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BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

APPEAL OF ZONING PERMIT 1020-782

**CITY OF HOMER'S BRIEF**

On September 10, 2020, Scott and Stacy Lowry (the “Applicants”) applied to Homer City Planning (“HCP) for a zoning permit for their property at 541 Bonanza Avenue (the “Property”) in Homer’s Central Business District (“CBD”). [R. 6-14] The property has an existing residential single family home. [R. 6] The Applicants applied for a zoning permit to construct an additional 360 square foot single family dwelling (the “dwelling” or “accessory dwelling”) on the Property. [R. 6] HCC 21.70.010(a)(1) requires a zoning permit for the construction of any building or structure. The Application included a site plan, a map of the property, information about exterior lighting that would be installed on the dwelling, photographs of the property, and a design rendering of the anticipated completed dwelling. [R. 6-14] The Applicants also obtained a water/sewer permit for the dwelling. [R. 16-17]

On October 5, 2020, HCP approved and issued Residential Zoning Permit 1020-782 (the “Permit”). [R. 5] HCP found that the proposed dwelling is permitted in the CBD under HCC 21.18.020(ii) because it is an accessory dwelling unit to a principal single-family dwelling on the Property. HCP charged the Applicants a fee of \$300, comprised of the ordinary permit fee of \$200 for a single family unit and an additional fee of \$100 (1.5 times the ordinary fee per the City’s fee schedule) for commencing construction without a permit. [R. 5, 15]

On October 8, 2020, Frank Griswold filed a notice that he was appealing HCP issuance of the Permit to the Homer Planning Commission (the “Commission”). [R. 3-4] The Homer City Clerk completed the Appeal Record on November 10, 2020. The appeal hearing was initially scheduled for January 6, 2021. However, at that hearing the Commission granted the City’s Motion to Continue Appeal Hearing and scheduled a new hearing for January 27, 2021.

### **ARGUMENT**

HCP’s grant of the Permit was in accord with the Homer Zoning Code and appropriate in all respects. HCC 21.18.020(ii) expressly allows the construction of an accessory dwelling unit on a property with an existing principal single-family dwelling. This is precisely the purpose for which Applicants sought the Permit. The detailed application contained all required information for HCP to decide whether to grant the Permit. Griswold’s “Allegations of Error” are factually and legally meritless. The City’s response to each of Griswold’s “Allegations of Error” is provided below:

**1. HCP's Planning Technician was Authorized by HCC 21.90.020(b) to Grant the Permit**

HCC 21.90.020(b) states:

b. If appointed by the City Manager, the City Planner shall have all functions and may exercise all powers necessary to administer and enforce the zoning code. Assistants to the City Planner may exercise the administration and enforcement functions and powers of the City Planner under the City Planner's supervision.

This provision clearly authorizes any assistant under the supervision of the City Planner, including Planning Technician Travis Brown, to exercise the administrative function of issuing zoning permits under HCC 21.70. Griswold's assertion that Mr. Brown did not have this authority is incorrect.

**2. The Inclusion of the Phrase "New Construction" on the Permit is Irrelevant to the Legality of the Permit**

The Permit is titled "Residential Zoning Permit New Construction." [R. 5] Griswold apparently disagrees with describing the dwelling as a "new construction." The phrase "new construction" is not defined in the Zoning Code. As a matter of practice, HCP uses the phrase "new construction" to describe improvements that are not part of an existing structure regardless of other improvements on the lot or the materials used in the structure. Nothing in the Zoning Code prohibits this practice. Moreover, the inclusion of the phrase "new construction" is irrelevant to the underlying legality of the permit. HCC 21.18.020(ii) expressly allows the detached accessory dwelling unit that is the subject of the Permit. Whether the Permit refers to the dwelling as "new construction" is an irrelevant semantic issue.

### 3. No Conditional Use Permit is Required

HCC 21.18.020 states, in relevant part:

The following uses are permitting outright in the Central Business District, except when such use requires a conditional use permit by reason of size, traffic volumes, or other reasons set forth in this chapter:

...

- ii. One detached dwelling unit, excluding mobile homes, as an accessory building to a principal single-family dwelling on a lot.

By contrast, HCC 21.18.030 describes the uses for which a conditional use permit (“CUP”) is required. Generally, a CUP is required where there is “[m]ore than one building containing a permitted principal use on a lot.” HCC 21.18.030(j). Read together, the intent of these provisions is to prescribe a general rule that a CUP is required for multiple buildings containing a permitted principal use on lot, but to carve out an exception where no CUP is required for a detached accessory dwelling unit to a principal single-family dwelling.

The history of HCC 21.18.020(ii) clearly establishes that this was the City Council’s intent. It was adopted in 2011 as part of Homer Ordinance 11-44(S). The ordinance states “[t]he Homer Advisory Planning Commission wishes to allow the placement of an accessory dwelling unit on a lot in the...Central Business zoning district[] without the burden of obtaining a conditional use permit if no other regulation requires such...” Homer Ord. 11-44(S). The City Council’s express intent in adopting HCC 21.18.020(ii) contradicts Griswold’s argument that a CUP is required under these circumstances.

#### 4. The Accessory Dwelling is Not a Nuisance Under HCC 21.18.080

Griswold's assertion that the accessory dwelling violates HCC 21.18.080 is meritless. Griswold appears to be referring to HCC 21.18.080(c). It provides:

c. Commercial vehicles, trailers, shipping containers and other similar equipment used for transporting merchandise shall remain on the premises only as long as required for loading and unloading operations, and shall not be maintained on the premises for storage purposes unless screen from public view.

The accessory dwelling is a converted shipping container. [R. 13-14] While it may have been used for transporting merchandise in the past, it is certainly not used for that purpose on the Property. It has been converted to an accessory dwelling<sup>1</sup> with a water and sewer connection. HCO has viewed the interior of the accessory dwelling and it is fully provisioned as a dwelling including sleeping, cooking, and sanitation facilities. The accessory dwelling is not a nuisance under HCC 21.18.080(c) because (1) it was not used for transporting merchandise to the Property; (2) it was not used for storage purposes at the Property; and (3) it is a "dwelling" or "dwelling unit" under the Zoning Code because it is arranged for residential occupancy and includes facilities for sleeping, cooking, and sanitation.<sup>2</sup>

Even if the accessory dwelling could be considered a nuisance and in violation of HCC 21.18.080, that would not be a basis for invalidating the Permit. HCP has discretionary enforcement authority to address such violations. HCC 21.90.020(c)(4).

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<sup>1</sup> See HCC 21.03.040 (defining "Dwelling" or "Dwelling Unit" as "any building or portion thereof designed or arranged for residential occupancy by not more than one family and includes facilities for sleeping, cooking, and sanitation and "Building" as "any structure used or intended for supporting or sheltering any use or occupancy").

<sup>2</sup> *Id.*  
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The Alaska Supreme Court held that discretionary enforcement decisions are not subject to review.<sup>3</sup> Accordingly, HCP's exercise of its discretionary authority not to enforce the alleged violation of HCC 21.18.080 is not reviewable and is not a basis for invalidating the Permit.

### **5. The Application Was Not Deficient**

The Applicants provided all information requested on the City's Zoning Permit Application. [R. 6-8] The City Planner has the discretion to determine whether a zoning permit application is incomplete. HCC 21.70.030(b). In this case, HCP found no errors or omissions in the application and exercised its discretion to review and grant the application. It is impossible to respond to Griswold's argument regarding compliance with HCC 21.70.020 because he does not identify the procedure he believes was "not fully complied with." To the extent any information was omitted, it was not material and did not hinder HCP's review of the application.

### **6. The Applicants Paid the Appropriate Fee**

HCC 21.70.060 requires an applicant for a zoning permit to pay a fee according to the fee schedule established by the Homer City Council. HCC 21.70.060. Per the fee schedule, the fee for a zoning permit for a single family home or duplex is \$200.<sup>4</sup> The fee when the applicant commences the permitted activity without a permit is "assessed at the regular rate multiplied by one and one half (1.5) for Residential..."<sup>5</sup> In this case, the

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<sup>3</sup> See *Yankee v. City and Borough of Juneau*, 407 P.3d 460 (Alaska 2017).

<sup>4</sup> See City of Homer Fee Schedule, [https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/city\\_clerk039s\\_office/page/7514/2020\\_07\\_fee\\_schedule.pdf](https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/city_clerk039s_office/page/7514/2020_07_fee_schedule.pdf), p. 16.

<sup>5</sup> *Id.*, p. 12 (n.1).

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Applicants paid a \$300 application fee, comprised of the ordinary \$200 zoning permit fee and an additional \$100 penalty for commencing activities prior to obtaining a permit. [R. 5, 15] The applicants paid precisely the correct fee pursuant to the fee schedule. Griswold's assertion to the contrary is incorrect.

### **7. HCP Did Not Waive Any Zoning Code Requirements**

HCP followed HCC 21.70 and all other applicable laws and regulations to review and grant the Permit. HCP did not waive any such provisions. It is impossible to respond to Griswold's argument because he does not specify which provisions he believes were not complied with.

### **8. The Technical Violation of HCC 21.70.010(b) is Not a Basis for Denying the Permit**

HCC 21.70.010(b) states "[t]he zoning permit required by this section shall be obtained prior to the commencement of any activity for which the permit is required. Failure to do so is a violation." It was a technical violation for the Applicants to commence the permitted activity before obtaining a permit. However, HCP has the discretionary enforcement authority to address such violations and there is no requirement for HCP to prescribe any particular penalty (or any penalty at all) for a violation. HCC 21.90.020(c)(4). In accord with its ordinary practice and the Homer Fee Schedule, HCP charged the Applicants an additional \$100 fee due to this technical violation. [R. 5; 15] HCP determined that this fee, in light of the Applicants' diligent work to make a lawful improvement to the Property, was a satisfactory means of

addressing the violation. This discretionary enforcement decision is not subject to review and the fact that a violation occurred does not invalidate the Permit.

### **9. A Zoning Permit Appeal is not the Proper Venue to Address Driveway Permitting**

Griswold appeals the approval of a zoning permit by the City Planner under HCC 21.93.020(a). Prior to the issuance of a zoning permit, an applicant must obtain any other necessary permits under the Zoning Code (HCC Title 21). HCC 21.70.070. HCC 11.08 regulates driveway permits and is not part of the Zoning Code. The Homer Public Works Department processes and reviews driveway permit applications. HCP is not involved in driveway permitting.

Whether a new driveway permit is required for the Property is irrelevant to this appeal of a zoning permit issued under HCC 21.70. That issue is within the sole discretion of the Homer Public Works Department. Accordingly, driveway permitting is not a basis to challenge the issuance of the Permit. Even if it were, Griswold's argument is meritless. The Applicants submitted driveway permits for the Property with the application. [R. 18-19] Contrary to Griswold's assertion, HCC 11.08.040(a) does not require a new driveway permit when two existing lots are combined into a single lot.

### **CONCLUSION**

HCP properly issued the Permit. The proposal to construct an accessory dwelling on the Property is allowed under the Homer Zoning Code. The accessory dwelling is not a nuisance under HCC 21.18.080. HCP appropriately followed all applicable Zoning Code requirements in considering the application and issuing the Permit. Griswold's



remaining arguments are meritless. Accordingly, the Commission should uphold HCP's decision to issue the Permit.

DATED this 25th day of January, 2021, at Anchorage, Alaska.

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