



KENAI PENINSULA BOROUGH

PLANNING DEPARTMENT

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CHARLIE PIERCE
BOROUGH MAYOR

MEMORANDUM

TO: Wayne Ogle, Assembly President
Kenai Peninsula Borough Assembly Members

FROM: Max Best, Planning Director *MB*

DATE: December 14, 2017

SUBJECT: Application for a new Standard Marijuana Cultivation Facility License. **Applicant:** Alaska Growth; **Landowner:** Pay Dirt Investments, LLC; **Parcel #:** 01418013; **Property Description:** The Northeast ¼ of the Northeast ¼ of the Southwest ¼ of the Northeast ¼, Section 14, Township 7 North, Range 12 West, Seward Meridian; **Location:** 49787 Island Lake Rd, Nikiski, Nikiski Area.

The Kenai Peninsula Borough Planning Commission reviewed the subject application during their regularly scheduled December 11, 2017 meeting.

Following the preparation of the staff report to the Planning Commission, the Finance Department determined that the applicant is tax compliant.

A motion to recommend approval of the Alaska Growth, a Standard Marijuana Cultivation Facility application **failed** by majority consent (*Bentz, No; Carluccio, No; Ecklund, No; Ernst, Yes; Fikes, No; Foster, No; Isham, Yes; Lockwood, Absent; Martin, Yes; Morgan, No; Ruffner, No; Venuti, Absent; Whitney, No*) based on the following reason:

The site plan submitted to the Borough, and testimony received at the hearing, indicates that the access to Island Lake Road passes through an adjacent property. The adjacent property owner objected to the applicant accessing the proposed facility through their property. No evidence of legal access was provided and the Planning Commission determined that there was not sufficient ingress and egress for traffic to the parcel as required by KP.B 7.30.020(C)(1).

Attached are the unapproved minutes of the subject portion of the meeting.

AGENDA ITEM F. PUBLIC HEARING

1. State application for a marijuana establishment license;

Staff Report given by Bruce Wall

PC MEETING: December 11, 2017

Applicant: Alaska Growth
Landowner: Pay Dirt Investments, LLC
Parcel ID#: 014-180-13
Legal Description: The Northeast ¼ of the Northeast ¼ of the Southwest ¼ of the Northeast ¼, Section 14, Township 7 North, Range 12 West, Seward Meridian
Location: 49787 Island Lake Rd, Nikiski

BACKGROUND INFORMATION: On May 23, 2017 the applicant notified the borough that he/she had submitted an application to the state for a Standard Marijuana Cultivation Facility license. On November 30, 2017 the applicant supplied the borough with a signed acknowledgement form and a site plan on September 11, 2017 of the proposed Standard Marijuana Cultivation Facility on the above described parcel. The Alcohol and Marijuana Control Office notified the borough that the application was complete on November 17, 2017. Staff has reviewed the completed license that has been submitted to the state and the site plan submitted to the borough and has found the following concerning the standards contained in KPB 7.30.020:

1. The Borough finance department has ~~been notified of the complete application and at the time of this report they have not indicated whether or not the applicant is~~ determined that the applicant is in tax compliance with the borough tax regulations.
2. Borough planning department staff has evaluated the application and has determined that the proposed facility will be located greater than 1,000 feet from any school.
3. Borough planning department staff has evaluated the application and has determined that the proposed facility will be located greater than 500 feet from all recreation or youth centers, and all buildings in which religious services are regularly conducted, and all correctional facilities.
4. The proposed facility is not located within a local option zoning district.
5. The proposed facility is not located where there is sufficient ingress and egress for traffic to the parcel.
 - The parcel accesses Island Lake Road which is a state maintained road and will not be accessing a borough right-of-way.
 - The signed acknowledgement form indicates that there will not be any parking in borough rights-of-way.
 - The site plan indicates a clear route for delivery vehicles which allows vehicles to turn safely.
 - On-site parking and loading areas are designated at a location that would preclude vehicles from backing out into the roadway.
6. Because this application is for cultivation the hours of operation for a retail store is not applicable.

KPB 7.30.020(E) allows the recommendation of additional conditions on a license to meet the following standards:

- protection against damage to adjacent properties,
- protection against offsite odors,

- protection against noise,
- protection against visual impacts,
- protection against road damage,
- protection against criminal activity, and
- protection of public safety.

The Alaska Marijuana Control Board will impose a condition a local government recommends unless the board finds the recommended condition is arbitrary, capricious, and unreasonable (3 ACC 306.060b). If the Planning Commission recommends additional conditions, additional findings must be adopted to support the conditions.

PUBLIC NOTICE: Public notice of the application was mailed on November 29, 2017 to the 10 landowners of the parcels within 300 feet of the subject parcel. Public notice of the application was published in the November 30, 2017 and December 7, 2017 issues of the Peninsula Clarion.

KPB AGENCY REVIEW: Application information was provided to pertinent KPB staff and other agencies on December 4, 2017.

ATTACHMENTS

- State marijuana establishment application with associated submitted documents
- Site Plan
- Acknowledgement form
- Aerial map
- Area land use map with 500' & 1,000' parcel radius

STAFF RECOMMENDATION

If a positive report is received from the finance department, staff recommends that the planning commission forward this application to the assembly with the findings contained in this staff report and with the recommendation that the following conditions be placed on the state license pursuant to 3 AAC 306.060(b):

1. The marijuana establishment shall conduct their operation consistent with the site plan submitted to the Kenai Peninsula Borough.
2. There shall be no parking in borough rights-of-way generated by the marijuana establishment.
3. The marijuana establishment shall remain current in all Kenai Peninsula Borough tax obligations consistent with KPB 7.30.020(A).

END OF STAFF REPORT

Chairman Martin opened the meeting for public comment.

1. Chris Kimball, 52896 Tenakee Loop.
Mr. Kimball stated he has resided there since 1976 and has resided in Alaska since 1969 so he has watched Nikiski grow for some time. The area where this grow facility wants to be is a pretty high residential dense area for the north road and according to rural Alaska standards.

Mr. Kimball stated that there are no commercial operations of any type except for a peony farm that has recently started from Miller Loop to the proposed grow facility. From that point northward on Island Lake Rd, about a half mile down there is a Veterinary clinic, approximately down another three-quarters of a mile there are two construction firms with general sales. He thought they provided supplies to the prison. There is also a Baptist Church down from there which was about it except for the Highway Department. The rest of the area was all residential that branch off of Island Lake Rd.

Mr. Kimball felt that marijuana has a stigma attached to it and believed that this facility will lower home values in the area if this goes in so therefore he wanted to resist it. There is a piece of land in the City

of Kenai, off of Willow St and the Spur Highway which was zoned commercial. He questioned what would happen if they tried to put a marijuana grow operation there. Mr. Kimball doubted it would go through. For the reasons he stated, the stigma attached to it and the problems that it would bring, he hoped that the commission would take this into consideration.

Chairman Martin asked if there were questions for Mr. Kimball. Hearing none the public hearing continued.

2. Rachel Grace

Ms. Grace stated that she and her husband just recently bought the acreage that is next to the proposed grow facility. She commented that they are intending to develop a farm.

Ms. Grace stated that the road that currently goes into the facility has no public access. The entire frontage on Island Lake Rd near the subject property is owned by them. There is no public access or borough road that goes into the requested area.

Ms. Grace also stated that she has a conflict with this operation because of her growing bees. She felt that her honey would be ruined if there were any open pathogens created from the marijuana.

Commissioner Ernst didn't understand how her honey would be ruined. He asked if it would become marijuana honey. Ms. Grace replied yes. Commissioner Ernst asked if she had evidence of that. Ms. Grace replied that she grew up in the State of Pennsylvania. She stated that honey was often sold because it would be spiked with marijuana. Commissioner Ernst stated that spiking with marijuana isn't the same as bee producing honey. Ms. Grace replied that the honey would have marijuana in it which would have the same side effects and highs. Commissioner Ernst stated that he had never heard of that.

Commissioner Carluccio asked if she owned the public access. Ms. Grace replied yes, it was a private drive. Commissioner Carluccio asked if it was off Island Lake Rd. Ms. Grace replied yes.

Commissioner Carluccio asked if staff was aware that this proposed facility did not have legal access. Mr. Wall replied that their legal access was to the west but was unable to determine that they have legal access off of Island Lake Rd. He stated that their legal access was unconstructed to the west.

Chairman Martin asked if it could be assumed that it had prescriptive rights. Mr. Wall replied they would have to claim those prescriptive rights and go to court on that or get an easement to continue to use that access. He stated they discussed internally when they first became aware of this. They were not able to find anything in the marijuana standards to address this issue.

Commissioner Carluccio asked Ms. Grace where their property was located. Ms. Grace replied that they had the 52 acres off of Island Lake Rd that was across the private lane. Commissioner Carluccio referred to the map on page 26 of the packet and asked where her property was located. Ms. Grace replied that it would be the area that was not highlighted. Commissioner Carluccio asked if it was the big area to the north. Ms. Grace replied yes.

There being no further comments or questions, the public hearing continued.

3. Edith VonWeltin, Alaska Growth

Ms. VonWeltin stated that she was the project manager for Alaska Growth. There would be none or 99.9% no contamination possible because the growth was indoors only. She stated it would be in conex boxes with appropriate filters so there would not be an issue in terms of honey contamination.

Ms. VonWeltin stated there were some questions in terms of the property because of where the bronze marker sits for the Northeast ¼ of the Northeast ¼ of the Southwest ¼ of the Northeast ¼. She stated that it was actually at the northern edge of that easement road.

Chairman Martin asked if there were questions for Ms. VonWeltin.

Commissioner Fikes asked if she could clarify how the property was accessed off of Island Lake Rd. Ms. VonWeltin replied she accesses the property where the school bus stops and the access to the Peony farm was a very large half circle. Commissioner Fikes asked if it was off of Glory Ave. Ms. VonWeltin replied no. She explained to Commissioner Fikes where her property was on the map on page 26 of the packet. Commissioner Fikes clarified that Ms. VonWeltin stated that she accesses her property off of Island Lake road near the red shaded area on the map near Glory Ave but the actual road was unnamed. Chairman Martin stated that it appeared that the road was not dedicated beyond that subdivision to the west.

Commissioner Ruffner asked for more clarification regarding the containment, air exchange, screens, etc. Ms. VonWeltin replied that there will be two conex boxes, 45 foot and 40 foot. The incoming and outgoing air will be filtered with the appropriate, heavy duty filters so that no insects, no dust, or bacteria come through there. Those filters have to be replaced or washed on a regular basis. Commissioner Ruffner asked if the filters are carbon filters since odors were one of the issues. Ms. VonWeltin agreed that odors were one of the issues in terms of outgoing gas so they are a combination of carbon and fabric. Commissioner Ruffner stated that he could mentally envision that it was not a screen but was more than a screen. Ms. VonWeltin replied that was correct. In this particular case, the filters are eight inches in diameter and they have what looked like a big chef's hat over top. Inside that is the carbon and the fabric that prevents outgoing odors and particulate matter and prevents incoming particulates, pollens, etc.

Chairman Martin stated that if it was small enough for pollen to not get in then the size of the bee could not get in. Ms. VonWeltin replied yes, that was correct. Chairman Martin stated that he has done some research on this topic in trying to stay on top of this technology. He believed that most growers were not producing pollen generating plants. It was all a female culture. Ms. VonWeltin replied that was correct. Chairman Martin understood that she would not have any pollen generating plants in her facility. Ms. VonWeltin replied that was correct because that would ruin the crop.

There being no further comments or questions, the public hearing continued.

Mr. Wall clarified that he did a site visit with the applicant. He stated that the imagery on page 25 of the packet was slightly off. The private road was actually on her property but because the property doesn't touch Island Lake Rd she would be crossing the neighbor's property. For the most part, the private road was on her property.

4. Jeff Epperheimer, 52980 Tenakee Loop

Mr. Epperheimer has lived in this area for about 12 years. He expressed concern about property devaluation with the stigma of a federally illegal drug operation taken place in a residential area.

Mr. Epperheimer stated that quite a few children live close by and some directly across the street from where this operation would take place. Realizing that a place where children live should be given the same, if not more, than the safety of a public park. He wasn't sure this would be approved across from a public park.

Mr. Epperheimer stated that he has read a lot from Colorado where they have issues of smell coming from growing operations which is one of his concerns also because of the vicinity of where he lives and those that live much closer than he does.

Chairman Martin asked if there were questions for Mr. Epperheimer. Hearing none the public hearing continued.

5. Cy Cox, 49790 Island Lake Rd, Nikiski

Mr. Cox was not at the meeting to protest the cultivation of marijuana and he understood there were some very valid medical benefits with marijuana. He had a friend who recently died from a 3.5 year battle of cancer and some of the only comfort he got was from marijuana products. Also, he was not at the meeting to destroy anyone's livelihood.

Mr. Cox had some concerns about a commercial operation in what is an established residential area. The land use map clearly shows the property near this proposed cultivation site was largely residential. He expressed concern about any increased commercial traffic through a residential area. There is already quite a bit of traffic on Island Lake Rd. That particular corner was pretty bad where he has almost been rear ended several times. This was nothing the applicant could control but it was a concern having more traffic going through there. Mr. Cox stated that there are a lot of children and families that use that road as well as the adjacent trail that was used for biking, walking, four-wheelers, snow machines, etc. He felt that it was always in the public's best interest to consider these kinds of traffic concerns.

Mr. Cox also expressed concern about any increased industrial noise but wasn't sure if that would be an issue. He hoped this would be considered when permitting a commercial operation in a residential area.

Unfortunately, one of his greatest concerns was actually security issues. Mr. Cox stated that Nikiski already has problems with thievery particularly in the Island Lake area. He understood that this facility has to conform to some very strict security regulations. Mr. Cox appreciated the fact that the applicants were trying to do things in accordance with all the established regulations but the fact that a facility was required to have such strict security reveals the concern that this kind of facility was a target for crime. He thought it would be irresponsible to place a target in a residential area. That was his biggest concern but he was not sure if any of these concerns would ever come to pass but he wasn't sure it was worth taking the chance when there are other properties that are available where cultivation facility could be established without any of these concerns.

Mr. Cox asked the question, if this was in the public's best interest to allow this facility on the proposed property. As a resident who will have to actually live with these concerns, the answer is no.

Chairman Martin asked if there were questions for Mr. Cox. Hearing none the public hearing continued.

Seeing and hearing no one else wishing to speak Chairman Martin closed the public comment period and opened discussion among the Commission.

MOTION: Commissioner Ernst moved, seconded by Commissioner Fikes to recommend approval of Alaska Growth, a Standard Marijuana Cultivation license according to staff recommendations, findings and to recommend that the following three conditions be placed on the state license.

Conditions

1. The marijuana establishment shall conduct their operation consistent with the site plan submitted to the Kenai Peninsula Borough.
2. There shall be no parking in borough rights-of-way generated by the marijuana establishment.
3. The marijuana establishment shall remain current in all Kenai Peninsula Borough tax obligations consistent with KPB 7.30.020(A).

Commissioner Carluccio expressed concern regarding access. The testifier for Alaska Growth stated that the road was on her property but even if the aerial photo was off, it looked like access to that road was not on her property. She felt it was not in their best interest to forward something that was in affect trespassing over someone else's property so she would not be supporting the motion.

Commissioner Ruffner asked what the code explicitly says about access and parking. Mr. Wall replied that the standards for access and parking are as follows:

Marijuana establishments shall:

1. *Be located where there is sufficient ingress and egress for traffic to the parcel including:*

- a. *The approach shall be constructed to a minimum of 28 feet in width where it accesses a borough right-of-way.* Mr. Wall stated that they have been interpreting that as being not applicable if it was accessing a State highway.
- b. *There shall be no parking in borough rights-of-way generated by the marijuana establishment.*
- c. *The site development shall delineate a clear route for delivery vehicles which shall allow vehicles to turn safely.*
- d. *On-site parking and loading areas shall be designed to preclude vehicles from back out into the roadway.*

Commissioner Ruffner stated that it sounded like they don't have the 28 feet of access in this case. He asked how staff resolved that. Mr. Wall replied that it was a group decision and deferred to Mr. Best to answer this question. It was something that they debated and tried to figure out if the code addressed that. Mr. Best replied that they discussed the access issue but it does not front on a borough right-of-way or something that they regulate. The code addresses borough rights-of-way and doesn't specify whether it was legal or it was a State access. They are concerned about the passage, the width and what happens there if it fronts on a borough right-of-way. Staff felt there was legal access since they were apparently already crossing that corner of the land and accessing properties beyond that so it was determined that they met the requirements of the code for access.

Commissioner Ruffner stated that the intent of why they would do that was so there would be no damage to borough roads. It seems that the intent would also be to make sure there was sufficient legal access to a facility. He stated he was also thinking the same way as Commissioner Carluccio.

Commissioner Foster asked if they were looking at Glory Ave being the legal access when further subdivision was done. Mr. Wall replied that the parcel was created by deed not a platted subdivision. He researched it the best he could. There was legal access going to Glory Ave, an easement going to the west. He stated it was never mentioned having an easement going to Island Lake Rd. Commissioner Foster stated he also agreed with Commissioner Carluccio and Commissioner Ruffner.

Commissioner Ruffner stated that they have to interpret the code and make a recommendation to the Assembly. There is another hearing that is held by the Assembly who makes the final recommendation to the State. He hoped that this was a significant finding regarding access and if it is not supported then the intent was not clear to the Assembly when the code for access was written.

Chairman Martin asked if this would fit the prescriptive rights claim. He asked if they have seen situations like this that have been turned down and there was an access. Mr. Best have asked people to come back to him and report on their prescriptive right claims but no one has ever come back to report to him. There was a situation where someone was using the corner of someone's property and they went to the court. One person put up a fence but the judge made him take it down and grant an easement. He felt that didn't meet the statute of limitations for years but the judge decided otherwise so he wasn't going to go out on a limb and say what a judge might say.

Mr. Best stated that the commission's determination was to determine if there was sufficient ingress / egress. When they drafted this, they drafted it for public safety aspects; the passage of cars, the ingress / egress onto the roads that were safe so people wouldn't have to wait for trucks to come and go and there was sufficient parking. He doesn't know that legal ever came into it as far as drafting the regulations.

Commissioner Carluccio stated that she was hesitating regarding prescriptive easements. There was a situation that the City of Seldovia was embroiled in a lawsuit over prescriptive rights. The city felt that it had a long standing claim but they lost so she was hesitate to base a decision on a possibility of prescriptive rights. Each case is litigated differently and realized that it was the judge or the mediator but she hates to base a decision here on the idea that someone was going to win or lose a prescriptive rights case.

Chairman Martin stated that the alternative was to make a decision assuming that they are going to lose. Commissioner Carluccio agreed but until someone has legal access she still didn't see how this could be granted. They may win but thought that it has to be litigated before the commission makes a decision.

Commissioner Fikes pointed out that the address noted in the application was an Island Lake Rd address.

Commissioner Ecklund understood that the applicant submitted a graph page which was included on page 24 of the packet. If she looked at that and took that as a legal plat then they might think that the easement road shown on the google map or the forested area that this easement road was on their property. Some of this may be solved if the applicant wanted to bring a legal plat showing the road was on their property. They have had speakers saying the road was on their property and had speakers say that a bronze marker was next to Island Lake Rd. Unless she sees something that shows a little better plan then she couldn't support the motion because of the egress / ingress.

Commissioner Ruffner asked if there was enough discussion to inform the Assembly on the concerns of the legal egress / ingress. Mr. Wall understood that the commission was expressing concerns regarding the applicant having sufficient egress / ingress which is one of the standards in the borough code.

Commissioner Ecklund asked if this would be forwarded to the Assembly if they do not support approving this application. Mr. Wall replied that this application will go to the Assembly. It was just a matter of whether the commission was recommending it be approved or not at the Assembly level.

Commissioner Ruffner reiterated that the Planning Commission was acting in an advisory capacity to the Assembly. The application comes in and makes a recommendation to the Assembly, the Assembly rules on it and makes a recommendation to the State. It was a multi-step process. He wanted the public to understand that this was not a final decision on what happens or doesn't happen with this particular project.

There being no further comments or questions, Chairman Martin called for a roll call vote.

VOTE: The motion failed by majority consent.

BENTZ NO	CARLUCCIO NO	ECKLUND NO	ERNST YES	FIKES NO	FOSTER NO	ISHAM YES
LOCKWOOD ABSENT	MARTIN YES	MORGAN NO	RUFFNER NO	VENUTI ABSENT	WHITNEY NO	3 YES 8 NO 2 ABSENT

~~AGENDA ITEM G. ANADROMOUS WATERS HABITAT PROTECTION DISTRICT (KPB 21.18) - None~~

~~AGENDA ITEM H. VACATIONS NOT REQUIRING A PUBLIC HEARING – None~~

~~AGENDA ITEM I. SPECIAL CONSIDERATIONS~~

1. Galen Gray Subdivision Jackman Addition
KPB File 2017-134 [Integrity / Jackman, Corbeille-Jackman]
Location: intersection of Gray Avenue & Tarawa Street, Nikiski area

Staff Report given by Max Best

Planning Commission Meeting: 12/11/17

Location: between Gray Avenue and Ambrym Avenue, Nikiski
Proposed Use: Residential
Water/Sewer: On-site