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**CITY OF HOMER
HOMER, ALASKA**

Erickson

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ORDINANCE 17-07(S-2)

AN ORDINANCE OF THE CITY COUNCIL OF HOMER, ALASKA, AMENDING HOMER CITY CODE 21.93.060, 21.93.070, 21.93.080, 21.93.100, 21.93.110, 21.93.500, 21.93.540, 21.93.550, 21.93.560, 21.93.570, 21.93.700, AND 21.93.710 TO OFFER APPELLANTS THE CHOICE BETWEEN AN APPEAL BEFORE THE BOARD OF ADJUSTMENT OR A HEARING OFFICER IN APPEALS OF PLANNING COMMISSION DECISIONS

WHEREAS, It is in the City's best interest to provide individuals appealing decisions issued by the Homer Advisory Planning Commission the ability to use a hearing officer rather than the Board of Adjustment; and

WHEREAS, The use of experienced hearing officers that do not otherwise advise the City on legislative land use matters promotes public confidence in the City of Homer's administrative appeals process,

NOW, THEREFORE, THE CITY OF HOMER ORDAINS:

Section 1. Section 21.41.400 shall be amended to read as follows:

a. The Planning Commission shall hear and decide appeals when it is alleged there is an error in any requirement, decision, or determination made by the Planning Department.

b. **The Board of Adjustment or A** hearing officer appointed by the City Manager shall hear and decide appeals when it is alleged there is an error in any requirement, decision, or determination made by the Planning Commission.

Section 2. Section 21.91.110 shall be amended to read as follows:

Either the The Board of Adjustment **or a hearing officer appointed by the City Manager** shall hear and decide appeals **authorized by HCC 21.93. A person appealing a decision under HCC 21.93 shall select between an appeal before the Board of Adjustment or a hearing officer in the person's notice of appeal.**

A hearing officer appointed by the City Manager shall hear and decide appeals

43 pursuant to the provisions of the zoning code.
44

- 45 a. A hearing officer appointed by the City Manager to act as the decision
46 maker in appeals of decisions made by the Planning Commission must
47 have at least five years' experience acting as an administrative law judge or
48 administrative hearing officer and must be licensed to practice law in the
49 State of Alaska and in good standing.
50

51 Section 3. Section 21.91.120 shall be amended as follows:
52

53 Appeals heard by the Board of Adjustment **or a hearing officer** shall be
54 conducted according to applicable procedures specified in Chapter 21.93 HCC.
55

56 Section 4. Section 21.91.130 shall be amended as follows:
57

58 a. An appeal from a final decision of the Board of Adjustment **or a hearing**
59 **officer** may be taken directly to the Superior Court by a party who actively and
60 substantively participated in the proceedings before the Board of Adjustment
61 **or the hearing officer** or by the City Manager or City Planner or any
62 governmental official, agency, or unit.
63

64 b. An appeal to the Superior Court shall be filed within 30 days of the date of
65 distribution of the final decision to the parties appearing before the Board of
66 Adjustment **or hearing officer**.
67

68 c. An appeal from a final decision of the **Board of Adjustment or** hearing
69 officer to the Superior Court is governed by court rules.
70

71 Section 5. Section 21.93.030 shall be amended to read as follows:
72

73 21.93.030 Decisions subject to appeal to the Board of Adjustment **or a hearing**
74 **officer**.
75

76 The following acts or determinations of the Commission, when final, may be
77 appealed to the Board of Adjustment **or a hearing officer appointed by the**
78 **City Manager** by a person with standing:
79

80 a. Grant or denial of a conditional use permit.
81

82 b. Grant or denial of a variance.
83

- 84 c. Grant or denial of formal recognition of a nonconforming use or structure, or
85 a decision terminating a nonconforming use or structure.
86
87 d. Grant or denial of a conditional fence permit.
88
89 e. A decision by the Commission in a matter appealed to the Commission
90 under HCC 21.93.020.
91
92 f. Any other final decision that is expressly made appealable to the Board of
93 Adjustment **or a hearing officer** by other provisions of the code.
94

95 Section 6. Section 21.93.060 shall be amended to read as follows:
96

97 21.93.060 Standing – Appeal to Hearing Officer.
98

99 Only the following have standing to appeal an appealable action or
100 determination of the Planning Commission to the Board of Adjustment **or a**
101 **hearing officer**:
102

- 103 a. Applicant for the action or determination, or the owner of the property that
104 is the subject of the action or determination under appeal.
105
106 b. The City Manager, the City Planner or the City Planner’s designee, or any
107 governmental official, agency, or unit.
108
109 c. Any person who actively and substantively participated in the proceedings
110 before the Commission and is aggrieved by the action or determination.
111
112 d. Any person who actively and substantively participated in the proceedings
113 before the Commission and would be aggrieved if the action or determination
114 being appealed were to be reversed on appeal.
115

116 Section 7. Section 21.93.070 shall be amended to read as follows:
117

118 a. An appeal to the Planning Commission must be filed within 30 days after the
119 date of distribution of the final action or determination to the applicant or
120 other person whose property is the subject of the matter being appealed.
121

- 122 a. An appeal to the Board of Adjustment **or a hearing officer** must be filed within
123 30 days after the date of distribution of the final action or determination to the
124 applicant and other parties, if any.
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Section 8. Section 21.93.080 shall be amended to read as follows:

- a. A notice of appeal from an action or determination of the City Planner or the Planning Commission shall be filed with the City Clerk.
- b. A notice of appeal shall be in writing, be signed by the appellant, and shall contain, but is not limited to, the following information:
 1. The name and address of the appellant.
 2. A description of the action or determination from which the appeal is sought and the date upon which the action or determination became final.
 3. The street address and legal description of the property that is the subject of the action or determination being appealed, and the name and address of the owner(s) of that property.
 4. Detailed and specific allegations of error, including reference to applicable provisions of the zoning code or other law.
 5. A statement of whether the action or determination should be reversed, modified, or remanded for further proceedings, or any other desired relief.
 6. Proof showing that the appellant is an aggrieved person with standing to appeal under HCC 21.93.050 or 21.93.060. whichever is applicable.
 7. **The appellant's choice of decision maker, which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.**
- c. The City Clerk shall reject any notice of appeal that does not comply with HCC 21.93.070 and this section and notify the appellant of the reasons for the rejection. If a notice of appeal is rejected for reasons other than timeliness, a corrected notice of appeal that complies with this section will be accepted as timely if filed within seven days of the date on which the City Clerk mails the notice of rejection.
- d. The City Clerk shall mail copies of the notice of appeal to all parties of record in the proceeding appealed from within seven days of the date on

168 which the City Clerk determines the notice of appeal complies with HCC
169 21.93.070 and this section.

170
171 e. Any person with standing under HCC 21.93.050 or 21.93.060, whichever is
172 applicable, may, within seven days after ~~date~~ of the **date the** City
173 Clerk's ~~mailing~~ **mailed** copies of an accepted notice of appeal, file notice of
174 cross appeal. Any notice of cross appeal shall, to the extent practical,
175 comply with subsection (b) of this section.

176
177 f. The City Clerk shall promptly give notice of the cross appeal to the
178 appellant and all other parties who have filed a notice of appearance.

179
180 Section 9. Section 21.93.100 shall be amended to read as follows:

181
182 a. All appeals must be heard within 60 days after the appeal record has been
183 prepared. The body **or officer** hearing the appeal may for good cause shown
184 extend the time for hearing. The decision on appeal must be rendered within
185 60 days after the appeal hearing.

186
187 b. The appellant, the applicant for the action or determination that is the
188 subject of the appeal, the owner of the property that is the subject of the
189 action or determination, and all parties who have entered an appearance shall
190 be provided not less than 15 days' written notice of the time and place of the
191 appeal hearing. Neighboring property owners shall be notified as set forth in
192 HCC 21.94.030.

193
194 **c. When an appellant chooses to appeal to a hearing officer, the City Clerk**
195 **shall identify the hearing officer in the notice of hearing. All parties shall**
196 **have ten days from the date of the notice to object to the hearing officer**
197 **based upon conflicts of interest, personal bias or ex parte contacts.**
198 **Failure to file an objection to the hearing officer within the ten days shall**
199 **waive any objection to the hearing officer.**

200
201 d. An electronic recording shall be kept of the entire proceeding. Written
202 minutes shall be prepared. The electronic recording shall be preserved for one
203 year unless required for further appeals. No recording or minutes shall be kept
204 of deliberations that are not open to the public.

205
206 Section 10. Section 21.93.110 shall be amended to read as follows:

207
208 a. All final decisions on appeals shall be in writing, and shall state the **names**
209 **and** number of members of the body who participated in the appeal, **the**

210 **names and** number voting in favor of the decision, and the **names and**
211 number voting in opposition to the decision. **All final decisions issued by a**
212 **hearing officer must state the name of the officer.**

213
214 b. A decision shall include an official written statement of findings and reasons
215 supporting the decision. This statement shall refer to specific evidence in the
216 record and to the controlling sections of the zoning code. Upon express vote,
217 the body **or hearing officer** may adopt, as **their**s statement of findings and
218 reasons, those findings and reasons officially adopted by the body **or officer**
219 **below** from which the appeal was taken.

220
221 c. Copies of the written decision shall be promptly mailed to the appellant, the
222 applicant for the action or determination that is the subject of the appeal, the
223 owner of the property that is the subject of the action or determination, and all
224 parties who entered a written notice of appearance in the appeal proceeding.

225

226 Section 11. Section 21.93.500 shall be amended to read as follows:

227
228 21.93.500 Parties eligible to appeal Planning Commission decision to the
229 Board of Adjustment **or a hearing officer** – Notice of appearance.

230
231 a. Only persons who actively and substantively participated in the matter
232 before the Commission and who would be qualified to appeal under HCC
233 21.93.060 may participate as parties in an appeal from the Commission to the
234 Board of Adjustment **or a hearing officer.**

235
236 b. Any person so qualified who desires to participate in the appeal as a party,
237 other than the appellant, the City Planner or the City Planner's designee, the
238 applicant for the action or determination that is the subject of the appeal and
239 the owner of the property that is the subject of the action or determination,
240 must, not less than 14 days before the date set for the appeal hearing, file with
241 the City Clerk a written and signed notice of appearance containing that
242 party's name and address, and proof that the person would be qualified under
243 HCC 21.93.060 to have filed an appeal.

244

245 Section 12. Section 21.93.510 shall be amended to read as follows:

246
247 a. Except as provided in subsections (b) and (c) of this section, the Board of
248 Adjustment **or hearing officer** shall not consider allegations of new evidence
249 or changed circumstances and shall make **its**their decision based solely on the
250 record. If new evidence or changed circumstances are alleged, the Board of
251 Adjustment **or hearing officer** may, in **its** **their** discretion, either hear the

252 appeal without considering the allegations or may remand the matter to the
253 appropriate lower administrative body or official to rehear the matter, if
254 necessary.

255
256 b. When the standing of a person is in issue, the Board of Adjustment **or**
257 **hearing officer** may take additional evidence for the limited purpose of
258 making findings on the question of the person's standing. No evidence
259 received under this subsection shall be considered for purposes other than
260 determining standing.

261
262 Section 13. Section 21.93.520 shall be amended to read as follows:

263
264 a. The appeal record shall be completed within 30 days after receipt of a timely
265 and complete notice of appeal to the Board of Adjustment **or hearing officer,**
266 **and** shall consist of the items, and shall be prepared in the manner, described
267 in this subsection.

268
269 1. The Clerk will assemble and paginate all relevant documents
270 involved in the original decision, including any staff reports, minutes, exhibits,
271 notices, and other documents considered in making the original decision.

272
273 2. A party may elect to include a verbatim transcript of the testimony
274 before the Planning Commission in the appeal record by making a written
275 request to the City Clerk for a recording of the testimony within 14 days after
276 the Clerk mails copies of the notice of appeal to the parties pursuant to HCC
277 21.93.080(d). The requesting party shall arrange and pay for the preparation of
278 the transcript. Only a transcript prepared and certified as accurate by a
279 qualified court reporter shall be accepted. The original transcript must be filed
280 with the City Clerk to be provided to the hearing officer with the record on
281 appeal.

282
283 b. The appellant, the applicant for the action or determination that is the
284 subject of the appeal, the owner of the property that is the subject of the
285 action or determination, and other parties who have entered an appearance
286 shall be notified by mail when the record and transcript, if ordered, are
287 complete. Any person may obtain a copy upon payment of the costs of
288 reproduction and any applicable mailing costs.

289
290 Section 14. Section 21.93.540 shall be amended to read as follows:

291
292 a. The meeting at which the Board of Adjustment hears an appeal shall be
293 open to the public. **An appeal before the hearing officer shall also be open**

294 **to the public.** The City Attorney or another attorney acting as legal counsel to
295 the Board shall be present **at appeals before the Board of Adjustment.**

296
297 b. Each party (each appellant, cross-appellant, and respondent) may present
298 oral argument at the appeal hearing, subject to the order of presentation and
299 time limitations that the Board of Adjustment **or hearing officer** adopts at the
300 commencement of the hearing. The taking of testimony or other evidence is
301 limited by HCC 21.93.510.

302
303 c. The Board of Adjustment **or hearing officer** may undertake deliberations
304 immediately upon the conclusion of the hearing on appeal or may take the
305 matter under advisement and meet at such other time as is convenient for
306 deliberations until a decision is rendered. Deliberations need not be public.

307
308 d. The Board of Adjustment **or hearing officer** may exercise his or her
309 independent judgment on legal issues raised by the parties. “Legal issues” as
310 used in this section are those matters that relate to the interpretation or
311 construction of the zoning code, ordinances or other provisions of law.

312
313 e. The Board of Adjustment **or hearing officer** shall defer to the findings of the
314 lower administrative body regarding disputed issues of fact. Findings of fact
315 adopted expressly or by necessary implication by the lower body shall be
316 considered as true if they are supported by substantial evidence. But findings
317 of fact adopted by less than a majority of the lower administrative body shall
318 not be given deference, and when reviewing such findings of fact the Board of
319 Adjustment **or hearing officer** shall exercise independent judgment and may
320 make ~~its~~**their** own findings of fact. If the lower administrative body fails to
321 make a necessary finding of fact and substantial evidence exists in the record
322 to enable the Board of Adjustment **or hearing officer** to make the finding of
323 fact, ~~it~~**they** may do so in the exercise of ~~its~~ **their** independent judgment, or, in
324 the alternative, the Board of Adjustment **or hearing officer** may remand the
325 matter for further proceedings. “Substantial evidence,” as used in this section,
326 means such relevant evidence as a reasonable mind might accept as adequate
327 to support a conclusion.

328
329 **Section 15.** Section 21.93.550 shall be amended to read as follows:

330
331 21.93.550 Board of Adjustment **or Hearing Officer** Decision

332
333 The Board of Adjustment **or hearing officer** may affirm or reverse the decision
334 of the lower administrative body in whole or in part. A decision affirming,
335 reversing, or modifying the decision appealed from shall be in a form that

336 finally disposes of the case on appeal, except where the case is remanded for
337 further proceedings.
338

339 Section 16. Section 21.93.560 shall be amended to read as follows:
340

341 a. The Board of Adjustment **or hearing officer** may remand the appeal to the
342 lower administrative body when the Board **or hearing officer** determines that:
343

344 1. There is insufficient evidence in the record on an issue material to the
345 decision of the case;
346

347 2. There has been a substantial procedural error that requires further
348 consideration by the lower administrative body; or
349

350 3. There is other cause requiring further proceedings by the lower
351 administrative body.
352

353 b. A decision remanding a case shall describe any issue upon which further
354 evidence should be taken, and shall set forth any further directions the Board
355 **or hearing officer** deems appropriate for the guidance of the lower
356 administrative body.
357

358 c. The lower administrative body shall promptly act on the case upon remand
359 in accordance with the decision of the Board of Adjustment **or hearing officer**.
360 A case on remand has priority on the agenda of the lower administrative body,
361 except cases remanded under HCC 21.93.510(a) are not entitled to priority. The
362 applicant or owner of the property in question may waive the priority given by
363 this subsection.
364

365 Section 17. Section 21.93.570 shall be amended to read as follows:
366

367 If no specific procedure is prescribed by the code, the Board of Adjustment **or**
368 **hearing officer** may proceed in an administrative appeal in any lawful manner
369 not inconsistent with this title, statutes, and the Constitution.
370

371 Section 18. Section 21.93.700 shall be amended to read as follows:
372

373 a. A member of the Planning Commission, ~~or~~ Board of Adjustment **or a hearing**
374 **officer** appointed to hear an appeal from a Planning Commission decision may
375 not participate in the deliberation or voting process of an appeal if, following
376 the procedures set forth in this chapter, the Commission, or Board member **or**
377 **hearing officer** is determined to have a substantial financial interest in the

378 official action, as defined in Chapter 1.18 HCC. In the absence thereof, all
379 Commission; or Board members **or a hearing officer** shall participate in the
380 deliberation and voting process unless excused pursuant to other provisions of
381 this chapter.

382
383 b. When a financial interest of a member of the Planning Commission or Board of
384 Adjustment is disclosed on the record, the remainder of the Commission or
385 Board, respectively, shall determine whether the member should participate in
386 the matter. If it is determined the member should participate, any action taken
387 thereafter by the body shall be valid notwithstanding a later determination by
388 a court, an appellate tribunal, **or a hearing officer** that the member should
389 have been disqualified from participation because of a substantial financial
390 interest in the matter; except the action shall be invalidated when the
391 disqualified member's vote was necessary to establish the required majority to
392 approve the decision of the body. When a Commission or Board decision is
393 invalidated because such vote was necessary to establish the required
394 majority, the body shall commence new consideration of the matter beginning
395 at the point where the Commission or Board, respectively, determines it is
396 necessary to do so to eliminate the effect of the member's improper
397 participation.

398
399 c. **A hearing officer shall disclose any substantial financial interest, personal**
400 **bias or ex parte contact immediately upon being appointed by the City**
401 **Manager and shall refrain from accepting the appointment if a substantial**
402 **financial interest, personal bias or ex parte contact exists. If the**
403 **substantial financial interest, personal bias or ex parte contact arises after**
404 **the hearing officer's appointment, he or she shall disclose his or her**
405 **interest and shall be disqualified from serving as the hearing officer unless**
406 **all parties waive any objection to the hearing officer.**

407
408 d. For purposes of hearing an appeal, a quorum of the Commission is four
409 members **and a quorum of the Board is four members**. If it is not possible to
410 obtain a quorum of the Planning Commission **or Board of Adjustment** to hear
411 an appeal without the participation of members disqualified by reason of a
412 substantial financial interest, then all members who would be so disqualified
413 shall nevertheless participate in the appeal, including deliberations and voting,
414 and the decision rendered in such a case shall be valid notwithstanding the
415 participation of such members. This subsection shall not apply if the matter
416 can be postponed to a later date (not later than 75 days after the appeal record
417 is prepared) when the body can obtain a quorum of members who are not
418 disqualified by a substantial financial interest.

419

420 Section 19. Section 21.93.710 shall be amended to read as follows:

421
422 a. No member of the Commission or Board of Adjustment **or any hearing**
423 **officer appointed by the City Manager to review a decision issued by the**
424 **Commission** shall have ex parte communication with any person. “Ex parte
425 communication” means to communicate, directly or indirectly, with the
426 appellant, other parties or persons affected by the appeal, or members of the
427 public concerning an appeal or issues specifically presented in the notice of
428 appeal, either before the appeal hearing or during any period of time the
429 matter is under consideration or subject to reconsideration, without notice
430 and opportunity for all parties to participate in the communication.

431
432 b. This section does not prohibit:
433
434 1. Members from discussing matters relating to the appeal among
435 themselves.

436
437 2. Communications between municipal staff and Commission or Board
438 members **or the hearing officer** where:

- 439
440 a. Such staff members are not themselves parties to the appeal;
441 and
442 b. Such communications do not furnish, augment, diminish, or
443 modify the evidence in the record on appeal.

444
445 3. Communications between the Commission or Board and its legal
446 counsel.

447
448 c. If, before an appeal commences, a member of the Commission or Board
449 receives an ex parte communication of a type that could not properly be
450 received while an appeal is pending, the member shall disclose the
451 communication in the manner prescribed in subsection (d) of this section at
452 the first meeting of the Commission or Board at which the appeal is addressed.

453
454 d. A member of the Commission or Board who receives an ex parte
455 communication at any time shall, at the first opportunity after the
456 communication, place on the record of the pending matter all written
457 communications received, all written responses to the communications, and a
458 memorandum stating the substance of all oral communications received, all
459 responses made, and the identity of each person from whom the member
460 received an ex parte communication. Any party to the appeal desiring to rebut

461 the ex parte communication must be granted a reasonable opportunity to do
462 so if a request is promptly made.

463
464 e. If the Commission or Board determines in its discretion it is necessary to
465 eliminate the harmful effect of an ex parte communication received in
466 violation of this section, the Commission or Board may disqualify the member
467 who received the communication from participation in the appeal. In addition,
468 the Commission may impose appropriate sanctions, including default, against
469 a party to the appeal for any violation of this section.

470
471 f. It is a violation, subject to penalties and other enforcement remedies under
472 this title:

473
474 1. For any person to knowingly have or attempt to have ex parte
475 communication with a Commission or Board **or hearing officer** in
476 violation of subsection (a) of this section.

477
478 2. For any Commission or Board member **or hearing officer** to
479 knowingly receive an ex parte communication in violation of subsection
480 (a) of this section.

481
482 3. For any Commission or Board member to knowingly fail to place on
483 the record any matter when and as required under subsections (c) and
484 (d) of this section.

485
486 Section 20. This ordinance shall take effect upon its adoption by the Homer City
487 Council.

488
489 Section 21. This ordinance is of a permanent and general character and shall be
490 included in the City Code.

491
492 ENACTED BY THE CITY COUNCIL OF HOMER, ALASKA, this _____ day of
493 _____, 2017.

494
495 CITY OF HOMER

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499 _____
BRYAN ZAK, MAYOR

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501
502

503 ATTEST:

504

505

506

507 _____
JO JOHNSON, MMC, CITY CLERK

508

509

510 YES:

511 NO:

512 ABSTAIN:

513 ABSENT:

514

515

516

517 First Reading:

518 Public Hearing:

519 Second Reading:

520 Effective Date:

521

522 Reviewed and approved as to form.

523

524

525 _____
Mary K. Koester, City Manager

526

527 Date: _____

528

529

530 Fiscal Note: NA

Holly C. Wells, City Attorney

Date: _____

