BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE CITY OF HOMER

In the Matter of	)	
	)	
CONDITIONAL USE PERMIT 2018-09	)	OAH No. 18-1264-MUN
	)	

DECISION ON APPEAL and ORDER OF REMAND

I. Introduction

Dr. Paul Raymond proposes to build a 20,000-square-foot, two-story medical building on a 1.4-acre parcel across Cityview Avenue from South Peninsula Hospital. Because the area's zoning requires a conditional use permit (CUP) for medical clinics and for buildings over 8,000 square feet, he applied for a CUP with the Homer Advisory Planning Commission ("Commission"). After two contentious public meetings to take testimony from many members of the community, the Commission voted unanimously on September 19, 2018 to approve the CUP. A written decision followed on October 19, 2018.

Robin Lund, who owns and lives in residential property about 200 feet from the subject parcel, testified against the CUP before the Commission and now appeals the Commission's decision. Also appearing in the appeal proceedings were the City Planner (defending the Commission's decision), Raymond Property Management, Inc. (owner of the parcel for which Dr. Raymond applied for a CUP), and Dr. Tim Scheffel (operator of a small office in the area).

Mr. Lund requested that his appeal be heard before a hearing officer, rather than before the Board of Adjustment.[1] The City Clerk referred the matter to the Alaska Office of Administrative Hearings to supply a hearing officer as permitted by HCC 21.93.100 and AS 44.64.055.

Some of the matters raised in this appeal are serious concerns, on which reasonable people could have different opinions. However, in the limited context of an appellate review, no deficiencies in procedure or analysis have been shown that would support a decision to overturn the Commission's decision entirely.

One error has occurred in connection with the review criterion regarding adequacy of public services and facilities. This will necessitate a remand to the Commission for limited supplemental proceedings to develop an adequate record and prepare better findings in this area. The supplemental proceedings may lead to a different outcome, such as the imposition of new conditions on the CUP.

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1 Record (R.) 12. *See also* HCC 21.93.080(b)(7).

II. Facts and Proceedings

A. Permit Background

The property at issue, which uses the address of 267 Cityview Avenue, is an L-shaped parcel with 225 feet of frontage on Cityview Avenue and with a depth of 320 feet. It spans the block between the main parking lot for South Peninsula Hospital and the 10,000-square-foot Homer Medical Clinic, and is therefore across the street from both of those structures. It has no frontage on Hohe or Bartlett Streets. Those margins of the block are occupied by small medical clinics or houses.[2]

The property is presently used as a parking lot.[3] There are suggestions in the record that this use predates the current owner and that it may be out of compliance with land use requirements, but there is no clear evidence on this.

Dr. Raymond proposes to build a 70-by-160-foot two-story building whose footprint would occupy one-sixth of the parcel's 60,000 square feet. Most of the remainder of the lot would be used for parking spaces for 85 vehicles, although there would also be landscaped areas.[4]

Dr. Raymond submitted his CUP application on a city form on July 30, 2018.[5] The form is filled out fairly completely but rather laconically. Dr. Raymond supplied a detailed and informative site plan, but little information about the surrounding area. The City's Planning and Zoning Department prepared and circulated an aerial photo of the vicinity and a local map that identifies some of the nearby lots.[6]

B. Area Zoning

267 Cityview Avenue is zoned Residential Office (RO).[7] This zoning category has the following general description in the Homer City Code:

> The Residential Office District is primarily intended for a mixture of low-density to medium-density residential uses and certain specified businesses and offices, which may include professional services, administrative services and personal services, but generally not including direct retail or wholesale transactions except for sales that are incidental to the provision of authorized services. A primary purpose of the district is to preserve and enhance the residential quality of the area while allowing certain

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2 R. 30-31, 54, 57-58, 62-63.
3 *E.g.*, R. 118.
4 R. 47-48, 246.
5 R. 117-128.
6 R. 130-131. The excellent, color-coded map at Raymond Ex. A is not part of the record on which this permit can be reviewed, as discussed later in this decision.
7 R. 110, 117.

services that typically have low traffic generation, similar scale and similar density. The district provides a transition zone between commercial and residential neighborhoods.[8]

Any building over 8,000 square feet, and any medical clinic, requires a CUP.[9]

C. Public Hearings and Decision

The Raymond application went to a public hearing in front of the Homer Advisory Planning Commission on September 5 and 19, 2018. At the September 5 hearing, the City Planner presented a Staff Report proposing ten findings and two special conditions.[10] This was supplemented on September 19, 2018, notably with a Traffic Impact Review responding to public concern on the issue of traffic.[11]

Robin Lund was an active participant in the public hearing process, commenting both orally and through a detailed, articulate, organized, and thoughtful set of written comments. Citizen interest in the application was quite high, with the majority of commenters expressing concern or opposition.

The Commission unanimously voted to "adopt staff report PL 18-50 and 18-58 and approve CUP 2018-09" with three conditions.[12] The Commission issued its formal written decision on October 19, 2018 and distributed it on October 22, 2018.[13]

In November of 2018 Dr. Raymond submitted an amended application, seeking approval to move the building's site from the middle of the tract to its north margin, directly opposite the hospital.[14] This was approved on January 2, 2019, with a formal decision issued on January 25, 2019.[15]

D. The Appeal

Robin (Rob) Lund, as previously mentioned, participated actively in the public process. He owns a residence on the northeast corner of Hohe Street and Danview Avenue, across the street from the block that would be altered by the proposed development.[16] He submitted an

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8 HCC 21.16.010.
9 HCC 21.16.030, 21.16.040(e).
10 R. 37-43.
11 R. 99-106.
12 R. 223-226.
13 R. 227-233.
14 R. 242-251.
15 R. 260-266.
16 R. 131.

"amended and resubmitted" appeal of the October 19 decision on December 11, 2018.[17] The circumstances under which the appeal was first initiated are not clear from the record, but the City Clerk has deemed the appeal timely and fully perfected.[18] By agreement, it has been deemed to encompass the January 2019 amended approval, all parties agreeing that the changes made in the amendment have little bearing on the issues in this appeal.

III. Discussion

A. Procedure

Applications for CUPs are submitted to the City Planner. The application is reviewed, and once deemed complete, the City Planner is required to schedule and notice a public hearing in front of the Commission.[19] Following the public hearing, the Commission is then required to act on the application and issue a decision that contains its written findings and reasoning in support of the decision.[20]

A person who "actively and substantively participated" in the matter in front of the Commission, has the right to appeal the Commission's decision granting or denying a CUP.[21] The appeal may be either to the Board of Adjustment or a hearing officer appointed by the City Manager.[22]

Appeals are heard solely on the established record, unless standing of a party or disqualification of a board member are at issue (neither exception applies here).[23] If changed circumstances or new evidence ought to be considered, or if there simply is not enough evidence in the record on a material issue, the remedy is to remand the matter to the Commission rather than to take evidence at the appeal level.[24] After briefing, an oral argument is to be held, and a decision issued.[25]

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17 R. 5-12. Note that the CUP amendment was pending, but not yet approved, at the time of the amended and resubmitted appeal.
18 R. 3.
19 HCC 21.71.030, HCC 21.27.050 (a).
20 HCC 21.71.050(b).
21 HCC 21.93.030(a), HCC 21.93.500(a).
22 HCC 21.93.030, HCC 21.93.500(a).
23 HCC 21.93.510.
24 HCC 21.93.510 and 21.93.560.
25 HCC 21.93.530 – 550.

Because new evidence may not be considered in the first instance at the appeal level, the exhibits submitted with Raymond Property Management's February 25, 2019 brief are hereby excluded. They have not been relied upon in this decision.

The Homer City Code permits the hearing officer to remand the case to the deciding body as a remedy for procedural errors or gaps in the evidence.[26] In this case, as we will see, there has been an apparent procedural error in handling one of the review criteria, which necessitates a remand. A remand for a procedural error leads to defined supplemental proceedings that have scheduling priority on the Commission's agenda.[27]

B. Standard of Review

The applicable standards of review on appeal are set by the Homer City Code. The standard of review on purely legal issues is one of independent judgment.[28] The standard of review for factual findings in a case such as this one is one of substantial evidence:

> The Board of Adjustment or hearing officer shall defer to the findings of the lower administrative body regarding disputed issues of fact. Findings of fact adopted expressly or by necessary implication by the lower body shall be considered as true if they are supported by substantial evidence. . . . "Substantial evidence," as used in this section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[29]

In a case reviewed on the substantial evidence standard, "[i]t is not the function of the [hearing officer] to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists."[30]

C. Points on Appeal

Mr. Lund's December 11 points on appeal are detailed and articulate, but they are difficult to work with because of cross-cutting issues. Mr. Lund recast his appeal points in his February 11, 2019 opening brief, and those points will be used in this discussion. No party has contended that the opening brief raised new issues that are outside the bounds of this appeal.

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26 HCC 21.93.560.

27 HCC 21.93.560(c).

28 HCC 21.93.540(d).

29 HCC 21.93.540(e). When a CUP is denied, it is possible to have a situation where the factual findings are made by a minority of the Commission's members (HCC 21.71.050(e)). In that circumstance, an independent judgment standard applies to the factual findings at the appeal level. In all other circumstances, the standard of review is substantial evidence.

30 *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

1. Challenges to Sufficiency of Application Form: "The City Planner was in error in accepting the application . . . and recommending for approval . . . in that the application lacked '. . . evidence sufficient to enable meaningful review of the application . . . .'"[31]

a. Failure to answer two questions in application

Mr. Lund points out that of approximately 35 questions on the application, two yes/no questions were left blank. One asked whether the applicant had a state or city driveway permit. The other asked if he had active city water and sewer permits.[32] The city planner explains that a blank response to such a question is simply construed as a negative answer.

These two items of information are not specifically required of an applicant by the Homer City Code. HCC 21.71.020(a)(7) requires "inclu[sion]" of "any permits . . . required by other provisions of the zoning code", but these requirements do not come from the zoning code and, in any event, one cannot include a permit one does not yet have. Hence the omission falls under the more general requirement to apply "on a form provided by the City",[33] a requirement that carries with it the implicit expectation that the applicant will fill out the form.

The Alaska Supreme Court faced a similar issue in *Zenk v. City & Borough of Juneau,*[34] a 2017 Memorandum Opinion and Judgment that, while not precedential, provides good example of how issues like this should be reviewed on appeal. In that case, an applicant for a CUP sought to build a commercial greenhouse in a residential neighborhood, but had omitted the detailed drawings of existing and proposed boundary landscaping that the application called for. Unlike Homer, Juneau has an explicit ordinance specifying that "all applications for permits must be complete . . . before the permit-issuing authority can accept the application."[35] Even so, the Supreme Court permitted the city planning staff to take a "substantial compliance" approach to omissions by the applicant. The court's main concern was that the CUP application provide "sufficient detail for neighbors to comment . . . and for Planning Commission members to question staff and [the applicant] about the proposed land use."[36]

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31 Opening Brief at 1.
32 *See* R. 45.
33 HCC 21.71.020(a).
34 S-16118 (Alaska MOJ 2017). MOJs are not as formal as published opinions and do not create legal precedent.
35 CBJ 49.15.130(a) cited in *id.* at n.31.
36 *Zenk, supra,* text following n.34.

Here, the appellant has articulated no reason that the applicant's failure to give specific information about whether he has yet obtained these collateral permits handicapped the review process. It was reasonable for the staff to treat the omissions as insubstantial, assume a "no" answer, and move on.

b. Alleged incorrect answer to question 2b

Mr. Lund faults the application for stating that "hospital & clinics surround the proposed use."[37] The argument is that this is factually inaccurate so as to make the application defective and require its rejection.

One might start by noting that applications for controversial projects will almost always contain claims that are subject to debate. That is why they are controversial, and that is why they are tested through a public process. The truth or falsity of such claims is often in the eye of the beholder. To require the planning staff or the reviewing body to reject applications on the threshold because a claim is arguable or potentially exaggerated would put the cart before the horse. The truth of the claims can be explored after the application is accepted.

Here, what has really happened is that Mr. Lund and Dr. Raymond have different understandings of the word "surrounded." Mr. Lund correctly points out that many immediately adjacent and nearby properties are residences. To him, the word "surrounded" seems to imply that everything nearby must be a hospital or clinic. But the fact remains that the tract on which the proposed clinic would be built is directly between a hospital to the north and a large clinic to the south; another clinic is directly adjacent to the west; a medical office is directly adjacent to the east; and additional clinics are close by.[38] This is also an acceptable use of the word "surrounded."

c. Failure to document alleged increase in values in 2c

Mr. Lund faults the application for simply claiming that replacing the existing parking lot with his proposed structure will "increase values" in the surrounding area,[39] without providing market studies, expert opinion, or other factual support. Nothing in the Code or the application form requires more than a layman's view on this subject, however. Dr. Raymond's claim was sufficient to alert commenters to the potential issue. It was addressed to a planning body where

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37 *See* R. 46. Mr. Lund misquotes this as "hospitals and clinics", which is unfair to Mr. Raymond since that would be much more of an exaggeration than what he wrote.

38 R. 173-174, accepting Mr. Lund's descriptions at p. 6 of his Reply Brief; R. 53.

39 *See id.*

opposing views could be considered and there is ample expertise on what does and does not enhance or detract from real estate values. Indeed, the Commission did not make a finding that local property values would increase.

d. Alleged mischaracterization of area in 2d

Question 2d asks the applicant, "How is your proposal compatible with existing uses of the surrounding land?"[40] Dr. Raymond asserted that it would be a "medical clinic in a medical area."[41] The appellant complains that "[t]his designation cannot be found in the zoning code."[42] But the question does not call for a zoning classification.

e. Single word answer to 2e

Question 2e asks, "Are/will public services adequate to serve the proposed uses and structures?", to which Dr. Raymond replied with a simple "Yes."[43] Mr. Lund feels he should have provided a statement of the extend and status of public services in the area. However, the question can be construed as simply an effort to determine whether the applicant will seek expansion of public services in any way in connection with the project, and the short answer is adequate to establish that this developer will not. In any event, the planning staff has expertise regarding local public services, and analyzed this area in some detail in the staff report it prepared for the first public hearing.[44]

f. Alleged factual errors in response to 2f

Question 2f of the application form poses a long, compound question:

> How will the development affect the harmony in scale, bulk, coverage and density upon the desirable neighborhood character, and will the generation of traffic and the capacity of surrounding streets and roads be negatively affected?[45]

Dr. Raymond's answer is terse and completely non-responsive: "Project will provide need [sic] parking & add'l medical services for area."[46] The appellant's objection is not to the failure to answer the question, however, but rather to the substance of what Dr. Raymond offered. Mr. Lund asserts that no additional parking is needed in the neighborhood (basing his contention on

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40 *Id.*
41 *Id.*
42 Opening Brief at 4.
43 R. 46.
44 R. 40.
45 R. 46.
46 *Id.* In his November amended application, Dr. Raymond did address the question asked to some degree. R. 244.

"casual observation" rather than any record citation), and contends in conformity with other commenters that medical services are already adequate.[47] As with the issue addressed in subsection *b* above, this criticism of the response fails to recognize that the presence of debatable claims does not render an application unacceptable.

g. Alleged incorrect/unsupported claim in response to 2g

Dr. Raymond answered with a simple "no" the question whether his clinic would "be detrimental to the health, safety, or welfare of the surrounding area or the city as a whole."[48] Mr. Lund faults this answer for failing to address the issue of traffic.[49] But it is not clear the question calls for that kind of information, which is addressed elsewhere in the questionnaire and which, in any event, is something the planning staff can and does analyze independently.

h. Lack of detail and alleged inconsistency in response to 2h

Question 2h asks the applicant to relate the project to the goals of the Comprehensive Plan. Mr. Lund points out that Dr. Raymond's answer is general, not mentioning any specific Comprehensive Plan goals,[50] but he likewise points to no particular goals for which a deeper analysis in the initial application would have helped the subsequent staff analysis and public process. Mr. Lund is concerned that the answer refers to the clinic as "beautiful" without pointing out what is beautiful about it. This criticism is frivolous; the application provided a detailed drawing by the architect,[51] and beauty is surely a subjective determination best made by looking at the picture, not by analysis. Mr. Lund also faults the answer for using the term "wellness center," which he regards as inconsistent with such prior descriptions as "medical clinic."[52] Since the object of a medical clinic is wellness, it is hard to discern how this could fairly be seen as inconsistent.

i. Lack of narrative description of existing uses of neighboring lots

Mr. Lund points out correctly that application instructions 4 tell the applicant to provide "a map showing neighboring lots and a narrative description of the existing uses of all neighboring lots."[53] Oddly, his concern regarding compliance with this requirement seems to be

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47 Opening Brief at 4.
48 R. 46.
49 Opening Brief at 5.
50 *Id.*
51 R. 50.
52 Opening Brief at 5; R. 46.
53 R. 44.

that Dr. Raymond did not discuss such things as whether psychiatric services would be provided in the proposed building,[54] which has nothing to do with "existing uses" of "neighboring lots." Mr. Lund has pointed to no deficiencies in the annotated map at R. 53 in meeting the actual objectives of instruction 4.

j. Alleged lack of map showing uses of neighboring lots

Mr. Lund says no map was submitted to identify residential or non-residential uses of neighboring lots.[55] He has overlooked R. 53.

k. Planner's failure to insist on "corrective actions"

Mr. Lund points out that HCC 21.71.020 requires the Planner to determine "if the application is complete," and if he finds it is not, to advise the applicant of "corrective actions" needed to complete the application. We may surmise that the Planner found the application to be complete because he forwarded it to the Commission. The code requires no more formal determination. As discussed in subsection *a* above, the Planner has some discretion in judging substantial completeness. He is not required to direct the applicant to take corrective actions unless he makes a determination of incompleteness. He did not make that determination here.

l. Commission's failure to ask for additional information

Mr. Lund's final argument regarding sufficiency of the application form is that the Commission itself was obliged to, but did not, "request additional information."[56] His basis for this argument is HCC 21.71.040(a), which provides that an application should not be approved "unless it is established that the proposal, with conditions if necessary, satisfies the applicable review criteria." This, however, is a substantive standard for approval, not a requirement regarding the contents of the application form that initiates the process. Sufficiency of the record as a whole--not just the application form--to support this determination will be addressed in later sections.

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All in all, Dr. Raymond's application was not a model of exposition, but it was sufficient to define the project so that commenters and the Planning Department could address the issues it posed. Mr. Lund has not demonstrated that accepting it for review was an abuse of discretion.

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54 Opening Brief at 5. Every one of the "for instance" examples is about future uses not existing uses.

55 *Id.*

56 Opening Brief at 6.

2. Challenges to Compliance with Zoning Requirements: "The project at 267 Cityview, as described by the applicant, failed to satisfy the zoning requirements of several chapters in Title 21 of the Homer City Code."[57]

This theme from the opening summary of Mr. Lund's brief encompasses Allegations 2, 3, 4, and 6 of his subsequent argument, which identify particular review criteria that Mr. Lund feels have not been met. These will be taken up in sections *a* through *d* below. Mr. Lund has a potentially more far-reaching "big picture" argument, omitted from his brief but articulated in his oral presentation to this tribunal, which is that in pushing the boundaries of the CUP review criteria and increasing once again the number of large clinics in the area, the Raymond project has moved beyond what should be addressed by a site-specific permit and crossed over into something that ought to be handled through a re-zone. Section *e* below addresses that argument.

a. Compatibility with existing uses of surrounding land

In general, a CUP may only be approved if the "proposal is compatible with existing uses of surrounding land."[58] The Commission found that this criterion had been met, noting in particular that the Homer Medical Clinic to the south has a similar footprint.[59] Mr. Lund contends that this criterion has not been met, observing that some immediately adjacent properties are residential; that the size of the proposed structure approaches ten times that of a typical single-family residence, and that the planned 85-space parking lot is incompatible with neighboring lawns, gardens, and such.[60]

Substantial evidence supports the Commission's finding of compatibility. The clinic would be across the street from a 130,000-square-foot medical center surrounded by parking lots, and would back up to a medical clinic that covers as much land as the proposed structure, coupled with significant parking. The adjacent block to the west has extensive parking lots and yet another large clinic.[61] That the structure is much larger than most homes is not disqualifying in itself. By limiting size to 8,000 square feet without a conditional use permit, the residential office zoning category plainly envisions that some structures will exceed this size if they obtain a CUP.[62] That the building is not to be surrounded by lawns and gardens (although, notably, the

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57 Opening Brief at 1.
58 HCC 21.71.030(d).
59 R. 230.
60 Opening Brief at 7-8.
61 See R. 30, 40, 58, 81, 174.
62 *See* HCC 21.16.040(e).

plan does include significant green space) is likewise not disqualifying in a zone that is expressly designed to accommodate business use.

b. Adequacy of public services and assessment of traffic impacts

CUP criterion (e), Homer City Code 21.71.030(e), requires that public services and facilities are, or will be, adequate to serve the proposed development. Mr. Lund contends that this criterion has not been met, focusing his argument entirely on road access.[63] The Planning Staff and the Commission both agree that road access is within the purview of CUP criterion (e).[64]

Mixed with this argument, Mr. Lund has also quarreled with the finding that the proposed clinic will likely generate fewer than 500 trips per day of vehicle traffic. If he were correct, as a factual matter, that traffic generation would exceed the 500-trip threshold, a different kind of CUP from the one sought here would apparently be required, accompanied by a traffic study.[65]

Let us first deal with this subsidiary argument before returning to the more general problem presented by criterion (e). The Planning Department has devoted considerable thought and analysis to its conclusion that this project would most likely generate just under 500 trips per day.[66] It identified two rules of thumb for estimating traffic volume generated by a new facility, one based on square footage and one based on number of employees. The square footage calculation would suggest additional traffic volume of 500-1,116 trips per day, whereas the per-employee calculation would suggest only 250-493 trips. Mr. Lund contends that the staff simply ignored the higher calculation,[67] but this is not so. Instead, the staff reasoned that with the current traffic on Bartlett Street--serving a 130,000 square-foot hospital and several clinics--at just 2,139 vehicles per day, the square footage calculation is simply not credible, and therefore the staff chose to be guided by the per-employee calculation.[68] Since this judgment by the body with planning expertise is supported by articulated, logical reasoning and substantial evidence, it cannot be disturbed on appeal.

Returning to criterion (e) more generally, however, a vexing problem remains. The problem starts with the fact that Dr. Raymond chose to submit his first application, in July of

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63 Opening Brief at 8-9.
64 Response Brief at 5-6; R. 40, 230.
65 HCC 21.16.060(b); statement of Mr. Abboud at oral argument.
66 R. 105-106.
67 Opening Brief at 9.
68 R. 105-106. If the square footage guideline were valid in this context, traffic on Bartlett ought to be much higher than what is being observed.

2018, flatly answering "no" to the question whether he "would be willing to make" any "[s]treet and road dedications and improvements."[69] There can be no doubt about his intent, as he again answered "no" to the same question in his resubmitted application on November 19, 2018.[70]

To issue a CUP, the Planning Commission must find that public services--including road access--"are or will be, prior to occupancy, adequate." The Commission did make a general finding to this effect, but immediately afterward it made another, inconsistent finding, recommending "that the applicant work with the City of Homer to share costs of improving the roads *so that access is adequate*."[71] If someone needs to do something "so that access is adequate," access must not be adequate at this time. While the record is sparse on this point, the City Planner bolsters this impression, indicating in his brief that "Citiview and Danview Streets are undeveloped."[72]

Compounding the problem is the fact that the course of action the Commission feels Dr. Raymond should take is one he seems to have refused to undertake. And yet the Commission imposed no conditions that would require him to do so.[73]

On the existing record, it is impossible to determine what the deficiencies in access are, and what might need to be done to make access "adequate." This matter will be remanded to the Commission to:

1. Gather additional facts as necessary to address the issue of road access in the context of Homer City Code 21.71.030(e), including, if desired, consultation with the applicant regarding his willingness and ability to secure adequate access;

2. Create a record on the issue of road access in the context of Homer City Code 21.71.030(e);

3. Make new findings regarding the criterion in Homer City Code 21.71.030(e), which shall be based on the augmented record; and

4. Impose any new Conditions related to access that the Commission, in its best judgment, feels are warranted.

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69 R. 119.

70 R. 244.

71 R. 263 (italics added).

72 Response Brief at 5. The Staff Report on CUP 18-50 suggested that adequate public road access is "beyond the purview of the CUP process." This is difficult to square with both the city code and actual practice--the Commission has made a finding in the area, and the CUP application asks applicants a question regarding road improvements.

73 R. 264.

c. Harm to neighborhood character and to health/safety/welfare

Mr. Lund's next appeal argument contests the Commission's finding number 8, that the project will not "cause undue harmful effect upon desirable neighborhood character." Much of this argument is focused on Mr. Lund's belief that the staff's traffic estimate is wrong and ought to have exceeded 500 vehicle trips per day, triggering a requirement for analysis by a traffic engineer and consideration of a CUP specific to the traffic issue.[74] Because, as discussed above, the Commission and staff acted reasonably and with substantial evidence in assessing the potential traffic at a much lower volume, Mr. Lund's contentions that are premised on overturning the traffic volume determination must be rejected.

Mr. Lund also objects that Dr. Raymond's CUP application was conclusory in its discussion of neighborhood effects, and made assertions without attaching any expert professional opinions. The City Code does not appear to require expert opinions from an applicant. Beyond that, Mr. Lund does not identify any missing information related to neighborhood degradation that the application could usefully provide.

The question of "undue" harm to "desirable neighborhood character" is inherently a subjective and wholistic one. Using information about the project itself supplied by the applicant, the Planning Commission can draw from a much broader array of knowledge and sources to assess what is desirable in the neighborhood and the described project might impact it negatively in "undue" ways. Apart from his claims regarding traffic volume, Mr. Lund has identified no aspect of this subjective judgment for which the Commission lacked adequate information, nor any way in which the Commission's judgment was illogical or self-contradictory. That he simply disagrees with the Commission's application of community values is not a basis to overturn the Commission's finding on appeal.

d. Consistency with purpose of residential office district

Mr. Lund's next concern relates to the purpose section of the Residential Office District chapter in the City Code, which includes the sentence: "A primary purpose of the district is to preserve and enhance the residential quality of the area while allowing certain services that typically have low traffic generation, similar scale and similar density."[75] Mr. Lund refers to this as "the" purpose of the district,[76] overlooking the fact that the Code identifies it as "a" purpose.

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74 Opening Brief at 10-11.
75 HCC 21.16.010.
76 Opening Brief at 13.

He contends that "the majority" of information in the record does not support a conclusion that the proposed medical building would fit this purpose.[77]

The main thrust of Mr. Lund's argument--apart from traffic generation, which has been addressed elsewhere--is a concern about scale. On this appeal point his argument is not based on the "scale and bulk" dimension of CUP review criterion (f), but rather the general reference to "similar scale" in the RO purpose clause quoted above.

Part of Mr. Lund's concern is a puzzling remark in the September 19, 2018 supplement to the staff report, in which the staff pointed to the "vast" size of the adjacent hospital and said that it "does not see a defensible argument for requiring a reduction in the size and scale of the clinic when there is such a disparity in building size in the immediate neighborhood."[78] The hospital predates the establishment of this RO zoning district and it is, in any event, a hospital, not a clinic or medical office building. Mr. Lund's skepticism of the staff's reasoning is well-founded: surely, the presence of one very large special-purpose structure in a mixed zoning district does not obviate all considerations of scale and bulk in other structures of different types. However, in its decision the Commission did not follow the staff's approach to this topic. It did consider scale, and its comparison to nearby structures centered on other clinics, not on the hospital.[79]

Mr. Lund also contends that the reference to "similar scale" in the RO purpose clause means that any non-residential structures must "be of a size and character comparable to residences."[80] In this contention he focuses too much on isolated words in the Code, without their overall context. The purpose clause makes it "a" purpose of the RO district to foster residential quality by allowing services that "typically" have similar scale.[81] It does not say that only structures of a residential scale are permitted, and indeed the allowance in the succeeding Code sections for churches, nursing facilities, and schools makes it clear that some structures will be far larger than homes. Moreover, the words "similar scale" are paired with "similar density," which implies that larger structures might be more acceptable if the overall density is in keeping with residential use.

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77 *Id.*
78 R. 99.
79 R. 229.
80 Opening Brief at 12.
81 HCC 21.16.010.

The purpose clause of the RO chapter does not preclude approval of the 20,595-square-foot medical clinic as a single structure on a tract the size of five residential lots. Such approval is within the range of the Commission's discretion, assuming other zoning requirements are met.

e. CUP Process versus Formal Rezoning

In his oral argument, Mr. Lund articulated a more global concept of his appeal than the item-by-item approach he had taken in briefing. He suggested that the Planning Commission is engaging in de-facto rezoning-by-CUP. As one CUP after another is approved, the area gradually loses its mixed-use character and becomes a hospital district, but the change occurs without the broader review and public process that would come with formal re-zoning.

This is potentially a serious concern. However, Mr. Lund did not raise this as a formal point on appeal, and he did not brief it. This meant that other parties were not on notice that it would be argued. It therefore cannot be considered here.

3. Challenges to Consistency with Comprehensive Plan: "The project, as described by the applicant, is contrary to the goals and objectives of the Comprehensive Plan; HCC 21.71.[0]30(i), states that: 'The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan."[82]

Under Homer City Code 21.71.030(i), a proposal for a CUP must not be "contrary to the applicable land use goals and objectives of the Comprehensive Plan." Mr. Lund contends that the Commission erred in finding this criterion to be met.[83]

The 2008 Comprehensive Plan, which governs this CUP approval, has six goals and a dozen or two objectives regarding land use. To meet criterion (i), the proposed development cannot be "contrary to" any of these items, although it need not further all of them. Notably, there is no requirement in the Code that the proposed development needs to align with every line of aspirational verbiage in the *text* of the plan, nor that it needs to align with the shorthand summaries of particular zoning chapters that appear in the *text* of the plan.[84] It is the actual goals and objectives that matter, and the potentially relevant goals and objectives are quoted below:

> Goal 1: "Guide Homer's growth with a focus on increasing the supply and diversity of housing, protect community character, encouraging infill, and helping minimize global impacts of public facilities including limiting greenhouse gas submissions."

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82 Opening Brief at 1.

83 Opening Brief at 11; *see also* R. 264.

84 Hence Mr. Lund's first boldface quotation in the first bullet under "Facts" on page 11 of his Opening Brief is irrelevant to the review task under HCC 21.71.030(i).

Objective A: "Continue to accommodate and support commercial, residential, and other land uses, consistent with the policies of this plan."

Objective B: "Promote a pattern of growth characterized by a concentrated mixed use center, and a surrounding ring of moderate-to-high density residential and mixed use areas with lower densities in outlying areas."

Goal 3: "Encourage high quality buildings and site design that complements Homer's beautiful natural setting."

Objective B: "Encourage high quality site design and buildings."

Goal 5: "Maintain high quality residential neighborhoods; promote housing choice by supporting a variety of dwelling options."

Objective C: "Promote infill development in all housing districts . . . ."

Dr. Raymond's proposal probably advances Goal 1, Objective B under Goal 1, and Objective C under Goal 5. As to the others, there is no basis to conclude that the Commission was legally compelled to find that the proposed development would run contrary to those goals and objectives. Whether buildings, site design, and residential neighborhoods are "high quality" are subjective judgments that are entrusted to the Commission.

IV. Conclusion

The decision of the Homer Advisory Planning Commission dated October 19, 2018,e which granted Conditional Use Permit 2018-09, is upheld in most respects. For reasons described above, the matter is remanded to the Commission for the following additional proceedings, which are entitled to priority on the Commission's agenda pursuant to HCC 21.93.560(c):

1.e Gather additional facts as necessary to address the issue of road access in thee context of HCC 21.71.030(e), including, if desired, consultation with the applicant regarding his willingness and ability to secure adequate access;

2.e Create a record on the issue of road access in the context of HCC 21.71.030(e);e

3.e Make new findings regarding the criterion in HCC 21.71.030(e), which shall bee based on the augmented record; and

4.e Impose any new Conditions related to access that the Commission, in its beste judgment, feels are warranted.

DATED: May 3, 2019

By: [redacted]

Christopher Kennedy
Administrative Law Judge

NOTICE OF DEFERRED APPEAL RIGHTS

This is an order of remand and is not a final disposition of the matter under review. *See* HCC 21.93.550(a). Although some issues have been fully resolved and will not be revisited on remand, if you wish to appeal any aspect of this decision, you may await the final disposition. Upon final disposition, parties must file an administrative appeal to the Alaska Superior Court within 30 days from the date of disposition. *See* AS 29.40.060, HCC 21.91.130 and Alaska Rule of Appellate Procedure 602.

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]