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BEFORE THE HOMER BOARD OF ADJUSTMENT

In the Matter of

)
)
APPEAL OF ZONING PERMIT 1020-782)
_____)

CITY OF HOMER'S REPLY BRIEF

In this administrative appeal of a zoning permit approval, Appellant Frank Griswold has filed a 38-page Opening Brief discussing at least twelve separate legal and factual issues.[1] For brevity's sake, this brief will focus on the particular issues for which additional analysis is necessary. With regard to the remaining issues, the City of Homer (the "City") relies upon its discussion of those issues in its Opening Brief.[2]

[1] Griswold's brief also contains two exhibits that are not part of the Appeal Record. *See* the materials labeled "Exhibit 1" and "Exhibit 2" attached to Griswold's Opening Brief. Since the Homer Board of Adjustment ("BOA") must make its decision regarding this appeal based solely upon the Appeal Record, the BOA cannot consider these materials for any purpose. *See* HCC 21.93.510(a).

[2] These issues include the following: Homer City Planning's ("HCP") planning technician was authorized by HCC 21.90.020(b) to grant the Permit (Opening Brief p. 5-6); the technical violation of HCC 21.70.010(b) is not a basis for denying the Permit (Opening Brief p. 6-7); no conditional use permit ("CUP") is required for the Accessory Dwelling (Opening Brief p. 7-8); Griswold's claim of bias against Commission Chair Smith is unsupported by the evidence in the record (Opening Brief p. 12-13); and the City properly noticed the appeal hearing (Opening Brief p. 16-17).

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1. The Subject Structure is an Accessory Dwelling Unit Pursuant to HCC 21.18.020(ii)

The Commission correctly held that the structure (the "Dwelling" or "Accessory Dwelling") that is the subject of Zoning Permit 1020-782 (the "Permit") is permissible outright in the Central Business District ("CBD") an accessory dwelling unit ("ADU") to the principal single-family dwelling on the lot. [R. 8] Griswold's arguments to the contrary boil down to two basic points: (1) the relative size or prominence of an ADU to the principal home is irrelevant to its characterization as an ADU and (2) the occupants of an ADU must be related to the occupants of the principal home.[3] Both arguments are meritless.

The zoning code defines an "accessory building" as one that is incidental and subordinate to the principal building on the lot.[4] Zoning law authorities suggest that common examples of ADUs include a backyard cottage, a residence above a detached garage, or an in-law apartment.[5] These types of dwellings are subordinate and incidental to the principal family home on the same property primarily because of their size relative to the principal home.[6]

The legislative history of Homer Ordinance 11-44(S), which authorized ADUs in the CBD, supports this position. Prior to approving the ordinance, a councilmember

[3] Griswold's Opening Brief, p. 6-12.
[4] HCC 21.03.040.
[5] *See* John Infranca, "Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units," 25 Stanford L. & Pol'y Rev. 53, 54 n.3 (2014); 2 Rathkopf's The Law of Zoning and Planning § 23.5 (4th ed.).
[6] *Id*.

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asked whether there would be a size limitation for ADUs.[7] City Planner Rick Abboud responded that Homer City Planning ("HCP") would require a proposed ADU to be "smaller than the primary dwelling."[8] The City Council then passed Homer Ordinance 11-44(S) in its current form. This demonstrates that when HCP considers whether a proposed ADU is subordinate or incidental to the primary residence, the City Council intended that the relative size of the two buildings be a primary consideration.

The principal building on the lot is significantly larger than the 360 square foot Accessory Dwelling. [R. 25] The Accessory Dwelling is associated with the principal home, but is smaller and less prominent. [R. 262] It is the functional equivalent of a backyard cottage or detached in-law apartment. Thus, the Commission correctly determined that it is an ADU in accord with the zoning code and established legal authority.

Griswold's argument that the same family must occupy a principal home and an ADU is unsupported and incorrect. Neither HCC 21.18.020(ii) nor any other provision of the zoning code contains a consanguinity or familial relation requirement for ADUs.[9] The zoning code regulates the structure rather than who can reside within it. ADUs are commonly rented to non-family members. As a leading zoning treatise explains:

[7] Homer City Council, Regular Meeting Minutes, p. 17 (December 12, 2011), https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/city_council/meeting/2282/december_12_2011_regular_0.pdf (accessed July 6, 2021).

[8] *Id*.

[9] Even if the zoning code contained such a requirement, it would likely conflict with the Alaska Constitution's privacy and equal protection clauses. *See, e.g., Coalition Advocating Legal Housing Options v. City of Santa Monica*, 88 Cal.App.4th 451, 460-61 (2001) (holding that the right to choose with whom one resides is fundamental and consanguinity requirement for ADUs violated privacy and equal protection clauses of California constitution).

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> Sometimes accessory dwelling units are used to house a relative of the occupant of the principal residence. Other times, accessory dwelling units are used to generate income that the property owner may reinvest in the upkeep of his or her property and use to pay property taxes. In such cases, accessory dwelling units are usually a more affordable option than other types of housing in a community.[10]

This reasoning applies to the City Council's stated goals in allowing ADUs in the CBD, which include "increasing the supply and diversity of housing" and "promot[ing] housing choice by supporting a variety of dwelling options."[11]

Both the evidence in the record and well-established law and custom in residential zoning support the Commission's finding that the Accessory Dwelling is an ADU allowed under HCC 21.18.020(ii).

2. The Accessory Dwelling is not a Nuisance under HCC 21.18.080

The Commission correctly found that the Accessory Dwelling does not violate CBD nuisance standards because it is a dwelling rather than a storage container. [R. 8-9] The record clearly supports the Commission's finding. [R. 25-26; 259; 260] Griswold incorrectly argues that a dwelling constructed from a former shipping container remains a nuisance regardless of is character as a dwelling or whether it could be used to transport merchandise.[12]

First, the Accessory Dwelling is not a shipping container. HCC 21.18.080(c) refers to "[c]ommercial vehicles, trailers, shipping containers and other similar equipment

[10] 2 Rathkopf's The Law of Zoning and Planning § 23.5 (4th ed.). *See also* 3 Am. Law. Zoning § 22:46 (5th ed.) (ADUs are a simple method of increasing housing stocks because they increase density and allow homeowners to rent out portions of their property).
[11] Homer Ord. 11-44(S).
[12] Griswold's Opening Brief, p. 12-16.

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used for transporting merchandise…" This language focuses on the use of the container rather than its exterior appearance. The Accessory Dwelling can no longer transport merchandise. It is connected to utilities and contains furniture, appliances, interior walls, cooking facilities, and sanitation facilities. [R. 259] It may have formerly been used as a shipping container, but it cannot be used for that purpose now. Accordingly, it is no longer regulated by HCC 21.18.080(c).

Even if it were a shipping container, it is not on the property for storage purposes. HCC 21.18.080(c) says that shipping containers "shall not be maintained on the premises for storage purposes unless screened from public view." Again, this language focuses on the use of the container rather than its appearance. The record establishes that the Accessory Dwelling has been converted to a dwelling and no longer is maintained on the property for storage purposes. Thus, the screening requirement in HCC 21.18.080(c) no longer applies.

Constructing residences and other structures using converted shipping containers is now a common practice. Converted shipping containers present a structurally sound, sustainable, and cost-effective alternative to traditional manufactured homes.[13] Nothing in the zoning code prohibits constructing a dwelling using a shipping container or parts thereof. Thus, although the exterior of the Accessory Dwelling utilizes a former shipping container,[14] it is now a dwelling that cannot be considered a nuisance under HCC

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[13] Michael N. Widener, "Zoning and Land Use Planning," 39 Real Estate L. J. 113, 123 (2010).

[14] The use of shipping containers also furthers the important policy goal of developing affordable housing options in Homer. Affordable housing promotes economic development, a sustainable workforce to

21.18.080(c).[15]

The Commission's eminently reasonable finding that the Accessory Dwelling is no longer a shipping container subject to HCC 21.18.080(c) is supported by substantial evidence in the record and should be upheld.

3. The Property's Water and Sewer Connections are Permitted and Otherwise Comply with City Code

Prior to the Applicants applying for a zoning permit, the Homer Public Works Department ("PWD") inspected and approved the water and sewer connections at the Property. [R. 28-29] PWD issued Permit No. 3002 for the Property on June 23, 2020. [R. 28-29] The Applicants included the Property's water/sewer permit with their application to HCP for a zoning permit. [R. 261] City Planner Abboud confirmed with PWD that there is only one sewer and water connection at the Property. [R. 261] All aspects of the Property's water and sewer connections comply with city code and no issues exist that would preclude granting the Permit.

Griswold's argument that there is more than one water connection at the Property is contradicted by the record. [R. 261] The water connection to the Accessory Dwelling is not a spaghetti line because it connects to the water main directly adjacent to the Property.[16] Regardless, PWD inspected and permitted the water and sewer connections and this issue is within the sole discretion of PWD. It is not a basis to challenge HCP's

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support Homer's business community, and the foundational goal of the pursuit of happiness for all individuals.

[15] As the City outlined in its Opening Brief, even if the Accessory Dwelling could be considered a nuisance, that does not provide a reason to overturn Homer City Planning's issuance of the Permit. Enforcement of HCC 21.18.080(c) is a discretionary decision not subject to review.

[16] *See* HCC 14.08.020.

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issuance of the Permit. Griswold's argument regarding the Fifth Amendment privilege against self-incrimination is irrelevant because neither the Applicants nor any other witness invoked the privilege.[17] Accordingly, there is no basis for the BOA to "assign negative implications"[18] to the Applicants' decision not to participate in the appeal hearing.

4. Griswold's Claim of Bias Against Commissioner Barnwell is Unsupported by the Record

During the "Comments of the Audience" portion at the end of the appeal hearing, Commissioner Charles Barnwell said that as a matter of policy, he believed the Commission should not be involved in zoning permit appeals and that the appeal hearing in this case took an inordinately long time. [R. 265] He also said that he fully respects Mr. Griswold's right to question city procedures. [R. 265] Griswold argues that these comments reflect Barnwell's "disqualifying bias/animosity/disinterest."[19] However, these comments (absent any supporting evidence) do not overcome the presumption of impartiality.[20]

Griswold fails to establish that Barnwell's ability to make a decision in the public's best interest was impaired due to partiality.[21] Barnwell's comments do not reflect partiality, but rather a policy position regarding the Commission's role in hearing

[17] *See Nelson v. State*, 273 P.3d 608, 611-612 (Alaska 2012) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)) (the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they invoke the Fifth Amendment privilege and refuse to testify in response to probative evidence offered against them).
[18] Griswold's Opening Brief, p. 19.
[19] Griswold's Opening Brief, p. 24.
[20] *See* 4 Am. Law of Zoning § 38:14.
[21] *See* HCC 1.18.020 ("impartial" means "acting in a manner that the City official believes is in the public's best interest and not acting to benefit a financial or personal interest of the City official").

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zoning permit appeals. There is no indication that Barnwell directed the comments at Griswold or the merits of the appeal nor is there any evidence that Griswold was prejudiced by Barnwell's comments. To the contrary, Barnwell said he respected Mr. Griswold's right to appeal. Accordingly, Griswold's claim of bias against Barnwell is meritless.

5. Griswold Fails to Show a Prejudicial Violation of his Due Process Rights

Initially, Griswold's due process argument fails because in the context of this administrative appeal, the BOA lacks authority to rule on constitutional issues. Evaluations of constitutionality are within the special expertise of courts rather than administrative agencies.[22] For that reason, the Alaska Supreme Court has held that "[a]dministrative agencies have no jurisdiction to decide issues of constitutional law."[23] In other words, the BOA cannot pass on the constitutionality of the Commission's hearing procedures.

Even if it could, Griswold's due process argument fails. To establish a violation of procedural due process rights, the Alaska Supreme Court requires a complainant to allege the violation "with particularity" and show that they were prejudiced by the alleged violation.[24] Griswold has done neither.

While Griswold complains generally about the Commission's hearing procedure, he fails to explain precisely how the Commission violated his due process rights and how

[22] *U.S. v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 507 (Alaska 1978).
[23] *Dougan v. Aurora Elec. Inc.*, 50 P.3d 789, 795 n.27 (Alaska 2002). *See also Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).
[24] *Fairbanks Gold Mining, Inc. v. Fairbanks North Star Borough Assessor*, ___P.3d___, 2021 WL 2490169 *8 (Alaska 2021) (citations omitted).

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these alleged violations prejudiced his appeal. For example, while Griswold complains about time limitations applicable to the presentation of evidence and oral argument at the appeal hearing, he provides no information about what evidence, testimony, or argument he was not able to present at the hearing.[25] Griswold's conclusory argument that the time provided was insufficient to develop the record does not establish a due process violation. The 30-minute presentation time was sufficient for the City to present two witnesses and make oral argument. [R. 258-261] Griswold received the same 30 minutes as well as additional time to cross-examine the City's witnesses.[26] The reason Griswold did not present witness testimony is that he failed to secure any witnesses to voluntarily testify in support of his appeal.[27] [R. 257] However, the Commission's procedure provided Griswold with the opportunity to present evidence and this is what due process requires.[28] Griswold fails to demonstrate that the time limitations at the appeal hearing prejudiced his appeal.

[25] The Alaska Supreme Court has held that an administrative board's decision to "place reasonable time limits on testimony" at an administrative hearing does not violate due process rights. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993).

[26] Griswold's cross-examination focused on such irrelevant issues as Planning Commission training and HCP's zoning code enforcement at other properties. [R. 262-263] This contradicts Griswold's claim that he was not given sufficient time to develop a full record with regard to the issues relevant to this appeal. Given more time, Griswold likely would have continued this witness badgering and irrelevant fishing expedition.

[27] Griswold was aware that merely identifying witnesses on his witness list would not ensure their participation at the hearing. In the memorandum accompanying its hearing procedures, the Commission said "the City does not have subpoena powers and can't require [witness] participation." If the Commission issued an illegal subpoena or otherwise asserted that it could compel witnesses to participate in the appeal hearing, it arguably may have raised witness due process concerns.

[28] *Fairbanks Gold Mining* at *8.

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While Griswold complains that he did not agree to the Commission's hearing procedure,[29] this issue is irrelevant to a due process analysis. Griswold raised his objections and the Commission rightly rejected them. [R. 132; 137-138] Neither HCC 21.93 nor due process require the Commission to obtain Griswold's agreement to its hearing procedures. The City's counsel reasonably attempted to stipulate with Griswold regarding the hearing procedures in this case. [R. 166] However, Griswold did not agree to the City's proposed procedure nor did he propose an alternative procedure. As a result and in accord with HCC 21.93.310, the Commission adopted a hearing procedure that was reasonable and fair in fact and appearance. The procedure was available to Griswold and the City well in advance of the hearing. [R. 166-168] The Commission's adoption of the hearing procedure was not "surreptitious[]"[30] and did not violate Griswold's due process rights. Instead, the City fairly sought to provide Griswold with an opportunity to stipulate to reasonable hearing procedures; his refusal to agree cannot be bootstrapped into a due process claim.

Griswold's other generalized complaints about the hearing procedure are similarly meritless. The Commission did not violate Griswold's due process rights when it acknowledged that it lacked authority to compel witnesses to appear or testify at the appeal hearing. Griswold fails to allege with particularity how the Commission's procedures with regard to written briefing and comments from non-parties violated his due process rights.

[29] Griswold's Opening Brief, p. 26.
[30] *Id*. at 25.

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6. The City's Counsel Does Not Represent the BOA in this Appeal

It was "very clear" to the Commission that the City Attorney was representing the City rather than the Commission in the proceedings before the Commission. [R. 7; 198; 247; 251-252] Griswold's conclusory allegation that the City Attorney attempted to make the Commission "believe" that it represented the Commission lacks any evidentiary support.[31]

In the instant appeal before the BOA, the City Attorney has filed an Entry of Appearance on behalf of Appellee the City of Homer.[32] Since it is representing a party in this appeal, the City Attorney will not represent or advise the BOA for the purposes of this appeal.[33] The BOA may retain an attorney to act as its legal counsel for the purposes of this appeal.[34] That is up to the BOA. Accordingly, there is no conflict between the City Attorney's representation of the City in this appeal and its representation of the City Council in other matters.

DATED this 15th day of July, 2021, at Anchorage, Alaska.

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[31] Griswold's Opening Brief, p. 35.
[32] *See* Entry of Appearance filed July 1, 2021.
[33] Griswold's ad hominem attacks on this issue are frivolous and should be firmly rejected.
[34] HCC 21.93.540(a).