



Homer City Hall
491 E. Pioneer Avenue
Homer, Alaska 99603
www.cityofhomer-ak.gov

City of Homer Agenda

City Council Special Meeting as Board of Adjustment

Monday, December 13, 2021 at 4:00 PM

In Person at City Hall Cowles Council Chambers and by Zoom Webinar

<https://cityofhomer.zoom.us/j/92222013235?pwd=ZS9ybzMvWXd2WXNna3ozYmF5cXRmdz09>

Or Dial: +1 669 900 6833 or +1 253 215 8782 or Toll Free 877 853 5247 or 888 788 0099

Webinar ID: 922 2201 3235 Passcode: 411958

CALL TO ORDER, 4:00 P.M.

AGENDA APPROVAL (Only those matters on the noticed agenda may be considered, pursuant to City Council's Operating Manual, pg. 6)

PENDING BUSINESS

Each party will be given a total of 15 minutes to address both matters.

- a. Consideration of Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal by Frank Griswold, Appellant

Memorandum 21-201 from City Clerk as backup

- b. Recommendation by the Planning Commission to Dismiss the Appeal of Conditional Use Permit (CUP) 20-15 for the Reconstruction of a Restaurant Building at 106 W. Bunnell Avenue, Homer, Alaska based on the Applicant's Withdrawal of their CUP Application.

Memorandum 21-202 from City Clerk as backup

NEW BUSINESS

COMMENTS OF THE AUDIENCE

ADJOURNMENT NO LATER THAN 4:50 P.M.

Next Regular Meeting is Monday, January 10, 2022 at 6:00 p.m., Committee of the Whole at 5:00 p.m. All meetings scheduled to be held in the City Hall Cowles Council Chambers located at 491 E. Pioneer Avenue, Homer, Alaska.



City of Homer

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Office of the City Clerk

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Memorandum 21-201

TO: MAYOR CASTNER AND CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: NOVEMBER 4, 2021

SUBJECT: MOTION FOR LEAVE AND TO SUPPLEMENT POINTS ON APPEAL BY FRANK GRISWOLD, APPELLANT

On August 10, 2021 a Motion for Leave to Supplement Points on Appeal to Address the Planning Commission's Dismissal of Appeal was filed by Frank Griswold, Appellant in the appeal of CUP 20-15.

In his motion, Mr. Griswold states he moved for leave to supplement his points on appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission.

At the September 20, 2021 meeting of the City Council sitting as Board of Adjustment (BOA), the BOA didn't take up the matter of the Motion for Leave. It may have been unclear as to whether it was a motion to be taken up by the BOA or the Planning Commission.

The matter is before the BOA to take action.

Recommendation: Move to deny the appellant's motion Leave to Supplement Points on Appeal to Address the Planning Commission's Dismissal of Appeal, or move to take up the matter at a date to be determined and a BOA meeting will be scheduled.

WJ

BEFORE THE CITY OF HOMER BOARD OF ADJUSTMENT

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____ /

RE: CUP 20-15

**MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL TO
ADDRESS PLANNING COMMISSION'S DISMISSAL OF APPEAL**

Pursuant to HCC 21.93.570, Appellant Frank Griswold hereby moves for leave to supplement his Points on Appeal so that the Board of Adjustment may address the Planning Commission's August 5, 2021 Order Granting Motion to Dismiss Appeal and the Commission's failure to respond to the Board's March 9, 2021 Decision and Order Remanding to the Commission. The Commission's Order and Appellant's Motion for Reconsideration are attached hereto as Exhibit 1 and Exhibit 2 respectively.

DATED: August 10, 2021

By: s/Frank Griswold/

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Max D. Holmquist, Esq.
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Attorneys for City of Homer

BEFORE THE HOMER PLANNING COMMISSION

In the Matter of

CONDITIONAL USE PERMIT 2020-15

)
)
) On appeal from Planning
) Commission Decision
) October 7, 2020

ORDER GRANTING MOTION TO DISMISS APPEAL

The Homer Planning Commission, having reviewed the City of Homer's Motion to Dismiss Appeal, as well as any opposition and reply thereto, and finding that Applicant Melody Livingston's withdrawal of her September 17, 2020 conditional use permit application for 106 West Bunnell Avenue voids Conditional Use Permit 20-15 and moots all pending issues in this appeal, and that there is good cause to dismiss this appeal;

HEREBY ORDERS that the above-captioned appeal is dismissed

DATED:

August 5, 2021

Scott Smith
SCOTT SMITH
CHAIR - HOMER PLANNING
COMMISSION

LAW OFFICES OF
JERMAIN DUNNAGAN & OWENS
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Exhibit 1

NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, the City Planner, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal to the Superior Court shall be filed within 30 days of the date of distribution of this decision.

I hereby certify that a true copy of the foregoing document was hand delivered/mailed on the 6th day of

August, 2021, to:
Frank Griswold, Attorneys Holmquist & Gatti
Melody Livingston, Matt Early, City Planner Aboud, City Manager DeMouchel
By: Melissa Jacobsen, City Clerk

M Jacobsen

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(01150886)

CITY OF HOMER'S MOTION TO DISMISS APPEAL

In the Matter of: Conditional Use Permit 2020-15

ON REMAND BEFORE THE HOMER PLANNING COMMISSION

FRANK GRISWOLD,

Appellant,

v.

HOMER PLANNING COMMISSION,
MELODY LIVINGSTON DBA
WILD HONEY BISTRO, MATT EARLY,

Appellees.

_____/ RE: CUP 20-15

MOTION FOR RECONSIDERATION

Pursuant to HCC 21.93.310, Appellant Frank Griswold hereby seeks reconsideration of the Commission's Order Granting Motion to Dismiss Appeal which was dated August 5, 2021 and distributed on August 6, 2021.

The Commission overlooked the material fact that it did not have the authority to consider the Motion to Dismiss Appeal. The Commission's authority is limited to that which the Board has expressly delegated to it. See *Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 962-63 (Alaska 2018) ("[a]dministrative agencies are created by statute and therefore must find within the statute the authority for the exercise of any power they claim"). HCC 21.93.560(b) states: "A decision remanding a case shall describe any issue upon which further

Exhibit 2

evidence should be taken, and shall set forth any further directions the Board or hearing officer deems appropriate for the guidance of the lower administrative body." The Board's March 9, 2021 Decision and Order says nothing about dismissing this appeal or taking evidence pertaining to its dismissal.

The Commission overlooked HCC 21.93.110(a) which states in relative part as follows: "All final decisions on appeals shall be in writing, and shall state the names and number of members of the body who participated in the appeal, the names and number voting in favor of the decision, and the names and number voting in opposition to the decision." The Commission's Order Granting Motion to Dismiss Appeal fails to state the name of any Commissioner other than Chair Smith.

The Commission overlooked HCC 21.93.110(b) which states in relevant part as follows: "A decision shall include an official written statement of findings and reasons supporting the decision. This statement shall refer to specific evidence *in the record* and to the controlling sections of the zoning code." The Commission's Order Granting Motion to Dismiss does not refer to any evidence in the appeal record or to any controlling code. Note that Melody Livingston's withdrawal of her application for CUP 20-15 is not included in the record on appeal and

constitutes illegally submitted new evidence which the Commission has no authority to consider.

The Commission overlooked HCC 21.93.300(b) which states: "An appeal hearing shall be scheduled within the time specified in HCC 21.93.100. The hearing will be open to the public." No formal appeal hearing was scheduled for the Motion to Dismiss Appeal and no formal briefing of the matter was allowed. The Commission overlooked the material fact that there was no opposition to holding a special public hearing to solely address the Motion to Dismiss Appeal. The City of Homer's Response to Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal states in relevant part as follows: "Subject to and without waiving its arguments on these issues, the City agrees that the Commission should continue the August 4, 2021 hearing. Out of an abundance of caution and to avoid a dispute on this issue, the City suggests that the Commission continue the hearing to provide public notice to neighboring property owners. Also, in light of numerous pleadings Mr. Griswold has filed related to the City's Motion to Dismiss Appeal, the Commission should consider setting a special hearing to solely address this matter."

The Commission overlooked HCC 21.93.100(b) which requires that neighboring property owners be notified of the proceedings as set forth in HCC 21.94.030. Neighboring property owners were not notified of the August 4, 2021 proceedings as set forth in HCC 21.94.030.

The Commission overlooked the material facts that the application for CUP 20-15 was merely suspended and that because live controversies still exist the issues on appeal are not moot.

The Commission overlooked HCC 21.93.560(c) which states in relevant part as follows: "The lower administrative body shall promptly act on the case upon remand in accordance with the decision of the Board of Adjustment or hearing officer." The Board remanded this matter to the Commission on March 10, 2021. Five months later, the Commission has still not acted on the issues remanded to it by the Board.

On page 2 of its Order, the Commission states: "This is a final decision. Pursuant to Homer City Code, Chapter 21.91.130, any party who actively and substantively participated in the proceedings before the Homer Board of Adjustment, the City Manager, or any governmental official, agency, or unit may appeal this decision directly to the Superior Court. An appeal

to the Superior Court shall be filed within 30 days of the date of distribution of this decision." The Commission clearly misconstrued, misrepresented, and/or misapplied HCC 21.91.130 which provides as follows:

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

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

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

Thus, HCC 21.91.130 applies solely to final decisions issued by the Board of Adjustment or hearing officer and does not apply to final decisions issued by the Planning Commission. The Planning Commission overlooked the material facts that the Board of Adjustment has not issued a final decision in this matter and the Commission does not have the authority to issue a decision on behalf of the Board of Adjustment. The Planning Commission overlooked the material fact that an appellant does not have the option of appealing an action or determination of the Planning Commission directly to the superior court. Appeals from an action or determination of the Planning Commission, such as its

August 5, 2021 Order Granting Motion to Dismiss Appeal, are governed by HCC 21.93.080. HCC 21.93.080(b)(7) provides that a notice of appeal from an action or determination of the Planning Commission shall include "[t]he appellant's choice of decision maker, **which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.**" While parties who actively and substantively participated in the proceedings before the Board of Adjustment plus the City Manager, the City Planner, and/or any governmental official, agency, or unit may appeal an action or determination of the **Board of Adjustment** directly to the superior court, none can appeal an action or determination of the **Planning Commission** directly to the superior court. HCC 21.91.130 does not state or imply that an action or determination of the City Manager or City Planner or any governmental official, agency, or unit can be appealed directly to the superior court. The City Manager, the City Planner, governmental officials, agencies, and/or units are merely additional parties, besides citizen appellants, who may appeal a final decision of the **Board of Adjustment** to the superior court.

DATED: August 10, 2021

By: s/Frank Griswold/



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Memorandum 21-202

TO: MAYOR CASTNER AND CITY COUNCIL SITTING AS BOARD OF ADJUSTMENT

FROM: MELISSA JACOBSEN, MMC, CITY CLERK

DATE: OCTOBER 15, 2021

SUBJECT: RECOMMENDATION FROM PLANNING COMMISSION ON THE APPEAL OF CUP
20-15

At the September 20, 2021 meeting of the City Council sitting as Board of Adjustment regarding the Appeal of Conditional Use Permit (CUP) 20-15 the Board and unanimously approved the following motion:

LORD/ADERHOLD MOVED THAT WHILE THE BOARD OF ADJUSTMENTS BELIEVES IT IS A MOOT POINT DUE TO THE LACK OF AN ACTIVE PERMIT APPLICATION, THE BOARD OF ADJUSTMENT BELIEVES THAT THE APPEAL PROCEDURALLY SHOULD BE BEFORE THE PLANNING COMMISSION FOR APPELLANT FRANK GRISWOLD'S MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 AND THE BOARD DIRECTS THE CLERK TO REFER THAT MOTION TO THE PLANNING COMMISSION FOR RECONSIDERATION.

The Planning Commission took the matter up at their October 20, 2021 meeting. The Commission denied the Motion for Reconsideration submitted by Frank Griswold, Appellant, and made the recommendation that the Board of Adjustment dismiss the appeal of CUP 20-15. The Commission unanimously approved the following motion:

HIGHLAND/BENTZ MOVED THAT THE PLANNING COMMISSION DENIES TAKING UP THE MOTION FOR RECONSIDERATION AND THE MOTION FOR LEAVE TO SUPPLEMENT POINTS ON APPEAL OF CUP 20-15 SUBMITTED BY APPELLANT GRISWOLD AND THAT THE PLANNING COMMISSION RECOMMENDS THE BOARD OF ADJUSTMENT DISMISS THE APPEAL OF CUP 20-15 DUE TO THE FACT THAT THE APPLICANT HAS WITHDRAWN THEIR CONDITIONAL USE PERMIT APPLICATION AND THEREFORE THE PERMIT NO LONGER EXISTS.

Recommendation: Move to dismiss the appeal of CUP 20-15 based on the Applicant's withdrawal of their application or Move to direct the Planning Commission to take up the Order Remanding to the Planning Commission regarding CUP 20-15.