

Session 21-05 a Special Meeting of the Homer City Council sitting as Board of Adjustment was called to order on February 11, 2021 by Mayor Ken Castner at 4:00 p.m. at the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska, and opened with the Pledge of Allegiance.

PRESENT: COUNCILMEMBER ADERHOLD, EVENSEN, HANSEN-CAVASOS, LORD, SMITH, VENUTI

STAFF: CITY CLERK JACOBSEN
ATTORNEY BRANDT-ERICHSEN

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

APPROVED without discussion.

NEW BUSINESS

- a. Appeal to the Board of Adjustment of the Homer Advisory Planning Commission Decision of October 7, 2020 for Approval of Conditional Use Permit 20-15 Conditional Use Permit 2020-15 under HCC 21.18.040(b)(4) a building within the twenty foot building setback and HCC 21.18.040(d) building area in excess of 30 percent of the lot area on a lot in the central business district on Chamberlain & Watson No. 4, Lot 1-A and T 6S R 13W SEC 19 Seward Meridian HM 2011002 Inlet Trading Post Condominiums Unit 2, at 106 W. Bunnell Avenue, Homer, Alaska.

City Clerk Jacobsen identified the following people were in attendance:

- Frank Griswold - Appellant
- Attorney Max Holmquist – representing City as Appellee
- City Planner Rick Abboud
- Larry Slone

Mayor Castner opened the floor to address preliminary issues and asked if there were any conflict of interest to be disclosed.

Councilmember Venuti stated she has a conflict of interest.

LORD/ADERHOLD MOVED THAT COUNCILMEMBER VENUTI HAS A CONFLICT OF INTEREST.

Councilmember Venuti explained her husband has a working relationship with the applicant that meets the conditions of a substantial financial interest as outlined in city code.

VOTE: YES: ADERHOLD, EVENSEN, LORD, SMITH, HANSEN-CAVASOS

Motion carried.

Councilmember Venuti left the meeting.

Mayor Castner asked if there were any ex-parte communications to be disclosed.

No Councilmember had and ex-parte communications to disclose.

Mayor Castner asked if there were any other preliminary issues to be taken up.

Frank Griswold commented in addition to disclosures for conflict of interest, bias is also an issue so it's possible someone believes they are either partial or their ability to render an impartial decision is impaired that would be grounds for disqualification also.

Mayor Castner noted the comment and asked if anyone on the Board of Adjustment who feels they cannot fairly sit and provide an equitable passage of the arguments presented in the appeal. There were no responses.

Mr. Griswold raised issue regarding potential conflict of interest of the Homer City Attorneys Gatti and Holmquist. He thinks their representation role is ambiguous at best, prejudicial, and they're representing in this appeal is contrary to their prescribed duties which creates the conflict of interest.

Mayor Castner responded with the assurance that's why Attorney Brandt-Erichsen is sitting as separate counsel for the Board of Adjustment. It was recognized going into this that there's a duality of duty here and we wanted only to receive legal advice from someone who didn't have an advocacy position. He asked if Attorney Brandt-Erichsen had anything to add.

Attorney Brandt-Erichsen commented for the purposes of the Board of Adjustment hearing he's acting in the role of City Attorney as advisor to the Board of Adjustment and he has no connection with the law firm representing the City in this matter.

Mr. Griswold referenced the reply brief where the City Attorney state "the City is represented by Counsel in this appeal." They also state "the Commission has legal existence apart from the City so the City is the appropriate appellee in this case." Instead of representing the Commission, he thinks the City Attorney is representing the City Planner and Planning Department on the grounds Mr. Abboud actively and substantively participated in the Commissions consideration of Conditional Use Permit (CUP) 20-15. The City administration are not appropriate appellees because they aren't members of the Commission, they aren't aggrieved, and did not file an appeal or cross appeal. He explained how he sees the City Planner and City Administration constitute one entity, the Planning Commission is another entity, and the Homer City Council/Board of Adjustment is another entity as well. He cited Homer City Code regarding the establishment of the Planning Commission, noted they are a separate entity, and would have been a more appropriate appellee. He reviewed how the Borough, City, and Planning Commission derive their planning powers and reiterated the separate entities of the City in relation to this appeal.

Mayor Castner noted Mr. Griswold requested his appeal be heard by the Board of Adjustment and their legal opinions will come from an outside attorney and if it's an appealable event that the law firm has some conflict, that's something he can pursue, but not something for them to take up here.

Mr. Griswold raised an issue regarding notice to surrounding property owners being misleading and deficient. He believes this hearing needs to continue until the neighboring property owners are provided with a proper public notice. The January 26, 2021 notice to surrounding property owners doesn't include information regarding the specific issues under appeal and a complete statement that the complete proposal is available to review at an identified location. This is required by HCC 21.94.020 (b)(4).

There were brief comments from Mayor Castner and Attorney Brandt-Erichsen who noted Mr. Griswold had access to the information and there are no other parties involved so he doesn't see the connection.

Mr. Griswold clarified is argument that the surrounding property owners weren't provided provide proper notice.

City Clerk Jacobsen noted under 21.93.100 general appeals procedure there is a requirement to notify neighboring property owners of the time and place of the appeal hearing and that it's to be done in accordance with 21.94.030, not 21.94.020. She stated she did meet the requirements of 21.94.030.

Attorney Brandt-Erichsen concurred with the Clerk regarding notice. The notice 21.94.020 is for public hearings, and this is not a public hearing matter.

No further preliminary matters were raised and Mayor Castner moved on to oral arguments.

Mayor Castner reminded parties this is not a time to offer new evidence, per HCC 21.93.510 cases must be based on evidence in the record from the Planning Commission. He explained each side has 30 minutes and the appellant can split and reserve time for rebuttal.

Mr. Griswold argued he received notice 48 hours ago that he gets first notice of a 30 minute time limit. It also suggests it's debatable. It would have been helpful to know 15 days ago, this is prejudicial to him. He pointed out recently in one of his court hearings, the Homer Superior Court allocated 1 hour to each party for oral arguments involving a similar and complex zoning appeal. He feels one hour for each side is an appropriate amount of time for presenting oral argument and rebuttal here.

Attorney Holmquist commented he doesn't believe it will take 30 minutes from their perspective, but he's available as long as needed and defers to Board for the appropriate length of oral argument.

Mayor Castner asked how much time Mr. Griswold has received when doing this before the Board or a Hearing officer, because it's his understanding that 30 minutes is customary at this level.

Mr. Griswold responded to arbitrarily set a specific time, regardless of the complexity of the matter is irresponsible and it's been a long time since he's presented oral argument and thinks it has varied in the past. He could probably do it in 45 minutes if he cuts out rebuttal but shouldn't have to.

Mayor Castner explained he had looked to the Supreme Court and that's a 15 minute oral argument, so he thought they were doing well expanding to 30 minutes. Mayor Castner conceded to 45 minutes total, and opened the floor to Mr. Griswold to present his arguments and advised he could reserve time for rebuttal at the end.

Mr. Griswold's oral argument addressed the following points based on the City's reply brief-

1. The proposal does not comply with the applicable provisions of the Community Design Manual (CDM) as stated in Commission finding 11. No provision of Homer City Code provides that the Commission has the authority to waive specific CDM requirement in the course of considering an application for CUP. He cited HCC 21.71.030(j) clearly states the proposal will comply with all applicable provisions of the CDM. There is no evidence in the record that the Commission undertook any review of the CDM. HCC 21.71.050(b) directs the Commission shall within 45 days of the close of the public hearing, approve, approve with conditions, or disapprove the application. The Commission shall promptly issue written findings and reasons supporting its decision. The Commission voted to approve CUP 20-15 on the very day of the public hearing.
2. An additional CUP under HCC 21.18.030(j) is required. The reply brief addresses since the Inlet Trading Post and Wild Honey Bistro are part of a single shared structure, this proposal doesn't include two buildings containing a permitted principal use on the property. This contradicts staff report 20-63 that says it's the site of two buildings and the second building, Wild Honey Bistro consists of three separate structures connected by hallways. He reviewed status of non-conformity, city code relevant to the destruction of non-conforming structures, requirement to rebuild in conformity, and restrictions of expanding non-conforming uses or structures.
3. The Commission had no authority to reduce the number of required parking spaces as suggested in Staff Report 20-63. He reviewed required number of parking spaces and that the applicant said no reduction in parking spaces were being requested. He reviewed code citations related to parking, fence permits, variance procedures, also special conditions of approval for a CUP, and land uses and structures with potential adverse effects on surroundings.

4. The proposal is not compatible with the purpose of the central business district (CBD). Restaurants are allowed in the central business district (CBD) and don't require a CUP, but not those that involve 15 foot setback reductions or 47% lot coverage. Focusing on the restaurant use, which is permitted, but ignoring the deleterious effects of the 15 foot setback encroachment and 47% lot coverage defeats the purpose of the CUP review criteria. Setback reduction adversely effects traffic safety, aesthetics, rest, recreation, and neighborhood character and appearance.

5. The value of adjoining property would be negatively affected. Setback reduction adversely affects traffic safety, aesthetics, rest, recreation, and neighborhood character and appearance, so too does excessive lot coverage. Comparing any proposed use to non-existent railroad use, as in the appellees reply brief is ridiculous and sets such a low bar as to nullify the review standard.

6. The proposal is not compatible with the existing uses of the surrounding land. The proposed encroachment and lot coverage is not compatible, there are very few historic structures remaining in old town. Many neighboring structures are fairly new and comport with current zoning standards. The fact that the subject site has contained mixed use for decades is irrelevant since the subject site doesn't its own surrounding land. The surrounding properties contain single uses not mixed uses, and the single uses don't cover 40% of their lots or encroach 15 feet into their 20 foot setbacks. Old Town is part of the CBD and property owners are required to comply with CBD zoning regulations. Mr. Griswold cited HCC 21.18.040(b)(1) regarding building setbacks noting it constitutes established law, and noted where allowable exceptions are not guaranteed. He also cited HCC 21.18.040(d) regarding building area in excess of total lot area, also constitutes established law and noted where exceptions are allowable but not guaranteed. The application could have applied for a variance, but chose not to do so. Maintaining and expanding the non-conforming character of the Old Town neighborhood does not justify violating current CBD zoning requirements. Perpetuating and expanding them constitutes poor public policy and contradicts the purpose for creating them in the first place. HCC 21.71.050(b) required the Commission to issue written findings and reasons supporting its decision, not simply adopt the staff report.

7. Public services and facilities are not adequate to serve the proposed uses and structures. Mr. Griswold said he's not required to prove the applicant didn't obtain Fire Marshall Certification, the applicant's required to prove they did and they didn't state the status of it on the application. The applicant did not produce sufficient evidence to enable meaningful review of the application. The side yard setback on the western lot line to meet the requirements of HCC 21.18040(b)(4), condition 1, does nothing to alleviate the potential fire danger of having no separation between the proposed restaurant structure and Inlet Trading Post. Conditions 1,3, and 4 are superfluous and devious because they merely require compliance with existing code while giving the illusion special conditions were imposed, when they were not.

8. The proposal will cause harmful effect on neighborhood character. The CBD describes desirable uses not desirable neighborhood character, and it encourages pedestrian friendly

designs and amenities, not setback reduction and rampant overbuilding of lots. Replacing the existing porch and creating ADA access at the rear of the building can be done without encroaching 15 feet into the setback and without exceeding the 30% lot coverage requirement. Rather than address the effects of setback reduction and excessive lot coverage staff report 20-63 readdressed the restaurants alleged compatibility with the CBD purpose and Comprehensive Plan. The restaurants permitted use and its basic design may not cause harmful effect on neighborhood character but its 15 foot encroachment into the setback, 47% lot coverage, and lack of parking will. The record reflects the Planning staff and Commission disregarded harmony, scale, bulk, coverage, density, generation of traffic, parking issues, nature and intensity of the proposed use, and the effects of the setback reduction.

9. The proposal will be unduly detrimental to the health, safety, and welfare of the surrounding area, and to the City as a whole. If all applicable standards were met the proposal would presumably not be. But stating this as a finding does not address the review criteria. Fire Marshall review of the project is irrelevant because it didn't happen. Improving the safety and quality of the Wild Honey Bistro doesn't mean the proposal will not be unduly detrimental to the health, safety, and welfare of the surrounding area, or to the City as a whole. He pointed out to the Commission the reasons for setback and lot density restrictions were enacted to promote unduly detrimental to the health, safety, and general welfare, and that arbitrarily reducing those requirements is therefore detrimental. The Commission did not consider or discuss any of his public comments but simply ignored them. No evidence was presented to show the setback reduction and increased lot coverage would not be detrimental.

10. The mere approval of CUP 20-15 and a zoning permit does not ensure the proposal complies with the zoning code. The Planning departments allegedly expert analysis concluded the proposal would comply with the applicable provisions of the zoning code does not constitute substantial evidence proving that is the cases. HCC 21.71.030(h) does not require the Commission to include an analysis supporting its findings, but HCC 21.71.050(b) does. The Commission illegally waived parking, landscaping, drainage, and myriad CDM requirements. Mr. Griswold noted relevant zoning code related to landscaping requirements and where Planning staff analysis was deficient in recommendations and suggests leaving it up to effected property owners.

11. The proposal is contrary to myriad goals and objectives of the Comprehensive Plan. The fact the plan comports with some goals and objectives doesn't mean it it's not contrary to others. The Commission's analysis states the proposal will promote infill development in all housing districts and encourage affordable housing, but the proposal has nothing to do with housing. It's also located in the CBD where conflicts between residential and non-residential uses are to be resolved in favor of non-residential uses. The goals this proposal is contrary to are relevant but none of the areas where the proposal may not comport were not addressed. Planning staff has a pro development bias and never finds evidence is contrary to goals and objectives of the Comprehensive Plan. If one fails to look for evidence one will generally not find it.

With that, Mr. Griswold concluded his oral argument and reserved his remaining time for rebuttal.

City Clerk Jacobsen noted property owner Melody Livingston joined the meeting at 4:41 p.m. and that Larry Slone joined as an audience member.

Mayor Castner acknowledged Mr. Griswold's time remaining 12 minutes of time for rebuttal and opened the floor to Attorney Holmquist.

Attorney Holmquist addressed that the issuance of CUP 20-15 was legal and appropriate in all respects. The Commission appropriately followed City Code 21.18 regarding setbacks and lot coverage in the CBD as long as the applicant obtains a CUP. The Commission followed procedure in HCC 21.71 and made factual findings on each of the CUP application criteria. The Commission's findings are supported by substantial evidence in the record. For those reasons the Commission's decision should be upheld.

Attorney Holmquist reviewed legal issues which have already been decided by the Alaska Superior Court in other appeal, noting Mr. Griswold has recently challenged two other Planning Commission discussions to issue CUP's for properties in the CBD. He explained both of the appeals have been decided by the Superior Court, many of the arguments were the same, the Court denied the appeals and rejected the arguments. Some issues already decided include:

- HCC 21.18.040(b) which allow setback reductions by CUP in the CBD is legal.
- HCC 21.18.040(b)(4) does not violate state statutes related to variances.
- HCC 21.18.040(b)(4) does not conflict with HCC 11.08.110 or 11.08.050 (driveway permitting).

He added Mr. Griswold has been barred from arguing these same issues again in a different case. It's called "collateral estoppel" and the goal is finality and is in place to prevent a party from repeatedly trying to reargue the same issue when it's already been decided. The Alaska Supreme Court has held this applies to administrative proceedings.

Not all of the arguments raised are barred by collateral estoppel but it's worth noting they've already been rejected by the Superior Court and would likely be barred if attempted again. Some of those decisions include:

- The City Planner is allowed to sign the Commission's decision and constitutes issuance of a CUP.
- HCC 21.71.030(a) which requires the applicant to produce sufficient evidence for review. The Commission looks at all the materials submitted with the application, not just the form itself.

Regarding the Equal Protection Clause, Attorney Holmquist explained it's a State and Federal Constitutional issue, and issuing a CUP for setback reduction does not violate the Equal Protection Clause. He cited HCC 21.18.040(b)(4) allowing setback reductions by CUP in the CBD

with exception of Lake Street and Sterling Highway. He explained the exception for those two areas and that it does not infringe or restrict what Mr. Griswold's can do on properties because he is not a property owner on Lake Street or Sterling Highway.

It was appropriate for the Planning Commission to consider the City Planning Staff Report 20-63 when reviewing the application. It's standard procedure for considering CUP's. Nothing prevents the Commission from disagreeing with the conclusion of the staff reports. When adopting the staff report findings, it only does so after the public hearing and after first reviewing the applications, written public comments, and testimony at the hearing. The Commission looks at the entire record before making a determination. This is not illegal in any way, as has been suggested.

Regarding the bias allegation against Commission Chair Smith, Attorney Holmquist said the allegation is not supported by the record. It appears to be based off of another hearing, not related to this one, and is not part of the record in this case.

Considering the application and granting CUP 20-15 as a single CUP authorizing multiple conditional uses on the property, setback reduction and lot coverage over 30%, was appropriate. In the argument of either requiring two separate applications and permits, or to separate sets of factual findings, the zoning code calls for a single application for all proposed uses and structures.

Discussion in Mr. Griswold's briefing arguing the Comprehensive Plan's reference to infill is unconstitutionally vague, and his clarifying comment the plan is unconstitutional as applied. In his reply brief he doesn't explain why the reference to infill is unconstitutionally vague as it was used in the Commission's decision specifically and doesn't meeting the burden of proof for a constitutional challenge.

Mr. Griswold argues a third reason for a CUP in this case is that a property would have more than one building containing a permitted principal use on the lot. Attorney Holmquist explain no CUP was required because Wild Honey and Inlet Trading are part of the same shared structure. He reviewed definitions in the zoning code and definitions related to this.

It was appropriate for the Commission to reduce the number of parking spaces for the property in the CUP process. The zoning code allows for the Commission to do this as special design or site requirements.

Regarding the Commissions factual findings, Attorney Holmquist noted in zoning code appeals the Board of Adjustment is supposed to defer to the Commission's findings on disputed factual issues. Factual findings are considered true if they're supported by substantial evidence. Substantial evidence is enough evidence for a reasonable person to accept as adequate to support a conclusion. He reviewed evaluation criteria, several of the Commission's findings, and information in the record that constitute substantial evidence to support those findings.

In closing, Attorney Holmquist commented the record reveals the Commission properly granted CUP 20-15, they properly followed the Zoning Code in considering the application, and their decision and factual findings are supported by substantial evidence of record. Most of Mr. Griswold's legal arguments are barred or have already been rejected by the Superior Court, and the others have no merit as is established in their briefing. The City respectfully requests the Board of Adjustment uphold the Commission's grant of CUP 20-15.

Mayor Castner opened the floor to Mr. Griswold for rebuttal.

Mr. Griswold expressed Attorney Holmquist's explanation of code compliance and that it relieves the Commission of doing any analysis. In addressing how this proposal meets goals for a renovated restaurant, which is a fully permitted use. There was no discussion tonight or in the staff report and Commission hearing about the setback reduction or 47% lot coverage. It was only mentioned on one line in the staff report as an approximation. All they did was analyze the restaurant expansion, which is a permitted use and it wouldn't have mattered because it would need a CUP if that's all it was. It ignored what was really being applied for. He questioned if it's inconceivable that Bunnell Street area will someday be reconstructed and drainage put in.

His main concern is the comments that all his arguments are barred. He thinks collateral estoppel applies in Superior Court proceedings, and he doesn't think it's applicable at this level. What wasn't addressed is that one of his appeals that set the precedence for collateral estoppel is long overdue for a decision by the Alaska Supreme Court. Once it's issued it could set the reversal precedent that would allow him to file to have those issues re-litigated. It's not a done deal.

Everyone's wringing their hands over parking issues and asking how they came about, it came about because developer were allowed to develop irresponsibly and not allow for adequate parking. It's easier to address these issues before they happen.

The staff report was prepared before any public testimony was received. It's always that way and it's wrong. It violates due process and unduly influences the Commission.

He addressed references in the staff report to two separate buildings, multiple CUP's, infill and constitutional challenge of the Comprehensive Plan but as it's applied. He questions what possible reasonable basis there could be for reducing parking spaces in an already congested area.

He explained the Board has full authority to remand to the Commission and impose additional conditions, he further noted that the criteria for a CUP has to be reviewed and met to be approved.

Mayor Castner announced oral arguments are concluded and opened the floor to question from the Board of Adjustment. No questions were raised.

COMMENTS OF THE AUDIENCE

There were no comments.

Mayor Castner asked for a motion to recess into executive session.

LORD/ADERHOLD MOVED THAT THE BOARD OF ADJUSTMENT RECESS INTO EXECUTIVE SESSION FOR THE PURPOSE OF DELIBERATING THIS APPEAL.

VOTE: YES: ADERHOLD, HANSEN-CAVASOS, LORD, SMITH, EVENSEN

Motion carried.

Council recessed into executive session at 6:00 p.m.

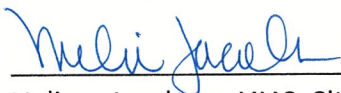
Mayor Castner reconvened the meeting at 7:21 p.m.

Councilmember Lord announced the Board of Adjustment met in executive session to deliberate this matter and provide input to the Board's Counsel.

Mayor Castner explained that a written decision will be prepared and issued to the parties at a later date after deliberations are completed. Copies of the written decision of the Board will be mailed to the appellant and all other parties who entered an appearance in the appeal pursuant to Homer City Code 21.93.110(c). Once a final decision has been entered by the Board, an appeal from that decision may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the Board of Adjustment or by the City Manager or City Planner or any governmental official, agency, or unit. That appeal must be filed within 30 days of the date of distribution of the final decision. HCC 21.91.130(a)(b).

ADJOURN

There being no further business to come before Council Mayor Castner adjourned the meeting at 7:23 p.m. The next Regular Meeting is Monday, February 22, 2021, at 6:00 p.m. Committee of the Whole at 5:00 p.m. All meetings scheduled to be held via Zoom Webinar in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.



Melissa Jacobsen, MMC, City Clerk

Approved: _____

March 22, 2021