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

In the Matter of:	)	
	)	
CONDITIONAL USE PERMIT 2020-15	)	OAH No. 21-2585-MUN
	)	CUP 2020-15

DECISION

I. INTRODUCTION

This matter involves a City of Homer Conditional Use Permit to rebuild a building — a permit that was vacated when its applicant withdrew its application. Despite the permit being vacated, Frank Griswold would like Homer Board of Adjustment to issue a decision on his appeal seeking to vacate the permit. The City filed a motion to dismiss the appeal as moot. Mr. Griswold opposed that motion, arguing for a public interest exception, and filed a myriad of his own motions related to his appeal.

Both parties' motions are the subject of this decision. As discussed below, the subject of the appeal no longer exists and the relief Mr. Griswold seeks is no longer available, so the appeal itself is moot. The issues Mr. Griswold raised are not the type of issues that are likely to repeatedly evade review nor are they issues of public concern that justify the Board deciding a moot appeal.

Because the appeal is moot, Mr. Griswold's motions related to the appeal are moot as well. The motions are also meritless, as set forth below.

The City's motion to dismiss is granted and all other pending motions are denied.

II. BACKGROUND

The Homer Advisory Planning Commission approved Conditional Use Permit ("CUP") 20-15 for the applicant to tear down and rebuild a restaurant structure within a 20-foot building setback and in excess of 30 percent of the lot area.[1] Mr. Griswold appealed that decision ("Appeal") to the Board of Adjustment, which remanded the matter to the Planning Commission on March 9, 2021 for further review.[2]

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1 R. 69-73.

2 R. 278-82.

The City Planner stated in a staff report to the Planning Commission that the Appeal had been remanded.[3] Mr. Griswold moved for default judgment against the City Planner, claiming this was an *ex parte* communication.[4] The Commission did not rule on that motion.

While the matter was on remand to the Planning Commission, the applicant withdrew the CUP application.[5] The City then moved to dismiss the Appeal because (1) the application withdrawal mooted the appeal; and (2) the application withdrawal left the Commission without jurisdiction.[6] Mr. Griswold opposed the motion, claiming a public interest exception to mootness. Mr. Griswold also filed several motions — a motion for default, claiming more *ex parte* communications, a motion to strike the application withdrawal as "new evidence," and a motion to cancel the Planning Commission's August 4, 2021 meeting, at which it planned to address the City's Motion to Dismiss.[7] The Planning Commission did not specifically rule on Mr. Griswold's motions. But it did grant the City's motion and dismissed the Appeal at its August 4, 2021 regular meeting.[8]

Mr. Griswold then filed a motion for reconsideration and motion to supplement his points on appeal.[9] At an October 20, 2021 regular meeting, the Planning Commission voted to "den[y] taking up" these two motion.[10]

At a December 13, 2021 special meeting, the Homer City Council, sitting as the Board of Adjustment, took up the dismissal and Mr. Griswold's motion to supplement points on appeal.[11] The Board of Adjustment voted to refer all pending issues to a hearing officer for decision.[12] The City engaged the Office of Administrative Hearings to provide an Administrative Law Judge as hearing officer.

Prior to the hearing, the City and Mr. Griswold agreed that scope of the hearing and the hearing officer's decision would be seven motions that either had not been ruled on at all or had not been rule on by the Board of Adjustment. These were the City's motion to dismiss the Appeal as moot and Mr. Griswold's motions for sanctions and default, for default judgment, to strike

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3 https://mccmeetings.blob.core.usgovcloudapi.net/homerak-pubu/MEET-Packet-3d1c75928fa148a6a513ece9cceb4c79.pdf at 11.
4 R. 545-46.
5 R. 288.
6 R. 287.
7 R. 317, 324, 328.
8 R. 339.
9 R. 344, 350.
10 R. 494-95.
11 R. 559.
12 R. 562-63.

evidence, to cancel a Planning Commission meeting, to reconsider the City's motion to dismiss, and to supplement points on appeal.

A hearing was held March 1, 2022. As specified in HCC 21.93.540, a hearing on an appeal consists of oral argument by the appellant and appellee. Mr. Griswold provided argument as the appellant and the City provided argument as the appellee.

III. DISCUSSION

A. City's Motion to Dismiss Appeal

The City filed a motion to dismiss the Appeal as moot on May 14, 2021. The City argues that because the applicant withdrew the permit that is the subject of the Appeal, the Appeal is moot and municipal tribunals lack jurisdiction to hear the Appeal.[13] Mr. Griswold opposed the motion, arguing the public interest exception to mootness should apply.[14] In response, the City argued that as an administrative tribunal, the Board of Adjustment cannot apply the judicially-created public interest exception to that doctrine.[15]

There can be no question here that Mr. Griswold's Appeal is moot. "A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[16] Mr. Griswold appealed issuance of the 20-15 CUP. After he filed the appeal, the applicant withdrew the CUP application.[17] As the City explained at the hearing, this withdrawal vacated the permit and the applicant has no procedural avenue to revive that permit or application. The controversy here is over whether the City should grant a specific CUP based on a specific permit. Because there is no live application or permit, no live controversy remains.[18] The relief Mr. Griswold seeks — revocation of the CUP — is similarly unattainable since there is no CUP to be revoked. The Appeal is moot. It can continue only if an exception to the mootness doctrine applies.

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13 R. 286-87.

14 R. 313-16.

15 R. 320; Hearing. Despite the briefing being complete, Mr. Griswold proceeded to file not one but two surreplies — a "Motion to Correct/Clarify Appellant's Opposition to Motion to Dismiss Appeal" on July 26, 2021 in which he again argued that the Appeal is not moot and an "Argument Regarding Motion to Dismiss Appeal" on July 28, 2021, also arguing the Appeal is not moot. R. 330-33. Generally a party may not submit a reply without leave to file. But because the City did not challenge these filings, and both continue the same arguments Mr. Griswold raised in his opposition, both were considered as part of Mr. Griswold's briefing.

16 *Fairbanks Fire Fighters Ass'n, Loc. 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

17 R. 288.

18 *See*, *e.g.*, *Alaska Community Action on Toxics v. Hartig*, 321 P.3d 360, 366-67 (Alaska 2014) (appeal regarding expired permit is moot).

The City's argument that an administrative tribunal can consider the judicially-created mootness doctrine but not its judicially-created public interest exception is incorrect. Quasi-judicial administrative decision makers regularly consider application of the public interest exception.[19] The City offered no authority or basis for concluding that Homer City proceedings cannot consider this exception.

For that exception to apply, however, Mr. Griswold must show that the disputed issues (1) are capable of repetition; (2) would repeatedly evade review under the mootness doctrine; and (3) are "so important to the public interest as to justify overriding the mootness doctrine."[20]

The issues Mr. Griswold raised are not likely to repeat. Mr. Griswold listed 14 issues in his Appeal. Ten are fact-specific issues related to this particular application and its review and appeal process.[21] Issues related to a particular factual situation and the process provided for review of that situation are not capable of repetition for purposes of the public interest exception.[22] Mr. Griswold argued that the applicant could later resubmit a similar CUP application and thus the issues would repeat. But that application would go through its own review process with its own record and decisions approving or denying it. This application, this record, the decision here would not be replicated.

Mr. Griswold's remaining four points on appeal make legal claims that are not validly raised here and in that sense are not likely to repeat. First, Mr. Griswold claims an equal protection violation because the code provision at issue includes an exception for certain areas.[23] The CUP here is not in those areas, so a constitutional claim regarding those areas is not ripe.[24]

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19 *See*, *e.g.*, *Matter of X E. N*, OAH No. 16-0053-PER at 2 (2016) (considering public interest exception to mootness); *Matter of Interior Alaska Fish Processors, Inc.*, OAH No. 12-0258-DEC at 2-4 (Dep't of Environmental Conservation 2012) (same).

20 *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 777–78 (Alaska 2001).

21 *See* points on appeal three (Commission's findings conclusory and not supported by substantial evidence), five (a Commissioner was not impartial); six (applicant did not produce sufficient evidence), 7 (application contained false or misleading information), 8 (City Planner should have issued CUP as separate instrument from the approval), 9 (Commission misapplied CUP review criteria), 10 (Commission included multiple variances), 11 (Commission should have issued multiple CUPs), and 14 (Commission waived zoning provisions). R.9-10. As to point on appeal four, Mr. Griswold should be aware that the City of Homer is not subject to Philippine law nor does this legal concept exist in Alaska or United States law.

22 *Smith v. Cleary*, 24 P.3d 1245, 1251-52 (Alaska 2001) (procedural due process challenges could repeat, but would be based on different facts and circumstances and therefore better addressed on a record developed for a future dispute); *Krohn v. State, Dep't of Fish and Game*, 938 P.2d 1019 (Alaska 1997) (issues regarding adoption of emergency regulation were dependent on the particular factual and procedural circumstances and therefore not capable of repetition).

23 R. 8 (point on appeal 1); HCC 21.18.040(b)(4).

24 *See*, *e.g.*, *Brause v. State, Dep't of Health & Social Services*, 21 P.3d 357, (Alaska 2001) (statutory provision could not be challenged in advance of a decision involving that provision).

Second, Mr. Griswold claims two code provisions conflict.[25] But the superior court determined, in an appeal filed by Mr. Griswold, that they do not.[26] As the superior court pointed out in yet another appeal by Mr. Griswold, he is collaterally estopped from attempting to relitigate this issue.[27] Mr. Griswold is similarly barred from raising that issue here. Third, Mr. Griswold claims the Commission's review process violates a doctrine of Philippine administrative law.[28] The City of Homer is not subject to Philippine law, nor does this doctrine exist in United States or Alaska law. Finally, Mr. Griswold claims a term in a Homer Comprehensive Plan is per se invalid under Supreme Court precedent, but the case Mr. Griswold cites did not reach this holding.[29] Because these issues are not appropriately raised here in the first place, they are not the type of issue likely to repeat in the future.

Even if any of Mr. Griswold's claims were conducive to repetition, no claim regarding a CUP is likely to evade review. Mr. Griswold argued at the hearing that these issues would evade review because he or another appellant might not go to the trouble of appealing a future application. But the public interest exception is not tool of convenience. It is a tool to avoid injustice. Whether an issue would repeatedly evade review refers to whether a tribunal would be unable to review an issue before it is mooted, not whether parties will be motivated to seek that review. This element of the public interest exception is about procedure and time.[30] For example, short term permits that expire before any party can challenge their issuance have been found likely to evade review.[31] There is no such problem here. As the City explained at the hearing, the terms of a CUP generally exceed the time it takes to resolve an appeal.

Mr. Griswold pointed to the application withdrawal as an instance of his issues evading review. But in a similar case involving a withdrawal by the State, the Supreme Court declined to

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25 R. 8 (point on appeal 2).
26 R. 164-65.
27 R. 196-97.
28 R. 9 (point on appeal 4).
29 R. 10 (point on appeal 12). Mr. Griswold claims "infill" is perse invalid, citing *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n.9. But the court there gave "filling in vacant places" as an example of a goal that is not per se legitimate. Being not per se legitimate is not the same thing as being per se invalid.
30 *Mullins v. Local Boundary Comm'n*, 226 P.3d 1012, 1019 (Alaska 2010) ("We analyze this prong of the public interest exception test by comparing the time it takes to bring the appeal with the time it takes for the appeal to become moot.") (cleaned up).
31 *See*, *e.g.*, *State, Dep't of Natural Res. v. Greenpeace, Inc.*, 96 P.3d 1056, 1062 (Alaska 2004) (permits could evade review because the were so temporary that it was "nearly impossible to obtain administrative and judicial review of a temporary permit" before they expired); *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995) (applying public interest exception to claims regarding permits that would likely expire before they could be litigated, but not to claims regarding procurement which did not have the same potential to expire before review).

apply the public interest exception because the issue would only evade review if State continuously withdrew similar measures.[32] The record offers no reason to suspect CUP applicants will repeatedly withdraw CUP applications whenever appealed. If a party has similar issues with a CUP in the future, that party will be able to raise those issues in an appeal with sufficient time to resolve that appeal.

Finally, the disputed issues here are not issues "so important to the public interest as to justify overriding the mootness doctrine."[33] Mr. Griswold has challenged a permit to rebuild a single building. He tried to characterize the Commission's CUP review process as part of a regular practice, but the record does not support that assertion. What we have here is a challenge to a particular permit and to the unique circumstances surrounding its approval. Addressing these fact-specific issues now would likely have only a remote impact, if any, on review of other CUP applications in the future, providing nothing more than an example that might be cited by analogy. No principles of urgent public import would be resolved definitively.

Courts and quasi-judicial administrative tribunals do not pontificate on the meaning of laws in hypothetical situations; they apply laws to the controversies in front of them. When a controversy ceases to exist, so too does the need to resolve that controversy. Only in rare circumstances does the public interest exception compel a court or other tribunal to move forward — where the issues are so important to the public and so likely to repeat yet evade review that it compels a decision. Those circumstances do not exist here. When the Commission approves CUP applications in the future, a party can appeal those approvals and raise issues then.

The City's Motion to Dismiss is granted. That dismissal moots Mr. Griswold's other motions. The merits of each motion are nonetheless addressed below.

B. Mr. Griswold's Motion for Sanctions and Default Judgment

Mr. Griswold filed a Motion for Sanctions and Default Judgment on April 8, 2021 claiming that the Planning Commission "received ex parte communications" about Mr. Griswold's Appeal of CUP 20-15 at its March 17, 2021 regular meeting.[34] Mr. Griswold does not identify this alleged communication. He states only that it was provided by City Planner Rick Abboud, that Mr. Abboud is a party to the CUP 20-15 Appeal, and that other parties to the Appeal

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[32] *Young v. State*, 502 P.3d 964, 970 (issues regarding State's withdrawal of stipulation to print and distribute signature booklets for ballot initiative that was under review was unlikely to repeat).
[33] *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d at 778.
[34] R. 545.

were not given notice and therefore Mr. Abboud's communication was *ex parte*. Mr. Griswold asks for default judgment to be entered against Mr. Abboud.

Mr. Griswold offered no evidence of a communication between Mr. Abboud and the Planning Commission regarding Mr. Griswold's CUP 20-15 Appeal. The motion does not identify or include any such communication. The record does not include documents related to the Planning Commission's March 17, 2021 regular meeting either. The agenda, agenda packet, supplemental packet, public notice, and approved minutes for this meeting, however, are all public documents available on the City's website.[35] A review of those documents explains why they are not part of the record here — there is not a single mention of CUP 20-15 or Mr. Griswold's Appeal in the minutes. The only reference to CUP 20-15 in any of these documents is in a staff report from Mr. Abboud in which he states that the matter had been remanded back to the Commission.[36]

The City Code's provision on *ex parte* communications, HCC 21.93.710, prohibits certain communications between the decision maker and parties to the appeal or members of the public.[37] Here, the City Planner acted as a part of the municipal staff, not as a party to the appeal itself. He did not file the Appeal. He did not intervene in the Appeal. He did not file any briefs related to the appeal. The record includes no affirmative act by Mr. Abboud to participate as a party. Thus, while a City Planner has the option to become a party to an appeal, he did not do so in Mr. Griswold's appeal.[38] Mr. Griswold himself admitted that Mr. Abboud was not a party to the Appeal in his Appeal brief on the merits.[39] And because Mr. Abboud is not a party, he not barred from communicating with the decision maker.

Furthermore, the City Code expressly states that communications between municipal staff and the decision maker are not prohibited *ex parte* communications so long as the staff member is not a party to the Appeal and the communication does not furnish, augment, diminish, or modify evidence in the record.[40] Mr. Abboud's statement that the Appeal is on remand did not modify any evidence in the record. The statement itself is not even in the record since the meeting did not address the CUP 20-15 Appeal. Even if it was in the record, the fact that the Appeal had been

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35 https://www.cityofhomer-ak.gov/hapc/planning-commission-regular-meeting-113.

36 https://mccmeetings.blob.core.usgovcloudapi.net/homerak-pubu/MEET-Packet-3d1c75928fa148a6a513ece9cceb4c79.pdf at 11.

37 HCC 21.93.710(a).

38 *See* HCC 21.93.050.

39 R. 119-20.

40 HCC 21.93.710(b)(1).

remanded is a fact already in the record through the remand itself. Because Mr. Abboud is not a party and because his statement did not modify the record, it was not an *ex parte* communication.

Nor is the relief Mr. Griswold seeks available. The current City Code does not provide for sanctions for *ex parte* communications.[41] Even under an earlier version of the code, sanctions could only be imposed "against a party to the appeal."[42] Mr. Abboud did not participate here as a party. And because he is not a party, default — *i.e.*, judgment against Mr. Abboud on Mr. Griswold's Appeal of CUP 20-15 — is not an option.

Mr. Griswold's motion is denied.

C. Mr. Griswold's Motion for Default Judgment

Mr. Griswold filed a Motion for Default Judgment on July 7, 2021, again arguing that Mr. Abboud had *ex parte* communications with the Planning Commission. Mr. Griswold based this motion on emails Mr. Abboud exchanged with the applicant and then allegedly relayed to the Planning Commission at an April 15, 2021 meeting.[43] At the hearing here, Mr. Griswold clarified that he was not asserting that the emails themselves were *ex parte*, but that Mr. Abboud speaking at the meeting about the emails was.

Mr. Griswold cites minutes from the April 15, 2021 Planning Commission meeting in his motion.[44] Those minutes are not in the record and for good reason — the minutes do not mention the Appeal at all. The minutes address a different appeal by Mr. Griswold challenging a different permit, unrelated to CUP 20-15.[45]

But even if Mr. Abboud had spoken about CUP 20-15 emails at this meeting, that communication would not be *ex parte*. As discussed above, Mr. Griswold took no action to become a party to this particular appeal and communications between non-party municipal staff and the Planning Commission that do not modify the record are not *ex parte* communications. There is no indication from Mr. Griswold's motion that the alleged communications about the emails — which according to the minutes did not occur — added to or modified the record in any way. Furthermore, default judgment against Mr. Abboud is not an available remedy because he is not a party here and because the City Code does not currently provide for that remedy.

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41 *See* January 10, 2022 Order (explaining that HCC 21.93 as amended by Ordinance 21-44(S), enacted August 9, 2021, would apply to these proceedings because the ordinance addressed procedures).

42 *See* Ordinance 21-44(S) at 17.

43 R. 317.

44 R. 317.

45 https://mccmeetings.blob.core.usgovcloudapi.net/homerak-pubu/MEET-Minutes-c954687b3634416f9cfae760bd509403.pdf

The motion is denied.

D. Mr. Griswold's Motion to Strike New Evidence

When the City moved to dismiss the Appeal as moot, it attached an email from the applicant withdrawing the CUP application. Mr. Griswold responded by moving to strike this email from the appeal record as "new evidence."[46]

Mr. Griswold is correct that generally a record on appeal may not be supplemented with new evidence that was not before the original decision maker. But that is not what the City did here. The City filed a motion regarding the justiciability of the Appeal and included evidence to support a factual statement it made in that motion. That motion and its attachment were not part of the record for the Appeal, nor would they have become part of that record if the motion had been denied.

The fact that an appeal was pending does not mean the Commission or Board of Adjustment must stick their heads in the sand. Justiciability issues like mootness may be raised at any time. The evidence to support the City's motion to dismiss was not new evidence and was not improper.

Mr. Griswold's motion is denied.

E. Mr. Griswold's Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal

Mr. Griswold filed a Motion to Cancel or Continue the August 4, 2021 Commission Proceeding Regarding Motion to Dismiss Appeal on July 26, 2021, arguing that the Planning Commission lack authority to consider a motion to dismiss on remand.[47] The Commission proceeded to discuss the Motion at this August 4, 2021 meeting, so a motion to continue or cancel that discussion is moot.[48] Mr. Griswold agreed at the hearing here that this motion is moot.

The motion is also without merit. As discussed above, justiciability issues like mootness may be raised at any time. The Commission was not barred from considering the motion to dismiss simply because the Appeal was pending. The mootness doctrine would be rendered meaningless if the pendency of an action prevented a tribunal from considering whether circumstances have rendered it moot.

Mr. Griswold's motion is denied.

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46 R. 328.
47 R. 324.
48 R. 338-39.

F. Mr. Griswold's Motion for Reconsideration

Mr. Griswold moved the Planning Commission to reconsider its dismissal of the Appeal as moot.[49] The City pointed out that the code does not provide for a reconsideration process. The motion is thus procedurally improper.

This motion is also meritless. Mr. Griswold argues that the Commission's authority was limited to deciding his Appeal on remand and that it could not consider dismissal. As discussed above, however, justiciability issues like mootness may be raised and considered at any time.

Mr. Griswold also argued that the dismissal decision did not comport with code provisions related to appeal hearings and appeal decisions. What the Commission granted was a motion to dismiss. It did not decide the appeal on the merits. Thus, provisions for appeal hearings and appeal decisions do not apply.

The motion is denied.

G. Mr. Griswold's Motion for Leave to Supplement Points on Appeal to Address Planning Commission's Dismissal of Appeal

Mr. Griswold moved to supplement his point on appeal to include the City's motion to dismiss the appeal. At the hearing Mr. Griswold volunteered that this motion is moot.

It is also unjustified. The Appeal itself addresses issuance of CUP 20-15. The motion to dismiss is a separate issue. Absent the Board consolidating these issues, it would not have been appropriate for Mr. Griswold to add the motion to dismiss to his appeal of the permit's issuance.

The motion is denied.

IV. CONCLUSION

Mr. Griswold's appeal is moot and he has not asserted issues that would justify applying the public interest exception. Accordingly, the City's motion to dismiss is granted.

Mr. Griswold's motions are also moot. They also lack merit for the reasons discussed above. All pending motions by Mr. Griswold are denied.

DATED: April 13, 2022.

By: *Signed*
Rebecca Kruse
Administrative Law Judge

[49] R. 344.

NOTICE OF APPEAL RIGHTS

This is a final decision. If you wish to appeal this decision, you must file an administrative appeal to the Alaska superior Court within 30 days from the date of distribution f this decision. See 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.]