From: Frank Griswold
To: Melissa Jacobsen
Subject: Re: November 8th BOA meeting scheduled Re: CUP 20-15
Date: Monday, November 8, 2021 9:58:25 AM

Ms. Jacobsen,

I just returned from a hunting trip and will not have time to adequately prepare for tonight's BOA meeting or submit written materials. Why was I not given at least 15 days written notice of this meeting as required under HCC 21.93.100(b)? Were neighboring property owners notified as set forth in HCC 21.94.100(b) and HCC 21.94.030?

Frank Griswold

> On Oct 27, 2021, at 9:32 AM, Melissa Jacobsen <MJacobsen@ci.homer.ak.us> wrote:
>
> Good morning,
>
> At the October 20th Planning Commission meeting the Commission unanimously adopted the following motion:
>
> *HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.*
>
> A special meeting of the Homer City Council to convene as the Board of Adjustment has been scheduled for November 8th at 4pm to take up this recommendation.
>
> Agenda and Packet materials will be posted no later than Thursday, November 4th and the deadline to provide material to be included in the packet is Wednesday, November 3rd at 11am. Any items received after the packet deadline and prior to 11am on Monday, November 8th will be included in the supplemental packet, after that time they'll be provided as laydown items.
>
> Thank you,
> Melissa

Melissa Jacobsen, MMC
City Clerk
City of Homer, Alaska
907-235-3130

From:	Frank Griswold
To:	Melissa Jacobsen
Cc:	Renee Krause
Subject:	November 8, 2021 BOA Meeting
Date:	Monday, November 8, 2021 12:40:43 PM

Please provide to the Board of Adjustment all of the documents included in the Supplemental Packet provided to the Planning Commission on October 20, 2021 including the email from Asia Freeman, my Reply to City's Response to Motion for Reconsideration, and my two emails.   Please also provide the Board with the Commission minutes wherein the Commissioners stated that they lacked credentials and knowledge of the law and therefore thought this matter should be decided later by an administrative law judge.

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

Memorandum
Supplemental Packet

TO:	HOMER PLANNING COMMISSION
FROM:	TRAVIS BROWN, PLANNING TECHNICIAN
DATE:	October 20, 2021
SUBJECT:	SUPPLEMENTAL PACKET

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

From: Asia Freeman
To: Department Clerk
Subject: Comments for Planning Commission on CUP 20-15 for a building at 106 West Bunnell
Date: Tuesday, October 19, 2021 1:06:48 PM

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear members of the Planning Commission,

I am writing to you today to suggest that pursuant to the public hearing on October 20, you deny a request for a conditional use permit that would allow expansion of a portion of the building at 106 West Bunnell, Wild Honey, adjacent to Bunnell Street Arts Center.

It has been a real privilege and responsibility for nearly thirty years to steward the historic Inlet Trading Post Building at 106 West Bunnell. This stately, former general mercantile store served the young town of Homer from the late thirties to the late eighties. It is home to Bunnell Street Arts Center, Old Town Bed and Breakfast (upstairs), The Fringe (downstairs) and Wild Honey (next door). About ten years ago, to incentivize long-term occupancy, I created a condominium in the building, dividing it into two units. Unit 1 is the larger portion, which houses the arts center, the Fringe and Old Town Bed and Breakfast. Unit 2 is currently owned by Melody Livingston. She created a thriving business there, Wild Honey Bistro.

Raised in Homer and passionate about the history and culture of this community, it is deeply important to me that we respect the lines and appearance of our historic buildings. The Inlet Trading Post, constructed in 1937, is the second oldest large commercial building still standing in Homer. It is the anchor of Old Town revitalization and a historic landmark. It is extremely rare for old wood buildings in Alaska to endure time, and the risk of fire and earthquakes. Moreover, the Inlet Trading Post has endured time with with increasing dignity over the years. I have invested a great deal of time and funds to preserve the original lines and health of this building. I deeply believe that this building should be preserved in all of its exterior roof lines, footprint and character.

Melody Livingston would like to tear down the original construction and consolidate her business under one roof, adding a second floor "prep kitchen" above. The footprint of the "prep kitchen is almost equal to the main kitchen below. I have watched the business grow and thrive, and because it functions within the limitations of multiple spaces that are not connected by interior halls or doors to the main kitchen it has always been a challenge to operate a restaurant there. You have a main room with a kitchen, separated from a dining room by an exterior deck and two doors. I can certainly appreciate why the current owner would like to renovate her space to create more connectivity and efficiency. In fact, I have discussed renovations of the space with three architects and four builders over the last thirty years. I am certain this can be done within the original footprint by rebuilding a more efficient interior design while maintaining the exterior lines of this precious landmark. There is plenty of poorly used storage space under the shed behind Wild Honey which could be made into a prep kitchen, meanwhile all of the interior front space including Wild Honey's porch could be incorporated into interior seating.

Ultimately, expansion of Wild Honey will result in greater demands on the very limited parking and utility services of this old building. I do not think we can bear it. Just last year I had to pay $18,500 for 85% of the cost of reconstruction of a broken sewer line servicing both Units 1 and 2. Wild Honey's water/sewer meter reading demonstrated a toll of 28.5% yet she refused to pay any more. Wild Honey is thriving. Melody has been away from Alaska since May and her staff has asserted to me several times they are thriving. The other businesses here are all working at capacity. I think we are strained to support the current utilities and comfortable adjacency as is. I think its wonderful that the owner of Wild Honey has created a very successful restaurant within the historic footprint and rooflines of the original machine shop and while renovation may be justified, expansion is not.

Sincerely,

Asia Freeman
Inlet Trading Post LLC
106 West Bunnell, Suite A
Homer, Ak 99603
907.299.1482

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

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 OF HOMER'S RESPONSE TO MOTION FOR RECONSIDERATION, LEAVE TO SUPPLEMENT POINTS ON APPEAL, AND PROPOSED REVISED ORDER

On March 9, 2021, the Homer Board of Adjustment remanded this matter to the Commission under HCC 21.93.510(a) and (c) to address and decide three issues for which the Commission's findings of fact were deemed to be inadequate. HCC 21.93.560(c) states: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer. A case on remand has priority on the agenda of the lower administrative body, except cases remanded under HCC 21.93.510(a) are not entitled to priority. The applicant or owner of the property in question may waive the priority given by this subsection." The issues remanded under HCC 21.93.510(a) are not entitled to priority on the

Commission's agenda but they must nonetheless be promptly acted upon by the Commission. However, they clearly were not promptly acted on by the Commission. Because the applicants and/or property owners never waived priority, the issues remanded under HCC 21.93.510(c) ***were*** entitled to priority on the Commission's agenda but now, more than 7 months following the Board's remand, the Commission has still not considered or acted on the Board's Decision and Order. Instead, City Planner Rick Abboud, who claims to be a party to this appeal, has colluded with Melody Livingston and initiated multiple ex parte communications with the Commission to secure the dismissal of this appeal while she "regroups" before resubmitting her CUP application within a year or two.[1]

A claim is moot if it has lost its character as a present, live controversy. *Kleven v. Yukon-Koyukuk School Dist.*, 853 P.2d 518, 523 (Alaska 1993) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)). An action is not moot if respondent has "a concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union Local 1000,* 567 U.S. 298, 307-08 (9th Cir. 2012). The *Knox* court further stated: "The

[1] While it is not illegal for a party to communicate with another party, it is illegal for a party to engage in ex parte communication(s) with the Commission. HCC 21.93.710(a).

voluntary cessation of challenged conduct does not render a case moot because the conduct could be resumed as soon as the case is dismissed" (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283). In 1995, the Alaska Supreme Court held as follows in *Kodiak Seafood Processors v. State*, 900 P.2d 1191:

"No scallop harvesting presently takes place in closed Alaska waters. Therefore, KSPA's claims seeking declaratory and injunctive relief are technically moot. Nevertheless, we may choose to address certain issues if they fall under the public interest exception to the mootness doctrine. The public interest exception requires the consideration of three main factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine. *Peloza v. Freas*, 871 P.2d 687, 688 (Alaska 1994); *Brandon*, 865 P.2d at 92 n. 6. None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue. *Hayes*, 693 P.2d at 834. Ultimately, the determination of whether to review a moot question is left to the discretion of the court. *Id.; Brandon*, 865 P.2d at 92. n. 6.

. . .

Because the Permit has been revoked, the question of the Commissioner's authority to issue the Permit is also technically moot. Nonetheless, the issue presents a live controversy. KSPA argues that by allowing a private fisher to sell fish obtained during a research trip, the Commissioner exceeded his authority by allowing "commercial fishing" in closed waters. ADF&G argues that it has the authority to finance an exploratory fishing operation by allowing a private contractor to sell the catch. This issue falls within the public interest exception to the mootness doctrine. First, the issue is capable of repetition. The State has not disavowed this type of financial arrangement for future test-fisheries. Second, because research fishing may be of limited duration, it is likely that, as in this case, an individual permit would expire before the issue could be litigated. Third, the scope of the Commissioner's power is an issue of public interest. Having determined that the commercial fishing issue satisfies the requirements of the public interest exception, and that the procurement issue does not, we turn to the merits of the trial court's decision."

Unlike the fishing permit at issue in the Kodiak Seafoods case, CUP 20-15 was not revoked, it was voluntarily and temporarily withdrawn by Ms. Livingston who indicated her intent to resubmit it, presumably under a different CUP designation (which is irrelevant) in a year or two. Accordingly, Ms. Livingston still has a huge interest in the outcome of this appeal. Because live controversies remain, this appeal is not moot, technically or otherwise. Even if this matter were technically moot, the public interest exception to the mootness doctrine would apply for the following reasons: 1. the disputed issues are capable of repetition; 2. if this appeal were to be dismissed as moot, review of the issues on appeal would be repeatedly circumvented; and 3. the issues presented in this appeal, including threshold constitutional issues, are so important to the public interest as to justify overriding the mootness doctrine.

The City of Homer's October 14, 2021 response to Appellate's Motion for Reconsideration falsely states as follows at page 4: "There is no authority or procedure in the Homer City

Code to hear a motion for reconsideration of a final written decision and Griswold has not cited to any such authority." The very first sentence of the Motion for Reconsideration states: "***Pursuant to HCC 21.93.310,*** Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss which was dated August 5, 2021 and distributed on August 6, 2021." HCC 21.93.310 states: "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." The city's Motion to Dismiss Appeal, on the other hand, cites to no authority or provision of Homer City Code. No provision of HCC gives the Commission the authority to summarily dismiss an appeal on remand from the Board of Adjustment or consider new evidence not authorized within the Board's remand instructions. The city attorneys admit that the Commission did not have express authority in the code to dismiss the appeal but claim that it had "implied" authority to do so under HCC 21.93.310. However, HCC 21.93.310 does not apply because the Commission's dismissal of the appeal was contingent on its receipt of ex parte communications between Mr. Abboud and Ms. Livingston and unauthorized consideration of that new evidence, both of which are unlawful and inconsistent with HCC Chapter 21.

At page 4 of the city's response it states: "HCC 21.93 clearly states that zoning appeal decisions are final and BOA decisions are appealable to the Superior Court" (citing HCC 21.93.110 in footnote 16). BOA final decisions are irrebuttably appealable to the superior court but the BOA has not issued a final decision and Planning Commission decisions are not appealable to the superior court. HCC 21.93 applies solely to Board of Adjustment proceedings and decisions, not to Planning Commission proceedings and decisions. In their Notice of Appeal Rights at page 5 of their proposed Revised Revised Order Granting Motion to Dismiss, the city attorneys deliberately and deceptively manipulate HCC 21.91.130 in order to give it a different meaning than intended. HCC 21.91.130(a) states: "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 substantively participated in the proceedings before the Board of Adjustment or hearing officer or by the City Manager or City Planner or any governmental official, agency, or unit." No provision of HCC allows anyone to appeal a final decision of the Planning Commission directly to the superior court. HCC 21.93.550(a) provides that the Board of Adjustment may affirm or reverse the decision of the lower administrative body in whole or in part and that a decision affirming, reversing, or modifying the decision appealed from shall be in a form that finally disposes of the case on appeal, except where the case is remanded for further proceedings. Thus, only final decisions can be appealed to the superior court. Because the Commission's order dismissing the appeal was not a decision on the merits, it did not constitute a final decision. Even if the Commission's August 5, 2021 Order did constitute a final decision, it cannot be appealed to the superior court; it can only be appealed to the Board of Adjustment in accordance with HCC 21.93.500. Just because a zoning decision is "final" (meaning that it disposes of all issues) does not mean that it cannot be reconsidered. If this were the case, the Board of Adjustment would not have directed the Commission to take up the subject Motion for Reconsideration following the City Clerk's erroneous ruling that motions for reconsideration of agency final decisions cannot be taken up. Alaska Appellate Rule 602(a)(2) clearly indicates that administrative agencies have the discretion to reconsider their final decisions.

The Commission does not have the authority to rule on Appellant's Motion for Leave to Supplement Points on Appeal. As its header clearly indicates, that motion was submitted to the Board of Adjustment, not to the Commission. No formal appeal or points on appeal were submitted to the Commission so there are no points on appeal to supplement except for those submitted on appeal to the Board of Adjustment which now has the sole authority to grant the leave requested.

The August 4, 2021 Planning Commission minutes reveal that the Commission moved to dismiss this appeal due to the "lack of credentials on the part of the Planning Commission in addressing issues like this since they do not know the law" and because "it will be better to have these types of actions go before a hearing officer." These are not valid justifications for dismissing this appeal. Lacking credentials and being ignorant of the law does not justify granting all motions made by the city attorneys on behalf of the appellees and ignoring all motions made by the appellant. The Commission had the authority to be represented by erudite, impartial, independent legal counsel but voted not to exercise that option, choosing instead to blindly rubber-stamp the Motion to Dismiss and ensuing [Proposed] Order prepared by the highly partisan city attorneys.

Now these partisan attorneys are proposing that the Commission deny Appellant's Motion for Reconsideration but nonetheless revise its "final decision" to incorporate points raised in that Motion for Reconsideration. No provision of HCC allows the Commission to revise an order or final decision without first considering a motion for reconsideration. An ethical, impartial Commission, regardless of its lack of credentials and/or ignorance of the law, would grant Appellant's Motion for Reconsideration and, to the best of its ability, consider all of the issues raised therein while disregarding the illegal *ex parte* communications from Melody Livingston pertaining to her strategic temporary withdrawal of the application for CUP 20-15. The Commission does not require special credentials or knowledge of the law to comply with the straight-forward remand instructions of the Board of Adjustment.

Commissioner Franco Venuti declared a disqualifying financial conflict of interest with regard to the application for CUP 20-15 therefore should not have participated in the August 4, 2021 remand proceedings and should not participate in the current proceedings.

DATED: October 19, 2021
By: *s/Frank Griswold/*
Frank Griswold

Travis Brown

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:26 PM
To: Department Planning
Cc: Melissa Jacobsen
Subject: Memorandum 21-153 (Please Provide to Commission for Tonight's Meeting)

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

From: To:
Cc: Subject: Date:

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

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

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

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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,

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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

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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

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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

Travis Brown

From: Melissa Jacobsen
Sent: Wednesday, October 20, 2021 3:03 PM
To: Travis Brown
Subject: FW: September 20, 2021 Special Meeting Minutes

Please provide to the planning commission

From: Frank Griswold <fsgriz@alaska.net>
Sent: Wednesday, October 20, 2021 1:14 PM
To: Melissa Jacobsen <MJacobsen@ci.homer.ak.us>
Cc: Renee Krause <RKrause@ci.homer.ak.us>
Subject: September 20, 2021 Special Meeting Minutes

Ms. Jacobsen,

Footnote 1 at page 3 of the September 20, 2021 BOA minutes erroneously states as follows:

"The Motion for Reconsideration and Motion for Leave to Supplement Points on Appeal regarding CUP 20-15 were the only matters scheduled and addressed at this meeting. The reference to a Motion to reconsider regarding Zoning Permit 1020-782 was mistakenly added to a proposed motion provided by the Clerk in the working agenda provided to the Board. Zoning Permit 1020-782 is a separate matter that was not addressed at this hearing."

At the September 20, 2021 BOA meeting I addressed my Motion for Reconsideration re: Zoning Permit 1020-782 and after considering this matter in executive session the Board of Adjustment passed a motion to not take it up. Please correct the September 20, 2021 minutes accordingly and provide a copy of the email I sent to the BOA to the Commission for its consideration at tonight's meeting.

Frank

Session 21-22, a Regular Meeting of the Planning Commission was called to order by Chair Scott Smith at 6:31 p.m. on October 20, 2021 at Cowles Council Chambers in City Hall located at 491 E. Pioneer Avenue, Homer, Alaska, and via Zoom Webinar.

PRESENT: COMMISSIONERS BARNWELL, BENTZ, CONLEY, CHIAPPONE, HIGHLAND, SMITH, VENUTI

STAFF: CITY PLANNER ABBOUD
CITY CLERK JACOBSEN

APPROVAL OF THE AGENDA

BENTZ/VENUTI MOVED TO APPROVE THE AGENDA AS PRESENTED.

There was no discussion.

Chair Smith confirmed that the Commissioners received the supplemental packet and were prepared to act on Staff Report 21-62. The Commissioners concurred they received the materials and were prepared.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

PUBLIC COMMENTS ON ITEMS ALREADY ON THE AGENDA

RECONSIDERATION

CONSENT AGENDA

A. Planning Commission Regular Meeting Minutes of September 15, 2021
B. Decision and Findings for Conditional Use Permit 21-07 at 1554 Homer Spit Road
C. Homer Lake Street Rehabilitation Right of Way Acquisition Preliminary Plat Time Extension Request

HIGHLAND/BENTZ MOVED TO APPROVE THE CONSENT AGENDA AS PRESENTED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

PRESENTATIONS / VISITORS

REPORTS

A. Staff Report 21-61, City Planner's Report

City Planner Abboud reviewed his staff report that was included in the packet. He answered questions from the Commission regarding items in his report. He addressed the Safeway parking lot progress and that they're fulfilling the requirements of code with the expansion of their parking lot. They discussed the recent State determination to allow ATV's on roadways and City Clerk Jacobsen advised that Council had recently adopted code prohibiting ATV's on city streets. They also touched on Resolution 21-065 regarding non-motorized amenities on Kachemak Drive and the challenges for bicyclist and pedestrians, and the work of the Homeless Coalition.

Commissioner Bentz noted her surprise that strategic planning and the comprehensive plan on the horizon, it seems staff has a lot of different irons in the fire as far as plan development that are coalescing and could help them look at a longer term vision for the community and land. She referenced hazard planning, storm water and drainage planning, and transportation planning and shared that as a Commission they can think of the components of the plans together and that will help with the strategic planning process. Near term it will be interesting to see what policy recommendations the hazard planning team comes up with, that will help with long term planning and perhaps bring some specific code changes like setbacks, definitions, coastal bluff definitions, and so forth.

Chair Smith suggested having the Borough Transportation Planning Department present at a future worksession, similar to Platting Manager Huff's presentation tonight. City Planner Abboud said he'd try to work that in and shared that the strategic planning he referenced is more of developing a work plan for the office as they continue have more demand for services than hours so they need to prioritize things. He's interested in having transportation professionals help in considering what the future is likely to bring, and not get caught in the solution of today.

PUBLIC HEARINGS

A. Staff Report 21-64, Remand from the Board of Adjustment of Conditional Use Permit 20-15 at 106 W. Bunnell Ave.

Commissioner Venuti was excused from participating due to ruling of his conflict of interest regarding this matter, and was moved to a waiting room.

Commissioner Bentz reported a potential ex-parte communication in that she received a phone message from a concerned member of the public. Commissioner Bentz pointed out that the member of the public put her comments in writing and they're provided the supplemental packet, so she doesn't think she has any other information than the other Commissioners have, but wanted to bring this before the Commission to determine if she had bias in any way based on the phone message.

Chair Smith asked if Commissioner Bentz engaged in conversation with the member of the public. Commissioner Bentz responded she did not, it was a message left on her phone and once she realized what it was about she recognized it would be ex parte communication if she were to call the person back. The written comments are part of the record now in the supplemental packet and that's the substance of the comments in the message.

HIGHLAND/BARNWELL MOVED THAT COMMISSIONER BENTZ HAS EX-PARTE COMMUNICATION.

Commissioner Highland shared that due to the fact is was a message on a phone with no return phone call there is no ex-parte communication.

VOTE: NO: HIGHLAND, BARNWELL, CHIAPONNE, CONLEY, SMITH

Motion failed.

Chair Smith summarized the decision and order remanding CUP 20-15 to the Planning Commission, and then opened the public hearing.

Frank Griswold, city resident and appellant in the remanded matter, commented regarding Commissioner Bentz's disclosure of ex-parte and that it wasn't disclosed appropriately in accordance with Homer City Code. He commented that complex dispositive motions are under consideration tonight and should therefore be addressed in a special public hearing and not during a regular commission meeting where public comment is limited to three minutes. He noted on July 29, 2021 Attorney Holmquist agreed with him that the Commission should provide notice to neighboring property owners and set a special meeting to solely address his motion to dismiss the appeal, but the Commission did not do so. Instead they voted to dismiss the appeal, in hopes it would go to a hearing officer. He referenced notice requirements outlined in City Code and that proper notice was not given, and explained the two toll free numbers provided for the Zoom meeting were working but the meeting id and passcode did not work. Finally the City Planner is a party to the appeal and should not have written the staff report encouraging dismissal of the appeal and should not have engaged in ex-parte communication with Commission related to the applicant's temporary withdrawal of the CUP application. He cited Kleven v. Yukon Koyukuk School District related to a moot claim, and Knox v. Service Employee International Union Local 1000 when an action is not moot and questioned what precedent the Commission wants to set. He also noted matters that are not allowable in Homer City Code related to appeals, and an appellate procedure rule of the Alaska Courts regarding filing a motion for reconsideration. He encouraged the Commission comply with the Boards instructions and if the Board sees fit to dismiss the appeal, so be it.

There were no further comments and the hearing was closed.

The Commission discussed how best to proceed with this matter. They acknowledged the points raised in the remand and the points raised by Mr. Griswold. One matter relates to tax code which is not their specialty, and they'd need to be advised on how to address that.

BENTZ/HIGHLAND MOVED THAT THE COMMISSION POSTPONE DELIBERATION WITH STAFF SUPPORT TO AT TIME TO BE DETERMINED.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT

Motion carried.

Commissioner Venuti was admitted back to the meeting.

PLAT CONSIDERATION

PENDING BUSINESS

A. Staff Report 21-62, Parking Requirements for One Bedroom Dwelling Units

City Planner Abboud reviewed his staff report that was included in the packet. There were no questions from the Commission.

BENTZ/VENUTI MOVED TO RECOMMEND ADOPTION OF THE DRAFT ORDINANCE AMENDING HOMER CITY CODE 21.55.090A1 AND FORWARD TO PUBLIC HEARING.

There was no discussion.

VOTE: NON OBJECTION: UNANIMOUS CONSENT.

Motion carried.

NEW BUSINESS

A. Staff Report 21-63, Motion to Dismiss and Motion for Leave to Supplement Points on Appeal of CUP 20-15 Submitted by Frank Griswold

There was discussion regarding process and in attempt to determine the meaning of Leave to Supplement Points of appeal.

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Commissioner Highland referenced the information on page 79 of the packet which notes that HCC 21.93 does not authorize a party to supplement or modify points on appeal, and that the motion is moot because the appeal was dismissed. She questioned if the Commission isn't supposed to act on this, then why was it in their packet. She personally agrees with the conclusion noted on page 80 of the packet, and feels the Board of Adjustment should dismiss the appeal.

Commission Chiaponne asked for clarification on the motion from the Board of Adjustment. City Clerk Jacobsen explained if she understood the discussion at the last Board of Adjustment meeting, one of the arguments was that the Planning Commission didn't have the authority to dismiss the appeal and that the Board of Adjustment would be the body that would make that decision. She explained when the Board of Adjustment came out of their executive session on September 20th, they adopted the motion that while the Board of Adjustment believes it is a moot point due to the lack of an active permit application, the Board of Adjustment believes that the appeal procedurally should be before the Planning Commission for Appellant Frank Griswold's motion for reconsideration and motion for leave to supplement points on appeal of CUP 20-15 and the Board directs the Clerk to refer that motion back to the Planning Commission for consideration.

Commissioner Bentz commented the motion on the floor as it stands would be in alignment with the Board of Adjustment vote and also in alignment with the City's proposed order to deny taking up these motions. She's in agreement with the motion on the floor.

Commissioner Highland referenced packet page 33 under staff recommendations and noted its reference to HCC 21.93 does not contain a procedure for reconsideration of a final decision in a zoning appeal, or for allowing an appellant to supplement their points on appeal. HCC 21.93.110 states that zoning appeal decisions are final decisions. Since the code doesn't have a procedure she feels that's a strong argument.

VOTE: YES: BARNWELL, SMITH, CONLEY, CHIAPONNE, BENTZ, HIGHLAND

Motion carried.

INFORMATIONAL MATERIALS

A. City Manager's Report for September 27 & October 11, 2021 City Council Meetings
B. Kenai Peninsula Borough Notice of Decisions
C. Planning Commission Calendar

COMMENTS OF THE AUDIENCE

COMMENTS OF THE CITY STAFF

City Clerk Jacobsen said it was nice to be with you all tonight, thank you for a good meeting.

COMMENTS OF THE COMMISSION

Commissioner Highland said it was an interesting meeting.

Commissioner Chiaponne thanked the group for their help tonight.

Commissioner Conley apologized for his technical difficulties and thanked everyone for a good meeting.

Commissioner Venuti said he enjoyed the worksession tonight. He's glad Ms. Keiser was able to join and get her input. He thanked staff for doing a great job.

Chair Smith enjoyed the meeting the thought it would be a little more involved than it was. He's looking forward to their future worksessions. He thinks what the City Planner has mapped out is outstanding.

There were no other comments.

ADJOURN

There being no further business before the Commission, the meeting was adjourned at 8:18 p.m. The next Regular Meeting is Wednesday, November 3, 2021 at 6:30 p.m. A worksession is scheduled for 5:30 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska and via Zoom webinar.

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Melissa Jacobsen, MMC, City Clerk

Approved:______________________________________