



City of Homer

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Memorandum

Agenda Changes/Supplemental Packet

TO: PLANNING COMMISSION
FROM: RENEE KRAUSE, DEPUTY CITY CLERK II
DATE: APRIL 5, 2023
SUBJECT: SUPPLEMENTAL

3. PUBLIC COMMENT ON ITEMS ALREADY ON THE AGENDA

- 3.A. Unapproved Meeting Minutes
Regular Meeting Minutes for March 15, 2023

Public Comment Received

pages 3-5

8. PUBLIC HEARING(S)

- 8.A. Request for Conditional Use Permit (CUP) 23-04 at 106 W Bunnell Avenue for Approval of Reduced Setback from a dedicated right-of-way within the Central Business District.

Agenda Item Report PC 23-023

Public Testimony Received.

pages 6-18



April 4, 2023

Re: Ex parte communications, partiality, and CUP 20-04.

Dear Commissioners,

On March 15, 2023, the Homer City Attorneys addressed the ex-parte communications that took place between the applicants for CUP 20-01/CUP 20-04 and multiple Commissioners. The attorneys characterized those ex parte communications as prohibited and advised Mr. Abboud that Commissioners should disclose any such ex parte contacts. However, the city attorneys cited no controlling provision of city code to support their legal advice.

Prior to the enactment of Ordinance 21-44(S), HCC 21.93.710(a) (regarding administrative appeal procedures) provided that no member of the Commission shall have ex parte communication with any person. HCC 21.93.710(c) required Commissioners to disclose illegal ex parte communications in accordance with HCC 21.93.710(d) which provided that a member of the Commission who receives an ex parte communication at any time shall, at the first opportunity thereafter, place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the member received an ex parte communication. HCC 21.93.710(e) provided that the Commission had the discretion to disqualify any member who participated in the appeal. In addition to disqualification, the Commission could impose appropriate sanctions, including default, against a party to the appeal for any ex parte violation. Under the guidance of attorney

Holmquist, HCC 21.93.710(c)(d) and (e) were repealed by Ordinance 21-44(S). The current gutted version of HCC 21.93.710, cited immediately below, provides that a *hearing officer* shall not have ex parte communications with any person but has no specific application to Commissioners considering an application for CUP or otherwise.

HCC 21.93.710 Ex parte communication prohibited.

a. The hearing officer appointed to review a decision issued by the Commission shall not have ex parte communication with any person. "Ex parte communication" means to communicate, directly or indirectly, with the appellant, other parties or persons affected by the appeal, or members of the public concerning an appeal or issues specifically presented in the notice of appeal, either before the appeal hearing or during any period of time the matter is under consideration, without notice and opportunity for all parties to participate in the communication.

b. This section does not prohibit:

1. Communications between municipal staff and Commission or the hearing officer where:

a. Such staff members are not themselves parties to the appeal; and

b. Such communications do not furnish, augment, diminish, or modify the evidence in the record on appeal.

2. Communications between the Commission and its legal counsel.

c. Repealed by Ord. 21-44(S).

d. Repealed by Ord. 21-44(S).

e. Repealed by Ord. 21-44(S).

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

1. For any person to knowingly have or attempt to have ex parte communication with a hearing officer in violation of subsection (a) of this section.
2. For the hearing officer to knowingly receive an ex parte communication in violation of subsection (a) of this section.
3. For the hearing examiner to knowingly fail to place on the record any matter that is an ex parte contact.

I am not aware of any current provision of HCC that specifically addresses ex parte communications involving Planning Commissioners but HCC 1.18.030(r) states: "City officials shall act impartially when conducting City business." Participating in ex parte communications clearly does not constitute acting impartially. Commissioners Smith and Barnwell willingly participated in lengthy ex parte communications with the applicants for CUP 23-04; this demonstrates that neither are impartial adjudicators. In accordance with HCC 1.18.048 (b) and (c), they should both be disqualified from all further proceedings regarding this matter.

Ex parte communications involving city officials have been taking place for decades. Recently, City Council member Shelly Erickson invited Commissioner Smith and Council member Davis to her residence to discuss her application for CUP 23-02. It is axiomatic that merely disclosing ex parte communications is insufficient to prevent them from occurring. The Commission should encourage the City Council to enact code provisions expressly prohibiting Commissioners from engaging in ex parte communications with applicants regarding quasi-judicial matters; implementing substantial enforceable penalties *might* help deter this pervasive activity in the future.



April 4, 2023

Dear Commissioners,

The Application for CUP 23-04 is glaringly incomplete and, for the most part, inapplicable to the setback reduction sought. The Application does not identify "setback reduction" as the proposed use or specifically state how many feet of setback reduction is being sought. Instead, it primarily refers to the proposed addition previously approved via CUP 23-01. Applicant(s) have clearly not produced sufficient evidence to enable meaningful review of the application as required under HCC 21.71.030. The Application for CUP 23-04 that was published online does not indicate on its face whether it was accepted by planning staff as complete or whether the appropriate application fee was paid. CUP 23-04 pertains to a stand-alone permit application and is not merely an amendment to CUP 23-01.

Staff Report 23-023 states as follows: "106 W Bunnell Ave is the site of four buildings and has adopted a condominium form of ownership for various elements found on the lot." This conflicts with Staff Report 20-63 dated October 7, 2020 regarding CUP 2020-15 which stated: "106 W Bunnell Ave is the site of two buildings, and the property has been turned into a condominium form of ownership." At that time, it was suggested by the city attorney that Wild Honey Bistro shares a common wall with the Inlet Trading Post structure such that all of the buildings on the lot collectively constitute a single structure. On appeal, the Homer Board of Adjustment remanded CUP 2020-15 to the Commission to determine whether the subject property contains a single building or whether the proposed project involves two buildings, but CUP

2020-15 was withdrawn before any relevant new evidence was presented. On February 8, 2023, Ms. Livingston stated that she owns 16% of Unit 2, by internal square footage, and that Unit 1 is a single structure housing the Bunnell Arts Center, Old Town Bed and Breakfast, and The Fringe which comprise 84% of ownership by internal square footage. However, 64% of the subject property involves external square footage such as parking lot(s), setbacks, and other open space. It has not been established who owns that external square footage and it is not readily apparent how many feet of setback reduction are being requested for Unit 1 and/or for Unit 2.

HCC 21.61.040(b) states: "No nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied as of the date it became nonconforming." Therefore, if any of the myriad uses of the subject lot constitute nonconforming uses, they cannot individually or collectively be extended into the setback. HCC 21.61.030(a) states: " A nonconforming structure may be enlarged or altered, but only if it does not increase its nonconformity." Extending nonconforming structures into the 20-foot setback could arguably increase their nonconformity, especially since HCC 1.08.010 mandates that "there shall be a minimum 20-foot building setback required which shall apply to any property line abutting any dedicated road or street right-of-way" and HCC 11.08.050(a)(3) requires that "all stands, buildings, gasoline pumps, and structures of any kind be placed at least 12 feet back on the property line." No evidence has been presented establishing when the existing decks and porches on the subject lot were constructed. Neither Planning Staff nor the Commission has the right to speculate as to the nonconforming status of a use or structure; the burden to establish nonconforming status of a structure or use

lies with the Applicant(s) in accordance with HCC 21.71.030 and HCC 21.61.050(a).

Nonconforming uses do not set a legal precedent for similar uses on adjacent properties; nonconforming uses are intended to be discontinued and replaced by conforming uses. In a memorandum to Council member Alan Parks dated April 3, 1998, Homer City Attorney Gordon Tans stated: "Generally, the existence of a non-conforming "grandfathered" use in a zoning district is not a legal precedent that would allow other similar establishments to open in the zone. To the contrary, the ordinance serves as the legal precedent saying that such establishments are not to be allowed in the zoning district. Therefore, the controlling legal precedent is the ordinance that prohibits the use." Likewise, illegally constructed structures or uses do not set a legal precedent for similar structures or uses.

The fact that there may be plans to modify setbacks for "Old Town" is irrelevant since no such plans have been implemented via ordinance. Furthermore, "Old Town" is not a zoning district. The subject lot lies within the CBD. Standard zoning enabling acts require that zoning ordinances apply uniformly to all properties within a zoning district.

Staff Report 23-023 was written by City Planner Rick Abboud who deemed himself a party to the appeal of CUP 2020-15 whee he acted in all respects on behalf of Ms. Livingston. It seems likely that he gave assurances to Ms. Livingston in exchange for her tactical withdrawal of her Application for CUP 2020-15. Staff Report 23-023 does not constitute an objective analysis of the requisite CUP review criteria and it was inappropriate for Mr. Abboud to have played any role in preparing it.

Mr. Abboud's proposed Findings are conclusionary and not supported by substantial evidence; this constitutes a flagrant violation of procedural due process. "Findings cannot be merely conclusionary, but must be based on evidence." *Day v. Williams*, 285 P.3d 256, 260 (Alaska 2012) quoting *Ethelbah v. Walker*, 225 P.3d 1082 at 1091 (Alaska 2009). The Commission is required under HCC 1.18.020 to be impartial in all quasi-judicial proceedings. Accordingly, it should act on its own independent consideration of the law and facts instead of rubber-stamping the biased, unsubstantiated findings of a subordinate.

Under review criteria (b), Staff Report 23-023 states "the purposes of the structures are well within the stated purpose of the district." However, the proposed purpose of the application for CUP 23-04 is to obtain a setback reduction and setback reduction is not a stated purpose of the CBD. Staff Report 23-023 further states: "The result of the structures located closer to the rights-of-way enhances a human scale and friendly pedestrian environment." Enhancing a human scale, whatever that means, is not a stated purpose of the CBD and reducing building setbacks along congested West Bunnell Avenue creates an unfriendly environment for pedestrians by exacerbating that traffic congestion. On the other hand, constructing sidewalks along Bunnell Avenue would create a friendly environment for pedestrians. Contrary to Staff Report 23-023, proposed CUP 23-04 offers no pedestrian amenities.

Under review criteria (f), Staff Report 23-023 states: "Desirable neighborhood character could be described by a portion of the purpose statement for the district. The proposed project is centrally located within the City of Homer and continues the general retail and restaurant uses of the property. The proposed design

aligns well with the existing buildings and sustains the character promoted in the Comprehensive Plan. The current setback distance promotes, [sic] mixed-use development, higher density development, and infill as supported in Chapter 4 Goal 1 Implementation item D-3 of the Homer Comprehensive Plan." Determining the effects of a proposal on desirable neighborhood character under review criteria (f) is a totally different standard from determining whether a proposal comports with the purposes of the zoning district and/or the comprehensive plan. Under review criteria (f), it irrelevant whether the proposed project is centrally located within the City of Homer, aligns with the existing buildings, or is supported by item D-3 of the Homer Comprehensive Plan. Under HCC 21.71.030(f), the Commission must consider harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, including parking issues, when determining whether the proposed setback reduction will not cause undue harmful effect upon desirable neighborhood character. Businesses that do not have adequate on-site parking will clearly have an undue harmful effect to any neighborhood. In his staff report, Mr. Abboud did not consider any of the factors prescribed under HCC 21.71.030(f) and deliberately chose to substitute factors prescribed in other review criteria in order to secure the Commission's approval of CUP 23-04.

Mr. Abboud claims that CUP 23-04 is contrary to the following goals and objectives of the Homer Comprehensive Plan: Goal 2: Maintain the quality of Homer's natural environment and scenic beauty. Objective A: Complete and maintain a detailed "green infrastructure" map for the City of Homer and environs that present an integrated functional system of environmental features on lands in both public and

private ownership and use green infrastructure concepts in the review and approval of development projects. Objective C: Provide extra protection for areas with highest environmental value or development constraints. Goal 3: Encourage high quality buildings **and sight design** that complements Homer's beautiful natural setting. The Comprehensive Plan Goal of "infill" is unconstitutionally vague; infilling per se is not a valid zoning objective. See *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9. In any event, the subject lot is already densely infilled.

Building setbacks were enacted to promote health, safety and general welfare in accordance with HCC 21.01.030 which includes 21.01.030(f): "Provide adequate open spaces for light and air; and to prevent and fight fires." No evidence has been presented to establish that existing fire services are adequate to serve this site where a restaurant kitchen fire could easily wipe out four business now located in the adjoining tinder-box structure that was formerly the Inlet Trading Post. With structure(s) built into the 20-foot setback forcing on-street parking, it could prove difficult to get a fire truck or ambulance anywhere close to such a fire.

Instead of focusing on the potential affects of the restaurant addition, the Commission should focus primarily on the affects of the proposed setback reduction, including the existing inadequate parking and resulting traffic congestion. If any amount of setback reduction is approved, there will be even less room for on-site parking. With vehicles protruding into the roadway from both sides, Bunnell Street is already an extremely dangerous place for motorists, bicyclists, and pedestrians.

With regard to CUP 2020-15, Planning Staff determined that 16 parking spaces were required for Wild Honey Bistro and that only 10 on-site parking spaces were provided. The current Application asks: "How many spaces are shown on your parking plan? But no requisite parking parking plan was submitted. In her cover letter, Ms. Livingston alleges that there are currently 20 parking spaces in the front, counting both sides of Bunnell Street, plus 10 parking spots in the rear. The angled parking spaces in front already encroach into the West Bunnell Street right-of-way and therefore constitute on-street parking which is generally disapproved of within the CBD. Ms. Livingston stated that the majority of bakery products are currently being prepared offsite and that prep work during the summer has to happen outside of normal work hours but after the new construction is completed, bakery products will be prepared onsite and prep work will happen during normal work hours. This means that even more parking spaces will be required for those additional onsite employees.

The parking spaces across the street from 106 West Bunnell serve other businesses and do not qualify as designated parking spaces for the myriad businesses operating on the subject lot. HCC 21.55.020(b) states: "Except as this chapter permits otherwise, the entire parking lot, including parking stalls and aisles, shall be located on private property and not in any public right-of-way." The 10 parking spaces in the rear are already insufficient to accommodate the customers, staff, employees, and delivery trucks serving the four businesses operating within the Inlet Trading Post structure, much less Wild Honey Bistro. The parking spaces owned by AJ's Steakhouse do not currently qualify as parking spaces for Wild Honey Bistro. HCC 21.55.050(b) states: "Off-street parking

that is not located on the same lot as the use for which it is required shall meet the standards for off-site parking in HCC 21.55.060. Among myriad other requirements, HCC 21.55.060 requires a recorded parking agreement between the parties involved and signs advising customers of the location of the off-site parking. HCC 21.55.120(a) states: "Each lot containing a building or use that receives or makes deliveries shall contain off-street facilities for the loading and unloading of delivery vehicles that meet the requirements of this section. HCC 21.55.120(b) states: "Each loading area shall be situated and of sufficient size to permit loading and unloading without interference with or projection into any public right-of-way or parking area, except as provided in subsection (c) of this section. Each loading area shall be provided with convenient access to a public right-of-way. The access may be located in a required yard or setback, but this does not permit the location of a structure in a required setback." HCC 21.55.120(c) states: "No loading or unloading may be conducted in a required off-street parking area for more than four hours in any period of 24 hours." The Commission does not have the authority to waive any parking space requirements. HCC 21.70.030(c).

HCC 21.18.050 states: "A zoning permit for any building or structure within the Central Business District shall not be issued by the City without a site plan and a level two right-of-way access plan approved by the City under Chapter 21.73 HCC." HCC 21.50.030(f)(1)(a)(i) mandates that landscaping shall include the retention of native vegetation to the maximum extent possible and shall include, but is not limited to, a buffer of three feet minimum width along all lot lines where setbacks permit; except where a single use is contiguous across common lot lines, such as, but not limited to, shared

driveways and parking areas. Whenever such contiguous uses cease the required buffers shall be installed. The 20-foot setback along West Bunnell Avenue would be an appropriate space for providing the landscaping required under HCC 21.50,030 and the CDM.

CUP 23-04 should be denied outright but when it is inevitably approved, significant conditions should be imposed. Down-lighting is not an actual condition because it is already required under HCC 21.59.030. Partially screening a dumpster does nothing to alleviate parking issues and traffic congestion. On September 21, 2022, Mayor Castner stated to this Commission that after reducing the number of conditional use permits [via Ordinance 22-68(A)], "A person can still go for a conditional use permit, but with the expectation that there is going to be conditions." No final action regarding this Application should be taken until all nonconforming status issues are investigated and resolved. Thereafter and absent outright denial, providing adequate on-site parking, providing pedestrian amenities, meeting all landscaping requirements, and obtaining Fire Marshal approval should be among the conditions imposed for CUP 23-04.

Frank Gotswald



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Memorandum PL 22-05

TO: HOMER PLANNING COMMISSION
FROM: RICK ABBOUD, AICP, CITY PLANNER
DATE: MARCH 15, 2023
SUBJECT: CONDITIONAL USE PERMIT (CUP) PROCEDURES

After receiving correspondence on the Decisions and Findings and other issues related to CUP 23-01, in addition to reported attempted or actual communications with Commissioners involved in the quasi-judicial item, I asked for clarification regarding procedures and options available to Commissioner's and the applicant from the City Attorney.

He provided me a communication that outlines provisions in code for CUP's and consideration for Commissioners once a motion has been made and approved after time for reconsideration has passed.

Basically, the Commission's decision is now final, the record is closed, and no substantive changes may be made to the Decisions and Findings document that would alter the motion passed at the last meeting. The applicant does have the right to appeal or take other actions to fulfil the conditions of the CUP. The Commissioners are asked to disclose their communications with the applicant.

I would like to correct the Attorney's correspondence that there are in fact 6 conditions that were approve with CUP 23-01 and not 5.

Attachments

City Attorney Email

From: [Michael Gatti](#)
To: [Rick Abboud](#)
Subject: Wild Honey Bistro CUP
Date: Wednesday, March 15, 2023 11:43:14 AM
Attachments: [image.png](#)
[image.png](#)

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

Rick,

Further to our recent discussions regarding CUP 23-01 and your recent communications with the applicant, we advise Homer City Planning as follows:

Following a public hearing conducted on March 1, 2023, the Homer Planning Commission approved CUP 23-01 in a subsequent written decision setting forth findings and conditions with regard to the application. That CUP permits the applicants to build over an area in excess of 30% of the lot, pursuant to HCC 21.18.040(d). CUP 23-01 contains five conditions, one of which requires the applicants to "Obtain approval of structures in the setback prior to commencement of any building activities." You have correctly advised the applicants that approval of structures in the property's setback requires an additional CUP for a reduction of the 20-foot setback requirement pursuant to HCC 21.18.040(b)(4). You also correctly advised the applicants that under Condition 1 of CUP 23-01 and HCC 21.71.020(a)(9), they must obtain a signed authorization from the property's other owner, Asia Freeman, consenting to the application for CUP 23-01 and consenting to be bound by the permit's terms.

The Commission's written decision with regard to CUP 23-01 is final. There is no procedure in the Homer City Code to re-open the application for CUP 23-01 to address any additional issues, supplement the record, or reconsider or clarify the decision. The applicants may appeal the Commission decision to a hearing officer pursuant to HCC 21.93.020(b)(1) if they disagree with some aspect of the decision. However, the Commission does not have the authority to revisit CUP 23-01.

You have informed us that the applicants may have communicated with individual commissioners following the March 1, 2023 hearing. Such communications would constitute a prohibited ex-parte contact. Commissioners must refrain from communicating with applicants about matters which have come before the Commission, even if the Commission has already decided them, due to the possibility of an appeal and subsequent remand of the matter to the Commission. Commissioners should disclose any ex-parte contacts with the applicants.

Please let us know if you have any questions regarding these issues.



Max D. Holmquist

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City Planning Department of Homer,

April 5, 2023

I am writing this letter of support for Wild Honey Bistro to be able to expand for capacity of City Bear Breads. The Old Town District is a growing area for our community. There are new residences being built as well as a few new businesses setting up shop in that area. The addition of a bakery will benefit the locals as well as tourists. Tourists like to support local businesses. Local restaurants like to purchase local ingredients and products for their menus. Locals like to purchase fresh products. For example, today I stopped in and purchased a fresh French Chai Croissant on my way to recycling. It enhanced my trip deliciously. I am hoping in the future to be able to stop in and get a fresh loaf of bread. For this to happen, there needs to be an expansion of the baking area.

Homer needs to be supporting new business growth in the down town area. The walk-ability of Wild Honey and City Bear Breads only enhances what Homer has to offer.

It is not easy in today's market to be a small business owner and operator. For Homer to be a vibrant and growing city, it needs to be investing in small businesses. These year round businesses shop locally, hire locally and pay taxes locally. I have heard it said money spent locally changes hands in that community 7 times. Promoting and allowing new businesses provides jobs, taxes and supports the other small businesses in the community.

Please approve the permitting required for a new bakery to add to our city of Homer.

Sherry Stead

Small Business Owner