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

Evidence

The Commission's recently adopted "Procedure for Planning Commission Hearing" expressly states that ***at the hearing*** the parties may submit evidence. In accordance with this Procedure and because the March 11, 2021 appeal hearing is being conducted in a virtual (Zoom) meeting where the physical introduction of written evidence is not feasible, Appellant Frank Griswold hereby submits this evidence prior to the hearing.

HCC 21.93.300(d) underscores the importance of developing a full record. The Procedure sets unreasonably short time limits for presenting testimony, other evidence, questioning witnesses, oral argument, cross-examination, and rebuttal oral argument. While time limits may be appropriate for Board of Adjustment proceedings where the record is closed, the Commission is acting as a trial court where the record is still being established.

The Commission does not have the authority to set arbitrary time limits on the presentation of that evidence or otherwise suppress the introduction of evidence to thwart the development of a full record.

In a parallel but unrelated appeal before the Homer Board of Adjustment, one of the first orders of business was "Identification of the Parties." This procedure should be followed in this appeal as well. The Commission's Procedure states: "The Commission may question each of [the] parties listed above." However, the Procedure merely cites "Appellant" and "Appellee" above without naming the associated parties. There are multiple Appellees in this appeal, including property owners Stacy Lowry and Scott Lowry. The Procedure fails to acknowledge that pursuant to HCC 21.93.300(d) members of the general public have the right to submit written briefs or testimony and sets no deadline for the filing of those written briefs or testimony.

Among others, I requested that Dan Gardner and the Lowrys be made available for questioning as witnesses. This should not require any subpoenas. A subpoena is a writ ordering a person to attend a tribunal; it is not something needed to require a person already in attendance to respond to direct questioning and/or cross-examination. In proceedings covered by the Alaska

Administrative Procedures Act, subpoenas are governed by AS 44.62.430. AS 44.62.430(a) provides that before the hearing begins, the agency shall issue subpoenas at the request of a party, in accordance with ALASKA R. CIV. P. 45(g). AS 42.62.590 allows the superior court in the judicial district where the hearing is being held to use the court's contempt powers to enforce a hearing officer's subpoena or other lawful order. The agency prepares a written certification setting out the details of the alleged subpoena violation. The person seeking to compel the subpoena initiates the enforcement proceeding by filing a petition requesting enforcement of the subpoena and including the written certification. The court will then issue an order to show cause why the person failing to honor the subpoena should not be held in contempt. Anyone who is competent can be compelled by the Commission to give evidence in this matter. The Commission and/or Administration can compel Public Works Supervisor Dan Gardner, who has knowledge about matters relevant to this appeal, to attend the March 11, 2021 hearing as a witness without the need for a subpoena. At the September 2, 2020 Commission meeting when they were not under oath to tell the truth, both Stacy and Scott Lowry were eager to testify to the Commission and respond to its questions regarding CUP 20-14. However, at the January 27, 2021 continued appeal hearing

regarding Zoning Permit 1020-782, the Lowrys indicated that they did not intend to respond to questioning. The Lowrys gave their implied consent to respond to questioning when they submitted their application for Zoning Permit 1020-782. The Commission should compel them to respond to material questions regarding their application and if they refuse to do so they should be held in contempt by the Commission and sanctioned appropriately. Alaska Rule of Evidence 512(d) permits a negative inference to be drawn against a party who asserts the Fifth Amendment in a civil (non-criminal) action.

The representation role of the Homer City Attorneys is impermissibly ambiguous, prejudicial, and contrary to their prescribed duties thereby creating a potential conflict of interest. The City Attorney(s) should be required to disclose which party or parties they are representing. City Planner Rick Abboud is not a legitimate appellee because he is not a captioned party, would not be aggrieved by the invalidation/ denial of Zoning Permit 1020-782, and did not file an appeal or cross appeal. Boroughs and cities are not individual legal entities recognized in the U. S. Constitution, but states are. The Kenai Peninsula Borough derives its zoning powers from the State of Alaska and the City of Homer derives its zoning powers from the KPB and the Homer Planning Commission derives its

powers from the City of Homer. *Governmental Entity* means any (a) multinational, federal, national, provincial, territorial, state, regional, municipal, local or other government, ***governmental or public department,*** central bank, court, ***tribunal,*** arbitral body, ***commission, administrative agency, board,*** bureau or agency, domestic or foreign, (b) subdivision, agent, ***commission, board, or authority of any of the foregoing,*** or (c) quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under, or for the account of, any of the foregoing, in each case, that has jurisdiction or authority with respect to the applicable Party. Thus, the Homer Planning Commission, the Planning Department/ Administration, and the Homer Board of Adjustment are all distinct, legally recognizable entities of the City of Homer. Different agencies within a government entity should be considered separate clients when they have opposing positions in matters in controversy. Josephson & Pierce, <u>To whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict</u>, 29 Howard Law J. 540; Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978), at 768. HCC 2.16.010 addresses the City Attorneys' duty of loyalty as follows: "The City Attorney shall act as legal advisor to and be attorney and counsel for the Council and shall be solely responsible to the City

Council." HCC 2.16.010(a) states: "He [referring to the City Attorney] shall advise any officer or department head of the City in matters relating to his official duties when so requested and shall file with the City Clerk a copy of all written opinions given by him." This is qualified by HCC 2.16.010(e) which states: "He shall at all times cooperate with the City Manager and shall provide such information and reports and perform such duties as are requested by the City Manager ***so long as they are not inconsistent with the duties of his office as provided in this section.***" Advocating for the City Planner and/or for the City Administration in an appeal before the Commission is clearly inconsistent with the duties of the City Attorney prescribed in HCC 2.16.010.

When the application for Zoning Permit 1020-782 was submitted, no public notice was provided to surrounding property owners. In this particular case the city's failure to so notify the surrounding property owners is essentially moot in light of the fact that this appeal was nonetheless filed. However, the public interest exception to the mootness doctrine applies because of the negative due process implications for future zoning permit appeals. Whenever a zoning permit is issued, all property owners within a 300-foot perimeter of the subject lot should be notified so that they may exercise their appeal

rights. The requirement that recipients of a zoning permit post it in a visible location is rarely complied with and never enforced and therefore does not provide a valid substitution for written public notification.

This Commission is being hoodwinked. The Lowrys applied for a zoning permit to construct a 360 square foot single family dwelling; they did not apply for an accessory dwelling unit and they did not receive a zoning permit for an accessory dwelling unit. HCC 21.70.020(b) requires that the application for zoning permit include the zoning code use classification under which the permit is sought. Accessory dwelling unit is not mentioned on the application or zoning permit. The water/sewer permit for the modified connex was illegally issued; one lot cannot have two water/sewer services. This is why the Memorandum of Understanding required the former owner to remove one such service when in 1993 he combined two lots into one. At page 2, the City Attorneys claim that "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." Note that no reference to the record was provided for this claim and here is why: No such finding was ever made and the converted connex does not constitute an accessory dwelling unit. The City Attorneys posit that HCC

21.90.020(b) authorized Mr. brown to issue the permit but it did not. There is also no evidence in the record that Planning Technician Travis Brown was being supervised by City Planner Rick Abboud when he issued Zoning Permit 1020-782. Furthermore, HCC 21.70.030(a) takes precedent over HCC 21.90.020(b) because it is more specific. The longstanding rule in Alaska is that "if two statutes conflict, then the specific controls over the general." *Allen v. Alaska Oil and Gas Conserv. Com'n.*, 147 P.3d 664 at 668 (Alaska 2006). Furthermore, where there is a conflict in land use codes, the more restrictive code governs. *Bluett v. County of Cook*, 19 Ill. App. 2d 172, 153 N.E.2d 305 (1958); *City of Richiawn v. McMakin*, 313 Ky. 265, 230 S.W.2d 902 (1950); *Szilvasy v. Saviers*, 70 Ohio App. 34, 44 N.E.2d 732 (1942). HCC 21.70.030(a) specifically states that the City Planner will review the application to determine whether the proposal complies with the zoning code and other applicable provisions of HCC and determine whether all permits, including driveway permits and water/sewer permits, and all approvals required by applicable Federal, State, or local regulation have been obtained. HCC 21.70.030(a) authorizes the City Planner to refer the application to other city officials for review, comment, or approval for compliance with HCC but ultimately only the City Planner can issue the zoning permit. Planning Technician Travis

Brown is a city employee but he is not a city official. HCC 1.18.020 defines "city official" as follows: "City official" means a person who holds elective office under the ordinances of the City, or who is a member of a board or commission whose appointment is subject to confirmation by the City Council." HCC 1.10.010 addresses indemnification from liability and distinguishes between city employees and city officials.

It was inappropriate and deceitful for HCP to categorize the subject structure as "new construction" on the zoning permit when, in fact, it is an old converted connex shipping container. I never stated or implied that a CUP is required for a detached accessory dwelling unit; I maintained that the subject structure is, as indicated on the application and ensuing zoning permit, a single family dwelling and not a detached accessory dwelling unit. A second single family dwelling on the subject lot would clearly require a CUP per HCC 21.18.030(j). As I stated in my brief, the two totally independent structures on the lot are not occupied by a single family and the converted connex is not incidental to or subordinate to the mobile home.

No provision of HCC 21.18.080(c) requires a shipping container to have been used for transporting merchandize to the Property or to be storing items inside to be considered a nuisance requiring screening from public view. HCP has

discretionary enforcement authority but it does not have the authority to approve a zoning permit that violates city code. That is what the City Planner's review under HCC 21.70.030(a) is designed to prevent. I appealed the issuance of Zoning Permit 1020-782, not some non-existent enforcement order.

The procedures not fully complied with on the Application form are clearly delineated in my brief. If simultaneous briefing were not city policy, Appellees could have responded to my brief instead of my less developed Points on Appeal. The information omitted from the application was extremely material and severely hindered HCP's review of the application.

Applicants' failure to obtain the prerequisite zoning permit prior to craning in the converted connex cannot be dismissed as a mere technical violation. Neither HCP nor the Commission has the discretion to waive HCC 21.70.010(b). HCC 21.70.030(c) states as follows: "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." Most Commissioners swore an Oath of Office to defend and support the Ordinances of the City of Homer, not the fee schedule. The additional $100 fee for after-the-fact zoning permits was enacted by Resolution, not by Ordinance, and provides no deterrent whatsoever to violating HCC 21.70.010(b). In fact, limiting a potential violator's liability to such a de minimus amount encourages violations.

HCP was required to investigate driveway permits. HCC 21.70.030(a) requires the City Planner to review the application to determine whether the proposal complies with the zoning code ***and other applicable provisions of HCC*** and determine whether all permits, including driveway permits, and all approvals required by applicable Federal, State, or local regulation have been obtained.

HCC 21.90.090 lists the following as violations of Title 21:

A structure, alteration of a structure, or use of land or a structure that conflicts with a provision of the Homer Zoning Code, or a regulation or a permit issued under the Homer Zoning Code.

To use or occupy a structure, land or water other than as allowed by the Homer Zoning Code, regulations, or a permit issued under the Homer Zoning Code.

To erect, construct, reconstruct, enlarge, move, repair or alter a structure or part thereof other than as allowed by the Homer

Zoning Code, a regulation or a permit issued under the Homer Zoning Code.

To develop, occupy or use any land or structure contrary to or in violation of the terms of this title or the terms of any permit issued under this title.

To develop, occupy or use any land or structure in any manner for which a permit is required under the Homer Zoning Code without such a permit or after a required permit has been suspended or revoked.

To knowingly act in any manner declared by the Homer Zoning Code to be prohibited, unlawful, a violation, or an offense.

To cause another to commit a violation of this title.

Each act or condition in violation of this title, and every day upon which the act or condition occurs, is a separate violation.

A violator is a person who:
1. Commits or causes a violation of this title; or
2. Occupies, maintains, keeps, alters, constructs or establishes a structure, or use of land or a structure, in violation of the Homer Zoning Code, a regulation or a permit; or
3. Owns, controls or has the right to control land or a structure where the land or structure is used, occupied, maintained, kept, altered, constructed or established in violation of the Homer Zoning Code, a regulation or a permit."

The Commission should neither advocate for nor coddle zoning violators. Zoning Permit 1020-782 should be invalidated.

DATED: March 9, 2021.

By: *s/Frank Griswold/*
Frank Griswold