

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE HOMER ADVISORY PLANNING COMMISSION**

In the Matter of:	)	
	)	
MATTER OF CUP 2018-02	)	OAH No. 18-0321-MUN
<hr/>	)	Agency No. 2018-02

**DECISION ON APPEAL**

**I. Introduction**

Derek and Catriona Reynolds own property located on Pioneer Avenue in Homer, Alaska. The Reynolds wanted to renovate the façade of their building, adding a covered porch and extending the entryway. These changes would encroach within the 20-foot setback required between the right-of-way and any structure. They filed an application for a conditional use permit (CUP) which would allow them to construct that addition. The Reynolds’ application, CUP 2018-02, went to a public hearing before the Homer Advisory Planning Commission (Planning Commission) on March 7, 2018. Frank Griswold objected to the granting of the CUP. The Planning Commission approved the application. Mr. Griswold has appealed on legal, procedural, and factual grounds.

The Planning Commission had jurisdiction to consider and grant the Reynolds’ application. The Homer City Code (HCC) specifically allows setback reductions to be dealt with through the CUP process. The Planning Commission’s action in granting the Reynolds’ application is supported by substantial evidence. As a result, the granting of the Reynolds’ CUP is AFFIRMED.

**II. Facts and Proceedings**

*A. The Permit Application*

The Reynolds own a building located at 302 E. Pioneer Avenue in Homer, in a zoning area designated as the Central Business District (CBD). The CBD has a setback requirement: “[b]uildings shall be set back 20 feet from all dedicated rights-of-way, except as allowed by subsection(b)(4) of this section.”<sup>1</sup> The Reynolds’ building faces Pioneer Avenue: it is a rectangular building whose preexisting entrance is contained in a small addition to the front of the building, which encroaches on the setback. The door does not open directly southward onto Pioneer Avenue, but rather faces west. The pictures of the building depict an older building in poor exterior shape with little landscaping or vegetation other than grass.<sup>2</sup>

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<sup>1</sup> HCC 21.18.040(b)(1).

<sup>2</sup> Administrative Record (AR) 26, 27, 32.

The Reynolds' building had been vacant for at least five years and they intended to operate a bicycle tour, sales, and rental business from the building. In connection with their intended use, the Reynolds applied for a CUP which would allow them to both build a covered porch along the front of the building for rental bike storage and extend the front entrance, including changing the doorway orientation so that it faced directly onto Pioneer Avenue. The existing entry already encroached onto the 20-foot setback. The covered porch would extend the preexisting encroachment, due to the existing entry, along the front of the building. The extension of the front entrance would encroach further into the 20-foot setback, leaving a 12-foot space between the sidewalk and the beginning of the entryway to the building.<sup>3</sup>

The Reynolds' application contained a description of the intended use of the property, photographs of the building in its current condition, as-built-surveys showing the location of the current building on its lot, which also showed the distance between the building and the sidewalk fronting on Pioneer Avenue, drawings showing the proposed additions to the building from front and side views, and how far it would encroach on the 20-foot setback. In addition, the record includes an aerial photograph of the site and adjoining properties.<sup>4</sup>

#### *B. The Public Hearing*

The Reynolds' application went to a public hearing in front of the Planning Commission on March 7, 2018. The Homer City Planner's office issued a written report which recommended approval of the application with ten factual findings:

1. The relevant ordinance allows a setback reduction if approved through the CUP process.
2. "The proposal is compatible with the purpose of the zoning district."
3. "The proposal will not negatively affect adjoining property values more than other permitted or conditionally permitted uses in the district."
4. "The proposal is compatible with existing uses of surrounding land."
5. "Existing public, water, sewer, and fire services are adequate to serve the structure."
6. "The proposal will not cause undue harmful effect upon desirable neighborhood character."

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<sup>3</sup> AR 16 – 33.

<sup>4</sup> AR 16 – 33.

7. “The covered outdoor space and entry way will not be unduly detrimental to the health, safety or welfare of the surrounding area or the City as a whole.”
8. “Following CUP approval and issuance of a zoning permit, this proposal will comply with applicable regulations of HCC Title 21.”
9. “No evidence has been found that the proposal is contrary to the applicable land use goals and objectives of the Comprehensive Plan.”
10. “The proposal will comply with the applicable provisions of the Community Design Manual.”<sup>5</sup>

On March 5, 2018, prior to the public hearing, Ms. Post from the Homer Bookstore, which is directly adjacent to the Reynolds’ building,<sup>6</sup> emailed the Planning Department expressing support for the Reynolds’ application:

We at the Homer bookstore would like to express our support of the proposed building frontage for Cycle Logical. We are thrilled to be seeing this eyesore of a building cleaned up. We feel this will be a great addition to this neighborhood and we look forward to the improvements that we expect to see. We do not have a problem with the proposed frontage.<sup>7</sup>

The Reynolds and the City Planner spoke in support of the application at the public hearing.<sup>8</sup> In addition to answering questions posed by the Planning Commission members, the City Planner recommended that the Planning Commission add an additional finding: “[t]hat the proposed activity will enhance the aesthetic environment of the community, providing gracious human scale entry ways and public ways, orienting the entry way toward the street.”<sup>9</sup>

Three other citizens also spoke at the public hearing in favor of granting the application. Their remarks generally noted the improvements that the applicants had made to what one described as a “derelict building.”<sup>10</sup> Mr. Griswold did not speak at the public hearing.<sup>11</sup> However, he emailed the Planning Department on March 6, 2018 objecting to the application.<sup>12</sup> He additionally filed a written statement on March 7, 2018 further objecting to the application.<sup>13</sup> Other than Mr. Griswold, there were no objections to the Reynolds’ application.

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<sup>5</sup> AR 10 – 15.

<sup>6</sup> See Aerial Map, AR 36.

<sup>7</sup> AR 37.

<sup>8</sup> AR 49 – 52.

<sup>9</sup> AR 49.

<sup>10</sup> ARE 50 – 51.

<sup>11</sup> AR 50 – 51.

<sup>12</sup> AR 38.

<sup>13</sup> AR 42 – 48.

The Planning Commission unanimously voted to “approve the staff report PL 18-14 and CUP 2018-02” with the additional finding requested by the City Planner.<sup>14</sup> The entire Planning Commission meeting, which included several agenda items in addition to the Reynolds’ CUP application, lasted one hour and six minutes, having been called to order at 6:30 p.m. and adjourning at 7:36 p.m.<sup>15</sup>

The Planning Commission issued its formal written decision on March 22, 2018. That decision is signed by the Vice-Chair of the Planning Commission. Below the Vice-Chair’s signature, it contains the signature of the City Planner.<sup>16</sup>

*C. The Appeal*

Mr. Griswold timely appealed the granting of the Reynolds’ CUP application on April 3, 2018.<sup>17</sup> Mr. Griswold requested that the appeal be heard by a hearing officer instead of the Homer Board of Adjustment.<sup>18</sup> As allowed by HCC 21.93.030, the Homer City Manager appointed an administrative law judge employed by the Alaska Office of Administrative Hearings to serve as the hearing officer.

Mr. Griswold and the City Planner filed hearing briefs.<sup>19</sup> The Reynolds did not file a brief. Oral argument was held on June 15, 2018. Mr. Griswold, the City Planner, and the Reynolds all participated.

**III. Discussion**

*A. Procedure*

Applications for CUPs are submitted to the City Planner.<sup>20</sup> The application is reviewed, and once deemed complete, the City Planner is required to schedule and notice a public hearing in front of the Planning Commission.<sup>21</sup> Following the public hearing, the Planning 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.<sup>22</sup>

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<sup>14</sup> AR 52.

<sup>15</sup> AR 9, 58 – 59.

<sup>16</sup> AR 53 – 57.

<sup>17</sup> AR 3- 8.

<sup>18</sup> AR 4.

<sup>19</sup> Mr. Griswold objected to the City Planner’s participation in the appeal.

<sup>20</sup> HCC 21.71.020.

<sup>21</sup> HCC 21.71.030, HCC 21.27.050 (a).

<sup>22</sup> HCC 21.71.050(b).

A person who “actively and substantively participated” in the matter in front of the Planning Commission, has the right to appeal the Planning Commission’s decision granting or denying a CUP.<sup>23</sup> The appeal may be either to the Board of Adjustment or a hearing officer appointed by the City Manager.<sup>24</sup>

Appeals are heard solely on the established record, unless there are allegations involving new evidence or changed circumstances, in which event the hearing officer (or Board of Adjustment) may remand the matter to the lower administrative body (here the Planning Commission).<sup>25</sup> After briefing, an appeal hearing is to be held, and a decision issued.<sup>26</sup>

*B. Standards 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.<sup>27</sup> The standard of review for factual findings 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.<sup>28</sup>

The substantial evidence standard requires the reviewer to uphold the original factual findings if they are supported by substantial evidence, even if the reviewer may have a different view of the evidence. “It 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.”<sup>29</sup>

*C. Points on Appeal*

Mr. Griswold filed his points on appeal on April 3, 2018.<sup>30</sup> They can be summarized as follows:

1. The Planning Commission is an advisory body which does not have the legal authority to approve CUPs.

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<sup>23</sup> HCC 21.93.030(a), HCC 21.93.500(a).

<sup>24</sup> HCC 21.93.030, HCC 21.93.500(a).

<sup>25</sup> HCC 21.93.510(a).

<sup>26</sup> HCC 21.93.530 – 550.

<sup>27</sup> HCC 21.93.540(d).

<sup>28</sup> HCC 21.93.540(e).

<sup>29</sup> *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

<sup>30</sup> AR 5 – 8.

2. The application did not provide the Planning Commission with enough evidence to meaningfully comply with the review requirements contained in HCC 21.71.030.
3. The City Planner's signature on the Planning Commission's decision was improper.
4. The Planning Commission erred when it did not limit the applicants to the three-minute time limit required of others.
5. The Planning Commission's required impartiality was compromised by the Planning Staff's report which resulted in a biased decision on the part of the Planning Commission.
6. The CUP process could not be used for a setback reduction.
7. The Planning Commission erred when it considered the factors listed in the ordinance pertaining to CUPs, HCC 21.71.030, instead of considering the effects of the setback reduction.
8. The granting of the CUP was a "use variance" which violated AS 29.40 and HCC 21.72.
9. Substantial evidence does not support the Planning Commission's findings.
10. The finding that the proposed use is compatible with the purpose of the zoning district was erroneous.
11. The finding that the proposed use will not negatively affect adjoining properties greater than that anticipated from other permitted/conditionally permit uses in the district was erroneous.
12. The finding that the proposed use is compatible with existing uses of surrounding property was erroneous.
13. The finding that the proposed use would not be unduly detrimental to the desirable neighborhood character was erroneous.
14. The finding that the proposed use complied with applicable ordinances was erroneous.
15. Approval of the CUP violated HCC 11.80.110 and HCC 21.71.040(b)(13).
16. The finding that the proposed use was not contrary to the City of Homer's Comprehensive Plan was erroneous.
17. The finding that the proposed use complied with the City of Homer's Community Design Manual was erroneous.
18. The addition of finding 11, being that the proposed use "will enhance the aesthetic environment" was erroneous.

19. The Planning Commission’s decision failed to include a requirement that rental bikes displayed outdoors, outside of business hours, be screened from public view.

*D. Analysis*

Mr. Griswold’s appeal points can be grouped into three categories: legal, procedural, and factual.

1. Legal challenges.

- a. Does the Homer Advisory Planning Commission have the legal authority to consider CUP applications (Appeal point 1)?

Mr. Griswold argues that the inclusion of the word “advisory” in the Planning Commission’s title renders it a purely advisory body without the requisite legal authority to hear and decide CUP applications.

The Alaska Supreme Court has expressly stated that “[t]he Kenai Peninsula Borough delegated to the City of Homer the zoning authority for areas within the City.”<sup>31</sup> The City of Homer’s ordinances state that “there shall be a Planning Commission established and functioning pursuant to Chapter 2.72 HCC.”<sup>32</sup> In Chapter 2.72 of the city code, the City created the “Homer Advisory Planning Commission.”<sup>33</sup> HCC 2.72.050, “Zoning powers and duties,” states that:

- a. The Homer Advisory Planning Commission shall exercise zoning authority delegated by the Borough Assembly:

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2. Act upon requests for PUDs, variances and conditional use permits.

Consequently, because the Homer City Code expressly confers the Advisory Planning Commission with the authority to act upon requests for CUPs, Mr. Griswold’s argument is not persuasive. The mere fact that the City of Homer chose to include the word “advisory” in its planning commission’s title does not render it an advisory body. It has the legal ability to consider and act upon CUP applications.

- b. Can a property owner receive a setback reduction through a CUP (Appeal points 6 and 8)?

Mr. Griswold makes several arguments on this point. Two of the arguments have the same underlying premise: an application to allow a structure to encroach into a designated

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<sup>31</sup> *Griswold v. City of Homer*, 925 P.2d 1015, 1017 (Alaska 1996).

<sup>32</sup> HCC 21.91.010.

<sup>33</sup> HCC 2.72.010.

setback is a variance. He then argues that it would be a use variance and illegal, and also argues that it would need to be handled through the variance process rather than through the CUP process. He additionally argues that the HCC provision providing for the CUP process for a setback reduction is either invalid or is unconstitutional as applied.

*i. Use Variance*

Mr. Griswold's argument is that the Reynolds' request for a setback reduction is an illegal use variance, which is disallowed under AS 29.40.040(b) to any other than a home rule city.<sup>34</sup> He cites to the *Alaska Planning Commission Handbook* in support of his argument. It should first be noted that the *Handbook* is not a statute or ordinance, instead it is a publication issued by the Alaska Department of Commerce and Economic Development as a nonbinding guide for local planning commission members.<sup>35</sup> Although quoting accurately from the *Handbook*, Mr. Griswold misapplies the explanation contained within the *Handbook* regarding use and area variances. "Area variances" provide "relief from setback ... and similar requirements and are permitted by AS 29.40.040(b)."<sup>36</sup> Because the Reynolds' application is one for a relief from a setback, it would therefore be an area variance under the definition provided in the *Handbook*, and allowable under AS 29.40.040(b).

*ii. CUP versus Variance*

Mr. Griswold follows up his argument on the variance issue to posit that because relief from a setback requirement is a variance, it is therefore reversible error for setback relief to be handled as a CUP instead

The City of Homer has chosen to enact specific ordinances relating to the CBD. Those set out a variety of outright permitted uses "except when such use requires a conditional use permit by reason of size, traffic volumes, or other reasons set forth in this chapter."<sup>37</sup> Retail businesses are included in the list of "uses [that] are permitted outright."<sup>38</sup> The HCC then provides a list of uses that specifically require a CUP, which includes recreational facilities, mobile home parks,

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<sup>34</sup> Homer is classified as a first-class city, not a home rule municipality. See <https://www.commerce.alaska.gov/dkra/DCRAExternal/community/Details/9c16b6f1-1486-4cf4-a1ff-21a74ecd4967> (date accessed August 10, 2018).

<sup>35</sup> The *Planning Commission Handbook* is available online at: <https://www.commerce.alaska.gov/web/Portals/4/pub/Planning%20Commission%20Handbook%20Jan%202012.pdf> (date accessed August 10, 2018).

<sup>36</sup> *Planning Commission Handbook*, p. 68.

<sup>37</sup> HCC 21.18.020.

<sup>38</sup> HCC 21.18.020(a).



greenhouses, and other uses.<sup>39</sup> The next ordinance in the HCC provides that “all structures and uses” in the CBD are subject to a 20 foot setback requirement “except as allowed by subsection (b)(4) of this section.”<sup>40</sup> That subsection specifically states that “[if] approved by a conditional use permit, the setback from a dedicated right-of-way, except from the Sterling Highway or Lake Street, may be reduced.”<sup>41</sup>

A review of the relevant ordinances shows that the City made a conscious choice to handle setback reduction in the CBD through the CUP process, rather than the variance process. This is well within the Planning Commission’s authority. Accordingly, Mr. Griswold’s argument is not sustainable.

*iii. Is HCC 21.18.040(b)(4) invalid?*

HCC 21.18.030 contains a list of “uses” which require a CUP to be permitted in the CBD. Mr. Griswold argues that this is an exclusive list for which CUPs are allowed in the CBD, and that as a result, HCC 21.18.040(b)(4), which allows a CUP to permit a setback reduction was invalid. These two ordinances do not conflict – and even if they did, the rules of statutory interpretation provide that “seemingly conflicting provisions must be harmonized unless such an interpretation would be at odds with statutory purpose.”<sup>42</sup> Reading these two ordinances together, they show that a CUP can be used to not only allow the uses provided in HCC 21.18.030, but also to reduce setback requirements. It follows that HCC 21.18.040(b)(4) provides a valid mechanism whereby a CUP can be used to reduce setback requirements.

*iv. Is HCC 21.18.040 unconstitutional as applied?*

Mr. Griswold argues that HCC 21.18.040 was unconstitutional as applied in his briefing. However, he was unable to explain the underlying basis for his argument either in his brief or during oral argument. Instead, he cited to case law for the general proposition that otherwise constitutional laws could be unconstitutional as applied.<sup>43</sup> Because Mr. Griswold failed to articulate any facts or reasoning in support of this argument, it is waived.

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<sup>39</sup> HCC 21.18.030.

<sup>40</sup> HCC 21.18.040(b)(1).

<sup>41</sup> HCC 21.18.040(b)(4).

<sup>42</sup> *Davis Wright Tremaine LLP v. State, Dept. of Administration* 324 P.3d, 293, 299 (Alaska 2014) (citation omitted).

<sup>43</sup> See e.g., *Mr. Griswold’s post-appeal hearing request to supplement his briefing with a citation to State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009).

c. Did approval of the CUP violate HCC 11.08.110 and HCC 21.71.040(b)(13) (Appeal Point 15)?

HCC 11.08.110 is an ordinance that sets a general rule requiring a “minimum 20-foot building setback which shall apply to any property line abutting any dedicated road or street right-of-way.” HCC 21.71.040(b)(13) is contained in the HCC Code Chapter which sets the general rules regarding the CUP application process.<sup>44</sup> It reads as follows:

More stringent dimensional requirements, such as lot area or dimensions, setbacks, and building height limitations. Dimensional requirements may be made more lenient by conditional use permit only when such relaxation is authorized by other provisions of the zoning code. Dimensional requirements may not be relaxed by conditional use permit when and to the extent other provisions of the zoning code expressly prohibit such alteration by conditional use permit.<sup>45</sup>

HCC 21.18.040(b)(4) expressly allows setbacks in the CBD to be reduced by CUPs. Reading these three ordinances together as a whole, both the general rules and specific rules for the CBD require a 20-foot setback, but because there is no “express” prohibition against it, the 20-foot setback requirement “may be made more lenient by” a conditional use permit. As a result, Mr. Griswold’s argument on this issue is not supported by the HCC.

2. Procedural Challenges

Mr. Griswold makes four specific procedural challenges in his points on appeal. First, he challenges the Planning Commission’s decision because it bears the City Planner’s signature. Second, he challenges the public hearing process, alleging that it was impermissibly tainted because the applicants were allowed to speak more than the three minutes allotted other speakers by the Chair. Third, he argues that the CUP was defective because it did not include the condition that rental bicycles be screened from public view “when remaining outdoors outside of open business hours.” Fourth, he argues that the Commission erred because it did not require fire marshal approval prior to issuing its permit.

a. The Planning Commission Decision (Appeal Point 3)

The Planning Commission’s decision which was issued on March 31, 2018, bears two signatures. The first signature is that of the Vice Chair Syverine Bentz. Below it is the signature of Mr. Abboud, the City Planner.<sup>46</sup> Mr. Griswold makes a general objection to the decision because it bears the City Planner’s signature. The HCC requires that the Planning Commission

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<sup>44</sup> HCC 21.71.010 *et. seq.*

<sup>45</sup> HCC 21.71.040(b)(13).

<sup>46</sup> AR 56.

“shall promptly issue written findings and reasons supporting its decision.”<sup>47</sup> Because the Vice Chair signed the decision, the Planning Commission has complied with its duty to issue the written decision. The City Planner’s signature does not demonstrate that the Planning Commission has not fulfilled its legal duty to issue a decision, or otherwise invalidate the decision.

b. Length of Comment Period (Appeal Point 4)

The Planning Commission meeting where the Reynolds’ CUP application was considered occurred on March 7, 2018. The Planning Commission’s agenda for that meeting, under Section 8 “Public Hearings,” provides for a limit of three minutes per speaker, but specifically provides that “[t]he applicant is not held to the 3 minute time limit.”<sup>48</sup> Mr. Griswold argues that this is discriminatory, prejudicial, and violates the equal protection afforded citizens under the United States Constitution, Amendment XIV.

This argument is not persuasive for at least two very simple reasons. First, Mr. Griswold did not attend the hearing. His objection to the CUP application were presented in writing. He cannot claim that his voice was limited or stymied by this time limitation. He was not personally prejudiced. Second, the only persons who spoke at the public meeting spoke in favor of granting the CUP application. There were no persons objecting to the application. Hence, Mr. Griswold cannot make a claim that the rights of citizens who were opposed to the application were limited or proscribed.

c. Outside Bicycle Storage (Appeal Point 19)

In the Planning Staff’s report, it discusses under possible conditions for approval, the HCC requirement that “[p]roducts for sale may be displayed outdoors in unscreened areas only during the open hours of the business.”<sup>49</sup> This would, as a logical consequence, require that products for sale that are stored outdoors outside of business hours be screened from view. The Planning Commission’s decision did not explicitly require this as a condition of approval.<sup>50</sup> Mr. Griswold argues that this was error on the part of the Planning Commission.

However, failure to expressly list the screening requirement is not fatal to the permit. The screening requirement is listed in the HCC ordinances for the CBD under “Nuisance standards.”<sup>51</sup>

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<sup>47</sup> HCC 21.71.050(b).

<sup>48</sup> AR 9.

<sup>49</sup> AR 14, citing to HCC 21.18.080(b).

<sup>50</sup> AR 55 – 56.

<sup>51</sup> HCC 21.18.080(b).

It follows that failure to adhere to this requirement would constitute a nuisance and subject to an enforcement action under HCC 21.90 “Administration and Enforcement.” It was not necessary to specifically include this condition, because it is already part of the general conditions that business owners in the CBD are required to comply with.

d. Fire Marshal Approval<sup>52</sup>

The Planning Commission’s decision did not add a requirement that the Reynolds’ renovation receive Fire Marshal approval. Mr. Griswold argues that this was an error. It should be noted that Mr. Reynolds stated, at the public hearing, that an application had been filed with Homer Fire Chief.<sup>53</sup> The Homer Volunteer Fire Department Interim Chief had “no comments with regard to public safety or fire department access.”<sup>54</sup> As with the screening requirement, this was not a condition that the Planning Commission needed to explicitly include as a condition of approval. Fire Marshal approvals are a matter of state law, which the Planning Commission cannot waive.<sup>55</sup>

3. Factual Arguments

Mr. Griswold’s factual arguments can be divided into three categories. First, he generally argues the Reynolds did not present enough evidence from which the Planning Commission could make its decision (Appeal Points 2 and 9), and then addresses individual factual findings (Appeal Points 10 – 14, 16 – 19). He additionally argues that the Planning Commission erred in that it did not consider the effect of the CUP on the setback itself (Appeal Point 7). Third, he argues that the Planning Commission was itself biased, or that its decision was biased (Appeal Point 5).

a. Overall Adequacy of the Evidence (Appeal Points 2 and 9)

In order to receive a CUP, “[t]he applicant must produce evidence sufficient to enable meaningful review of the application.” The Reynolds’ application showed the current building, its orientation to the street, its existing distance in relation to the required setback, the design of the proposed renovations to the building, how those renovations would appear from the street and from the side, and how they would encroach into the required setback. This provides sufficient evidence to evaluate a simple request, the renovation of the frontage of an existing building,

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<sup>52</sup> This issue was not raised as part of Mr. Griswold’s points on appeal. Nor was it arguably included in them. However, because it was addressed in Mr. Griswold’s Opening Brief, p. 21, it is addressed.

<sup>53</sup> AR 51.

<sup>54</sup> Planning Staff Report, AR 15.

<sup>55</sup> 13 AAC 50.027.

specifically adding a covered porch along the front of the building for rental bike storage and extending the front entrance, including changing the doorway orientation so that it faced directly onto Pioneer Avenue.

The additional information presented to the Planning Commission at hearing consisted of the Reynolds' statement, the statements by three community members, an email from one of the neighboring businesses, the Planning Staff report, and Mr. Griswold's written objections. This provided additional information upon which the Planning Commission could evaluate the application.

Mr. Griswold, however, challenges specific findings, and his arguments regarding the adequacy of the evidence (Appeal Point 2) and the lack of substantial evidence supporting the Planning Commission's findings (Appeal Point 9), are best addressed by dealing with his specific objections, rather than addressing them in general terms.

*i. Factual Finding No. 2 (Appeal Point 10)*

One of the criteria for review of a CUP is whether the "proposed use(s) and structure(s) are compatible with the purpose of the zoning district."<sup>56</sup> The Planning Commission's Finding 2 provides that "[t]he proposal is compatible with the purpose of the zoning district."<sup>57</sup> Mr. Griswold argues that finding is erroneous because the Planning Commission "failed to identify what the purposes of the CBD zoning district are or provide any basis for this finding."<sup>58</sup>

Mr. Griswold's argument ignores the Planning Commission's Finding 1, which specifically references the ordinance which discusses what uses are permitted in the CBD.<sup>59</sup> It also ignores the fact that the Planning Commission approved the staff report, which contained a short discussion of both the purpose of the CBD and how the Reynolds' business, being a retail, rental, and tour business fit within the purposes of the CBD.<sup>60</sup> As a result, there is substantial evidence demonstrating that the Planning Commission identified the purposes of the CBD zoning district and provided the basis for the finding that the Reynolds' use and structure was compatible with the purpose of the CBD.

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<sup>56</sup> HCC 21.71.030(b).

<sup>57</sup> AR 54.

<sup>58</sup> Mr. Griswold's Opening Brief, p. 14.

<sup>59</sup> AR 54.

<sup>60</sup> AR 11 (Planning Staff Report), AR 52 (Public Hearing Minutes).

ii. *Factual Finding No. 3 (Appeal Point 11).*

One of the criteria for review of a CUP is whether the proposed use will not negatively affect the value of the adjoining property more than it would be by other “permitted or conditionally permitted uses in [the] district.”<sup>61</sup> Mr. Griswold argues that the Planning Commission’s Finding 3 to this effect was erroneous, and that it failed to identify what other uses it considered.

Mr. Griswold’s argument ignores the evidence showing that the Reynolds were renovating a dilapidated previously vacant building, that a directly adjacent business (The Homer Bookstore) described as an “eyesore” and that the public testimony described as a “derelict building.” This mere fact leads to a reasonable conclusion that the encroachment into the setback to accomplish the renovation would only increase the subject property’s value and would not negatively affect the value of adjoining properties. The Reynolds’ application itself, the public testimony, and the Planning Staff report, which was approved by the Planning Commission, all provide substantial evidence supporting this finding. In addition, the Planning Staff report notes that other conditionally permitted uses in the CBD such as mobile home parks and auto fueling stations would negatively affect adjoining properties more than the Reynolds’ use.<sup>62</sup> Consequently, there is substantial evidence supporting this finding.

iii. *Factual Finding No. 4 (Appeal Point 12)*

One of the criteria for review of a CUP is whether the “proposal is compatible with existing uses of surrounding land.”<sup>63</sup> Mr. Griswold argues that the Planning Commission’s Finding 4 to this effect was erroneous, and that it failed to identify what effects were considered or if they were desirable or not.

The Planning Staff report, which was approved by the Planning Commission, specifically noted that “[t]he proposal is compatible with other nearby buildings that have covered outdoor spaces and entrances that face the street including the Salvation Army, the Homer Bookstore, and Bay Realty.”<sup>64</sup> The Planning Staff report further noted that a nearby building had a covered entrance approved within the setback.<sup>65</sup> Consequently, there is substantial evidence supporting the finding that the Reynolds’ proposal was “compatible with existing uses of surrounding land.”

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<sup>61</sup> HCC 21.71.030(c).

<sup>62</sup> AR 11.

<sup>63</sup> HCC 21.71.030(d).

<sup>64</sup> AR 12.

<sup>65</sup> AR 12.

iv. *Factual Finding No. 6. (Appeal Point 13)*

One of the criteria for review of a CUP is whether the “proposal will not cause undue harmful effect upon desirable neighborhood character.”<sup>66</sup> Mr. Griswold argues that the Planning Commission’s Finding 6 to this effect was erroneous.

The ordinance lists elements including “scale, bulk, coverage, ..., density, ... traffic, the nature and intensity of the proposed use, and other relevant effects.”<sup>67</sup> The Planning Staff report, under the “Applicant” section specifically mentions that “[t]he additional traffic generated should not negatively affect the neighborhood and will be comparable to when the property was last in use as a pawn shop, and to other neighboring businesses.”<sup>68</sup> The Planning Staff analysis provides:

[t]he nature and intensity of the proposal will not significantly affect the scale, bulk, coverage and density of the site. The proposed covered outdoor space and entry way will be in harmony with other facades along Pioneer Avenue, including the adjacent covered porches of the Salvation Army and the Homer Bookstore.<sup>69</sup>

The record therefore shows that the applicants and the Planning Staff presented evidence to the Planning Commission which demonstrated that the ordinance’s review criteria was satisfied. As a result, there is substantial evidence which supports this factual finding.

v. *Factual Finding No. 7*<sup>70</sup>

One of the criteria for review of a CUP is whether the proposed use “will not be unduly detrimental to the health, safety, or welfare of the surrounding area of the City as a whole.”<sup>71</sup> Mr. Griswold argues that the Planning Commission’s Finding 7 to this effect was erroneous. In part, his argument is based on his interpretation of the relevant ordinances governing setbacks. Those are addressed in 1(b) above.

Mr. Griswold then argues that “allowing an 8-foot encroachment into the [20-foot setback] would harm public health, safety, and general welfare.”<sup>72</sup> The evidence in front of the Planning Commission shows that the business is a bicycle retail, rental, and tour business, that wanted to

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<sup>66</sup> HCC 21.71.030(f).

<sup>67</sup> HCC 21.70.030(f).

<sup>68</sup> AR 12.

<sup>69</sup> AR 12.

<sup>70</sup> Mr. Griswold did not directly raise the validity of this factual finding in his points on appeal (AR 4 – 8). However, he raised it in his Opening Brief, p. 15, and indirectly raised it in his Appeal Point 7, where he argued that violated “HCC 21.71.030(c) (d)(f)(g).” (AR 6). Accordingly, it is addressed.

<sup>71</sup> HCC 21.71.030(g).

<sup>72</sup> Mr. Griswold’s Opening Brief, p. 15.

renovate its exterior. The evidence, as discussed above, shows that the renovations would greatly improve its street appearance, and it would not affect traffic or safety issues. In contrast, there was no evidence that the proposed use would harm “health, safety, or welfare” of either the CBD or the City. In short, there was substantial evidence that supported this finding.

*vi. Factual Finding No. 8 (Appeal Point 14)*

One of the criteria for review of a CUP is whether the proposed use will comply with the city code.<sup>73</sup> Mr. Griswold argues that the Planning Commission’s Finding 8 “[f]ollowing CUP approval and issuance of a zoning permit, this proposal will comply with applicable regulation of HCC Title 21”<sup>74</sup> to this effect was erroneous. This is more of a legal argument than a factual argument. It is dealt with in section 1(b) above, which concludes that the pertinent portions of the HCC allow use of a CUP to reduce the 20-foot setback requirement.

*vii. Factual Finding No. 9. (Appeal Point 16)*

One of the criteria for review of a CUP is whether the proposed use will “not be contrary to the applicable land use goals and objectives of the Comprehensive Plan.”<sup>75</sup> Mr. Griswold argues that the Planning Commission’s Finding 9 to this effect was erroneous in that the Planning Commission did not identify the requisite goals and did not try to determine if the proposed use was contrary to them.

The Planning Staff report, which was approved by the Planning Commission, specifically refers to components of the Comprehensive Plan, and states that there is no evidence that the proposal is contrary to them.<sup>76</sup> The Planning Commission is also presumably aware of the Homer Comprehensive Plan<sup>77</sup> Given the evidence in this case, including the Planning Staff report, and the information presented regarding the Reynolds’ site plans, there was substantial evidence supporting this finding.

*viii. Factual Finding No. 10 (Appeal Point 17)*

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<sup>73</sup> HCC 21.71.030(h).

<sup>74</sup> See AR 55.

<sup>75</sup> HCC 21.71.030(i).

<sup>76</sup> AR 13.

<sup>77</sup> The *Homer Comprehensive Plan* is available online at <https://www.cityofhomer-ak.gov/planning/comprehensive-plan-2008-adopted-2010> (date accessed August 10, 2018). The Planning Commission was actively involved in its development. See *Homer Comprehensive Plan*, Foreword, pp. i – v.



One of the criteria for review of a CUP is whether the proposed use will “comply with all applicable provisions of the Community Design Manual.”<sup>78</sup> Mr. Griswold argues that the Planning Commission’s Finding 10 to this effect was erroneous. As part of his argument, Mr. Griswold again posits that reducing a setback is not allowed, a point which has already been addressed.

The Planning Staff report, which was approved by the Planning Commission, specifically refers to the applicable provisions of the Community Design Manual, and states that the Reynolds’ proposal comports with them. It includes a condition that outdoor lighting must be compliant with the Community Design Manual.<sup>79</sup> In addition, the Planning Commission had the Reynolds’ application in front of them, which included design plans for the proposed renovations that encroached on the setback. The Planning Commission had adequate evidence to make this finding, *i.e.*, the finding is supported by substantial evidence.

*ix. Factual Finding 11 (Appeal Point 18)*

Mr. Griswold objects to the Planning Commission’s finding 11, which provides:

[t]he proposed activity will enhance the aesthetic environment of the community, providing gracious human scale entryways and public ways orienting the entryway toward the street.<sup>80</sup>

Mr. Griswold argues that adding this finding violates HCC 21.71.030 and 21.71.050(b). HCC 21.71.030 contains the mandatory review criteria to be used for CUPs. HCC 21.71.050(b) simply requires that the Planning Commission issue “written findings and reasons supporting its decision.” Neither of these two ordinances proscribe the addition of additional findings that supplement those required under HCC 21.71.030.

*b. Did the Planning Commission Fail to Consider the Effect of the Setback Reduction (Appeal Point 7)?*

Mr. Griswold argues that the Planning Commission approached its analysis of the review criteria contained in HCC 21.71.030(c),(d),(f), (g), (i),<sup>81</sup> and “related criteria” from the wrong vantage point, by focusing on the request’s effect on the neighborhood, etc., rather than its effect on the setback. A review of Mr. Griswold’s written presentation to the Planning Commission

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<sup>78</sup> HCC 21.71.030(i). The *Community Design Manual for the City of Homer* is available online at <https://www.cityofhomer-ak.gov/planning/community-design-manual> (dated accessed August 10, 2018).

<sup>79</sup> AR 13 – 14.

<sup>80</sup> AR 56.

<sup>81</sup> The points on appeal do not mention HCC 21.71.030(i). This appears for the first time in Mr. Griswold’s Opening Brief, p. 12.

reveals two primary arguments on this point. The first is that a setback reduction is not a “use” which can be dealt with under the CUP process. This argument, as discussed in section 1(b) above, is not supported by a review of the Homer City Code.

Mr. Griswold’s second argument on this point is that the underlying purposes of setbacks are to provide protection to the public through control of traffic, designs of entrances and exits to the property, and provide drainage. He states “[s]tructures in close proximity to dedicated rights-of-way hamper snow removal operations and affect drainage to and from the streets.”<sup>82</sup>

It should first be noted that this CUP application does not involve any change to ingress and egress to the property. The City Planner specifically responded to Mr. Griswold’s written comments during the Planning Commission meeting. He stated that Mr. Griswold failed to show how the proposal would affect snow removal and drainage, and that he evaluated the property to see if there would be a problem with the “line of sight for pedestrians and cars pulling onto the highway” but found “no apparent safety issues.”<sup>83</sup> Both Mr. and Ms. Reynolds also spoke regarding the line of sight issue and opined that they did not think there would be a problem. Mr. Reynolds thought that the proposed porch addition, with its roof and gutter, would improve drainage. Ms. Reynolds thought that they had already improved the line of sight by removing trash and rosebushes in the front of the building and that snow removal was not an issue.<sup>84</sup>

To the extent that Mr. Griswold’s argument is a factual one, there is substantial evidence showing that Mr. Griswold’s concerns regarding the effect of the encroachment into the setback was presented to and responded to before the Planning Commission. The Planning Commission’s written decision specifically mentions, under the “Evidence Presented” heading, a summary of the evidence recited immediately above. The evidence therefore shows that the effect of the proposed encroachment on that setback was presented to the Planning Commission. It should be noted that the ordinance which sets out the required review criteria, HCC 21.71.030, does not require a specific factual finding on this factual issue.

c. Bias (Appeal Point 5).

Mr. Griswold’s briefing contains numerous references to “bias.” However, he has not made any factual averments that the Planning Commission members were themselves biased. Instead, he argues that the drafting of the Planning Staff report and its approval by the Planning

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<sup>82</sup> Mr. Griswold’s Opening Brief, p. 6.

<sup>83</sup> Planning Commission Minutes, AR 50.

<sup>84</sup> Planning Commission Minutes, AR 50.

Commission is proof of bias. However, the review of CUP applications for completeness is part of the City Planner's mandatory duties, as is administering and enforcing the zoning code, including processing all zoning applications.<sup>85</sup> The Staff Report simply contains a report of staff's view of an application. Nothing constrains or requires that the Planning Commission adopt its findings and conclusions.

Mr. Griswold then points to several other items that he considered indicia of bias or a failure of the Planning Commission to fully exercise its duties. First, he notes the fact that the City Planner's signature is on the Planning Commission's decision. As discussed above, this does not vitiate the decision, which is signed by the Vice Chair of the Planning Commission. Second, he points to the fact that this was a brief hearing overall, having lasted only one hour and five minutes.<sup>86</sup> Third, he argued that the Commission did not enter executive session and could have drafted its own decision.

However, this was a simple case involving the renovation of the frontage of a preexisting building. The Planning Commission was apparently satisfied with the information it received from the application, the Planning Staff, and the public. The fact that Mr. Griswold disagreed with the result of the public process is not sufficient to demonstrate bias.

#### **IV. Summary**

This case presented numerous allegations of error. A review of those allegations demonstrates that all of them lacked either a legal or a factual basis. The Homer City Code created a Homer Advisory Planning Commission with the legal authority to consider, grant, or deny applications for Conditional Use Permits. The Homer City Code specifically provides that an applicant in its Central Business District can request and receive leave to reduce the otherwise required 20-foot setback requirement. This is handled through the Conditional Use Permit process. The Homer City Code provides an explicit list of conditions which must be considered by the Planning Commission in deciding whether to grant or deny the application. There is substantial evidence in the record demonstrating that the Planning Commission did consider the relevant factors and substantial evidence that supports its findings on those conditions. Finally, there is nothing in the record that shows the process was flawed, or that the Planning Commission's decision in favor of the Reynolds was biased.

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<sup>85</sup> HCC 21.71.020, HCC 21.71.050(a), HCC 21.90.020(b) and (c).

<sup>86</sup> See AR 58 – 59.

**V. Conclusion**

The decision of the Homer Advisory Planning Commission dated March 22, 2018, which granted Conditional Use Permit 2018-02, is upheld.

DATED: August 14, 2018

By: Signed \_\_\_\_\_  
Lawrence A. Pederson  
Administrative Law Judge

**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 this decision is distributed to you. 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.]