the item by reading of the title and noted that this matter was before the Planning Commission at their June 6, 2021[1] regular meeting and it was discovered after the fact that the parties had not received notice of the motion to dismiss. As a result, the action from the June 6th[2] meeting is void. Notice was distributed to the parties on July 6, 2021 and they were given the opportunity to respond. This matter is back before the Commission tonight for action.

Deputy City Clerk Krause responded to Chair Smith's request for clarification on the ordinance amending city code to remove matters like this from the Commission. She explained that it was introduced and still needed to go through the public hearing and second reading before becoming effective, further stating she believed that was scheduled for the upcoming Council meeting.

Chair Smith requested a motion and second.

VENUTI/HIGHLAND MOVED TO POSTPONE ACTION ON THE MOTION TO DISMISS UNTIL CITY COUNCIL RESOLVED ACTION ON THE ISSUE.

Commissioner Venuti recommended the postponement to allow City Council time to address the code changes.

Commissioner Highland requested some input from Deputy City Clerk Krause on whether they could postpone the action before them.

Deputy City Clerk Krause explained that City Council approving the ordinance would not change the action before the Commission tonight however there was information in the supplemental packet regarding a request for a continuation. This matter is in the hands of the Commission and in my opinion you should not postpone it to await the outcome of Council action.

Commissioner Venuti stated that he would like to amend his motion.

Deputy City Clerk Krause recommended voting on the motion on the floor.

Chair Smith called for any additional discussion hearing none he requested the Clerk to take a roll call vote.

VOTE. NO. CONLEY, BARNWELL, VENUTI, SMITH, CHIAPPONE, HIGHLAND.

Motion failed.

Chair Smith requested Commissioner Venuti to restate his motion but before he did he recognized Commissioner Highland.

[1] Incorrect date provided of June 6, 2021 correct date of meeting should reflect June 2, 2021
[2] See note 1 above

HIGHLAND/VENUTI MOVED TO DISMISS THE APPEAL BY FRANK GRISWOLD OF THE PLANNING COMMISSION DECISION ON CONDITIONAL USE PERMIT 20-15 FOR THE RECONSTRUCTION OF A RESTAURANT BUILDING AT 106 WEST BUNNELL AVENUE, HOMER, ALASKA.

There was a brief commentary on the lack of credentials on the part of the Planning Commission in addressing issues like this since they do not know the law and while Mr. Griswold brings forward interesting points it will be better to have these types of actions go before a hearing officer.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

B. Memorandum Re: Planning Commission Declaration of Vacancy

Chair Smith introduced the item by reading of the title. He then requested input from the Clerk.

Deputy City Clerk Krause responded that in accordance with the Commission bylaws since she had exceeded the allowed absences.

HIGHLAND/VENUTI MOVED TO DECLARE THE SEAT OF SYVERINE BENTZ VACANT IN ACCORDANCE WITH THE BYLAWS.

Discussion ensued on the ability for Ms. Bentz to reapply for her seat and encouragement from all members of the Commission and the Mayor. Further points made on being cognizant of how important attendance is to this commission and how inflexible the rules are in comparison to the other commissions and board.

Deputy City Clerk Krause responded that she does have attendance sheet but with the meetings being conducted via Zoom she lost track in keeping accurate accounting of absences and it was Commissioner Bentz herself who brought that issue to the Clerk's attention in response to Commissioner's questions.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

C. Staff Report 21-46, Election of Officers

Chair Smith introduced the item by reading of the title and opened the floor for nominations of Chair.

Commissioner Highland nominated Commissioner Smith for the Office of Chair.

Commissioner Barnwell seconded.

There were no further nominations.

Commissioner Smith was unanimously voted in as Chair.

Chair Smith then opened the floor for nominations of Vice Chair.

Commissioner Venuti nominated Commissioner Highland for Vice Chair.

Commissioner Barnwell seconded.

Chair Smith called for additional nominations for Vice Chair.

Commissioner Smith nominated Commissioner Conley.

Commissioner Conley declined the nomination citing the lack of time on the commission.

Commissioner Barnwell nominated Commissioner Venuti.

Commissioner Venuti declined the nomination citing that he has served as both Chair and Vice Chair and believes that every sitting Commissioner should be given the opportunity to serve as Chair or Vice Chair during their term as a commissioner.

Commissioner Highland was voted in as Vice Chair unanimously.

D. Staff Report 21-45, Parking Code

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide his report.

City Planner Abboud reported that the number of parking spaces is higher than the standards used in other communities. Especially for multi-family dwellings and small detached units like cabins. If the efficiency units are in one building only one spot is required but if there are several small cabins on one lot each is required to have two parking spaces. They would like to amend City Code to adjust the requirement to one space for small 500 square foot cabins or efficiencies.

Chair Smith inquired about how or where visitors would park and how would that be configured.

City Planner Abboud responded that staff could work on that and bring it back before the commission. He further acknowledged that there was no parking on city streets, possibly working on off-site parking, the likelihood of someone not having a vehicle, especially living in the center of town.

HIGHLAND/VENUTI MOVE TO ADOPT STAFF REPORT 21-45 AND AMEND HOMER CITY CODE 21.55.090 (1) TO ALLOW TWO PARKING SPACES PER DWELLING UNIT OR ONE PARKIN SPACE PER EFFICIENCY OR ONE BEDROOM UNIT WHEN MORE THAN ONE DWELLING UNIT IS LOCATED ON A PARCEL

Discussion on parking for visitors if there is no dedicated parking on site; this applies only to efficiency/studio units. Evaluation of a formula where a maximum is established and then additional spaces are required; if project is in the center of town the likelihood that the occupant would have a car or have many visitors is unlikely but to require parking that will not be used is a waste of real estate.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

E. Staff Report 21-42, Large Retail and Wholesale Stores

Chair Smith introduced the item by reading of the title.

City Planner Abboud reviewed discussion points from the worksession and then proceeded to continue reviewing proposed changes to Title 21.57.

Chair Smith commented that it was a good visioning exercise and suggested a worksession for the Commission to discuss with staff the proposed amendments.

Chair Smith and City Planner Abboud facilitated additional discussion on the following:

How these amendments would work with the Community Design Manual
Does it need to be duplicated in city code
Original city code was developed to combat change and change happened anyway.
It is important to grow the City inside out as it is beginning to be difficult to develop commercial projects. As an example, the new grocery store being developed out East End Road, thus there is no benefit to the city.
The city needs to temper its code and zoning requirements for large retail developments.
Homer has grown immensely over the last twenty years.

City Planner Abboud will work on these considerations and present the amendments for a future meeting.

F. Memorandum Re: City of Homer Draft 2022-27 Capital Improvement Plan (CIP)

Chair Smith introduced the item by reading of the title. He noted the information provided by Ms. Carroll at the worksession.

City Planner Abboud reviewed the process briefly for the Commission and requested each Commissioner submit their top two projects.

The Commissioners then provided their top two projects from the draft Capital Improvement Plan for City Planner Abboud to list.

City Planner Abboud reviewed the projects selected and noted that the Main Street Sidewalk Project is the top priority but there is a not consensus on the second project. He noted the top three projects selected:

Barge Mooring and Large Vessel Haul out Repair Facility
New Large Vessel Harbor; and
the New Public Works Facility

Chair Smith suggested that he submit all three projects and leave the final selections to City Council.

City Planner Abboud stated that Commissioner Chiappone needs to select a second project to support.

Commissioner Chiappone selected the Barge Mooring and Large Vessel Haul-out Repair Facility.

City Planner Abboud reported that the Commission selections were the Main Street Sidewalk Project North of Pioneer Avenue and the Barge Mooring and Large Vessel Haul Out Repair Facility. He will forward these recommendations to Ms. Carroll.

INFORMATIONAL MATERIALS

A. City Manager Reports for June 28 & July 26, 2021 City Council Meetings
B. Planning Commission Calendar
C. Kenai Peninsula Borough Notice of Decision

Chair Smith noted the informational items in the packet and there were no comments on the material provided.

COMMENTS OF THE AUDIENCE

Syverine Bentz, congratulated Deputy City Planner Engebretsen on 19 years with the Planning Department. She thanked the Commissioners for following the process and believed that the Commission should revisit the bylaws regarding absences. They should be operating consistently with the other Commissions and Council and considering virtual attendance options in the future. She appreciates all the hard work and for the long meeting tonight.
Chair Smith thanked Ms. Bentz for staying throughout the meeting and encouraged her to re-apply for her seat on the Commission.

COMMENTS OF THE CITY STAFF

Deputy City Clerk Krause thanked the Commissioners for getting through such a long agenda in a timely fashion and that it was a good meeting. She further noted that the Clerk's Office was drafting some amendments to City Code regarding telephonic/electronic meetings and attendance and hoping to have it reading for introduction to Council soon. They also noted conflicts in city code with what was stated in the bylaws. Ms. Krause announced the candidacy filing period is currently open until 4:30 p.m. on August 16th if anyone was interested.

COMMENTS OF THE COMMISSION

Commissioner Highland commented on the long meeting and that Commissioner Chiappone was able to experience that for his first meeting.

Commissioner Venuti welcomed Commissioner Chiappone and noted that his first meeting lasted until 11:00 p.m. and all he could think of, was what did he get himself into, so he got off easy. He then stated that he hopes Ms. Bentz rejoins the Commission as she was a very important part of the Commission. He did want to bring to the Commission's and the City Planner's attention that a couple of years ago they approved a CUP to permit more cottages and he noticed that they are starting to build more just below the Chamber of Commerce so Homer is growing again. It was a good meeting and always a pleasure working with everyone.

Commissioner Conley commented on it being nice to see everyone and hoped everyone was having a good summer so far. He thanked the Chair for getting them out at a fairly early hour.

Commissioner Barnwell welcomed Commissioner Chiappone and echoed the sentiments on Ms. Bentz rejoining the Commission.

Commissioner Chiappone thanked everyone for the warm welcome and stated that it has been eye opening and excited about being on the Commission. He thought that the city was more complex than he realized and he has lived on the south peninsula off and on for over 20 years but only been in the City, downtown metropolitan area for the last 6 or 7 years. This has really been eye opening. It never could imagine the huge undertaking it is to keep it going.

Chair Smith echoed the sentiments of encouragement to Ms. Bentz and welcoming Commissioner Chiappone to the Commission. He commented on the interesting topics and expressed his appreciation for the work of the Planning Staff and requested the City Planner to forward their thanks to his staff on behalf of the Commission. He then expressed his opinion that Deputy City Clerk Krause was amazing in her ability to keep them in line and on task. He was very appreciative of all the efforts of staff.

ADJOURN

There being no further business before the Commission, the meeting was adjourned at 9:35 p.m. Next Regular Meeting is Wednesday, August 18, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held virtually by Zoom Webinar from the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Renée Krause

RENEE KRAUSE, MMC, DEPUTY CITY CLERK II

Approved: August 18, 2021

AUG 10 2021 AM09:19 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR RECONSIDERATION

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss Appeal which was dated August 5, 2021 and distributed on August 6, 2021.

The Commission overlooked the material fact that it did not have the authority to consider the Motion to Dismiss Appeal. The Commission's authority is limited to that which the Board has expressly delegated to it. See *Alaska State Comm'n for Human Rights v. Anderson,* 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim"). HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further

344-OAH

evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board's March 9, 2021 Decision and Order says nothing about dismissing this appeal or taking evidence pertaining to its dismissal.

The Commission overlooked HCC 21.93.110(a) which states in relative part as follows: "All final decisions on appeals shall be in writing, and shall state the names and number of members of the body who participated in the appeal, the names and number voting in favor of the decision, and the names and number voting in opposition to the decision." The Commission's Order Granting Motion to Dismiss Appeal fails to state the name of any Commissioner other than Chair Smith.

The Commission overlooked HCC 21.93.110(b) which states in relevant part as follows: "A decision shall include an official written statement of findings and reasons supporting the decision. This statement shall refer to specific evidence ***in the record*** and to the controlling sections of the zoning code." The Commission's Order Granting Motion to Dismiss does not refer to any evidence in the appeal record or to any controlling code. Note that Melody Livingston's withdrawal of her application for CUP 20-15 is not included in the record on appeal and

constitutes illegally submitted new evidence which the Commission has no authority to consider.

The Commission overlooked HCC 21.93.300(b) which states: "An appeal hearing shall be scheduled within the time specified in HCC 21.93.100. The hearing will be open to the public." No formal appeal hearing was scheduled for the Motion to Dismiss Appeal and no formal briefing of the matter was allowed. The Commission overlooked the material fact that there was no opposition to holding a special public hearing to solely address the Motion to Dismiss Appeal. The City of Homer's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal states in relevant part as follows: "Subject to and without waiving its arguments on these issues, the City agrees that the Commission should continue the August 4, 2021 hearing. Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter."

The Commission overlooked HCC 21.93.100(b) which requires that neighboring property owners be notified of the proceedings as set forth in HCC 21.94.030. Neighboring property owners were not notified of the August 4, 2021 proceedings as set forth in HCC 21.94.030.

The Commission overlooked the material facts that the application for CUP 20-15 was merely suspended and that because live controversies still exist the issues on appeal are not moot.

The Commission overlooked HCC 21.93.560(c) which states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer." The Board remanded this matter to the Commission on March 10, 2021. Five months later, the Commission has still not acted on the issues remanded to it by the Board.

On page 2 of its Order, the Commission states: "This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal

to the Superior Court shall be filed within 30 days of the date of distribution of this decision." The Commission clearly misconstrued, misrepresented, and/or misapplied HCC 21.91.130 which provides as follows:

"a. ***An appeal from a final decision of the Board of Adjustment*** or a hearing officer 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 the hearing officer or by the City Manager or 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*** or hearing officer.

c. An appeal from a final decision of the ***Board of Adjustment*** or hearing officer to the Superior Court is governed by court rules."

Thus, HCC 21.91.130 applies solely to final decisions issued by the Board of Adjustment or hearing officer and does not apply to final decisions issued by the Planning Commission. The Planning Commission overlooked the material facts that the Board of Adjustment has not issued a final decision in this matter and the Commission does not have the authority to issue a decision on behalf of the Board of Adjustment. The Planning Commission overlooked the material fact that an appellant does not have the option of appealing an action or determination of the Planning Commission directly to the superior court. Appeals from an action or determination of the Planning Commission, such as its

August 5, 2021 Order Granting Motion to Dismiss Appeal, are governed by HCC 21.93.080. HCC 21.93.080(b)(7) provides that a notice of appeal from an action or determination of the Planning Commission shall include "[t]he appellant's choice of decision maker, ***which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.***" While parties who actively and substantively participated in the proceedings before the Board of Adjustment plus the City Manager, the City Planner, and/or any governmental official, agency, or unit may appeal an action or determination of the ***Board of Adjustment*** directly to the superior court, none can appeal an action or determination of the ***Planning Commission*** directly to the superior court. HCC 21.91.130 does not state or imply that an action or determination of the City Manager or City Planner or any governmental official, agency, or unit can be appealed directly to the superior court. The City Manager, the City Planner, governmental officials, agencies, and/or units are merely additional parties, besides citizen appellants, who may appeal a final decision of the ***Board of Adjustment*** to the superior court.

DATED: August 10, 2021

By: *s/Frank Griswold/*

AUG 10 2021 PM04:59

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL TO ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL

Pursuant to HCC 21.93.570, Appellant Frank Griswold hereby moves for leave to supplement his Points on Appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission. The Commission's Order and Appellant's Motion for Reconsideration are attached hereto as Exhibit 1 and Exhibit 2 respectively.

DATED: August 10, 2021

By: *s/Frank Griswold/*

350-OAH

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322
mgatti@jdolaw.com
mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

CONDITIONAL USE PERMIT 2020-15	)	On appeal from Planning Commission Decision October 7, 2020

ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal, as well as any opposition and reply thereto, and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: August 5 2021

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

(01150986)

Exhibit 1

NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.

I hereby certify that a true copy of the foregoing document was hand delivered/mailed on the 6th day of August, 2021, to: Frank Griswold, Attorneys Holmquist + Gatti Melody Livingston, Matt Early, City Planner Abbond, City Manager Dumouchel

By: Melissa Jacobsen, City Clerk

MJacobsen

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
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ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR RECONSIDERATION

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The Commission overlooked the material fact that it did not have the authority to consider the Motion to Dismiss Appeal. The Commission's authority is limited to that which the Board has expressly delegated to it. See *Alaska State Comm'n for Human Rights v. Anderson,* 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim"). HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further

Exhibit 2

evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board's March 9, 2021 Decision and Order says nothing about dismissing this appeal or taking evidence pertaining to its dismissal.

The Commission overlooked HCC 21.93.110(a) which states in relative part as follows: "All final decisions on appeals shall be in writing, and shall state the names and number of members of the body who participated in the appeal, the names and number voting in favor of the decision, and the names and number voting in opposition to the decision." The Commission's Order Granting Motion to Dismiss Appeal fails to state the name of any Commissioner other than Chair Smith.

The Commission overlooked HCC 21.93.110(b) which states in relevant part as follows: "A decision shall include an official written statement of findings and reasons supporting the decision. This statement shall refer to specific evidence ***in the record*** and to the controlling sections of the zoning code." The Commission's Order Granting Motion to Dismiss does not refer to any evidence in the appeal record or to any controlling code. Note that Melody Livingston's withdrawal of her application for CUP 20-15 is not included in the record on appeal and

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The Commission overlooked HCC 21.93.100(b) which requires that neighboring property owners be notified of the proceedings as set forth in HCC 21.94.030. Neighboring property owners were not notified of the August 4, 2021 proceedings as set forth in HCC 21.94.030.

The Commission overlooked the material facts that the application for CUP 20-15 was merely suspended and that because live controversies still exist the issues on appeal are not moot.

The Commission overlooked HCC 21.93.560(c) which states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer." The Board remanded this matter to the Commission on March 10, 2021. Five months later, the Commission has still not acted on the issues remanded to it by the Board.

On page 2 of its Order, the Commission states: "This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal

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c. An appeal from a final decision of the ***Board of Adjustment*** or hearing officer to the Superior Court is governed by court rules."

Thus, HCC 21.91.130 applies solely to final decisions issued by the Board of Adjustment or hearing officer and does not apply to final decisions issued by the Planning Commission. The Planning Commission overlooked the material facts that the Board of Adjustment has not issued a final decision in this matter and the Commission does not have the authority to issue a decision on behalf of the Board of Adjustment. The Planning Commission overlooked the material fact that an appellant does not have the option of appealing an action or determination of the Planning Commission directly to the superior court. Appeals from an action or determination of the Planning Commission, such as its

August 5, 2021 Order Granting Motion to Dismiss Appeal, are governed by HCC 21.93.080. HCC 21.93.080(b)(7) provides that a notice of appeal from an action or determination of the Planning Commission shall include "[t]he appellant's choice of decision maker, ***which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.***" While parties who actively and substantively participated in the proceedings before the Board of Adjustment plus the City Manager, the City Planner, and/or any governmental official, agency, or unit may appeal an action or determination of the ***Board of Adjustment*** directly to the superior court, none can appeal an action or determination of the ***Planning Commission*** directly to the superior court. HCC 21.91.130 does not state or imply that an action or determination of the City Manager or City Planner or any governmental official, agency, or unit can be appealed directly to the superior court. The City Manager, the City Planner, governmental officials, agencies, and/or units are merely additional parties, besides citizen appellants, who may appeal a final decision of the ***Board of Adjustment*** to the superior court.

DATED: August 10, 2021

By: *s/Frank Griswold/*

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

City Council as Board of Adjustment
Monday, September 20, 2021 at 4:00 PM
Cowles Council Chambers
Webinar ID: 962 0489 3653 Passcode: 811147
Dial: 1 669 900 6833 or 1 253 215 8782 or Toll Free 888 788 0099 or 877 853 5247

CALL TO ORDER, 4:00 P.M.

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

NEW BUSINESS

a. Memorandum 21-153 from City Clerk re: Motions filed by Appellant Frank Griswold Related to the Appeal of CUP 20-15 and Zoning Permit 1020-782

COMMENTS OF THE AUDIENCE

ADJOURNMENT NO LATER THAN 4:50 P.M.

Next Regular Meeting is Monday, September 27, 2021, at 6:00 p.m. A Worksession is scheduled for 4:00 p.m. Committee of the Whole at 5:00 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom webinar.

City of Homer
www.cityofhomer-ak.gov

Office of the City Clerk
491 East Pioneer Avenue
Homer, Alaska 99603
clerk@cityofhomer-ak.gov
(p) 907-235-3130
(f) 907-235-3143

Memorandum 21-153

TO: MAYOR CASTNER AND HOMER CITY COUNCIL

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: SEPTEMBER 7, 2021

SUBJECT: MOTIONS FILED BY APPELLANT FRANK GRISWOLD RELATED TO THE APPEAL OF CUP 20-15 AND ZONING PERMIT 1020-782

Appellant Frank Griswold has filed a Motion for Reconsideration and the Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal regarding the appeal of CUP 20-15 and Motion for Reconsideration regarding the appeal of Zoning Permit 1020-782 in an effort to get these matters back before the Board of Adjustment.

The appeal of CUP 20-15 was regarding the Planning Commission Decision on Conditional Use Permit 20-15 under HCC 21.18.040(b)(4) a building within the twenty foot building setback and HCC 21.18.040(d) building area in excess of 30 percent of the lot area on a lot in the central business district on Chamberlain & Watson No. 4, Lot 1-A and T 6S R 13W SEC 19 Seward Meridian HM 2011002 Inlet Trading Post Condominiums Unit 2 at 106 W. Bunnell Avenue, Homer, Alaska. Council remanded the matter to the Planning Commission and following the remand the applicant withdrew her CUP application. The Planning Commission approved a Motion to Dismiss submitted by Attorney Holmquist on behalf of the City based on the finding that the applicant withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal.

The appeal of Zoning Permit 1020-782 was regarding an Appeal of the Planning Commission Decision on appeal of Zoning Permit 1020-782 issued for the property located at 541 Bonanza Avenue, Homer, Alaska.

Final decisions were issued regarding both matters and the decisions were mailed to parties in accordance with Homer City Code. The appellant argued that the notice of appeal rights was not printed on the final decision document related to the zoning permit, so that accommodation has been made and re-issued to the parties.

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

Homer City Code provides no provisions for an appellant to submit motions to bring a matter back before the Board of Adjustment after a final decision has been issued. I have advised Mr. Griswold as such, but he disagrees. Because of this I'm asking Council to advise me on how to proceed with these matters. Attorney Scott Brandt-Erichsen, who provided procedural advice to the Board of Adjustment in this matter, has advised that the Homer City Code does not authorize reconsideration, and HCC 21.91.130 as applied to this case makes the final decision appealable directly to the superior court without reconsideration. Further, he advises that addressing a motion for reconsideration and granting or denying the motion where there is no authority to do so would inject a potential procedural error into the

proceedings, and therefore he recommends that the response be that the Board of Adjustment declines to take up the motion as it is out of order, and to direct the clerk to so advise the parties.

If the Council agrees it should convene as Board of Adjustment to take up and consider the motions, Council will need to provide me with direction on process for noticing parties, noticing the public, opportunities for responses or briefing related to the motions that have been filed, and when to schedule the special meeting to take up the matters.

Recommendation:
Make a Motion that the Board of Adjustment declines to take up the motions of reconsideration as it is out of order and that the Clerk is directed to advise the parties that reconsideration will not be taken up and that they have 30 days from the final decision to appeal to the superior court.

City of Homer
www.cityofhomer-ak.gov

Office of the City Clerk
491 East Pioneer Avenue
Homer, Alaska 99603
clerk@cityofhomer-ak.gov
(p) 907-235-3130
(f) 907-235-3143

NOTICE OF HEARING

September 14, 2021

To Parties of Record: Frank Griswold, Appellant
Rick Abboud, Appellee
Scott and Stacy Lowry, Property Owners
Melody Livingston, Applicant
Matt Early, Applicant's Representative
Rick Abboud, City Planner

A special meeting has been scheduled to address Memorandum 21-153 regarding Motions filed by Appellant Frank Griswold related to the Appeal of Conditional Use Permit 20-15 and Zoning Permit 1020-782.

The Board of Adjustment has established the date for Monday, September 20, 2021 at 4:00 p.m. The meeting will be conducted via Zoom in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska. Zoom meeting details will be provided prior to the meeting.

Pursuant to Homer City Code Section 21.94.030 property owners within a 300-foot periphery of the site that is the subject of the proposed action shall be noticed.

_____
Renee Krause, MMC, Deputy City Clerk II

Cc: Board of Adjustment
Attorney Gatti
City Manager
Attorney Brandt-Erichsen

City of Homer
www.cityofhomer-ak.gov

Office of the City Clerk
491 East Pioneer Avenue
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Memorandum
Supplemental Packet

TO:	MAYOR CASTNER AND HOMER CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT
FROM:	MELISSA JACOBSEN, MMC, CITY CLERK
DATE:	SEPTEMBER 20, 2021
SUBJECT:	SUPPLEMENTAL PACKET

NEW BUSINESS

Memorandum 21-153 from City Clerk re: Motions Filed by Appellant Frank Griswold related to the Appeal of CUP20-15 and Zoning Permit 1020-782

Comments from Frank Griswold Page 2

From: Frank Griswold
To: Melissa Jacobsen
Cc: Renee Krause
Subject: Memorandum 21-153
Date: Monday, September 20, 2021 11:06:37 AM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Homer Board of Adjustment,

Re: Appeal of CUP 20-15

Memorandum 21-153 states: "The Planning Commission approved a Motion to Dismiss submitted by Attorney Holmquist on behalf of the City based on the finding that the applicant withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal." Mr. Holmquist's Motion to Dismiss is notably void of any provision of Homer City Code that authorizes it because HCC includes no specific provision authorizing the filing of a motion to dismiss an administrative appeal, on remand or otherwise. The former version of HCC 21.93.310 stated: "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" but Mr. Holmquist's Motion to Dismiss was manifestly inconsistent with HCC Title 21 and therefore not authorized by HCC 21.93.310. Mr. Holmquist's Motion to Dismiss Appeal was out of order because the Commission had no authority to consider any matter not specifically remanded to it by the Board of Adjustment, consider new evidence, or receive or act on illegal ex parte communications from City Planner Rick Abboud (a party to the appeal) regarding property owner Melody Livingston's temporary and strategic withdrawal of her application for CUP 20-15 to "regroup." Nonetheless, the City Clerk's Office forwarded it to the Planning Commission which eagerly rubber-stamped Mr. Holmquist's Motion to Dismiss Appeal. Arbitrarily allowing Mr. Holmquist to submit his Motion to Dismiss Appeal but then refusing to "take up" my ensuing Motion for Reconsideration to the Commission and Motion to Supplement Points on Appeal to the Board of Adjustment, both legitimately filed pursuant to HCC 21.93.310 and HCC 21.93.570 respectively, violates the equal protection clause of the Fourteenth Amendment to the US Constitution and violates my due process rights.

On July 29, 2021, the Homer City Attorneys responded in relevant part as follows to my Motion to Continue the August 4, 2021 Commission Proceeding Regarding the City's Motion to Dismiss Appeal: "Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous

pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter." But no special hearing was scheduled and neighboring property owners were not notified. Following the Commission's decision, the Clerk's Office should have promptly submitted my timely filed Motion for Reconsideration to the Commission and my timely filed Motion to Supplement Points on Appeal to the Board of Adjustment. The Board and Commission could then have decided whether to consider, grant, or deny my motions. The parties were excluded from the discussions between Ms. Jacobsen and Mr. Brandt-Erichsen who was hired to advise the Board of Adjustment, not to unilaterally render decisions on the Board's behalf or provide biased procedural advice to the City Clerk. Neither Mr. Brandt-Erichsen, the Clerk's Office, nor the City Council has the authority to make adjudicatory decisions on behalf of the Commission or Board.

At paragraph four of her memorandum, Ms. Jacobsen states: "final decisions were issued regarding both matters" and at paragraph five she states: "an appeal from a final decision [deliberately omitting "of a hearing officer"] may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer." She neglects to point out that the Board of Adjustment never issued a final decision regarding CUP 20-15 and that only final decisions of the Board of Adjustment or a hearing officer can be appealed directly to the superior court and that no hearing officer was involved, and that the Planning Commission's "final decision" was not a response to the Board of Adjustment's remand order but merely the granting of a motion to dismiss the appeal, and that even if the Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal did constitute a final decision, it cannot be appealed directly to the superior court. The version of HCC 21.91.130(a) recently enacted via Ordinance 21-44(S) states: "An appeal from a final decision of a hearing officer may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The version of HCC 21.91.130(a) (misquoted in Ordinance 21-44(S)) in effect when I filed my appeal states as follows: "An appeal from a final decision of the Board of Adjustment or a hearing officer may be taken directly to the Superior Court by a party who actively and substantially participated in the proceedings before the Board of Adjustment or the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The City Council should not rely on any paraphrased rendition of HCC that is manipulated and spun to give it a meaning other than what was actually intended. Just because the City Clerk and/or Planning Commission claim the Commission's remand determination constitutes a final decision does not make it so. The Commission issued its first, and arguably only, Final Decision on October 22, 2020 and that decision was appropriately appealed to the Board of Adjustment. The Notice of Appeal Rights attached to the Planning Commission's August 5,

2021 Order Granting Motion to Dismiss Appeal deceptively states that "Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment may appeal this [Planning Commission] decision to the Superior Court." In light of the fact that the Board of Adjustment and the Planning Commission are no longer involved in adjudicating zoning appeals, the code provisions that previously applied to Board and Commission appeal proceedings govern appeals still pending before them. In any event, neither version of HCC 21.91.130 provides that decisions of the Planning Commission may be appealed directly to the Superior Court or that a party who actively participated in proceedings before the Board of Adjustment can appeal an ensuing remand determination of the Planning Commission directly to the superior court. The Planning Commission never addressed the matters remanded to it by the Board of Adjustment on March 9, 2021 and should be sanctioned for not promptly responding to the Board's (non-final) Decision and Order, illegally accepting and considering new evidence, and engaging in ex parte communications. The Planning Commission's August 5, 2021 order/decision can only be directly appealed to the Board of Adjustment in accordance with HCC 21.93.500-550. After the Board of Adjustment issues a final decision, the Planning Commission's ultra vires dismissal of the appeal and other erroneous determinations can be appealed directly to the superior court.

At paragraph six of her memorandum, Ms. Jacobsen states: "Homer City Code provides no provisions for an appellant to submit motions to bring a matter back before the Board of Adjustment after a final decision has been issued. I have advised Mr. Griswold as such, but he disagrees." I disagreed because Ms. Jacobsen is patently wrong. HCC 21.93.310 and HCC 21.93.570 authorize an appellant to submit post-decision motions to the Planning Commission and Board of Adjustment. Alaska Rules of Appellate Procedure 602(a)(2) states: "An appeal may be taken to the superior court from an administrative agency within 30 days from the date the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal." This appellate rule clearly contemplates motions for reconsideration of final agency decisions so it would clearly not be out of order or inject procedural error into the proceedings if the Board or Commission addressed a motion for reconsideration. No provision of HCC authorizes the City Clerk to reject a party's timely filed motion for reconsideration of an adjudicatory body's final decision so the City

Clerk's unilateral rejection of a party's timely filed motion for reconsideration would inject procedural error into the proceedings and be grounds for remand or reversal. In the past, it has routinely been the practice of the Clerk's Office to promptly forward such motions to the appropriate adjudicatory body. On June 19, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration of Board of Adjustment Decision regarding CUP 13-13 and on December 4, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration Re: Standing to Appeal CUP 14-05. Neither of these orders was subsequently ruled to be procedurally flawed or otherwise out of order by the appellate courts.

Re: Appeal of Zoning Permit 1020-782

The City Clerk's duties are ministerial, not adjudicatory. Ms. Jacobsen had no sua sponte authority to reject my Motion for Reconsideration or initiate the addition of a Notice of Appeal Rights to the Board of Adjustment's initial Final Decision. Even as amended, final decision #2 still violates HCC 21.93.110(a) which requires that a final decision state "the names and number [of Board members] voting in favor of the decision, and the names and number voting in opposition to the decision." If the Board of Adjustment grants my Motion for Reconsideration it can legitimately amend its August 26, 2021 Final Decision to correct deficiencies and/or erroneous findings. The fact that final decision #2 was issued on September 7, 2021 soundly debunks the specious argument that a matter cannot be brought back before the Board after a final decision has been issued. Whether the Board and/or Commission have legal authority to convene to "take up" the subject motions is a question of law and it is not generally the role of the City Council or Mayor to dispense legal advice to the City Clerk. The Council could authorize funding to allow the Clerk's Office to seek impartial legal advice from an erudite attorney. Because City Attorneys Max Holmquist and Michael Gatti represent parties to the pending appeals they would not be impartial sources. It is inappropriate for Ms. Jacobsen to ask the Council to provide her with direction on process for noticing parties, noticing the public, opportunities for responses or briefing, and/or when to schedule the special meeting while simultaneously recommending to the Council that it make, and presumably pass, a motion that the Board of Adjustment declines to take up the motions for reconsideration. (FYI, I only filed one motion for reconsideration to the Board of Adjustment and it pertained to ZP 1020-782. I filed another motion to the Board to supplement my points on appeal re: CUP 20-15. My other motion for reconsideration pertained to the Planning Commission's order granting the city's motion to dismiss the appeal of CUP 20-15). One seeking direction from the Council is self-admittedly unqualified to recommend what that direction should be. Accordingly, no weight should be given to Ms. Jacobsen's baseless, self-serving recommendation. Memorandum 21-153 should have been sent to the Board of Adjustment, not the City Council. The Council would be out of

order making a motion that the Board of Adjustment declines to take up the subject motions because, unless and until it formally convenes as a Board of Adjustment, the Council and Mayor have no legal authority to rule on behalf of the Board of Adjustment, especially when proper notice has not been given to parties and neighboring property owners. Furthermore, Robert's Rules discourages making negative motions. Alternatively, Ms. Jacobsen could forgo seeking further direction and simply allow due process to run its course by forwarding the subject motions to the designated adjudicatory bodies to let them exercise their discretion to issue procedural notices and decide whether those motions should be reviewed, considered, granted, or denied.

Audi alteram partem,

Frank Griswold

Session 21-24 a Special Meeting of the Homer City Council sitting as Board of Adjustment was called to order on September 20, 2021 by Mayor Ken Castner at 4:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBER ADERHOLD, DAVIS, HANSEN-CAVASOS, LORD, SMITH

ABSENT: COUNCILMEMBER VENUTI (Excused)

STAFF: CITY CLERK JACOBSEN
ATTORNEY BRANDT-ERICHSEN

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

LORD/ADERHOLD MOVED TO APPROVE THE AGENDA.

There was no discussion.

VOTE: YES: SMITH, ADERHOLD, DAVIS, LORD, HANSEN-CAVASOS

Motion carried.

NEW BUSINESS

a. Memorandum 21-153 from City Clerk re: Motions filed by Appellant Frank Griswold Related to the Appeal of CUP 20-15 and Zoning Permit 1020-782

Mayor Castner opened the floor to comments from the parties. He proposed 10 minutes for each side to comment, that appellant Frank Griswold would comment first then Attorney Holmquist on behalf of the City.

Mr. Griswold, participating by telephone through Zoom, asked to raise a procedural matter regarding the Board of Adjustment not having representation as mandated by Homer City Code. Mayor Castner advised that Attorney Brandt-Erichsen was in attendance via Zoom.

Mr. Griswold raised the matter that neither the notice that was mailed nor the agenda has any provisions for comments until the end at audience comments and he thinks a lot of people may not have been aware they could comment and he was unable to prepare a statement.

Mayor Castner reiterated he's providing an opportunity to for the parties to speak. He added that motions for reconsideration typically come from within the body, that they've never had a third party request for reconsideration, and that isn't a procedure in Homer City Code (HCC) to allow it to take it up.

Mr. Griswold commented if the Mayor had read the email he sent he explained with specific examples how he has submitted motions for reconsideration in the past that were provided to the Board by the Clerk for review. He also argued that it didn't seem that the Mayor was aware of what the memorandum from the Clerk is about, and clarified it's about two motions for reconsideration and a motion for leave to supplement his points on appeal, because he wants to appeal the decision of the Planning Commission decision on remand to the Board of Adjustment. Mayor Castner attempted to give assurance that the Board would listen to his arguments and make a decision whether to consider the matters.

Mr. Griswold continued that the City Clerk's duties are ministerial and not adjudicatory and she can't reject timely filed motions to the Board of Adjustment, but should have forwarded them to the respective bodies to decide whether to take them up. He addressed the differences of the notice of appeal rights on the decisions that were issued and that a decision of the Planning Commission can't be appealed directly to the Superior Court. He appealed to the BOA, the BOA remanded to the Planning Commission, a remand decision isn't a final decision, and only final decisions can be appealed. The Planning Commission never took up the remand, they waited for a strategic withdrawal of the CUP so they wouldn't have to take it up, and they don't have the authority to dismiss the appeal. The BOA has never issued a final decision. If he filed it in Superior Court they would likely say he has not exhausted all his remedies and it should go to the BOA for final decision before the Court takes it up.

Attorney Holmquist explained there is no authority or procedure in City Code to hear a motion for reconsideration of a final written decision. The Alaska Supreme Court has held that administrative agencies such as the planning Commission or the BOA only possess the authority expressly granted to them under statute or code, so they have limited jurisdiction or they only possess the authority that's granted to them by implication, as necessarily incident to the exercise of powers that are actually granted. Homer City Code provides that the appeal of a final decision should be filed in the Superior Court. The Supreme Court has held that where there is no provision for reconsideration, an administrative statutes ordinances the administrative decision is final.

Mayor Castner noted Mr. Griswold made good points about what happened after the remand and that it leaves him in limbo. He asked what the City's position is regarding that.

Attorney Holmquist explained that in the motion to dismiss provided to the Planning Commission they outlined that neither the Commission nor the BOA have jurisdiction or authority to decide any issues raised in the appeal with the applicants withdrawal of their application because it invalidated the CUP, because there was no longer a permit to base an appeal on. Their argument is that it didn't matter whether the Planning Commission or BOA issued the final decision because neither had the authority to take any further action. Regardless whether the Planning Commission or the BOA takes action to dismiss the appeal the end result is the same either way. He reiterated the appeal must be dismissed because

there's no jurisdiction or authority to take any further action on it after the applicant withdrew their application. He added if at some future time the applicant determines she wants to refile for a CUP then she will need to go through all the steps of the CUP process again.

Mr. Griswold rebutted by pointing out Homer City Code has a catch-all that the BOA or hearing officer may proceed and administrative appeal in any lawful manner, not inconsistent with this title statutes and the Constitution, so considering a motion for reconsideration is allowed by 21.93.570. Because it's not inconsistent with statutes or the Constitution, it's clearly contemplated by the superior Court and the fact that it has been the policy of the city in the past under the same set of rules to at least take them up.

LORD/ADERHOLD MOVED THAT THE BOARD OF ADJUSTMENT TO ADJOURN TO EXECUTIVE SESSION TO DISCUSS THE APPELLANT FRANK GRISWOLD'S MOTION FOR RECONSIDERATION AND LEAVE TO SUPPLEMENT POINTS AND APPEAL TO ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL REGARDING THE APPEAL OF CUP 20-15 AND MOTION FOR RECONSIDER RECONSIDERATION REGARDING THE APPEAL OF ZONING PERMIT 1020-782 AND HAVE ATTORNEY BRANDT-ERICHSON JOIN US IN EXECUTIVE SESSION.

There was no discussion.

VOTE: YES: ADERHOLD, HANSEN-CAVASOS, LORD, SMITH, DAVIS

Motion carried.

The Board of Adjustment went into executive session at 4:31 and Mayor Castner reconvened the meeting at 5:01 p.m.

LORD/ADERHOLD MOVED THAT WHILE THE BOARD OF ADJUSTMENTS BELIEVES IT IS A MOOT POINT DUE TO THE LACK OF AN ACTIVE PERMIT APPLICATION, THE BOARD OF ADJUSTMENT BELIEVES THAT THE APPEAL PROCEDURALLY SHOULD BE BEFORE THE PLANNING COMMISSION FOR APPELLANT FRANK GRISWOLD'S MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 AND THE BOARD DIRECTS THE CLERK TO REFER THAT MOTION TO THE PLANNING COMMISSION FOR RECONSIDERATION.

There was no discussion.

VOTE: YES: HANSEN-CAVASOS, LORD, DAVIS, ADERHOLD, SMITH

Motion carried.

COMMENTS OF THE AUDIENCE

ADJOURNMENT NO LATER THAN 4:50 P.M.

Next Regular Meeting is Monday, September 27, 2021, at 6:00 p.m. A Worksession is scheduled for 4:00 p.m. Committee of the Whole at 5:00 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom webinar.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Approved: October 25, 2021

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

Planning Commission Regular Meeting
Wednesday, October 20, 2021 at 6:30 PM
Council Chambers via Zoom Webinar
Webinar ID: 979 8816 0903 Password: 976062
Dial 669 900 6833 or 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099

CALL TO ORDER, 6:30 P.M.

AGENDA APPROVAL

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

RECONSIDERATION

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.

A. Planning Commission Regular Meeting Minutes of September 15, 2021 **p. 3**

B. Decision and Findings for Conditional Use Permit 21-07 at 1554 Homer Spit Road **p. 11**

C. Homer Lake Street Rehabilitation Right of Way Acquisition Preliminary Plat Time Extension Request **p.16**

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-61, City Planner's Report **p. 18**

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave. **p. 21**

PLAT CONSIDERATION

PENDING BUSINESS

A. Staff Report 21-62, Parking Requirements for One Bedroom Dwelling Units **p. 29**

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold **p. 32**

INFORMATIONAL MATERIALS

A. City Manager's Report for September 27 & October 11, 2021 City Council Meetings **p. 86**

B. Kenai Peninsula Borough Notice of Decisions **p. 101**

C. Planning Commission Calendar **p. 103**

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

COMMENTS OF THE STAFF

COMMENTS OF THE COMMISSION

ADJOURNMENT

Next Regular Meeting is Wednesday, November 3 at 6:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska. Meetings will adjourn promptly at 9:30 p.m. An extension is allowed by a vote of the Commission

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

Staff Report PL 21-64

TO: Homer Planning Commission
FROM: Julie Engebretsen, Deputy City Planner
DATE: October 20, 2021
SUBJECT: Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Requested Action: Conduct a Public Hearing.

Attachments
1. Decision and order remanding to the Planning Commission dated March 9, 2021
2. Public Notice

BEFORE THE CITY OF HOMER

BOARD OF ADJUSTMENT

In the Matter of		
	)	
	)	On Appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision of
	)	October 7, 2020.

DECISION AND ORDER REMANDING TO THE PLANNING COMMISSION

The Board of Adjustment met in open session on February 11, 2021 and heard arguments in the above referenced matter. At the conclusion of the hearing, the BOA recessed into executive session to deliberate. The Board of Adjustment met again on March 9, 2021 to deliberate and considered the Appellant's Motion for Consideration of Additional Evidence and for Remand due to the ownership to the property. The Board of Adjustment met in executive session and deliberated concerning the Motion for Consideration of Additional Evidence and for Remand based upon new information and decided the matter. Participants in this proceeding and decision included Mayor Ken Castner as chair, who was a non-voting participant, and council members Donna Aderhold, Heath Smith, Storm Hansen-Cavasos, Rachel Lord and Joey Evensen. Council Member Caroline Venuti did not participate in the hearing or decision due to conflict of interest as determined by vote of the balance of the Board of Adjustment. After deliberation and consideration of the record and the arguments of the parties, the Board of Adjustment decision is as set forth herein.

Upon review of the Appellant's February 13, 2021 Motion for Consideration of Additional Evidence and to Remand and Plaintiff's Opposition, the Motion to Remand is GRANTED. The new evidence is admitted to the record and the matter is remanded to the Homer Planning Commission for further review under HCC 21.93.510 (a) and (c) to address the following issues:

1. Whether any members of the Planning Commission had disqualifying financial interests or bias due to the ownership of the Inlet Trading Post, LLC, and the three individuals identified in the motion, Lewis Morris, Michael Walsh, and Asia Freeman;
2. Whether the subject property involved in the project is a single structure and involves the entire parcel identified as Tax ID # 17516052, specifically,
    a. Whether the project is a single building and thus exempt from the requirement for a Conditional Use Permit (CUP) for a second building containing a permitted principal use on a single lot under HCC 21.18.030(j);
    b. Whether the project is two buildings but is exempt from getting a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) because the particular use here has an existing non-conforming use right which is not lost by the reconstruction;
    c. Whether the project is two buildings and requires a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) and the CUP

application here was treated as including that CUP request and the request was granted; or

d. Whether the project here is two buildings and requires a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) and the CUP application did not include that request.

3. Whether, if the Planning Commission determines that the project includes or affects attributes such as parking involving the entire parcel or condominium association, the application was incomplete or defective for the lack of signature of the representatives of the condominium association or the owners of both units on the parcel identified as Tax ID # 17516052 showing consent of the owner and authority to bind the owners of the entire lot involved in the project as required under HCC 21.71.020(a)(9).

The Board of Adjustment finds that the Planning Commission's findings of fact on these issues is inadequate for review. The Board of Adjustment recognizes that it has the discretion to either remand to address these issues to the Planning Commission or make its own findings of fact under HCC 21.93.540(e). Due to the allegation of conflict, and the central role that the allegation regarding building ownership has in the determination of these questions of fact which are not reflected in the record, the Board of Adjustment determines that remand to the Planning Commission for further proceedings is the most appropriate course of action.

DATED: 09 March, 2021.

KEN CASTNER, MAYOR
HOMER BOARD OF ADJUSTMENT

Certification of Distribution

I certify that a copy of the Board of Adjustment decision in the matter of Conditional Use Permit 2020-15 on Appeal from Planning Commission Decision of October 7, 2020 was mailed to the recipients listed below on March 10, 2021. A copy was delivered to the City of Homer Planning Department on the same date.

3·10·21
Date

Melissa Jacobsen, MMC, City Clerk

Frank Griswold
519 Klondike Ave.
Homer, AK 99603

Melody Livingston
106 W. Bunnell #2
Homer, AK 99603

Matt Early, Beachy Construction
5243 Kachemak Dr.
Homer, AK 99603

Michael Gatti and Max Holmquist
Jermain, Dunnagan & Owens
3000 A Street, Suite 300
Anchorage, AK 99503

Robert Dumouchel, City Manager
491 E. Pioneer Avenue
Homer, AK 99603

CITY OF HOMER
PUBLIC HEARING NOTICE
PLANNING COMMISSION MEETING

A public hearing on the matter below is scheduled for Wednesday, October 20, 2021 during the Regular Planning Commission Meeting. The meeting begins at 6:30 p.m. and will be conducted via Zoom webinar. Participation is available virtually or in-person at City Hall, more information below.

REMAND FROM THE BOARD OF ADJUSTMENT OF CONDITIONAL USE PERMIT 20-15 UNDER HCC 21.18.040(B)(4) A BUILDING WITHIN THE TWENTY FOOT BUILDING SETBACK AND HCC 21.18.040(D) BUILDING AREA IN EXCESS OF 30 PERCENT OF THE LOT AREA IN THE CENTRAL BUSINESS DISTRICT AT 106 W. BUNNELL AVENUE, HOMER, ALASKA, LOT 1-A, CHAMBERLAIN & WATSON NO. 4, SEC 19, T 6S R 13W S.M., HM 2003005.

In-person meeting participation is available in Cowles Council Chambers located downstairs at Homer City Hall, 491 E. Pioneer Ave., Homer, AK 99603.

To attend the meeting virtually, visit zoom.us and enter the Meeting ID & Passcode listed below. To attend the meeting by phone, dial any one of the following phone numbers and enter the Webinar ID & Passcode below, when prompted: 1-253-215-8782, 1-669-900-6833, (toll free) 888-788-0099 or 877-853-5247.

Meeting ID: 979 8816 0903
Passcode: 976062

Additional information regarding this matter will be available by 5pm on the Friday before the meeting. This information will be posted to the City of Homer online calendar page for October 20, 2021 at *https://www.cityofhomer-ak.gov/calendar*. It will also be available at the City Clerk's Office at Homer City Hall and at the Homer Public Library.

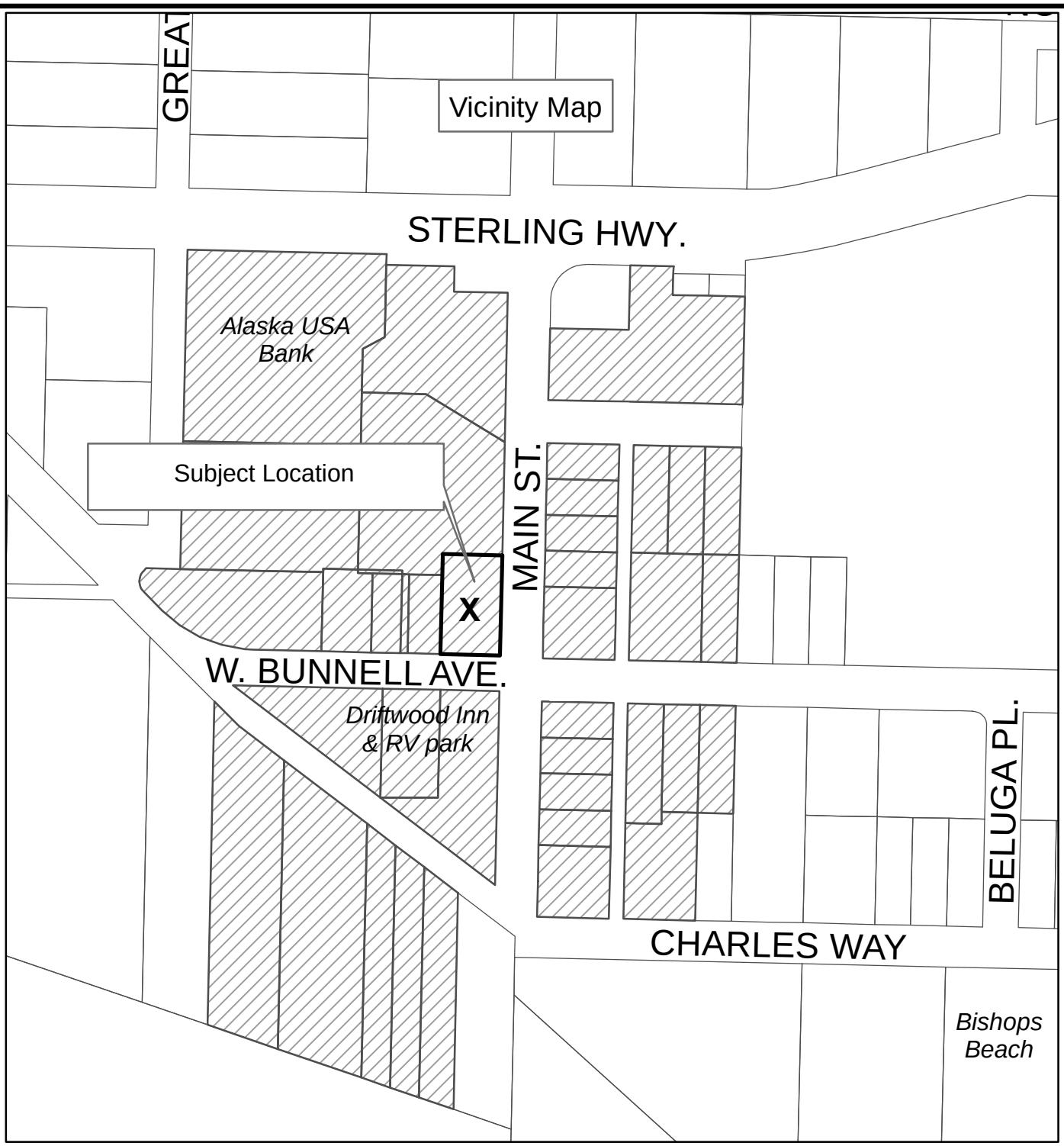
Written comments can be emailed to the City Clerk's Office at the address below, mailed to Homer City Hall at the address above, or placed in the Homer City Hall drop box at any time. Written comments must be received by 4pm on the day of the meeting.

If you have questions, contact the City Clerk's Office. Phone: (907) 235-3130, email: *clerk@cityofhomer-ak.gov*, or in-person at Homer City Hall.

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

VICINITY MAP ON REVERSE

380-OAH



City of Homer
Planning and Zoning Department

10/7/21

Remand of
Conditional Use Permit 20-15
106 W. Bunnell Ave.

Marked lots are within 300 feet and property owners notified.

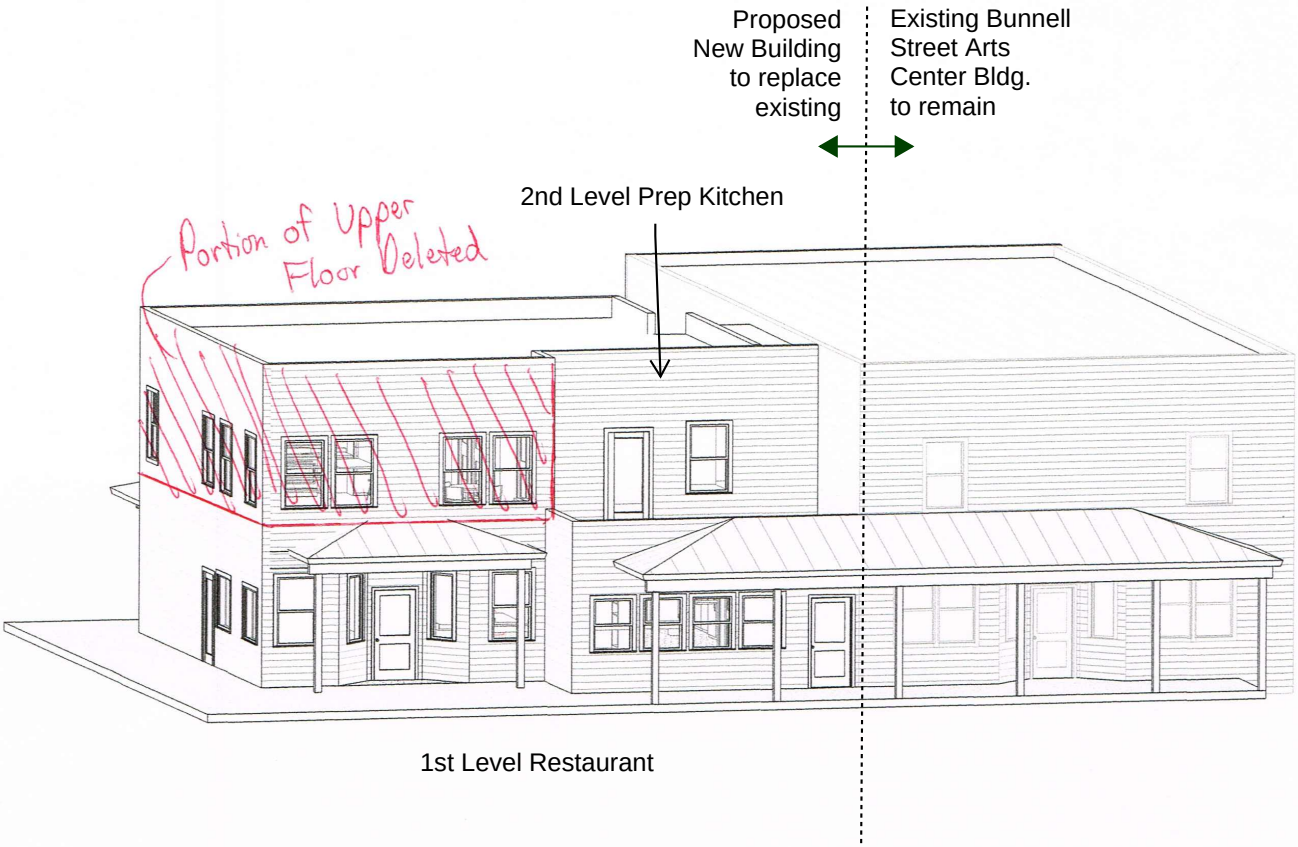
Feet
0 150 300

N

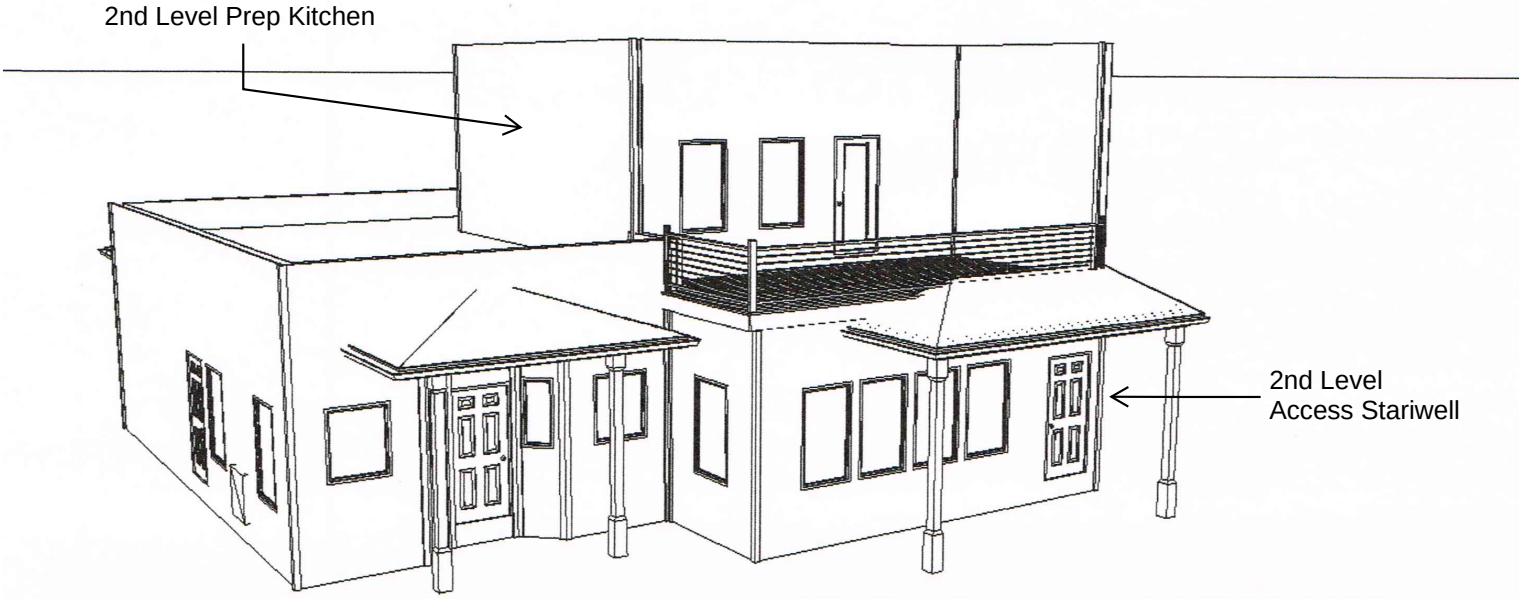
Disclaimer:
It is expressly understood the City of Homer, its council, board, departments, employees and agents are not responsible for any errors or omissions contained herein, or deductions, interpretations or conclusions drawn therefrom.

381-OAH

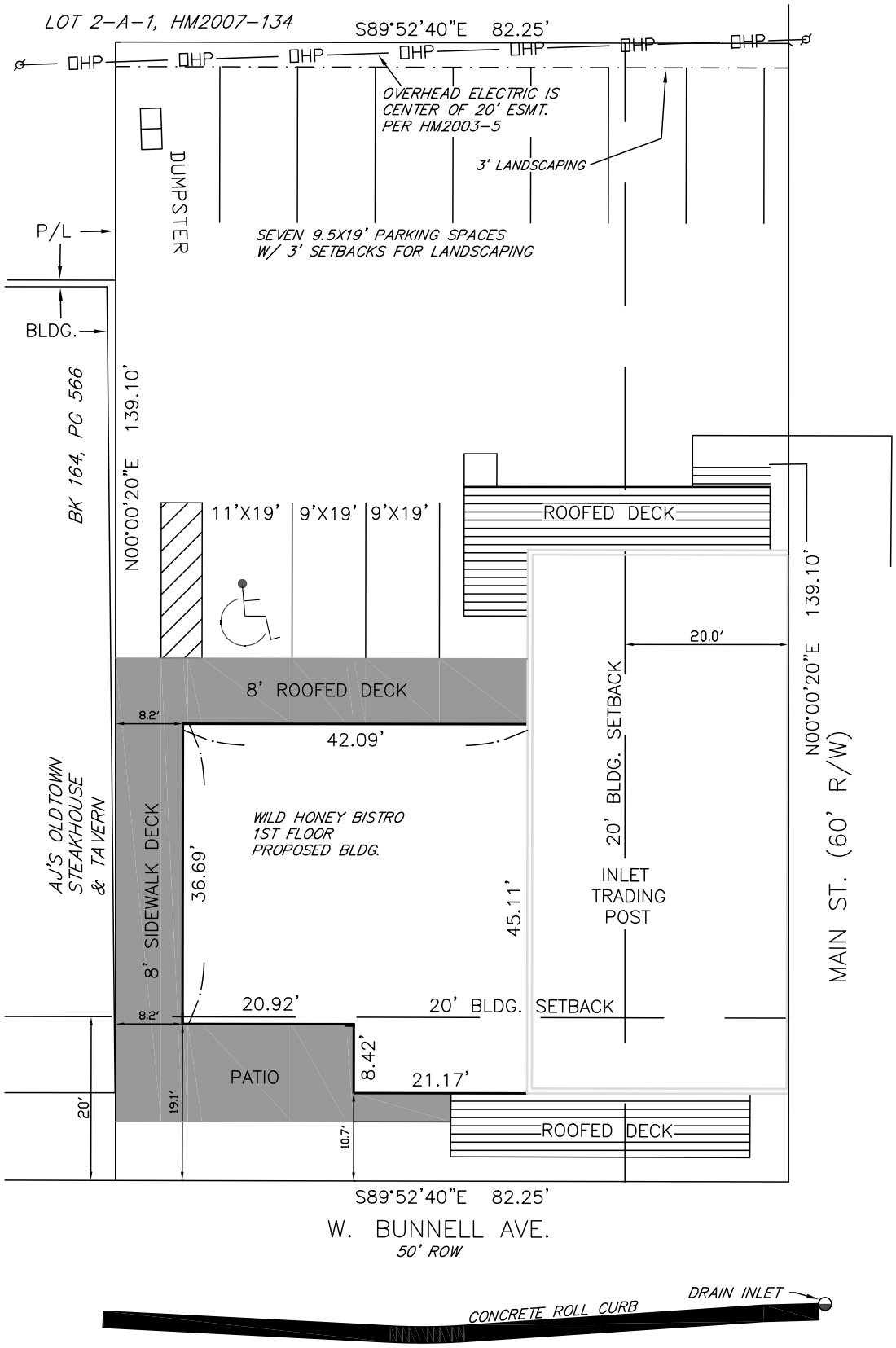
"Elevation A"



"Elevation B"



382-OAH



STATE OF ALASKA
49TH
Gary D. Nelson
Gary D. Nelson
NO. 7610-S
REGISTERED PROFESSIONAL LAND SURVEYOR

JOB No.	5225
DATE	09/14/2020
SCALE	1"= 15'
ADDRESS:	106 W. BUNNELL AVE
DRAWING	5225_5138_5169
TAX PARCEL	17516052
PLAT No.	2011-2
SECTION	SE-1/4, 19
TOWNSHIP	6S
RANGE	13W (SM)

PLOT PLAN
WILD HONEY BISTRO

LOT 1-A CHAMBERLAIN & WATSON NO.4

WITHIN SE1/4 SEC 19, T 6S, R 13W (S.M.)
IN THE CITY OF HOMER
HOMER RECORDING DISTRICT

ABILITY SURVEYS
REGISTERED LAND SURVEYORS
(907) 235-8440
152 DEHEL AVE., HOMER, ALASKA 99603

383-OAH

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
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(p) 907-235-3106
(f) 907-235-3118

Staff Report 21-63

TO: Homer Planning Commission
FROM: Rick Abboud, AICP, City Planner
DATE: October 20, 2021
SUBJECT: Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

Introduction

I received a notice from the City Clerk regarding a decision that was made regarding CUP 20-15 and a request to schedule an agenda item to take up the remand. Enclosed was their motion:

"At the Board of Adjustment hearing on Sept 20th the BOA made the following motion-

LORD/ADERHOLD MOVED THAT WHILE THE BOARD OF ADJUSTMENTS BELIEVES IT IS A MOOT POINT DUE TO THE LACK OF AN ACTIVE PERMIT APPLICATION, THE BOARD OF ADJUSTMENT BELIEVES THAT THE APPEAL PROCEDURALLY SHOULD BE BEFORE THE PLANNING COMMISSION FOR APPELLANT FRANK GRISWOLD'S MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 AND THE BOARD DIRECTS THE CLERK TO REFER THAT MOTION TO THE PLANNING COMMISSION FOR RECONSIDERATION.

There was no discussion.

VOTE: YES: HANSEN-CAVASOS, LORD, DAVIS, ADERHOLD, SMITH"

Analysis

On March 9, 2021, the BOA remanded the appeal of CUP 20-15 to the Commission to make additional findings. I received an email from Melody Livingstone on April 20, 2021 stating that she was withdrawing her application for CUP 20-15. As of April 20, 2021, the application for the CUP was extinguished and CUP 20-15 was voided.

On May 14, 2021 the City filed a Motion to Dismiss the appeal arguing that the withdrawal of the application made the appeal moot and the Commission did not have jurisdiction to consider or decide any issues in the appeal since CUP 20-15 was void. Griswold opposed the motion and filed several other motions, including a Motion for Default Judgment, a Motion to Correct or Clarify Appellant's Opposition to Motion to Dismiss Appeal, a Motion to Cancel or

Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal, and a Motion to Strike New Evidence. All of those materials are attached.

The Commission considered the City's M0tion to Dismiss and related motions at an open hearing on August 4, 2021. The Commission voted unanimously to grant the City's request to dismiss the appeal. On August 5, 2021, the Commission distributed a written order dismissing the appeal. The order explained that "applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal."

On August 10, 2021, Griswold filed a Motion for Reconsideration and a Motion to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal. On August 19, 2021, the City Clerk informed Griswold in a letter that those motions were rejected because the August 5, 2021 order was final and Griswold was required to appeal to the Superior Court.

On September 20, 2021 the BOA voted to refer the Motion for Reconsideration and Motion to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal to the Commission for consideration. On October 14, 2021, the City responded to Griswold's motions and asked that they be denied. The City also submitted a proposed order addressing the decision to dismiss the appeal and denying Griswold's motions. Those filings are attached for the Commission's consideration.

The Clerk should be supplementing the hearing materials with the minutes from the BOA hearing of September 20, 2021 hearing.

Staff Recommendation

The Commission is asked to consider Griswold's Motion for Reconsideration and Motion to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal and decide whether to grant or deny those motions. HCC 21.93 does not contain a procedure for reconsideration of a final decision in a zoning appeal or for allowing an appellant to supplement his points on appeal. HCC 21.93.110 states that zoning appeal decisions are "final decisions." Since the Code does not have a procedure for what Griswold is requesting, City Planning recommends that the Commission deny Griswold's motions.

Attachments

1. BOA remand 3.09.21
2. Livingstone Email 4.20.21
3. City Motion to Dismiss Appeal 5.14.21
4. Griswold Motion for Default Judgment 7.7.21
5. Griswold Opposition to Motion to Dismiss 7.7.21
6. City's Reply to Opposition to Motion to Dismiss and Opposition to Motion for Default Judgment 7.14.21

7. City's Proposed Order Granting Motion to Dismiss Appeal 7.14.21
8. Griswold Motion to Correct or Clarify Appellant's Opposition to Motion to Dismiss Appeal 7.26.21
9. Griswold Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal 7.26.21
10. Griswold Motion to Strike New Evidence 7.26.21
11. City's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal 7.29.21
12. Order Granting Motion to Dismiss Appeal 8.5.21
13. Griswold Motion for Reconsideration 8.10.21
14. Griswold Motion to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal 8.10.21
15. City Clerk letter to Griswold 8.19.21
16. City of Homer's Response to Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal 10.14.21
17. City's Proposed Revised Order Granting Motion to Dismiss Appeal and Denying Motion for Reconsideration and Motion to Supplement Points on Appeal 10.14.21

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Supplement to Staff Report 21-63
Index of Attachments

TO: HOMER PLANNING COMMISSION
FROM: TRAVIS BROWN, PLANNING TECHNICIAN
DATE: October 20, 2021
SUBJECT: Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

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The October 20, 2021 packet page numbers for the listed staff report attachments are referenced below in **bold**

1. BOA remand 3.09.21 **page 36**
2. Livingstone Email 4.20.21 **page 39**
3. City Motion to Dismiss Appeal 5.14.21 **page 40**
4. Griswold Motion for Default Judgment 7.7.21 **page 42**
5. Griswold Opposition to Motion to Dismiss 7.7.21 **page 44**
6. City's Reply to Opposition to Motion to Dismiss and Opposition to Motion for Default Judgment 7.14.21 **page 48**
7. City's Proposed Order Granting Motion to Dismiss Appeal 7.14.21 **page 51**
8. Griswold Motion to Correct or Clarify Appellant's Opposition to Motion to Dismiss Appeal 7.26.21 **page 53**
9. Griswold Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal 7.26.21 **page 55**
10. Griswold Motion to Strike New Evidence 7.26.21 **page 57**
11. City's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal 7.29.21 **page 59**
12. Order Granting Motion to Dismiss Appeal 8.5.21 **page 61**
13. Griswold Motion for Reconsideration 8.10.21 **page 63**
14. Griswold Motion to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal 8.10.21 **page 69**
15. City Clerk letter to Griswold 8.19.21 **page 70**
16. City of Homer's Response to Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal 10.14.21 **page 71**
17. City's Proposed Revised Order Granting Motion to Dismiss Appeal and Denying Motion for Reconsideration and Motion to Supplement Points on Appeal 10.14.21 **page 77**

* Additional item included in packet:
September 20, 2021 Minutes of the Special Meeting of the Homer City Council sitting as Board of Adjustment **page 82**

BEFORE THE CITY OF HOMER

BOARD OF ADJUSTMENT

In the Matter of		
	)	
	)	On Appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision of
	)	October 7, 2020.

DECISION AND ORDER REMANDING TO THE PLANNING COMMISSION

The Board of Adjustment met in open session on February 11, 2021 and heard arguments in the above referenced matter. At the conclusion of the hearing, the BOA recessed into executive session to deliberate. The Board of Adjustment met again on March 9, 2021 to deliberate and considered the Appellant's Motion for Consideration of Additional Evidence and for Remand due to the ownership to the property. The Board of Adjustment met in executive session and deliberated concerning the Motion for Consideration of Additional Evidence and for Remand based upon new information and decided the matter. Participants in this proceeding and decision included Mayor Ken Castner as chair, who was a non-voting participant, and council members Donna Aderhold, Heath Smith, Storm Hansen-Cavasos, Rachel Lord and Joey Evensen. Council Member Caroline Venuti did not participate in the hearing or decision due to conflict of interest as determined by vote of the balance of the Board of Adjustment. After deliberation and consideration of the record and the arguments of the parties, the Board of Adjustment decision is as set forth herein.

Upon review of the Appellant's February 13, 2021 Motion for Consideration of Additional Evidence and to Remand and Plaintiff's Opposition, the Motion to Remand is GRANTED. The new evidence is admitted to the record and the matter is remanded to the Homer Planning Commission for further review under HCC 21.93.510 (a) and (c) to address the following issues:

1. Whether any members of the Planning Commission had disqualifying financial interests or bias due to the ownership of the Inlet Trading Post, LLC, and the three individuals identified in the motion, Lewis Morris, Michael Walsh, and Asia Freeman;
2. Whether the subject property involved in the project is a single structure and involves the entire parcel identified as Tax ID # 17516052, specifically,
    a. Whether the project is a single building and thus exempt from the requirement for a Conditional Use Permit (CUP) for a second building containing a permitted principal use on a single lot under HCC 21.18.030(j);
    b. Whether the project is two buildings but is exempt from getting a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) because the particular use here has an existing non-conforming use right which is not lost by the reconstruction;
    c. Whether the project is two buildings and requires a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) and the CUP

application here was treated as including that CUP request and the request was granted; or

d. Whether the project here is two buildings and requires a CUP for the second principal use in a separate building on a single lot under HCC 21.18.030(j) and the CUP application did not include that request.

3. Whether, if the Planning Commission determines that the project includes or affects attributes such as parking involving the entire parcel or condominium association, the application was incomplete or defective for the lack of signature of the representatives of the condominium association or the owners of both units on the parcel identified as Tax ID # 17516052 showing consent of the owner and authority to bind the owners of the entire lot involved in the project as required under HCC 21.71.020(a)(9).

The Board of Adjustment finds that the Planning Commission's findings of fact on these issues is inadequate for review. The Board of Adjustment recognizes that it has the discretion to either remand to address these issues to the Planning Commission or make its own findings of fact under HCC 21.93.540(e). Due to the allegation of conflict, and the central role that the allegation regarding building ownership has in the determination of these questions of fact which are not reflected in the record, the Board of Adjustment determines that remand to the Planning Commission for further proceedings is the most appropriate course of action.

DATED: 09 March, 2021.

KEN CASTNER, MAYOR
HOMER BOARD OF ADJUSTMENT

Certification of Distribution

I certify that a copy of the Board of Adjustment decision in the matter of Conditional Use Permit 2020-15 on Appeal from Planning Commission Decision of October 7, 2020 was mailed to the recipients listed below on March 10, 2021. A copy was delivered to the City of Homer Planning Department on the same date.

3·10·21
Date

Melissa Jacobsen, MMC, City Clerk

Frank Griswold
519 Klondike Ave.
Homer, AK 99603

Melody Livingston
106 W. Bunnell #2
Homer, AK 99603

Matt Early, Beachy Construction
5243 Kachemak Dr.
Homer, AK 99603

Michael Gatti and Max Holmquist
Jermain, Dunnagan & Owens
3000 A Street, Suite 300
Anchorage, AK 99503

Robert Dumouchel, City Manager
491 E. Pioneer Avenue
Homer, AK 99603

Travis Brown

From: (null) (null) <melodyliving@yahoo.com>
Sent: Tuesday, April 20, 2021 6:14 AM
To: Rick Abboud
Subject: Re: remand

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Sorry about the delay. I am now in Chicago. The move was demanding ☹.
Please withdraw my current application. We will resubmit in a year or two.
Thank you for your efforts on this.
Melody Livingston

Sent from my iPhone

On Apr 15, 2021, at 7:32 PM, Rick Abboud <RAbboud@ci.homer.ak.us> wrote:

Melody,

Just wanted to follow up on our last conversation regard the remand of your CUP for Wild Honey. If you wish to regroup and reapply at a later, please respond with an email stating your intent to withdraw your current application.

Thanks,

Rick

RICK ABBOUD, AICP
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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

MOTION TO DISMISS APPEAL

The City of Homer (the "City"), by and through its counsel of record, Jermain, Dunnagan & Owens, P.C., hereby moves to dismiss the above-captioned appeal because the applicant for Conditional Use Permit 2020-15, Melody Livingston (the "Applicant"), has withdrawn her application.

On March 9, 2021, the Homer Board of Adjustment ("BOA") remanded the above-captioned appeal to the Homer Planning Commission (the "Commission") for further review under HCC 21.93.510(a).[1] On April 20, 2021, the Applicant emailed the City notifying it that she has withdrawn her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue that is the subject of this appeal.[2] The Applicant's withdrawal of her conditional use permit application voids CUP 20-15.

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[1] *See* Decision and Order Remanding to the Planning Commission dated March 9, 2021.
[2] *See* emails between Melody Livingston and the City, copies of which are attached hereto as Exhibit A.

The Commission should dismiss this appeal due to the Applicant's withdrawal of her application for two reasons. First, the withdrawal of the CUP application that is the basis of this appeal moots the claims on appeal. The Alaska Supreme Court has held that "a claim is moot if it has lost its character as a present, live controversy."[3] In this appeal, the relief sought by the Appellant is the denial of CUP 20-15. Since CUP 20-15 is voided by the withdrawal of the CUP application, the issues raised in this appeal are moot.

Second, the Commission and the BOA no longer have jurisdiction to decide any issues raised in this appeal. The Commission's jurisdiction to consider and decide upon a CUP application depends upon the existence of a CUP application.[4] The BOA's appellate jurisdiction only extends to the grant or denial of a CUP.[5] Neither body has jurisdiction to decide legal issues related to a CUP appeal after a CUP applicant has withdrawn her application and is no longer seeking a CUP.

Accordingly, the City respectfully requests that the Commission dismiss the above-captioned appeal.

DATED this 14th day of May, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee
City of Homer

By: s/*Michael R. Gatti*/
Michael R. Gatti
Alaska Bar No. 8306033
Max D. Holmquist
Alaska Bar No. 0911057

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[3] *Akpik v. State, Office of Management and Budget*, 115 P.3d 532, 535 (Alaska 2005).
[4] HCC 21.71.040(a).
[5] HCC 21.93.030(a).

JUL 07 2021 AM 10:56 RK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR DEFAULT JUDGMENT

During the time this matter has been under consideration, Mr. Abboud has repeatedly emailed Ms. Livingston about this appeal and communicated with the Commission about those emails without notice and opportunity for all parties to participate in those communications. (See emails between Mr. Abboud and Ms. Livingston dated April 15, 2021 and April 20, 2021 attached as Exhibit A to city's Motion to Dismiss Appeal; see also April 15, 2021 Commission minutes). HCC 21.93.710(a) prohibits members of the Commission from having ex parte communication with any person. HCC 21.93.710(b)(2)(a) allows communications between municipal staff and Commission members where such staff members are not themselves parties to the appeal but the July 6, 2021 Notice of Motion to Dismiss identifies City Planner Rick Abboud as a party to this appeal so the exception under HCC

21.93.710(b)(2)(a) does not apply to Mr. Abboud. Pursuant to HCC 21.93.710(a) and HCC 21.93.710(b)(2)(a), Mr. Abboud and the Commission have therefore been engaging in ex parte communications. HCC 21.93.710(e) provides that the Commission may impose appropriate sanctions, including default, against a party to an appeal for any violation of this section and HCC 21.93.710(f) provides that it is a violation for any person to knowingly have or attempt to have ex parte communication with a Commission in violation of subsection (a) of this section. Accordingly, the Commission should grant default judgment to Mr. Griswold prior to and in lieu of ruling on the city's Motion to Dismiss Appeal which would then be rendered moot.

DATED: July 7, 2021

By: *s/Frank Griswold/*
Frank Griswold

JUL 07 2021 AM10:56 RK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

Although technically rendered moot as a result of the withdrawal of the application for CUP, this appeal should not be dismissed because the public interest exception to the mootness doctrine applies. A claim is moot if it is no longer a present live controversy or if the adjudicatory body cannot provide the relief sought by the appellant. But there is a public interest exception to the mootness doctrine which requires considering and weighing three factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeated circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Kodiak Seafood Processors*, 900 P.2d 1191 at 1196 (Alaska 1995). There can be no doubt that the disputed

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issues in this appeal are capable of repetition. On April 20, 2021, property owner/applicant Melody Livingston stated as follows in an email to City Planner Rick Abboud: "Please withdraw my current application. We will resubmit in a year or two." Meanwhile, the Commission will likely be considering other CUP applications seeking reductions in setback requirements, lot density requirements, parking space requirements, and nonconforming use requirements, all which were at issue in the instant appeal. The city has consistently applied and interpreted its regulations incorrectly and arbitrarily and is now attempting to circumvent a review of these issues that are likely to be repeated so that it can continue to do so. The city is in the process of making monumental amendments to its appeal procedures designed to make it more difficult or impossible for Mr. Griswold to appeal Ms. Livingston's new application and/or prevail thereby trampling his due process rights. Having encountered stiff opposition to her proposal and seeing the writing on the wall after extensive briefing has been completed, Ms. Livingston has strategically withdrawn her application with the intention of resubmitting it after the city adopts its amended appeal procedures. Mr. Griswold is a lay pro se public interest litigant who, without compensation or hopes of compensation, has invested a bucket of

sweat in this appeal; he should not be forced to start over every time things do not bode well for Ms. Livingston. The third prong of the public interest exception is met when a case involves "concepts of fairness underlying the right to procedural due process." *Greenpeace Inc.,* 96 P.3d 1056 at 1062-63 (Alaska 2004). The myriad points on appeal in this case involve threshold issues, due process issues, and agency interpretations of law that are extremely important to the public interest. Mr. Griswold challenged the Commission's authority to apply HCC 21.18.040(b)(4) to the application because it violates the equal protection clause of the Fourteenth Amendment to the US Constitution; he claimed the Commission violated a cardinal primary requirement of procedural due process by merely rubber-stamping the biased findings of subordinate Planning Staff instead of acting on its own independent consideration of the law and facts of the controversy; and he alleged that the Comprehensive Plan Goal of "infill" is unconstitutionally vague. Though not a constitutional issue, he claimed that the Commission did not have the authority to waive, relax, or ignore parking space requirements; a ruling on this issue could have widespread effects on the community. Mr. Griswold's allegation that the Applicants did not produce evidence sufficient to enable

meaningful review of the application as required under HCC 21.71.030 constitutes an important threshold issue that could affect numerous future applications for conditional use permits. The Commission's acknowledgment and application of the public interest exception to the mootness doctrine and non-dismissal of this appeal will avoid another unnecessary round of contentious and time-consuming appeal proceedings next year when Ms. Livingston resubmits her CUP application.

DATED: July 7, 2021

By: *s/Frank Griswold/*
Frank Griswold

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

REPLY TO OPPOSITION TO MOTION TO DISMISS APPEAL AND OPPOSITION TO MOTION FOR DEFAULT JUDGMENT

The Homer Planning Commission (the "Commission") must dismiss the above-captioned appeal because it lacks authority and jurisdiction to decide any issues raised in this appeal. The Commission's authority is limited that which the Homer City Council has expressly delegated to it.[1] The Commission's jurisdiction to consider and decide upon a CUP application (and any related legal issues) depends upon the existence of a CUP application.[2] Absent a CUP application, the Commission cannot issue advisory legal opinions with regard to moot issues.

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[1] HCC 2.58.010; HCC 2.72.030; HCC 21.91.020. *See also Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim").
[2] HCC 21.71.040(a).

Griswold agrees with the City that the Applicant's withdrawal of her CUP application moots the issues remaining in this appeal.[3] The Commission cannot apply the public interest mootness exception. The public interest exception is a doctrine applied by the Alaska Supreme Court to consider recurrent matters of public concern that are capable of repetition if the mootness doctrine is applied.[4] However, the Commission is not a court. It cannot issue generally applicable legal opinions.[5] Rather, in the context of a CUP application, its authority is limited to reviewing and deciding upon the application. Since the application has been withdrawn,[6] the Commission lacks authority to proceed with this appeal.

Griswold's assertion regarding alleged ex-parte comments by City Planner Abboud to the Commission is also moot.[7] Without a CUP application to review, the Commission has no authority to impose sanctions against the City for alleged ex-parte communications.

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[3] Appellant's Opposition to Motion to Dismiss Appeal, p. 1.

[4] *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985).

[5] Griswold fails to cite any authority in the Homer City Code that would allow the Commission (or the Homer Board of Adjustment) to consider legal issues related to a CUP appeal in the absence of a CUP application.

[6] Contrary to Griswold's assertion, the applicant's apparent intention to submit a new CUP application in the future supports dismissal of this appeal. A future application may materially differ from the now-withdrawn application such that the legal issues associated with the initial application may no longer be relevant.

[7] *See* Griswold's Motion for Default Judgment. Griswold's allegation about City Planner Abboud's communication with the Commission at the April 15, 2021 Commission meeting is unclear. Abboud did not participate in the April 15 meeting and made no comments to the Commission about this appeal nor any other subject. *See* Homer Planning Commission, Special Meeting Minutes, p. 1-2 (April 15, 2021), https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/planning_commission/meeting/72623/pc_041521_special_minutes_approved.pdf (accessed July 9, 2021).

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Accordingly, the Commission should dismiss this appeal and deny Griswold's Motion for Default Judgment.

DATED this 14th day of July, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee City of Homer

By: s/*Michael R. Gatti*/
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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

[PROPOSED] ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal, as well as any opposition and reply thereto, and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: _____ _____

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

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NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.

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JUL 26 2021 AM10:21 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO CORRECT/CLARIFY APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby moves to correct/clarify the first two sentences of Appellant's Opposition to Motion to Dismiss Appeal which state as follows: "Although technically rendered moot as a result of the withdrawal of the application for CUP, this appeal should not be dismissed because the public interest exception to the mootness doctrine applies. A claim is moot if it is no longer a present live controversy or if the adjudicatory body cannot provide the relief sought by the appellant." Mr. Griswold did not intend to state or imply that the application for CUP 20-15 is moot, technically or otherwise. Because the property owner voluntarily withdrew CUP 20-15 with the intention of resubmitting it within a year or two, it constitutes a present live controversy and

405-OAH

therefore is unequivocally not moot. Accordingly, the Commission must deny the city's Motion to Dismiss Appeal.

DATED: July 26, 2021

By: *s/Frank Griswold/*

JUL 26 2021 AM 10:21 PC

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO CANCEL OR CONTINUE THE AUGUST 4, 2021 COMMISSION PROCEEDING REGARDING MOTION TO DISMISS APPEAL

In accordance with HCC 21.93.560(c), Appellant Frank Griswold hereby requests that the August 4, 2021 proceeding regarding the city's Motion to Dismiss Appeal be canceled due to the fact that the Commission lacks jurisdiction/authority to act on that motion or take new evidence pertaining to it. HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." HCC 21.93.560(c) states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand ***in accordance with the decision of the Board of Adjustment.***" Thus, the Commission is prohibited from acting on

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or taking further evidence on any issue not specifically described in the Board's decision/remand order. The record in this appeal is closed and does not include Ms. Livingston's correspondence with Mr. Abboud regarding her intention to temporarily suspend her CUP application. If new evidence or changed circumstances are alleged, ***the Board of Adjustment*** may, at its discretion, either hear the appeal without considering the allegations or may remand the matter to the Commission to rehear the matter, if necessary. HCC 21.93.510(a). However, the Commission has no authority to sua sponte consider allegations of new evidence or changed circumstances or consider any issue not expressly remanded to it by the Board of Adjustment. Furthermore, no evidence received under HCC 21.93.510(c) shall be considered for purposes other than determining disqualification. HCC 21.93.510(c). Alternatively and in accordance with HCC 21.93.100(b), HCC 21.94.020, and HCC 21.94.030, Appellant Frank Griswold requests that the August 4, 2021 proceeding regarding the city's Motion to Dismiss Appeal be continued to such a time that it can be scheduled for a public hearing and neighboring property owners properly notified.

DATED: July 26, 2021

By: *s/Frank Griswold/*

JUL 26 2021 AM 10:21 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO STRIKE NEW EVIDENCE

Email correspondence between City Planner Rick Abboud and subject property owner Melody Livingston was recently submitted in support of the city's Motion to Dismiss Appeal. In accordance with HCC 21.93.560(b), Appellant Frank Griswold hereby requests that this new evidence be stricken from the record. HCC 21.93.560(b) states: "A decision remanding a case ***shall describe any issue upon which further evidence should be taken***, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board of Adjustment's January 9, 2021 Decision and Order Remanding to the Planning Commission says nothing about Ms. Livingston's temporary withdrawal of her application for CUP 20-15 or any other issue pertaining to the potential dismissal of this appeal. The appeal record for this matter is closed

except for the taking of evidence pertaining to the ownership of the subject property and potential Commissioner disqualifying financial conflicts of interest/partiality related thereto. No evidence received under HCC 21.93.510(c) shall be considered for purposes other than determining disqualification. HCC 21.93.510(c). The closed appeal record does not include Ms. Livingston's recent correspondence with Mr. Abboud and the Commission does not have the authority to consider allegations of new evidence sua sponte. Accordingly, the recent email correspondence between Ms. Livingston and Mr. Abboud and any other newly submitted evidence not directly related to the ownership of the subject property should be stricken from the record.

DATED: July 26, 2021

By: *s/Frank Griswold/*

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

CITY OF HOMER'S RESPONSE TO MOTION TO CANCEL OR CONTINUE THE AUGUST 4, 2021 COMMISSION PROCEEDING REGARDING MOTION TO DISMISS APPEAL

The City of Homer (the "City"), through its counsel Jermain, Dunnagan & Owens, P.C., hereby responds to Appellant's Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal.[1]

The City disputes Griswold's assertion that the Homer Planning Commission (the "Commission") lacks authority to take the procedural step of dismissing an appeal remanded from the Homer Board of Adjustment (the "BOA") for which the underlying CUP permit application has been withdrawn.[2] The City also disputes Griswold's

[1] Filed July 26, 2021.
[2] *See* the City's Motion to Dismiss Appeal, filed May 14, 2021 and the City's Reply to Opposition to Motion to Dismiss, filed July 14, 2021.

assertion that the Applicant's notice of withdrawal of her CUP application constitutes "new evidence."

Subject to and without waiving its arguments on these issues, the City agrees that the Commission should continue the August 4, 2021 hearing. Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter.

DATED this 29th day of July, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee City of Homer

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal, as well as any opposition and reply thereto, and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: August 5, 2021

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

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NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.

I hereby certify that a true copy of the foregoing document was hand delivered/mailed on the 6th day of August, 2021, to:
Frank Griswold, Attorneys Holmquist + Gatti
Melody Livingston, Matt Early, City Planner Abboud, City Manager Dumouchel
By: Melissa Jacobsen, City Clerk

MJacobsen

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AUG 10 2021 AM09:19 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR RECONSIDERATION

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss Appeal which was dated August 5, 2021 and distributed on August 6, 2021.

The Commission overlooked the material fact that it did not have the authority to consider the Motion to Dismiss Appeal. The Commission's authority is limited to that which the Board has expressly delegated to it. See *Alaska State Comm'n for Human Rights v. Anderson,* 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim"). HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further

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evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board's March 9, 2021 Decision and Order says nothing about dismissing this appeal or taking evidence pertaining to its dismissal.

The Commission overlooked HCC 21.93.110(a) which states in relative part as follows: "All final decisions on appeals shall be in writing, and shall state the names and number of members of the body who participated in the appeal, the names and number voting in favor of the decision, and the names and number voting in opposition to the decision." The Commission's Order Granting Motion to Dismiss Appeal fails to state the name of any Commissioner other than Chair Smith.

The Commission overlooked HCC 21.93.110(b) which states in relevant part as follows: "A decision shall include an official written statement of findings and reasons supporting the decision. This statement shall refer to specific evidence ***in the record*** and to the controlling sections of the zoning code." The Commission's Order Granting Motion to Dismiss does not refer to any evidence in the appeal record or to any controlling code. Note that Melody Livingston's withdrawal of her application for CUP 20-15 is not included in the record on appeal and

constitutes illegally submitted new evidence which the Commission has no authority to consider.

The Commission overlooked HCC 21.93.300(b) which states: "An appeal hearing shall be scheduled within the time specified in HCC 21.93.100. The hearing will be open to the public." No formal appeal hearing was scheduled for the Motion to Dismiss Appeal and no formal briefing of the matter was allowed. The Commission overlooked the material fact that there was no opposition to holding a special public hearing to solely address the Motion to Dismiss Appeal. The City of Homer's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal states in relevant part as follows: "Subject to and without waiving its arguments on these issues, the City agrees that the Commission should continue the August 4, 2021 hearing. Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter."

The Commission overlooked HCC 21.93.100(b) which requires that neighboring property owners be notified of the proceedings as set forth in HCC 21.94.030. Neighboring property owners were not notified of the August 4, 2021 proceedings as set forth in HCC 21.94.030.

The Commission overlooked the material facts that the application for CUP 20-15 was merely suspended and that because live controversies still exist the issues on appeal are not moot.

The Commission overlooked HCC 21.93.560(c) which states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer." The Board remanded this matter to the Commission on March 10, 2021. Five months later, the Commission has still not acted on the issues remanded to it by the Board.

On page 2 of its Order, the Commission states: "This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal

to the Superior Court shall be filed within 30 days of the date of distribution of this decision." The Commission clearly misconstrued, misrepresented, and/or misapplied HCC 21.91.130 which provides as follows:

"a. ***An appeal from a final decision of the Board of Adjustment*** or a hearing officer 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 the hearing officer or by the City Manager or 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*** or hearing officer.

c. An appeal from a final decision of the ***Board of Adjustment*** or hearing officer to the Superior Court is governed by court rules."

Thus, HCC 21.91.130 applies solely to final decisions issued by the Board of Adjustment or hearing officer and does not apply to final decisions issued by the Planning Commission. The Planning Commission overlooked the material facts that the Board of Adjustment has not issued a final decision in this matter and the Commission does not have the authority to issue a decision on behalf of the Board of Adjustment. The Planning Commission overlooked the material fact that an appellant does not have the option of appealing an action or determination of the Planning Commission directly to the superior court. Appeals from an action or determination of the Planning Commission, such as its

August 5, 2021 Order Granting Motion to Dismiss Appeal, are governed by HCC 21.93.080. HCC 21.93.080(b)(7) provides that a notice of appeal from an action or determination of the Planning Commission shall include "[t]he appellant's choice of decision maker, ***which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.***" While parties who actively and substantively participated in the proceedings before the Board of Adjustment plus the City Manager, the City Planner, and/or any governmental official, agency, or unit may appeal an action or determination of the ***Board of Adjustment*** directly to the superior court, none can appeal an action or determination of the ***Planning Commission*** directly to the superior court. HCC 21.91.130 does not state or imply that an action or determination of the City Manager or City Planner or any governmental official, agency, or unit can be appealed directly to the superior court. The City Manager, the City Planner, governmental officials, agencies, and/or units are merely additional parties, besides citizen appellants, who may appeal a final decision of the ***Board of Adjustment*** to the superior court.

DATED: August 10, 2021

By: *s/Frank Griswold/*

AUG 10 2021 PM04:59

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL TO ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL

Pursuant to HCC 21.93.570, Appellant Frank Griswold hereby moves for leave to supplement his Points on Appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission. The Commission's Order and Appellant's Motion for Reconsideration are attached hereto as Exhibit 1 and Exhibit 2 respectively.

DATED: August 10, 2021

By: *s/Frank Griswold/*

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August 19, 2021

Frank Griswold
519 Klondike Ave.
Homer, AK 99603
By email to fsgriz@alaska.net

Mr. Griswold,

The City will not be taking up the *Motion for Reconsideration* and the *Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal* that you presented to the City Clerk's Office on August 10, 2021. This is due to the fact that the Board of Adjustment remanded the matter to the Planning Commission and the Planning Commission voted unanimously to dismiss the matter based on the finding that the applicant, Melody Livingston, withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal.

A copy of the signed Order Granting Motion to Dismiss Appeal was mailed to you and the other parties on August 6, 2021. The order includes a notice of appeal rights that states the motion to dismiss is a final decision and directs that you and the other parties may appeal this decision directly to the Superior Court.

Respectfully,

Melissa Jacobsen, MMC
City Clerk

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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

CITY OF HOMER'S RESPONSE TO MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL

The City of Homer (the "City"), through its counsel Jermain, Dunnagan & Owens, P.C., hereby responds to Appellant's Motion to Dismiss Appeal and Motion for Leave to Supplement Points on Appeal. Both motions should be denied. The Commission's decision to dismiss the appeal was factually and legally sound and the Homer City Code does not allow either reconsideration of a decision or supplementation of points on appeal.

I. FACTUAL AND PROCEDURAL HISTORY

On March 9, 2021 the Homer Board of Adjustment ("BOA") remanded this appeal to the Homer Planning Commission (the "Commission") for further review pursuant to HCC 21.93.510(a).[1] The purpose of the remand was for the Commission to make factual

[1] *See* Decision and Order Remanding to the Planning Commission dated March 9, 2021.

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findings with regard to several issues that arose in briefing and argument before the BOA for which the BOA determined there was an inadequate record.[2] However, on April 20, 2021, the applicant for CUP 20-15 withdrew her application before the Commission held a hearing to address these issues.[3] The applicant asked to withdraw her current application and said she intended to resubmit a new application in a year or two.[4]

The City moved to dismiss the appeal for two reasons: (1) the applicant's withdrawal of the application on which Griswold's appeal is based mooted all pending issues in the appeal and (2) without a CUP application, neither the BOA nor the Commission have jurisdiction to consider and decide upon any issues raised in the appeal.[5] Following briefing on that motion and four others filed by Griswold, the Commission dismissed the appeal on August 5, 2021.[6] The Commission found that "applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal."[7]

Griswold subsequently filed what he styled a Motion for Reconsideration of the Commission's order dismissing the appeal[8] and a Motion to Supplement Points on

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[2] *Id.*
[3] *See* emails between Melody Livingston and the City, Exhibit A to the City's Motion to Dismiss filed May 14, 2021.
[4] *Id.*
[5] *See* the City's Motion to Dismiss, filed May 14, 2021.
[6] *See* Order Granting Motion to Dismiss Appeal dated August 5, 2021.
[7] *Id.*
[8] *See* Griswold's Motion for Reconsideration, filed August 10, 2021.

Appeal to Address Planning Commission's Dismissal of Appeal.[9] The City Clerk initially rejected both motions because the Commission's August 5, 2021 order dismissing the appeal was a final decision appealable to the Superior Court.[10] However, on September 20, 2021, the BOA directed the City Clerk to refer both motions to the Commission for consideration.

II. ARGUMENT

The Commission should deny Griswold's motions and uphold its decision to dismiss this appeal. The Commission's decision to dismiss the appeal due to the applicant's withdrawal of her application for CUP 20-15 was factually and legally correct. Griswold's motions should be denied because HCC 21.93 does not allow for the filing or consideration of motions for reconsideration or supplementation of points on appeal. Even if the code allowed for reconsideration, Griswold's arguments are meritless.

The Commission's decision to dismiss this appeal was legally sound in all respects. First, as the Commission correctly determined, the applicant's withdrawal of the CUP application for CUP 20-15 moots all of Griswold's claims in this appeal. A claim is moot if "it has lost its character as a present, live controversy."[11] The effect of the applicant's withdrawal is to void CUP 20-15. Since the permit being appealed no longer exists, there is no present, live controversy with regard to any issue raised in this

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[9] *See* Griswold's Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal, filed August 10, 2021.
[10] *See* August 19, 2021 letter from City Clerk to Frank Griswold.
[11] *Akpik v. State, Office of Management and Budget*, 115 P.3d 532, 535 (Alaska 2005).

appeal. Second, the Commission and the BOA lack jurisdiction to decide any issue raised in this appeal.[12] The Commission's jurisdiction to consider and decide upon a CUP application depends on the existence of a CUP application.[13] The BOA's appellate jurisdiction only extends to the grant or denial of a CUP.[14] Neither body has jurisdiction to decide legal issues related to the issuance of CUP 20-15 because it is void. Since CUP 20-15 no longer exists, the Commission has no jurisdiction to proceed with this appeal.

The Commission should deny Griswold's motions because they are procedurally improper. There is no authority or procedure in the Homer City Code to hear a motion for reconsideration of a final written decision and Griswold has not cited to any such authority. Where there is no provision for reconsideration in an administrative code, the administrative decision is final and must be appealed to Superior Court.[15] HCC 21.93 clearly states that zoning appeal decisions are final and BOA decisions are appealable to the Superior Court.[16] The HCC 21.93 likewise contains no authority or procedure for a party to supplement its points on appeal. This procedural issue alone requires the Commission to deny Griswold's motions.

Even if HCC 21.93 allowed motions for reconsideration of final decisions, Griswold fails to present any issue for which reconsideration is necessary. While the

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[12] The Commission and BOA no longer hear Title 21 appeals since the appellate procedures were amended in Homer Ord. 21-44(S). This section references the procedures in effect when Griswold filed his appeal.
[13] HCC 21.71.040(a).
[14] HCC 21.93.030(a).
[15] *Oaks v. Grocers Wholesale, Inc.*, 377 P.2d 1001, 1003 (Alaska 1963).
[16] HCC 21.93.110 (referring to zoning appeal decisions as "final decisions"); HCC 21.93.550 (BOA decision should be in a form that finally disposes of a case on appeal); HCC 21.91.130(a) (the appeal of a final decision in a BOA appeal should be filed in the Superior Court).

Commission did not have express authority in the code to dismiss the appeal, it had implied authority to do so. Administrative bodies possess implied authority to take actions that are necessarily incident to the powers they have been granted.[17] HCC 21.93 does not contemplate the appropriate procedure when an applicant withdraws her CUP application while a BOA appeal is pending. However, the former HCC 21.93.310 states "[i]f 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." Since the withdrawal immediately mooted all issues in the appeal and the Commission and BOA lacked authority and jurisdiction to adjudicate the appeal, the Commission had implied authority to dismiss the appeal.[18] The only other alternative was for the Commission to exceed its authority in the Homer City Code by continuing to adjudicate an appeal regarding a CUP that no longer exists.

The Commission's order dismissing the appeal was not a decision on the merits and thus was not subject to all of the requirements listed in HCC 21.93.110. However, the City proposes that the Commission revise its decision dismissing the case to further elaborate on its legal conclusions. The City has attached a proposed order for the Commission's consideration.

The hearing at which the Commission considered and granted the Motion to Dismiss was a properly noticed and conducted public hearing. The City Clerk provided notice to the parties that the Motion to Dismiss would be heard at the August 4, 2021

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[17] *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1033 n.19 (Alaska 1972).
[18] *See* former HCC 21.93.310.

Commission meeting. The Commission was not required to conduct a "formal" or "special" hearing to decide this issue.

The Commission's August 5, 2021 order correctly provided Griswold with notice of his appeal rights under HCC 21.91.130. The Commission, acting under its implied authority, dismissed this BOA appeal. Since this was a final decision in a BOA appeal, Griswold may only appeal the decision to the Superior Court. However, the City encourages the Commission to revise its decision and adopt the City's proposed order to further elaborate on its legal conclusions.

III. CONCLUSION

The Commission's decision to dismiss this appeal was factually, legally, and procedurally correct. HCC 21.93 contains no authority or procedure for reconsideration of a final decision or supplementation of points on appeal. Even if such motions were allowed, Griswold's arguments are meritless. Accordingly, the Commission should deny Griswold's motions. To provide additional detail regarding its decision to dismiss the appeal, the Commission should adopt the proposed findings and legal conclusions in the City's proposed order.

DATED this 14 day of October, 2021, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for Appellee City of Homer

By: s/*Michael R. Gatti*/
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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of		
	)	
	)	On appeal from Planning
CONDITIONAL USE PERMIT 2020-15	)	Commission Decision
	)	October 7, 2020

[PROPOSED] REVISED ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR RECONSIDERATION AND MOTION TO SUPPLEMENT POINTS ON APPEAL

The Homer Planning Commission (the "Commission") met in open session on October 20, 2021 to consider Appellant Frank Griswold's Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal. The Commission participants in this proceeding included Commission Chair Scott Smith and Commissioners Charles Barnwell, Franco Venuti, Brad Conley, Roberta Highland, and Richard Chiappone. At that time, the Commission voted to deny Griswold's motions. The Commission's findings and legal conclusions are set forth below.

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I. FACTS AND PROCEEDINGS BELOW

On October 7, 2020, the Commission approved CUP 20-15. Griswold appealed that decision to the Homer Board of Adjustment ("BOA"). On March 9, 2021, the BOA remanded this appeal to the Commission to make additional factual findings pursuant to HCC 21.93.510(a). On April 20, 2021, the applicant for CUP 20-15 provided notice to the City Planner that she was withdrawing her application and said she intended to resubmit a new CUP application in a year or two. Appellee the City of Homer (the "City") filed a Motion to Dismiss Appeal. Griswold opposed the motion and filed several other motions, including a Motion for Default Judgment, Motion to Correct/Clarify Appellant's Opposition to Motion to Dismiss Appeal, Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal, and Motion to Strike New Evidence.

On August 4, 2021, the Commission met in open session to consider these motions. After a discussion of the issue, the Commission unanimously passed a motion to dismiss the appeal. On August 5, 2021, the Commission issued a written order dismissing the appeal. In the order, the Commission explained that "Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and there is good cause to dismiss this appeal."

On August 10, 2021, Griswold filed a Motion for Reconsideration and a Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal. The City Clerk initially rejected these motions, noting that the Commission's

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August 5, 2021 order included a notice that it is a final decision that may appealed directly to Superior Court. On September 20, 2021, the BOA directed the City Clerk to refer both of these motions to the Commission for reconsideration. On October 20, 2021, the Commission held a hearing to consider these motions and voted to deny them.

II. DISCUSSION

After consideration of the materials discussed above and following the discussion of these issue at the October 20, 2021 hearing, the Commission has determined that Griswold's Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal are hereby denied.

The Commission properly granted the City's Motion to Dismiss Appeal. The applicant's withdrawal of her CUP application voided CUP 20-15 and mooted all issues and pending motions in the appeal. Since CUP 20-15 no longer exists, there is no basis for an appeal of its issuance. The appeal has lost its character as a present, live controversy. The Commission has no authority or jurisdiction to make factual findings or adjudicate legal issues regarding a void CUP.

HCC 21.93 does not contain express guidance for the appropriate disposition of an appeal under these circumstances. However, the former HCC 21.93.310 states "[i]f 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." This provides inherent authority to the Commission to dismiss an appeal that is mooted by the withdrawal of the underlying CUP application.

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

HCC 21.93 does not allow a party to move for reconsideration of a final decision in an appeal. Where there is no provision for reconsideration in an administrative code, the administrative decision is final and must be appealed to Superior Court.[1] Several provisions in HCC 21.93 provide that appeal decisions are final and a decision in a BOA appeal must be appealed to Superior Court.[2] Since HCC 21.93 provides no procedure for the Commission to reconsider its order dismissing this case, Griswold's Motion for Reconsideration is denied.

Griswold's motion to for leave to supplement his points on appeal is denied for two reasons. First, HCC 21.93 does not authorize a party to supplement or modify his points on appeal. Second, the motion is moot because the appeal was dismissed.

III. CONCLUSION

For the reasons stated above, Griswold's Motion for Reconsideration and Motion to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal are denied.

DATED: _____ _____

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

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[1] *Oaks v. Grocers Wholesale, Inc.*, 377 P.2d 1001, 1003 (Alaska 1963).

[2] HCC 21.93.110 (referring to zoning appeal decisions as "final decisions"); HCC 21.93.550 (BOA decision should be in a form that finally disposes of a case on appeal); HCC 21.91.130(a) (the appeal of a final decision in a BOA appeal should be filed in the Superior Court).

NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.[3]

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[3] Since the Commission revised its order granting the City's Motion to Dismiss, the 30 day period outlined in HCC 21.91.130 begins anew as of the date of this Order.

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

Memorandum
Supplemental Packet

TO:	HOMER PLANNING COMMISSION
FROM:	TRAVIS BROWN, PLANNING TECHNICIAN
DATE:	October 20, 2021
SUBJECT:	SUPPLEMENTAL PACKET

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Email Comment from Asia Freeman, dated Oct. 19, 2021 **p. 2**

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

Appellant's Reply to the City of Homer's Response to Motion for Reconsideration, Leave to Supplement Points on Appeal, and Proposed Revised Order, dated Oct. 19, 2021 **p. 4**

Email Comment from Frank Griswold to Homer Board of Adjustment, dated Oct. 20, 2021 **p. 13**

Email Comment from Frank Griswold to City Clerk, Melissa Jacobsen, MMC, dated Oct. 20, 2021 **p. 18**

From: Asia Freeman
To: Department Clerk
Subject: Comments for Planning Commission on CUP 20-15 for a building at 106 West Bunnell
Date: Tuesday, October 19, 2021 1:06:48 PM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear members of the Planning Commission,

I am writing to you today to suggest that pursuant to the public hearing on October 20, you deny a request for a conditional use permit that would allow expansion of a portion of the building at 106 West Bunnell, Wild Honey, adjacent to Bunnell Street Arts Center.

It has been a real privilege and responsibility for nearly thirty years to steward the historic Inlet Trading Post Building at 106 West Bunnell. This stately, former general mercantile store served the young town of Homer from the late thirties to the late eighties. It is home to Bunnell Street Arts Center, Old Town Bed and Breakfast (upstairs), The Fringe (downstairs) and Wild Honey (next door). About ten years ago, to incentivize long-term occupancy, I created a condominium in the building, dividing it into two units. Unit 1 is the larger portion, which houses the arts center, the Fringe and Old Town Bed and Breakfast. Unit 2 is currently owned by Melody Livingston. She created a thriving business there, Wild Honey Bistro.

Raised in Homer and passionate about the history and culture of this community, it is deeply important to me that we respect the lines and appearance of our historic buildings. The Inlet Trading Post, constructed in 1937, is the second oldest large commercial building still standing in Homer. It is the anchor of Old Town revitalization and a historic landmark. It is extremely rare for old wood buildings in Alaska to endure time, and the risk of fire and earthquakes. Moreover, the Inlet Trading Post has endured time with with increasing dignity over the years. I have invested a great deal of time and funds to preserve the original lines and health of this building. I deeply believe that this building should be preserved in all of its exterior roof lines, footprint and character.

Melody Livingston would like to tear down the original construction and consolidate her business under one roof, adding a second floor "prep kitchen" above. The footprint of the "prep kitchen is almost equal to the main kitchen below. I have watched the business grow and thrive, and because it functions within the limitations of multiple spaces that are not connected by interior halls or doors to the main kitchen it has always been a challenge to operate a restaurant there. You have a main room with a kitchen, separated from a dining room by an exterior deck and two doors. I can certainly appreciate why the current owner would like to renovate her space to create more connectivity and efficiency. In fact, I have discussed renovations of the space with three architects and four builders over the last thirty years. I am certain this can be done within the original footprint by rebuilding a more efficient interior design while maintaining the exterior lines of this precious landmark. There is plenty of poorly used storage space under the shed behind Wild Honey which could be made into a prep kitchen, meanwhile all of the interior front space including Wild Honey's porch could be incorporated into interior seating.

Ultimately, expansion of Wild Honey will result in greater demands on the very limited parking and utility services of this old building. I do not think we can bear it. Just last year I

had to pay $18,500 for 85% of the cost of reconstruction of a broken sewer line servicing both Units 1 and 2. Wild Honey's water/sewer meter reading demonstrated a toll of 28.5% yet she refused to pay any more. Wild Honey is thriving. Melody has been away from Alaska since May and her staff has asserted to me several times they are thriving. The other businesses here are all working at capacity. I think we are strained to support the current utilities and comfortable adjacency as is. I think its wonderful that the owner of Wild Honey has created a very successful restaurant within the historic footprint and rooflines of the original machine shop and while renovation may be justified, expansion is not.

Sincerely,

Asia Freeman
Inlet Trading Post LLC
106 West Bunnell, Suite A
Homer, Ak 99603
907.299.1482

OCT 19 2021 AM09:50
RT

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT'S REPLY TO CITY OF HOMER'S RESPONSE TO MOTION FOR RECONSIDERATION, LEAVE TO SUPPLEMENT POINTS ON APPEAL, AND PROPOSED REVISED ORDER

On March 9, 2021, the Homer Board of Adjustment remanded this matter to the Commission under HCC 21.93.510(a) and (c) to address and decide three issues for which the Commission's findings of fact were deemed to be inadequate. HCC 21.93.560(c) states: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer. A case on remand has priority on the agenda of the lower administrative body, except cases remanded under HCC 21.93.510(a) are not entitled to priority. The applicant or owner of the property in question may waive the priority given by this subsection." The issues remanded under HCC 21.93.510(a) are not entitled to priority on the

Commission's agenda but they must nonetheless be promptly acted upon by the Commission. However, they clearly were not promptly acted on by the Commission. Because the applicants and/or property owners never waived priority, the issues remanded under HCC 21.93.510(c) ***were*** entitled to priority on the Commission's agenda but now, more than 7 months following the Board's remand, the Commission has still not considered or acted on the Board's Decision and Order. Instead, City Planner Rick Abboud, who claims to be a party to this appeal, has colluded with Melody Livingston and initiated multiple ex parte communications with the Commission to secure the dismissal of this appeal while she "regroups" before resubmitting her CUP application within a year or two.[1]

A claim is moot if it has lost its character as a present, live controversy. *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 523 (Alaska 1993) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)). An action is not moot if respondent has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union Local 1000,* 567 U.S. 298, 307-08 (9th Cir. 2012). The *Knox* court further stated: "The

[1] While it is not illegal for a party to communicate with another party, it is illegal for a party to engage in ex parte communication(s) with the Commission. HCC 21.93.710(a).

voluntary cessation of challenged conduct does not render a case moot because the conduct could be resumed as soon as the case is dismissed" (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283). In 1995, the Alaska Supreme Court held as follows in *Kodiak Seafood Processors v. State*, 900 P.2d 1191:

"No scallop harvesting presently takes place in closed Alaska waters. Therefore, KSPA's claims seeking declaratory and injunctive relief are technically moot. Nevertheless, we may choose to address certain issues if they fall under the public interest exception to the mootness doctrine. The public interest exception requires the consideration of three main factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Peloza v. Freas*, 871 P.2d 687, 688 (Alaska 1994); *Brandon*, 865 P.2d at 92 n. 6. None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue. *Hayes*, 693 P.2d at 834. Ultimately, the determination of whether to review a moot question is left to the discretion of the court. *Id.; Brandon*, 865 P.2d at 92. n. 6.

. . .

Because the Permit has been revoked, the question of the Commissioner's authority to issue the Permit is also technically moot. Nonetheless, the issue presents a live controversy. KSPA argues that by allowing a private fisher to sell fish obtained during a research trip, the Commissioner exceeded his authority by allowing "commercial fishing" in closed waters. ADF&G argues that it has the authority to finance an exploratory fishing operation by allowing a private contractor to sell the catch. This issue falls within the public interest exception to the mootness doctrine. First, the issue is capable of repetition. The State has not disavowed this type of financial arrangement for future test-fisheries. Second, because research fishing may be of limited duration, it is likely that, as in this case, an individual permit would expire before the issue could be litigated. Third, the scope of the Commissioner's power is an

issue of public interest. Having determined that the commercial fishing issue satisfies the requirements of the public interest exception, and that the procurement issue does not, we turn to the merits of the trial court's decision."

Unlike the fishing permit at issue in the Kodiak Seafoods case, CUP 20-15 was not revoked, it was voluntarily and temporarily withdrawn by Ms. Livingston who indicated her intent to resubmit it, presumably under a different CUP designation (which is irrelevant) in a year or two. Accordingly, Ms. Livingston still has a huge interest in the outcome of this appeal. Because live controversies remain, this appeal is not moot, technically or otherwise. Even if this matter were technically moot, the public interest exception to the mootness doctrine would apply for the following reasons: 1. the disputed issues are capable of repetition; 2. if this appeal were to be dismissed as moot, review of the issues on appeal would be repeatedly circumvented; and 3. the issues presented in this appeal, including threshold constitutional issues, are so important to the public interest as to justify overriding the mootness doctrine.

The City of Homer's October 14, 2021 response to Appellate's Motion for Reconsideration falsely states as follows at page 4: "There is no authority or procedure in the Homer City

Code to hear a motion for reconsideration of a final written decision and Griswold has not cited to any such authority." The very first sentence of the Motion for Reconsideration states: "***Pursuant to HCC 21.93.310,*** Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss which was dated August 5, 2021 and distributed on August 6, 2021." HCC 21.93.310 states: "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." The city's Motion to Dismiss Appeal, on the other hand, cites to no authority or provision of Homer City Code. No provision of HCC gives the Commission the authority to summarily dismiss an appeal on remand from the Board of Adjustment or consider new evidence not authorized within the Board's remand instructions. The city attorneys admit that the Commission did not have express authority in the code to dismiss the appeal but claim that it had "implied" authority to do so under HCC 21.93.310. However, HCC 21.93.310 does not apply because the Commission's dismissal of the appeal was contingent on its receipt of ex parte communications between Mr. Abboud and Ms. Livingston and

unauthorized consideration of that new evidence, both of which are unlawful and inconsistent with HCC Chapter 21.

At page 4 of the city's response it states: "HCC 21.93 clearly states that zoning appeal decisions are final and BOA decisions are appealable to the Superior Court" (citing HCC 21.93.110 in footnote 16). BOA final decisions are irrebuttably appealable to the superior court but the BOA has not issued a final decision and Planning Commission decisions are not appealable to the superior court. HCC 21.93 applies solely to Board of Adjustment proceedings and decisions, not to Planning Commission proceedings and decisions. In their Notice of Appeal Rights at page 5 of their proposed Revised Revised Order Granting Motion to Dismiss, the city attorneys deliberately and deceptively manipulate HCC 21.91.130 in order to give it a different meaning than intended. HCC 21.91.130(a) states: "An appeal from a final decision of the ***Board of Adjustment*** or a hearing officer 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 hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." No provision of HCC allows anyone to appeal a final decision of the Planning Commission directly

to the superior court. HCC 21.93.550(a) provides that the Board of Adjustment may affirm or reverse the decision of the lower administrative body in whole or in part and that 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. Thus, only final decisions can be appealed to the superior court. Because the Commission's order dismissing the appeal was not a decision on the merits, it did not constitute a final decision. Even if the Commission's August 5, 2021 Order did constitute a final decision, it cannot be appealed to the superior court; it can only be appealed to the Board of Adjustment in accordance with HCC 21.93.500. Just because a zoning decision is "final" (meaning that it disposes of all issues) does not mean that it cannot be reconsidered. If this were the case, the Board of Adjustment would not have directed the Commission to take up the subject Motion for Reconsideration following the City Clerk's erroneous ruling that motions for reconsideration of agency final decisions cannot be taken up. Alaska Appellate Rule 602(a)(2) clearly indicates that administrative agencies have the discretion to reconsider their final decisions.

The Commission does not have the authority to rule on Appellant's Motion for Leave to Supplement Points on Appeal. As its header clearly indicates, that motion was submitted to the Board of Adjustment, not to the Commission. No formal appeal or points on appeal were submitted to the Commission so there are no points on appeal to supplement except for those submitted on appeal to the Board of Adjustment which now has the sole authority to grant the leave requested.

The August 4, 2021 Planning Commission minutes reveal that the Commission moved to dismiss this appeal due to the "lack of credentials on the part of the Planning Commission in addressing issues like this since they do not know the law" and because "it will be better to have these types of actions go before a hearing officer." These are not valid justifications for dismissing this appeal. Lacking credentials and being ignorant of the law does not justify granting all motions made by the city attorneys on behalf of the appellees and ignoring all motions made by the appellant. The Commission had the authority to be represented by erudite, impartial, independent legal counsel but voted not to exercise that option, choosing instead to blindly rubber-stamp the Motion to Dismiss and ensuing [Proposed] Order prepared by the highly partisan city attorneys.

Now these partisan attorneys are proposing that the Commission deny Appellant's Motion for Reconsideration but nonetheless revise its "final decision" to incorporate points raised in that Motion for Reconsideration. No provision of HCC allows the Commission to revise an order or final decision without first considering a motion for reconsideration. An ethical, impartial Commission, regardless of its lack of credentials and/or ignorance of the law, would grant Appellant's Motion for Reconsideration and, to the best of its ability, consider all of the issues raised therein while disregarding the illegal *ex parte* communications from Melody Livingston pertaining to her strategic temporary withdrawal of the application for CUP 20-15. The Commission does not require special credentials or knowledge of the law to comply with the straight-forward remand instructions of the Board of Adjustment.

Commissioner Franco Venuti declared a disqualifying financial conflict of interest with regard to the application for CUP 20-15 therefore should not have participated in the August 4, 2021 remand proceedings and should not participate in the current proceedings.

DATED: October 19, 2021
By: *s/Frank Griswold/*
Frank Griswold

Travis Brown

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:26 PM
To: Department Planning
Cc: Melissa Jacobsen
Subject: Memorandum 21-153 (Please Provide to Commission for Tonight's Meeting)

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

From: To:
Cc: Subject: Date:

Frank Griswold
Melissa Jacobsen
Renee Krause
Memorandum 21-153
Monday, September 20, 2021 11:06:37 AM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Homer Board of Adjustment, Re: Appeal of CUP 20-15

Memorandum 21-153 states: “The Planning Commission approved a Motion to Dismiss submitted by Attorney Holmquist on behalf of the City based on the finding that the applicant withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal.” Mr. Holmquist’s Motion to Dismiss is notably void of any provision of Homer City Code that authorizes it because HCC includes no specific provision authorizing the filing of a motion to dismiss an administrative appeal, on remand or otherwise. The former version of HCC 21.93.310 stated: "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” but Mr. Holmquist's Motion to Dismiss was manifestly inconsistent with HCC Title 21 and therefore not authorized by HCC 21.93.310. Mr. Holmquist’s Motion to Dismiss Appeal was out of order because the Commission had no authority to consider any matter not specifically remanded to it by the Board of Adjustment, consider new evidence, or receive or act on illegal ex parte communications from City Planner Rick Abboud (a party to the appeal) regarding property owner Melody Livingston’s temporary and strategic withdrawal of her application for CUP 20-15 to “regroup.” Nonetheless, the City Clerk’s Office forwarded it to the Planning Commission which eagerly rubber-stamped Mr. Holmquist’s Motion to Dismiss Appeal. Arbitrarily allowing Mr. Holmquist to submit his Motion to Dismiss Appeal but then refusing to “take up” my ensuing Motion for Reconsideration to the Commission and Motion to Supplement Points on Appeal to the Board of Adjustment, both legitimately filed pursuant to HCC 21.93.310 and

HCC 21.93.570 respectively, violates the equal protection clause of the Fourteenth Amendment to the US Constitution and violates my due process rights.

On July 29, 2021, the Homer City Attorneys responded in relevant part as follows to my Motion to Continue the August 4, 2021 Commission Proceeding Regarding the City's Motion to Dismiss Appeal: "Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous

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pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter." But no special hearing was scheduled and neighboring property owners were not notified. Following the Commission's decision, the Clerk's Office should have promptly submitted my timely filed Motion for Reconsideration to the Commission and my timely filed Motion to Supplement Points on Appeal to the Board of Adjustment. The Board and Commission could then have decided whether to consider, grant, or deny my motions. The parties were excluded from the discussions between Ms. Jacobsen and Mr. Brandt-Erichsen who was hired to advise the Board of Adjustment, not to unilaterally render decisions on the Board's behalf or provide biased procedural advice to the City Clerk. Neither Mr. Brandt- Erichsen, the Clerk's Office, nor the City Council has the authority to make adjudicatory decisions on behalf of the Commission or Board.

At paragraph four of her memorandum, Ms. Jacobsen states: "final decisions were issued regarding both matters" and at paragraph five she states: "an appeal from a final decision [deliberately omitting "of a hearing officer"] may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer." She neglects to point out that the Board of Adjustment never issued a final decision regarding CUP 20-15 and that only final decisions of the Board of Adjustment or a hearing officer can be appealed directly to the superior court and that no hearing officer was involved, and that the Planning Commission's "final decision" was not a response to the Board of Adjustment's remand order but merely the granting of a motion to dismiss the appeal, and that even if the Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal did constitute a final decision, it cannot be appealed directly to the superior court. The version of HCC 21.91.130(a) recently enacted via Ordinance 21-44(S) states: "An appeal from a final decision of a hearing officer may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The version of HCC 21.91.130(a) (misquoted in Ordinance 21-44(S)) in effect when I filed my appeal states as follows: "An appeal from a final decision of the Board of Adjustment or a hearing officer may be taken directly to the Superior Court by a party who actively and substantially participated in the proceedings before the Board of Adjustment or the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The City Council should not rely on

any paraphrased rendition of HCC that is manipulated and spun to give it a meaning other than what was actually intended. Just because the City Clerk and/or Planning Commission claim the Commission's remand determination constitutes a final decision does not make it so. The Commission issued its first, and arguably only, Final Decision on October 22, 2020 and that decision was appropriately appealed to the Board of Adjustment. The Notice of Appeal Rights attached to the Planning Commission's August 5,

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2021 Order Granting Motion to Dismiss Appeal deceptively states that "Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment may appeal this [Planning Commission] decision to the Superior Court." In light of the fact that the Board of Adjustment and the Planning Commission are no longer involved in adjudicating zoning appeals, the code provisions that previously applied to Board and Commission appeal proceedings govern appeals still pending before them. In any event, neither version of HCC 21.91.130 provides that decisions of the Planning Commission may be appealed directly to the Superior Court or that a party who actively participated in proceedings before the Board of Adjustment can appeal an ensuing remand determination of the Planning Commission directly to the superior court. The Planning Commission never addressed the matters remanded to it by the Board of Adjustment on March 9, 2021 and should be sanctioned for not promptly responding to the Board's (non-final) Decision and Order, illegally accepting and considering new evidence, and engaging in ex parte communications. The Planning Commission's August 5, 2021 order/decision can only be directly appealed to the Board of Adjustment in accordance with HCC 21.93.500-550. After the Board of Adjustment issues a final decision, the Planning Commission's ultra vires dismissal of the appeal and other erroneous determinations can be appealed directly to the superior court.

At paragraph six of her memorandum, Ms. Jacobsen states: "Homer City Code provides no provisions for an appellant to submit motions to bring a matter back before the Board of Adjustment after a final decision has been issued. I have advised Mr. Griswold as such, but he disagrees." I disagreed because Ms. Jacobsen is patently wrong. HCC 21.93.310 and HCC 21.93.570 authorize an appellant to submit post-decision motions to the Planning Commission and Board of Adjustment. Alaska Rules of Appellate Procedure 602(a)(2) states: "An appeal may be taken to the superior court from an administrative agency within 30 days from the date the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal." This appellate rule clearly contemplates motions for reconsideration of final agency decisions so it would clearly not be

out of order or inject procedural error into the proceedings if the Board or Commission addressed a motion for reconsideration.

No provision of HCC authorizes the City Clerk to reject a party's timely filed motion for reconsideration of an adjudicatory body's final decision so the City

4

Clerk's unilateral rejection of a party's timely filed motion for reconsideration would inject procedural error into the proceedings and be grounds for remand or reversal. In the past, it has routinely been the practice of the Clerk's Office to promptly forward such motions to the appropriate adjudicatory body. On June 19, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration of Board of Adjustment Decision regarding CUP 13-13 and on December 4, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration Re: Standing to Appeal CUP 14-05. Neither of these orders was subsequently ruled to be procedurally flawed or otherwise out of order by the appellate courts.

Re: Appeal of Zoning Permit 1020-782

The City Clerk's duties are ministerial, not adjudicatory. Ms. Jacobsen had no sua sponte authority to reject my Motion for Reconsideration or initiate the addition of a Notice of Appeal Rights to the Board of Adjustment's initial Final Decision. Even as amended, final decision #2 still violates HCC 21.93.110(a) which requires that a final decision state "the names and number [of Board members] voting in favor of the decision, and the names and number voting in opposition to the decision." If the Board of Adjustment grants my Motion for Reconsideration it can legitimately amend its August 26, 2021 Final Decision to correct deficiencies and/or erroneous findings. The fact that final decision #2 was issued on September 7, 2021 soundly debunks the specious argument that a matter cannot be brought back before the Board after a final decision has been issued. Whether the Board and/or Commission have legal authority to convene to "take up" the subject motions is a question of law and it is not generally the role of the City Council or Mayor to dispense legal advice to the City Clerk. The Council could authorize funding to allow the Clerk's Office to seek impartial legal advice from an erudite attorney. Because City Attorneys Max Holmquist and Michael Gatti represent parties to the pending appeals they would not be impartial sources. It is inappropriate for Ms. Jacobsen to ask the Council to provide her with direction on process for noticing parties, noticing the public, opportunities for responses or briefing, and/or when to schedule the special meeting while simultaneously recommending to the Council that it make, and presumably pass, a motion that the Board of Adjustment declines to take up the motions for reconsideration. (FYI, I only filed one motion for reconsideration to the Board of Adjustment and it pertained to ZP 1020-782. I filed another motion to the Board to supplement my points on appeal re: CUP 20-15. My other motion for reconsideration pertained to the Planning Commission's order granting the city's motion to dismiss the appeal of CUP 20-15). One seeking direction from the Council is self-admittedly unqualified to recommend what that direction should be. Accordingly, no weight should be given to Ms. Jacobsen's baseless, self-serving recommendation. Memorandum 21-

153 should have been sent to the Board of Adjustment, not the City Council. The Council would be out of

order making a motion that the Board of Adjustment declines to take up the subject motions because, unless and until it formally convenes as a Board of Adjustment, the Council and Mayor have no legal authority to rule on behalf of the Board of Adjustment, especially when proper notice has not been given to parties and neighboring property owners. Furthermore, Robert's Rules discourages making negative motions. Alternatively, Ms. Jacobsen could forgo seeking further direction and simply allow due process to run its course by forwarding the subject motions to the designated adjudicatory bodies to let them exercise their discretion to issue procedural notices and decide whether those motions should be reviewed, considered, granted, or denied.

Audi alteram partem,

Frank Griswold

Travis Brown

From: Melissa Jacobsen
Sent: Wednesday, October 20, 2021 3:03 PM
To: Travis Brown
Subject: FW: September 20, 2021 Special Meeting Minutes

Please provide to the planning commission

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:14 PM
To: Melissa Jacobsen <MJacobsen@ci.homer.ak.us>
Cc: Renee Krause <RKrause@ci.homer.ak.us>
Subject: September 20, 2021 Special Meeting Minutes

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Ms. Jacobsen,

Footnote 1 at page 3 of the September 20, 2021 BOA minutes erroneously states as follows:

"The Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal regarding CUP 20-15 were the only matters scheduled and addressed at this meeting. The reference to a Motion to reconsider regarding Zoning Permit 1020-782 was mistakenly added to a proposed motion provided by the Clerk in the working agenda provided to the Board. Zoning Permit 1020-782 is a separate matter that was not addressed at this hearing."

At the September 20, 2021 BOA meeting I addressed my Motion for Reconsideration re: Zoning Permit 1020-782 and after considering this matter in executive session the Board of Adjustment passed a motion to not take it up. Please correct the September 20, 2021 minutes accordingly and provide a copy of the email I sent to the BOA to the Commission for its consideration at tonight's meeting.

Frank

Session 21-23, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:31 p.m. on October 20, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, and via Zoom Webinar.

PRESENT: COMMISSIONERS BARNWELL, BENTZ, CONLEY, CHIAPPONE, HIGHLAND, SMITH, VENUTI

STAFF: CITY PLANNER ABBOUD
CITY CLERK JACOBSEN

APPROVAL OF THE AGENDA

BENTZ/VENUTI MOVED TO APPROVE THE AGENDA AS PRESENTED.

There was no discussion.

Chair Smith confirmed that the Commissioners received the supplemental packet and were prepared to act on Staff Report 21-62. The Commissioners concurred they received the materials and were prepared.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of September 15, 2021
B. Decision and Findings for Conditional Use Permit 21-07 at 1554 Homer Spit Road
C. Homer Lake Street Rehabilitation Right of Way Acquisition Preliminary Plat Time Extension Request

HIGHLAND/BENTZ MOVED TO APPROVE THE CONSENT AGENDA AS PRESENTED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-61, City Planner's Report

City Planner Abboud reviewed his staff report that was included in the packet. He answered questions from the Commission regarding items in his report. He addressed the Safeway parking lot progress and that they're fulfilling the requirements of code with the expansion of their parking lot. They discussed the recent State determination to allow ATV's on roadways and City Clerk Jacobsen advised that Council had recently adopted code prohibiting ATV's on city streets. They also touched on Resolution 21-065 regarding non-motorized amenities on Kachemak Drive and the challenges for bicyclist and pedestrians, and the work of the Homeless Coalition.

Commissioner Bentz noted her surprise that strategic planning and the comprehensive plan on the horizon, it seems staff has a lot of different irons in the fire as far as plan development that are coalescing and could help them look at a longer term vision for the community and land. She referenced hazard planning, storm water and drainage planning, and transportation planning and shared that as a Commission they can think of the components of the plans together and that will help with the strategic planning process. Near term it will be interesting to see what policy recommendations the hazard planning team comes up with, that will help with long term planning and perhaps bring some specific code changes like setbacks, definitions, coastal bluff definitions, and so forth.

Chair Smith suggested having the Borough Transportation Planning Department present at a future worksession, similar to Platting Manager Huff's presentation tonight. City Planner Abboud said he'd try to work that in and shared that the strategic planning he referenced is more of developing a work plan for the office as they continue to have more demand for services than hours so they need to prioritize things. He's interested in having transportation professionals help in considering what the future is likely to bring, and not get caught in the solution of today.

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Commissioner Venuti was excused from participating due to ruling of his conflict of interest regarding this matter, and was moved to a waiting room.

Commissioner Bentz reported a potential ex-parte communication in that she received a phone message from a concerned member of the public. Commissioner Bentz pointed out that the member of the public put her comments in writing and they're provided the in supplemental packet, so she doesn't think she has any other information than the other Commissioners have, but wanted to bring this before the Commission to determine if she had bias in any way based on the phone message.

Chair Smith asked if Commissioner Bentz engaged in conversation with the member of the public. Commissioner Bentz responded she did not, it was a message left on her phone and once she realized what it was about she recognized it would be ex parte communication if she were to call the person back. The written comments are part of the record now in the supplemental packet and that's the substance of the comments in the message.

HIGHLAND/BARNWELL MOVED THAT COMMISSIONER BENTZ HAS EX-PARTE COMMUNICATION.

Commissioner Highland shared that due to the fact is was a message on a phone with no return phone call there is no ex-parte communication.

VOTE: NO: HIGHLAND, BARNWELL, CHIAPONNE, CONLEY, SMITH

Motion failed.

Chair Smith summarized the decision and order remanding CUP 20-15 to the Planning Commission, and then opened the public hearing.

Frank Griswold, city resident and appellant in the remanded matter, commented regarding Commissioner Bentz's disclosure of ex-parte and that it wasn't disclosed appropriately in accordance with Homer City Code. He commented that complex dispositive motions are under consideration tonight and should therefore be addressed in a special public hearing and not during a regular commission meeting where public comment is limited to three minutes. He noted on July 29, 2021 Attorney Holmquist agreed with him that the Commission should provide notice to neighboring property owners and set a special meeting to solely address his motion to dismiss the appeal, but the Commission did not do so. Instead they voted to dismiss the appeal, in hopes it would go to a hearing officer. He referenced notice requirements outlined in City Code and that proper notice was not given, and explained the two toll free numbers provided for the Zoom meeting were working but the meeting id and passcode did not work. Finally the City Planner is a party to the appeal and should not have written the staff report encouraging dismissal of the appeal and should not have engaged in ex-parte communication with Commission related to the applicant's temporary withdrawal of the CUP application. He cited Kleven v. Yukon Koyukuk School District related to a moot claim, and Knox v. Service Employee International Union Local 1000 when an action is not moot and questioned what precedent the Commission wants to set. He also noted matters that are not allowable in Homer City Code related to appeals, and an appellate procedure rule of the Alaska Courts regarding filing a motion for reconsideration. He encouraged the Commission comply with the Boards instructions and if the Board sees fit to dismiss the appeal, so be it.

There were no further comments and the hearing was closed.

The Commission discussed how best to proceed with this matter. They acknowledged the points raised in the remand and the points raised by Mr. Griswold. One matter relates to tax code which is not their specialty, and they'd need to be advised on how to address that.

BENTZ/HIGHLAND MOVED THAT THE COMMISSION POSTPONE DELIBERATION WITH STAFF SUPPORT AT A TIME TO BE DETERMINED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

Commissioner Venuti was admitted back to the meeting.

PLAT CONSIDERATION

PENDING BUSINESS

A. Staff Report 21-62, Parking Requirements for One Bedroom Dwelling Units

City Planner Abboud reviewed his staff report that was included in the packet. There were no questions from the Commission.

BENTZ/VENUTI MOVED TO RECOMMEND ADOPTION OF THE DRAFT ORDINANCE AMENDING HOMER CITY CODE 21.55.090A1 AND FORWARD TO PUBLIC HEARING.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

There was discussion regarding process and an attempt to determine the meaning of Leave to Supplement Points of appeal.

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Commissioner Highland referenced the information on page 79 of the packet which notes that HCC 21.93 does not authorize a party to supplement or modify points on appeal, and that the motion is moot because the appeal was dismissed. She questioned if the Commission isn't supposed to act on this, then why was it in their packet. She personally agrees with the

conclusion noted on page 80 of the packet, and feels the Board of Adjustment should dismiss the appeal.

Commission Chiappone asked for clarification on the motion from the Board of Adjustment. City Clerk Jacobsen explained if she understood the discussion at the last Board of Adjustment meeting, one of the arguments was that the Planning Commission didn't have the authority to dismiss the appeal and that the Board of Adjustment would be the body that would make that decision. She explained when the Board of Adjustment came out of their executive session on September 20th, they adopted the motion that while the Board of Adjustment believes it is a moot point due to the lack of an active permit application, the Board of Adjustment believes that the appeal procedurally should be before the Planning Commission for Appellant Frank Griswold's motion for reconsideration and motion for leave to supplement points on appeal of CUP 20-15 and the Board directs the Clerk to refer that motion back to the Planning Commission for consideration.

Commissioner Bentz commented the motion on the floor as it stands would be in alignment with the Board of Adjustment vote and also in alignment with the City's proposed order to deny taking up these motions. She's in agreement with the motion on the floor.

Commissioner Highland referenced packet page 33 under staff recommendations and noted its reference to HCC 21.93 does not contain a procedure for reconsideration of a final decision in a zoning appeal, or for allowing an appellant to supplement their points on appeal. HCC 21.93.110 states that zoning appeal decisions are final decisions. Since the code doesn't have a procedure she feels that's a strong argument.

VOTE: YES: BARNWELL, SMITH, CONLEY, CHIAPONNE, BENTZ, HIGHLAND

Motion carried.

INFORMATIONAL MATERIALS

A. City Manager's Report for September 27 & October 11, 2021 City Council Meetings
B. Kenai Peninsula Borough Notice of Decisions
C. Planning Commission Calendar

COMMENTS OF THE AUDIENCE

COMMENTS OF THE CITY STAFF

City Clerk Jacobsen said it was nice to be with you all tonight, thank you for a good meeting.

COMMENTS OF THE COMMISSION

Commissioner Highland said it was an interesting meeting.

Commissioner Chiappone thanked the group for their help tonight.

Commissioner Conley apologized for his technical difficulties and thanked everyone for a good meeting.

Commissioner Venuti said he enjoyed the worksession tonight. He's glad Ms. Keiser was able to join and get her input. He thanked staff for doing a great job.

Chair Smith enjoyed the meeting, he thought it would be a little more involved than it was. He's looking forward to their future worksessions. He thinks what the City Planner has mapped out is outstanding.

There were no other comments.

ADJOURN

There being no further business before the Commission, the meeting was adjourned at 8:18 p.m. The next Regular Meeting is Wednesday, November 3, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom webinar.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Approved: November 3, 2021

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

City Council Special Meeting
Sitting as Board of Adjustment
Monday, November 08, 2021 at 4:00 PM
In Person at City Hall Cowles Council Chambers
By Zoom Webinar
https://cityofhomer.zoom.us/j/92222013235?pwd=ZS9ybzMvWXd2WXNna3ozYmF5cXRmdz09
Or Dial: +1 669 900 6833 or +1 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099
Webinar ID: 922 2201 3235 Passcode: 411958

CALL TO ORDER, 4:00 P.M.

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

PENDING BUSINESS

NEW BUSINESS

Parties will be given a total of 10 minutes to comment on the matters below, not 10 minutes per topic, but 10 minutes total time to address both matters.

a. Consideration of Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal by Frank Griswold, Appellant.

   Memorandum 21-201 from City Clerk as backup

b. Recommendation by the Planning Commission to Dismiss the Appeal of Conditional Use Permit (CUP) 20-15 for the Reconstruction of a Restaurant Building at 106 W. Bunnell Avenue, Homer, Alaska based on the Applicant's Withdrawal of their CUP Application.

   Memorandum 21-202 from City Clerk as backup

COMMENTS OF THE AUDIENCE

ADJOURNMENT NO LATER THAN 4:50 P.M.
Next Regular Meeting is Monday, December 13, 2021 at 6:00 p.m., Committee of the Whole at 5:00 p.m. and a Worksession November 22, 2021. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

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www.cityofhomer-ak.gov

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(f) 907-235-3143

Memorandum 21-201

TO: MAYOR CASTNER AND CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: NOVEMBER 4, 2021

SUBJECT: MOTION FOR LEAVE AND TO SUPPLEMENT POINTS ON APPEAL BY FRANK GRISWOLD, APPELLANT

On August 10, 2021 a Motion for Leave to Supplement Points on Appeal to Address the Planning Commission's Dismissal of Appeal was filed by Frank Griswold, Appellant in the appeal of CUP 20-15.

In his motion, Mr. Griswold states he moved for leave to supplement his points on appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission.

At the September 20, 2021 meeting of the City Council sitting as Board of Adjustment (BOA), the BOA didn't take up the matter of the Motion for Leave. It may have been unclear as to whether it was a motion to be taken up by the BOA or the Planning Commission.

The matter is before the BOA to take action.

Recommendation: Move to deny the appellant's motion Leave to Supplement Points on Appeal to Address the Planning Commission's Dismissal of Appeal, or move to take up the matter at a date to be determined and a BOA meeting will be scheduled.

AUG 10 2021 PM04:59

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL TO ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL

Pursuant to HCC 21.93.570, Appellant Frank Griswold hereby moves for leave to supplement his Points on Appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission. The Commission's Order and Appellant's Motion for Reconsideration are attached hereto as Exhibit 1 and Exhibit 2 respectively.

DATED: August 10, 2021

By: *s/Frank Griswold/*

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322
mgatti@jdolaw.com
mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

CONDITIONAL USE PERMIT 2020-15	)	On appeal from Planning Commission Decision October 7, 2020

ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal, as well as any opposition and reply thereto, and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: August 5 2021

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.

I hereby certify that a true copy of the foregoing document was hand delivered/mailed on the 6th day of August, 2021, to:
Frank Griswold, Attorneys Holmquist + Gatti
Melody Livingston, Matt Early, City Planner Abbond, City Manager Dumouchel
By: Melissa Jacobsen, City Clerk

MJacobsen

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR RECONSIDERATION

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss Appeal which was dated August 5, 2021 and distributed on August 6, 2021.

The Commission overlooked the material fact that it did not have the authority to consider the Motion to Dismiss Appeal. The Commission's authority is limited to that which the Board has expressly delegated to it. See *Alaska State Comm'n for Human Rights v. Anderson,* 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim"). HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further

Exhibit 2

evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board's March 9, 2021 Decision and Order says nothing about dismissing this appeal or taking evidence pertaining to its dismissal.

The Commission overlooked HCC 21.93.110(a) which states in relative part as follows: "All final decisions on appeals shall be in writing, and shall state the names and number of members of the body who participated in the appeal, the names and number voting in favor of the decision, and the names and number voting in opposition to the decision." The Commission's Order Granting Motion to Dismiss Appeal fails to state the name of any Commissioner other than Chair Smith.

The Commission overlooked HCC 21.93.110(b) which states in relevant part as follows: "A decision shall include an official written statement of findings and reasons supporting the decision. This statement shall refer to specific evidence ***in the record*** and to the controlling sections of the zoning code." The Commission's Order Granting Motion to Dismiss does not refer to any evidence in the appeal record or to any controlling code. Note that Melody Livingston's withdrawal of her application for CUP 20-15 is not included in the record on appeal and

constitutes illegally submitted new evidence which the Commission has no authority to consider.

The Commission overlooked HCC 21.93.300(b) which states: "An appeal hearing shall be scheduled within the time specified in HCC 21.93.100. The hearing will be open to the public." No formal appeal hearing was scheduled for the Motion to Dismiss Appeal and no formal briefing of the matter was allowed. The Commission overlooked the material fact that there was no opposition to holding a special public hearing to solely address the Motion to Dismiss Appeal. The City of Homer's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal states in relevant part as follows: "Subject to and without waiving its arguments on these issues, the City agrees that the Commission should continue the August 4, 2021 hearing. Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter."

The Commission overlooked HCC 21.93.100(b) which requires that neighboring property owners be notified of the proceedings as set forth in HCC 21.94.030. Neighboring property owners were not notified of the August 4, 2021 proceedings as set forth in HCC 21.94.030.

The Commission overlooked the material facts that the application for CUP 20-15 was merely suspended and that because live controversies still exist the issues on appeal are not moot.

The Commission overlooked HCC 21.93.560(c) which states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer." The Board remanded this matter to the Commission on March 10, 2021. Five months later, the Commission has still not acted on the issues remanded to it by the Board.

On page 2 of its Order, the Commission states: "This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal

to the Superior Court shall be filed within 30 days of the date of distribution of this decision." The Commission clearly misconstrued, misrepresented, and/or misapplied HCC 21.91.130 which provides as follows:

"a. ***An appeal from a final decision of the Board of Adjustment*** or a hearing officer 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 the hearing officer or by the City Manager or 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*** or hearing officer.

c. An appeal from a final decision of the ***Board of Adjustment*** or hearing officer to the Superior Court is governed by court rules."

Thus, HCC 21.91.130 applies solely to final decisions issued by the Board of Adjustment or hearing officer and does not apply to final decisions issued by the Planning Commission. The Planning Commission overlooked the material facts that the Board of Adjustment has not issued a final decision in this matter and the Commission does not have the authority to issue a decision on behalf of the Board of Adjustment. The Planning Commission overlooked the material fact that an appellant does not have the option of appealing an action or determination of the Planning Commission directly to the superior court. Appeals from an action or determination of the Planning Commission, such as its

August 5, 2021 Order Granting Motion to Dismiss Appeal, are governed by HCC 21.93.080. HCC 21.93.080(b)(7) provides that a notice of appeal from an action or determination of the Planning Commission shall include "[t]he appellant's choice of decision maker, ***which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.***" While parties who actively and substantively participated in the proceedings before the Board of Adjustment plus the City Manager, the City Planner, and/or any governmental official, agency, or unit may appeal an action or determination of the ***Board of Adjustment*** directly to the superior court, none can appeal an action or determination of the ***Planning Commission*** directly to the superior court. HCC 21.91.130 does not state or imply that an action or determination of the City Manager or City Planner or any governmental official, agency, or unit can be appealed directly to the superior court. The City Manager, the City Planner, governmental officials, agencies, and/or units are merely additional parties, besides citizen appellants, who may appeal a final decision of the ***Board of Adjustment*** to the superior court.

DATED: August 10, 2021

By: *s/Frank Griswold/*

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Memorandum 21-202

TO: MAYOR CASTNER AND CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: OCTOBER 15, 2021

SUBJECT: RECOMMENDATION FROM PLANNING COMMISSION ON THE APPEAL OF CUP 20-15

At the September 20, 2021 meeting of the City Council sitting as Board of Adjustment regarding the Appeal of Conditional Use Permit (CUP) 20-15 the Board and unanimously approved the following motion:

LORD/ADERHOLD MOVED THAT WHILE THE BOARD OF ADJUSTMENTS BELIEVES IT IS A MOOT POINT DUE TO THE LACK OF AN ACTIVE PERMIT APPLICATION, THE BOARD OF ADJUSTMENT BELIEVES THAT THE APPEAL PROCEDURALLY SHOULD BE BEFORE THE PLANNING COMMISSION FOR APPELLANT FRANK GRISWOLD'S MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 AND THE BOARD DIRECTS THE CLERK TO REFER THAT MOTION TO THE PLANNING COMMISSION FOR RECONSIDERATION.

The Planning Commission took the matter up at their October 20, 2021 meeting. The Commission denied the Motion for Reconsideration submitted by Frank Griswold, Appellant, and made the recommendation that the Board of Adjustment dismiss the appeal of CUP 20-15. The Commission unanimously approved the following motion:

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Recommendation: Move to dismiss the appeal of CUP 20-15 based on the Applicant's withdrawal of their application or Move to direct the Planning Commission to take up the Order Remanding to the Planning Commission regarding CUP 20-15.

From: Frank Griswold
To: Melissa Jacobsen
Subject: Re: November 8th BOA meeting scheduled Re: CUP 20-15
Date: Monday, November 8, 2021 9:58:25 AM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Ms. Jacobsen,

I just returned from a hunting trip and will not have time to adequately prepare for tonight's BOA meeting or submit written materials. Why was I not given at least 15 days written notice of this meeting as required under HCC 21.93.100(b)? Were neighboring property owners notified as set forth in HCC 21.94.100(b) and HCC 21.94.030?

Frank Griswold

> On Oct 27, 2021, at 9:32 AM, Melissa Jacobsen <MJacobsen@ci.homer.ak.us> wrote:
>
> Good morning,
>
> At the October 20th Planning Commission meeting the Commission unanimously adopted the following motion:
>
> *HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.*
>
> A special meeting of the Homer City Council to convene as the Board of Adjustment has been scheduled for November 8th at 4pm to take up this recommendation.
>
> Agenda and Packet materials will be posted no later than Thursday, November 4th and the deadline to provide material to be included in the packet is Wednesday, November 3rd at 11am. Any items received after the packet deadline and prior to 11am on Monday, November 8th will be included in the supplemental packet, after that time they'll be provided as laydown items.
>
> Thank you,
> Melissa

Melissa Jacobsen, MMC
City Clerk
City of Homer, Alaska
907-235-3130

City of Homer City Clerk's Office
PUBLIC RECORDS LAW DISCLOSURE: Most e-mails from or to this address will be available for public inspection under Alaska public records law.

From:	Frank Griswold
To:	Melissa Jacobsen
Cc:	Renee Krause
Subject:	November 8, 2021 BOA Meeting
Date:	Monday, November 8, 2021 12:40:43 PM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Please provide to the Board of Adjustment all of the documents included in the Supplemental Packet provided to the Planning Commission on October 20, 2021 including the email from Asia Freeman, my Reply to City's Response to Motion for Reconsideration, and my two emails. Please also provide the Board with the Commission minutes wherein the Commissioners stated that they lacked credentials and knowledge of the law and therefore thought this matter should be decided later by an administrative law judge.

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
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Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

Memorandum
Supplemental Packet

TO:	HOMER PLANNING COMMISSION
FROM:	TRAVIS BROWN, PLANNING TECHNICIAN
DATE:	October 20, 2021
SUBJECT:	SUPPLEMENTAL PACKET

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Email Comment from Asia Freeman, dated Oct. 19, 2021 **p. 2**

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

Appellant's Reply to the City of Homer's Response to Motion for Reconsideration, Leave to Supplement Points on Appeal, and Proposed Revised Order, dated Oct. 19, 2021 **p. 4**

Email Comment from Frank Griswold to Homer Board of Adjustment, dated Oct. 20, 2021 **p. 13**

Email Comment from Frank Griswold to City Clerk, Melissa Jacobsen, MMC, dated Oct. 20, 2021 **p. 18**

From: Asia Freeman
To: Department Clerk
Subject: Comments for Planning Commission on CUP 20-15 for a building at 106 West Bunnell
Date: Tuesday, October 19, 2021 1:06:48 PM

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Dear members of the Planning Commission,

I am writing to you today to suggest that pursuant to the public hearing on October 20, you deny a request for a conditional use permit that would allow expansion of a portion of the building at 106 West Bunnell, Wild Honey, adjacent to Bunnell Street Arts Center.

It has been a real privilege and responsibility for nearly thirty years to steward the historic Inlet Trading Post Building at 106 West Bunnell. This stately, former general mercantile store served the young town of Homer from the late thirties to the late eighties. It is home to Bunnell Street Arts Center, Old Town Bed and Breakfast (upstairs), The Fringe (downstairs) and Wild Honey (next door). About ten years ago, to incentivize long-term occupancy, I created a condominium in the building, dividing it into two units. Unit 1 is the larger portion, which houses the arts center, the Fringe and Old Town Bed and Breakfast. Unit 2 is currently owned by Melody Livingston. She created a thriving business there, Wild Honey Bistro.

Raised in Homer and passionate about the history and culture of this community, it is deeply important to me that we respect the lines and appearance of our historic buildings. The Inlet Trading Post, constructed in 1937, is the second oldest large commercial building still standing in Homer. It is the anchor of Old Town revitalization and a historic landmark. It is extremely rare for old wood buildings in Alaska to endure time, and the risk of fire and earthquakes. Moreover, the Inlet Trading Post has endured time with with increasing dignity over the years. I have invested a great deal of time and funds to preserve the original lines and health of this building. I deeply believe that this building should be preserved in all of its exterior roof lines, footprint and character.

Melody Livingston would like to tear down the original construction and consolidate her business under one roof, adding a second floor "prep kitchen" above. The footprint of the "prep kitchen is almost equal to the main kitchen below. I have watched the business grow and thrive, and because it functions within the limitations of multiple spaces that are not connected by interior halls or doors to the main kitchen it has always been a challenge to operate a restaurant there. You have a main room with a kitchen, separated from a dining room by an exterior deck and two doors. I can certainly appreciate why the current owner would like to renovate her space to create more connectivity and efficiency. In fact, I have discussed renovations of the space with three architects and four builders over the last thirty years. I am certain this can be done within the original footprint by rebuilding a more efficient interior design while maintaining the exterior lines of this precious landmark. There is plenty of poorly used storage space under the shed behind Wild Honey which could be made into a prep kitchen, meanwhile all of the interior front space including Wild Honey's porch could be incorporated into interior seating.

Ultimately, expansion of Wild Honey will result in greater demands on the very limited parking and utility services of this old building. I do not think we can bear it. Just last year I

had to pay $18,500 for 85% of the cost of reconstruction of a broken sewer line servicing both Units 1 and 2. Wild Honey's water/sewer meter reading demonstrated a toll of 28.5% yet she refused to pay any more. Wild Honey is thriving. Melody has been away from Alaska since May and her staff has asserted to me several times they are thriving. The other businesses here are all working at capacity. I think we are strained to support the current utilities and comfortable adjacency as is. I think its wonderful that the owner of Wild Honey has created a very successful restaurant within the historic footprint and rooflines of the original machine shop and while renovation may be justified, expansion is not.

Sincerely,

Asia Freeman
Inlet Trading Post LLC
106 West Bunnell, Suite A
Homer, Ak 99603
907.299.1482

OCT 19 2021 AM09:50
RT

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT'S REPLY TO CITY OF HOMER'S RESPONSE TO MOTION FOR RECONSIDERATION, LEAVE TO SUPPLEMENT POINTS ON APPEAL, AND PROPOSED REVISED ORDER

On March 9, 2021, the Homer Board of Adjustment remanded this matter to the Commission under HCC 21.93.510(a) and (c) to address and decide three issues for which the Commission's findings of fact were deemed to be inadequate. HCC 21.93.560(c) states: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer. A case on remand has priority on the agenda of the lower administrative body, except cases remanded under HCC 21.93.510(a) are not entitled to priority. The applicant or owner of the property in question may waive the priority given by this subsection." The issues remanded under HCC 21.93.510(a) are not entitled to priority on the

Commission's agenda but they must nonetheless be promptly acted upon by the Commission. However, they clearly were not promptly acted on by the Commission. Because the applicants and/or property owners never waived priority, the issues remanded under HCC 21.93.510(c) ***were*** entitled to priority on the Commission's agenda but now, more than 7 months following the Board's remand, the Commission has still not considered or acted on the Board's Decision and Order. Instead, City Planner Rick Abboud, who claims to be a party to this appeal, has colluded with Melody Livingston and initiated multiple ex parte communications with the Commission to secure the dismissal of this appeal while she "regroups" before resubmitting her CUP application within a year or two.[1]

A claim is moot if it has lost its character as a present, live controversy. *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 523 (Alaska 1993) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)). An action is not moot if respondent has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union Local 1000,* 567 U.S. 298, 307-08 (9th Cir. 2012). The *Knox* court further stated: "The

[1] While it is not illegal for a party to communicate with another party, it is illegal for a party to engage in ex parte communication(s) with the Commission. HCC 21.93.710(a).

voluntary cessation of challenged conduct does not render a case moot because the conduct could be resumed as soon as the case is dismissed" (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283). In 1995, the Alaska Supreme Court held as follows in *Kodiak Seafood Processors v. State*, 900 P.2d 1191:

"No scallop harvesting presently takes place in closed Alaska waters. Therefore, KSPA's claims seeking declaratory and injunctive relief are technically moot. Nevertheless, we may choose to address certain issues if they fall under the public interest exception to the mootness doctrine. The public interest exception requires the consideration of three main factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Peloza v. Freas*, 871 P.2d 687, 688 (Alaska 1994); *Brandon*, 865 P.2d at 92 n. 6. None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue. *Hayes*, 693 P.2d at 834. Ultimately, the determination of whether to review a moot question is left to the discretion of the court. *Id.; Brandon*, 865 P.2d at 92. n. 6.

. . .

Because the Permit has been revoked, the question of the Commissioner's authority to issue the Permit is also technically moot. Nonetheless, the issue presents a live controversy. KSPA argues that by allowing a private fisher to sell fish obtained during a research trip, the Commissioner exceeded his authority by allowing "commercial fishing" in closed waters. ADF&G argues that it has the authority to finance an exploratory fishing operation by allowing a private contractor to sell the catch. This issue falls within the public interest exception to the mootness doctrine. First, the issue is capable of repetition. The State has not disavowed this type of financial arrangement for future test-fisheries. Second, because research fishing may be of limited duration, it is likely that, as in this case, an individual permit would expire before the issue could be litigated. Third, the scope of the Commissioner's power is an

issue of public interest. Having determined that the commercial fishing issue satisfies the requirements of the public interest exception, and that the procurement issue does not, we turn to the merits of the trial court's decision."

Unlike the fishing permit at issue in the Kodiak Seafoods case, CUP 20-15 was not revoked, it was voluntarily and temporarily withdrawn by Ms. Livingston who indicated her intent to resubmit it, presumably under a different CUP designation (which is irrelevant) in a year or two. Accordingly, Ms. Livingston still has a huge interest in the outcome of this appeal. Because live controversies remain, this appeal is not moot, technically or otherwise. Even if this matter were technically moot, the public interest exception to the mootness doctrine would apply for the following reasons: 1. the disputed issues are capable of repetition; 2. if this appeal were to be dismissed as moot, review of the issues on appeal would be repeatedly circumvented; and 3. the issues presented in this appeal, including threshold constitutional issues, are so important to the public interest as to justify overriding the mootness doctrine.

The City of Homer's October 14, 2021 response to Appellate's Motion for Reconsideration falsely states as follows at page 4: "There is no authority or procedure in the Homer City

Code to hear a motion for reconsideration of a final written decision and Griswold has not cited to any such authority." The very first sentence of the Motion for Reconsideration states: "***Pursuant to HCC 21.93.310,*** Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss which was dated August 5, 2021 and distributed on August 6, 2021." HCC 21.93.310 states: "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." The city's Motion to Dismiss Appeal, on the other hand, cites to no authority or provision of Homer City Code. No provision of HCC gives the Commission the authority to summarily dismiss an appeal on remand from the Board of Adjustment or consider new evidence not authorized within the Board's remand instructions. The city attorneys admit that the Commission did not have express authority in the code to dismiss the appeal but claim that it had "implied" authority to do so under HCC 21.93.310. However, HCC 21.93.310 does not apply because the Commission's dismissal of the appeal was contingent on its receipt of ex parte communications between Mr. Abboud and Ms. Livingston and

unauthorized consideration of that new evidence, both of which are unlawful and inconsistent with HCC Chapter 21.

At page 4 of the city's response it states: "HCC 21.93 clearly states that zoning appeal decisions are final and BOA decisions are appealable to the Superior Court" (citing HCC 21.93.110 in footnote 16). BOA final decisions are irrebuttably appealable to the superior court but the BOA has not issued a final decision and Planning Commission decisions are not appealable to the superior court. HCC 21.93 applies solely to Board of Adjustment proceedings and decisions, not to Planning Commission proceedings and decisions. In their Notice of Appeal Rights at page 5 of their proposed Revised Revised Order Granting Motion to Dismiss, the city attorneys deliberately and deceptively manipulate HCC 21.91.130 in order to give it a different meaning than intended. HCC 21.91.130(a) states: "An appeal from a final decision of the ***Board of Adjustment*** or a hearing officer 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 hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." No provision of HCC allows anyone to appeal a final decision of the Planning Commission directly

to the superior court. HCC 21.93.550(a) provides that the Board of Adjustment may affirm or reverse the decision of the lower administrative body in whole or in part and that 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. Thus, only final decisions can be appealed to the superior court. Because the Commission's order dismissing the appeal was not a decision on the merits, it did not constitute a final decision. Even if the Commission's August 5, 2021 Order did constitute a final decision, it cannot be appealed to the superior court; it can only be appealed to the Board of Adjustment in accordance with HCC 21.93.500. Just because a zoning decision is "final" (meaning that it disposes of all issues) does not mean that it cannot be reconsidered. If this were the case, the Board of Adjustment would not have directed the Commission to take up the subject Motion for Reconsideration following the City Clerk's erroneous ruling that motions for reconsideration of agency final decisions cannot be taken up. Alaska Appellate Rule 602(a)(2) clearly indicates that administrative agencies have the discretion to reconsider their final decisions.

The Commission does not have the authority to rule on Appellant's Motion for Leave to Supplement Points on Appeal. As its header clearly indicates, that motion was submitted to the Board of Adjustment, not to the Commission. No formal appeal or points on appeal were submitted to the Commission so there are no points on appeal to supplement except for those submitted on appeal to the Board of Adjustment which now has the sole authority to grant the leave requested.

The August 4, 2021 Planning Commission minutes reveal that the Commission moved to dismiss this appeal due to the "lack of credentials on the part of the Planning Commission in addressing issues like this since they do not know the law" and because "it will be better to have these types of actions go before a hearing officer." These are not valid justifications for dismissing this appeal. Lacking credentials and being ignorant of the law does not justify granting all motions made by the city attorneys on behalf of the appellees and ignoring all motions made by the appellant. The Commission had the authority to be represented by erudite, impartial, independent legal counsel but voted not to exercise that option, choosing instead to blindly rubber-stamp the Motion to Dismiss and ensuing [Proposed] Order prepared by the highly partisan city attorneys.

Now these partisan attorneys are proposing that the Commission deny Appellant's Motion for Reconsideration but nonetheless revise its "final decision" to incorporate points raised in that Motion for Reconsideration. No provision of HCC allows the Commission to revise an order or final decision without first considering a motion for reconsideration. An ethical, impartial Commission, regardless of its lack of credentials and/or ignorance of the law, would grant Appellant's Motion for Reconsideration and, to the best of its ability, consider all of the issues raised therein while disregarding the illegal *ex parte* communications from Melody Livingston pertaining to her strategic temporary withdrawal of the application for CUP 20-15. The Commission does not require special credentials or knowledge of the law to comply with the straight-forward remand instructions of the Board of Adjustment.

Commissioner Franco Venuti declared a disqualifying financial conflict of interest with regard to the application for CUP 20-15 therefore should not have participated in the August 4, 2021 remand proceedings and should not participate in the current proceedings.

DATED: October 19, 2021
By: *s/Frank Griswold/*
Frank Griswold

Travis Brown

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:26 PM
To: Department Planning
Cc: Melissa Jacobsen
Subject: Memorandum 21-153 (Please Provide to Commission for Tonight's Meeting)

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From: To:
Cc: Subject: Date:

Frank Griswold
Melissa Jacobsen
Renee Krause
Memorandum 21-153
Monday, September 20, 2021 11:06:37 AM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Homer Board of Adjustment, Re: Appeal of CUP 20-15

Memorandum 21-153 states: “The Planning Commission approved a Motion to Dismiss submitted by Attorney Holmquist on behalf of the City based on the finding that the applicant withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal.” Mr. Holmquist’s Motion to Dismiss is notably void of any provision of Homer City Code that authorizes it because HCC includes no specific provision authorizing the filing of a motion to dismiss an administrative appeal, on remand or otherwise. The former version of HCC 21.93.310 stated: "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” but Mr. Holmquist's Motion to Dismiss was manifestly inconsistent with HCC Title 21 and therefore not authorized by HCC 21.93.310. Mr. Holmquist’s Motion to Dismiss Appeal was out of order because the Commission had no authority to consider any matter not specifically remanded to it by the Board of Adjustment, consider new evidence, or receive or act on illegal ex parte communications from City Planner Rick Abboud (a party to the appeal) regarding property owner Melody Livingston’s temporary and strategic withdrawal of her application for CUP 20-15 to “regroup.” Nonetheless, the City Clerk’s Office forwarded it to the Planning Commission which eagerly rubber-stamped Mr. Holmquist’s Motion to Dismiss Appeal. Arbitrarily allowing Mr. Holmquist to submit his Motion to Dismiss Appeal but then refusing to “take up” my ensuing Motion for Reconsideration to the Commission and Motion to Supplement Points on Appeal to the Board of Adjustment, both legitimately filed pursuant to HCC 21.93.310 and

HCC 21.93.570 respectively, violates the equal protection clause of the Fourteenth Amendment to the US Constitution and violates my due process rights.

On July 29, 2021, the Homer City Attorneys responded in relevant part as follows to my Motion to Continue the August 4, 2021 Commission Proceeding Regarding the City's Motion to Dismiss Appeal: "Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous

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pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter." But no special hearing was scheduled and neighboring property owners were not notified. Following the Commission's decision, the Clerk's Office should have promptly submitted my timely filed Motion for Reconsideration to the Commission and my timely filed Motion to Supplement Points on Appeal to the Board of Adjustment. The Board and Commission could then have decided whether to consider, grant, or deny my motions. The parties were excluded from the discussions between Ms. Jacobsen and Mr. Brandt-Erichsen who was hired to advise the Board of Adjustment, not to unilaterally render decisions on the Board's behalf or provide biased procedural advice to the City Clerk. Neither Mr. Brandt- Erichsen, the Clerk's Office, nor the City Council has the authority to make adjudicatory decisions on behalf of the Commission or Board.

At paragraph four of her memorandum, Ms. Jacobsen states: "final decisions were issued regarding both matters" and at paragraph five she states: "an appeal from a final decision [deliberately omitting "of a hearing officer"] may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer." She neglects to point out that the Board of Adjustment never issued a final decision regarding CUP 20-15 and that only final decisions of the Board of Adjustment or a hearing officer can be appealed directly to the superior court and that no hearing officer was involved, and that the Planning Commission's "final decision" was not a response to the Board of Adjustment's remand order but merely the granting of a motion to dismiss the appeal, and that even if the Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal did constitute a final decision, it cannot be appealed directly to the superior court. The version of HCC 21.91.130(a) recently enacted via Ordinance 21-44(S) states: "An appeal from a final decision of a hearing officer may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The version of HCC 21.91.130(a) (misquoted in Ordinance 21-44(S)) in effect when I filed my appeal states as follows: "An appeal from a final decision of the Board of Adjustment or a hearing officer may be taken directly to the Superior Court by a party who actively and substantially participated in the proceedings before the Board of Adjustment or the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The City Council should not rely on

any paraphrased rendition of HCC that is manipulated and spun to give it a meaning other than what was actually intended. Just because the City Clerk and/or Planning Commission claim the Commission's remand determination constitutes a final decision does not make it so. The Commission issued its first, and arguably only, Final Decision on October 22, 2020 and that decision was appropriately appealed to the Board of Adjustment. The Notice of Appeal Rights attached to the Planning Commission's August 5,

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2021 Order Granting Motion to Dismiss Appeal deceptively states that "Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment may appeal this [Planning Commission] decision to the Superior Court." In light of the fact that the Board of Adjustment and the Planning Commission are no longer involved in adjudicating zoning appeals, the code provisions that previously applied to Board and Commission appeal proceedings govern appeals still pending before them. In any event, neither version of HCC 21.91.130 provides that decisions of the Planning Commission may be appealed directly to the Superior Court or that a party who actively participated in proceedings before the Board of Adjustment can appeal an ensuing remand determination of the Planning Commission directly to the superior court. The Planning Commission never addressed the matters remanded to it by the Board of Adjustment on March 9, 2021 and should be sanctioned for not promptly responding to the Board's (non-final) Decision and Order, illegally accepting and considering new evidence, and engaging in ex parte communications. The Planning Commission's August 5, 2021 order/decision can only be directly appealed to the Board of Adjustment in accordance with HCC 21.93.500-550. After the Board of Adjustment issues a final decision, the Planning Commission's ultra vires dismissal of the appeal and other erroneous determinations can be appealed directly to the superior court.

At paragraph six of her memorandum, Ms. Jacobsen states: "Homer City Code provides no provisions for an appellant to submit motions to bring a matter back before the Board of Adjustment after a final decision has been issued. I have advised Mr. Griswold as such, but he disagrees." I disagreed because Ms. Jacobsen is patently wrong. HCC 21.93.310 and HCC 21.93.570 authorize an appellant to submit post-decision motions to the Planning Commission and Board of Adjustment. Alaska Rules of Appellate Procedure 602(a)(2) states: "An appeal may be taken to the superior court from an administrative agency within 30 days from the date the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal." This appellate rule clearly contemplates motions for reconsideration of final agency decisions so it would clearly not be

out of order or inject procedural error into the proceedings if the Board or Commission addressed a motion for reconsideration.

No provision of HCC authorizes the City Clerk to reject a party's timely filed motion for reconsideration of an adjudicatory body's final decision so the City

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Clerk's unilateral rejection of a party's timely filed motion for reconsideration would inject procedural error into the proceedings and be grounds for remand or reversal. In the past, it has routinely been the practice of the Clerk's Office to promptly forward such motions to the appropriate adjudicatory body. On June 19, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration of Board of Adjustment Decision regarding CUP 13-13 and on December 4, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration Re: Standing to Appeal CUP 14-05. Neither of these orders was subsequently ruled to be procedurally flawed or otherwise out of order by the appellate courts.

Re: Appeal of Zoning Permit 1020-782

The City Clerk's duties are ministerial, not adjudicatory. Ms. Jacobsen had no sua sponte authority to reject my Motion for Reconsideration or initiate the addition of a Notice of Appeal Rights to the Board of Adjustment's initial Final Decision. Even as amended, final decision #2 still violates HCC 21.93.110(a) which requires that a final decision state "the names and number [of Board members] voting in favor of the decision, and the names and number voting in opposition to the decision." If the Board of Adjustment grants my Motion for Reconsideration it can legitimately amend its August 26, 2021 Final Decision to correct deficiencies and/or erroneous findings. The fact that final decision #2 was issued on September 7, 2021 soundly debunks the specious argument that a matter cannot be brought back before the Board after a final decision has been issued. Whether the Board and/or Commission have legal authority to convene to "take up" the subject motions is a question of law and it is not generally the role of the City Council or Mayor to dispense legal advice to the City Clerk. The Council could authorize funding to allow the Clerk's Office to seek impartial legal advice from an erudite attorney. Because City Attorneys Max Holmquist and Michael Gatti represent parties to the pending appeals they would not be impartial sources. It is inappropriate for Ms. Jacobsen to ask the Council to provide her with direction on process for noticing parties, noticing the public, opportunities for responses or briefing, and/or when to schedule the special meeting while simultaneously recommending to the Council that it make, and presumably pass, a motion that the Board of Adjustment declines to take up the motions for reconsideration. (FYI, I only filed one motion for reconsideration to the Board of Adjustment and it pertained to ZP 1020-782. I filed another motion to the Board to supplement my points on appeal re: CUP 20-15. My other motion for reconsideration pertained to the Planning Commission's order granting the city's motion to dismiss the appeal of CUP 20-15). One seeking direction from the Council is self-admittedly unqualified to recommend what that direction should be. Accordingly, no weight should be given to Ms. Jacobsen's baseless, self-serving recommendation. Memorandum 21-

153 should have been sent to the Board of Adjustment, not the City Council. The Council would be out of

order making a motion that the Board of Adjustment declines to take up the subject motions because, unless and until it formally convenes as a Board of Adjustment, the Council and Mayor have no legal authority to rule on behalf of the Board of Adjustment, especially when proper notice has not been given to parties and neighboring property owners. Furthermore, Robert's Rules discourages making negative motions. Alternatively, Ms. Jacobsen could forgo seeking further direction and simply allow due process to run its course by forwarding the subject motions to the designated adjudicatory bodies to let them exercise their discretion to issue procedural notices and decide whether those motions should be reviewed, considered, granted, or denied.

Audi alteram partem,

Frank Griswold

Travis Brown

From: Melissa Jacobsen
Sent: Wednesday, October 20, 2021 3:03 PM
To: Travis Brown
Subject: FW: September 20, 2021 Special Meeting Minutes

Please provide to the planning commission

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:14 PM
To: Melissa Jacobsen <MJacobsen@ci.homer.ak.us>
Cc: Renee Krause <RKrause@ci.homer.ak.us>
Subject: September 20, 2021 Special Meeting Minutes

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Ms. Jacobsen,

Footnote 1 at page 3 of the September 20, 2021 BOA minutes erroneously states as follows:

"The Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal regarding CUP 20-15 were the only matters scheduled and addressed at this meeting. The reference to a Motion to reconsider regarding Zoning Permit 1020-782 was mistakenly added to a proposed motion provided by the Clerk in the working agenda provided to the Board. Zoning Permit 1020-782 is a separate matter that was not addressed at this hearing."

At the September 20, 2021 BOA meeting I addressed my Motion for Reconsideration re: Zoning Permit 1020-782 and after considering this matter in executive session the Board of Adjustment passed a motion to not take it up. Please correct the September 20, 2021 minutes accordingly and provide a copy of the email I sent to the BOA to the Commission for its consideration at tonight's meeting.

Frank

Session 21-22, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:31 p.m. on October 20, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, and via Zoom Webinar.

PRESENT: COMMISSIONERS BARNWELL, BENTZ, CONLEY, CHIAPPONE, HIGHLAND, SMITH, VENUTI

STAFF: CITY PLANNER ABBOUD
CITY CLERK JACOBSEN

APPROVAL OF THE AGENDA

BENTZ/VENUTI MOVED TO APPROVE THE AGENDA AS PRESENTED.

There was no discussion.

Chair Smith confirmed that the Commissioners received the supplemental packet and were prepared to act on Staff Report 21-62. The Commissioners concurred they received the materials and were prepared.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of September 15, 2021
B. Decision and Findings for Conditional Use Permit 21-07 at 1554 Homer Spit Road
C. Homer Lake Street Rehabilitation Right of Way Acquisition Preliminary Plat Time Extension Request

HIGHLAND/BENTZ MOVED TO APPROVE THE CONSENT AGENDA AS PRESENTED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-61, City Planner's Report

City Planner Abboud reviewed his staff report that was included in the packet. He answered questions from the Commission regarding items in his report. He addressed the Safeway parking lot progress and that they're fulfilling the requirements of code with the expansion of their parking lot. They discussed the recent State determination to allow ATV's on roadways and City Clerk Jacobsen advised that Council had recently adopted code prohibiting ATV's on city streets. They also touched on Resolution 21-065 regarding non-motorized amenities on Kachemak Drive and the challenges for bicyclist and pedestrians, and the work of the Homeless Coalition.

Commissioner Bentz noted her surprise that strategic planning and the comprehensive plan on the horizon, it seems staff has a lot of different irons in the fire as far as plan development that are coalescing and could help them look at a longer term vision for the community and land. She referenced hazard planning, storm water and drainage planning, and transportation planning and shared that as a Commission they can think of the components of the plans together and that will help with the strategic planning process. Near term it will be interesting to see what policy recommendations the hazard planning team comes up with, that will help with long term planning and perhaps bring some specific code changes like setbacks, definitions, coastal bluff definitions, and so forth.

Chair Smith suggested having the Borough Transportation Planning Department present at a future worksession, similar to Platting Manager Huff's presentation tonight. City Planner Abboud said he'd try to work that in and shared that the strategic planning he referenced is more of developing a work plan for the office as they continue have more demand for services than hours so they need to prioritize things. He's interested in having transportation professionals help in considering what the future is likely to bring, and not get caught in the solution of today.

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Commissioner Venuti was excused from participating due to ruling of his conflict of interest regarding this matter, and was moved to a waiting room.

Commissioner Bentz reported a potential ex-parte communication in that she received a phone message from a concerned member of the public. Commissioner Bentz pointed out that the member of the public put her comments in writing and they're provided the supplemental packet, so she doesn't think she has any other information than the other Commissioners have, but wanted to bring this before the Commission to determine if she had bias in any way based on the phone message.

Chair Smith asked if Commissioner Bentz engaged in conversation with the member of the public. Commissioner Bentz responded she did not, it was a message left on her phone and once she realized what it was about she recognized it would be ex parte communication if she were to call the person back. The written comments are part of the record now in the supplemental packet and that's the substance of the comments in the message.

HIGHLAND/BARNWELL MOVED THAT COMMISSIONER BENTZ HAS EX-PARTE COMMUNICATION.

Commissioner Highland shared that due to the fact is was a message on a phone with no return phone call there is no ex-parte communication.

VOTE: NO: HIGHLAND, BARNWELL, CHIAPONNE, CONLEY, SMITH

Motion failed.

Chair Smith summarized the decision and order remanding CUP 20-15 to the Planning Commission, and then opened the public hearing.

Frank Griswold, city resident and appellant in the remanded matter, commented regarding Commissioner Bentz's disclosure of ex-parte and that it wasn't disclosed appropriately in accordance with Homer City Code. He commented that complex dispositive motions are under consideration tonight and should therefore be addressed in a special public hearing and not during a regular commission meeting where public comment is limited to three minutes. He noted on July 29, 2021 Attorney Holmquist agreed with him that the Commission should provide notice to neighboring property owners and set a special meeting to solely address his motion to dismiss the appeal, but the Commission did not do so. Instead they voted to dismiss the appeal, in hopes it would go to a hearing officer. He referenced notice requirements outlined in City Code and that proper notice was not given, and explained the two toll free numbers provided for the Zoom meeting were working but the meeting id and passcode did not work. Finally the City Planner is a party to the appeal and should not have written the staff report encouraging dismissal of the appeal and should not have engaged in ex-parte communication with Commission related to the applicant's temporary withdrawal of the CUP application. He cited Kleven v. Yukon Koyukuk School District related to a moot claim, and Knox v. Service Employee International Union Local 1000 when an action is not moot and questioned what precedent the Commission wants to set. He also noted matters that are not allowable in Homer City Code related to appeals, and an appellate procedure rule of the Alaska Courts regarding filing a motion for reconsideration. He encouraged the Commission comply with the Boards instructions and if the Board sees fit to dismiss the appeal, so be it.

There were no further comments and the hearing was closed.

The Commission discussed how best to proceed with this matter. They acknowledged the points raised in the remand and the points raised by Mr. Griswold. One matter relates to tax code which is not their specialty, and they'd need to be advised on how to address that.

BENTZ/HIGHLAND MOVED THAT THE COMMISSION POSTPONE DELIBERATION WITH STAFF SUPPORT TO AT TIME TO BE DETERMINED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

Commissioner Venuti was admitted back to the meeting.

PLAT CONSIDERATION

PENDING BUSINESS

A. Staff Report 21-62, Parking Requirements for One Bedroom Dwelling Units

City Planner Abboud reviewed his staff report that was included in the packet. There were no questions from the Commission.

BENTZ/VENUTI MOVED TO RECOMMEND ADOPTION OF THE DRAFT ORDINANCE AMENDING HOMER CITY CODE 21.55.090A1 AND FORWARD TO PUBLIC HEARING.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

There was discussion regarding process and in attempt to determine the meaning of Leave to Supplement Points of appeal.

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Commissioner Highland referenced the information on page 79 of the packet which notes that HCC 21.93 does not authorize a party to supplement or modify points on appeal, and that the motion is moot because the appeal was dismissed. She questioned if the Commission isn't supposed to act on this, then why was it in their packet. She personally agrees with the

conclusion noted on page 80 of the packet, and feels the Board of Adjustment should dismiss the appeal.

Commission Chiaponne asked for clarification on the motion from the Board of Adjustment. City Clerk Jacobsen explained if she understood the discussion at the last Board of Adjustment meeting, one of the arguments was that the Planning Commission didn't have the authority to dismiss the appeal and that the Board of Adjustment would be the body that would make that decision. She explained when the Board of Adjustment came out of their executive session on September 20th, they adopted the motion that while the Board of Adjustment believes it is a moot point due to the lack of an active permit application, the Board of Adjustment believes that the appeal procedurally should be before the Planning Commission for Appellant Frank Griswold's motion for reconsideration and motion for leave to supplement points on appeal of CUP 20-15 and the Board directs the Clerk to refer that motion back to the Planning Commission for consideration.

Commissioner Bentz commented the motion on the floor as it stands would be in alignment with the Board of Adjustment vote and also in alignment with the City's proposed order to deny taking up these motions. She's in agreement with the motion on the floor.

Commissioner Highland referenced packet page 33 under staff recommendations and noted its reference to HCC 21.93 does not contain a procedure for reconsideration of a final decision in a zoning appeal, or for allowing an appellant to supplement their points on appeal. HCC 21.93.110 states that zoning appeal decisions are final decisions. Since the code doesn't have a procedure she feels that's a strong argument.

VOTE: YES: BARNWELL, SMITH, CONLEY, CHIAPONNE, BENTZ, HIGHLAND

Motion carried.

INFORMATIONAL MATERIALS

A. City Manager's Report for September 27 & October 11, 2021 City Council Meetings
B. Kenai Peninsula Borough Notice of Decisions
C. Planning Commission Calendar

COMMENTS OF THE AUDIENCE

COMMENTS OF THE CITY STAFF

City Clerk Jacobsen said it was nice to be with you all tonight, thank you for a good meeting.

COMMENTS OF THE COMMISSION

Commissioner Highland said it was an interesting meeting.

Commissioner Chiaponne thanked the group for their help tonight.

Commissioner Conley apologized for his technical difficulties and thanked everyone for a good meeting.

Commissioner Venuti said he enjoyed the worksession tonight. He's glad Ms. Keiser was able to join and get her input. He thanked staff for doing a great job.

Chair Smith enjoyed the meeting the thought it would be a little more involved than it was. He's looking forward to their future worksessions. He thinks what the City Planner has mapped out is outstanding.

There were no other comments.

ADJOURN

There being no further business before the Commission, the meeting was adjourned at 8:18 p.m. The next Regular Meeting is Wednesday, November 3, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom webinar.

_____

Melissa Jacobsen, MMC, City Clerk

Approved:_____

Session 21-29 a Special Meeting of the Homer City Council was called to order on November 8, 2021 by Mayor Ken Castner at 4:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBERS ADERHOLD, DAVIS, ERICKSON, HANSEN-CAVASOS, LORD

ABSENT: COUNCILMEMBER VENUTI (excused)

STAFF: CITY CLERK JACOBSEN
ATTORNEY BRANDT-ERICHSEN

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

Mayor Castner announced the laydown information from Frank Griswold, Appellant including an email advising the Clerk he did not have adequate time to prepare and regarding notice, and a second email requesting supplemental items be included.

LORD/ADERHOLD MOVED TO APPROVE THE AGENDA.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

City Clerk Jacobsen announced for the record that Councilmember Hansen-Cavasos, Attorney Brandt-Erichson, Attorney Holmquist, and City Planner Abboud were in attendance via Zoom.

PENDING BUSINESS

NEW BUSINESS

Parties will be given a total of 10 minutes to comment on the matters below, not 10 minutes per topic, but 10 minutes total time to address both matters.

Prior to taking up the matters, Mayor Castner commented regarding his understanding of the procedure that the Council can act in reaction to a complaint against a pending permit or action. He requested Attorney Brandt-Erichsen provide advice to the Board regarding the necessity to convene the Board of Adjustment (BOA).

Attorney Brandt-Erichsen responded the reason for the Council to meet as BOA and address the pending request would be in order to make a clear record and have a final decision for an aggrieved party to appeal to the Superior Court if they desired.

Board member Lord acknowledged Mr. Griswold's correspondence regarding notice and asked if there was notice that should have been provided.

Attorney Brandt-Erichsen noted the 15 days' notice requirement in code is notice for a hearing, which isn't necessarily controlling in this instance, and an exercise in caution would be to provide 15 days' notice prior to convening. Whether the Court would determine that 12 days' notice is prejudicial is speculative.

City Clerk Jacobsen explained notice was not mailed to neighboring property owners. City Code doesn't give direction on noticing types of matters that go beyond the appeal hearing and final decision. The parties were noticed by email, the BOA meeting was noticed in the newspaper regular meeting notice, and an additional legal ad to notice the BOA would be taking up these matters. She suggested if the BOA deems that to be insufficient the matter can be postponed to December 13th and asked for guidance on noticing.

Board member Lord suggested in would be prudent to postpone and re-notice. At the request of Mayor Castner, City Clerk Jacobsen explained those to be noticed in an appeal hearing for this matter include Mr. Griswold, JDO as attorneys for the City, Melody Livingston, Beachy Construction, and property owners within 300 feet of the proposed action.

LORD/ADERHOLD MOVED TO POSTPONE TO DECEMBER 13TH BOTH ITEMS ON THE AGENDA TODAY, CONSIDERATION OF MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL TO ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL BY FRANK GRISWOLD, APPELLANT, AND RECOMMENDATION BY THE PLANNING COMMISSION TO DISMISS THE APPEAL OF CONDITIONAL USE PERMIT (CUP) 20-15 FOR THE RECONSTRUCTION OF A RESTAURANT BUILDING AT 106 W. BUNNELL AVENUE, HOMER, ALASKA BASED ON THE APPLICANT'S WITHDRAWAL OF THEIR CUP APPLICATION, TO PROVIDE TIME TO GIVE NOTICE TO THE APPROPRIATE PARTIES.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

a. Consideration of Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal by Frank Griswold, Appellant.

   Memorandum 21-201 from City Clerk as backup

b. Recommendation by the Planning Commission to Dismiss the Appeal of Conditional Use Permit (CUP) 20-15 for the Reconstruction of a Restaurant Building at 106 W. Bunnell Avenue, Homer, Alaska based on the Applicant's Withdrawal of their CUP Application.

Memorandum 21-202 from City Clerk as backup

COMMENTS OF THE AUDIENCE

Larry Slone, city resident, commented this seems to be an issue of conflicting sources of jurisdiction or authority between city ordinances and case law. He agrees with Mr. Griswold in that the city ordinances have not been followed as closely as they should have been. There's an area of confusion in that the application has been withdrawn and it makes common sense that the process shouldn't continue on, particularly since there is case law backing up that argument. But the area of confusion in the future it might be wise to clarify what the Planning Commission should do in the future in the event of a case like this with regard to the city ordinances.

ADJOURN

There being no further business to come before the Board, Mayor Castner adjourned the meeting at 4: 20 p.m. The next Regular Meeting is Monday, December 13, 2021 at 6:00 p.m., Committee of the Whole at 5:00 p.m. and a Worksession November 22, 2021. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Approved: December 13, 2021

Session 21-30 a Regular Meeting of the Homer City Council was called to order on November 8, 2021 by Mayor Ken Castner at 6:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBERS ADERHOLD, DAVIS, ERICKSON, HANSEN-CAVASOS, LORD, VENUTI

STAFF: CITY MANAGER DUMOUCHEL
CITY CLERK JACOBSEN
FINANCE DIRECTOR WALTON
PORT DIRECTOR HAWKINS
LIBRARY DIRECTOR BERRY
PUBLIC WORKS DIRECTOR KEISER
CITY ATTORNEY GATTI

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

Mayor Castner announced supplemental items to the packet as follows- **CONSENT AGENDA** **Resolution 21-078**, A Resolution of the City Council of Homer, Alaska Confirming the Assessment Roll, Establishing Dates for Payment of Special Assessments and Establishing Delinquency, Penalty, and Interest Provisions for the Seawall Improvement Special Assessment District for Armor Rock Toe Improvements. City Clerk. Memorandum 21-203 from Public Works Director as backup; **Resolution 21-079**, A Resolution of the City Council of Homer, Alaska Authorizing the City Manager to Apply and Accept a Loan from the State of Alaska Department of Environmental Conservation, Alaska Drinking Water Fund, in an Amount not to Exceed $86,250 to Finance Costs of the Public Works Department's Computerized Maintenance Management System (CMMS). City Manager/Public Works Director. Amended Memorandum 21-197(A) from Public Works Director as backup; **ANNOUNCEMENTS / PRESENTATIONS / REPORTS** Planning Commission Written Report **RESOLUTIONS** Resolution 21-082, A Resolution of the City Council of Homer, Alaska Acknowledging the Results of the Invitation to Bid for City Owned Cold Storage Seasonal Rental Units. City Clerk. Resolution 21-082(S), A Resolution of the City Council of Homer, Alaska Acknowledging the Results of the Invitation to Bid for City Owned Cold Storage Seasonal Rental Units. City Clerk. Memorandum 21-198 from Port Director as backup.

LORD/ADERHOLD MOVED TO APPROVE THE AGENDA

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

MAYORAL PROCLAMATIONS AND RECOGNITIONS

Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer
Agenda

City Council Special Meeting as Board of Adjustment
Monday, December 13, 2021 at 4:00 PM
In Person at City Hall Cowles Council Chambers and by Zoom Webinar
https://cityofhomer.zoom.us/j/92222013235?pwd=ZS9ybzMvWXd2WXNna3ozYmF5cXRmdz09
Or Dial: +1 669 900 6833 or +1 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099
Webinar ID: 922 2201 3235 Passcode: 411958

CALL TO ORDER, 4:00 P.M.

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

PENDING BUSINESS

Each party will be given a total of 15 minutes to address both matters.

a. Consideration of Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal by Frank Griswold, Appellant

   Memorandum 21-201 from City Clerk as backup

b. Recommendation by the Planning Commission to Dismiss the Appeal of Conditional Use Permit (CUP) 20-15 for the Reconstruction of a Restaurant Building at 106 W. Bunnell Avenue, Homer, Alaska based on the Applicant's Withdrawal of their CUP Application.

   Memorandum 21-202 from City Clerk as backup

NEW BUSINESS

COMMENTS OF THE AUDIENCE

ADJOURNMENT NO LATER THAN 4:50 P.M.
Next Regular Meeting is Monday, January 10, 2022 at 6:00 p.m., Committee of the Whole at 5:00 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

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www.cityofhomer-ak.gov

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(f) 907-235-3143

Memorandum 21-201

TO: MAYOR CASTNER AND CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: NOVEMBER 4, 2021

SUBJECT: MOTION FOR LEAVE AND TO SUPPLEMENT POINTS ON APPEAL BY FRANK GRISWOLD, APPELLANT

On August 10, 2021 a Motion for Leave to Supplement Points on Appeal to Address the Planning Commission's Dismissal of Appeal was filed by Frank Griswold, Appellant in the appeal of CUP 20-15.

In his motion, Mr. Griswold states he moved for leave to supplement his points on appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission.

At the September 20, 2021 meeting of the City Council sitting as Board of Adjustment (BOA), the BOA didn't take up the matter of the Motion for Leave. It may have been unclear as to whether it was a motion to be taken up by the BOA or the Planning Commission.

The matter is before the BOA to take action.

Recommendation: Move to deny the appellant's motion Leave to Supplement Points on Appeal to Address the Planning Commission's Dismissal of Appeal, or move to take up the matter at a date to be determined and a BOA meeting will be scheduled.

AUG 10 2021 PM04:59

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL TO ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL

Pursuant to HCC 21.93.570, Appellant Frank Griswold hereby moves for leave to supplement his Points on Appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission. The Commission's Order and Appellant's Motion for Reconsideration are attached hereto as Exhibit 1 and Exhibit 2 respectively.

DATED: August 10, 2021

By: *s/Frank Griswold/*

Michael R. Gatti, Esq.
Max D. Holmquist, Esq.
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322
mgatti@jdolaw.com
mholmquist@jdolaw.com

Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

CONDITIONAL USE PERMIT 2020-15	)	On appeal from Planning Commission Decision October 7, 2020

ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal, as well as any opposition and reply thereto, and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed.

DATED: August 5 2021

SCOTT SMITH
CHAIR – HOMER PLANNING COMMISSION

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
A PROFESSIONAL CORPORATION
3000 A STREET, SUITE 300
ANCHORAGE, ALASKA 99503
(907) 563-8844
FAX (907) 563-7322

NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.

I hereby certify that a true copy of the foregoing document was hand delivered/mailed on the 6th day of August, 2021, to: Frank Griswold, Attorneys Holmquist + Gatti Melody Livingston, Matt Early, City Planner Abbond, City Manager Dumouchel

By: Melissa Jacobsen, City Clerk

MJacobsen

LAW OFFICES OF
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A PROFESSIONAL CORPORATION
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FAX (907) 563-7322

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR RECONSIDERATION

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss Appeal which was dated August 5, 2021 and distributed on August 6, 2021.

The Commission overlooked the material fact that it did not have the authority to consider the Motion to Dismiss Appeal. The Commission's authority is limited to that which the Board has expressly delegated to it. See *Alaska State Comm'n for Human Rights v. Anderson,* 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim"). HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further

Exhibit 2

evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board's March 9, 2021 Decision and Order says nothing about dismissing this appeal or taking evidence pertaining to its dismissal.

The Commission overlooked HCC 21.93.110(a) which states in relative part as follows: "All final decisions on appeals shall be in writing, and shall state the names and number of members of the body who participated in the appeal, the names and number voting in favor of the decision, and the names and number voting in opposition to the decision." The Commission's Order Granting Motion to Dismiss Appeal fails to state the name of any Commissioner other than Chair Smith.

The Commission overlooked HCC 21.93.110(b) which states in relevant part as follows: "A decision shall include an official written statement of findings and reasons supporting the decision. This statement shall refer to specific evidence ***in the record*** and to the controlling sections of the zoning code." The Commission's Order Granting Motion to Dismiss does not refer to any evidence in the appeal record or to any controlling code. Note that Melody Livingston's withdrawal of her application for CUP 20-15 is not included in the record on appeal and

constitutes illegally submitted new evidence which the Commission has no authority to consider.

The Commission overlooked HCC 21.93.300(b) which states: "An appeal hearing shall be scheduled within the time specified in HCC 21.93.100. The hearing will be open to the public." No formal appeal hearing was scheduled for the Motion to Dismiss Appeal and no formal briefing of the matter was allowed. The Commission overlooked the material fact that there was no opposition to holding a special public hearing to solely address the Motion to Dismiss Appeal. The City of Homer's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal states in relevant part as follows: "Subject to and without waiving its arguments on these issues, the City agrees that the Commission should continue the August 4, 2021 hearing. Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter."

The Commission overlooked HCC 21.93.100(b) which requires that neighboring property owners be notified of the proceedings as set forth in HCC 21.94.030. Neighboring property owners were not notified of the August 4, 2021 proceedings as set forth in HCC 21.94.030.

The Commission overlooked the material facts that the application for CUP 20-15 was merely suspended and that because live controversies still exist the issues on appeal are not moot.

The Commission overlooked HCC 21.93.560(c) which states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer." The Board remanded this matter to the Commission on March 10, 2021. Five months later, the Commission has still not acted on the issues remanded to it by the Board.

On page 2 of its Order, the Commission states: "This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal

to the Superior Court shall be filed within 30 days of the date of distribution of this decision." The Commission clearly misconstrued, misrepresented, and/or misapplied HCC 21.91.130 which provides as follows:

"a. ***An appeal from a final decision of the Board of Adjustment*** or a hearing officer 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 the hearing officer or by the City Manager or 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*** or hearing officer.

c. An appeal from a final decision of the ***Board of Adjustment*** or hearing officer to the Superior Court is governed by court rules."

Thus, HCC 21.91.130 applies solely to final decisions issued by the Board of Adjustment or hearing officer and does not apply to final decisions issued by the Planning Commission. The Planning Commission overlooked the material facts that the Board of Adjustment has not issued a final decision in this matter and the Commission does not have the authority to issue a decision on behalf of the Board of Adjustment. The Planning Commission overlooked the material fact that an appellant does not have the option of appealing an action or determination of the Planning Commission directly to the superior court. Appeals from an action or determination of the Planning Commission, such as its

August 5, 2021 Order Granting Motion to Dismiss Appeal, are governed by HCC 21.93.080. HCC 21.93.080(b)(7) provides that a notice of appeal from an action or determination of the Planning Commission shall include "[t]he appellant's choice of decision maker, ***which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.***" While parties who actively and substantively participated in the proceedings before the Board of Adjustment plus the City Manager, the City Planner, and/or any governmental official, agency, or unit may appeal an action or determination of the ***Board of Adjustment*** directly to the superior court, none can appeal an action or determination of the ***Planning Commission*** directly to the superior court. HCC 21.91.130 does not state or imply that an action or determination of the City Manager or City Planner or any governmental official, agency, or unit can be appealed directly to the superior court. The City Manager, the City Planner, governmental officials, agencies, and/or units are merely additional parties, besides citizen appellants, who may appeal a final decision of the ***Board of Adjustment*** to the superior court.

DATED: August 10, 2021

By: *s/Frank Griswold/*

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Memorandum 21-202

TO: MAYOR CASTNER AND CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: OCTOBER 15, 2021

SUBJECT: RECOMMENDATION FROM PLANNING COMMISSION ON THE APPEAL OF CUP 20-15

At the September 20, 2021 meeting of the City Council sitting as Board of Adjustment regarding the Appeal of Conditional Use Permit (CUP) 20-15 the Board and unanimously approved the following motion:

LORD/ADERHOLD MOVED THAT WHILE THE BOARD OF ADJUSTMENTS BELIEVES IT IS A MOOT POINT DUE TO THE LACK OF AN ACTIVE PERMIT APPLICATION, THE BOARD OF ADJUSTMENT BELIEVES THAT THE APPEAL PROCEDURALLY SHOULD BE BEFORE THE PLANNING COMMISSION FOR APPELLANT FRANK GRISWOLD'S MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 AND THE BOARD DIRECTS THE CLERK TO REFER THAT MOTION TO THE PLANNING COMMISSION FOR RECONSIDERATION.

The Planning Commission took the matter up at their October 20, 2021 meeting. The Commission denied the Motion for Reconsideration submitted by Frank Griswold, Appellant, and made the recommendation that the Board of Adjustment dismiss the appeal of CUP 20-15. The Commission unanimously approved the following motion:

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Recommendation: Move to dismiss the appeal of CUP 20-15 based on the Applicant's withdrawal of their application or Move to direct the Planning Commission to take up the Order Remanding to the Planning Commission regarding CUP 20-15.

City of Homer
www.cityofhomer-ak.gov

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Memorandum
Supplemental Packet

TO: MAYOR CASTNER AND HOMER CITY COUNCIL
FROM: MELISSA JACOBSEN, MMC, CITY CLERK
DATE: DECEMBER 13, 2021
SUBJECT: SUPPLEMENTAL PACKET SPECIAL MEETING @ 4:00 P.M.

December 13, 2021 Appellant Preliminary Matters Page 2

November 9, 2021 Special Meeting Laydown Materials Page 6
- Email – November 8th BOA meeting scheduled Re: CUP 20-15
- Email – November 8, 2021 BOA Meeting
- October 20, 2021 Planning Commission Supplemental Packet
- October 20, 2021 Planning Commission Minutes

April 4, 2021 Appellant Motion for Sanctions & Default Judgement Page 33

July 26, 2021 Appellant Motion to Strike New Evidence Page 35

August 4, 2021 Planning Commission Minutes Page 37

DEC 13 2021 AM10:16 RK

BEFORE THE HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

PRELIMINARY MATTERS

1. In a distinct but nonetheless similar proceeding regarding Zoning Permit 1020-782 that took place on August 2, 2021, I questioned why the City Council sitting as a Board of Adjustment was not being represented by a (JDO) City Attorney who, in accordance with the duties prescribed under HCC 2.16.010, "shall act as legal advisor to and be attorney and counsel for the Council and shall be solely responsible to the City Council." Mayor Castner stated as follows: "Well, city attorney would be the attorney in fact of -- all the way through the proceeding so I think they start and they stop as long as the proceedings are in process and the Board of Appeals is -- has a separate attorney for the -- for our appeal process. So I think I understand what you're saying, the wafting of that interest but

as far as the Chinese curtain that has to be set up, I think that the City is on solid ground." A Chinese Wall ethical barrier usually only needs to be set up when attorneys from the same law firm are representing different parties in a case. That does not appear to be the situation now or previously when attorney Scott Brant-Erichsen provided legal counsel to the Board. Attorney Erichsen has indicated that he may only be providing procedural advice to the Board. However, there is no requirement that an attorney totally unaffiliated with the City Attorneys' law firm only provide procedural advice to the Board. This begs the following questions: Is attorney Brant-Erichsen in some manner affiliated with or beholding to the law firm of Jermain, Dunnagan, & Owens (JDO)? Does he, or did he while practicing law in Anchorage, have some working or personal relationship with Attorney Michael Gatti or Attorney Max Holmquist or any other person affiliated with JDO? Of all of the attorneys licensed to practice law in the state of Alaska, why and how was attorney Brant-Erichsen chosen to represent the Board? What role, if any, did the Board play in hiring attorney Brant-Erichsen? Did anyone affiliated with JDO recommend that attorney Brant-Erichsen be hired to represent the Board? What Chinese Wall/Chinese curtain or other ethical barrier has been set up regarding this matter and, if none, why did Mayor Castner

state or imply that a Chinese curtain was in place previously? Is attorney Brant-Erichsen's current role limited to providing procedural advice to the Board or can he advise the Board regarding non-procedural matters as well?

2. The Board has failed to act on my Motion for Sanctions and Default Judgement dated April 8, 2021.

3. Memorandum 21-202 cites the following motion made on September 20, 2021: **"Lord/Aderhold moved that while the Board of Adjustment believes it is a moot point due to the lack of an active permit application,** the Board of Adjustment believes that the appeal procedurally should be before the Planning Commission etc." Now, the Board is adjudicating matters which it has already determined are moot before taking or considering contrary evidence. As a quasi-judicial body, the Board is required to be impartial. It is also required to make its decision based solely on the record. HCC 21.93.510(a). No allegations of changed circumstances meriting dismissal were remanded to the Commission by the Board so the Commission had no authority to take evidence regarding the withdrawal of the application for CUP 20-15 or make any recommendation to the Board regarding dismissal of this appeal. The Board's September 20, 2021 motion clearly demonstrates that the Board pre-judged the matters now before it and improperly influenced the

Commission's determinations and recommendation to the Board. Pursuant to HCC 21.93.700(e), a hearing officer must now be appointed to conduct a rescheduled hearing within 60 days.

4. Because the Board has already made up its collective mind that this appeal is moot and should therefore be dismissed, it apparently sees no point in taking anything more than token evidence to the contrary. 15 minutes is clearly insufficient time for me to comprehensively address the complex issues involved and rebut opposing arguments.

DATED: December 13, 2021

By: s/*Frank Griswold*/
Frank Griswold

From: Frank Griswold
To: Melissa Jacobsen
Subject: Re: November 8th BOA meeting scheduled Re: CUP 20-15
Date: Monday, November 8, 2021 9:58:25 AM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Ms. Jacobsen,

I just returned from a hunting trip and will not have time to adequately prepare for tonight's BOA meeting or submit written materials. Why was I not given at least 15 days written notice of this meeting as required under HCC 21.93.100(b)? Were neighboring property owners notified as set forth in HCC 21.94.100(b) and HCC 21.94.030?

Frank Griswold

> On Oct 27, 2021, at 9:32 AM, Melissa Jacobsen <MJacobsen@ci.homer.ak.us> wrote:
>
> Good morning,
>
> At the October 20th Planning Commission meeting the Commission unanimously adopted the following motion:
>
> *HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.*
>
> A special meeting of the Homer City Council to convene as the Board of Adjustment has been scheduled for November 8th at 4pm to take up this recommendation.
>
> Agenda and Packet materials will be posted no later than Thursday, November 4th and the deadline to provide material to be included in the packet is Wednesday, November 3rd at 11am. Any items received after the packet deadline and prior to 11am on Monday, November 8th will be included in the supplemental packet, after that time they'll be provided as laydown items.
>
> Thank you,
> Melissa

Melissa Jacobsen, MMC
City Clerk
City of Homer, Alaska
907-235-3130

City of Homer City Clerk's Office
PUBLIC RECORDS LAW DISCLOSURE: Most e-mails from or to this address will be available for public inspection under Alaska public records law.

From: Frank Griswold
To: Melissa Jacobsen
Cc: Renee Krause
Subject: November 8, 2021 BOA Meeting
Date: Monday, November 8, 2021 12:40:43 PM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Please provide to the Board of Adjustment all of the documents included in the Supplemental Packet provided to the Planning Commission on October 20, 2021 including the email from Asia Freeman, my Reply to City's Response to Motion for Reconsideration, and my two emails. Please also provide the Board with the Commission minutes wherein the Commissioners stated that they lacked credentials and knowledge of the law and therefore thought this matter should be decided later by an administrative law judge.

City of Homer
www.cityofhomer-ak.gov

Planning
491 East Pioneer Avenue
Homer, Alaska 99603
Planning@ci.homer.ak.us
(p) 907-235-3106
(f) 907-235-3118

Memorandum
Supplemental Packet

TO:	HOMER PLANNING COMMISSION
FROM:	TRAVIS BROWN, PLANNING TECHNICIAN
DATE:	October 20, 2021
SUBJECT:	SUPPLEMENTAL PACKET

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Email Comment from Asia Freeman, dated Oct. 19, 2021 **p. 2**

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

Appellant's Reply to the City of Homer's Response to Motion for Reconsideration, Leave to Supplement Points on Appeal, and Proposed Revised Order, dated Oct. 19, 2021 **p. 4**

Email Comment from Frank Griswold to Homer Board of Adjustment, dated Oct. 20, 2021 **p. 13**

Email Comment from Frank Griswold to City Clerk, Melissa Jacobsen, MMC, dated Oct. 20, 2021 **p. 18**

From: Asia Freeman
To: Department Clerk
Subject: Comments for Planning Commission on CUP 20-15 for a building at 106 West Bunnell
Date: Tuesday, October 19, 2021 1:06:48 PM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear members of the Planning Commission,

I am writing to you today to suggest that pursuant to the public hearing on October 20, you deny a request for a conditional use permit that would allow expansion of a portion of the building at 106 West Bunnell, Wild Honey, adjacent to Bunnell Street Arts Center.

It has been a real privilege and responsibility for nearly thirty years to steward the historic Inlet Trading Post Building at 106 West Bunnell. This stately, former general mercantile store served the young town of Homer from the late thirties to the late eighties. It is home to Bunnell Street Arts Center, Old Town Bed and Breakfast (upstairs), The Fringe (downstairs) and Wild Honey (next door). About ten years ago, to incentivize long-term occupancy, I created a condominium in the building, dividing it into two units. Unit 1 is the larger portion, which houses the arts center, the Fringe and Old Town Bed and Breakfast. Unit 2 is currently owned by Melody Livingston. She created a thriving business there, Wild Honey Bistro.

Raised in Homer and passionate about the history and culture of this community, it is deeply important to me that we respect the lines and appearance of our historic buildings. The Inlet Trading Post, constructed in 1937, is the second oldest large commercial building still standing in Homer. It is the anchor of Old Town revitalization and a historic landmark. It is extremely rare for old wood buildings in Alaska to endure time, and the risk of fire and earthquakes. Moreover, the Inlet Trading Post has endured time with with increasing dignity over the years. I have invested a great deal of time and funds to preserve the original lines and health of this building. I deeply believe that this building should be preserved in all of its exterior roof lines, footprint and character.

Melody Livingston would like to tear down the original construction and consolidate her business under one roof, adding a second floor “prep kitchen” above. The footprint of the “prep kitchen is almost equal to the main kitchen below. I have watched the business grow and thrive, and because it functions within the limitations of multiple spaces that are not connected by interior halls or doors to the main kitchen it has always been a challenge to operate a restaurant there. You have a main room with a kitchen, separated from a dining room by an exterior deck and two doors. I can certainly appreciate why the current owner would like to renovate her space to create more connectivity and efficiency. In fact, I have discussed renovations of the space with three architects and four builders over the last thirty years. I am certain this can be done within the original footprint by rebuilding a more efficient interior design while maintaining the exterior lines of this precious landmark. There is plenty of poorly used storage space under the shed behind Wild Honey which could be made into a prep kitchen, meanwhile all of the interior front space including Wild Honey’s porch could be incorporated into interior seating.

Ultimately, expansion of Wild Honey will result in greater demands on the very limited parking and utility services of this old building. I do not think we can bear it. Just last year I

had to pay $18,500 for 85% of the cost of reconstruction of a broken sewer line servicing both Units 1 and 2. Wild Honey's water/sewer meter reading demonstrated a toll of 28.5% yet she refused to pay any more. Wild Honey is thriving. Melody has been away from Alaska since May and her staff has asserted to me several times they are thriving. The other businesses here are all working at capacity. I think we are strained to support the current utilities and comfortable adjacency as is. I think its wonderful that the owner of Wild Honey has created a very successful restaurant within the historic footprint and rooflines of the original machine shop and while renovation may be justified, expansion is not.

Sincerely,

Asia Freeman
Inlet Trading Post LLC
106 West Bunnell, Suite A
Homer, Ak 99603
907.299.1482

OCT 19 2021 AM09:50
RT

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

APPELLANT'S REPLY TO CITY OF HOMER'S RESPONSE TO MOTION FOR RECONSIDERATION, LEAVE TO SUPPLEMENT POINTS ON APPEAL, AND PROPOSED REVISED ORDER

On March 9, 2021, the Homer Board of Adjustment remanded this matter to the Commission under HCC 21.93.510(a) and (c) to address and decide three issues for which the Commission's findings of fact were deemed to be inadequate. HCC 21.93.560(c) states: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer. A case on remand has priority on the agenda of the lower administrative body, except cases remanded under HCC 21.93.510(a) are not entitled to priority. The applicant or owner of the property in question may waive the priority given by this subsection." The issues remanded under HCC 21.93.510(a) are not entitled to priority on the

Commission's agenda but they must nonetheless be promptly acted upon by the Commission. However, they clearly were not promptly acted on by the Commission. Because the applicants and/or property owners never waived priority, the issues remanded under HCC 21.93.510(c) ***were*** entitled to priority on the Commission's agenda but now, more than 7 months following the Board's remand, the Commission has still not considered or acted on the Board's Decision and Order. Instead, City Planner Rick Abboud, who claims to be a party to this appeal, has colluded with Melody Livingston and initiated multiple ex parte communications with the Commission to secure the dismissal of this appeal while she "regroups" before resubmitting her CUP application within a year or two.[1]

A claim is moot if it has lost its character as a present, live controversy. *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 523 (Alaska 1993) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)). An action is not moot if respondent has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union Local 1000,* 567 U.S. 298, 307-08 (9th Cir. 2012). The *Knox* court further stated: "The

[1] While it is not illegal for a party to communicate with another party, it is illegal for a party to engage in ex parte communication(s) with the Commission. HCC 21.93.710(a).

voluntary cessation of challenged conduct does not render a case moot because the conduct could be resumed as soon as the case is dismissed" (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283). In 1995, the Alaska Supreme Court held as follows in *Kodiak Seafood Processors v. State*, 900 P.2d 1191:

"No scallop harvesting presently takes place in closed Alaska waters. Therefore, KSPA's claims seeking declaratory and injunctive relief are technically moot. Nevertheless, we may choose to address certain issues if they fall under the public interest exception to the mootness doctrine. The public interest exception requires the consideration of three main factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Peloza v. Freas*, 871 P.2d 687, 688 (Alaska 1994); *Brandon*, 865 P.2d at 92 n. 6. None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue. *Hayes*, 693 P.2d at 834. Ultimately, the determination of whether to review a moot question is left to the discretion of the court. *Id.; Brandon*, 865 P.2d at 92. n. 6.

. . .

Because the Permit has been revoked, the question of the Commissioner's authority to issue the Permit is also technically moot. Nonetheless, the issue presents a live controversy. KSPA argues that by allowing a private fisher to sell fish obtained during a research trip, the Commissioner exceeded his authority by allowing "commercial fishing" in closed waters. ADF&G argues that it has the authority to finance an exploratory fishing operation by allowing a private contractor to sell the catch. This issue falls within the public interest exception to the mootness doctrine. First, the issue is capable of repetition. The State has not disavowed this type of financial arrangement for future test-fisheries. Second, because research fishing may be of limited duration, it is likely that, as in this case, an individual permit would expire before the issue could be litigated. Third, the scope of the Commissioner's power is an

issue of public interest. Having determined that the commercial fishing issue satisfies the requirements of the public interest exception, and that the procurement issue does not, we turn to the merits of the trial court's decision."

Unlike the fishing permit at issue in the Kodiak Seafoods case, CUP 20-15 was not revoked, it was voluntarily and temporarily withdrawn by Ms. Livingston who indicated her intent to resubmit it, presumably under a different CUP designation (which is irrelevant) in a year or two. Accordingly, Ms. Livingston still has a huge interest in the outcome of this appeal. Because live controversies remain, this appeal is not moot, technically or otherwise. Even if this matter were technically moot, the public interest exception to the mootness doctrine would apply for the following reasons: 1. the disputed issues are capable of repetition; 2. if this appeal were to be dismissed as moot, review of the issues on appeal would be repeatedly circumvented; and 3. the issues presented in this appeal, including threshold constitutional issues, are so important to the public interest as to justify overriding the mootness doctrine.

The City of Homer's October 14, 2021 response to Appellate's Motion for Reconsideration falsely states as follows at page 4: "There is no authority or procedure in the Homer City

Code to hear a motion for reconsideration of a final written decision and Griswold has not cited to any such authority." The very first sentence of the Motion for Reconsideration states: "***Pursuant to HCC 21.93.310,*** Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss which was dated August 5, 2021 and distributed on August 6, 2021." HCC 21.93.310 states: "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." The city's Motion to Dismiss Appeal, on the other hand, cites to no authority or provision of Homer City Code. No provision of HCC gives the Commission the authority to summarily dismiss an appeal on remand from the Board of Adjustment or consider new evidence not authorized within the Board's remand instructions. The city attorneys admit that the Commission did not have express authority in the code to dismiss the appeal but claim that it had "implied" authority to do so under HCC 21.93.310. However, HCC 21.93.310 does not apply because the Commission's dismissal of the appeal was contingent on its receipt of ex parte communications between Mr. Abboud and Ms. Livingston and

unauthorized consideration of that new evidence, both of which are unlawful and inconsistent with HCC Chapter 21.

At page 4 of the city's response it states: "HCC 21.93 clearly states that zoning appeal decisions are final and BOA decisions are appealable to the Superior Court" (citing HCC 21.93.110 in footnote 16). BOA final decisions are irrebuttably appealable to the superior court but the BOA has not issued a final decision and Planning Commission decisions are not appealable to the superior court. HCC 21.93 applies solely to Board of Adjustment proceedings and decisions, not to Planning Commission proceedings and decisions. In their Notice of Appeal Rights at page 5 of their proposed Revised Revised Order Granting Motion to Dismiss, the city attorneys deliberately and deceptively manipulate HCC 21.91.130 in order to give it a different meaning than intended. HCC 21.91.130(a) states: "An appeal from a final decision of the ***Board of Adjustment*** or a hearing officer 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 hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." No provision of HCC allows anyone to appeal a final decision of the Planning Commission directly

to the superior court. HCC 21.93.550(a) provides that the Board of Adjustment may affirm or reverse the decision of the lower administrative body in whole or in part and that 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. Thus, only final decisions can be appealed to the superior court. Because the Commission's order dismissing the appeal was not a decision on the merits, it did not constitute a final decision. Even if the Commission's August 5, 2021 Order did constitute a final decision, it cannot be appealed to the superior court; it can only be appealed to the Board of Adjustment in accordance with HCC 21.93.500. Just because a zoning decision is "final" (meaning that it disposes of all issues) does not mean that it cannot be reconsidered. If this were the case, the Board of Adjustment would not have directed the Commission to take up the subject Motion for Reconsideration following the City Clerk's erroneous ruling that motions for reconsideration of agency final decisions cannot be taken up. Alaska Appellate Rule 602(a)(2) clearly indicates that administrative agencies have the discretion to reconsider their final decisions.

The Commission does not have the authority to rule on Appellant's Motion for Leave to Supplement Points on Appeal. As its header clearly indicates, that motion was submitted to the Board of Adjustment, not to the Commission. No formal appeal or points on appeal were submitted to the Commission so there are no points on appeal to supplement except for those submitted on appeal to the Board of Adjustment which now has the sole authority to grant the leave requested.

The August 4, 2021 Planning Commission minutes reveal that the Commission moved to dismiss this appeal due to the "lack of credentials on the part of the Planning Commission in addressing issues like this since they do not know the law" and because "it will be better to have these types of actions go before a hearing officer." These are not valid justifications for dismissing this appeal. Lacking credentials and being ignorant of the law does not justify granting all motions made by the city attorneys on behalf of the appellees and ignoring all motions made by the appellant. The Commission had the authority to be represented by erudite, impartial, independent legal counsel but voted not to exercise that option, choosing instead to blindly rubber-stamp the Motion to Dismiss and ensuing [Proposed] Order prepared by the highly partisan city attorneys.

Now these partisan attorneys are proposing that the Commission deny Appellant's Motion for Reconsideration but nonetheless revise its "final decision" to incorporate points raised in that Motion for Reconsideration. No provision of HCC allows the Commission to revise an order or final decision without first considering a motion for reconsideration. An ethical, impartial Commission, regardless of its lack of credentials and/or ignorance of the law, would grant Appellant's Motion for Reconsideration and, to the best of its ability, consider all of the issues raised therein while disregarding the illegal *ex parte* communications from Melody Livingston pertaining to her strategic temporary withdrawal of the application for CUP 20-15. The Commission does not require special credentials or knowledge of the law to comply with the straight-forward remand instructions of the Board of Adjustment.

Commissioner Franco Venuti declared a disqualifying financial conflict of interest with regard to the application for CUP 20-15 therefore should not have participated in the August 4, 2021 remand proceedings and should not participate in the current proceedings.

DATED: October 19, 2021
By: *s/Frank Griswold/*
Frank Griswold

Travis Brown

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:26 PM
To: Department Planning
Cc: Melissa Jacobsen
Subject: Memorandum 21-153 (Please Provide to Commission for Tonight's Meeting)

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From: To:
Cc: Subject: Date:

Frank Griswold
Melissa Jacobsen
Renee Krause
Memorandum 21-153
Monday, September 20, 2021 11:06:37 AM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Homer Board of Adjustment, Re: Appeal of CUP 20-15

Memorandum 21-153 states: "The Planning Commission approved a Motion to Dismiss submitted by Attorney Holmquist on behalf of the City based on the finding that the applicant withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal." Mr. Holmquist's Motion to Dismiss is notably void of any provision of Homer City Code that authorizes it because HCC includes no specific provision authorizing the filing of a motion to dismiss an administrative appeal, on remand or otherwise. The former version of HCC 21.93.310 stated: "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" but Mr. Holmquist's Motion to Dismiss was manifestly inconsistent with HCC Title 21 and therefore not authorized by HCC 21.93.310. Mr. Holmquist's Motion to Dismiss Appeal was out of order because the Commission had no authority to consider any matter not specifically remanded to it by the Board of Adjustment, consider new evidence, or receive or act on illegal ex parte communications from City Planner Rick Abboud (a party to the appeal) regarding property owner Melody Livingston's temporary and strategic withdrawal of her application for CUP 20-15 to "regroup." Nonetheless, the City Clerk's Office forwarded it to the Planning Commission which eagerly rubber-stamped Mr. Holmquist's Motion to Dismiss Appeal. Arbitrarily allowing Mr. Holmquist to submit his Motion to Dismiss Appeal but then refusing to "take up" my ensuing Motion for Reconsideration to the Commission and Motion to Supplement Points on Appeal to the Board of Adjustment, both legitimately filed pursuant to HCC 21.93.310 and

HCC 21.93.570 respectively, violates the equal protection clause of the Fourteenth Amendment to the US Constitution and violates my due process rights.

On July 29, 2021, the Homer City Attorneys responded in relevant part as follows to my Motion to Continue the August 4, 2021 Commission Proceeding Regarding the City's Motion to Dismiss Appeal: "Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous

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pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter." But no special hearing was scheduled and neighboring property owners were not notified. Following the Commission's decision, the Clerk's Office should have promptly submitted my timely filed Motion for Reconsideration to the Commission and my timely filed Motion to Supplement Points on Appeal to the Board of Adjustment. The Board and Commission could then have decided whether to consider, grant, or deny my motions. The parties were excluded from the discussions between Ms. Jacobsen and Mr. Brandt-Erichsen who was hired to advise the Board of Adjustment, not to unilaterally render decisions on the Board's behalf or provide biased procedural advice to the City Clerk. Neither Mr. Brandt- Erichsen, the Clerk's Office, nor the City Council has the authority to make adjudicatory decisions on behalf of the Commission or Board.

At paragraph four of her memorandum, Ms. Jacobsen states: "final decisions were issued regarding both matters" and at paragraph five she states: "an appeal from a final decision [deliberately omitting "of a hearing officer"] may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer." She neglects to point out that the Board of Adjustment never issued a final decision regarding CUP 20-15 and that only final decisions of the Board of Adjustment or a hearing officer can be appealed directly to the superior court and that no hearing officer was involved, and that the Planning Commission's "final decision" was not a response to the Board of Adjustment's remand order but merely the granting of a motion to dismiss the appeal, and that even if the Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal did constitute a final decision, it cannot be appealed directly to the superior court. The version of HCC 21.91.130(a) recently enacted via Ordinance 21-44(S) states: "An appeal from a final decision of a hearing officer may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The version of HCC 21.91.130(a) (misquoted in Ordinance 21-44(S)) in effect when I filed my appeal states as follows: "An appeal from a final decision of the Board of Adjustment or a hearing officer may be taken directly to the Superior Court by a party who actively and substantially participated in the proceedings before the Board of Adjustment or the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The City Council should not rely on

any paraphrased rendition of HCC that is manipulated and spun to give it a meaning other than what was actually intended. Just because the City Clerk and/or Planning Commission claim the Commission's remand determination constitutes a final decision does not make it so. The Commission issued its first, and arguably only, Final Decision on October 22, 2020 and that decision was appropriately appealed to the Board of Adjustment. The Notice of Appeal Rights attached to the Planning Commission's August 5,

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2021 Order Granting Motion to Dismiss Appeal deceptively states that "Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment may appeal this [Planning Commission] decision to the Superior Court." In light of the fact that the Board of Adjustment and the Planning Commission are no longer involved in adjudicating zoning appeals, the code provisions that previously applied to Board and Commission appeal proceedings govern appeals still pending before them. In any event, neither version of HCC 21.91.130 provides that decisions of the Planning Commission may be appealed directly to the Superior Court or that a party who actively participated in proceedings before the Board of Adjustment can appeal an ensuing remand determination of the Planning Commission directly to the superior court. The Planning Commission never addressed the matters remanded to it by the Board of Adjustment on March 9, 2021 and should be sanctioned for not promptly responding to the Board's (non-final) Decision and Order, illegally accepting and considering new evidence, and engaging in ex parte communications. The Planning Commission's August 5, 2021 order/decision can only be directly appealed to the Board of Adjustment in accordance with HCC 21.93.500-550. After the Board of Adjustment issues a final decision, the Planning Commission's ultra vires dismissal of the appeal and other erroneous determinations can be appealed directly to the superior court.

At paragraph six of her memorandum, Ms. Jacobsen states: "Homer City Code provides no provisions for an appellant to submit motions to bring a matter back before the Board of Adjustment after a final decision has been issued. I have advised Mr. Griswold as such, but he disagrees." I disagreed because Ms. Jacobsen is patently wrong. HCC 21.93.310 and HCC 21.93.570 authorize an appellant to submit post-decision motions to the Planning Commission and Board of Adjustment. Alaska Rules of Appellate Procedure 602(a)(2) states: "An appeal may be taken to the superior court from an administrative agency within 30 days from the date the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal." This appellate rule clearly contemplates motions for reconsideration of final agency decisions so it would clearly not be

out of order or inject procedural error into the proceedings if the Board or Commission addressed a motion for reconsideration.

No provision of HCC authorizes the City Clerk to reject a party's timely filed motion for reconsideration of an adjudicatory body's final decision so the City

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Clerk's unilateral rejection of a party's timely filed motion for reconsideration would inject procedural error into the proceedings and be grounds for remand or reversal. In the past, it has routinely been the practice of the Clerk's Office to promptly forward such motions to the appropriate adjudicatory body. On June 19, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration of Board of Adjustment Decision regarding CUP 13-13 and on December 4, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration Re: Standing to Appeal CUP 14-05. Neither of these orders was subsequently ruled to be procedurally flawed or otherwise out of order by the appellate courts.

Re: Appeal of Zoning Permit 1020-782

The City Clerk's duties are ministerial, not adjudicatory. Ms. Jacobsen had no sua sponte authority to reject my Motion for Reconsideration or initiate the addition of a Notice of Appeal Rights to the Board of Adjustment's initial Final Decision. Even as amended, final decision #2 still violates HCC 21.93.110(a) which requires that a final decision state "the names and number [of Board members] voting in favor of the decision, and the names and number voting in opposition to the decision." If the Board of Adjustment grants my Motion for Reconsideration it can legitimately amend its August 26, 2021 Final Decision to correct deficiencies and/or erroneous findings. The fact that final decision #2 was issued on September 7, 2021 soundly debunks the specious argument that a matter cannot be brought back before the Board after a final decision has been issued. Whether the Board and/or Commission have legal authority to convene to "take up" the subject motions is a question of law and it is not generally the role of the City Council or Mayor to dispense legal advice to the City Clerk. The Council could authorize funding to allow the Clerk's Office to seek impartial legal advice from an erudite attorney. Because City Attorneys Max Holmquist and Michael Gatti represent parties to the pending appeals they would not be impartial sources. It is inappropriate for Ms. Jacobsen to ask the Council to provide her with direction on process for noticing parties, noticing the public, opportunities for responses or briefing, and/or when to schedule the special meeting while simultaneously recommending to the Council that it make, and presumably pass, a motion that the Board of Adjustment declines to take up the motions for reconsideration. (FYI, I only filed one motion for reconsideration to the Board of Adjustment and it pertained to ZP 1020-782. I filed another motion to the Board to supplement my points on appeal re: CUP 20-15. My other motion for reconsideration pertained to the Planning Commission's order granting the city's motion to dismiss the appeal of CUP 20-15). One seeking direction from the Council is self-admittedly unqualified to recommend what that direction should be. Accordingly, no weight should be given to Ms. Jacobsen's baseless, self-serving recommendation. Memorandum 21-

153 should have been sent to the Board of Adjustment, not the City Council. The Council would be out of

order making a motion that the Board of Adjustment declines to take up the subject motions because, unless and until it formally convenes as a Board of Adjustment, the Council and Mayor have no legal authority to rule on behalf of the Board of Adjustment, especially when proper notice has not been given to parties and neighboring property owners. Furthermore, Robert's Rules discourages making negative motions. Alternatively, Ms. Jacobsen could forgo seeking further direction and simply allow due process to run its course by forwarding the subject motions to the designated adjudicatory bodies to let them exercise their discretion to issue procedural notices and decide whether those motions should be reviewed, considered, granted, or denied.

Audi alteram partem,

Frank Griswold

Travis Brown

From: Melissa Jacobsen
Sent: Wednesday, October 20, 2021 3:03 PM
To: Travis Brown
Subject: FW: September 20, 2021 Special Meeting Minutes

Please provide to the planning commission

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:14 PM
To: Melissa Jacobsen <MJacobsen@ci.homer.ak.us>
Cc: Renee Krause <RKrause@ci.homer.ak.us>
Subject: September 20, 2021 Special Meeting Minutes

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Ms. Jacobsen,

Footnote 1 at page 3 of the September 20, 2021 BOA minutes erroneously states as follows:

"The Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal regarding CUP 20-15 were the only matters scheduled and addressed at this meeting. The reference to a Motion to reconsider regarding Zoning Permit 1020-782 was mistakenly added to a proposed motion provided by the Clerk in the working agenda provided to the Board. Zoning Permit 1020-782 is a separate matter that was not addressed at this hearing."

At the September 20, 2021 BOA meeting I addressed my Motion for Reconsideration re: Zoning Permit 1020-782 and after considering this matter in executive session the Board of Adjustment passed a motion to not take it up. Please correct the September 20, 2021 minutes accordingly and provide a copy of the email I sent to the BOA to the Commission for its consideration at tonight's meeting.

Frank

Session 21-22, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:31 p.m. on October 20, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, and via Zoom Webinar.

PRESENT: COMMISSIONERS BARNWELL, BENTZ, CONLEY, CHIAPPONE, HIGHLAND, SMITH, VENUTI

STAFF: CITY PLANNER ABBOUD
CITY CLERK JACOBSEN

APPROVAL OF THE AGENDA

BENTZ/VENUTI MOVED TO APPROVE THE AGENDA AS PRESENTED.

There was no discussion.

Chair Smith confirmed that the Commissioners received the supplemental packet and were prepared to act on Staff Report 21-62. The Commissioners concurred they received the materials and were prepared.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of September 15, 2021
B. Decision and Findings for Conditional Use Permit 21-07 at 1554 Homer Spit Road
C. Homer Lake Street Rehabilitation Right of Way Acquisition Preliminary Plat Time Extension Request

HIGHLAND/BENTZ MOVED TO APPROVE THE CONSENT AGENDA AS PRESENTED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-61, City Planner's Report

City Planner Abboud reviewed his staff report that was included in the packet. He answered questions from the Commission regarding items in his report. He addressed the Safeway parking lot progress and that they're fulfilling the requirements of code with the expansion of their parking lot. They discussed the recent State determination to allow ATV's on roadways and City Clerk Jacobsen advised that Council had recently adopted code prohibiting ATV's on city streets. They also touched on Resolution 21-065 regarding non-motorized amenities on Kachemak Drive and the challenges for bicyclist and pedestrians, and the work of the Homeless Coalition.

Commissioner Bentz noted her surprise that strategic planning and the comprehensive plan on the horizon, it seems staff has a lot of different irons in the fire as far as plan development that are coalescing and could help them look at a longer term vision for the community and land. She referenced hazard planning, storm water and drainage planning, and transportation planning and shared that as a Commission they can think of the components of the plans together and that will help with the strategic planning process. Near term it will be interesting to see what policy recommendations the hazard planning team comes up with, that will help with long term planning and perhaps bring some specific code changes like setbacks, definitions, coastal bluff definitions, and so forth.

Chair Smith suggested having the Borough Transportation Planning Department present at a future worksession, similar to Platting Manager Huff's presentation tonight. City Planner Abboud said he'd try to work that in and shared that the strategic planning he referenced is more of developing a work plan for the office as they continue have more demand for services than hours so they need to prioritize things. He's interested in having transportation professionals help in considering what the future is likely to bring, and not get caught in the solution of today.

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Commissioner Venuti was excused from participating due to ruling of his conflict of interest regarding this matter, and was moved to a waiting room.

Commissioner Bentz reported a potential ex-parte communication in that she received a phone message from a concerned member of the public. Commissioner Bentz pointed out that the member of the public put her comments in writing and they're provided the supplemental packet, so she doesn't think she has any other information than the other Commissioners have, but wanted to bring this before the Commission to determine if she had bias in any way based on the phone message.

Chair Smith asked if Commissioner Bentz engaged in conversation with the member of the public. Commissioner Bentz responded she did not, it was a message left on her phone and once she realized what it was about she recognized it would be ex parte communication if she were to call the person back. The written comments are part of the record now in the supplemental packet and that's the substance of the comments in the message.

HIGHLAND/BARNWELL MOVED THAT COMMISSIONER BENTZ HAS EX-PARTE COMMUNICATION.

Commissioner Highland shared that due to the fact is was a message on a phone with no return phone call there is no ex-parte communication.

VOTE: NO: HIGHLAND, BARNWELL, CHIAPONNE, CONLEY, SMITH

Motion failed.

Chair Smith summarized the decision and order remanding CUP 20-15 to the Planning Commission, and then opened the public hearing.

Frank Griswold, city resident and appellant in the remanded matter, commented regarding Commissioner Bentz's disclosure of ex-parte and that it wasn't disclosed appropriately in accordance with Homer City Code. He commented that complex dispositive motions are under consideration tonight and should therefore be addressed in a special public hearing and not during a regular commission meeting where public comment is limited to three minutes. He noted on July 29, 2021 Attorney Holmquist agreed with him that the Commission should provide notice to neighboring property owners and set a special meeting to solely address his motion to dismiss the appeal, but the Commission did not do so. Instead they voted to dismiss the appeal, in hopes it would go to a hearing officer. He referenced notice requirements outlined in City Code and that proper notice was not given, and explained the two toll free numbers provided for the Zoom meeting were working but the meeting id and passcode did not work. Finally the City Planner is a party to the appeal and should not have written the staff report encouraging dismissal of the appeal and should not have engaged in ex-parte communication with Commission related to the applicant's temporary withdrawal of the CUP application. He cited Kleven v. Yukon Koyukuk School District related to a moot claim, and Knox v. Service Employee International Union Local 1000 when an action is not moot and questioned what precedent the Commission wants to set. He also noted matters that are not allowable in Homer City Code related to appeals, and an appellate procedure rule of the Alaska Courts regarding filing a motion for reconsideration. He encouraged the Commission comply with the Boards instructions and if the Board sees fit to dismiss the appeal, so be it.

There were no further comments and the hearing was closed.

The Commission discussed how best to proceed with this matter. They acknowledged the points raised in the remand and the points raised by Mr. Griswold. One matter relates to tax code which is not their specialty, and they'd need to be advised on how to address that.

BENTZ/HIGHLAND MOVED THAT THE COMMISSION POSTPONE DELIBERATION WITH STAFF SUPPORT TO AT TIME TO BE DETERMINED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

Commissioner Venuti was admitted back to the meeting.

PLAT CONSIDERATION

PENDING BUSINESS

A. Staff Report 21-62, Parking Requirements for One Bedroom Dwelling Units

City Planner Abboud reviewed his staff report that was included in the packet. There were no questions from the Commission.

BENTZ/VENUTI MOVED TO RECOMMEND ADOPTION OF THE DRAFT ORDINANCE AMENDING HOMER CITY CODE 21.55.090A1 AND FORWARD TO PUBLIC HEARING.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

There was discussion regarding process and in attempt to determine the meaning of Leave to Supplement Points of appeal.

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Commissioner Highland referenced the information on page 79 of the packet which notes that HCC 21.93 does not authorize a party to supplement or modify points on appeal, and that the motion is moot because the appeal was dismissed. She questioned if the Commission isn't supposed to act on this, then why was it in their packet. She personally agrees with the

conclusion noted on page 80 of the packet, and feels the Board of Adjustment should dismiss the appeal.

Commission Chiaponne asked for clarification on the motion from the Board of Adjustment. City Clerk Jacobsen explained if she understood the discussion at the last Board of Adjustment meeting, one of the arguments was that the Planning Commission didn't have the authority to dismiss the appeal and that the Board of Adjustment would be the body that would make that decision. She explained when the Board of Adjustment came out of their executive session on September 20th, they adopted the motion that while the Board of Adjustment believes it is a moot point due to the lack of an active permit application, the Board of Adjustment believes that the appeal procedurally should be before the Planning Commission for Appellant Frank Griswold's motion for reconsideration and motion for leave to supplement points on appeal of CUP 20-15 and the Board directs the Clerk to refer that motion back to the Planning Commission for consideration.

Commissioner Bentz commented the motion on the floor as it stands would be in alignment with the Board of Adjustment vote and also in alignment with the City's proposed order to deny taking up these motions. She's in agreement with the motion on the floor.

Commissioner Highland referenced packet page 33 under staff recommendations and noted its reference to HCC 21.93 does not contain a procedure for reconsideration of a final decision in a zoning appeal, or for allowing an appellant to supplement their points on appeal. HCC 21.93.110 states that zoning appeal decisions are final decisions. Since the code doesn't have a procedure she feels that's a strong argument.

VOTE: YES: BARNWELL, SMITH, CONLEY, CHIAPONNE, BENTZ, HIGHLAND

Motion carried.

INFORMATIONAL MATERIALS

A. City Manager's Report for September 27 & October 11, 2021 City Council Meetings
B. Kenai Peninsula Borough Notice of Decisions
C. Planning Commission Calendar

COMMENTS OF THE AUDIENCE

COMMENTS OF THE CITY STAFF

City Clerk Jacobsen said it was nice to be with you all tonight, thank you for a good meeting.

COMMENTS OF THE COMMISSION

Commissioner Highland said it was an interesting meeting.

Commissioner Chiaponne thanked the group for their help tonight.

Commissioner Conley apologized for his technical difficulties and thanked everyone for a good meeting.

Commissioner Venuti said he enjoyed the worksession tonight. He's glad Ms. Keiser was able to join and get her input. He thanked staff for doing a great job.

Chair Smith enjoyed the meeting the thought it would be a little more involved than it was. He's looking forward to their future worksessions. He thinks what the City Planner has mapped out is outstanding.

There were no other comments.

ADJOURN

There being no further business before the Commission, the meeting was adjourned at 8:18 p.m. The next Regular Meeting is Wednesday, November 3, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom webinar.

_____
Melissa Jacobsen, MMC, City Clerk

Approved:_____

Received
City Clerk's Office
APR - 8 2021
City of Homer

ON APPEAL BEFORE THE HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR SANCTIONS AND DEFAULT JUDGMENT

During the March 17, 2021 regular meeting of the Homer Planning Commission, Commissioners Barnwell, Venuti, Smith, Petska-Rubalcava, and Highland received ex parte communications from City Planner Rick Abboud regarding the pending appeal of CUP 20-15. Mr. Abboud is a party to that appeal and was therefore not exempt from engaging in those ex parte communications under HCC 21.93.710(b)(2). HCC 21.93.710(d) mandates that a member of the Commission who receives an ex parte communication at any time shall, at the first opportunity after the communication, place on the record of the pending matter a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the member received an ex parte communication. HCC 21.93.710(f) states that it is a violation, subject to penalties and other enforcement remedies under this title, for any person to knowingly have ex parte communications with a Commissioner in violation of HCC 21.93.710(a). Neither I nor any other parties to the pending appeal of CUP 20-15 were given notice that any matter pertaining to this appeal would be

discussed at the March 17, 2021 Commission meeting or given an opportunity to participate in that discussion. Not only is Mr. Abboud in violation of HCC 21.93.710(a), but so too would be the five Commissioners who received his illegal ex parte communication if they knowingly fail to place it on the record at their first opportunity thereafter. HCC 21.93.710(d); HCC 21.93.710(f)(3). Pursuant to HCC 21.93.710(e), I hereby request that the Commission impose appropriate sanctions against Mr. Abboud including default judgment.

DATED: April 8, 2021.

By: *s/Frank Griswold/*
Frank Griswold

JUL 26 2021 AM 10:21 PK

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION TO STRIKE NEW EVIDENCE

Email correspondence between City Planner Rick Abboud and subject property owner Melody Livingston was recently submitted in support of the city's Motion to Dismiss Appeal. In accordance with HCC 21.93.560(b), Appellant Frank Griswold hereby requests that this new evidence be stricken from the record. HCC 21.93.560(b) states: "A decision remanding a case ***shall describe any issue upon which further evidence should be taken***, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board of Adjustment's January 9, 2021 Decision and Order Remanding to the Planning Commission says nothing about Ms. Livingston's temporary withdrawal of her application for CUP 20-15 or any other issue pertaining to the potential dismissal of this appeal. The appeal record for this matter is closed

except for the taking of evidence pertaining to the ownership of the subject property and potential Commissioner disqualifying financial conflicts of interest/partiality related thereto. No evidence received under HCC 21.93.510(c) shall be considered for purposes other than determining disqualification. HCC 21.93.510(c). The closed appeal record does not include Ms. Livingston's recent correspondence with Mr. Abboud and the Commission does not have the authority to consider allegations of new evidence sua sponte. Accordingly, the recent email correspondence between Ms. Livingston and Mr. Abboud and any other newly submitted evidence not directly related to the ownership of the subject property should be stricken from the record.

DATED: July 26, 2021

By: *s/Frank Griswold/*

Session 21-17, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:33 p.m. on August 4, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, via Zoom Webinar. There is one vacancy on the Commission.

PRESENT: COMMISSIONERS BARNWELL, VENUTI, SMITH, CONLEY, HIGHLAND, CHIAPPONE

STAFF: CITY PLANNER ABBOUD
DEPUTY CITY CLERK KRAUSE

The Commission met prior to the regular meeting at 5:30 p.m. for a worksession. On their agenda was discussion on the 2022-2027 Capital Improvement Plan and Homer City Code 21.57 Large Retail and Wholesale Stores.

APPROVAL OF THE AGENDA

Chair Smith read the agenda changes and supplemental items into the record and requested a motion.

HIGHLAND/VENUTI MOVED TO APPROVE THE AGENDA WITH THE CHANGES AND SUPPLEMENTAL ITEMS

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of June 16, 2021
B. Decisions and Findings for Conditional Use Permit 21-06 at 1308 Lakeshore Dr

Chair Smith read the Consent Agenda into the record and requested a motion of approval.

HIGHLAND/VENUTI MOVED TO APPROVE THE CONSENT AGENDA AS PRESENTED.

There was no discussion.

VOTE. NON-OBJECTION.UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

Aaron Fleenor, Yard Manager, Northern Enterprises Boat Yard made a presentation to the Commission on the recent improvements to their facility and the proposed plan to increase their footprint with the purchase of available property.

Mr. Fleenor responded to questions from the Commission on the following:
-Traffic crossing concerns regarding Kachemak Drive
- Long term prediction of increased need for large vessel haul out facilities
- Increase in large boats coming to Homer over the last 13 years
- Influx of boats from northern communities in Alaska
- Kodiak has the infrastructure but is limited in space and difficulties in getting supplies
- Seward does not have the infrastructure
- Homer does have tidal issues
- Large economic driver for the community
- Community concerns over wetland use and moose habitat
- Current land holdings have some dedication to wetlands and there is currently 35 acres dedicated to moose habitat along Kachemak Drive
- Moose and wildlife are still able to access Northern Enterprises property
- Estimated number of vessels that will increase use of their services
- Diversity of Marine Trades available in Homer
- Permitting is currently in place by the Corps of Engineers allowing Northern Enterprises to dredge materials from the specific area but they do not, by practice, remove the dredge materials. They just push them to the sides to provide additional depth needed when bringing vessels out of the water for services.

The Commission expressed their appreciation for the presentation.

REPORTS

A. Staff Report 21-48, City Planner's Report

Chair Smith introduced the item and deferred to City Planner Abboud.

City Planner Abboud spoke to his written staff report, highlighting the following:
- Tsunami response on Wednesday, July 21, 2021
- Siren control and volume

City Planner Abboud facilitated discussion on the scheduling of a future agenda item on use of connexes as structures in Homer City Limits and getting public input on the use of those structures and meeting in person in the Council Chambers and or via teleconference.

B. Public Works Campus Task Force Report

Chair Smith introduced the item and asked for Commissioner Barnwell to provide his report. He additionally noted the minutes provided in the Supplemental Packet of the July 14th and 28th regular meetings.

Commissioner Barnwell reported on the Task Force progress refining their final report to City Council. He responded to questions of the Commission on use of a phased approach, availability of commercial real estate, inclusion in the Capital Improvement Plan.

PUBLIC HEARINGS

PLAT CONSIDERATION

A. Staff Report 21-41, James Waddell Homestead 2021 Replat Preliminary Plat

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide his report.

City Planner provided a summary of Staff Report 21-41 for the Commission.

There was no applicant present.

Chair Smith opened the public comment period and having no members of the public requesting to comment closed the public comment period.

VENUTI/HIGHLAND MOVED TO ADOPT STAFF REPORT 21-41 AND RECOMMEND APPROVAL OF THE JAMES WADDELL HOMESTEAD 2021 REPLAT PRELIMINARY PLAT TO VACATE A LOT LINE.

There was a brief comment on this action being clear and straight forward.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

B. Staff Report 21-44, Barnett's South Slope, Evans Addition, Preliminary Plat

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide his report to the Commission.

City Planner Abboud provided a summary of Staff Report 21-44.

Tom Latimer, representing the applicant reported that he was available for questions.

Chair Smith opened the public comment period and having no members of the public requesting to comment closed the public comment period.

HIGHLAND/VENUTI MOVED TO ADOPT STAFF REPORT 21-44 AND RECOMMEND APPROVAL OF THE BARNETT'S SOUTH SLOPE EVANS ADDITION PRELIMINARY PLAT TO REMOVE A LOT LINE BETWEEN TWO LOTS WITH THE FOLLOWING COMMENTS:

1. INCLUDE A PLAT NOTE STATING "PROPERTY OWNER SHOULD CONTACT ARMY CORPS OF ENGINEERS PRIOR TO ANY ON-SITE DEVELOPMENT OR CONSTRUCTION ACTIVITY TO OBTAIN THE MOST CURRENT WETLAND DESIGNATION (IF ANY) PROPERTY OWNERS ARE RESPONSIBLE FOR OBTAINING ALL REQUIRED LOCAL STATE AND FEDERAL PERMITS.
2. COMMISSION TO CONCUR WITH MAINTAINING EAST TASMANIA COURT AS A 50 FOOT RIGHT OF WAY WITH THE INCLUSION OF PLAT NOTE AND DEPICTION DESIGNATING THE ADJACENT 15 FOOT UTILITY EASEMENT AS A UTILITY AND SLOPE EASEMENT.
3. CORRECT THE STREET NAME TO EAST TASMANIA COURT.

There was no discussion.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

Chair Smith called for a recess at 7:45 pm. The meeting was called back to order at 7:50 p.m.

PENDING BUSINESS

A. Staff Report 21-43, Marijuana Onsite Consumption Endorsement

Chair Smith introduced the item by reading of the title.

City Planner Abboud provided a summary and explanation of why this item was back before the Commission noting that they could not take further action or recommendations. He noted that the Commission could provide, and what City Council was requesting, was further clarification on the reasons for not supporting on site consumption regulation.

Commissioner Barnwell and Highland commented that in further consideration of the subject if they could change or vote again on the issue they would vote it down.

Chair Smith provided clarification on why he could not support allowing onsite consumption was the location in the Central Business District in the middle of an area that is highly frequented by families and children and with the wind blowing the odor would be in his opinion advertisement for the product.

City Planner Abboud responded that if any smell was detected outside the location the business would be shut down in accordance with state regulations.

NEW BUSINESS

A. Motion to Dismiss Appeal by Frank Griswold of the Planning Commission Decision on Conditional Use Permit 20-15 for the reconstruction of a restaurant building at 106 W. Bunnell Avenue, Homer, Alaska

Chair Smith introduced the item by reading of the title and noted that this matter was before the Planning Commission at their June 6, 2021[1] regular meeting and it was discovered after the fact that the parties had not received notice of the motion to dismiss. As a result, the action from the June 6th[2] meeting is void. Notice was distributed to the parties on July 6, 2021 and they were given the opportunity to respond. This matter is back before the Commission tonight for action.

Deputy City Clerk Krause responded to Chair Smith's request for clarification on the ordinance amending city code to remove matters like this from the Commission. She explained that it was introduced and still needed to go through the public hearing and second reading before becoming effective, further stating she believed that was scheduled for the upcoming Council meeting.

Chair Smith requested a motion and second.

VENUTI/HIGHLAND MOVED TO POSTPONE ACTION ON THE MOTION TO DISMISS UNTIL CITY COUNCIL RESOLVED ACTION ON THE ISSUE.

Commissioner Venuti recommended the postponement to allow City Council time to address the code changes.

Commissioner Highland requested some input from Deputy City Clerk Krause on whether they could postpone the action before them.

Deputy City Clerk Krause explained that City Council approving the ordinance would not change the action before the Commission tonight however there was information in the supplemental packet regarding a request for a continuation. This matter is in the hands of the Commission and in my opinion you should not postpone it to await the outcome of Council action.

Commissioner Venuti stated that he would like to amend his motion.

Deputy City Clerk Krause recommended voting on the motion on the floor.

Chair Smith called for any additional discussion hearing none he requested the Clerk to take a roll call vote.

VOTE. NO. CONLEY, BARNWELL, VENUTI, SMITH, CHIAPPONE, HIGHLAND.

Motion failed.

Chair Smith requested Commissioner Venuti to restate his motion but before he did he recognized Commissioner Highland.

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[1] Incorrect date provided of June 6, 2021 correct date of meeting should reflect June 2, 2021
[2] See note 1 above

HIGHLAND/VENUTI MOVED TO DISMISS THE APPEAL BY FRANK GRISWOLD OF THE PLANNING COMMISSION DECISION ON CONDITIONAL USE PERMIT 20-15 FOR THE RECONSTRUCTION OF A RESTAURANT BUILDING AT 106 WEST BUNNELL AVENUE, HOMER, ALASKA.

There was a brief commentary on the lack of credentials on the part of the Planning Commission in addressing issues like this since they do not know the law and while Mr. Griswold brings forward interesting points it will be better to have these types of actions go before a hearing officer.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

B. Memorandum Re: Planning Commission Declaration of Vacancy

Chair Smith introduced the item by reading of the title. He then requested input from the Clerk.

Deputy City Clerk Krause responded that in accordance with the Commission bylaws since she had exceeded the allowed absences.

HIGHLAND/VENUTI MOVED TO DECLARE THE SEAT OF SYVERINE BENTZ VACANT IN ACCORDANCE WITH THE BYLAWS.

Discussion ensued on the ability for Ms. Bentz to reapply for her seat and encouragement from all members of the Commission and the Mayor. Further points made on being cognizant of how important attendance is to this commission and how inflexible the rules are in comparison to the other commissions and board.

Deputy City Clerk Krause responded that she does have attendance sheet but with the meetings being conducted via Zoom she lost track in keeping accurate accounting of absences and it was Commissioner Bentz herself who brought that issue to the Clerk's attention in response to Commissioner's questions.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

C. Staff Report 21-46, Election of Officers

Chair Smith introduced the item by reading of the title and opened the floor for nominations of Chair.

Commissioner Highland nominated Commissioner Smith for the Office of Chair.

Commissioner Barnwell seconded.

There were no further nominations.

Commissioner Smith was unanimously voted in as Chair.

Chair Smith then opened the floor for nominations of Vice Chair.

Commissioner Venuti nominated Commissioner Highland for Vice Chair.

Commissioner Barnwell seconded.

Chair Smith called for additional nominations for Vice Chair.

Commissioner Smith nominated Commissioner Conley.

Commissioner Conley declined the nomination citing the lack of time on the commission.

Commissioner Barnwell nominated Commissioner Venuti.

Commissioner Venuti declined the nomination citing that he has served as both Chair and Vice Chair and believes that every sitting Commissioner should be given the opportunity to serve as Chair or Vice Chair during their term as a commissioner.

Commissioner Highland was voted in as Vice Chair unanimously.

D. Staff Report 21-45, Parking Code

Chair Smith introduced the item by reading of the title and invited City Planner Abboud to provide his report.

City Planner Abboud reported that the number of parking spaces is higher than the standards used in other communities. Especially for multi-family dwellings and small detached units like cabins. If the efficiency units are in one building only one spot is required but if there are several small cabins on one lot each is required to have two parking spaces. They would like to amend City Code to adjust the requirement to one space for small 500 square foot cabins or efficiencies.

Chair Smith inquired about how or where visitors would park and how would that be configured.

City Planner Abboud responded that staff could work on that and bring it back before the commission. He further acknowledged that there was no parking on city streets, possibly working on off-site parking, the likelihood of someone not having a vehicle, especially living in the center of town.

HIGHLAND/VENUTI MOVE TO ADOPT STAFF REPORT 21-45 AND AMEND HOMER CITY CODE 21.55.090 (1) TO ALLOW TWO PARKING SPACES PER DWELLING UNIT OR ONE PARKIN SPACE PER EFFICIENCY OR ONE BEDROOM UNIT WHEN MORE THAN ONE DWELLING UNIT IS LOCATED ON A PARCEL

Discussion on parking for visitors if there is no dedicated parking on site; this applies only to efficiency/studio units. Evaluation of a formula where a maximum is established and then additional spaces are required; if project is in the center of town the likelihood that the occupant would have a car or have many visitors is unlikely but to require parking that will not be used is a waste of real estate.

VOTE. NON-OBJECTION. UNANIMOUS CONSENT.

Motion carried.

E. Staff Report 21-42, Large Retail and Wholesale Stores

Chair Smith introduced the item by reading of the title.

City Planner Abboud reviewed discussion points from the worksession and then proceeded to continue reviewing proposed changes to Title 21.57.

Chair Smith commented that it was a good visioning exercise and suggested a worksession for the Commission to discuss with staff the proposed amendments.

Chair Smith and City Planner Abboud facilitated additional discussion on the following:

- How these amendments would work with the Community Design Manual
- Does it need to be duplicated in city code
- Original city code was developed to combat change and change happened anyway.
- It is important to grow the City inside out as it is beginning to be difficult to develop commercial projects. As an example, the new grocery store being developed out East End Road, thus there is no benefit to the city.
- The city needs to temper its code and zoning requirements for large retail developments.
- Homer has grown immensely over the last twenty years.

City Planner Abboud will work on these considerations and present the amendments for a future meeting.

F. Memorandum Re: City of Homer Draft 2022-27 Capital Improvement Plan (CIP)

Chair Smith introduced the item by reading of the title. He noted the information provided by Ms. Carroll at the worksession.

City Planner Abboud reviewed the process briefly for the Commission and requested each Commissioner submit their top two projects.

The Commissioners then provided their top two projects from the draft Capital Improvement Plan for City Planner Abboud to list.

City Planner Abboud reviewed the projects selected and noted that the Main Street Sidewalk Project is the top priority but there is a not consensus on the second project. He noted the top three projects selected:

- Barge Mooring and Large Vessel Haul out Repair Facility
- New Large Vessel Harbor; and
- the New Public Works Facility

Chair Smith suggested that he submit all three projects and leave the final selections to City Council.

City Planner Abboud stated that Commissioner Chiappone needs to select a second project to support.

Commissioner Chiappone selected the Barge Mooring and Large Vessel Haul-out Repair Facility.

City Planner Abboud reported that the Commission selections were the Main Street Sidewalk Project North of Pioneer Avenue and the Barge Mooring and Large Vessel Haul Out Repair Facility. He will forward these recommendations to Ms. Carroll.

INFORMATIONAL MATERIALS

A. City Manager Reports for June 28 & July 26, 2021 City Council Meetings
B. Planning Commission Calendar
C. Kenai Peninsula Borough Notice of Decision

Chair Smith noted the informational items in the packet and there were no comments on the material provided.

COMMENTS OF THE AUDIENCE

Syverine Bentz, congratulated Deputy City Planner Engebretsen on 19 years with the Planning Department. She thanked the Commissioners for following the process and believed that the Commission should revisit the bylaws regarding absences. They should be operating consistently with the other Commissions and Council and considering virtual attendance options in the future. She appreciates all the hard work and for the long meeting tonight.
Chair Smith thanked Ms. Bentz for staying throughout the meeting and encouraged her to re-apply for her seat on the Commission.

COMMENTS OF THE CITY STAFF

Deputy City Clerk Krause thanked the Commissioners for getting through such a long agenda in a timely fashion and that it was a good meeting. She further noted that the Clerk's Office was drafting some amendments to City Code regarding telephonic/electronic meetings and attendance and hoping to have it reading for introduction to Council soon. They also noted conflicts in city code with what was stated in the bylaws. Ms. Krause announced the candidacy filing period is currently open until 4:30 p.m. on August 16th if anyone was interested.

COMMENTS OF THE COMMISSION

Commissioner Highland commented on the long meeting and that Commissioner Chiappone was able to experience that for his first meeting.

Commissioner Venuti welcomed Commissioner Chiappone and noted that his first meeting lasted until 11:00 p.m. and all he could think of, was what did he get himself into, so he got off easy. He then stated that he hopes Ms. Bentz rejoins the Commission as she was a very important part of the Commission. He did want to bring to the Commission's and the City Planner's attention that a couple of years ago they approved a CUP to permit more cottages and he noticed that they are starting to build more just below the Chamber of Commerce so Homer is growing again. It was a good meeting and always a pleasure working with everyone.

Commissioner Conley commented on it being nice to see everyone and hoped everyone was having a good summer so far. He thanked the Chair for getting them out at a fairly early hour.

Commissioner Barnwell welcomed Commissioner Chiappone and echoed the sentiments on Ms. Bentz rejoining the Commission.

Commissioner Chiappone thanked everyone for the warm welcome and stated that it has been eye opening and excited about being on the Commission. He thought that the city was more complex than he realized and he has lived on the south peninsula off and on for over 20 years but only been in the City, downtown metropolitan area for the last 6 or 7 years. This has really been eye opening. It never could imagine the huge undertaking it is to keep it going.

Chair Smith echoed the sentiments of encouragement to Ms. Bentz and welcoming Commissioner Chiappone to the Commission. He commented on the interesting topics and expressed his appreciation for the work of the Planning Staff and requested the City Planner to forward their thanks to his staff on behalf of the Commission. He then expressed his opinion that Deputy City Clerk Krause was amazing in her ability to keep them in line and on task. He was very appreciative of all the efforts of staff.

ADJOURN

There being no further business before the Commission, the meeting was adjourned at 9:35 p.m. Next Regular Meeting is Wednesday, August 18, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held virtually by Zoom Webinar from the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Renée Krause

RENEE KRAUSE, MMC, DEPUTY CITY CLERK II

Approved: August 18, 2021

Session 21-31 a Special Meeting of the Homer City Council was called to order on December 13, 2021 by Mayor Ken Castner at 4:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBERS ADERHOLD, DAVIS, ERICKSON, HANSEN-CAVASOS, LORD

ABSENT: COUNCILMEMBER VENUTI (excused)

STAFF: CITY CLERK JACOBSEN
ATTORNEY BRANDT-ERICHSEN

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

Mayor Castner announced the laydown information requested by Appellant Frank Griswold, including Preliminary Matters, laydown materials from the November 8th special meeting, also Appellants motion for sanctions & default judgement dated April 4, 2021, Appellants Motion to Strike New Evidence dated July 26, 2021, and August 4, 2021 Planning Commission Minutes.

ADERHOLD/LORD MOVED TO APPROVE THE AGENDA.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

PENDING BUSINESS

Mayor Castner announced the Board of Adjustment (BOA) is meeting to take up Appellant Frank Griswold's Motion for Leave to Supplement Points on Appeal to address the Planning Commissions Dismissal of Appeal by Frank Griswold and the Recommendation by the Planning Commission to Dismiss the Appeal of Conditional Use Permit 20-15 for the Reconstruction of a Restaurant Building at 106 W. Bunnell Avenue. He advised that each party may provide oral argument for 15 minutes total on the topics. The appellant may reserve time to rebut following the appellee's oral arguments and opened the floor to Mr. Griswold.

Mr. Griswold requested the Board address his preliminary matters before he begins his argument.

It was noted that there are two items on the agenda for consideration and question was raised whether it's appropriate to take up additional matters. Advice was requested from Attorney Brandt-Erichsen who summarized the matters. Mayor Castner interjected with questions for Mr. Griswold. Mayor Castner asked him to elaborate on why the Board wouldn't have the ability to have a Council of its choosing, in reference to preliminary matter 1.

Mr. Griswold responded his concern relates to the Mayor's comment regarding the BOA's representation and his reference to a Chinese curtain on August 2nd. If the attorney for the BOA is in a separate law firm than the City's attorney, JDO, and if they aren't sharing files or in any way affiliated with JDO, then there wouldn't be any need for that. Mr. Griswold requested clarification as to under what circumstances Attorney Brandt-Erichsen was hired for this matter. There was discussion confirming Attorney Brandt-Erichsen is not affiliated with JDO, and was hired by the City Manager to serve as counsel to the BOA.

Mayor Castner requested Attorney Brandt-Erichsen comment regarding the second preliminary matter of the BOA's failure to address Mr. Griswold's motion for sanctions and default judgement. Attorney Brandt-Erichsen responded regarding the April 8th motion, he is unsure what relief is being requested regarding this matter or how it fits in. The motion came in after the BOA issued their decision in March and he's not certain what the BOA role would be in addressing the request after the matter was remanded back to the Planning Commission.

Mr. Griswold explained the role he intended was for the BOA to provide guidance to the Commission that they were going down a rabbit hole and considering this new evidence was trickling in by ex parte communication between Mr. Abboud and the applicant. If there's new evidence or a change in circumstance that has to come before the BOA, then the BOA has the option of remanding it back to the commission for taking evidence. The only thing the Commission was authorized to address was ownership and conflicts of interest. The new evidence or change of circumstance was inappropriate for them to address. They were supposed to respond to the remand, and they delayed it until Mr. Abboud got the applicant to withdraw it. It should have come to the BOA for direction regarding the new evidence.

Mayor Castner commented unless and if the new information is the withdrawal of the application, which is alluded to in the third preliminary matter, than it's a legal question whether it's an interrupting event that stops everything. He thinks what the BOA decided is that when the application was withdrawn, there was no harm, other than the process harm that's been indicated.

Mr. Griswold raised the issue again regarding his motion for sanctions and default judgement in that it was never addressed by the BOA.

Mayor Castner asked for a motion to place Mr. Griswold's motion for sanctions and default judgement in abeyance until you've (the BOA) reached your final determination.

ADERHOLD/LORD SO MOVED

There was no discussion.

At request of the Mayor, Attorney Brandt-Erichsen confirmed this action should be fine procedurally.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

Mayor Castner acknowledged the third preliminary matter regarding the mootness issue and suggested it's something that isn't properly before the BOA now because it hasn't been presented in a procedurally correct manner.

Mr. Griswold explained that in the motion it indicates the BOA has already made up their mind regarding mootness, so it's no longer an impartial adjudicatory body. Under city rules, if the matter can't be postponed to a time when there is an impartial board, then all would be allowed to participate, and there's a provision in the code that an alternative option is to use a hearing officer. A hearing officer wasn't his initial choice to hear this appeal, but in light of the fact that the BOA has indicated in writing they believe it is a moot point due the lack of an active permit application, that's very difficult to overcome. This body is supposed to be impartial and not render a decision before hearing the evidence.

Mayor Castner asked Mr. Griswold if it would be preferred for the BOA to adjourn and assign this matter to a hearing officer. Mr. Griswold responded he didn't think there is another proper option. He questioned at what point does the hearing officer take over, it's very muddy when one body starts something and another takes over.

Mayor Castner asked for confirmation. Mr. Griswold said he chose the BOA and up and until the time they revealed this strong bias on the issue now before them, that's not acceptable to him.

Mayor Castner asked for a motion to adjourn the BOA and turn the matter over to a hearing officer.

ADERHOLD/LORD MOVED TO ADJOURN THE BOA HEARING AND REMAND ALL THE ACTIONS TO A HEARING OFFICER UNDER HOMER CITY CODE.

There was brief discussion with Attorney Brandt-Erichsen regarding the wording of the action.

ADERHOLD/LORD MOVED TO AMEND THE MOTION TO REFER THE ISSUES BEFORE THE BOARD OF ADJUSTMENT TO A HEARING OFFICER FOR A DECISION AND THAT THIS IS MADE AT THE REQUEST AND CONSENT OF MR. GRISWOLD.

Mayor Castner opened the floor to Attorney Holmquist to comment.

Attorney Holmquist expressed the City's position regarding Mr. Griswold's request is that there really is no reason to refer it to a hearing officer. What Mr. Griswold claims to be a form of bias appears to the City to be a factual finding that was determined at a prior meeting by the BOA. It's been 7 or 8 months since the applicant withdrew her application and the City would prefer to have this decided tonight by the BOA. But if the BOA prefers to refer it to a hearing officer the City won't object.

Mayor Castner responded he felt Mr. Griswold was correct regarding initial concerns by the BOA regarding ownership and representation of ownership, and that never got sifted out along the way. He thinks allowing the BOA to move this along to someone who can look at it with fresh eyes is probably in the best interest of the City.

Boardmember Aderhold noted for the record she doesn't believe there is any bias on her part. Whether the BOA continues work on this or it goes to a hearing officer, it won't be finished tonight because there isn't time.

Boardmember Lord echoed the feeling of impartiality she feels she's continued to bring to the table. In terms of the mootness of the application, they're working with independent legal counsel and that's the best she has to go off of. In terms of concepts of a factual finding, there is no permit on the table, it was withdrawn. She believes motives behind whomever to that action are outside their jurisdiction. If she's getting legal advice that there is no permit to be batting around, she has a difficult time figuring out the BOA is supposed to adjudicate something that doesn't exist. She's not interested in impugning people's motives as to why or why not the permit is on the ground. She's comfortable with a hearing officer, however she does think, as Mr. Holmquist noted, it's a factual finding.

Mr. Griswold commented the BOA shouldn't even know that there is no longer a permit. None of that evidence was legitimately presented.

VOTE (motion to amend): YES: ERICKSON, ADERHOLD, LORD, DAVIS, HANSEN-CAVASOS

Motion carried.

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

VOTE (main motion as amended): YES: ADERHOLD, HANSEN-CAVASOS, LORD, ERICKSON, DAVIS

Motion carried.

a. Consideration of Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal by Frank Griswold, Appellant

Memorandum 21-201 from City Clerk as backup

b. Recommendation by the Planning Commission to Dismiss the Appeal of Conditional Use Permit (CUP) 20-15 for the Reconstruction of a Restaurant Building at 106 W. Bunnell Avenue, Homer, Alaska based on the Applicant's Withdrawal of their CUP Application.

Memorandum 21-202 from City Clerk as backup

NEW BUSINESS

COMMENTS OF THE AUDIENCE

Mr. Griswold commented he'd like to know the status of the Planning Commission's August 4th decision and what is the extent of their future involvement. By the BOA going to a hearing officer, does that also mean they are no longer involved and it would be solely a hearing officer decision that would be appealed to the superior court.

ADJOURN

There being no further business to come before the Council as Board of Adjustment Mayor Castner adjourned the meeting at 4:37 P.M. The next Regular Meeting is Monday, January 10, 2022 at 6:00 p.m., Committee of the Whole at 5:00 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.

Melissa Jacobsen

Melissa Jacobsen, MMC, City Clerk

Approved: January 10, 2022