

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,

MELODY LIVINGSTON DBA

WILD HONEY BISTRO, MATT EARLY,

Appellees.

RE: CUP 20-15

**APPELLANT'S REPLY TO CITY'S OPPOSITION TO MOTION FOR REMAND/
VITIATION**

The City Attorneys base their objection to Appellant's Motion for Remand/Vitiation on the premise that the public records referred to do not constitute "new evidence" (citing *Babinec v. Yabuki*, 799 P.2d 1325, 1332-33 (Alaska 1990)). *Babinec v Yabuki* involved a personal injury claim, a civil trial, and an assertion of fraud, misrepresentation or misconduct as a ground for relief under Civil Rule 60(b)(3), it did not involve an administrative appeal of a planning commission's zoning determination. Civil Rule 60(b)(2) provides for relief from final judgment where there is newly discovered evidence which by due diligence ***could not have been discovered in time to move for a new trial under Rule 59(b)***. In the instant case, the newly discovered property ownership evidence was discovered in time

for a remanded proceeding. If this previously undisclosed ownership evidence does not constitute "new" evidence, what kind of evidence is it?

An application for a conditional use permit requires the name and address of all owners of the subject lot. HCC 21.71.020(a)(1). A CUP application must include the applicant's signed certification that all the information contained in the application is true and correct. HCC 21.71.020(a)(10). The City Planner will determine if the application is complete. If not complete, the City Planner will advise the applicant what corrective actions should be taken to complete the application. HCC 21.71.020(b). The reason why public records which existed prior to and during the Commission's consideration of the application were not discovered by due diligence is because neither planning staff nor the Commissioners exercised due diligence in their consideration of CUP 20-15. The City Attorneys fail to explain why the public records showing ownership interests in the subject property which existed prior to and during the Commission's consideration of the application were not discovered via due diligence by the allegedly expert planning staff and/or the Commission.

Staff Report 20-63 identifies the subject parcel as 17516052. [R. 7] KPB records show that this parcel is solely

owned by Inlet Trading Post LLC which, in turn, is owned by Asia Freeman and Michael Walsh. The rear parking lot is used for "parking by all business occupants/staff for Bunnell, The Fringe and Old Town B&B." [R. 54] Asia Freeman didn't want to incur the expense of paving that potentially dusty parking lot: "It is a very big expense (at least \$20,000, last I checked) for Wild Honey (and consequently the Bunnell Art Center, and other tenants of 106 W Bunnell, *and it's [sic] shared owner*) but not other business owners in Old Town." [R. 53] She also objected to the imposition of landscaping and fencing requirements. [R. 54]

The fact that the KPB Real Property Assessment records showing who owns the subject property were not previously included in the record clearly qualifies them as "new evidence." Identifying all property owners involved is essential for any CUP application. Furthermore, all property owners are indispensable parties to this appeal. The deliberate concealment of multiple ownership interests is fatal to the application for CUP 2020-15. Where an intent to deceive exists, the burden may shift to the non-moving party to prove that the misconduct did not interfere with the full and fair presentation of the case. *Anderson v. Cryovac Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) (quoting *Bros Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir. 1965)).

At page 2 of City's Reply Brief it states as follows:

Although City Planning Staff Report 20-63 describes the Property as having two "buildings," in fact the Inlet Trading Post and the Wild Honey Bistro are currently part of a single structure. [R. 8] The application describes the Inlet Trading Post and the Wild Honey Bistro as a "shared structure." [R. 18] Asia Freeman of the Bunnell Street Arts Center (in the Inlet Trading Post) noted that the Wild Honey Bistro "is physically attached to the Inlet Trading Post..." [R. 53] Photographs of the Property confirm these descriptions. [R. 29-31] When the project is complete, **they will share a load-bearing wall, front porch, and awning, and will be connected by an interior staircase on the second level.** [R. 24- 28] Since the Inlet Trading Post and the Wild Honey Bistro are part of a single shared structure, this proposal does not include two buildings containing a permitted principal use on the Property.

Accordingly, there is no non-conforming use and no CUP is required under HCC 21.18.030(j).

So when arguing that no additional CUP is required for more than one building containing a permitted principal use on the subject lot, the City Attorneys argue that the Inlet Trading Post structure and the Wild Honey Bistro structure will share a load-bearing wall, front porch, awing, and interior staircase. But when arguing that the ownership of the Inlet Trading Post is immaterial to the application for CUP 20-15, they claim that "Michael Walsh, Asia Freeman, and the Inlet Trading Post, LLC have no ownership interest in Unit 2."¹ When the Commission issued its Decision, it relied on Staff Report 20-63 (stating that the Property had two buildings). The Commission approved

¹Page 2 of City's Opposition.

Staff Report 20-63 [R. 63-64]; it did not approve the City Attorney's Reply Brief. The new and old evidence indicates that the proposal involves two abutting condominium buildings with some portions thereof and elsewhere on the subject lot shared in common among four property owners. It seems highly unlikely that Fire Marshal Certification for the proposed construction could be obtained without there being a substantial separation/fire break between the two buildings. Note that connecting the three existing Wild Honey Bistro structures did not transform them into one building.

At page 3, the City Attorneys claim that the fact that Asia Freeman is part owner of Unit 1 is not "new" evidence but fail to point out where in the record her ownership interest in Unit 1 is disclosed. The City Attorneys further claim: "There is also no suggestion in the record that Ms. Freeman's comments were any more "influential" than other public comments or materials in the record. The record clearly demonstrates that Ms. Freeman's comments were more influential than those regarding dust pollution, noise pollution, visual distraction, ventilation of cooking smells, landscaping, decreased property values, and parking issues submitted by adjacent property owners Sherry Thompson, Susan Miller, and Gary Miller which were totally ignored after Ms. Freeman weighed in. [R. 47-48; 55]

CONCLUSION

The public records referenced in Appellant's motion clearly constitute "new evidence" in the context of HCC 21.93.510. Pursuant to HCC 21.93.570 and Civil Rule 60(b)(2), the deliberate misrepresentation of ownership interests is grounds for vitiation of CUP 20-15 by the Board of Adjustment. Alternatively, remand to the Commission in accordance with HCC 21.93.510(c) would be appropriate.

DATED: March 8, 2020.

By: s/Frank Griswold/
Frank Griswold