



**KENAI PENINSULA BOROUGH PLANNING COMMISSION
RESOLUTION 2025-01
KENAI RECORDING DISTRICT**

A RESOLUTION GRANTING APPROVAL OF A MODIFICATION TO A CONDITIONAL LAND USE PERMIT TO OPERATE A SAND, GRAVEL, OR MATERIAL SITE FOR A PARCEL DESCRIBED AS T 05N R 11W SEC 24 SW KN 2015012 DIAMOND WILLOW ESTATES SUB PART 13 TRACT 13, KENAI RECORDING DISTRICT, THIRD JUDICIAL DISTRICT, STATE OF ALASKA

- WHEREAS,** on February 13, 2015, the Kenai Peninsula Borough Board of Adjustment reversed the decision of the Kenai Peninsula Borough Planning Commission and granted approval of a conditional land use permit (permit) to operate a sand, gravel, or material site for a parcel described as T 05N R 11W Sec 24 SW KN 2015012 Diamond Willow Estates Sub Part 13 Tract 13, Kenai Recording District, Third Judicial District, State of Alaska (KPB PIN 05527001) (the CLUP) (Exhibit A), subject to the conditions and recommendations of Resolution 2014-20 (Exhibit B); and
- WHEREAS,** KPB 21.25 allows for land in the rural district to be used as a sand, gravel or material site once a permit has been obtained from the Kenai Peninsula Borough; and
- WHEREAS,** KPB 21.29 provides that a permit is required for material extraction which disturbs more than 2.5 cumulative acres, enters the water table, or material processing; and
- WHEREAS,** KPB 21.29.070 allows operators to request modifications to their permit conditions based on changes in operations; and
- WHEREAS,** on July 31, 2024, the applicant, Sean Cude, submitted to the Borough Planning Department an application for a modification to the CLUP for a portion of KPB Parcel 05527001, which is located within the rural district; and
- WHEREAS,** public notice of the application was mailed on or before August 21, 2024, to the 324 landowners or leaseholders within a half-mile of the subject parcel pursuant to KPB 21.25.060; and
- WHEREAS,** public notice was sent to the postmaster in the Kalifornsky area requesting that it be posted at the local Post Office; and
- WHEREAS,** public notice of the project was posted pursuant to KPB 1.08.180(B)(1)(3); and
- WHEREAS,** a public hearing was held at the September 9, 2024, meeting of the Kenai Peninsula Borough Planning Commission; and
- WHEREAS,** during the public hearing, planning staff requested a postponement, due to the fact that the applicant could not attend the meeting as scheduled; and
- WHEREAS,** during public testimony, the testifiers asked the Planning Commission to reschedule the hearing, giving property owners enough time to gather additional evidence; and
- WHEREAS,** public notice of the application was mailed on or before October 30, 2024, to the 324 landowners or leaseholders within a half-mile of the subject parcel pursuant to KPB 21.25.060; and
- WHEREAS,** public notice was sent to the postmaster in the Kalifornsky area requesting that it be posted

at the local Post Office; and

WHEREAS, public notice of the project was posted pursuant to KPB 1.08.180(B)(1)(3); and

WHEREAS, a public hearing was held at the November 18, 2024 meeting of the Kenai Peninsula Borough Planning Commission; and

WHEREAS, prior to the date of applicant's request for modification to the existing permit on July 31, 2024, there were no water sources within 300 horizontal feet of the proposed material mining activity; and

WHEREAS, at the November 18, 2024, the applicant voluntarily agreed to not engage in dewatering and further agreed that operating hours for all purposes, including but not limited to rock crushing, would be from 7:00 a.m. to 7:00 p.m.;

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH:

Section 1. That the land use and operations are described and shall be conducted on KPB Parcel Number(s) 05527001, T 05N R 11W SEC 24 SW KN 2015012 DIAMOND WILLOW ESTATES SUB PART 13 TRACT 13. The total area to be disturbed under this activity is approximately 19.36 acres; of that, this modification will affect approximately 8.8 acres. The applicant, Sean Cude, is granted a permit to excavate approximately 18 feet below the seasonal high water-table elevation, consistent with the permit conditions contained within this Resolution, including the site plan, and reclamation plan.

Section 2. Findings of Fact pursuant to KPB 21.25 and 21.29:

1. Ordinance 2022-36 (Substitute), which amended KPB Chapter 21.25 and 21.29 took effect on October 1, 2024.
2. The application for a modification of the CLUP was submitted on July 31, 2024, prior to October 1, 2024, therefore the application must be analyzed under the KPB Code provisions as they existing prior to October 1, 2024.
3. KPB 21.25 allows for land in the rural district to be used as a sand, gravel, or material site once a permit has been obtained from the Kenai Peninsula Borough.
4. KPB 21.29 governs material site activity within the rural district of the Kenai Peninsula Borough.
5. KPB 21.29 provides that a conditional land use permit is required for material extraction that disturbs more than 2.5 cumulative acres or that processes material.
6. A public hearing of the Planning Commission was held on September 9, 2024, and notice of the meeting was published, posted, and mailed in accordance with KPB 21.25.060 and KPB 21.11.
7. Another public hearing of the Planning Commission was held on November 18, 2024, and notice of the meeting was published, posted, and mailed in accordance with KPB 21.25.060 and KPB 21.11.
8. The proposed cumulative disturbed area within the parcel is approximately 19.36 acres.

Parcel Boundaries

9. All boundaries of the subject parcel shall be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter. Field verification and staking will require the services of a professional land surveyor. The site plan indicates the property boundary within 300 feet of the work area was staked in 2024.



Buffer Zone

10. A buffer zone shall be maintained around the excavation perimeter or parcel boundaries. The site plan and application propose the following buffers, which shall not overlap an easement:
 - a. North: minimum 6 ft. earthen berm
 - b. South: minimum 6 ft. earthen berm, minimum 6 ft. fence
 - c. East: 50 ft. of natural or improved vegetation
 - d. West: minimum 6 ft. earthen berm
11. A 2:1 slope shall be maintained between the buffer zone and excavation floor on all inactive site walls. Material from the area designated for the 2:1 slope may be removed if suitable stabilizing material is replaced within 30 days from the time of removal.
12. Per KPB 21.19.050(A)(2)(c), buffers provided using vegetation and/or a fence shall be of sufficient height and density to provide visual and noise screening of the proposed use as deemed appropriate by the planning commission.
13. Buffers shall not cause surface water diversion which negatively impacts adjacent properties or waterbodies.
14. At its discretion, the planning commission may waive buffer requirements where the topography of the property or the placement of natural barriers makes screening not feasible or not necessary. Buffer requirements shall be made in consideration of and in accordance with existing uses of adjacent property at the time of approval of the permit. There is no requirement to buffer the material site from uses which commence after the approval of the permit.

Processing

15. The applicant indicates that material processing will take place on the property. Any equipment used for conditioning or processing materials will be operated at least 300 feet from the East, South and West property lines. Operations, including but not limited to crushing rock or other materials, will only occur between 7:00 a.m. and 7:00 p.m., to minimize noise disturbance to other properties.
16. The 300-foot processing buffer to the Northern property line was waived to allow a 100-foot buffer through Resolution 2014-20.

Water Source Separation

17. Material extraction is prohibited within 100 horizontal feet of any water source existing prior to the original permit issuance.
18. The site plan indicates that there are 9 wells located within 300 feet of the property line.
19. The applicant is required to maintain a 2-foot vertical separation from the seasonal high-water table from any excavation areas not permitted by the planning commission under KPB 21.29.050(A)(5).
20. The application indicates that the seasonal high-water table is 27 feet below original grade which was determined by the placement of monitor wells.
21. The applicant may not dewater by pumping, ditching or some other form of drainage unless an exemption is granted by the planning commission.
22. The applicant has withdrawn a request for an exemption for dewatering within the permitted area.
23. Having withdrawn a request for an exemption to allow dewatering, the applicant will not be required to post a bond for liability for potential accrued damages.

Excavation in the Water Table

24. The application states that work is anticipated to be completed in the water table.
25. The applicant's depth of excavation will be 45 feet deep, and go 18 feet into the water table.
26. The application included certification by a qualified independent civil engineer or professional hydrogeologist that the excavation plan will not negatively impact the quantity of an aquifer serving existing water sources.
27. A minimum of three water monitoring tubes or well casings have been installed to determine flow direction, flow rate, and water elevation.



28. For at least four quarters prior to submitting the application, groundwater elevation, flow direction, and flow rate for the subject parcel, were measured in quarterly intervals by a duly licensed and qualified independent civil engineer or professional hydrogeologist.
29. Monitoring tubes or wells must be kept in place, and measurements taken, for the duration of any excavation in the water table.
30. Operations will not breach an aquifer-confining layer.

Waterbodies

31. The site plan states that there are no wetlands or surface waters within the proposed excavation area.

Fuel Storage

32. The applicant is required to store fuel containers larger than 50 gallons in impermeable berms and basins capable of retaining 110 percent of storage capacity. Fuel storage containers 50 gallons or smaller shall not be placed directly on the ground, but shall be stored on a stable impermeable surface.

Haul Route

33. The site plan indicates that the material haul route will be as follows: Haul route will access the site from two locations (Northeast corner of property at Virginia Drive and Southwest corner of property at Canvasback Ave).

Roads

34. Operations shall be conducted in a manner so as not to damage borough roads as required by KPB 14.40.175 and will be subject to the remedies set forth in KPB 14.40.

Dust Control

35. Dust suppression is required on haul roads within the boundaries of the material site by application of water or calcium chloride.

Hours of Operation

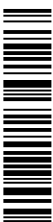
36. Per the Applicant's voluntary agreement, all operations, including but not limited to the operation of rock crushing equipment, may only occur between 7:00 a.m. and 7:00 p.m.

Reclamation

37. The applicant has submitted a reclamation plan consistent with KPB 21.29.050(12)(a) and 21.29.060.
38. The applicant has indicated that ponding will be used as a reclamation method, which may be used if approved by the planning commission.
39. Extraction at this material site is expected to be less than 50,000 cubic yards of material per year.

Other Permits

40. The permittee is responsible for complying with all other federal, state and local laws applicable to the material site operation, and abiding by related permits. These laws and permits include, but are not limited to, the Borough's floodplain, coastal zone, and habitat protection regulations, those state laws applicable to material sites individually, reclamation, storm water pollution and other applicable Environmental Protection Agency (EPA) regulations, clean water act and any other U.S. Army Corp of Engineer permits, any EPA air quality regulations, EPA and ADEC water quality regulations,



EPA hazardous material regulations, U.S. Dept. of Labor Mine Safety and Health Administration (MSHA) regulations (including but not limited to noise and safety standards), and Federal Bureau of Alcohol, Tobacco and Firearm regulations regarding using and storing explosives.

Signage

41. For permitted parcels on which the permittee does not intend to begin operations for at least 12 months after being granted a Conditional Land Use Permit, the permittee shall post notice of intent on parcel corners or access, whichever is more visible. Sign dimensions shall be no more than 15" by 15" and must contain the following information: the phrase "Permitted Material Site" along with the permittee's business name and a contact phone number.

Section 3. That based on the above findings, the Planning Commission concludes as a matter of law that the application has met all the requirements of KPB 21.25 and KPB 21.29, and through imposition of the conditions under KPB 21.29.050, the Planning Commission concludes as a matter of law that the application meets the six standards found in KPB 21.29.040:

1. **The proposed activity must protect against lowering of water sources serving other properties.**
 - a. This Standard is met by imposition of Conditions 6-15.
 - b. Conditions 6-15 are supported by Findings 17-31.
2. **The proposed activity must protect against physical damage to adjacent properties.**
 - a. This Standard is met by imposition of Conditions 2-4, and 16.
 - b. Conditions 2-4, are supported by Findings 9-14, 32 and 34.
3. **The proposed activity must minimize the off-site movement of dust.**
 - a. This Standard is met by the conditions of the existing CLUP, and those conditions are not affected by this Modification.
 - b. This Standard is also met by imposition of Condition 19.
 - c. Condition 19 is supported by Findings 10, 15 and 35.
4. **The proposed activity must minimize noise disturbance to other properties.**
 - a. This Standard is met by the conditions of the existing CLUP, and those conditions are not affected by this Modification.
 - b. This Standard is also met by imposition of Conditions 3 and 5.
 - c. Conditions 3 and 5 are supported by Findings 10, 12, 15, and 36.
5. **The proposed activity must minimize visual impacts.**
 - a. This Standard was met by the conditions of the existing CLUP, and those conditions are not affected by this Modification.
 - b. This Standard is also met by imposition of Condition 3.
 - c. Condition 3 is supported by Findings 10 and 12.
6. **The proposed activity must provide for alternate post-mining land uses.**
 - a. This Standard is met by Condition 20.
 - b. Condition 20 is supported by Findings 37-38.

Section 4: Permit Conditions

1. ALL CONDITIONS OF THE EXISTING CLUP THAT ARE NOT EXPRESSLY MODIFIED AS PROVIDED BELOW REMAIN IN FULL EFFECT.
2. The permittee shall cause the boundaries of the subject parcel to be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter.
3. The permittee shall place and maintain a 6-foot berm along the north property line adjacent to Virginia Drive, the west property line along Ciechanski Road, and along a portion of the south property line along Canvasback Avenue; place and maintain a 6-foot fence along the remainder of the south property line adjacent to Ravenwood Subdivision; and maintain a minimum of 50 feet of undisturbed, natural vegetation between the excavation perimeter and the east property line until



excavation takes place in that area, the vegetative buffer shall then be replaced with a 6-foot fence that shall be maintained.

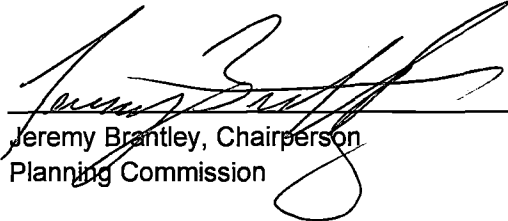
4. The permittee shall maintain at least a 2:1 slope between the inner buffer zones and pit floor on all inactive site walls. Material from the area designated for the 2:1 slope may be removed if suitable stabilizing material is replaced within 30 days from the time of removal.
5. The permittee may not operate materials processing equipment within 300 feet of the west, south, or east parcel boundaries; or within 100 feet of the north boundary. Per applicant's voluntary agreement operations, including but not limited to, Rock crushing equipment, will be between 7:00 a.m. and 7:00 p.m.
6. The permittee shall not extract material within 100 horizontal feet of any water source existing prior to issuance of this permit.
7. The permittee shall maintain a 2-foot vertical separation from the seasonal high-water table WITHIN 300 HORIZONTAL FEET OF ANY WATER SOURCE EXISTING PRIOR TO THE APPLICATION FOR THIS PERMIT MODIFICATION.
8. THE APPLICANT VOLUNTARILY WITHDREW A REQUEST FOR A MODIFICATION TO ALLOW DEWATERING AND, ACCORDINGLY, THE PERMITTEE SHALL NOT DEWATER EITHER BY PUMPING, DITCHING, OR ANY OTHER FORM OF DRAINING UNLESS AN EXEMPTION IS GRANTED BY THE PLANNING COMMISSION.
9. HAVING WITHDRAWN THE REQUEST TO DEWATER, APPLICANT IS NOT REQUIRED TO POST A BOND FOR LIABILITY FOR POTENTIAL ACCRUED DAMAGES, IN THE AMOUNT OF \$90,000.
10. THE PERMITTEE MAY EXCAVATE IN THE WATER TABLE GREATER THAN 300 HORIZONTAL FEET FROM AN EXISTING WATER SOURCE THAT EXISTED AT THE TIME OF MODIFICATION APPLICATION PER KPB 21.29.050(A)(5) AND SUBJECT TO CONDITIONS 10-13.
11. THE PERMITTEE MUST PROVIDE CERTIFICATION BY A QUALIFIED INDEPENDENT CIVIL ENGINEER OR PROFESSIONAL HYDROGEOLOGIST THAT THE EXCAVATION PLAN WILL NOT NEGATIVELY IMPACT THE QUANTITY OF AN AQUIFER SERVING EXISTING WATER SOURCES.
12. THE PERMITTEE IS REQUIRED TO MAINTAIN A MINIMUM OF THREE WATER MONITORING TUBES OR WELL CASINGS AS DETERMINED BY A QUALIFIED INDEPENDENT CIVIL ENGINEER OR PROFESSIONAL HYDROGEOLOGIST ADEQUATE TO CHARACTERIZE FLOW DIRECTION, FLOW RATE, AND WATER ELEVATION.
13. THE PERMITTEE MUST KEEP THE MONITORING TUBES OR WELLS IN PLACE AND MUST TAKE MEASUREMENTS FOR THE DURATION OF ANY EXCAVATION IN THE WATER TABLE.
14. THE PERMITTEE'S OPERATIONS SHALL NOT BREACH AN AQUIFER-CONFINING LAYER.
15. The permittee shall maintain an undisturbed buffer, and no earth material extraction activities shall take place within 100 linear feet from a lake, river, stream, or other water body, including riparian wetlands and mapped floodplains.
16. The permittee shall ensure that fuel storage containers larger than 50 gallons shall be contained in impermeable berms and basins capable of retaining 110 percent of storage capacity to minimize the potential for uncontained spills or leaks. Fuel storage containers 50 gallons or smaller shall not be placed directly on the ground, but shall be stored on a stable impermeable surface.
17. The permittee shall notify the planning department of any further subdivision or return to acreage of this parcel. The planning director may issue a written exemption from the permit amendment requirement if it is determined that the subdivision is consistent with the use of the parcel as a material site and all original permit conditions can be met.
18. The permittee shall conduct operations in a manner so as not to damage borough roads as required by KPB 14.40.175, and will be subject to the remedies set forth in KPB 14.40 for violation of this condition.
19. The permittee shall provide dust suppression on haul roads within the boundaries of the material site by application of water or calcium chloride.
20. The permittee shall reclaim the site as described in the reclamation plan for this parcel and approved by the planning commission.
21. The permittee is responsible for determining the need for any other municipal, state or federal



permits and acquiring the same. The permittee is responsible for complying with all other federal, state and local laws applicable to the material site operation, and abiding by related permits.

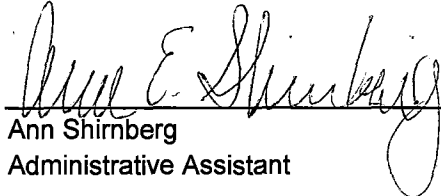
22. The permittee shall operate in accordance with the application and site plan as approved by the planning commission. If the permittee revises or intends to revise operations so that they are no longer consistent with the original application, a permit modification is required in accordance with KPB 21.29.090.
23. This conditional land use permit may be subject to annual review by the planning department to ensure compliance with the conditions of the permit. In addition to the penalties provided by KPB 21.25.090, the planning commission may revoke a permit issued pursuant to this chapter if the permittee fails to comply with the provisions of KPB 21.29 or the conditions of the permit. The planning director will provide at least 30 days written notice to the permittee of a revocation hearing before the planning commission.
24. Once effective, this conditional land use permit is valid for five years. A written request for permit extension must be made to the planning department at least 30 days prior to permit expiration, in accordance with KPB 21.29.070.
25. All permits, permit extensions, modified permits, prior existing uses, and terminations shall be recorded.
26. The Planning Department is responsible for filing the Planning Commission resolution. The permittee will provide the recording fee for the resolution to the Planning Department.

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON THIS 16TH DAY OF DECEMBER, 2024.



Jeremy Brantley, Chairperson
Planning Commission

ATTEST:



Ann Shirnberg
Administrative Assistant

PLEASE RETURN
Kenai Peninsula Borough
Planning Department
144 North Binkley St.
Soldotna, AK 99669



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302-2025-000109-0

EXHIBIT A

BOARD OF ADJUSTMENT

KENAI PENINSULA BOROUGH

In the Matter of the Appeal of the Kenai Peninsula Borough Planning Commission)
Approval of conditional land use permit)
for KPB Tax Parcel ID #055-270-88,)
055-270-50, 055-270-51 and 055-270-52,)
a 19.36 acre site located at Tract A2A,)
Diamond Willow Estates Subdivision)
Part 11 according to Plat 2012-03; Kenai)
Recording District, Third Judicial District,)
State of Alaska; and Lots C, D & E,)
Diamond Willow Estates Subdivision)
Part 10 according to Plat 2008-135, Kenai)
Recording District, Third Judicial District,)
State of Alaska.)

Joe Kashi, attorney for Sean Cude,

Applicant.

The Board hereby unanimously issues this written decision with the following members present and participating in the hearing and deliberations: Betty Glick (Chair), Mildred Martin (Vice Chair), Tom Clark, Ron Long and Hal Smalley.

DECISION ON APPEAL AND FINDINGS OF THE BOARD OF ADJUSTMENT

On January 21, 2016, the Kenai Peninsula Borough ("KPB" or "Borough") Board of Adjustment ("Board") heard the above-titled appeal from denial by the Borough Planning Commission ("Commission") of the application of Sean Cude for a conditional land use permit ("CLUP") on KPB Tax Parcels numbered 055-270-88, 055-270-50, 055-270-51, and 055-270-52. The Board met later that same day in adjudicatory session to deliberate and adopt its decision.

Having considered the Record, written and oral arguments of the parties and applicable Alaska law and KPB Code, the Board unanimously reverses the decision of

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the Commission and grants the CLUP at issue subject to the conditions recommended by Borough staff.¹

A. PROCEDURAL HISTORY AND BACKGROUND

On August 24, 2014, the Commission denied approval of a CLUP for a sand, gravel, or material site. R. 12-14. The subject property is owned by SBC 2012 Irrevocable Trust and the material site applicant is Sean Cude. R. 2.

The configuration of the proposed site is an approximate 15-acre material site (Tract A2A) which has been substantially exhausted (R. 15, 23, 28). Abutting this parcel are lots C, D, and E, each between 1 and 2 acres, where further excavation is proposed. R. 15, 23, 28. See also Opening Statement of the Kenai Peninsula Borough, dated November 26, 2014. The applicant's proposed depth of excavation is 20 feet below the natural existing grade. R. 2. Excavation is not proposed below the floor of the existing pit. R. 17. Mr. Cude indicated in his application and the parties noted in their statements that material processing will take place on the site. R. 2, 5. Mr. Cude's application asserts that all processing will be located greater than 300 feet from the west, south, and east parcel boundaries. R. 2, 5.

Mr. Cude also included a request for a waiver and an exception from excavation requirements in his application, both of which were denied by the Commission. Specifically, Mr. Cude requested a waiver permitting processing up to 100 feet from the north parcel boundary. See R. 2, 5, 16. He also requested an exception under KPB 21.29.050(A)(2)(e) to the buffer requirements allowed for contiguous parcels for the boundary shared by the existing pit and lots C, D, and E. While the Borough staff recommended granting the waiver, it recommended denying the requested exception. See KPB Opening Statement, R. 76. Instead, staff recommended that lots C, D, and E be eliminated through a replat and combined with the larger existing pit. R. 16. Based upon testimony at the hearing, Mr. Cude has agreed to this approach and has initiated the combination process.

Borough staff recommended approval of Mr. Cude's application based upon 25 findings of fact and 15 conditions. These findings and conditions are, after careful

¹ Mr. Cude submitted a written motion to supplement the record on November 26, 2014. This motion sought to admit certain photographs that were not presented to the Commission, as well as a letter from Lori Aldrich, State of Alaska Department of Environmental Conservation Solid Waste Regional Program Manager, regarding Mr. Cude's compliance with the Alaska Department of Environmental Conservation's Solid Waste Program on the subject parcels. The Board determined that pursuant to KPB 21.20.280 and 21.20.270, record supplementation was not warranted and the motion was denied. Additionally, Mr. Cude withdrew the motion to supplement the record based upon discussions with the Borough planning staff prior to the hearing. The Board did grant approval to use some of the photographs demonstrably as visual aids during the hearing.



review and analysis by this Board, hereby incorporated into this Board's findings and its final decision.

The Commission received approximately 14 letters of objection or concern to the requested CLUP and one agency comment letter. Ten people testified before the Commission against granting the CLUP, noting concerns regarding prior and/or anticipated negative impacts on water quality, property values, traffic flow and safety, site reclamation, and general nuisances resulting from noise and dust. Tr. 4-33, 44-45; R.31-56. At the appeal hearing before this Board, these same concerns were reiterated during oral argument.

B. STANDARD OF REVIEW

The Board applies the following standards in reviewing the Commission's decision: The Board exercises its independent judgment on matters that relate to the interpretation or construction of ordinances or other provisions of law. KPB 21.30.020. The Board defers to the judgment of the Commission regarding findings of fact if they are supported in the record by substantial evidence ("substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion"). KPB 21.20.320(2). Where the Board decides that a finding of fact made by the Commission is not supported by substantial evidence, the Board may make a different finding on the factual issues, based upon the evidence in the record developed before the Commission if it concludes a different finding was supported by substantial evidence, or may remand the matter to the Commission.

C. LEGAL ANALYSIS

After reviewing the statements of the parties, the record, and listening to oral testimony, the Board has determined that the Commission's decision denying the CLUP exceeded the scope of authority granted the Commission. While the Board certainly sympathizes with the concerns expressed by the Commission and during oral testimony, these concerns fall outside the discretion afforded the Commission and the Board as a matter of local law.

The Borough has, for the most part, transferred zoning authority to the cities within its borders. While the Borough does maintain zoning authority over areas outside the regulatory arm of the cities but within Borough boundaries, which constitute the Borough rural zoning district, the local legislature permits almost wholly unrestricted use of these areas and has limited restrictions on use to only those expressly provided in the Kenai Peninsula Borough Code. See KPB 21.04.010(B).

Among the few restrictions that apply to the rural zoning district, KPB 21.29 requires users to obtain a permit for material extraction in certain situations. See KPB 21.29.020. While there are different permit requirements depending upon the nature of the extraction, a Conditional Land Use Permit is required for material extraction disturbing more than 2.5 acres or entering the water table. KPB 21.29.020(B). In order to obtain a CLUP, or an extraction permit of the type at issue, an applicant must submit



a permit planning application that provides information identified in the Code. KPB 21.29.030. The Code actually requires significant documentation of the intended extraction on site, including but not limited to plans regarding the life span of the extraction, a buffer plan, a reclamation plan, and so on. While the Code requires applicants to submit significant documentation in order to obtain a CLUP, the Code does not provide the Commission discretion to deny a CLUP when the application has been properly submitted. Instead, the Code preserves the unrestricted nature of the rural zoning district and limits the Borough to the imposition of certain conditions to extraction. See 21.29.040.

Specifically, the Code provides that:

These material site regulations are intended to protect against aquifer disturbance, road damage, physical damage to adjacent properties, dust, noise, and visual impacts. Only the conditions set forth in KPB 21.29.050 may be imposed to meet these standards:

1. Protects against the lowering of water sources serving other properties;
2. Protects against physical damage to other properties;
3. Minimizes off-site movement of dust;
4. Minimizes noise disturbance to other properties;
5. Minimizes visual impacts; and
6. Provides for alternate post-mining land uses.

KPB 21.29.040 (emphasis added). Here, the Commission did not deny or identify evidence suggesting that Mr. Cude failed to meet the CLUP application requirements. Instead, the Commission's findings only identified concerns surrounding extraction that fell outside Code requirements. For example, the Commission's findings and concerns regarding water degradation ignored the applicant's compliance with KPB 21.29.040(A4), which ensures no material extraction takes place within 100 horizontal feet of any existing water source. Again, the Commission may only apply conditions under KPB 21.29.050 when issuing a CLUP. It may not impose additional conditions despite the positive impact such conditions may have in the rural zoning district or the community at large. See KPB 21.29.050. To the extent the parties disagree with these limitations, it is the Kenai Peninsula Borough Assembly through the local legislative process, and not this Board or the Commission, that holds the power to change the CLUP permit approval process.

The differences between the traditional role of a "conditional use permit" and the CLUP required by the Borough further highlights the limited authority granted to the Borough to regulate extraction within the rural zoning district. Although the Borough has



entitled its extraction permit a "conditional use permit," the permitting process differs greatly from the traditional "conditional use" permitting process. Generally, a conditional use permit is designed to permit certain uses otherwise prohibited in a zoning district. By way of example, a local residential zoning district may permit day care facilities within that district but only where a conditional use permit is obtained. The community with zoning authority may expect its planning commission to grant or deny the conditional use permit after balancing several factors identified by ordinance, including the best interest of the district and the community. In such cases, the permit at issue grants the permit applicant greater rights than other land owners in the zoning district at issue. Consequently, the permitting community would have an obligation to ensure that the district's interests warrant granting one landowner more freedom of use than another.

Here, the Borough's CLUP process has the opposite effect. A CLUP actually imposes greater rather than less restrictions upon the permitted parcels. While the district is predominately unregulated and unrestricted, an applicant's parcels are subject to specific and express conditions that are not automatically imposed on other parcels in the same district. Thus, the government must ensure that the application of greater restrictions upon the applicant are in fact justified and imposed in a fair and objective way. The KPB Code preserves this fairness by granting the Borough staff, the Commission, and this Board very limited discretion in denying and even conditioning CLUPs.

D. CONCLUSION

For all of the reasons stated above, the Board hereby reverses the Commission's decision and grants the conditional use permit application filed June 25, 2014, by Sean Cude subject to the conditions and recommendations by Resolution 2014-20.

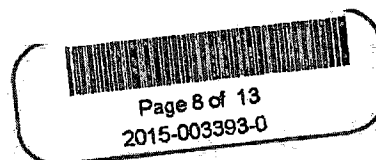
NOTICE OF RIGHT TO APPEAL

Pursuant to KPB 21.20.360 and AS 29.40.060, this decision constitutes the final administrative decision of the Kenai Peninsula Borough in this matter. Any party aggrieved by this decision has thirty (30) days from the date of distribution of this decision to file an appeal in the Superior Court for the State of Alaska in Kenai, Alaska, in accordance with Part VI of the Alaska Rules of Appellate Procedure.

Dated this 13th day of February, 2015.



Betty J. Glick, Chair
KPB Board of Adjustment



ATTEST:


Joani Blankenship, MMC
Borough Clerk

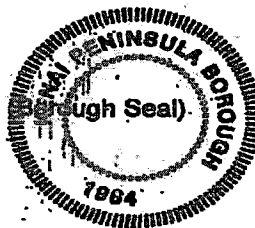


EXHIBIT B

KENAI PENINSULA BOROUGH PLANNING COMMISSION RESOLUTION 2014-20 KENAI RECORDING DISTRICT

A resolution granting approval of a conditional land use permit to operate a sand, gravel, or material site for a parcel described as Tract A2A, Diamond Willow Estates Subdivision Part 11 according to Plat 2012-93, Kenai Recording District, Third Judicial Court, State of Alaska; and Lots C, D, & E, Diamond Willow Estates Subdivision Part – 10 according to Plat 2008-135, Kenai Recording District, Third Judicial Court, State of Alaska.

- WHEREAS,** KPB 21.25 allows for land in the rural district to be used as a sand, gravel or material site once a permit has been obtained from the Kenai Peninsula Borough; and
- WHEREAS,** KPB 21.29 provides that a conditional land use permit is required for material extraction which disturbs more than 2.5 cumulative acres; and
- WHEREAS,** on July 25, 2014 the applicant, Sean Cude, submitted a conditional land use permit application to the Planning Department for a material site greater than 2.5 acres on KPB Tax Parcel Numbers 055-270-98, 055-270-50, 055-270-51, and 055-270-52, which are located within the rural district; and
- WHEREAS,** public notice of the application was mailed on August 5, 2014 to the 284 landowners or leaseholders within one-half mile of the subject parcel pursuant to KPB 21.25.060; and
- WHEREAS,** public notice was sent to the postmasters in Soldotna & Kenai requesting that it be posted at the Soldotna & Kenai Post Offices; and
- WHEREAS,** public notice of the application was published in the August 14, 2014 & August 21, 2014 issues of the Peninsula Clarion; and
- WHEREAS,** a public hearing was held at the August 25, 2014 meeting of the Kenai Peninsula Borough Planning Commission;

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That the Planning Commission makes the following findings of fact pursuant to KPB 21.25 and 21.29:

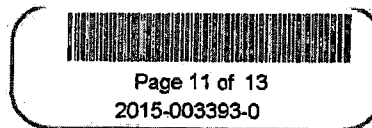
Findings of Fact

1. KPB 21.25 allows for land in the rural district to be used as a sand, gravel or material site once a permit has been obtained from the Kenai Peninsula Borough.
2. KPB 21.29 governs material site activity within the rural district of the Kenai Peninsula Borough.
3. On July 25, 2014 the applicant, Sean Cude, submitted to the Borough Planning Department a conditional land use permit application for KPB Tax Parcel Numbers 055-270-98, 055-270-50, 055-270-51, and 055-270-52, which are located within the rural district.
4. KPB 21.29 provides that a conditional land use permit is required for material extraction that disturbs more than 2.5 cumulative acres.
5. The proposed cumulative disturbed area within the parcel is approximately 19.36 acres,



- including existing disturbed areas.
6. KPB 21.29.030(A) states the planning director may determine that certain contiguous parcels are eligible for a single permit.
 7. The planning director has reviewed this application and has determined that these four parcels are not eligible for a single permit.
 8. Tax Parcel Numbers 055-270-50, 055-270-51, and 055-270-52 are located within Diamond Willow Estates Subdivision Part – 10 which states, in part, "Wastewater disposal Soil conditions, water table levels, and soil slopes in this subdivision have been found suitable for conventional onsite wastewater treatment and disposal systems serving single family of [sic] duplex residences, and meeting the regulatory requirements of the Kenai Peninsula Borough."
 9. Tax Parcel Numbers 055-270-51 and 055-270-52 are configured as flag lots. The proposed excavation would not be compatible with the designed access for these lots.
 10. A new plat that combines these four parcels into just one parcel would eliminate Tax Parcel Numbers 055-270-50, 055-270-51, and 055-270-52, thus eliminating the possibility of a buyer of these lots relying on the information on the plat.
 11. A new plat that combines these four parcels into just one parcel would make the new parcel eligible for a conditional land use permit for a material site.
 12. To meet material site standard 21.29.040(A1), the proposed activity must protect against aquifer disturbance by maintaining a 2-foot vertical separation from the seasonal high water table and by ensuring that no material extraction takes place within 100 horizontal feet of any existing water source.
 13. An excavated test hole in the existing material site floor found groundwater at approximately 2 feet below the existing material site floor.
 14. The proposed excavation will be to the same elevation as the existing material site floor.
 15. The site plan indicates that there are no known wells located within 100 feet of the proposed excavation area.
 16. The site plan indicates that there are several wells located within 300 feet of the proposed material site.
 17. To meet material site standard 21.29.040(A2), the proposed activity must be conducted in a manner to protect against physical damage to adjacent properties by complying with the required permit conditions of KPB 21.29.050.
 18. To meet material site standard 21.29.040(A3), the proposed activity must be conducted in a manner which minimizes the on-site movement of dust by complying with required permit condition KPB 21.29.050(10), Dust Control.
 19. Ingress and egress to the material site will be Virginia Drive which is a Borough maintained road.
 20. To meet material site standard 21.29.040(A4), the proposed activity must be conducted in a manner which minimizes noise disturbance to other properties by complying with permit condition KPB 21.29.050(2), Buffer Zone; KPB 21.29.050(3), Processing; and KPB 21.29.050(11), Hours of Operation.
 21. The applicant indicates that material processing will take place on the site. As indicated on the submitted site plan all processing will be located greater than 300 feet from the west, south, and east parcel boundaries and 100' from the north boundary, which adjacent to a large vacant parcel.
 22. To meet material site standard 21.29.040(A5), the proposed activity must be conducted in a manner which minimizes visual impacts by complying with the permit condition KPB 21.29.050(2), Buffer Zone.
 23. The submitted site plan and application indicates that a 6-foot berm, 6-foot fence, or a 50-foot vegetated buffer will be maintained on all boundaries.
 24. The bonding requirement of KPB 21.29.050(12b) will apply to this material site if extraction in any one year exceeds 50,000 cubic yards of material.
 25. A public hearing of the Planning Commission was held on August 25, 2014 and notice of the meeting was published, posted, and mailed in accordance with KPB 21.25.060 and KPB 21.11.

SECTION 2. That the land use and operations are described and shall be conducted as follows:



- A. An area currently known as KPB Tax Parcel Numbers 055-270-98, 055-270-50, 055-270-51, and 055-270-52. The total disturbed area within this area is up to 19.36 acres.
- B. Tract A2A, Diamond Willow Estates Subdivision Part 11 according to Plat 2012-93, Kenai Recording District, Third Judicial Court, State of Alaska; and Lots C, D, & E, Diamond Willow Estates Subdivision Part – 10 according to Plat 2008-135, Kenai Recording District, Third Judicial Court, State of Alaska.
- C. The applicant, Sean Cude, proposes to: 1. Extract gravel from the subject parcel; 2. Reclaim the site to a stable condition upon depletion of material.

PERMIT CONDITIONS

1. The permittee shall cause the boundaries of the subject parcel to be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter.
2. The permittee shall place and maintain a 6-foot berm along the north property line adjacent to Virginia Drive, the west property line along Ciechanski Road, and along a portion of the south property line along Canvasback Avenue; place and maintain a 6-foot fence along the remainder of the south property line adjacent to Ravenwood Subdivision; and maintain a minimum of 50 feet of undisturbed, natural vegetation between the excavation perimeter and the east property line until excavation takes place in that area, the vegetative buffer shall then be replaced with a 6-foot fence that shall be maintained.
3. The permittee shall maintain at least a 2:1 slope between the inner buffer zones and pit floor on all inactive site walls. Material from the area designated for the 2:1 slope may be removed if suitable, stabilizing material is replaced within 30 days from the time of removal.
4. The permittee may not operate materials processing equipment within 300 feet of the west, south, or east parcel boundaries; or within 100 feet of the north boundary. Rock crushing equipment shall not be operated between 10:00 p.m. and 6:00 a.m.
5. The permittee shall not extract material within 100 horizontal feet of any water source existing prior to issuance of this permit.
6. The permittee shall maintain a 2-foot vertical separation from the seasonal high water table.
7. The permittee shall not dewater either by pumping, ditching or any other form of draining unless an exemption is granted by the planning commission.
8. The permittee shall ensure that fuel storage containers larger than 50 gallons shall be contained in impermeable berms and basins capable of retaining 110 percent of storage capacity to minimize the potential for uncontained spills or leaks. Fuel storage containers 50 gallons or smaller shall not be placed directly on the ground, but shall be stored on a stable impermeable surface.
9. The permittee shall conduct operations in a manner so as not to damage borough roads as required by KPB 14.0175, and will be subject to the remedies set forth in KPB 14.40 for violation of this condition.
10. The permittee shall notify the planning department of any further subdivision or return to acreage of this parcel. The planning director may issue a written exemption from the permit amendment requirement if it is determined that the subdivision is consistent with the use of the parcel as a material site and all original permit conditions can be met.
11. The permittee shall apply water or calcium chloride, as needed, on haul roads within the boundaries of the subject parcel.
12. The permittee shall reclaim the site as described in the reclamation plan for this parcel and as approved by the planning commission.
13. The permittee is responsible for determining the need for any other municipal, state or federal permits and acquiring the same. The permittee is responsible for complying with all other federal, state and local laws applicable to the material site operation, and abiding by related permits.
14. This conditional land use permit is subject to annual review by the planning department to ensure compliance with the conditions of the permit. In addition to the penalties provided by KPB 21.25.090, the planning commission may revoke a permit issued pursuant to this chapter if the permittee fails to comply with the provisions of this chapter or the conditions of the permit. The planning director shall provide at least 30 days written notice to the permittee of a revocation.



- hearing before the planning commission.
15. Once effective, this conditional land use permit is valid for five years. A written request for permit extension must be made to the planning department at least 30 days prior to permit expiration, in accordance with KPB 21.29.070.

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON
THIS _____ DAY OF _____, 2014.

Blair Martin, Vice Chairperson
Planning Commission

ATTEST:

Patti Hartley
Administrative Assistant

PLEASE RETURN
Kenai Peninsula Borough
Planning Department
144 North Binkley St.
Soldotna, AK 99669

NOT APPROVED

