ON APPEAL TO THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

TRAVIS BROWN, SCOTT LOWRY,
AND STACY LOWRY,

Appellees.

_____/ Appeal of Zoning Permit 1020-782

APPELLANT'S BRIEF

1. City Planner Rick Abboud is not a legitimate a party to this appeal and has no authority to represent any entity of the City of Homer in this matter

City Planner Rick Abboud did not file an appeal or cross-appeal. He has no ownership interest in the subject property or neighboring property and is not otherwise aggrieved by Planning Technician Travis Brown's issuance of Zoning Permit 1020-782. Accordingly, he has no authority to represent Mr. Brown or the Lowrys in this matter. HCC 21.93.050(b) provides that the City Manager or City Planner or any governmental official, agency, or unit have standing to appeal an appealable action or determination of the City Planner to the Commission but it does not authorize the City Planner to participate as a party in administrative appeals filed by others and it does not give him standing to appeal an action or determination of his staff.

Alaska Statutes and Homer City Code mandate that all parties to a zoning appeal must be "aggrieved." The fact that Mr. Abboud may experience disappointment or hurt feelings when an action or determination of his staff is appealed does not make him an aggrieved person or otherwise give him standing to participate in that appeal. The City Planner should be objective and impartial and not an advocate for those who apply for zoning permits. HCC 1.18.048(a) states: "A City official or the City Manager who has partiality concerning a quasi-judicial matter shall not advise on [the] matter, adjudicate the matter or serve as a member of a body adjudicating the matter." Homer Personnel Regulation 8.7.3 states: "No employee shall use the implied authority of their position to unduly influence the decision of others or promote a personal interest in the community."

A corporation is an artificial entity created by law that cannot represent itself. AS 22.20.040 provides that a corporation, either public or private, shall appear by an attorney in all cases unless an exception has been explicitly made by law. Mr. Abboud is not an attorney and therefore cannot legally represent the Planning Department or any other entity of the City of Homer in any quasi-judicial proceeding. Individuals may represent themselves pro se but this exception does not apply to corporations. A non-lawyer (officer, agent or employee)

cannot represent a corporation in any judicial or quasi-judicial matter. See *Stone Street Partners LLC vs. The City of Chicago Dept. of Administrative Hearings*, 2014 IL App(1st) 123654 (Illinois, 2014). Any non-lawyer who represents others in a quasi-judicial proceeding engages in the unauthorized practice of law.

If City Planner Abboud is deemed to be a legitimate party to this appeal, HCC 21.93.710(a)(2)(a) prohibits ex parte communications between him and Planning Commissioners. HCC 21.93.710(c): "If before an appeal commences, a member of the Commission or Board receives an ex parte communication of a type that could not properly be received while an appeal is pending, the member shall disclose the communication in the manner prescribed in subsection (d) of this section at the first meeting of the Commission or Board at which the appeal is addressed."

2. The role of the Homer City Attorneys in this matter is not clear.

Appellant received no entry of appearance regarding this matter from JDO. JDO has not specifically indicated which entity of the City of Homer it is representing. There was no JDO logo on the proposed appeal procedures submitted by JDO. JDO has not indicated whether it will be be "assisting" in the preparation

of the Commission's decision. One has to wonder why the Administration is represented by legal counsel while the Commission is apparently not. Depriving the lay Commissioners of impartial legal counsel encourages them to rely on the biased advice of legal counsel for the Administration i.e., JDO which, in turn, is highly prejudicial to the Appellant.

3. The original Public Notice mailed to neighboring property owners was inaccurate and biased

The original Public Notice includes a biased computer generated rendering of the subject structure provided by the Applicant instead of an actual photo. This Public Notice falsely claims ZP 1020-782 is for an accessory dwelling unit and refers to Memorandum PL 21-01 which does not exist. Recipients of this public notice were instructed to contact City Planner Rick Abboud if they have questions or would like more information about the matter; Mr. Abboud claims to be a party to this appeal and was not positioned to provide impartial answers and/or information to the neighboring property owners or general public. The original Public Notice contained no certification of service or list of property owners served. The second public notice pertaining to the January 27, 2021 appeal hearing, if mailed at all, may not have been timely provided to neighboring property owners or otherwise have complied with HCC 21.94.030.

4. Commission Chair Scott Smith is not an impartial adjudicator and should be disqualified from participation in this matter

HCC 1.18.040(a) states: "A City official or the City Manager who has partiality concerning a quasi-judicial matter shall not advise on matter, adjudicate the matter or serve as a member of a body adjudicating the matter. HCC 1.18.020 states in relative part as follows: "Partiality" applies only in quasi-judicial proceedings and means:

> 1. The ability of a member of the quasi-judicial body to make an impartial decision is actually impaired; or
> 2. The circumstances are such that reasonable persons would conclude the ability of the member to make an impartial decision is impaired and includes, but is not limited to, instances in which:
> a. The member has a personal bias or prejudice for or against a party to the proceeding including a party's lawyer;
> b. The member or an immediate family member is a party, material witness to the proceeding or represents a party in the proceeding.

HCC 1.18.048 Procedure for declaring and ruling on partiality in quasi-judicial matters:

"a. A City official or the City Manager who has partiality concerning a quasi-judicial matter shall not advise on matter, adjudicate the matter or serve as a member of a body adjudicating the matter.
b. A City official who is a member of a quasi-judicial body and who has or may have partiality concerning a matter to be adjudicated shall disclose the facts concerning the official's possible partiality to the body to the parties to the matter prior to the commencement of proceedings by the body. Any member of the body, and any party to a matter before the body, may raise a question concerning a member's partiality, in which case the member in question shall disclose facts concerning the official's possible partiality in the matter.

c. After such disclosure, the City official may excuse themselves for partiality without a vote of the body, otherwise the body (including a body comprised of City Council members when serving in a quasi-judicial capacity) shall by majority vote rule on whether the member must be excused from participation, which must be the ruling when the body determines the official has partiality concerning the matter.

d. Rule of Necessity. Exceptions to a ruling excusing a member from participation shall be made in cases where:

1. By reason of being excused for partiality the number of members of the Council or other body eligible to vote is reduced to less than the minimum number required to approve the official action;

2. No other body of the City has jurisdiction and authority to take the official action on the matter; and

3. The official action cannot be set aside to a later date, within a reasonable time, when the body could obtain the minimum number of members to take action who are not excused for partiality.

When the body determines this exception applies, then all members, except the applicant when the applicant is a member of the body, shall participate in the official action."

At the conclusion of the September 2, 2020 Commission meeting, Chair Smith addressed the applicants for CUP 20-14 (an unrelated, distinct proceeding) as follows: "I think you can see that we're trying to advocate for you, and balancing our lay down from Mr. Griswold with code and your desires was an interesting process. So we'll trust that you get back with the city planner and are able to move forward." Chair Smith clearly revealed his implicit bias in favor of development. An impartial adjudicator advocates for no party in a quasi-judicial proceeding and cares not whether the application under

consideration moves forward. An impartial adjudicator sets his personal feelings aside and makes his decision based solely on the evidence. Implicit bias, by definition, pertains to attitudes and stereotypes that affect one's understanding, actions, and decisions in an unconscious manner. Nonetheless, it constitutes a bias/partiality that is prohibited under HCC 1.18.040(a) and HCC 1.18.020. The application to serve on the Homer Planning Commission asks: "Have you ever developed real property other than a personal residence"? [See Exhibit 4 attached hereto]. This inquiry inappropriately selects for Commissioners like Chair Smith who favor development thus fostering and perpetuating implicit and overt pro-development bias.

5. Planning Technician Travis Brown did not have the authority to issue Zoning Permit 1020-782

Planning Technician Travis Brown issued Zoning Permit 1020-782 [R. 5] but he did not have the legal authority to do so. HCC 21.70.030(a) states: "The City Planner will review the application to determine whether the proposed building or structure, and intended use, comply with the zoning code and other applicable provisions of the City Code, and to determine whether all permits and approvals required by applicable Federal, State, or local law or regulation have been obtained.

The City Planner may also refer the application to other City officials for review, comment or approval for compliance with applicable City Code. If the application meets all of the requirements, ***the City Planner will issue a written zoning permit.***" (Emphasis added). Thus, while Planning Technician Travis Brown had the authority to review the application for Zoning Permit 1020-782 for compliance with applicable code, he did not have the authority to issue the permit; this would have been solely the duty of the City Planner. HCC 21.70.030(c) states: "[i]n granting a zoning permit, no City official or employee has authority to grant a waiver, variance, or deviation from the requirements of the zoning code and other applicable laws and regulations, unless such authority is expressly contained therein. Any zoning permit that attempts to do so may be revoked by the City Manager as void. The applicant, owner, lessee, and occupant of the lot bear continuing responsibility for compliance with the zoning code and all other applicable laws and regulations."

6. Contrary to the caption on Zoning Permit 1020-782, the subject structure does not constitute "New Construction"

At the top of Zoning Permit 1020-782 it states: "Residential Zoning Permit New Construction." [R. 5] The subject structure is a rusty old converted connex shipping container

transported to Homer from Kenai [R. 13; SR. 14] but Zoning Permit 1020-782 does not identify it as such. It appears that Planning Staff was attempting to obfuscate the fact that Zoning Permit 1020-782 pertained to an old, rusty, converted connex shipping container and was being issued after-the-fact in violation of HCC 21.70.010(b).

7. Zoning Permit 1020-782 was not obtained prior to commencement of the activity for which it was required in violation of HCC 21.70.010(b)

Staff Report 20-58 regarding CUP 20-14 states: "The current property is one large lot. At one point it was two lots, but the interior lot line was vacated in 1993 so the current configuration is one large lot. Staff brings this to the Commission's attention because it is possible for the applicant to re-subdivide the lot, and have one mobile home on each lot without a conditional use permit. The applicant placed a "connex" single family dwelling on the property on July 20, 2020. No zoning permit was applied for, so the structure is in violation of city code. . . ." [SR. 13] HCC 21.70.010(b) states: "The 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." The Commissioners swore an Oath of Office to defend and support the Ordinances of the City of Homer, including HCC 21.71.010(b) and

HCC 21.70.030(c) which states: "In granting a zoning permit, no City official or employee has authority to grant a waiver, variance, or deviation from the requirements of the zoning code and other applicable laws and regulations, unless such authority is expressly contained therein. Any zoning permit that attempts to do so may be revoked by the City Manager as void. The applicant, owner, lessee, and occupant of the lot bear continuing responsibility for compliance with the zoning code and all other applicable laws and regulations." HCC 21.70.090 states: "No person shall use or occupy a building or structure that has been erected, constructed, enlarged, altered, repaired, moved, improved, or converted after January 1, 2000, without a properly issued and unrevoked zoning permit required by this chapter." The subject connex was occupied by tenants long before the illegal issuance of Zoning Permit 1020-782 on October 5, 2020.

8. The subject structure constitutes a single family residence which is not allowed on the subject lot because the lot already contains a single family dwelling

Applicants described the use of the existing structure as "existing residential 2 BR/1BA mobile home/house" and the use of the proposed structure as "residential 1BR 1BA 360 sq. ft." [R. 6] Zoning Permit 1020-782 identifies the structure permitted as a "360 square foot single family dwelling." [R. 5] The

subject lot already contains a single family (mobile home) dwelling. [R. 13] HCC 21.18.030(j) requires a conditional use permit for more than one building containing a permitted principal use on a lot. HCC 21.71.070 states: "Nothing in this chapter shall relieve the applicant of the obligation to obtain a conditional use permit, sign permit, variance, or other permit or approval required by other provisions of the zoning code. The zoning permit required by this chapter shall be in addition to any other applicable permit or approval requirements. ***If any such additional permits or approvals are required, they must be obtained prior to the issuance of the zoning permit under this chapter.***" (Emphasis added).

9. The subject structure violates nuisance standards prescribed in HCC 21.18.080

HCC 21.18.080(c) states: "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 screened from public view." The subject connex violates HCC 21.18.080(c) which states: "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 screened from public view." At the September 2, 2020 Homer Planning Commission meeting, the Commission entertained a motion to find that the structure in question was not used for transportation of merchandise and therefore HCC 21.18.080 Nuisance standards, item c, does not apply. This motion failed unanimously. [SR. 7] Nonetheless, the Commission's ensuing Decision denying CUP 20-14 states as follows: "The Commission also noted that the structure was not used for the transportation of merchandise, so it did not constitute equipment used for the transportation of merchandise described in HCC 21.18.080(c)." [SR. 52] The subject connex was originally constructed to be a shipping container designed for the transportation of merchandise and, regardless of what use it is later capable of or put to including conversion to a dwelling unit, it remains a shipping container subject to the nuisance standards of HCC 21.18.080(c). When a connex or other type of shipping container is being used for the transportation of merchandize, it does not constitute a nuisance or require screening from public view provided it only remains on the premises long enough for loading and unloading operations to take place. If it lingers on the premises, it is arguably being

maintained for storage purposes. This terminology is somewhat ambiguous as it could mean the connex itself is being stored, it could mean the connex is being used to store things inside, or it could mean both. The intent, however, is clear: shipping containers not engaged in the loading or unloading of merchandize are considered a nuisance in the CBD and must therefore be screened from public view. Even if a permanently or semi-permanently situated shipping container contains nothing, it constitutes a nuisance. The exterior is the objectionable part and its interior contents are, for the most part, irrelevant. Thus, any connex shipping container parked for an extended period of time on any parcel in the CBD must be screened from public view. The two unsightly shipping containers that have been parked/stored on Al Waddell's CBD property across from the Post Office for decades are clearly not in the process of being loaded or unloaded so they are subject to the nuisance standards of HCC 21.18.080(c). [SR. 73-76] Installing cooking facilities etc. inside and calling them dwelling units would not alter the fact that they are stored shipping containers which therefore require screening from public view. The fact that these two derelict shipping containers may no longer be suitable or capable of transporting merchandize is irrelevant; if anything, this makes them even more of an eyesore and a public

nuisance. HCC 21.18.020(o) allows Ministorage in the CBD as a permitted use but if that storage takes place within a permanently stored connex shipping container, that connex would need to be screened from public view pursuant to the nuisance standards set forth in HCC 21.18.080(c).

10. The subject structure does not constitute a detached Accessory Dwelling Unit (ADU)

Zoning Permit 1020-782 was clearly intended to permit a (second) single family dwelling on the subject lot, not a detached accessory dwelling unit. However, the original Public Hearing Notice, submitted into the record as a laydown, states: "Public notice is hereby given that the City of Homer will hold a public hearing by the Homer Planning Commission on Wednesday, January 6, 2021 at 5:30 p.m. via a virtual meeting, on the following matter: **Memorandum PL 21, Appeal of issuance of Zoning Permit 1020-782 to the Homer Planning Commission. Zoning Permit 1020-782 approved an accessory dwelling unit, a converted shipping container, at 541 Bonanza Ave., Lot 24A, Glacier View Subdivision No. 23., Sec. 20, T.6S., R.13 W., S.M. HM 0930033.**" During its discussions on September 2, 2020 regarding CUP 20-14, the Commission considered whether the converted connex might qualify as a detached accessory dwelling unit (ADU). [SR. 6-7] HCC 21.18.020(ii) permits one detached dwelling unit, excluding

mobile homes, as an accessory building to a single family dwelling on a lot. Definitions per HCC 21.03.040:

"Dwelling" or "dwelling unit" means 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.

"Dwelling, single family" means a detached dwelling unit designed ***for residential occupancy by one family.***

"Accessory building" means an ***incidental*** and subordinate building customarily ***incidental*** to and located on the same lot by [sic] the principal use or building, such as a detached garage ***incidental*** to a residential building.

Definitions otherwise:

Incidental means accompanying but not a major part of something.

Subordinate means less in rank or position - of lesser importance.

The subject connex is a stand-alone rental unit that is totally independent of the other rental unit on the lot. It has separate utilities, a separate driveway, and is physically separated from the mobile home portion of the lot by a 100-foot-long fence. [SR 61-62] The converted connex is smaller than the mobile home structure but it is neither subordinate to nor incidental to it, as would be the case if it were a detached garage or greenhouse etc. Applicant's testimony is recorded as follows in the September 2, 2020 Commission minutes: "There is an older mobile home on the property that is currently rented and that tenant has resided on the property prior to them purchasing the

property. They intend to use the new structure as a vacation home as they come to Homer every summer since they have family here. . . . The Applicant explained that they had future plans to replace the existing mobile home with a new structure." [SR. 4] Scott and Stacy Lowry are not related to the tenant of the existing mobile home, a former classmate of Stacy Lowry presumably named Jared Hemphill, [laydown] or to the new unidentified tenants of the connex. The tenants of the connex are not related to the tenant of the existing mobile home. Accordingly, the requirement for an accessory dwelling unit that the two dwelling units be designed for residential occupancy by one family is clearly not met.

11. Application procedures set forth under HCC 21.70.020 were not fully complied with

HCC 21.70.020(b) requires that the application include the following highlighted missing information:

1. The name, residence address, and mailing address of the applicant, the owner of the lot, and ***any lessee of the lot.***

4. ***The zoning code use classification under which the permit is sought.***

5. ***If construction or a new or changed use under a zoning permit will change the quantity or location of required off-street parking, a survey, plat, or plan, drawn to a scale of not less***

than one inch equals 20 feet showing the actual dimensions of the lot, the exact location of the buildings and structures erected or to be erected thereon, adjacent street rights-of-way, utility easements and facilities, building setbacks, drainage, parking lot ingress and egress points, driveways, parking lot aisles, and the number and location of off-street parking spaces and loading spaces. Where off-site parking will be provided to meet a requirement for off-street parking, a similar survey, plat or plan also shall be provided for the off-site parking, accompanied by the document required by HCC 21.55.060(d). A site plan prepared according to Chapter 21.73 HCC may be substituted for the survey, plat, or plan required by this subsection.

7. ***Copies of any building permits or other permits required by applicable Federal, State or local law or regulations.*** The 1993 Memorandum of Understanding regarding 541 Bonanza states in relevant part as follows: "City of Homer Policy allows only one water service per lot. Lot 24 and Lot 25 each have a water service. The water service to one of the lots must be abandoned before the two lots are resubdivided into one, single parcel. The owner of the lot agrees to remove the curb box and stem from one of the water services. At the time this work is done, the City of Homer will inspect the work. The owner agrees to secure the proper permits required to accomplish this work." [laydown]

On September 2, 2020 Scott Lowry testified to the Commission that there were already two sewer systems on the lot. There is no evidence in the record that any permits were obtained to remove any curb box or water stem. The connex and the mobile home are now connected to separate water services i.e., there are two water services illegally serving one lot.

12. A new (second) driveway permit was not obtained thus violating HCC 11.08.040(a)

The former driveway at 541 Bonanza Avenue was vacated when two lots were combined into one after which the driveway that formerly served 551 Bonanza became the driveway for the entire lot now designated 541 Bonanza. Driveway permit 1199 originally applied to 551 Bonanza while Driveway Permit 1432 applied to 541 Bonanza. Following subdivision, Driveway Permit 1199 applied to the combined lot which was arbitrarily designated 541 Bonanza and Driveway Permit 1432 was thereafter void. The site of that abandoned driveway was recently de-fenced, graveled, and graded but no new driveway permit was ever obtained authorizing this construction. This violates HCC 11.08.040(a) which states: "Any owner of abutting property desiring to gain access, or to enlarge or change the location of an existing access, to a road or street right-of-way shall do so only in strict accordance with the provisions of a permit issued by the City. Written

application must be made to secure such a permit from the City through the City Planner. Each application for a permit shall be accompanied by a fee in the amount determined by Council resolution and set forth in the City of Homer fee schedule." HCC 11.08.070(d)states: "No alteration shall be made without securing a permit." HCC 11.08.120(b) states: "There shall not be more than two driveways for any one property. Additional drives [sic] should not be requested unless there is a clear necessity for them. Additional driveways must be approved by the Director of Public Works." After the second driveway was vacated following the subdivision that combined two lots into one, the construction of an additional driveway was never approved by the Director of Public Works.

For all of the reasons above, Zoning Permit 1020-782 cannot be sustained.

DATED: January 25, 2021.

By: Frank Griswold
Frank Griswold