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

In the Matter of:	)	
	)	
CONDITIONAL USE PERMIT 14-05	)	OAH No. 19-0355-MUN
	)	Agency No. 14-05

DECISION ON APPEAL

I. Introduction

Terry Yager, a tenant in a commercial building on Pioneer Avenue in Homer, Alaska, applied for a conditional use permit (CUP) to install a covered porch on their building. The porch would encroach within the 20-foot setback required between the street right-of-way and any structure. The application, CUP 14-05, went to a public hearing before the Homer Advisory Planning Commission (Commission) on April 16, 2014. After Frank Griswold submitted written objections to the granting of the CUP, the Commission approved the application.

Mr. Griswold appealed to the Homer Board of Adjustment (Board). After a series of appellate decisions on the question of his standing to contest the Commission's decision, the matter was remanded to the Board for a decision on the merits of Mr. Griswold's challenge to the CUP.

This decision finds that the Commission had the authority under state law and the Homer City Code (HCC) to consider and grant the CUP application; the HCC specifically allows setback reductions to be dealt with through the CUP process. In addition, the Planning Commission's decision granting Mr. Yager's application was based on substantial evidence of the CUP's compliance with Homer planning standards and ordinances. Therefore, the Commission's decision is affirmed.

II. Facts and Proceedings

A. The permit application and public hearing

John and Norma Smith own a building at 320 W. Pioneer Avenue in Homer, Alaska, in a zoning area designated as the Central Business District (CBD).[1] They own and operate a small hotel there, the Windjammer Suites. 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."[2] The Smith's building is rectangular and sits at an angle, with its eastern face fronting on Pioneer Avenue. Their son-in-law, Terry Yager, applied for a CUP which would allow them to build a covered porch along the portion of the building facing Pioneer Avenue, which at that time

[1] Agency Record (AR) 29.
[2] HCC 21.18.040(b)(1).

was a blank wall.[3] A triangular portion of the porch would encroach a maximum of 10 feet into the 20-foot setback from the edge of Pioneer Avenue.[4]

Mr. Yager's application included, among other things, a description of the intended addition to the property, an aerial photograph of the neighborhood where the building is located, as-built-surveys showing the location of the current building on its lot and the distance between the building and the edge of Pioneer Avenue, and a drawing showing the proposed addition to the building and how much it would encroach on the 20-foot setback.[5]

B. The Public Hearing

Mr. Yager's application went to a public hearing in front of the Planning Commission on April 16, 2014. Prior to the hearing, the Homer City Planner's office issued a written report[6] which recommended approval of the application and made ten factual findings:

1. Applicable code authorizes the proposed use by CUP in that zoning district, because hotels are a permitted use within the CBD, and the relevant ordinance, HCC 21.18.040(b), allows a setback reduction if approved through the CUP process.[7]
2. The proposed use is "compatible with the purpose of the zoning district," because the covered porch "provides protection from the weather and enhances a pedestrian-friendly atmosphere along Pioneer Avenue."
3. "The value of adjoining property will not be negatively affected because this proposal improves the exterior façade of an existing building."
4. "The proposal is compatible with existing uses of surrounding land," because "[w]ithin 250 feet there are three buildings [with] reduced setbacks to Pioneer Avenue and … decks similar to the proposed deck."
5. "The covered deck will not increase the need for public services."
6. The proposal "will not cause undue harmful effect upon desirable neighborhood character," because "[t]he scale, bulk, coverage and density of the proposed covered porch will be in harmony with other facades along Pioneer Avenue [and] will not have an undue harmful effect on Pioneer Avenue character."
7. "The [proposed porch] will not be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole."

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[3] Mr. Yager signed the application as "applicant," and Mr. Smith signed as "property owner." AR 38.

[4] AR 44.

[5] AR 35–46. Mr. Griswold acknowledges that because the building sits at an angle, only a portion of the porch encroaches on the setback; only a small portion actually encroaches 10 feet.

[6] Staff Report PL 14-33, AR 29-34.

[7] AR 30; the report contains a typographical error at this juncture, referring to a non-existent provision, HCC 21.08.040(b).

8. "With an approved CUP, this proposal will comply with the applicable regulations and conditions specified in HCC Title 21."

9. "The proposal is not contrary to the applicable land use goals and objectives of the Comprehensive Plan," because "[t]he commercial streetscape of Pioneer Ave will be enhanced by the construction of the covered porch and by the provision of direct pedestrian access from the sidewalk to the business."

10. "The covered deck will meet the applicable provisions of the Community Design Manual;" (a) it will "provide space for outdoor leisure;" (b) it "will be prominently visible on Pioneer Avenue and provide architectural interest to the existing blank wall;" (c) the porch will be "proportional to the existing 9,000 sf building;" (d) the porch will "provide easy and direct access to Pioneer Avenue;" (e) it "provides an appropriate covering over the deck;" (f) "[l]andscaping shall include flower box plantings along the rim of the deck facing Pioneer Avenue;" (g) "[t]he area between the proposed covered deck and Pioneer Avenue will not be used for parking;" and (h) "[a]ll lighting shall meet the outdoor light standards per HCC 21.59.030 … by using downward directional lighting."[8]

The staff report recommended that the latter point be incorporated into a condition on the CUP to require downward directional lighting.[9] It also recommended a condition requiring landscaping in the form of the flower box plantings mentioned above.[10]

Prior to the hearing, Mr. Griswold submitted two sets of written objections to the requested CUP.[11] His primary argument in these filings was that the requested CUP should be treated as a request for a variance which, in Mr. Griswold's view, would be improper if granted.[12] In response to these filings, the Homer City Clerk provided a short memorandum from the city's counsel opining that it was appropriate to consider the application as a CUP rather than as a variance.[13]

Mr. Yager and Mr. Smith appeared at the hearing, and Mr. Yager spoke in support of the application.[14] Two commissioners, Ms. Erickson and Mr. Venuti, indicated that they had potential conflicts of interest as a result of their business dealings with Mr. Yager. After discussion, motions were brought regarding both potential conflicts; the Commission voted in both instances against finding any conflicts of interest.[15]

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8 AR 30–34.
9 AR 33.
10 *Id.*
11 AR 48-49, 59-60. Mr. Griswold, however, did not speak at the public hearing.
12 *Id.*
13 AR 61.
14 AR 63.
15 AR 63-64.

After the vote on potential conflicts of interest, there was discussion of the proposed porch construction; no one from the public appeared to testify regarding the application.[16] A motion was then made to adopt the planning staff report and approve the CUP, incorporating the staff's findings 1 through 10 and the two conditions mentioned above. The Commission took a recess to review Mr. Griswold's written objections and the memorandum from the city's attorney. The commission then voted unanimously in favor of granting the CUP.[17]

Subsequently, the Commission issued a written decision, documenting its approval of CUP 14-05.[18] This written decision documents the Commission's vote to adopt the planning staff report, including the 10 findings in the report and the two conditions recommended by the staff.[19] The decision was signed by the Commission's chairperson and by City Planner Rick Abboud.[20]

C. Mr. Griswold's appeal

Mr. Griswold timely appealed the Commission's decision to the Homer Board of Adjustment (Board).[21] The Board found that Mr. Griswold lacked standing to contest the decision. Mr. Griswold further appealed to the Superior Court, which affirmed the Board's decision on standing. The Alaska Supreme Court, however, reversed on the standing question, and the matter was remanded to the Board for a decision on the merits.[22] Mr. Griswold then requested that the appeal be heard by a hearing officer instead of the Board. As allowed by HCC 21.93.030, the Homer City Clerk appointed an administrative law judge (ALJ) employed by the Alaska Office of Administrative Hearings to serve as the hearing officer.

Mr. Griswold and City Planner Abboud each filed opening briefs to the Board, and Mr. Griswold filed a reply brief.[23] They each also filed supplemental briefs with the hearing officer after the remand to the Board.[24] Mr. Yager did not file a brief or otherwise participate in the appeal.

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16 AR 64.
17 *Id.*
18 AR 70-74.
19 *Id.*
20 AR 74.
21 AR 17.
22 *See* AR 2-16 (*Griswold v. Homer Board of Adjustment*, Op. No. 7354 (Alaska Supreme Court, April 19, 2019), which includes detailed discussion of Board and Superior Court decisions regarding standing issues).
23 AR 103-120.
24 Mr. Griswold moved to strike briefs filed by City Planner Abboud, and to disqualify Mr. Abboud from participating in the appeal on behalf of the Commission. These issues were addressed in a pre-hearing order issued by the undersigned hearing officer on June 20, 2019, which denied both requests.

Oral argument was held on July 11, 2019. Mr. Griswold and City Planner Abboud participated in the oral argument.[25] The matter was then taken under advisement.

III. Discussion

A. Procedure

Applications for CUPs are submitted to the City Planner.[26] The application is reviewed, and once deemed complete, the City Planner is required to schedule and notice a public hearing before the Commission.[27] Following the public hearing, the Commission is required to act on the application and issue a decision that contains its written findings and reasoning in support of the decision.[28]

A person who "actively and substantively participated" in the matter before the Commission has the right to appeal the Commission's decision granting or denying a CUP.[29] The appeal may be either to the Board of Adjustment or a hearing officer appointed by the City Manager.[30]

Appeals are heard solely on the established record, unless there are allegations involving new evidence or changed circumstances, in which event the hearing officer may remand the matter to the lower administrative body (here the Commission).[31] After briefing, an appeal hearing is to be held, and a decision issued.[32]

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.[33] 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

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25 At the outset of oral argument, Mr. Griswold orally requested that this decision be held in abeyance until the Superior Court issues its decision in another appeal by Mr. Griswold regarding a CUP in the CBD (3HO-18-00240CI; OAH case no. 18-0321-MUN); he followed that up with a written request submitted after oral argument. The request was denied by order dated July 17, 2019, because the hearing officer lacks the authority to extend the timeframe to issue a decision under HCC 21.93.100(a).

26 HCC 21.71.020.

27 HCC 21.71.030, HCC 21.27.050 (a).

28 HCC 21.71.050(b).

29 HCC 21.93.030(a), HCC 21.93.500(a).

30 HCC 21.93.030, HCC 21.93.500(a).

31 HCC 21.93.510(a).

32 HCC 21.93.530–.550.

33 HCC 21.93.540(d).

section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[34]

Thus, 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. In reviewing whether a decision is based on substantial evidence, "[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."[35]

C. Points on Appeal

Mr. Griswold filed an amended notice of appeal to the Board on June 3, 2014.[36] His points on appeal are summarized as follows:

1. The Planning Commission is an advisory body which does not have the legal authority to approve CUPs.
2. It was inappropriate for City Planner Abboud to sign the Commission's decision.
3. Terry Yager is not an attorney and therefore was not authorized to be the "applicant" for the CUP or to represent the Smiths before the Commission.
4. Commissioners Erickson and Venuti had conflicts of interest that should have barred them from voting on the CUP application.
5. "Notwithstanding HCC 21.18.040(b)(4)," a setback reduction is not a "use" which can be considered in connection with an application for a CUP.
6. The Commission erred "by solely considering the effects of the covered porch … instead of considering the effects of the Windjammer Suites hotel *and* the covered porch."
7. The Commission erred because it really granted a *"de facto* variance" and therefore illegally granted "an arbitrary and capricious spot zone."
8. The Commission's findings are not supported by substantial evidence.
9. The Commission erred by failing to identify any purposes of the CBD with which the covered porch would be compatible.
10. The Commission erred in finding that adjoining property values would not be negatively affected by the covered porch.
11. The Commission erred in finding that the covered porch would be compatible with other buildings along Pioneer Avenue.
12. The Commission erred in finding that the covered porch would not cause undue harmful effect upon neighborhood character.

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34 HCC 21.93.540(e).

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

36 AR 18–24.

13. The Commission erred by failing to provide evidence in support of its finding that the covered deck will not be unduly detrimental to the health, safety and welfare of the surrounding area.

14. The Commission erred in finding that the with the approved CUP, the covered porch will comply with applicable planning ordinances and standards under the HCC Title 21.

15. HCC 21.18.040(b)(4) is "in direct conflict with HCC 11.80.110" which requires a minimum 20-foot building setback in Homer.

16. The Commission erred in finding that the covered porch is not contrary to the land use goals and objectives of Homer's Comprehensive Plan.

17. The Commission erred in failing to make findings regarding Windjammer Suites compliance with Homer's Community Design Manual (CDM).

18. The Commission erred in failing to make all provisions of the CDM conditions for approval of the CUP.

19. The Commission erred in determining that flower box plantings along the edge of the covered porch constitute "landscaping."

20. The Commission demonstrated bias by omitting HCC 21.71.040(a) from its review criteria for the CUP.[37]

D. Discussion

For purposes of discussion and analysis, it is useful to group Mr. Griswold's appeal points into three categories: legal, procedural, and factual.

1. Legal challenges.

a. <u>Does the Commission have the legal authority to consider CUP applications (Appeal Point 1)?</u>

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."[38] The City of Homer's ordinances state that "there shall be a Planning Commission established and functioning pursuant to Chapter 2.72 HCC."[39] Chapter 2.72 of the city code created the "Homer Advisory Planning Commission*."*[40] Under HCC 2.72.050, "Zoning powers and duties," subsection (a)(2)

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37 *Id.*
38 *Griswold v. City of Homer*, 925 P.2d 1015, 1017 (Alaska 1996).
39 HCC 21.91.010.
40 HCC 2.72.010.

explicitly authorizes the Commission to "[a]ct upon requests for PUDs, variances and conditional use permits." Mr. Griswold's argument fails because the Homer City Code expressly confers the Advisory Planning Commission with the authority to act upon requests for CUPs. Simply including the term "advisory" in the title of the Commission does not eliminate its authority to act as a decision maker on CUP applications.

b. Can a property owner receive a setback reduction through a CUP (Appeal Points 5 and 7)?

Mr. Griswold makes two related arguments on this point. He argues that a setback reduction for a covered porch is not a "use," *per* se, which can be considered for a CUP. And he argues that an application to allow a structure to encroach into a designated setback is in reality a request for a variance. He then argues that granting such a request would be an illegal "use variance." In addition, although not mentioned in his points on appeal, Mr. Griswold argues that the HCC provision providing for the CUP process for a setback reduction is unconstitutional as applied.

i. Is a setback reduction for a covered porch a "use?"

Mr. Griswold's argument on this point is somewhat difficult to discern. He argues as follows:

> The Commission did not have the authority to apply the conditional use criteria under HCC 21.71 when considering CUP 14-05 because the "*use*" being applied for is a setback reduction i.e., a dimensional requirement which does not constitute a use.[41]

This argument, however, ignores the fact that the CUP application concerned a covered porch requiring a setback reduction. A covered porch constitutes a "use" of the formerly unoccupied portion of the property.

Mr. Griswold also appears to argue that because HCC 21.18.030 contains a list of "uses" which require a CUP to be permitted in the CBD, and "'setback reduction' is not listed as a conditional use under HCC 21.18.030," therefore the CUP requested by Mr. Yager cannot possibly concern a "use." There are two problems with this argument. First, as already mentioned, the CUP concerns the "use" of a covered porch requiring a setback reduction. Second, the list of uses contained in HCC 21.18.030 is not an exclusive list for which CUPs can be allowed in the CBD; the fact that covered porches requiring reduced setbacks are not listed does not render them absolutely impermissible. Any other reading of HCC 21.18.030 would run counter to the principle of statutory

[41] Griswold Ancillary Opening Brief at 7.

construction that "seemingly conflicting provisions must be harmonized unless such an interpretation would be at odds with statutory purpose."[42] HCC 21.18.030 must be read in concert with HCC 21.18.040(b)(4), which explicitly provides that in the CBD, setbacks from dedicated rights of way may be allowed "if approved by a conditional use permit." Reading the two ordinances together, it is clear that a CUP can be used to not only allow the uses provided in HCC 21.18.030, but also to allow a covered porch with a reduced setback.

ii. Use variances

Mr. Griswold further argues that Mr. Yager's 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.[43] He cites to the *Alaska Planning Commission Handbook (Handbook)* in support of his argument. The *Handbook*, however, is not a statute, regulation, or ordinance; rather, it is a publication issued by the Alaska Department of Commerce and Economic Development as a nonbinding guide for local planning commissions.[44] 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)."[45] Because the CUP 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).

iii. CUP versus Variance

Mr. Griswold elaborates on his variance argument by contending that because relief from a setback requirement is a variance, it is therefore reversible error for a setback reduction to be handled as a CUP. However, the City of Homer has chosen to enact specific ordinances relating to the CBD. Those ordinances 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

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

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

44 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).

45 *Planning Commission Handbook*, p. 68.

chapter."[46] Retail businesses are included in the list of "uses [that] are permitted outright."[47] The HCC then 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."[48] Subsection (b)(4) 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."[49]

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. Thus, Mr. Yager's CUP application is well within the Planning Commission's authority (and that fact was outlined for the Commission by the city attorney in his memorandum prior to the Commission's vote in favor of the CUP application in April 2014). The relatively straightforward language of HCC 21.18.040(b)(4) means that Mr. Griswold's argument fails.

iv. Is HCC 21.18.040 unconstitutional as applied?

Although Mr. Griswold did not raise a constitutional argument in his points on appeal, he argues in his briefing that HCC 21.18.040 was unconstitutional as applied. However, he fails to adequately explain the underlying basis for his argument in his briefs, and he was unable to do so during oral argument. In his post-remand opening brief, he simply cites to case law for the general proposition that otherwise constitutional laws could be unconstitutional as applied; he then argues that the Commission exceeded its authority by applying HCC 21.18.040(b)(4) to something that does not meet the definition of a "use."[50] When the hearing officer asked him during oral argument to elaborate on this issue, he simply stated that treating a variance as a CUP application violates due process.

Because Mr. Griswold failed to articulate any facts or reasoning on this issue, he has not established that HCC 21.18.040 was unconstitutionally applied by the Commission in this case.

c. Is HCC 21.18.040(b)(4) in direct conflict with HCC 11.08.110 and therefore invalid (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." Another relevant, general ordinance is HCC 21.71.040(b)(13). It reads as follows:

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46 HCC 21.18.020.
47 HCC 21.18.020(a).
48 HCC 21.18.040(b)(1).
49 HCC 21.18.040(b)(4).
50 Griswold Ancillary Opening Brief at 8 (*citing State v. ACLU of Alaska,* 204 P.3d 364, 372 (Alaska 2009).

> 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.

HCC 21.18.040(b)(1) provides that within the CBD, "[b]uildings shall be set back 20 feet from all dedicated rights-of-way, except as allowed by subsection (b)(4)." As already mentioned, HCC 21.18.040(b)(4) explicitly states that within the CBD, "[i]f approved by a conditional use permit, the setback from a dedicated right-of-way … may be reduced." Reading all of these 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 three 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 argues that Mr. Yager is not an attorney and therefore should not have been allowed to apply for the CUP or represent the property owners on the application. Third, he argues that the Commission erred by considering only the effects of the covered porch, rather than considering the effects of both the hotel and the covered porch.

a. The City Planner signed the Commission's decision (Appeal Point 3)

The Commission's decision, which was issued on May 14, 2014, bears two signatures. The first signature is that of the Commission Chair Franco Venuti. Below it is the signature of Mr. Abboud, the City Planner.[51] Mr. Griswold makes a general objection to the decision because it bears the City Planner's signature. The HCC requires that the Planning Commission "shall promptly issue written findings and reasons supporting its decision."[52] 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.

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51 AR 74.

52 HCC 21.71.050(b).

Mr. Griswold also makes a related argument, that Mr. Abboud signed the decision in order to somehow "circumvent" the requirement under HCC 21.71.060 that "the City Planner shall promptly issue a conditional use permit in accordance with a decision of the Commission approving an application." Notwithstanding this prompt issuance requirement, Mr. Griswold argues that the permit should not have been issued until the decision was "final," i.e., after all appeals had been exhausted. This argument, however, is based on Mr. Griswold's misreading of the same signature page of the Commission's decision, which cites the HCC's provision regarding standing, describes the 30-day timeframe for appealing to the Board and then states that any decision not timely appealed "shall be final." From these provisions, Mr. Griswold cobbles together an argument that the permit should have been held in abeyance for all these years while his appeals have been litigated all the way up to the Alaska Supreme Court, and then through a remand o a hearing on the merits, with more possible appeals to follow; and that Mr. Abboud signed the decision to circumvent that process. To accept Mr. Griswold's argument on this issue would mean that any project requiring a CUP could be delayed for many years by a determined challenger.

Stated quite simply, Mr. Abboud's signature on the document constituted issuance of the CUP, in accordance with the requirements of HCC 21.71.060. Mr. Griswold's argument fails, because the City Planner is required to promptly issue a CUP after Commission approval.

b. Mr. Yager's role in obtaining the CUP for property owned by the Smiths

As discussed above, Mr. Yager signed the CUP application as "applicant," and Mr. Smith signed it as "property owner." Mr. Griswold argues that Mr. Yager is not an attorney and therefore he was engaging in the unlicensed practice of law by representing the Smiths' interests in connection with the CUP application. Mr. Griswold's argument, however, is based on a misunderstanding of the statutes and rules of the Alaska Bar that govern unauthorized practice of law issues. The facts are that Mr. Yager and Mr. Smith both signed the application, and they both appeared before the Commission, with Mr. Yager taking the lead in presenting the basic elements of the application. There is no evidence that Mr. Yager held himself out as an attorney or "represented" Mr. Smith in a manner that could be construed as acting as his legal counsel. By merely submitting a CUP application jointly with Mr. Smith, the owner of the relevant property, and then appearing with him at a Commission hearing on the application and speaking factually about the application, Mr. Yager took no steps that could be viewed as unauthorized practice of law.

Mr. Griswold also makes a related argument that Mr. Yager is not bound by the terms of the CUP because he is not the property owner. However, the more important question is whether the property owner, Mr. Smith, is bound by the CUP. The City's recourse for any violation would be against the property owner.

Mr. Yager's role in pursuing the CUP application did not constitute unauthorized practice of law. His signing of the application and appearance before the Commission did not render the CUP invalid.

c. The Commission's failure to consider the effects of both the hotel and the covered porch

Mr. Griswold's argument on this issue is, again, difficult to discern. He states in his amended notice of appeal that the Windjammer Suites hotel and the covered porch constitute a permitted hotel use, not requiring a CUP; therefore the Commission "should have focused on the effects of the [hotel] encroaching into the reduced setback instead of just focusing on the effects of the proposed covered porch."[53] Mr. Griswold did not elaborate on this issue during the July 11, 2019 oral argument; and the hearing officer is unable to locate any discussion of it within Mr. Griswold's four briefs filed in this matter (totaling approximately 74 pages of briefing).

The CUP application at issue in this case concerned a covered porch requiring a reduced setback within the CBD, and the effect of that proposed change on "neighborhood character, property values etc." was the proper subject of the Commission's inquiry. Absent any cognizable argument in support of this point by Mr. Griswold, the Commission's failure to consider the effects of the hotel and the covered porch together is not fatal to its decision granting the CUP.

3. Factual Arguments

Mr. Griswold makes a number of factual arguments. First, he generally argues that the decision of the Commission was not based on substantial evidence (Appeal Point 8); he then addresses specific factual findings of the Commission (Appeal Points 9 – 14, 16 – 19). He additionally argues that two Commissioners had impermissible conflicts of interest (Appeal Point 4), and that the Commission overall demonstrated bias (Appeal Point 20).

a. Adequacy of the evidence (Appeal Point 8)

In order to receive a CUP, "[t]he applicant must produce evidence sufficient to enable meaningful review of the application." Mr. Yager's application showed the current building, its

[53] AR 20.

orientation to the street, the existing distance between the building and the required setback, the design of the proposed renovations to the building, how those renovations would appear from the street, and how they would encroach into the required setback. This provided sufficient evidence to evaluate a simple request, the renovation of the frontage of an existing building, specifically adding a covered porch along what at the time was a blank wall on the building.

Mr. Griswold argues that the Commission's decision, generally, was not based on substantial evidence. As discussed above, substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[54] Mr. Griswold's amended notice of appeal states that the Commission's findings are not supported by substantial evidence and characterizes them as "non-objective, inadequate, off-point, [and] contrived to the point of being ridiculous."[55] He provides no additional analysis on this general issue, however. Therefore, it makes more sense to address each of his specific factual arguments, individually.

i. Compatibility with purposes of the CBD (Appeal Point 9)

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."[56] The Planning Commission's Finding 2 provides that "[t]he proposed use(s) and structure(s) are compatible with the purpose of the zoning district…," with the specific finding that "the covered porch provides protection from the weather and enhances a pedestrian-friendly atmosphere along Pioneer Avenue."[57] Mr. Griswold argues that finding is erroneous because "protection from the weather" is not one of the explicit purposes of the CBD; and "a pedestrian-friendly atmosphere," while listed as something to be encouraged within the CBD, is a subjective concept. He also argued at oral argument that in his opinion, adding a covered porch to the building, where previously there had been a blank wall, does not make the property more pedestrian friendly. Mr. Griswold's comments at that time are telling:

> Most pedestrians do not want to be within speaking distance of a structure or otherwise engage it. … I don't need to … engage or speak to a porch or anybody on the porch. If I'm walking, I'm in Alaska because I like open air and nature and I like to see green grass and … if I wanted to live in New York City with buildings on either side … some people find comfort in that, I don't… I don't think most Alaskans or Homerites do… but it's an arguable point, you can't just say this is

54 HCC 21.93.540(e).
55 AR 20.
56 HCC 21.71.030(b).
57 AR 71.

> pedestrian friendly because [you] think it's pedestrian friendly just like I can't say it's not pedestrian friendly because I don't like it.[58]

Mr. Griswold's argument highlights the fact that some aspects of the land-use planning process are, by necessity, subjective. This is a theme that seems to run throughout his various factual objections to the Commission's decision in this case. In any event, however, encouraging a "pedestrian-friendly atmosphere" is stated within the purposes of the CBD, and the planning staff report made the finding that the covered porch with reduced setback at issue here would be pedestrian friendly. The Commission adopted the report of the planning staff, including those findings. 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 proposed covered porch with reduced setback was compatible with the purpose of the CBD.

ii. Effect on adjoining property values (Appeal Point 10).

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 CBD.[59] Mr. Griswold argues that the Planning Commission's Finding 3 to this effect was erroneous, because it failed "to consider the deleterious effects of the … encroachment into the setback, that a covered porch is not inherently an improvement …, and that the exterior façade of the [hotel] could be improved without further encroaching into the 20-foot setback … ."[60] The staff planning report to the Commission drew the conclusion that because the proposed use - the covered porch with reduced setback - was replacing a blank wall facing the street with an attractive covered porch, this constituted an improvement to the exterior façade of the building.[61]

Mr. Griswold's argument is illustrative of the often subjective nature of planning analysis, discussed above. He disagrees with the subjective views of the planning staff and believes that the blank wall facing the street was at least as attractive and desirable for the neighborhood as the proposed covered porch. The Commission, however, was entitled to adopt the findings of the staff report if the Commissioners found them to be reasonable and factually based. The Commissioners adopted the reasonable conclusion of the staff that the porch would be an improvement, which can

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58 Griswold oral comments, July 11, 2019, at hearing record approx. 52:40.
59 HCC 21.71.030(c).
60 AR 20-21.
61 AR 30.

lead one to the reasonable conclusions that the encroachment into the setback would only increase the subject property's value, and because it would be an improvement to the neighborhood, it would not negatively affect the value of adjoining properties. The application itself, Mr. Yager's testimony, and the Planning Staff report, which was approved by the Planning Commission, all provide substantial evidence supporting this finding. Consequently, there is substantial evidence supporting this finding.

iii. Compatibility with other buildings (Appeal Point 11)

One of the criteria for review of a CUP is whether the "proposal is compatible with existing uses of surrounding land."[62] The Planning Staff report, which was adopted by the Commission, specifically noted that "[t]he covered porch is compatible with the other buildings along Pioneer Avenue. Within 250 feet there are three buildings that have reduced setbacks … and offer decks similar to the proposed deck."[63] Mr. Griswold argues that the Commission's Finding 4 to this effect was erroneous, because some buildings in the neighborhood do not encroach on the setback, and the Commission failed to identify whether other buildings with similar porches along Pioneer Avenue in the CBD are permitted, non-conforming, or illegal structures.[64]

The concept of "compatibility" would appear to be aimed at land uses that are markedly different from one another, e.g., a noxiously loud factory may not be compatible next to a hospital and a nursing home. In any event, however, the review criterion in question does not require the level of analysis inherent in Mr. Griswold's argument on this point. The Commission's finding included reference to three buildings close to the Windjammer Suites with which the proposed use would be compatible.[65] Although this issue presents another subjective question on which Mr. Griswold may differ with the Commission, substantial evidence supported the finding that the covered porch with reduced setback would be "compatible with existing uses of surrounding land."

iv. Effect on neighborhood character (Appeal Point 12)

One of the criteria for review of a CUP is whether the "proposal will not cause undue harmful effect upon desirable neighborhood character."[66] The Commission's Finding 6 stated:

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62 HCC 21.71.030(d).
63 AR 72.
64 AR 21.
65 AR 72.
66 HCC 21.71.030(f).

> The scale, bulk, coverage and density of the proposed covered porch will be in harmony with other facades along Pioneer Avenue. The covered deck will not have an undue harmful effect on Pioneer Avenue character.[67]

Mr. Griswold argues that the Planning Commission's finding here was erroneous, because "the scale, bulk, coverage, and density of the Windjammer Suites hotel including the covered porch were never calculated and may exceed the maximum limits allowed by city code."[68] This argument, however, assumes that the use in question to be analyzed by the Commission was the hotel and the porch together. The impact of the hotel itself on the neighborhood character was not at issue before the Commission, and it is not at issue in this appeal.

Mr. Griswold's argument on this point is misplaced. The record shows that the applicant and the Planning Staff presented evidence to the Planning Commission which demonstrated that the ordinance's review criterion was satisfied. There is substantial evidence in support of this factual finding.

v. Health, safety and welfare of surrounding area (Appeal Point 13)

Another 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."[69] Mr. Griswold argues that the Planning Commission's Finding 7 to this effect was erroneous. He states certain assumptions regarding the purposes of the 20-foot setback requirement, and then argues that "the Commission had a duty to explain why it is now in the public's interest to reduce [the] setback by 50%."[70]

The evidence presented to the Commission showed that the applicants operated a hotel and wished to add the covered porch to enhance the wall of their building facing out onto Pioneer Avenue. The uncontroverted evidence, as discussed above, shows that this addition would improve the building's street appearance, and no one has suggested that the covered porch would affect traffic or safety issues. There was no evidence that the proposed use would harm "health, safety, or welfare" of either the CBD or the City – a complete absence of any evidence, or even a suggestion, of detrimental effect. There was substantial evidence that supported this finding.

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67 AR 72.
68 AR 21.
69 HCC 21.71.030(g).
70 AR 21-22.

vi. Compliance with HCC Title 21 (Appeal Point 14)

One of the criteria for review of a CUP is whether the proposed use will comply with the city code.[71] Mr. Griswold argues that the Planning Commission's Finding 8 ("[w]ith an approved CUP, this proposal will comply with the applicable regulations and conditions specified in HCC Title 21"[72]) to this effect was erroneous.[73] Mr. Griswold argues that the Commission applied circular reasoning in this finding, i.e,, by premising compliance with HCC Title 21 only on obtaining approval of a CUP.

Mr. Griswold is incorrect. The Commission, by adopting this finding, was simply stating that the CUP approval process was sufficient to ensure the compliance of the proposed porch and reduced setback with the code. The Commission correctly found compliance with the city code. .

vii. Consistency with the Comprehensive Plan (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."[74] Mr. Griswold argues that the Commission's Finding 9 to this effect was erroneous in that the Commission "didn't even identify the applicable land use goals" and failed to determine if the proposed use was contrary to them.

Mr. Griswold's argument here fails to note that the Planning Staff report, which was adopted by the Commission, specifically refers to components of the Comprehensive Plan, and states that the proposed use would enhance "the commercial streetscape of Pioneer Ave." in furtherance of the referenced goals.[75] No evidence was presented to the Commission that the proposal was contrary to the Comprehensive Plan. Given the evidence in this case, including the Planning Staff report, and the information presented regarding the proposed covered porch, there was substantial evidence supporting this finding.

viii. Compliance with Community Design Manual (Appeal Points 17 & 18)

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" (Manual).[76] Mr. Griswold argues in his

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71 HCC 21.71.030(h).

72 *See* AR 55.

73 To the extent that is is more of a legal argument, it is addressed in in sections 1(b) and 1(c) above, which conclude that the pertinent portions of the HCC allow use of a CUP to reduce the 20-foot setback requirement.

74 HCC 21.71.030(i).

75 AR 32, 72.

76 HCC 21.71.030(j). 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).

amended notice of appeal that the Commission erred by failing to make findings that the Windjammer Suites Hotel constituted a residential use subject to the requirements of the Manual.[77] His next point on appeal argues that the Commission erred "by failing to identify all applicable provisions of the [Manual} and making them conditions for approval of the CUP."[78] In his opening brief after remand, he appears to amend these arguments, contending that the Commission erred by finding that the covered deck would meet the applicable provisions of the Manual.[79]

Mr. Griswold presents no authority for the proposition that every potentially applicable provision of the Manual must have been imposed as a condition for approval of the proposed covered porch at issue here. Compliance with the provisions of the Manual was properly addressed by the Planning Staff report, which was adopted by the Commission; it specifically refers to the applicable provisions of the Community Design Manual, and states that the proposed covered porch comports with them.[80] The approved CUP includes a condition that outdoor lighting must be compliant with the Community Design Manual, as well as the condition discussed above regarding landscaping in the form of flower box plantings.[81] In addition, the Commission had Mr. Yager's 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. Landscaping issue (*Appeal Point 19)*

Mr. Griswold objects to the Planning Commission's conclusion that the CUP condition requiring flower box plantings along the front edge of the covered porch facing Pioneer Avenue constitutes "landscaping."[82] He argues that true landscaping would be possible if the land were not to be occupied by the covered porch.[83] It is apparent that Mr. Griswold simply disagrees that flower boxes can be characterized as landscaping.[84] He presents no authority for the proposition that flower box plantings are not properly characterized as "landscaping" that can aid a project in meeting the terms of the Community Design Manual. The mere fact that he has a philosophical

77 AR 23.
78 *Id.*
79 Griswold Ancillary Opening Brief at 18-19.
80 Ar 32-33.
81 AR 73.
82 AR 23.
83 *Id.*
84 Mr. Griswold also argues that the terms of the flower box condition are too ambiguous to be enforceable (the condition states "landscaping shall include flower box plantings along the edge of the deck facing Pioneer Ave." AR 73. Because he did not further address this argument in his briefing or at oral argument, however, it is waived.

disagreement with the planning staff and the Commission on this issue does not render the condition invalid.

b. Conflicts of interest and bias (Appeal Points 4 & 20)

Mr. Griswold first argues that Commissioners Erickson and Venuti had conflicts of interest that should have barred them from voting on the CUP application (Appeal Point 4). As discussed above, both Commissioners disclosed their potential conflicts to the Commission. After discussion, motions were brought and the Commission as a whole voted against finding conflicts on the part of Ms. Erickson and Mr. Venuti. In his briefing, Mr. Griswold notes that the discussion described in the Commission's meeting minutes indicates that both Ms. Erickson and Mr. Venuti stated that their conflicts had to do with business relationships with Mr. Yager rather than with Windjammer Suites, but they apparently did not indicate whether their business relationships involved Mr. Yager's real estate business.[85] It is pertinent here to note that along with adding the covered porch, a portion of the Windjammer Suites was going to be remodeled to create an office for Mr. Yager's real estate business.

Mr. Griswold argues that the primary concern under HCC 1.18.030 is whether the City official has a financial interest in the subject of the proposed action. He implies that Ms. Erickson and Mr. Venuti could have had financial relationships with Mr. Yager's real estate business that might implicate the concerns covered by HCC 1.18.030.

Mr. Griswold fails to note, however, that the proposed action at issue here is not the remodeling of the hotel to accommodate Mr. Yager's real estate office, it is simply the CUP to allow the addition of the covered porch with a reduced setback. In addition, as pointed out by Mr. Abboud in his brief on remand, seven commissioners voted in favor of the CUP, so the two commissioners' votes were not instrumental in approval of the CUP. In other words, even if one assumes *arguendo* that Ms. Erickson and Mr. Venuti should have been disqualified, the failure to disqualify them constituted harmless error.

Mr. Griswold also argues that the Commission overall demonstrated bias "by deliberately omitting HCC 21.71.040(a) from its review criteria" (Appeal Point 20).[86] HCC 21.71.040(a) provides that:

> The Planning Commission will review and may approve, approve with conditions, or deny an application for conditional use permit. The application shall not be

[85] Griswold Ancillary Opening Brief at 24-26.
[86] AR 23.

approved unless it is established that the proposal, with conditions if necessary, satisfies the applicable review criteria.

This argument apparently relates back to Mr. Griswold's contentions regarding the Community Design Manual, discussed at length above.[87] However, nowhere does Mr. Griswold explain how the Commission's analysis of the provisions of the Manual demonstrates bias on the part of the Commissioners. His failure to address this allegation in his briefs or at oral argument results in a waiver of the argument.

c. Non-conforming use issue

Mr. Griswold raised one additional argument for the first time at oral argument; he pointed out that the Windjammer Suites building was built in 1975, before any setback requirements existed in City Code, that the building already slightly encroached on the 20-foot setback when it was enacted, and that as a result the encroachment was grandfathered in. This historical encroachment of approximately two feet into the setback was noted in the Planning Staff report to the Commission.[88] Mr. Griswold contended at oral argument that this meant that the building was a legal, "non-conforming structure," and that provisions of the HCC provide that non-conforming structures cannot be enlarged if to do so would increase their non-conformity.[89] Mr. Griswold conceded that this was the first time he had raised this issue throughout the history of this proceeding.

The question of whether the decision to grant the CUP at issue here violated HCC provisions regarding non-conforming uses is beyond the scope of this proceeding. Appeals to the Board of Adjustment are heard solely on the established record, unless there are allegations involving new evidence or changed circumstances.[90] Mr. Griswold's failure to raise this issue to the Commission or in his four appeal briefs to the Board bars him from raising it now.

IV. Summary

A review of Mr. Griswold's numerous points on appeal in this case demonstrates that his arguments 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

87 *See* Griswold Ancillary Opening Brief at 20-21.
88 AR 29-30.
89 *See* HCC 21.61.030(a), .040(c).
90 HCC 21.93.510(a).

Central Business District can request and receive leave to reduce the otherwise required 20-foot setback requirement, by applying for a CUP 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 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 CUP for the covered porch with reduced setback at the Windjammer Suite building was biased.

V. Conclusion

The decision of the Homer Advisory Planning Commission dated May 14, 2014, which granted Conditional Use Permit 14-05, is affirmed.

DATED: September 9, 2019

By: *Signed*
Andrew M. Lebo
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.]