

## **Appeal Record Index**

Frank Griswold vs. Planning Commission Re:

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

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# City of Homer

[www.cityofhomer-ak.gov](http://www.cityofhomer-ak.gov)

## Office of the City Clerk

491 East Pioneer Avenue  
Homer, Alaska 99603

[clerk@cityofhomer-ak.gov](mailto: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](http://www.cityofhomer-ak.gov/cityclerk).

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

Kind regards,

A handwritten signature in black ink that reads "Melissa Jacobsen". The script is cursive and fluid, with the first name "Melissa" and last name "Jacobsen" clearly distinguishable.

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



**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



# City of Homer

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## Planning

491 East Pioneer Avenue  
Homer, Alaska 99603

[Planning@ci.homer.ak.us](mailto:Planning@ci.homer.ak.us)

(p) 907-235-3106

(f) 907-235-3118

### 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**

### **Site and more than 30% lot coverage analysis**

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

(1<sup>st</sup> 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%.**

**Building within the 20 ft setback area**

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 through 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 through 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: melodylvng@yahoo.com

### PROPERTY INFORMATION:

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

Legal Description of Property: TGS 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    |       |

**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  
restaurant 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 restaurant 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.

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

City code and the Comprehensive plan both encourage retail and ~~res~~ 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 restaurants among others, and this project would accomplish that. ~~The district is meant to accommodate 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

- 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.

Would increase the quality of the existing structure.

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: \_\_\_\_\_

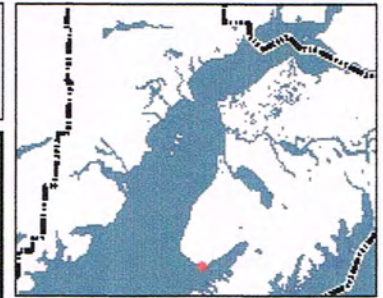
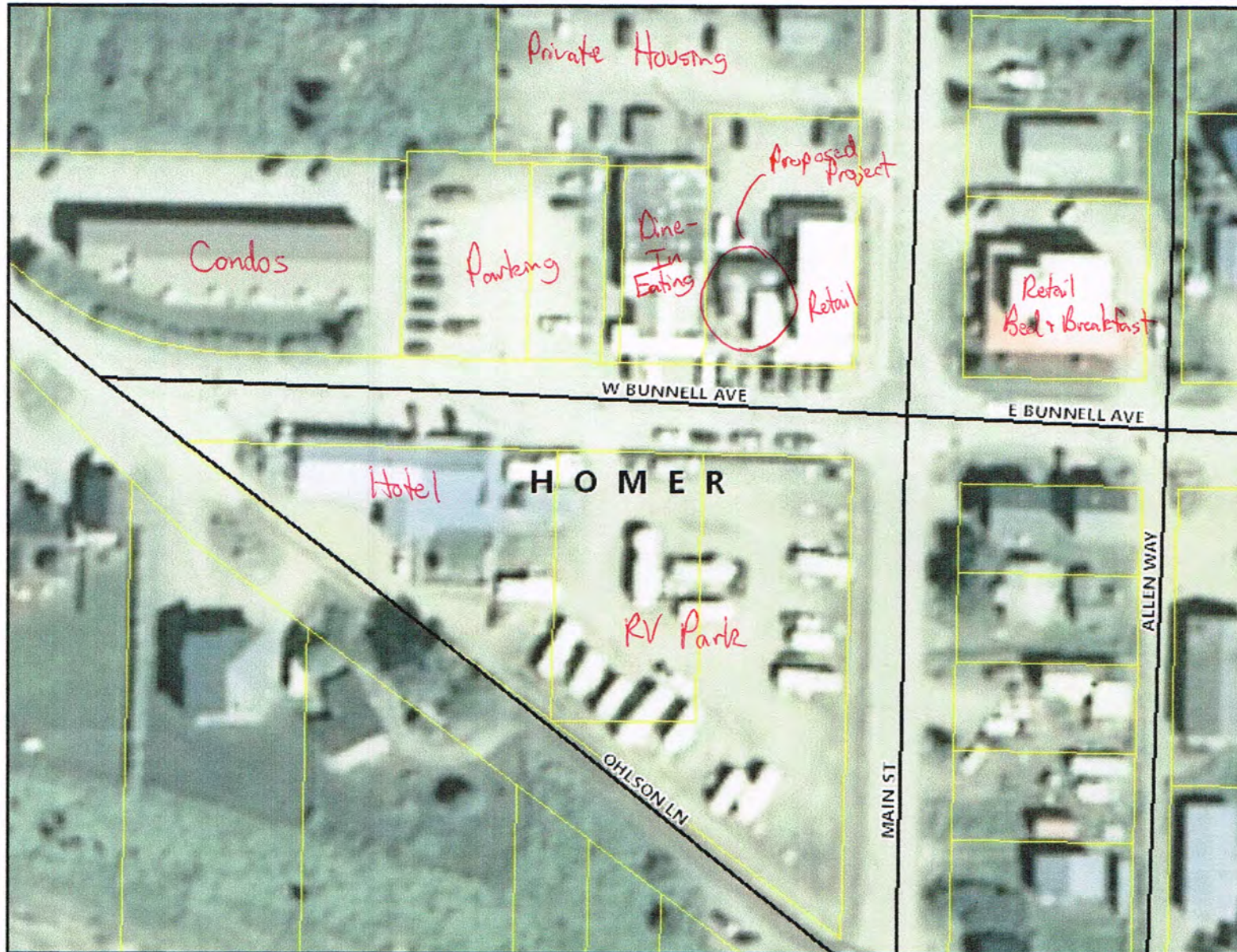
Date: 8/26/20

Property Owner's signature: \_\_\_\_\_

Date: \_\_\_\_\_



## 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.

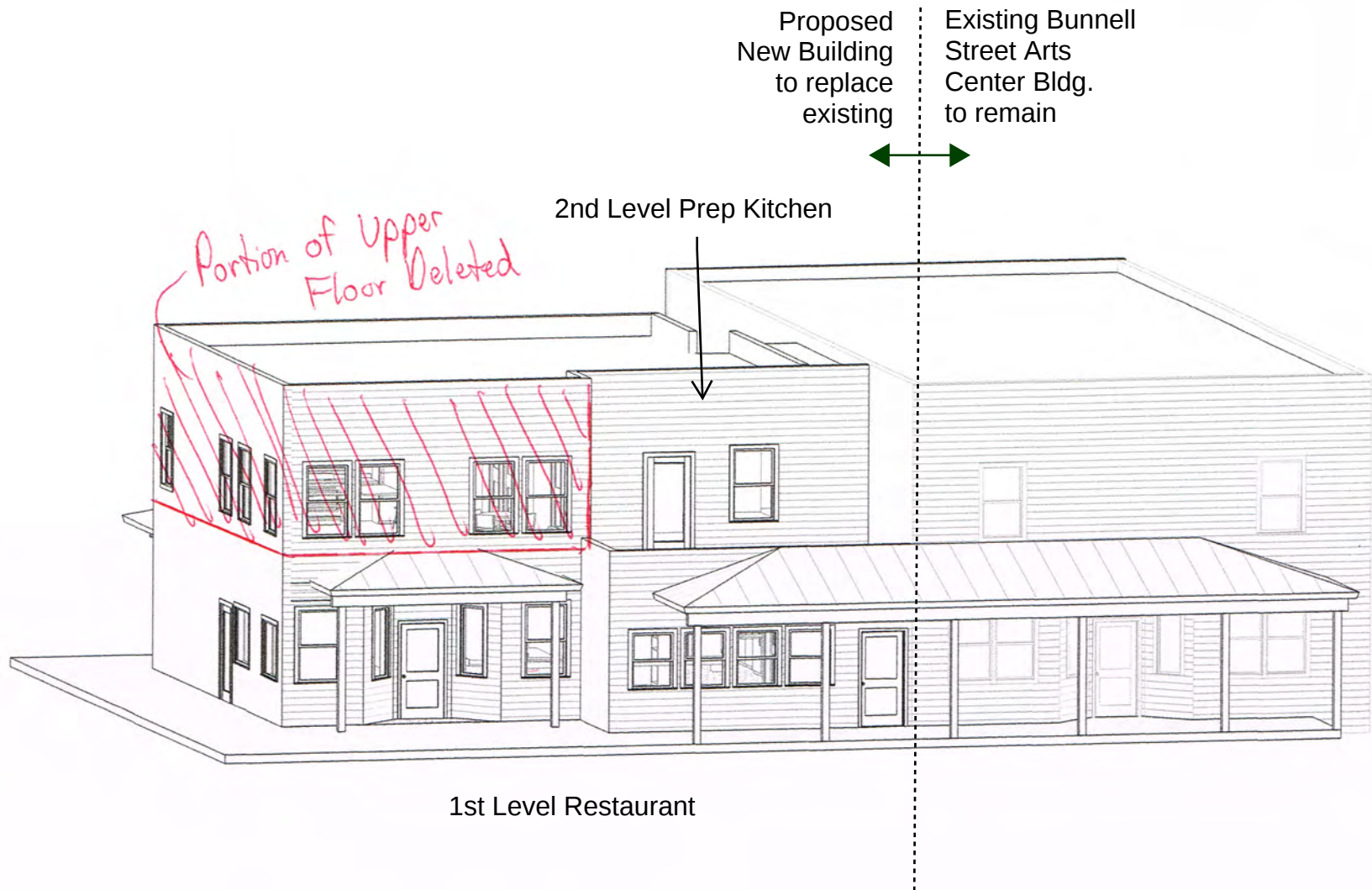
0.0 0 0.02 0.0 Miles

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.

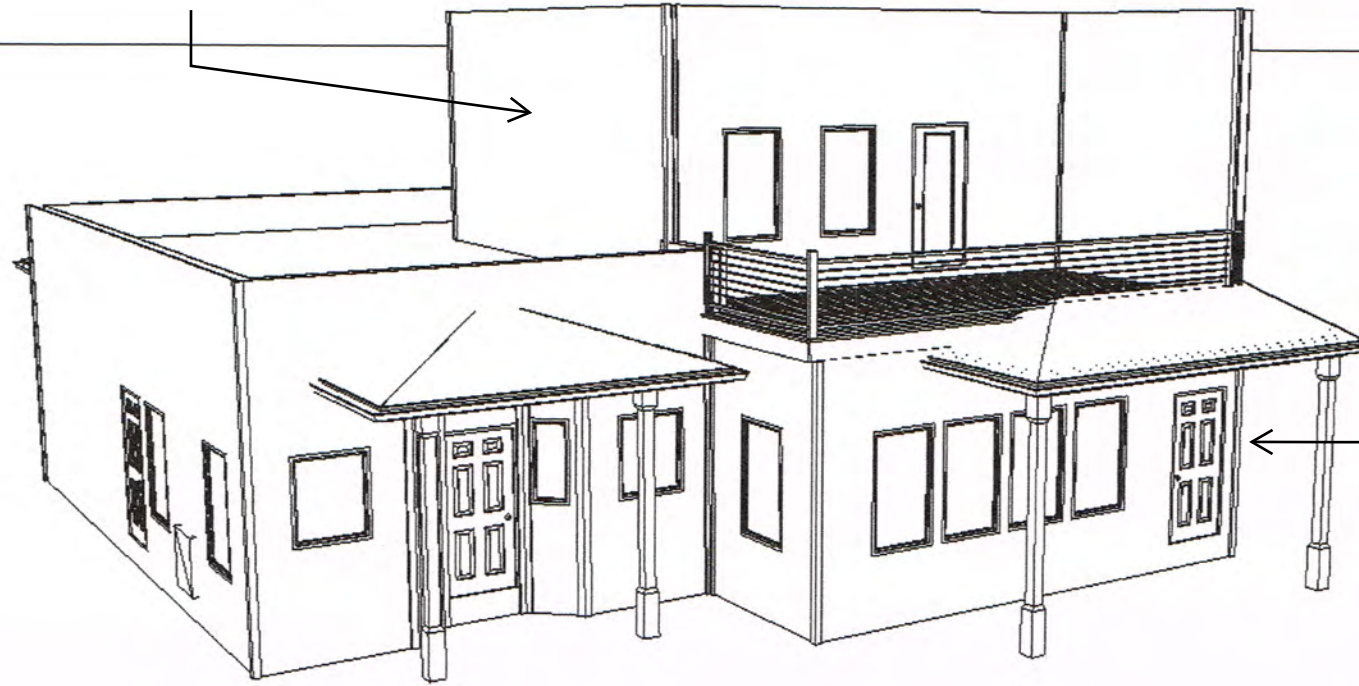
DATE PRINTED: 8/26/2020

# "Elevation A"



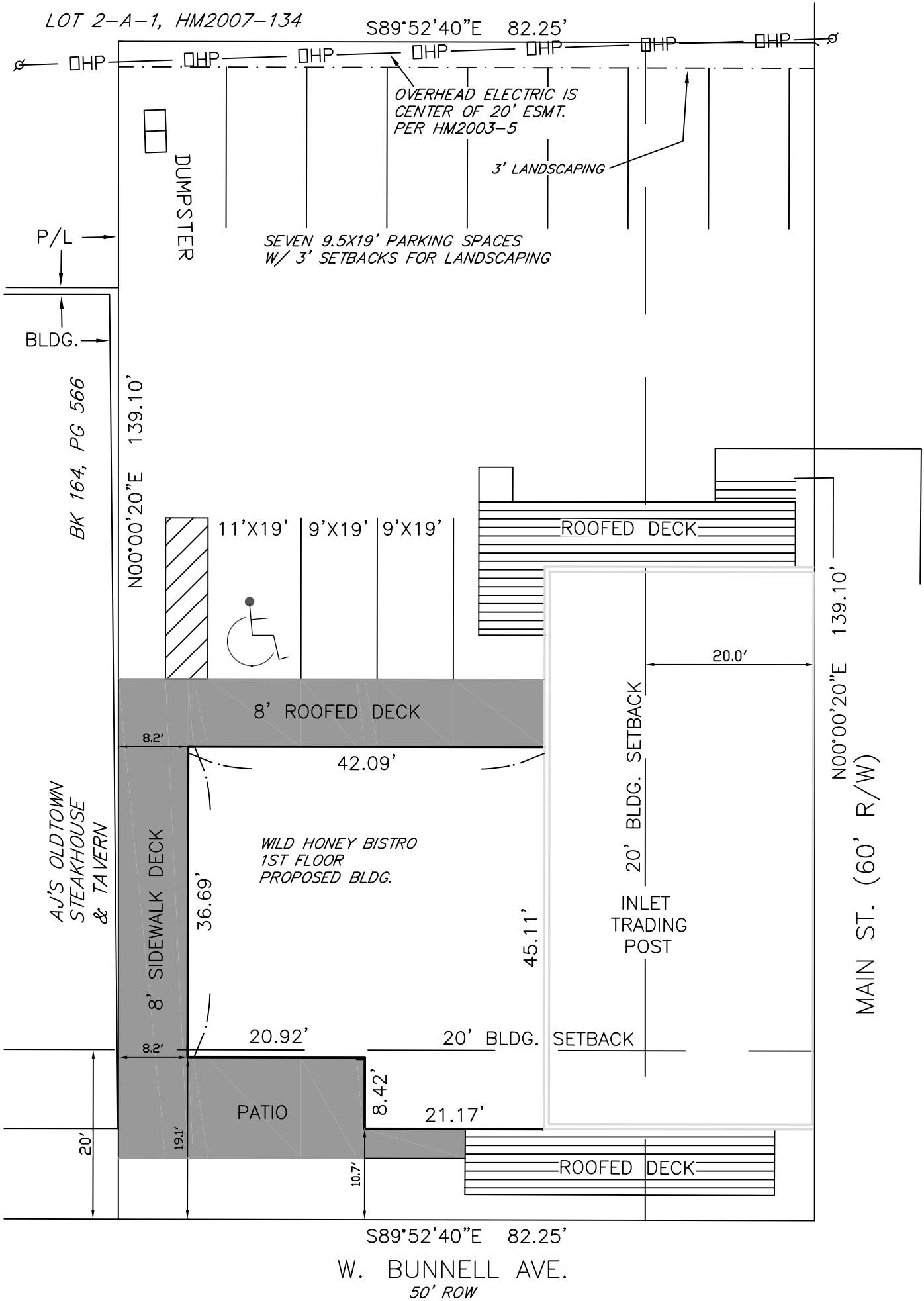
"Elevation B"

2nd Level Prep Kitchen



2nd Level  
Access Stairwell

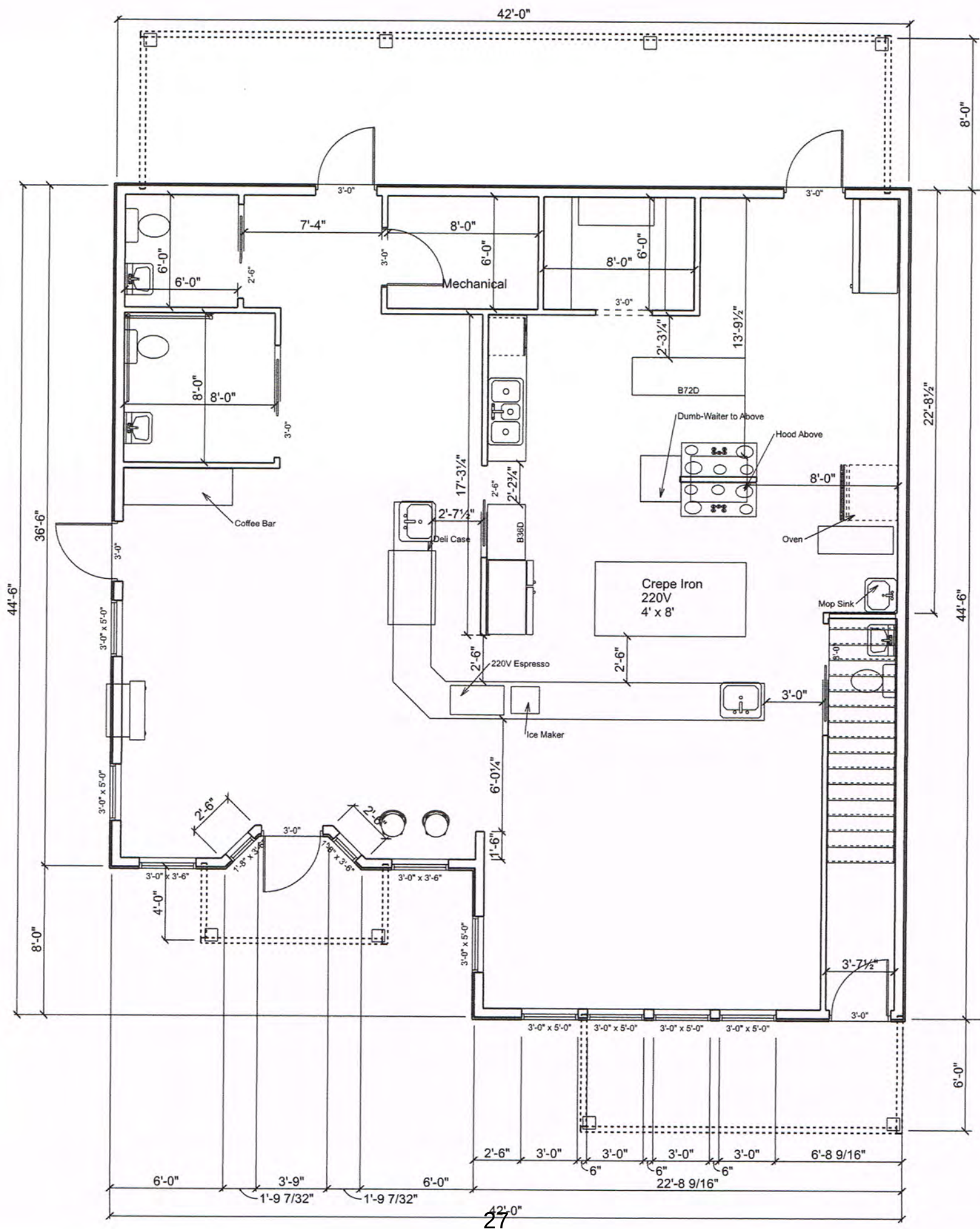
1st Level Restaurant



|            |                    |
|------------|--------------------|
| 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











# CERTIFICATE OF COMPLETION

SECTION 34.08.090 OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT PROVIDES THAT A DECLARATION FOR A CONDOMINIUM MAY NOT BE RECORDED 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 THE 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 EXTERIOR DIMENSIONS. SHEET 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 RECORDED 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 RESPONSIBILITY OF THE OWNER(S) TO COMPLY WITH ALL APPLICABLE PORTIONS OF THE CITY OF HOMER ZONING CODE.

## 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 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 3<sup>rd</sup> DAY OF

February 2011

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

*gph*  
 NOTARY PUBLIC FOR ALASKA  
 MY COMMISSION EXPIRES: 04/2013



## 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



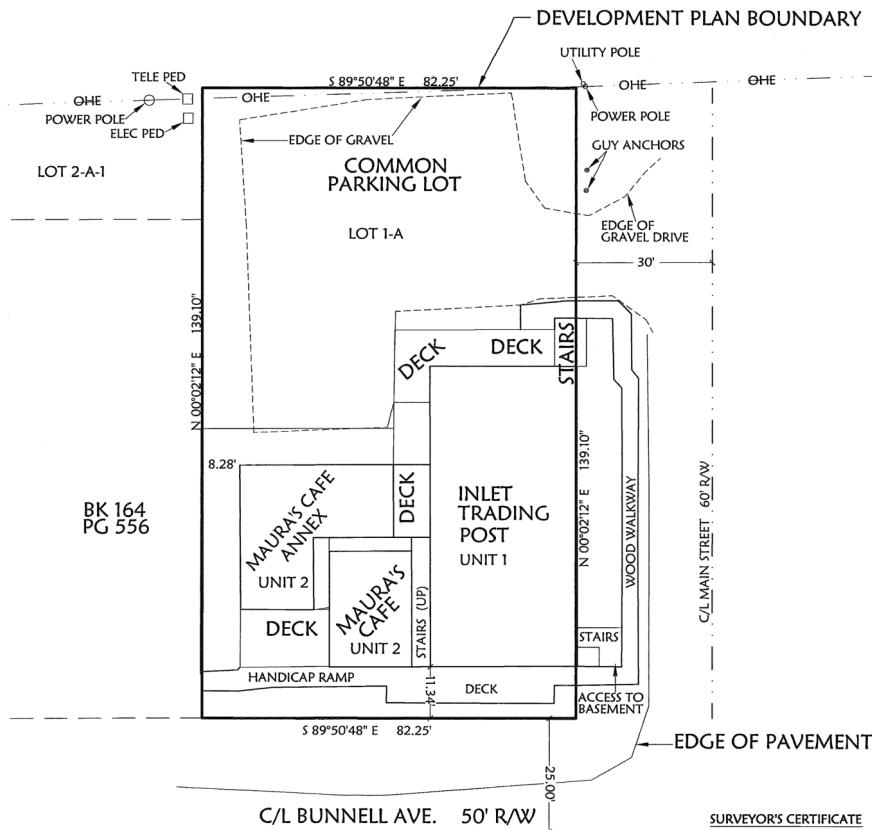
Homer 2011-2

## 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.

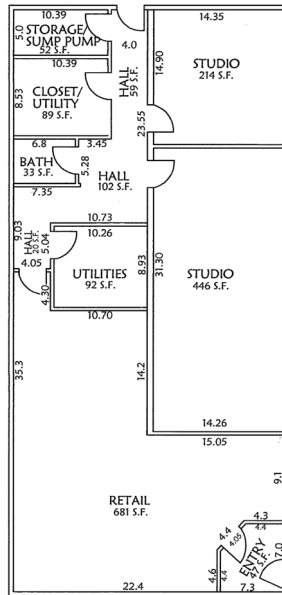
*Kenton T. Bloom* DATE: FEB. 3, 2011  
 KENTON T. BLOOM, P.L.S. 7968-S  
 1044 EAST ROAD SUITE A  
 HOMER, ALASKA 99603



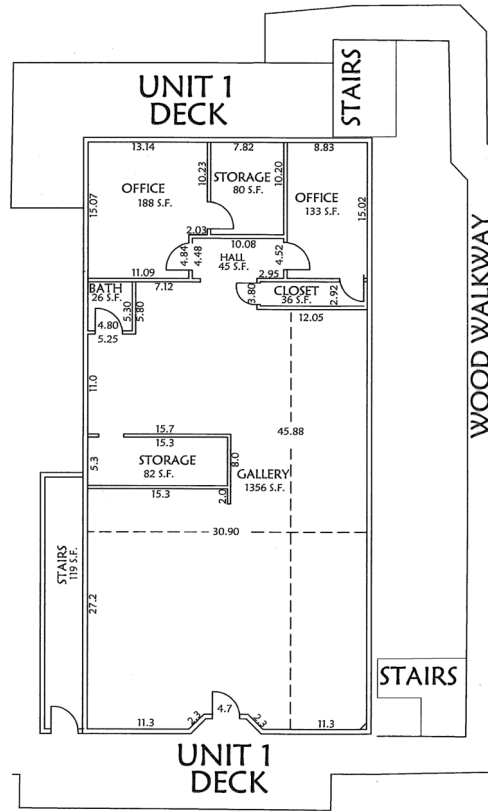
SCALE 1" = 20'

# INLET TRADING POST UNIT 1

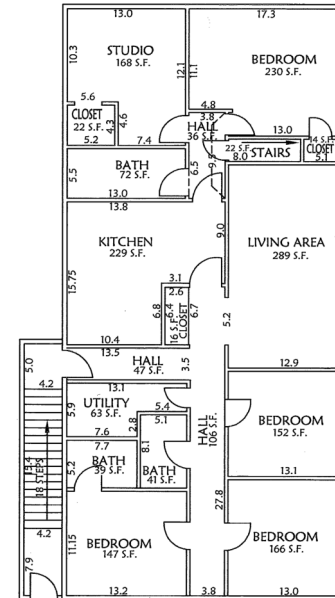
UNIT 1 INTERIOR  
BASEMENT 1815 SQ.FT.  
FIRST FLOOR 2065 SQ. FT.  
SECOND FLOOR 1858 SQ. FT.  
TOTAL 5738 SQ. FT.



**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.



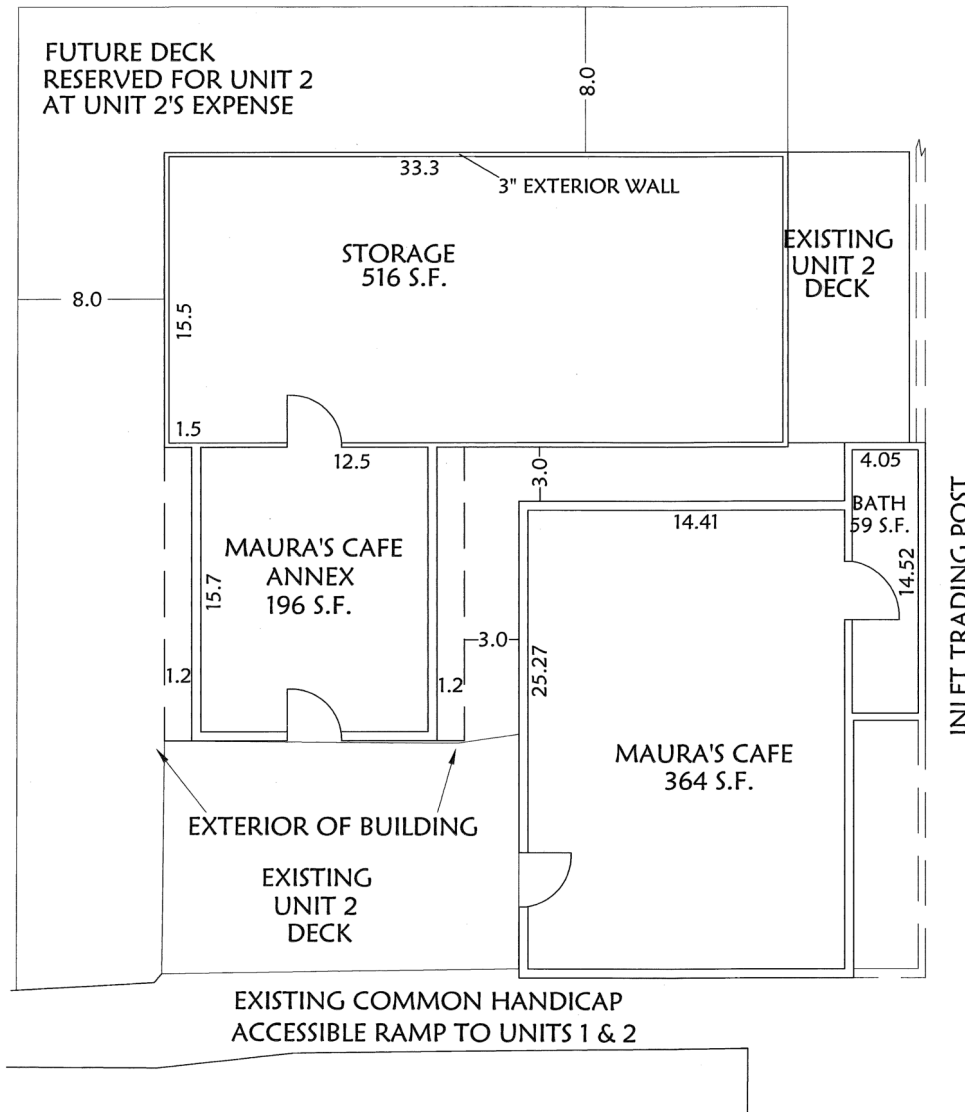
SCALE 1" = 10'

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

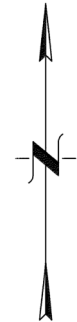
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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|-----------------|
| <b>INLET TRADING POST<br/>ASBUILT DRAWING</b><br>LOT 1-A CHAMBERLAIN AND WATSON NO. 4<br>RECORDED AS PLAT NO. 2003-005 H.R.D<br>LOCATED IN THE SW 1/4 SEC. 19., T. 65., R. 13W.,<br>S.M. WITHIN THE CITY OF HOMER<br>KENAI PENINSULA BOROUGH, THIRD JUDICIAL<br>DISTRICT, STATE OF ALASKA (H.R.D.),<br>CONTAINING 0.26 ACRES MORE OR LESS |              |                 |
| <b>SEABRIGHT SURVEY + DESIGN</b><br>1044 EAST ROAD, SUITE A<br>HOMER ALASKA 99603<br>(907) 235-4247<br>EMAIL: seabrightz@gmail.com                                                                                                                                                                                                        |              |                 |
| DRAWN BY: KB                                                                                                                                                                                                                                                                                                                              | DATE: 1-2011 | SCALE: 1" = 10' |
| CHK BY: KB                                                                                                                                                                                                                                                                                                                                | JOB #10-09   | SHEET 2 OF 4    |

MAURA'S CAFE  
UNIT 2

UNIT 2 INTERIOR  
TOTAL 1076 SQ. FT.

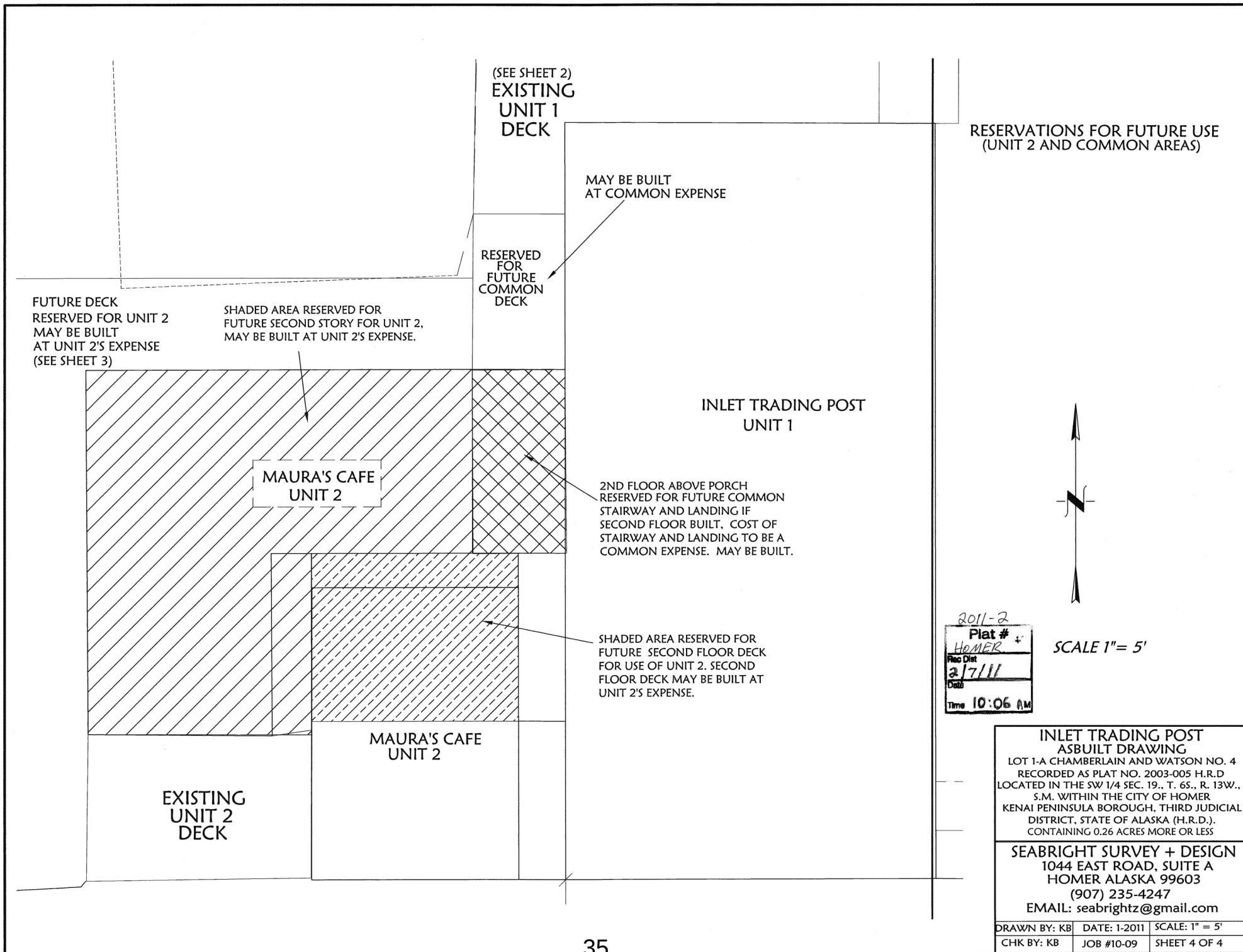


NOTE: 1. ALL AREAS SHOWN ARE NET INTERIOR.  
AREAS DO NOT INCLUDE SPACE OCCUPIED BY INTERIOR WALLS



SCALE 1" = 5'

|                                                                                                                                                                                                                                                                                           |              |                |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|----------------|
| <b>INLET TRADING POST<br/>ASBUILT DRAWING</b>                                                                                                                                                                                                                                             |              |                |
| LOT 1-A CHAMBERLAIN AND WATSON NO. 4<br>RECORDED AS PLAT NO. 2003-005 H.R.D.<br>LOCATED IN THE SW 1/4 SEC. 19., T. 65., R. 13W.,<br>S.M. WITHIN THE CITY OF HOMER<br>KENAI PENINSULA BOROUGH, THIRD JUDICIAL<br>DISTRICT, STATE OF ALASKA (H.R.D.).<br>CONTAINING 0.26 ACRES MORE OR LESS |              |                |
| <b>SEABRIGHT SURVEY + DESIGN</b><br>1044 EAST ROAD, SUITE A<br>HOMER ALASKA 99603<br>(907) 235-4247<br>EMAIL: seabrightz@gmail.com                                                                                                                                                        |              |                |
| DRAWN BY: KB                                                                                                                                                                                                                                                                              | DATE: 1-2011 | SCALE: 1" = 5' |
| CHK BY: KB                                                                                                                                                                                                                                                                                | JOB #10-09   | SHEET 3 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 7<sup>th</sup>, 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.

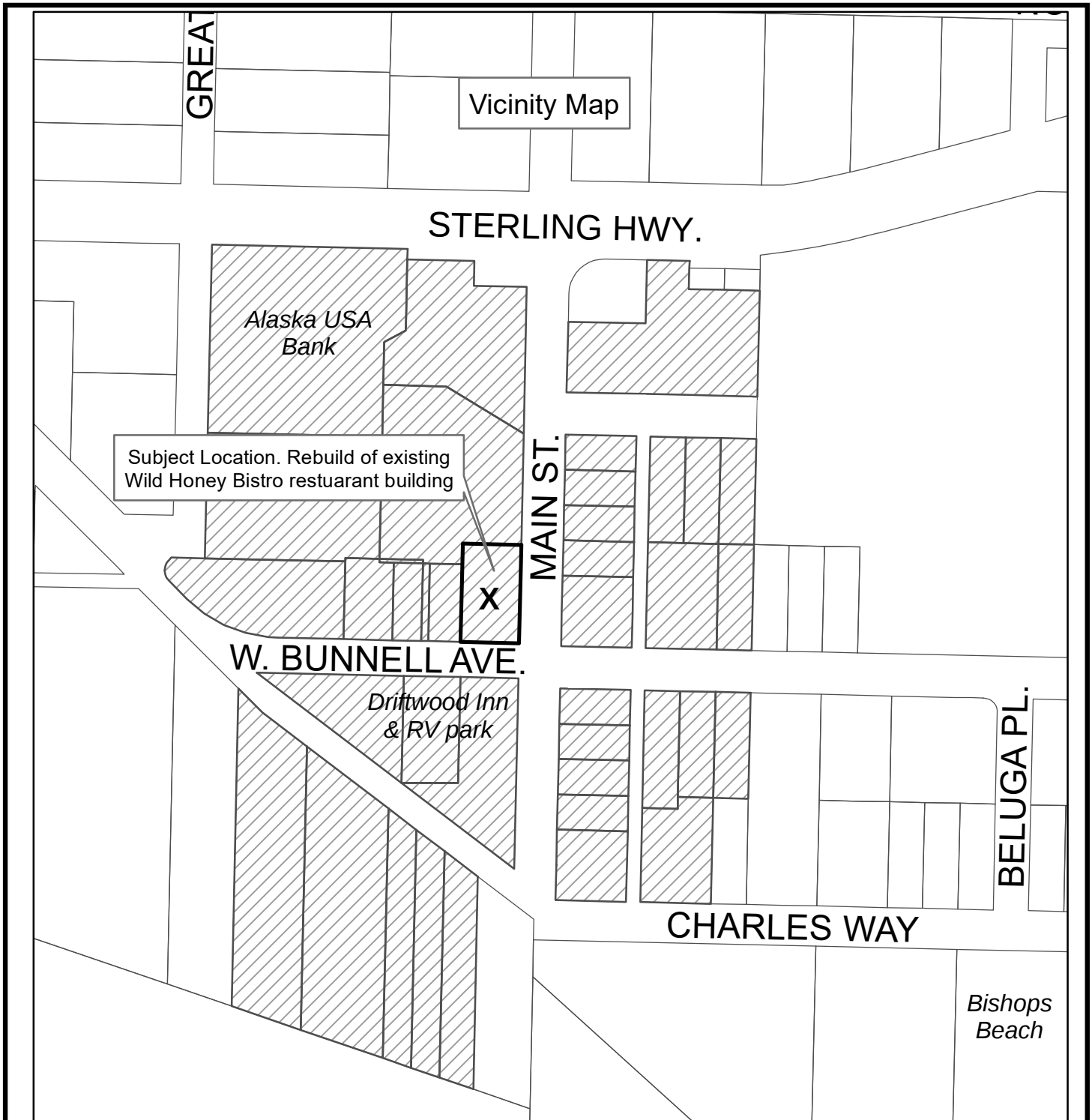
Visit the link above or call the City Clerk's Office to learn how to provide verbal testimony during the meeting via telephone or the Zoom online platform. Written comments can be emailed to [planning@ci.homer.ak.us](mailto:planning@ci.homer.ak.us) or mailed to Homer City Hall, 491 E. Pioneer Ave., Homer, 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.

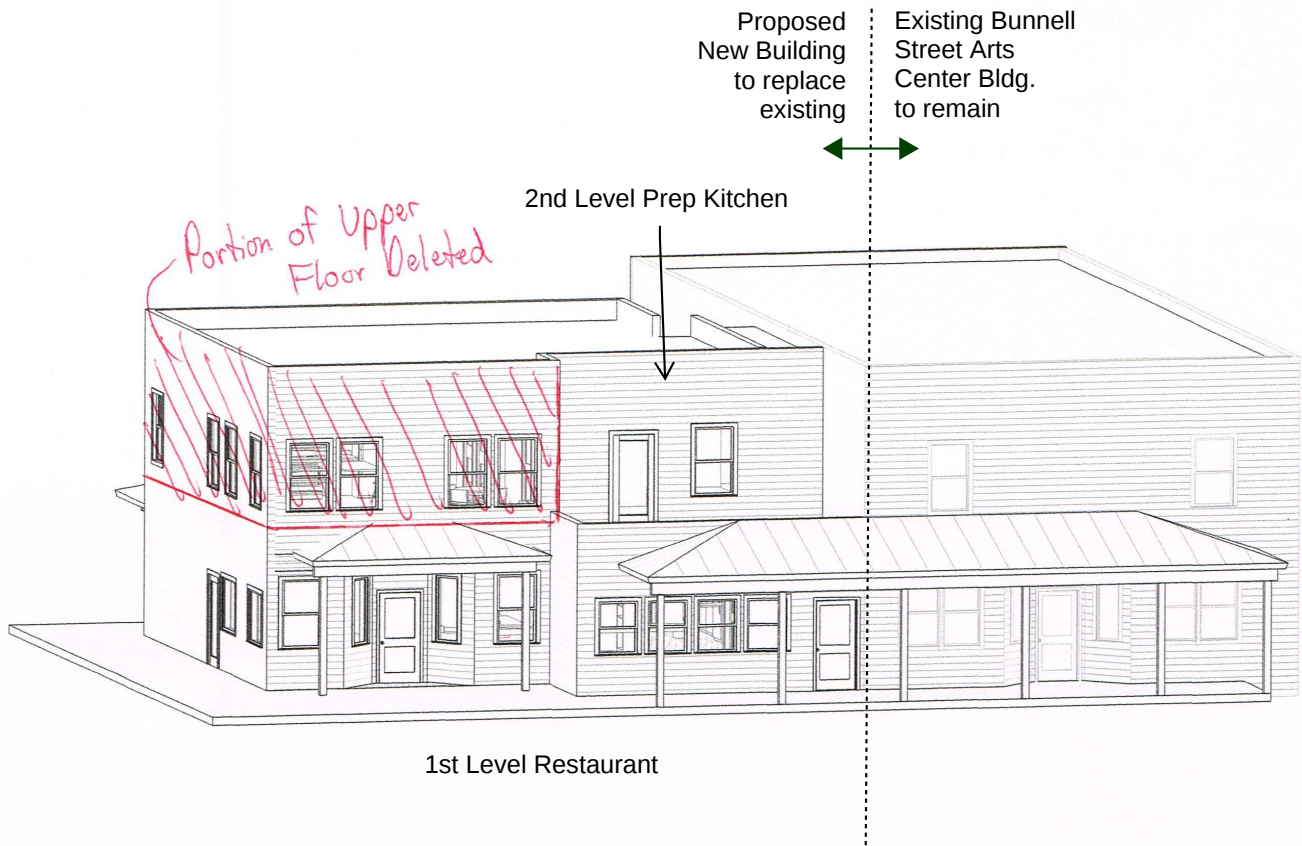
Marked lots are within 300 feet and  
property owners notified.

0 150 300 Feet

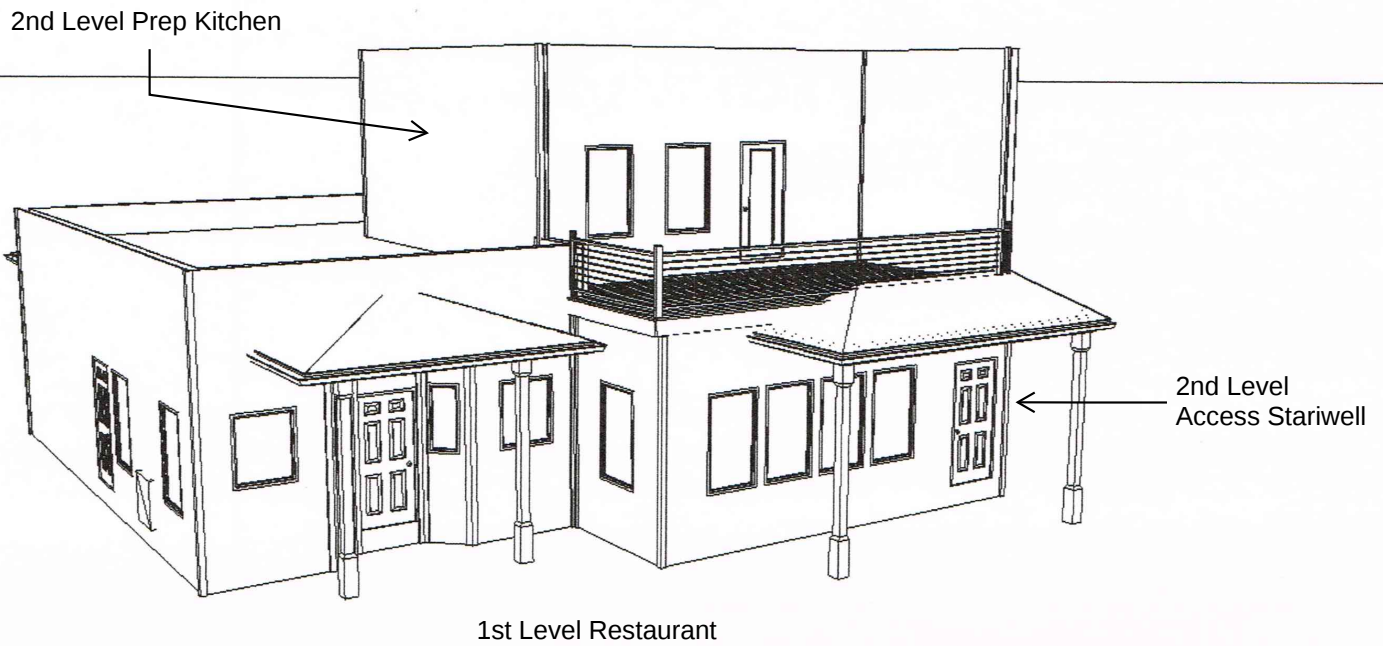


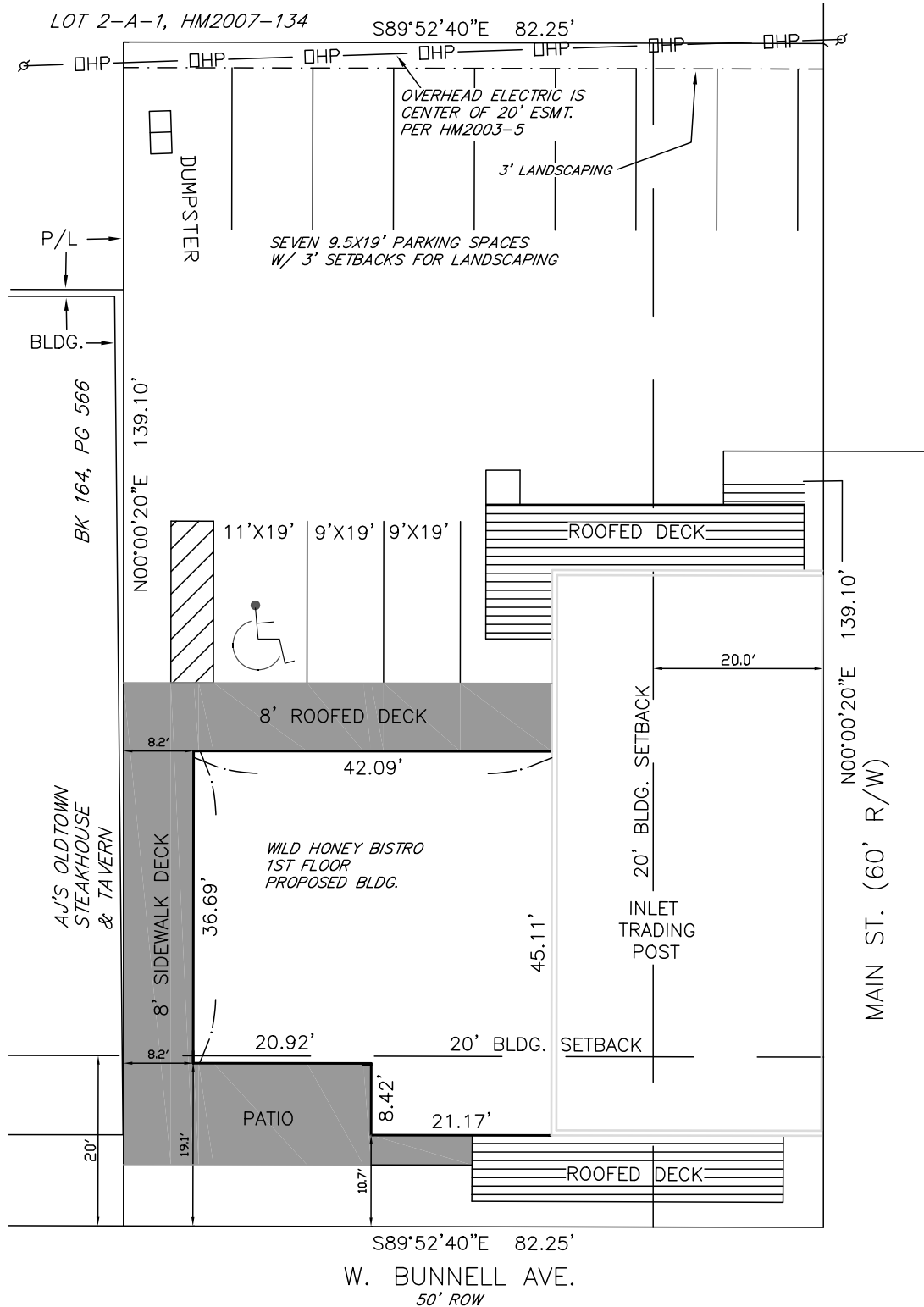
Disclaimer:  
It is expressly understood the City of  
Homer, its council, board,  
departments, employees and agents are  
not responsible for any errors or omissions  
contained herein, or deductions, interpretations  
or conclusions drawn therefrom.

"Elevation A"



"Elevation B"



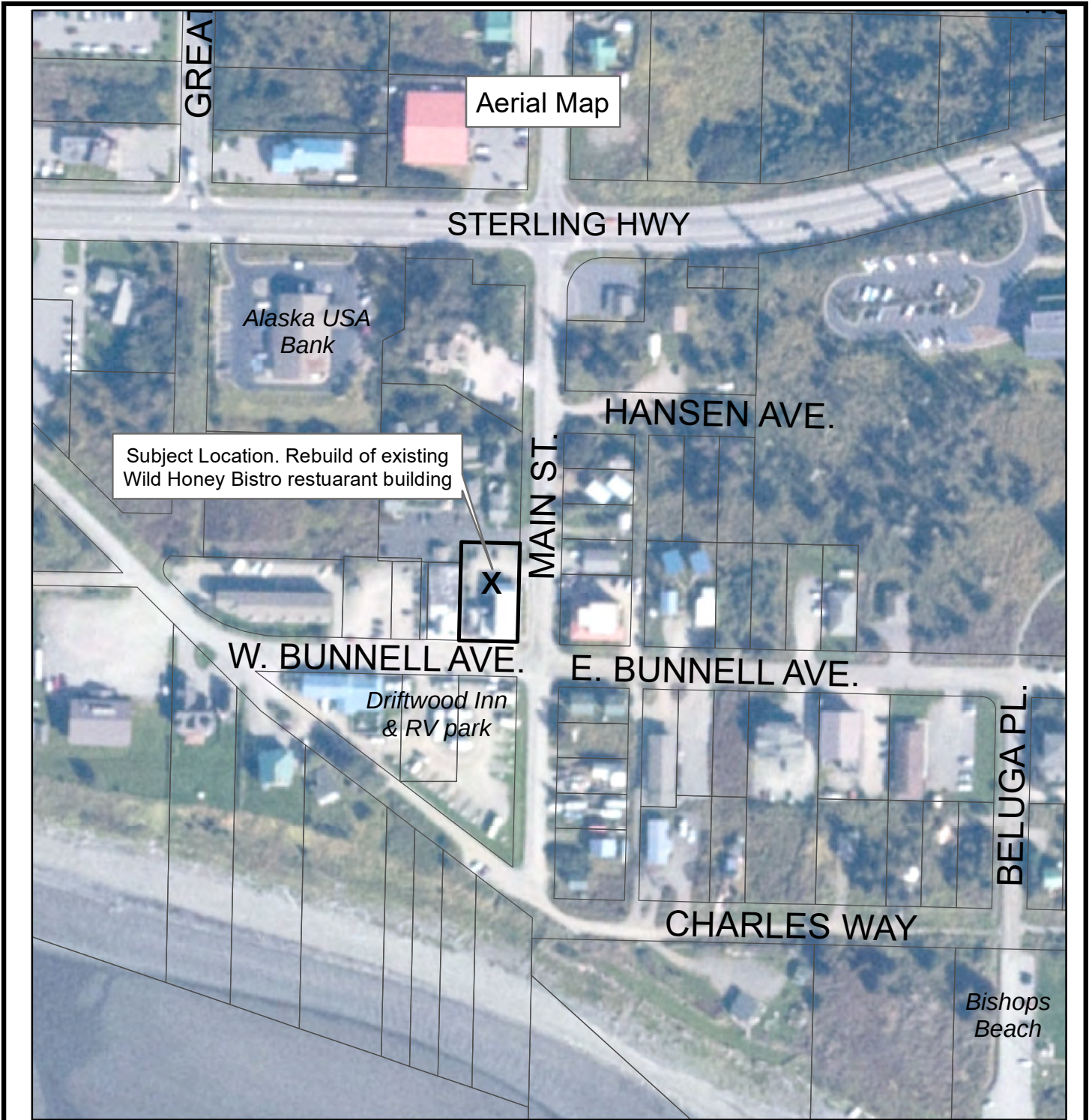


|            |                    |
|------------|--------------------|
| JOB No.    | 5225               |
| DATE       | 09/14/2020         |
| SCALE      | 1" = 15'           |
| ADDRESS:   | 106 W. BUNNELL AVE |
| DRAWING    | 5225_5138_5169     |
| TAX PARCEL | 17516052           |
| PLAT No.  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



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



# City of Homer

[www.cityofhomer-ak.gov](http://www.cityofhomer-ak.gov)

## Planning

491 East Pioneer Avenue  
Homer, Alaska 99603

[Planning@ci.homer.ak.us](mailto: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

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## Planning

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Homer, Alaska 99603

[Planning@ci.homer.ak.us](mailto:Planning@ci.homer.ak.us)

(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

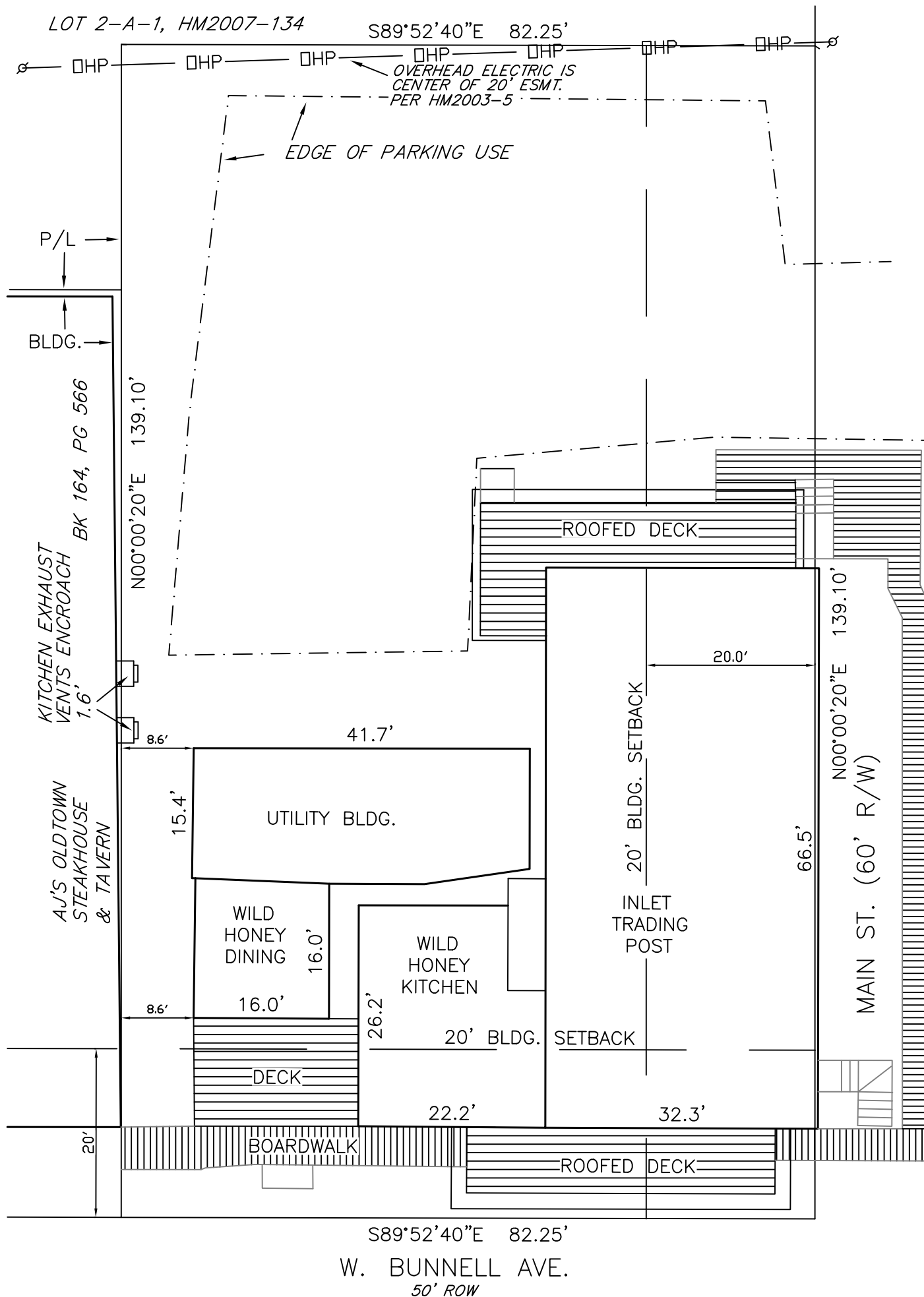
Contract purchaser

Applicant signature: \_\_\_\_\_

Date: 8/26/20

Property Owner's signature: \_\_\_\_\_

Date: 9/14/20



|            |                    |
|------------|--------------------|
| JOB No.    | 5225               |
| DATE       | 08/26/2020         |
| 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)           |

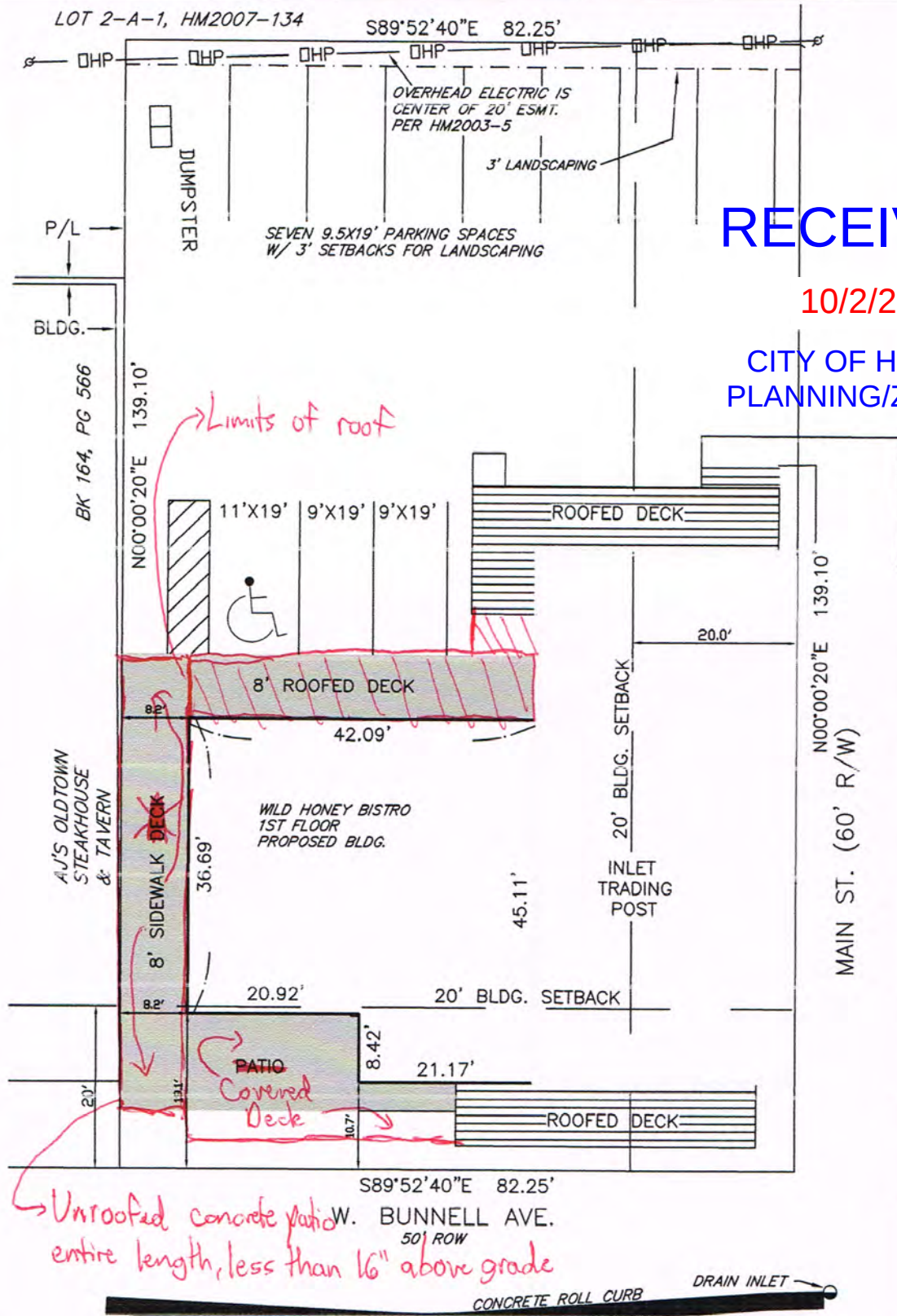
**AS-BUILT EXHIBIT**

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**

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



RECEIVED

10/2/2020

CITY OF HOMER  
PLANNING/ZONING



|            |                    |
|------------|--------------------|
| JOB No.    | 5225               |
| DATE       | 09/14/2020         |
| SCALE      | 1" = 15'           |
| ADDRESS:   | 106 W. BUNNELL AVE |
| DRAWING    | 5225_5138_5169     |
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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 than 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 appeal 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](mailto:matt@bcihomer.com)



**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 its 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](mailto: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, Qu yana, Thank you! We are committed to resisting colonialism by partnering with Indigenous artists and supporting Indigenous-led practices

<sup>[1][1][1]</sup><sub>[SEP][SEP]</sub> 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 permissible" 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

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

### ***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](http://www.cityofhomer-ak.gov)

### Planning

491 East Pioneer Avenue  
Homer, Alaska 99603

[Planning@ci.homer.ak.us](mailto: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

Frank Griswold  
519 Klondike Ave  
Homer, AK 99603

Michael Gatti  
Jermain, Dunnagan & Owens  
3000 A Street, Suite 300  
Anchorage, AK 99503

Rob Dumouchel  
491 E Pioneer Ave  
Homer, AK 99603

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."<sup>1</sup> "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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<sup>1</sup> *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 used 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]<sup>2</sup> 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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<sup>2</sup> 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.<sup>3</sup> 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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<sup>3</sup> 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

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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 with 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*

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**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(1<sup>st</sup>) 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

Appellant's Opening Brief Re: CUP 20-15/Page 49

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.

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EXHIBIT 1

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.

Reid 05-10/01  
12:10  
1

## PERKINS COIE LLP

1029 WEST THIRD AVENUE, SUITE 300 • ANCHORAGE, ALASKA 99501-1970  
TELEPHONE: 907 279-8561 • FACSIMILE: 907 276-3108

GORDON I. TAYLOR  
TAYLOR@PERKINS-COIE.COM

Curl: sent to  
4 RELEASED 4/10/98

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

[13126-0300/AA030230.000]

EXHIBIT 2

Alan Parks  
April 3, 1998  
Page 3

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<sup>1</sup> 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." <sup>1</sup> 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. <sup>1</sup> 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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<sup>1</sup> *Barber v. Municipality of Anchorage*, 775 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.")

Alan Parks  
April 3, 1998  
Page 4

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. 565, 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 *Chrismson v. Guildford 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]

Alan Parks  
April 3, 1998  
Page 6

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, ~~changing~~ 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.<sup>1</sup> 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

<sup>1</sup> 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.

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 8<sup>th</sup> day of January, 2021.

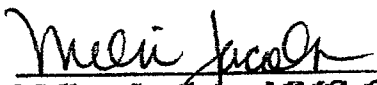
City of Homer Planning Department

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



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

**CITY CLERK'S OFFICE  
CITY OF HOMER  
491 E. PIONEER AVE  
HOMER, AK 99603  
PH. 907-235-3130  
FAX 907-235-3143  
clerk@cityofhomer-ak.**

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.

- |                                                                                                                                                                           |                                                                                                                                                                                                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> <b>ADVISORY PLANNING COMMISSION</b><br>1ST & 3RD WEDNESDAY OF THE MONTH AT 6:30 PM<br>WORKSESSION PRIOR TO EACH MEETING AT 5:30 PM               | <input type="checkbox"/> <b>ECONOMIC DEVELOPMENT ADVISORY COMMISSION</b><br>2ND TUESDAY OF THE MONTH AT 6:00 PM                                                                                |
| <input type="checkbox"/> <b>PARKS ART RECREATION &amp; CULTURE ADVISORY COMMISSION</b><br>3RD THURSDAY OF THE MONTH AT 5:30 PM<br>NO MEETINGS IN JANUARY, JULY & DECEMBER | <input type="checkbox"/> <b>CITY COUNCIL</b><br>2ND & 4TH MONDAY OF THE MONTH<br>SPECIAL MEETINGS & WORKSESSIONS AT 4:00 PM<br>COMMITTEE OF THE WHOLE AT 5:00 PM<br>REGULAR MEETING AT 6:00 PM |
| <input type="checkbox"/> <b>PORT &amp; HARBOR ADVISORY COMMISSION</b><br>4th WEDNESDAY OF THE MONTH<br>OCT-APRIL AT 5:00 PM<br>MAY - SEPT AT 6:00 PM                      | <input type="checkbox"/> <b>LIBRARY ADVISORY BOARD</b><br>1ST TUESDAY OF THE MONTH AT 5:30 PM<br>NO MEETINGS IN JANUARY, JUNE AND JULY                                                         |
| <input type="checkbox"/>                                                                                                                                                  | <input type="checkbox"/> <b>OTHER - PLEASE INDICATE</b><br>_____                                                                                                                               |
| <input type="checkbox"/>                                                                                                                                                  |                                                                                                                                                                                                |

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.

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

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

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

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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:

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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:

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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](mailto:mgatti@jdolaw.com)  
[mholmquist@jdolaw.com](mailto:mholmquist@jdolaw.com)

Attorneys for City of Homer

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

In the Matter of

CONDITIONAL USE PERMIT 2020-15

)  
)  
)  
)  
)

On appeal from Planning  
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

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

{01099632}

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.<sup>1</sup> 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:

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<sup>1</sup> 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 *Haggbloom 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).

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.

### **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

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.

## **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

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.

## **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.

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

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.”

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. *Haggbloom*, 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.” *Haggbloom*, 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

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

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.

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

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.

Decision

Griswold v. Homer Advisory Planning Commission, et al., Case No. 3HO-18-00240CI

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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.<sup>1</sup> The application is reviewed, and if complete, the application is set to be heard in a public hearing in front of the Commission.<sup>2</sup> Following the hearing, the Commission must issue a decision containing its written findings and reasoning supporting the decision.<sup>3</sup>

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.<sup>4</sup> The appeal may be heard by either the Board of Adjustment or a hearing officer appointed by the City Manager.<sup>5</sup>

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.<sup>6</sup> After briefing, an appeal hearing is held, and a decision is issued.<sup>7</sup>

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<sup>1</sup> HCC 21.71.020.

<sup>2</sup> HCC 21.71.030, HCC 21.050(a).

<sup>3</sup> HCC 21.71.050(b).

<sup>4</sup> HCC 21.93.030(a), HCC 21.92.500(a).

<sup>5</sup> HCC 21.93.030, HCC 21.93.500(a).

<sup>6</sup> HCC 21.93.510(a).

<sup>7</sup> 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.<sup>8</sup>

**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."<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

**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:

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<sup>8</sup> HCC 21.91.130.

<sup>9</sup> HC 21.18.040(b)(1).

<sup>10</sup> Administrative Record (AR) 26,27,32.

<sup>11</sup> AR 16-33

<sup>12</sup> 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."<sup>13</sup>

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

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<sup>13</sup> AR 10-15.

improvements that we expect to see. We do not have a problem with the proposed frontage.<sup>14</sup>

The City Planner and the Reynolds spoke in support of the application of the application at the public hearing.<sup>15</sup> 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.”<sup>16</sup>

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.”<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> The meeting lasted just over an hour and included several other agenda items.<sup>20</sup> The Commission issued their written decision on March 22, 2018.<sup>21</sup>

#### **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

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<sup>14</sup> AR 37, *see also* Arial Map, AR 36.

<sup>15</sup> AR 37.

<sup>16</sup> AR 49.

<sup>17</sup> AR 37, 59.

<sup>18</sup> AR 42-48.

<sup>19</sup> AR 52.

<sup>20</sup> AR 9, 58-59.

<sup>21</sup> AR 53.

the Homer Board of Adjustment.<sup>22</sup> 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.<sup>23</sup>

The substantial evidence standard applies to questions of fact.<sup>24</sup> "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."<sup>25</sup> Substantial evidence is what a "reasonable mind might accept as adequate to support a conclusion."<sup>26</sup>

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

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<sup>22</sup> AR 4.

<sup>23</sup> *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).

<sup>24</sup> *Rubey*, 217 P.3d at 415.

<sup>25</sup> *Griswold v. City of Homer*, 55 P.3d 64, 67 (Alaska 2002).

<sup>26</sup> *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.”<sup>27</sup> This standard requires the court to give “deference to the agency’s interpretation so long as it is reasonable.”<sup>28</sup>

The substitution of judgment standard applies to questions of law that do not implicate agency expertise “or the formation of fundamental policies.”<sup>29</sup> 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.”<sup>30</sup>

The reasonable and not arbitrary standard applies to claims that legislative enactments violate substantial due process.<sup>31</sup>

#### IV. DISCUSSION

Mr. Griswold raised 18 points on appeal from Judge Pederson’s administrative decision.<sup>32</sup> Only those points substantively raised in the briefing are addressed; the rest are considered waived.<sup>33</sup>

##### 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

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<sup>27</sup> *Marathon Oil Co. v. State, Dep’t of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

<sup>28</sup> *Id.*

<sup>29</sup> *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 254 (Alaska 2000).

<sup>30</sup> *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

<sup>31</sup> *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).

<sup>32</sup> Statement of Points on Appeal, September 10, 2018.

<sup>33</sup> *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.”<sup>34</sup> 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.”<sup>35</sup> “It may be said that a variance grants permission to engage in a use that an appropriate legislative authority has otherwise proscribed.”<sup>36</sup>

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).<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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<sup>34</sup> Appellant’s Brief (AB) 4.

<sup>35</sup> *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).

<sup>36</sup> C.J.S. Zoning and Land Planning § 305 Variance Defined.

<sup>37</sup> See C.J.S. Zoning and Planning § 304 Use and Area Variances Distinguished.

<sup>38</sup> *Id.*

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

HCC 21.18.040 (b)(1) sets the standard setback in the CBD at 20 feet from all dedicated rights-of-way.<sup>43</sup> HCC 21.18.040(b)(4) specifically permits the setback to be reduced by a conditional use permit.<sup>44</sup> 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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<sup>40</sup> AB 4-10,

<sup>41</sup> 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](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](https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/advisory_planning_commission/meeting/packets/33181/packet_reduced.pdf) (last visited Oct. 15, 2019).

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

<sup>43</sup> HCC 21.18.040(b)(1).

<sup>44</sup> HCC 21.18.040(b)(4).

measures to further the goal of the plan.<sup>45</sup> 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.<sup>46</sup> 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).<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup>

- 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.

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<sup>45</sup> See AS 29.40.040.

<sup>46</sup> *Id.*

<sup>47</sup> See AS 29.40.040.

<sup>48</sup> HCC 21.18.040.

<sup>49</sup> 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.”<sup>50</sup>

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.”<sup>51</sup>

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<sup>50</sup> *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).

<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> “Substantial due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose.”<sup>55</sup>

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.<sup>56</sup>

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<sup>52</sup> AB 15-16; HCC 21.71.010(c); HCC 21.71.040(a).

<sup>53</sup> AR 14.

<sup>54</sup> AR 15

<sup>55</sup> *Concerned Citizens of S. Kenai Peninsula*, 527 P.2d at 452. *Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996).

<sup>56</sup> 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](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)."<sup>57</sup> 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.<sup>58</sup> The Commission's decision did not explicitly require such screening as a condition of approval, and Mr. Griswold argues that this was error.<sup>59</sup>

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

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<sup>57</sup> AB 21.

<sup>58</sup> AR 14.

<sup>59</sup> AR 55-56.

conditions for approving the permit.<sup>60</sup> 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.”<sup>61</sup> Mr. Griswold adds that structures near the roadway prevent effective snow removal and drainage, and do not properly protect the public.<sup>62</sup> HCC 11.08.110 sets a minimum setback requirement of 20 feet to any property line abutting a road or right-of-way.<sup>63</sup>

“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.”<sup>64</sup> When two statutes conflict, “the more specific controls the general.”<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup>

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<sup>60</sup> HCC 21.90 “Administration and Enforcement.”

<sup>61</sup> AB 22.

<sup>62</sup> *Id.*

<sup>63</sup> HCC 11.08.110.

<sup>64</sup> *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 254 (Alaska 2000).

<sup>65</sup> *Allen v. Alaska Oil and Gas Conservation Com'n*, 147 P.3d 664, 668 (Alaska 2006).

<sup>66</sup> AR 50.

<sup>67</sup> AR 50.

<sup>68</sup> 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.<sup>69</sup> 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."<sup>70</sup>

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<sup>69</sup> 1979 WL 22915 (Alaska A.G. Sept. 11, 1979).

<sup>70</sup> 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.<sup>71</sup> 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."<sup>72</sup> 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

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<sup>71</sup> See AR 124-135, 159-162.

<sup>72</sup> AB 12.

*the whole record.*”<sup>73</sup> 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.<sup>74</sup>

The Commission specifically referenced the Staff Report, application, and the public hearing in drafting its Decision.<sup>75</sup> 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.<sup>76</sup> 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.”<sup>77</sup> Functionally, Mr. Griswold asserts that the Commission did not give

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<sup>73</sup> *Anderson v. Employers Liab. Assur. Corp.*, 498 P.2d 288, 289–90 (Alaska 1972) (emphasis added).

<sup>74</sup> *See Brown v. Personnel Bd. For City of Kenai*, 327 P.3d 871, 876 (Alaska 2014).

<sup>75</sup> AR 53.

<sup>76</sup> *Id.*

<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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

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<sup>78</sup> AR 19-24.

<sup>79</sup> AR 59.

<sup>80</sup> *Id.*

finding that the proposal is compatible with the purpose of the zoning district per HCC 21.71.030(b).”<sup>81</sup>

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.”<sup>82</sup>

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.<sup>83</sup> A neighboring business operator also registered her support via email before the meeting.<sup>84</sup> 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

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<sup>81</sup> AR 16.

<sup>82</sup> HCC 21.18.010.

<sup>83</sup> AR 49-52.

<sup>84</sup> AR 37.

21.71.030(f) and failed to identify what effects were considered and whether they were desirable or undesirable.”<sup>85</sup>

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.<sup>86</sup> However, multiple other Homer citizens testified to exactly the opposite, including the belief that “walkability and friendliness” would be improved by the awning.<sup>87</sup>

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.<sup>88</sup> 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).<sup>89</sup> 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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<sup>85</sup> AB 17.

<sup>86</sup> *Id.*

<sup>87</sup> AR 51.

<sup>88</sup> AR 59.

<sup>89</sup> 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.<sup>90</sup> Mr. Griswold cites to several of the goals set out in Homer's Comprehensive Plan, which emphasize low density development "particularly in residential areas."<sup>91</sup> 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.<sup>92</sup> 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."<sup>93</sup> 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.<sup>94</sup> The Manual applies to the CBD, and states that "quality design is more important than strict

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<sup>90</sup> 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](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).

<sup>91</sup> AB 19.

<sup>92</sup> Comprehensive Plan at 4 – 8, AR 19.

<sup>93</sup> AB 19.

<sup>94</sup> Community Design Manual I, <https://www.cityofhomer-ak.gov/planning/community-design-manual> (last visited Oct. 15, 2019).

conformance.”<sup>95</sup> The Commission is only required to review applicable provisions of the Manual when reviewing a CUP.<sup>96</sup> 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.<sup>97</sup>

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”<sup>98</sup> After hearing the testimony at the meeting and asking a few clarifying questions, the Commission unanimously adopted the finding.<sup>99</sup>

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

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<sup>95</sup> *Id.* at 3.

<sup>96</sup> HCC 21.72.030(j).

<sup>97</sup> AB at 21

<sup>98</sup> AR at 61.

<sup>99</sup> *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.”<sup>100</sup>

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.

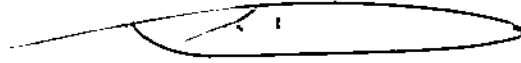
For all of the above reasons, in addition to any reasoning the court may have missed in ALJ Peterson’s decision, which is adopted by reference here, the decision of

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<sup>100</sup> *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 17<sup>th</sup> day of October, 2019, at Kenai, Alaska



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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.

Case No. 3HO-14-00243CI

HOMER BOARD OF ADJUSTMENT,  
JOHN SMITH, NORMA SMITH,  
TERRY YAGER, JONNIE YAGER,  
and RICK ABBODD,

Appellees.

**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<sup>1</sup> and his wife Norma Smith live in Homer, where they own and run a small hotel called the Windjammer Suites.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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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<sup>1</sup> 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).

<sup>2</sup> The hotel's name has since changed to the "Seafarer Suites."

<sup>3</sup> (R. at 9–23.)

<sup>4</sup> (*Id.*)

findings and analysis in Staff Report 14-33.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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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<sup>5</sup> (R. at 3–8.)

<sup>6</sup> (*Id.*)

<sup>7</sup> (R. at 7.)

<sup>8</sup> (R. at 39–40, 46–48.)

<sup>9</sup> (R. at 39.)

<sup>10</sup> (*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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> After reconvening, the commissioners decided to follow the city attorney's legal guidance.<sup>15</sup> They held a vote and unanimously approved Mr. Yager's Conditional Use Permit application and issued the Conditional Use Permit.<sup>16</sup> The Planning Commission adopted the staff report's

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<sup>11</sup> (R. at 39–40.)

<sup>12</sup> (R. at 25–26.)

<sup>13</sup> (R. at 38.)

<sup>14</sup> (R. at 40.)

<sup>15</sup> (*Id.*)

<sup>16</sup> (*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.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup>

The superior court affirmed the Board's determination.<sup>20</sup> 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.<sup>21</sup>

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).<sup>22</sup> The ALJ took briefing and heard oral arguments, and on September 9, 2019, issued a decision affirming the Planning Commission's permit grant.<sup>23</sup>

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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<sup>17</sup> (R. at 40–45.)

<sup>18</sup> (R. at 162–208.)

<sup>19</sup> (R. at 209–23.)

<sup>20</sup> *Griswold v. Homer Bd. of Adjustment*, No. 3HO-14-00243CI (Alaska Super. Ct. Jan. 22, 2016).

<sup>21</sup> (R. at 232–36.) *See generally* *Griswold v. Homer Bd. of Adjustment*, 440 P.3d 248 (Alaska 2019).

<sup>22</sup> (R. at 241.)

<sup>23</sup> (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.<sup>24</sup> 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.<sup>25</sup> *Pro se* appellants are not exempt from this rule, but are held to a "less demanding" form of it.<sup>26</sup> 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."<sup>27</sup> This test applies regardless of whether the lower proceeding was an administrative appeal or a trial.<sup>28</sup> Points #1,<sup>29</sup> #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.<sup>30</sup> This rule applies to *pro se* appellants, too, just not as strictly as to

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<sup>24</sup> (Appellant's Statement of Points on Appeal \*1–7.)

<sup>25</sup> *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)).

<sup>26</sup> *Thoeni v. Consumer Elec. Servs.*, 151 P.3d 1249, 1257 (Alaska 2007).

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

<sup>28</sup> *See id.*

<sup>29</sup> 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.)

<sup>30</sup> *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.<sup>31</sup> *Pro se* appellants still “must cite authority and provide a legal theory” for each of their points on appeal to avoid waiving them,<sup>32</sup> 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.”<sup>33</sup> 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.<sup>34</sup>
- 2.) The Planning Commission erroneously found that the Conditional Use Permit’s proposed deck would be compatible with other buildings along Pioneer Avenue.<sup>35</sup>
- 3.) The Planning Commission erroneously found that granting the Conditional Use Permit would not cause an undue harmful effect on the neighborhood’s character.<sup>36</sup>
- 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.<sup>37</sup>
- 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.<sup>38</sup>

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<sup>31</sup> *Wright*, 390 P.3d at 1175.

<sup>32</sup> *Id.* (quoting *Casciola v. F.S. Air Serv., Inc.*, 120 P.3d 1059, 1063 (Alaska 2005)).

<sup>33</sup> *Id.* (quoting *Hagen v. Strobel*, 353 P.3d 799, 805 (Alaska 2015)).

<sup>34</sup> (Statement of Points on Appeal ¶ 18.)

<sup>35</sup> (Statement of Points on Appeal ¶ 20.)

<sup>36</sup> (Statement of Points on Appeal ¶ 21.)

<sup>37</sup> (Statement of Points on Appeal ¶ 24.)

<sup>38</sup> (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.<sup>39</sup>
- 7.) Homer City Code (HCC) 21.18.040(b)(4),<sup>40</sup> 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.<sup>41</sup>
- 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.<sup>42</sup>
- 9.) Mr. Yager's application failed to provide the Commission with sufficient evidence to enable meaningful review.<sup>43</sup>
- 10.) The Planning Commission erroneously did not conclude that the Conditional Use Permit needed to meet all relevant provisions of the Community Design Manual.<sup>44</sup>
- 11.) Mr. Yager's participation before the Planning Commission constituted the unauthorized practice of law.<sup>45</sup>
- 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.<sup>46</sup>
- 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.<sup>47</sup>

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<sup>39</sup> (Statement of Points on Appeal ¶ 3.)

<sup>40</sup> 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.

<sup>41</sup> (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.

<sup>42</sup> (Statement of Points on Appeal ¶ 8.)

<sup>43</sup> (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.

<sup>44</sup> (Statement of Points on Appeal ¶ 28.)

<sup>45</sup> (Statement of Points on Appeal ¶ 12.)

<sup>46</sup> (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.<sup>48</sup>

## **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,"<sup>49</sup> 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.<sup>50</sup>

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<sup>47</sup> (Statement of Points on Appeal ¶ 13.)

<sup>48</sup> (Statement of Points on Appeal ¶ 27.)

<sup>49</sup> See also Appellate Rule 601(b) ("An appeal may be taken to the superior court . . . from a final decision of an administrative agency").

<sup>50</sup> *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.”<sup>51</sup>

#### *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.”<sup>52</sup> 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.”<sup>53</sup>

#### *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.”<sup>54</sup> This standard is especially deferential when the agency is a zoning board: “Zoning board interpretations of zoning

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<sup>51</sup> *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)).

<sup>52</sup> *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978).

<sup>53</sup> *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)).

<sup>54</sup> *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.’”<sup>55</sup>

### *C. Questions of Law Not Involving Agency Expertise*

Points #11–#14<sup>56</sup> 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,”<sup>57</sup> but still “[gives] some weight to what the agency has done, especially where the agency interpretation is longstanding.”<sup>58</sup>

## **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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<sup>55</sup> *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’”).

<sup>56</sup> 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).

<sup>57</sup> *Tesoro Alaska*, 746 P.2d at 903.

<sup>58</sup> *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.<sup>59</sup>

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."<sup>60</sup> 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.<sup>61</sup>

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."<sup>62</sup>

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.<sup>63</sup>

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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<sup>59</sup> HCC 21.71.030(c).

<sup>60</sup> (R. at 42.)

<sup>61</sup> (Appellant's Br. 32.)

<sup>62</sup> *Miller*, 577 P.2d at 1046.

<sup>63</sup> *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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup>

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.”<sup>67</sup>

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<sup>64</sup> HCC 21.71.030(d).

<sup>65</sup> (R. at 42–43.)

<sup>66</sup> *Miller*, 577 P.2d at 1046.

<sup>67</sup> (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.<sup>68</sup> 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

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<sup>68</sup> *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.”<sup>69</sup>

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.<sup>70</sup>

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.<sup>71</sup>

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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<sup>69</sup> 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.”

<sup>70</sup> (R. at 43.)

<sup>71</sup> (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.<sup>72</sup> 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.'"<sup>73</sup> 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."<sup>74</sup> 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.<sup>75</sup> 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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<sup>72</sup> *Pub. Safety Emps. Ass'n*, 420 P.3d at 1248 (emphasis in original).

<sup>73</sup> (R. at 297.)

<sup>74</sup> (Appellant's Br. at 36.)

<sup>75</sup> *Pub. Safety Emps. Ass'n*, 420 P.3d at 1248.

Avenue satisfies the review criteria . . . .”<sup>76</sup> 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.”<sup>77</sup> 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.”<sup>78</sup>

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.<sup>79</sup>

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

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<sup>76</sup> (R. at 42.)

<sup>77</sup> *Griswold*, 55 P.3d at 67–68.

<sup>78</sup> (R. at 43.); HCC 21.71.030(h).

<sup>79</sup> (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.<sup>80</sup>

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.<sup>81</sup> They are therefore waived, and it would be "inappropriate" for the court to consider them.<sup>82</sup>

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.<sup>83</sup>

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."<sup>84</sup> 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

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<sup>80</sup> *Pub. Safety Emps. Ass'n*, 420 P.3d at 1248 (emphasis in original).

<sup>81</sup> *See* (R. at 267–90.)

<sup>82</sup> *West*, 467 P.3d at 1071–72 & n.36.

<sup>83</sup> *See* HCC 21.71.030(j).

<sup>84</sup> (R. at 43.)

found in the Town Center Plan.”<sup>85</sup> The Planning Commission adopted these findings in its decision.<sup>86</sup>

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.<sup>87</sup>

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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<sup>85</sup> (R. at 6.)

<sup>86</sup> (R. at 43.)

<sup>87</sup> (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.<sup>88</sup>

*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

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<sup>88</sup> *Pub. Safety Emps. Ass'n*, 420 P.3d at 1248 (emphasis in original).

in the CBD.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup> For the purposes of requirement (3), a final decision that is under appeal continues to exert preclusive effect until it is actually reversed.<sup>93</sup>

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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<sup>89</sup> *Griswold v. Homer Advisory Planning Comm'n*, No. 3HO-18-00240CI (Alaska Super. Ct. Oct. 17, 2019), included as (Appellee's Ex. 1.)

<sup>90</sup> (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.

<sup>91</sup> *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)).

<sup>92</sup> *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)).

<sup>93</sup> *Id.* at 951–52.

Superior Court has yet been issued.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup> For the same reasons described above, Mr. Griswold is collaterally estopped from litigating it here. Accordingly, the

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<sup>94</sup> *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.

<sup>95</sup> (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).

<sup>96</sup> (Appellant's Br. 6–8.)

<sup>97</sup> (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.<sup>98</sup>

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.<sup>99</sup>

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."<sup>100</sup> 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

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<sup>98</sup> (Appellant's Br. 22–23.)

<sup>99</sup> (*Id.*)

<sup>100</sup> 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."<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup>

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."<sup>104</sup> 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.<sup>105</sup> The staff report evaluated not only Mr. Yager's application form, but also the surveys, maps, drawings, and aerial photographs he provided.<sup>106</sup> 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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<sup>101</sup> HCC 21.71.030 (flush language).

<sup>102</sup> (Appellant's Br. 25–28.)

<sup>103</sup> (*Id.*)

<sup>104</sup> (Appellant's Br. 25.)

<sup>105</sup> (R. at 41–45.)

<sup>106</sup> (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."<sup>107</sup> 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.<sup>108</sup>

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

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<sup>107</sup> HCC 21.71.030(j).

<sup>108</sup> (Appellant's Br. 41–42.)

Community Design Manual criteria applicable to his application.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup>

*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

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<sup>109</sup> (R. at 6–7.)

<sup>110</sup> (*Id.*)

<sup>111</sup> (R. at 40.)

<sup>112</sup> (Appellant’s Br. 41.)

<sup>113</sup> (*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.”<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> 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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<sup>114</sup> (Appellant’s Br. 17).

<sup>115</sup> Bar Rule 63; *see also* AS § 08.08.230(a).

<sup>116</sup> (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.”<sup>117</sup> The CUP application for the Windjammer Suites lists Mr. Yager as the applicant,<sup>118</sup> and Mr. Smith signed it as the property’s owner.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> 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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<sup>117</sup> HCC 21.71.020(a)(9).

<sup>118</sup> (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.

<sup>119</sup> (R. at 12.)

<sup>120</sup> (Appellant’s Br. 19–21.)

<sup>121</sup> (Appellee’s Ex. 1.)

and/or bias in favor of Mr. Yager.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> The other members may question the city official on facts relevant to the potentially conflicting interest.<sup>125</sup> The city official may recuse himself or herself directly.<sup>126</sup> 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.<sup>127</sup>

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."<sup>128</sup> Because an Alaska superior court only has appellate jurisdiction over administrative agency matters "when appeal is provided by law,"<sup>129</sup> 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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<sup>122</sup> (Appellant's Br. 45–50.)

<sup>123</sup> HCC 1.18.030(b).

<sup>124</sup> HCC 1.18.045(a).

<sup>125</sup> *Id.*

<sup>126</sup> HCC 1.18.045(c).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> 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.<sup>130</sup> But Mr. Griswold's arguments in his administrative appeal below dealt solely with conflicts of interest.<sup>131</sup> 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.<sup>132</sup> 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,<sup>133</sup> even though the Alaska Supreme Court has recognized Mr. Griswold as a "frequent litigant in matters of land use and zoning."<sup>134</sup>

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.'" <sup>135</sup> 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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<sup>130</sup> *E.g.*, HCC 1.18.048.

<sup>131</sup> (R. at 288–90.)

<sup>132</sup> (Appellant's Br. 40–41.) *See also* (Appellant's Statement of Points on Appeal ¶ 27.)

<sup>133</sup> *E.g.*, *Robinson v. Alaska Housing Fin. Corp.*, 442 P.3d 763, 768 (Alaska 2019).

<sup>134</sup> *Griswold v. City of Homer*, 252 P.3d 1020, 1023 (Alaska 2011).

<sup>135</sup> (Appellant's Br. 40–41 (quoting R. at 327.))

Comprehensive Plan.”<sup>136</sup> Thus, he argues, the ALJ should not have upheld the Planning Commission’s determination.<sup>137</sup>

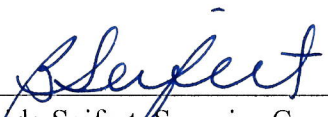
Mr. Griswold’s characterization of the Code as placing a burden upon a CUP applicant to provide specific evidence of his or her proposal’s compliance with applicable provisions of the Comprehensive Plan is incorrect. The Code requires CUP applicants to “produce evidence sufficient to enable meaningful review of the application.”<sup>138</sup> 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.<sup>139</sup>

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.”<sup>140</sup> Because this was a finding of fact, the ALJ applied the correct standard of review,<sup>141</sup> 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

<sup>136</sup> (Appellant’s Br. 41.)

<sup>137</sup> (*Id.*)

<sup>138</sup> HCC 21.71.030 (flush language).

<sup>139</sup> *Id.*

<sup>140</sup> (R. at 327.)

<sup>141</sup> *E.g., Handley*, 838 P.2d at 1233.

I certify that on 12-14-2020  
a copy of this document was sent to  
☒ Attorney(s) of record  
☒ Other Griswold  
at address of record  
By   
Deputy Clerk

## 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

Appellant's Reply Brief Re: CUP 20-15/Page 5

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: "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." 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 conclusively 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

Appellant's Reply Brief Re: CUP 20-15/Page 16

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.<sup>1</sup> 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

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<sup>1</sup> 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**

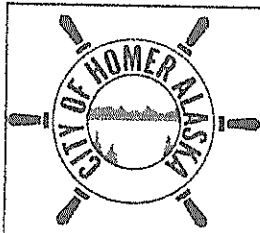
Friends, either you're closing your eyes to a situation you do not wish to acknowledge or you are not aware of the caliber of disaster indicated by the presence of arbitrary zoning in your community. It takes judgment, brains, and maturity to zone in the CBD. I say that any boob can take and approve 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!<sup>2</sup>

**DATED: February 1, 2021.**

By: Frank Griswold  
Frank Griswold

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<sup>2</sup> Apologies to The Music Man.



**City of Homer**

[www.cityofhomer.ak.gov](http://www.cityofhomer.ak.gov)

**Planning**

491 East Pioneer Avenue  
Homer, Alaska 99603

[Planning@ci.homer.ak.us](mailto:Planning@ci.homer.ak.us)

(p) 907-235-3106

(f) 907-235-3118

**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.

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Date

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Chair, Scott Smith

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Date

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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

Applicant:

Adam Barrowcliff  
PO Box 595  
Anchor Point, AK 99556

Michael Gatti  
Jermain, Dunnagan & Owens  
3000 A Street, Suite 300  
Anchorage, AK 99503

Rick Abboud, Interim City Manager  
491 E Pioneer Avenue  
Homer, AK 99603

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](mailto:mgatti@jdolaw.com)  
[mholmquist@jdolaw.com](mailto:mholmquist@jdolaw.com)

Attorneys for City of Homer

BEFORE THE HOMER BOARD OF ADJUSTMENT

In the Matter of

|                                |   |                         |
|--------------------------------|---|-------------------------|
|                                | ) |                         |
|                                | ) |                         |
| CONDITIONAL USE PERMIT 2020-15 | ) | On appeal from Planning |
|                                | ) | 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

Inlet Trading Post and the Wild Honey Bistro are currently part of a single structure.<sup>1</sup> [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<sup>2</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> 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<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup> 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

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<sup>4</sup> 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 (5<sup>th</sup> 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.

#### **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<sup>5</sup> or conditionally permitted<sup>6</sup> 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

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<sup>5</sup> See HCC 21.18.020.

<sup>6</sup> 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.<sup>7</sup> 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

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<sup>7</sup> 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<sup>8</sup> 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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<sup>8</sup> Griswold does not identify the non-conforming properties to which he is referring.

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prohibiting such uses.”<sup>9</sup> 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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<sup>9</sup> Griswold’s Opening Brief, p. 26.

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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.

[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,”<sup>10</sup> 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

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<sup>10</sup> *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.”<sup>11</sup> [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.”<sup>12</sup> [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.<sup>13</sup> [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

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<sup>11</sup> The “permitting process” refers to the zoning permit process under HCC 21.70, not the CUP procedure under HCC 21.71.

<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup> 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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<sup>14</sup> Griswold’s Opening Brief, p. 29-30.

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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.<sup>15</sup> Griswold's argument regarding HCC 21.61.040 is addressed in the City's Opening Brief<sup>16</sup> and his argument regarding HCC 21.18.030(j) is addressed above.<sup>17</sup>

**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

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<sup>15</sup> *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).

<sup>16</sup> City of Homer's Opening Brief, p. 15.

<sup>17</sup> *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”<sup>18</sup> is irrelevant to this appeal. The City Council adopted the Comprehensive Plan by ordinance<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> The BOA is not required to guess at the substance of Griswold’s argument – rather, this conclusory and inadequately briefed argument is waived.<sup>22</sup>

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<sup>18</sup> Griswold’s Opening Brief, p. 33.

<sup>19</sup> See Homer Ordinance 18-47.

<sup>20</sup> 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.

<sup>21</sup> Griswold’s Opening Brief, p. 36-39.

<sup>22</sup> *Supra*, n. 13.

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## **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.<sup>23</sup> The Commission has the authority to waive specific CDM requirements and states prominently that “quality design is more important than strict conformance.”<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> Accordingly, that argument is waived.<sup>27</sup>

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<sup>23</sup> Community Design Manual for the City of Homer, p. 1, 3, <https://www.cityofhomer-ak.gov/planning/community-design-manual>.

<sup>24</sup> *Id.*, p. 3.

<sup>25</sup> HCC 21.71.030(j).

<sup>26</sup> Griswold’s Opening Brief, p. 41-42.

<sup>27</sup> *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.<sup>28</sup> 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.<sup>29</sup> 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.

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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<sup>28</sup> 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.

<sup>29</sup> HCP is a department of the City.

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