

Appellant Materials Submitted

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City Assembly
City and Borough of Sitka
100 Lincoln Street
Sitka, Alaska 99835

December 23, 2021

Re: Appeal of Denial of Short Term Rental Conditional Use Permit


To Whom it May Concern,

This letter constitutes notice from Benjamin Timby of his intent to appeal the Planning Commission's December 15, 2021 decision on matter CUP 21-19, to deny him a conditional use permit for he and his wife Tiffany Justice's residence at 717 Sawmill Creek Road in Sitka.

Mr. Timby's appeal is supported by the attached Memorandum, his conditional use permit application, the Planning and Community Development Department's Report for CUP 21-19, a link to the recording of the relevant portion of the December 15, 2021 Commission Meeting, and a copy of a July 12th, 2017 Planning Commission meeting minutes which approved CUP 18-14 conditional use permit with a car-limitation condition. Mr. Timby has filed a public records request with the City of Sitka for additional relevant conditional use permits which Mr. Timby will add to this appeal when the records are processed and delivered.

Mr. Timby respectfully asks that the Planning Commission review these materials, and reconsider their decision to deny the short term rental permit.

Sincerely,


Ben Timby


Tiffany Justice

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Bentimby@gmail.com

City Assembly
City and Borough of Sitka
100 Lincoln Street
Sitka, Alaska 99835

December 23, 2021

Re: Memorandum in Support of Appeal

Dear Assembly Members,

Benjamin Timby appeals the December 15, 2021 denial of his request for a short term rental permit (henceforth “STR permit”) for his and his wife, Tiffany Justice’s, home at 717 Sawmill Creek Road on the following grounds:

1. The Commission’s decision to deny the STR permit applied an incorrect legal standard.
2. The Commission’s denial violated Due Process because it was unconstitutionally biased and contrary to the evidence.
3. The Commission’s decision to deny the STR permit violated the Full Faith and Credit Clause of the United State’s Constitution.
4. The Commission’s decision to deny the STR permit violated the equal protection provision of the Constitution of the State of Alaska.

I. Introduction and Procedural History

Benjamin Timby and his wife Tiffany Justice (henceforth “Mr. and Mrs. Timby” or “the Timbys”) are Sitka residents who own a residence at 717 Sawmill Creek Road, located within Sitka’s Historic downtown district. When they purchased the home it was derelict and believed to be a teardown. However, the Timby’s worked hard to save the building, restoring it with care over the past four years.

717 Sawmill Creek Road is a historic home and, as with many lots in the historic downtown district, is a legal non-conforming lot. The non-conformity is that it does not have

off-street parking located on the lot. As with the downtown areas of many major cities and small towns, the Timby's must look for parking on the street and walk to their home.

On that particular stretch of Sawmill Creek Road, as with the rest of the City and Borough of Sitka, the on-street parking is not restricted based on a permitting system. Rather, the parking is available and held out for the use of the entire public. Nevertheless, the area, though heavily trafficked, is not heavily "parked." The Timby's have never struggled to find the parking spaces they need close to their home.

Mr. and Mrs. Timby's primary work is delivering and crewing sailboats, which is supplemented by additional income from boat and construction work when they are in town. As with fishing, the nature of their work requires flexibility in their schedule, which creates a unique challenge with the house. If Mr. and Mrs. Timby choose to rent the house as a long term rental, they won't have their house available to them when they are in town. If they choose not to rent it, they are left with an empty house during their absence and a burden of cost. Given their circumstances, a short term rental is a perfect solution that allows them to both live in their house when they are in town and rent it when they are out of town. It also allows the flexibility to keep the house 100% occupied and generate income when they are out of town. This led the Timby's to request a short term rental permit this fall.

The Timby's submitted their application to the planning department on Oct. 20th, 2021. The Planning and Community Development Department Staff Report on the permit recommended approval and the Planning Commission considered the permit application at its meeting on December 15, 2021. Notably, there was no public opposition to the permit application at either the Planning Commission or Assembly reviews. The Permit Application and Planning Commission Report are attached for your review. The Zoom conference recording of the relevant portion of that meeting is attached as well. In reviewing the audio file, the Assembly appears to have denied the permit due to the fact that individuals residing at 717 Sawmill Creek road must use publicly available parking. Assembly members and staff made the following statements:

"We have had other short term rentals that did not meet the parking requirements and there were in some cases mitigations required as part of the conditions of approval." [26:09-26:20].

"I'm very concerned about this one because of the fact that there...its not just the fact that there is no off street parking, it's the fact that there is no parking 99% of the time on this street as it is. Partly due to the property beside it having vehicles parked in front of it year round ...that don't move. Clearly these photos are older and ...um... and are well placed photos. But I have concerns...The thought of having six people in this home and having... the need for multiple vehicles...um.. that bothers me....I feel like if there was some form of mitigation to guarantee that there would be a.. one single vehicle, or no vehicles, and it would be bike access style or something like that. The problem with then putting that on as a mitigation means that there has to be enforcement, which is sometimes a problem." [26:28 -28:14]

“The lack of parking for the property is indeed a legal non-conformity for its existence as a single family home....” “That legal non-conformity does not excuse the requirement to then turn the home into a short-term rental and have two parking spaces. So, it is a requirement that is not met. However, that doesn’t necessarily mean that the permit needs to be turned down.” [28:16 - 29:07].

“I have the same concerns, but the thought crosses my mind - if this were a long term rental it would be the same problem as a short term rental.” [29:32 - 29:41].

“At the same time, it would ...I mean, it is a horrible parking spot...especially with the neighbors.” [29:42 - 29:58].

“Q: I’m wondering, in what...um... do you know off the top of your head if we have granted short term rentals to other short term rentals that have not met all the requirements recently?

A: I don’t know how recent it is. There was one that was approved shortly before I started that I remember reading about it. It’s a short-term rental on Halibut Point Road, just after ALPS Federal Credit Union, that did not have the two required parking spaces. And there’s actually a flight of stairs that goes from Halibut Point Road up to the property. And that was not able to meet the parking requirements. So a condition of approval...sort of two conditions of approval were associated with it. First that the renters were not allowed to bring cars and second that the property owner had to provide bikes for renters to use. That’s the main one that’s coming to mind right now.... [30:53-31:57]”

“Full Disclosure... that is my father’s short term rental...” [32:10-32:13].

“Ben: I just want to contribute that I would go back to the question of is the actual situation any different between long term and short term renting. And basically, does this actually change, mitigate, any of those impacts.... and just so you know, it was brought up in that first point that those photos were old...that 99% of the parking was not available or used. I’m looking at those photos - those are very recent. We have discussions with our neighbors - one of their sons is a mechanic and there has been some discussions we’ve had to have and resolutions around sharing that space...we have reached an understanding with our neighbors that they are not using spots in front of our house out of respect for all of our access to our own homes... So yes, those are recent photos, we have had access for up to three vehicles. When we live in we’ve only needed one or rarely needed two or rented to anyone with two. I can’t even imagine needing three in the downtown area... We are happy to mitigate through other means. [33:44 -35:45].

“It could open up... I don’t think this is a good fit” [36:49-36:57]

“Can we limit the parking to one vehicle only and sunset this condition use permit at the sale of the house added to the conditions?” [36:57-37:13]

“I think that if he is planning on having the availability of six guests to be there, offer six bikes...” [37:15-37:22]

“We could put a condition of only having one car...” [37:46-37:50]

“...My concern is the fact that in some ways we are starting to set a precedent about it. I don't like doing that especially when we work really hard to try to make it bomb proof, bullet-point, you need all these things... Yes we've made some changes, and delineated certain things...” [37:57-38:30]

“Then again, if there is a problem with parking. Whose problem is it? It's person who's renting it, who is going to have to park a block away and walk in. I just think that - I don't see the difference between a long term rental and a short term rental. You can have a long term renter in there that has three or four friends come over.” [39:26-39:57]

“These non-conforming things drive me nuts.” [40:03-40:06]

“We need to make a motion so we can vote on it.” [40:24-40:26]

Following that discussion, the Commission moved to approve the permit, subject to attached conditions of approval, but the Commission voted to deny the permit application. The Commission then, nonsensically, voted to “adopt and approve the required finding of the conditional use permit as listed in the Staff Report” even though the Staff Report's finding recommended approval.

The Timbys now appeal the Commission's denial because it unlawfully applied an incorrect legal standard, was contrary to the evidence presented, violated the Full Faith and Credit Clause of the US Constitution, and denied the Timby's equal protection of the law under the Alaska Constitution.

II. The Commission's decision to deny the Timby's STR permit applied an incorrect legal standard.

Sitka's Comprehensive Plan 2030 holds participation in the tourism industry and preservation of historical buildings as integral parts for the economic development of our community. Additionally, it is well known that availability of both long term rentals and short term accommodations for visitors is in utter crises.]

As 717 Sawmill Creek is the Timby's primary residence and they come and go irregularly due to the work as sailing crew, long term rentals are not an option for their housing needs and

do not supply a supplemental income to subsidize the costs of restoring and maintaining this historic Sitka building. However, short term rentals at the residence would provide the Timby's substantial economic opportunity for subsidizing the costs of living in Sitka, funding further restoration of their historic home, and provide them the flexibility of using their house or renting it as needed. It also provides accommodations for independent travelers within walking distance to downtown, but outside of the main cruise tourist onslaught areas.

The Planning Department Staff Report stated that "Staff recommends that the Planning Commission approve the short-term rental at 717 Sawmill Creek Road," observing that the lack of two off-site parking spaces at the lot was a "legal non-conforming use."

The Sitka general code places the burden on the applicant for a conditional use permit to show that the conditional use meets all of the criteria in subsection B of SGC 22.30.160:

A [conditional use](#) permit may be approved only if all of the following findings can be made regarding the proposal and are supported by the record that the granting of the proposed [conditional use](#) permit will not: (a.) Be detrimental to the public health, safety, and general welfare; (b.) Adversely affect the established character of the surrounding vicinity; nor (c.) Be injurious to the uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located.

These conditions don't specifically require that off-street parking be available, only that the problems elucidated in 22.30.160 not occur. Specifically, although SGC 22.30.160 requires two off-street parking sites in the R-1 residential district, the Planning Director explained that the lack of parking at the Timby's residence is a legal non-conforming use for a single-family home, and that although it fails to meet the two-spot criteria for short term rentals, that does not necessarily mean the application must fail. The question goes back to the health, safety, and use criteria of SGC 22.30.160.

So the question is not whether guests will have to park on the street - they will - but, as one commissioner correctly and repeatedly pointed out, whether short term renters doing so has negative impacts on the surrounding area as compared to the Timby's or long-term renter's use of the property. The Timby's application and the Planning department's findings concluded that conducting short term stays of less than 14 days would not have any impact on the parking situation compared to the Timby's use of the property or long-term stays of 15 days or more, at worst.

There was no evidence presented to the Planning Department, Planning Commission, or City Assembly that short term renters using the legal, but non-conforming lot would strain the parking situation on Sawmill Creek Road. Specifically, there was no evidence presented that short term renters parking on Sawmill Creek Road - just as Mr. and Mrs. Timby do themselves - would be detrimental to public health, safety, or welfare; adversely affect the area; or be injurious to nearby property uses.

The question before the Commission was not whether the non-conformity regarding parking was legal - it is. The question was whether there was an impact from short term renters

making use of street parking beyond the impact made by long term renters or the Timby's themselves - which there is not.

Because the Commission applied the wrong legal standard, it should reconsider its decision to deny the Timby's conditional use permit application and issue the permit with the condition that short term rentals place no more strain on the public parking available near 717 Sawmill Creek Road than the Timby's have themselves in the past.

This could include, as the Commission suggested (and admittedly has approved for one of the Commissioner's own fathers) limiting vehicles associated with the short term rentals to one or two vehicles, and/or requiring the Timby's to provide bicycles to their guests. (See [30:54-32:13] and attached Planning Commission Meeting Minutes dated July 17, 2018 (approving CUP 18-14 at 409 Halibut Point Road with conditions that "There shall be no more than one car allowed in the Short Term Rental and the owner shall provide bicycles.")).

II. The Commission's denial violated Due Process because it was unconstitutionally biased and contrary to the evidence.

In making decisions that "involve the application of established rules or policy-specific facts in order to determine the rights of a specific person or discrete group of persons" a City Commission is acting as a quasi-judicial body." (See attached training materials for the "Alaska Association of Municipal Clerks: Nuts & Bolts Session: The Alaska Open Meetings Act, Quasi-Judicial Proceedings" and the "Municipal Clerks Role as an Impartial Intermediary" available at [Law of the Land \(alaskaclerks.org\)](http://Law of the Land (alaskaclerks.org)), provided by the Levesque Law Group, LLC). Permitting decisions are clearly a quasi-judicial role, which has constitutional and conflict of interest implications.

Due Process requires that quasi-judicial decisions must be based upon a valid government purpose and only upon those facts before the decision-maker. Specifically, "A fair trial in a fair tribunal is a basic requirement for due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavoured to prevent **even the probability of unfairness.**" [*Balough v. Fairbanks North Star Borough*, 995P.2d 245,26 (*Alaska* 200)]

Here, the Commissioner engaged in a number of unfair procedures. Specifically, at least one commissioner relied on evidence that was not presented to the commission regarding the parking situation - speculating that the photos Mr. Timby submitted were old and carefully taken to show empty parking spots in front of the home. This speculation was not based on any evidence presented to the commission, and was contrary to Mr. Timby's testimony that there were no parking issues, that spaces are readily available on the street, and that the pictures were recent. He took them himself the month prior to the application. Even more concerning, another commissioner admitted on record that he was biased against non-conforming lots, of which there are many in downtown Sitka, stating: "These non-conforming things drive me nuts."

Even worse, the Commission considered but discarded single car and bicycle provision requirements for the Timby's residence, even though they admitted on record that one of the current sitting Commissioner's fathers has such conditions on his own short term rental property. The denial of similar conditions for the Timby's property when a Commissioner's own father - with whom the Timby's short term rental would directly compete - introduced an unconstitutional level of bias and conflict of interest into the proceedings.

Because of one Commissioner's admitted bias, another Commissioner's conflict of interest on the record, and at least one Commissioner's inaccurate speculation about the parking situation that was contrary to the evidence before him, the Commission's decision to deny the Timby's a short term rental permit violated their due process rights under the Alaska and Federal Constitutions.

The Commission should therefore reconsider its denial in a fashion that conforms with Due Process, eliminates bias and conflicts of interest from its proceedings, and base its decision on the evidence presented and not on speculation.

III. Full Faith and Credit

Under the Full Faith and Credit Clause of the U.S. Constitution, governmental bodies must treat non-residents and residents equally under the law. In the present case, the lack of parking at 717 SMC is a legal non-conformity that allows the Timby's to reside in their home while making use of street parking for their vehicles. By justifying denying tourist use of the building based on the parking situation, the Commission is unlawfully denying non-residents the same legal right to use the public, state-owned street that is granted to the Timbys. This is unconstitutional, and the Assembly should reconsider its denial, and instead issue a permit with conditions that short term guest use have the same or less impact than the Timby's personal use of the property.

IV. The Commission's Decision unlawful violated the Timby's right to Equal Protection under the law.

Article I, section 1 of the Alaska Constitution "mandates 'equal treatment of those similarly situated;' it protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause."²³ The State courts "have long recognized that [this clause] affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."²⁴ *Alaska C.L. Union v. State*, 122 P.3d 781, 787 (Alaska 2005). "The equal protection clause thus requires that all enactments be substantially related to a legitimate state interest. Some enactments are held to higher standards, and may even need to be the least restrictive means of achieving a compelling state interest. *Enserch*, 787 P.2d at 631-32 (Alaska 1989).

Article one, Section 1 of the Constitution of the State of Alaska also enshrines the right of all individuals to "...the enjoyment of the rewards of their own industry." The Alaska Supreme

Court has “noted that the right to engage in an economic endeavor within a particular industry is an “important” right for state equal protection purposes.” *Enserch*, 787 P.2d at 632 (Alaska 1989) citing *Commercial Fisheries Entry Comm’n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980). “Close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state’s interest underlying the enactment be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close.” *Enserch*, 787 P.2d at 633. When a decision is allegedly based on important state goals, but those goals “conceal[ed] the underlying objective of economically assisting one class [of residents] over another. We have held that this objective is illegitimate.” *Enserch*, 787 P.2d at 633. The Court explained that:

In the present case, the Commission is discriminating between residents with legal lots that conform to the 2-parking space requirement and the Timby’s non-conforming lot, which is nevertheless legal. This type of economic favoritism, allowing participation in the tourism economy to one set of residents but not others is unconstitutional, because the Commission’s concerns about parking are pretextual. As one Commissioner repeatedly states - a short-term 13-day rental would have no more impact on parking than the Timby’s themselves or a “long-term” 15 day rental. Absent of a showing that the short-term renters would stress the parking situation more than the Timby’s current use, there is no legitimate interest in discriminating between the Timby’s and other people with legal uses of their property. Instead, the comments by some Commission members reveal a discriminatory interest of punishing owners of legal, but non-conforming lots.

A second Commission member had a direct conflict of interest due to her father’s STR permit having been approved for a similarly non-conforming lots. Viewed within the totality of the hearing, the Commission’s motivation was clear to favor owners of conforming lots over those with non-conforming lots, not due to any evidence based concerns about parking, but to economically punish the non-conforming lots (except, evidently, where the non-conforming lot is owned by a family member of a commissioner).

Further, even if the Commission’s concerns about the parking situation were legitimate, the hearing showed that any potential risk of parking congestion on the street is because the Timby’s neighbors have allowed their son, who is a mechanic, to store derelict vehicles on the street in front of their home. A mechanic shop is not a permitted use for this section of Sawmill Creek road, and it is the City’s duty - not the Timby’s - to ensure that the neighbors are not operating a mechanics shop or junk yard unlawfully on City roads. Economically discriminating against homeowner’s who’s neighbors are failing to comply within a zoning code is both an illegitimate state interest and does not bear a close relationship to the Timby’s property.

Further still, if the Commission’s parking concerns were supported by the evidence, the nexus between the parking concerns and a flat out denial of the Timby’s permit is not “close.” In particular, the concerns can be addressed by requiring that the STR guests use no more parking than the Timby’s themselves do, and by requiring the Timby’s to provide bicycles. Conditions which the Assembly has not only issued for other STR permits that had parking concerns - but issued for one of the Commissioner’s own fathers.

The Commission's denial amounted to a violation of the Timby's right to equal protection under the law, and the Assembly should reconsider its decision, issuing the permit with conditions that have a "close nexus" to its concerns about parking - as it has done for other residents.

Conclusion

The Commission's December 15, 2021 decision to deny the Timby's Short-Term Rental Conditional Use Permit was illegal under Sitka General Code, State and Federal Constitutions, and contrary to the evidence presented. The evidence presented favors granting of the permit, perhaps with conditions of no more vehicles than the Timby's personal use of the residence and additional reporting requirements in the yearly report.

The Timby's respectfully request that the Assembly reconsider and issue an STR permit in line with the planning department's recommendation, with procedures that do not violate the Timby's constitutional rights, and in line with the evidence present at hearing.

In the alternative, should the Commission not reconsider its decision, Mr. and Mrs. Timby respectfully ask for a response from the City attorney confirming that with the denial of the appeal, Mr. and Mrs. Timby have exhausted all administrative remedies and their claim is now ripe for appeal to the Superior Court.