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Memorandum
Supplemental Packet

TO: MAYOR CASTNER AND HOMER CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT
FROM: MELISSA JACOBSEN, MMC, CITY CLERK
DATE: SEPTEMBER 20, 2021
SUBJECT: SUPPLEMENTAL PACKET

NEW BUSINESS

Memorandum 21-153 from City Clerk re: Motions Filed by Appellant Frank Griswold related to the Appeal of CUP20-15 and Zoning Permit 1020-782

Comments from Frank Griswold Page 2

From: Frank Griswold
To: Melissa Jacobsen
Cc: Renee Krause
Subject: Memorandum 21-153
Date: Monday, September 20, 2021 11:06:37 AM

Dear Homer Board of Adjustment,

Re: Appeal of CUP 20-15

Memorandum 21-153 states: "The Planning Commission approved a Motion to Dismiss submitted by Attorney Holmquist on behalf of the City based on the finding that the applicant withdrew her conditional use permit application which voids Conditional Use Permit 20-15 and moots all pending issues in this appeal." Mr. Holmquist's Motion to Dismiss is notably void of any provision of Homer City Code that authorizes it because HCC includes no specific provision authorizing the filing of a motion to dismiss an administrative appeal, on remand or otherwise. The former version of HCC 21.93.310 stated: "If no specific procedure is prescribed by the code, the Planning Commission may proceed in an administrative appeal in any lawful manner not inconsistent with this title, statutes, and the Constitution" but Mr. Holmquist's Motion to Dismiss was manifestly inconsistent with HCC Title 21 and therefore not authorized by HCC 21.93.310. Mr. Holmquist's Motion to Dismiss Appeal was out of order because the Commission had no authority to consider any matter not specifically remanded to it by the Board of Adjustment, consider new evidence, or receive or act on illegal ex parte communications from City Planner Rick Abboud (a party to the appeal) regarding property owner Melody Livingston's temporary and strategic withdrawal of her application for CUP 20-15 to "regroup." Nonetheless, the City Clerk's Office forwarded it to the Planning Commission which eagerly rubber-stamped Mr. Holmquist's Motion to Dismiss Appeal. Arbitrarily allowing Mr. Holmquist to submit his Motion to Dismiss Appeal but then refusing to "take up" my ensuing Motion for Reconsideration to the Commission and Motion to Supplement Points on Appeal to the Board of Adjustment, both legitimately filed pursuant to HCC 21.93.310 and HCC 21.93.570 respectively, violates the equal protection clause of the Fourteenth Amendment to the US Constitution and violates my due process rights.

On July 29, 2021, the Homer City Attorneys responded in relevant part as follows to my Motion to Continue the August 4, 2021 Commission Proceeding Regarding the City's Motion to Dismiss Appeal: "Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous

pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter." But no special hearing was scheduled and neighboring property owners were not notified. Following the Commission's decision, the Clerk's Office should have promptly submitted my timely filed Motion for Reconsideration to the Commission and my timely filed Motion to Supplement Points on Appeal to the Board of Adjustment. The Board and Commission could then have decided whether to consider, grant, or deny my motions. The parties were excluded from the discussions between Ms. Jacobsen and Mr. Brandt-Erichsen who was hired to advise the Board of Adjustment, not to unilaterally render decisions on the Board's behalf or provide biased procedural advice to the City Clerk. Neither Mr. Brandt-Erichsen, the Clerk's Office, nor the City Council has the authority to make adjudicatory decisions on behalf of the Commission or Board.

At paragraph four of her memorandum, Ms. Jacobsen states: "final decisions were issued regarding both matters" and at paragraph five she states: "an appeal from a final decision [deliberately omitting "of a hearing officer"] may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer." She neglects to point out that the Board of Adjustment never issued a final decision regarding CUP 20-15 and that only final decisions of the Board of Adjustment or a hearing officer can be appealed directly to the superior court and that no hearing officer was involved, and that the Planning Commission's "final decision" was not a response to the Board of Adjustment's remand order but merely the granting of a motion to dismiss the appeal, and that even if the Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal did constitute a final decision, it cannot be appealed directly to the superior court. The version of HCC 21.91.130(a) recently enacted via Ordinance 21-44(S) states: "An appeal from a final decision of a hearing officer may be taken directly to the Superior Court by a party who actively and substantively participated in the proceedings before the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The version of HCC 21.91.130(a) (misquoted in Ordinance 21-44(S)) in effect when I filed my appeal states as follows: "An appeal from a final decision of the Board of Adjustment or a hearing officer may be taken directly to the Superior Court by a party who actively and substantially participated in the proceedings before the Board of Adjustment or the hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." The City Council should not rely on any paraphrased rendition of HCC that is manipulated and spun to give it a meaning other than what was actually intended. Just because the City Clerk and/or Planning Commission claim the Commission's remand determination constitutes a final decision does not make it so. The Commission issued its first, and arguably only, Final Decision on October 22, 2020 and that decision was appropriately appealed to the Board of Adjustment. The Notice of Appeal Rights attached to the Planning Commission's August 5,

2021 Order Granting Motion to Dismiss Appeal deceptively states that "Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment may appeal this [Planning Commission] decision to the Superior Court." In light of the fact that the Board of Adjustment and the Planning Commission are no longer involved in adjudicating zoning appeals, the code provisions that previously applied to Board and Commission appeal proceedings govern appeals still pending before them. In any event, neither version of HCC 21.91.130 provides that decisions of the Planning Commission may be appealed directly to the Superior Court or that a party who actively participated in proceedings before the Board of Adjustment can appeal an ensuing remand determination of the Planning Commission directly to the superior court. The Planning Commission never addressed the matters remanded to it by the Board of Adjustment on March 9, 2021 and should be sanctioned for not promptly responding to the Board's (non-final) Decision and Order, illegally accepting and considering new evidence, and engaging in ex parte communications. The Planning Commission's August 5, 2021 order/decision can only be directly appealed to the Board of Adjustment in accordance with HCC 21.93.500-550. After the Board of Adjustment issues a final decision, the Planning Commission's ultra vires dismissal of the appeal and other erroneous determinations can be appealed directly to the superior court.

At paragraph six of her memorandum, Ms. Jacobsen states: "Homer City Code provides no provisions for an appellant to submit motions to bring a matter back before the Board of Adjustment after a final decision has been issued. I have advised Mr. Griswold as such, but he disagrees." I disagreed because Ms. Jacobsen is patently wrong. HCC 21.93.310 and HCC 21.93.570 authorize an appellant to submit post-decision motions to the Planning Commission and Board of Adjustment. Alaska Rules of Appellate Procedure 602(a)(2) states: "An appeal may be taken to the superior court from an administrative agency within 30 days from the date the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal." This appellate rule clearly contemplates motions for reconsideration of final agency decisions so it would clearly not be out of order or inject procedural error into the proceedings if the Board or Commission addressed a motion for reconsideration. No provision of HCC authorizes the City Clerk to reject a party's timely filed motion for reconsideration of an adjudicatory body's final decision so the City

Clerk's unilateral rejection of a party's timely filed motion for reconsideration would inject procedural error into the proceedings and be grounds for remand or reversal. In the past, it has routinely been the practice of the Clerk's Office to promptly forward such motions to the appropriate adjudicatory body. On June 19, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration of Board of Adjustment Decision regarding CUP 13-13 and on December 4, 2014, the Homer Board of Adjustment issued its Order Regarding Motion for Reconsideration Re: Standing to Appeal CUP 14-05. Neither of these orders was subsequently ruled to be procedurally flawed or otherwise out of order by the appellate courts.

Re: Appeal of Zoning Permit 1020-782

The City Clerk's duties are ministerial, not adjudicatory. Ms. Jacobsen had no sua sponte authority to reject my Motion for Reconsideration or initiate the addition of a Notice of Appeal Rights to the Board of Adjustment's initial Final Decision. Even as amended, final decision #2 still violates HCC 21.93.110(a) which requires that a final decision state "the names and number [of Board members] voting in favor of the decision, and the names and number voting in opposition to the decision." If the Board of Adjustment grants my Motion for Reconsideration it can legitimately amend its August 26, 2021 Final Decision to correct deficiencies and/or erroneous findings. The fact that final decision #2 was issued on September 7, 2021 soundly debunks the specious argument that a matter cannot be brought back before the Board after a final decision has been issued. Whether the Board and/or Commission have legal authority to convene to "take up" the subject motions is a question of law and it is not generally the role of the City Council or Mayor to dispense legal advice to the City Clerk. The Council could authorize funding to allow the Clerk's Office to seek impartial legal advice from an erudite attorney. Because City Attorneys Max Holmquist and Michael Gatti represent parties to the pending appeals they would not be impartial sources. It is inappropriate for Ms. Jacobsen to ask the Council to provide her with direction on process for noticing parties, noticing the public, opportunities for responses or briefing, and/or when to schedule the special meeting while simultaneously recommending to the Council that it make, and presumably pass, a motion that the Board of Adjustment declines to take up the motions for reconsideration. (FYI, I only filed one motion for reconsideration to the Board of Adjustment and it pertained to ZP 1020-782. I filed another motion to the Board to supplement my points on appeal re: CUP 20-15. My other motion for reconsideration pertained to the Planning Commission's order granting the city's motion to dismiss the appeal of CUP 20-15). One seeking direction from the Council is self-admittedly unqualified to recommend what that direction should be. Accordingly, no weight should be given to Ms. Jacobsen's baseless, self-serving recommendation. Memorandum 21-153 should have been sent to the Board of Adjustment, not the City Council. The Council would be out of

order making a motion that the Board of Adjustment declines to take up the subject motions because, unless and until it formally convenes as a Board of Adjustment, the Council and Mayor have no legal authority to rule on behalf of the Board of Adjustment, especially when proper notice has not been given to parties and neighboring property owners. Furthermore, Robert's Rules discourages making negative motions. Alternatively, Ms. Jacobsen could forgo seeking further direction and simply allow due process to run its course by forwarding the subject motions to the designated adjudicatory bodies to let them exercise their discretion to issue procedural notices and decide whether those motions should be reviewed, considered, granted, or denied.

Audi alteram partem,

Frank Griswold