

**PC RESOLUTION 2021-10**

**REMAND AFTER APPEAL OF THE KENAI  
PENINSULA BOROUGH PLANNING COMMISSION**

**DENIAL OF A MODIFICATION TO  
CONDITIONAL LAND USE PERMIT IN  
THE SOLDOTNA**

**KPB Tax Parcel ID#s: 13524313 & 13524329**

**Legal Description:**

**T 5N R 10W SEC 34 SEWARD MERIDIAN KN NW1/4  
SE1/4 EXCLUDING PATSON PROPERTIES PART 1  
&  
T 05N R 10W SEC 34 SEWARD MERIDIAN KN 2019068  
PATSON PROPERTIES 2019 REPLAT TRACT C1**

**Applicant  
River Resources, LLC**

**Landowner  
River Resources, LLC**

**HOMEOWNER DALE  
MCBRIDE'S WRITTEN  
SUBMISSION WITH  
ATTACHMENTS**

Directly affected homeowner Dale McBride objects to the grant of the proposed modification to the River Resources conditional land use permit requesting a permit to excavate gravel as much as 12 feet or more below the water table. McBride urges the planning commission to continue in force and uphold its current rejection of the proposed modification.

The attached geophysical report of Coble Geophysical Services (CGS), including its attachments, is incorporated as part of McBride's submission. Mr. Coble is a professional geophysicist focusing upon water issues for more than 20 years on the Kenai Peninsula. He is quite familiar scientifically with this immediate area, having in fact done extensive groundwater investigation and consulting work with the City of Soldotna as it developed the aquifers in this area as part of the City of Soldotna's arsenic mitigation and city water supply improvement project. McBride also attaches and incorporates by attachment the Superior Court's decision in Bilben, which we believe was previously circulated to the Planning Commission.

### **HIGHLY NEGATIVE POTENTIAL IMPACTS OF PROPOSED MCLUP**

The CGS report makes a number of fundamental points regarding the negative potential impacts and effects of the proposed operation which would mine gravel below the water table to the extent that it would largely remove the aquifer to at least 12 feet below the "current" water table as depicted by the Applicant's submitted modification request. To quote from the CGS summary:

1. "In addition to its more-obvious effects upon the pre-existing residences down-gradient from the gravel pit, and because the confining layer has not been investigated and defined in the area of the proposed excavation and removal of the aquifer, the proposed below-water table operation has significant potential negative impacts upon an important portion of the City of Soldotna water system, specifically the wellhead for Soldotna's Well E. The city wells on the other side of the Kenai River at and near Swiftwater Campground are also part of the same aquifer system.

2. By excavating the aquifer gravel to at least 12 feet below the ill-defined “current water table”, as shown in its initial modification application, and then backfilling with less porous material, the proposed gravel pit operation will seriously disturb the remaining aquifer over a physically large area.
3. The aquifer flow submitted by the applicant is clearly wrong relative to the down-gradient residential wells at issue here and relative to the lower elevation Kenai River. The application purports that the ground water in the unconfined aquifer is flowing up-gradient away from the lower elevation Kenai River and up the nearby hill. This incorrect result may be due in part to the inadequate monitoring well design and inadequate information gathered and disclosed.
4. The continued integrity of the aquifer confining layer is important for the numerous users of any confined aquifers here. The confining layer has not been tested and evaluated in the vicinity of the Patson-River Resources materials site and, and because the proposed below-water table gravel mining has the significantly negative potential impact of unsafely increasing the arsenic content of the unconfined aquifer, it also poses an additional risk to municipal water supply wells which by law have maximum allowable arsenic levels.
5. The applicant has failed to document the varying strata and aquifers in the area of below-water table excavation and nearby. The proposed below-water table excavation must be denied at this time because the applicant cannot show with an adequate level of certainty that its below-water table gravel excavation will not damage not only the surrounding properties but also the City of Soldotna municipal water supply. This potential impact is much too great a risk to take at this time without a high level of prior knowledge and certainty, and we do not have that here.
6. The proposed excavation and on-site water discharge, not to mention the presence of nearby contaminated sites and municipal water supplies, will necessarily require State of Alaska permits. We did not see evidence of these permits or permit applications.
7. The proposed gravel pit excavation and aquifer removal below the water table will seriously disturb the up-gradient portion of the unconfined aquifer upon which the neighboring residences, including McBride, depend for their household water.

8. The proposed removal of the aquifer in this large gravel pit is substantially likely to negatively impact the water quality of any down-gradient residences and the Kenai River.
9. The water flow is down-gradient toward the Kenai River when the nearby Kenai River is included and the aquifer in question is part of the Kenai River recharge buffer. Disturbing the aquifer damages Kenai River habitat. Aquifer discharge into the Kenai River is evident on the Gravier property wetlands bordering the Kenai River. See attached Gravier submission.
10. Addressing monitoring wells, the application is deficient in several regards: The monitoring well logs were not provided, and therefore we do not know where the screening has been done and hence where the water levels originate from. The groundwater levels are not represented, for example by a time stamp. The exercise of monitoring groundwater levels with time should include many groundwater maps, not one.
11. Protection of the City of Soldotna municipal water supply wellhead must be taken into account and evaluating that important potential impact cannot be done at this time due to a near-complete lack of pertinent investigation and data.”

The potential impacts upon both the public interest, upon pre-existing residences, and upon the property rights of neighboring properties is very severe and probable. These are severe red flags and any one of the above is in itself sufficient to deny the requested MCLUP. In combination, there are overwhelming factual reasons why the requested below-water table excavation MCLUP must be denied and the current decision of the Planning Commission to deny the MCLUP remain in full force and effect.

### **BONDING REQUIREMENTS**

The negative potential impacts upon the down-gradient homeowners, the Kenai River, and potentially the City of Soldotna water supply are potentially very large. Bonding in the amount of several millions of dollars at a minimum is necessary in the event that below-water excavation creates long term adverse effects, particularly any increase in soluble arsenic, a long-term continuing concern for the City of Soldotna municipal water system, not to mention the

increased potential for hazardous man-made contamination to the aquifers from fuels, solvents, and the like that are common problems with even materials sites above the water table..

Damage to the Kenai River habitat from any pollution is similarly a public interest concern that would require remediation.

The proposed up-gradient aquifer disturbance will very likely render the very valuable Kenai River properties greatly reduced in value.

McBride accordingly recommends that a TEN MILLION Dollar (\$10,000,000) bonding amount be set.

### **LACK OF ADEQUATE AND INDEPENDENT MONITORING AND HYDROLOGY EVALUATION**

One the questions upon remand includes the determination of what constitutes an “independent” water monitoring professional. In the instant case, the engineering office hired by petitioner River Resources designed and submitted the original Conditional Land Use Permit application as well as the proposed modification petition to allow also purported to be the independent water monitoring agency.

As the designer of the proposed below-water table gravel mining operation as well as the entity that submitted the MCLUP application on behalf of River Resources, McLane cannot be plausibly deemed “independent” here in any sense of the word. Indeed, that engineering office was listed as the agent of petitioner by the Borough and similarly described in the remand order. In an email which homeowner McBride believes to be already on the record, the engineering office declined to discuss anything with one of the homeowners, citing a conflict of interest.

It is self-evident that any entity that submits a petition on behalf of its paying client and which then declines to discuss anything citing a conflict of interest cannot be plausibly deemed to be “independent”, certainly not in an intensely disputed matter such as this one. Given the serious potential impacts, the Planning Commission should have much better and more complete information. Further, as the CGS report notes, the information supplied to date is both greatly

insufficient and in some instances inaccurately showing water flowing uphill away from the much lower nearby Kenai River.

Accordingly, homeowner McBride strongly urges the Planning Commission to require petitioner River Resources, prior to any further action, to secure new and truly independent hydrology and water monitoring services entirely separate from its engineering office and to undertake a detailed investigation and description of all aquifers in the area and how they inter-relate, particularly anything that plausibly affects the City of Soldotna municipal water supply.

### **PROTECTION OF PROPERTY RIGHTS**

McBride urges this commission to truly protect the property rights of all parties, not just that of the commercial entity. As this area gradually grows, as it has since its founding, inevitably there are increased conflicts between long-established, often valuable, properties, such as the long-standing municipal water supply in the area, the adjoining and nearby Kenai River residences, and the proposed large gravel excavation and aquifer removal operation arriving later.

Equal protection of property rights includes strongly protecting the valuation and the quiet use and enjoyment of the many previously built properties surrounding this and similar materials sites “gravel pits”. It is unreasonable to define the protection of “property rights” as pertaining solely to a late-coming industrial operation that damages the aquifer and the value and quiet use and enjoyment of existing properties and to exclude the impact upon homeowners from the balance.

The Planning Commission’s prior hearing records in this and other similar MCLUP matters reflects that at least some planning commission members believed this commission did not have the legal power to deny a modification despite misgivings. The Superior Court’s decision in the Bilben Anchor Point matter, attached and incorporated by attachment, makes it clear that this Commission does have the power to deny a permit or modification in order to protect surrounding landowners when the damage to surrounding properties is so significant that mitigation measures are ineffective. Such is the case here and the modification should be denied.

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## **MISUSE OF THE MCLUP PROCESS**

Homeowner McBride observes that there seems to be a tendency toward misuse of the modification process. Here, the petitioner submitted an initial plan which provided for monitoring and restoration including, apparently, later construction of a housing development and an access road across the property to be fully reclaimed and received approval. Within a short time after beginning gravel removal, a modification is requested to remove the underlying aquifer by gravel mining below the water table. The protections and reclamations upon which the initial CLUP was approved are completely overthrown and negated. Now, the petitioner seeks to immediately mine gravel beneath the water table, removing the aquifer upon which the down-gradient homeowners rely, and leaving behind a highly disturbed, if not destroyed up-gradient aquifer subject to increasing the arsenic content..

When the original conditional land use permit was submitted, Applicant River Resources stated that the intended excavation would not disturb the underlying unconfined aquifer and that the reclamation plan would include restoration and the development of housing. At an earlier hearing, the Planning Commission staff recommended a cross street through the proposed materials site due to block length requirements and public safety concerns. Despite changes to the wording of the initial staff recommendation, the CLUP still requires a cross street for public safety and access concerns. The proposed modification request completely ignores all of the prior representations and for all practical purposes is a fundamentally new, much more extensive operation that bears little resemblance to the original CLUP approved only shortly before this modification was first proposed.

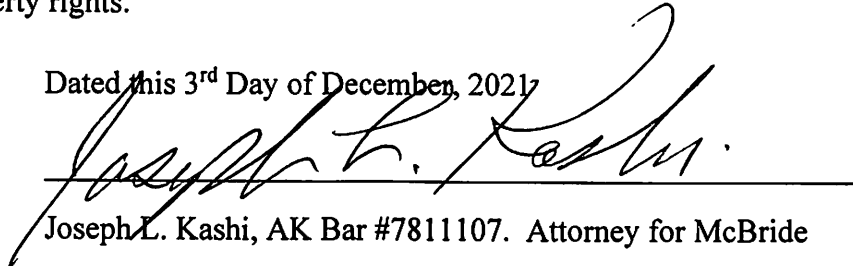
Mining within the water table will leave a pool of water that will prevent a cross street as required by previous decisions from being constructed post reclamation which will endanger the public safety of the surrounding residents and property owners. It will disturb the up-gradient aquifer to a very great extent.

Given the prior circumstances where at least some members of this Planning Commission stated their misapprehended belief that this Commission was required to grant modification petitions, it seems evident that the MCLUP process is being abused, with an initial conditional land use

permit providing reclamation, etc., shortly to be followed with a highly expanded “modification” that essentially removes a critical aquifer and takes away any protections for the homeowners.

The proposed modification should be denied. It is neither in the public interest and it destroys many private property rights.

Dated this 3<sup>rd</sup> Day of December, 2021

A handwritten signature in black ink, appearing to read "Joseph L. Kashi", is written over a horizontal line. The signature is fluid and cursive.

Joseph L. Kashi, AK Bar #7811107. Attorney for McBride



# DECISION OF THE KENAI PENINSULA BOROUGH PLANNING COMMISSION

## A. CASE INFORMATION

Appeal Number:	2021-01-PCA; REMAND HEARING
Hearing Date:	October 18, 2021
Place of Hearing:	KPB, Betty J. Glick Assembly Chambers
Parcel Identification Number:	13524313 & 13524329
Applicable Code:	KPB 21.29.040 and KPB 21.29.050
Name of Appellants:	River Resources LLC – Owner/Applicant; and Numerous nearby landowners
Reason for remand	<ul style="list-style-type: none"> <li>• Make factual findings supporting the Planning Commission’s decision based on substantial evidence in the record regarding the:               <ul style="list-style-type: none"> <li>a. Bonding requirements;</li> <li>b. Well monitoring timeline;</li> <li>c. Qualifications and independence of McLane Consulting, Inc; and</li> <li>d. Specific criterion contained in KPB Code §§ 21.29.040 and 21.29.050</li> </ul> </li> <li>• To the extent that factual information does not presently exist in the record the Commission shall augment the record by conducting an additional hearing.</li> </ul>

<b>PLANNING COMMISSIONERS</b>	<b>PRESENT</b>	<b>ABSENT</b>
Blair Martin, Chair	√	
Robert Ruffner, Vice chair	√	
Syverine Abrahamson-Bentz	√	
Diane Fikes		x
Jeremy Brantley	√	
Pamela Gillham	√	
Virginia Morgan	√	
Franco Venuti	√	

#### **B. COMPLIANCE WITH PROCEDURAL REQUIREMENTS**

	<b>YES</b>	<b>NO</b>
1. A quorum was present.	√	
2. The Certified Record on appeal to the Hearing Officer was provided to the Planning Commission	√	
3. The Motion to Remand and applicable Hearing Officer remand orders were provided to the Planning Commission	√	

#### **C. DECISION SETTING A PUBLIC HEARING ON REMAND**

**PURSUANT TO THE CERTIFIED RECORD, MOTION TO REMAND, AND ORDERS ENTERED BY THE HEARING OFFICER REMANDING THIS MATTER, THE PLANNING COMMISSION ENTERS THE FOLLOWING DECISION ON REMAND:**

1. A remand hearing was held on October 18, 2021. Public testimony and evidence was not reopened for the October 18, 2021 remand hearing. Pursuant to the certified record and in accordance with the orders entered by the Hearing Officer, the Planning Commission determined during deliberations that it needed more information from the parties involved and therefore will reopen public testimony and evidence in this matter.


2. The public hearing on remand shall be set for December 13, 2021 and shall only be continued in the event the Applicant provides a good cause basis for not being able to timely comply with the below requested information.
3. By December 3, 2021, the Applicant, River Resources LLC, and the Applicant's engineer, Gina DeBardelaben/McLane Consulting, Inc., should provide responses pertaining to the following questions raised by the Hearing Officer's orders:
  - a. A best effort to identify known wells within 300', 500' and 1000' of the proposed dewatering;
  - b. Anticipated impacts, if any, to nearby wells;
  - c. Potential impacts to nearby wells in a worst-case scenario and the possible remedial costs of those impacts on a per-well basis;
  - d. The dates of measurements for the monitor wells done pursuant to KPB 21.29.050(A)(5);
  - e. The amount of the bond proposed by River Resources, LLC; and
  - f. Any other information or documentation that River Resources, LLC would like to provide for consideration in support of its applications and requests.
4. By December 3, 2021, interested parties/nearby landowners may provide information regarding:
  - a. Well tests performed to-date;
  - b. Professional opinions, if any, regarding potential impacts that may occur as a result of the Applicant's (i) request to allow for excavation in the water table; and (ii) localized dewatering exemption request during excavation below groundwater elevation; and
  - c. Any other expert opinions or information that nearby landowners or interested parties would like to provide for consideration in this matter.
5. By December 3, 2021, the Planning Department should provide an updated staff report that, to the best of staff's ability, answers the questions under paragraph 3 and 4 above, with recommendations that includes a proposed resolution, findings of fact, conclusions of law, and conditions, if applicable.
6. The Applicant, including its agents, counsel, and/or engineer, shall have 15 minutes to provide public testimony at the public hearing scheduled for December 13, 2021.

7. Nearby owners and other interested parties shall have 3 minutes per person to provide public testimony that is relevant to the information requested under paragraph 3 and 4 above; however, the total allotted time for nearby owners and interested parties' testimony shall be capped at a maximum of 45 minutes.

Dated this 18th day of October, 2021.

  
Blair Martin, Chair, KPB Planning Commission

ATTEST:

  
for Ann Shirnberg AA  
Ann Shirnberg, Administrative Assistant

# COBLE GEOPHYSICAL SERVICES

GEOPHYSICAL CONSULTING

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Groundwater/Surface Water  
Geophysics

CGS MEMO 12/3/21

**Joe Kashi, Atty at Law**

206 E Beluga Ave.

Soldotna, Alaska 99669

Phone: (907) 398-0480

[kashi@alaska.net](mailto:kashi@alaska.net)

**RE: River Resources, LLC Conditional Land Use Permit – Modification Application**

RE: Excavation within Patson Properties on Replat, KPB Parcel #13524313 and #13524329

*Groundwater and Surface Water Impacts – East Soldotna*

**NON-TECHNICAL SYNOPSIS**

1. In addition to its more-obvious effects upon the pre-existing residences down-gradient from the gravel pit, and because the confining layer has not been investigated and defined in the area of the proposed excavation and removal of the aquifer, the proposed below-water table operation has significant potential negative impacts upon an important portion of the City of Soldotna water system, specifically the wellhead for Soldotna's Well E. The city wells on the other side of the Kenai River at and near Swiftwater Campground are also part of the same aquifer system.
2. By excavating the aquifer gravel to at least 12 feet below the ill-defined "current water table", as shown in its initial modification application, and then backfilling with less porous material, the proposed gravel pit operation will seriously disturb the remaining aquifer over a physically large area.
3. The aquifer flow submitted by the applicant is clearly wrong relative to the down-gradient residential wells at issue here and relative to the lower elevation Kenai River. The application purports that the ground water in the unconfined aquifer is flowing up-gradient away from the lower elevation Kenai River and up the nearby hill. This incorrect result may be due in part to the inadequate monitoring well design and inadequate information gathered and disclosed.
4. The continued integrity of the aquifer confining layer is important for the numerous users of any confined aquifers here. The confining layer has not been tested and evaluated in the vicinity of the Patson-River Resources materials site and, and because the proposed below-water table gravel mining has the significantly negative potential impact of unsafely increasing the arsenic content of the unconfined aquifer, it also poses an additional risk to municipal water supply wells which by law have maximum allowable arsenic levels.

5. The applicant has failed to document the varying strata and aquifers in the area of below-water table excavation and nearby. The proposed below-water table excavation must be denied at this time because the applicant cannot show with an adequate level of certainty that its below-water table gravel excavation will not damage not only the surrounding properties but also the City of Soldotna municipal water supply. This potential impact is much too great a risk to take at this time without a high level of prior knowledge and certainty, and we do not have that here.
6. The proposed excavation and on-site water discharge, not to mention the presence of nearby contaminated sites and municipal water supplies, will necessarily require State of Alaska permits. We did not see evidence of these permits or permit applications.
7. The proposed gravel pit excavation and aquifer removal below the water table will seriously disturb the up-gradient portion of the unconfined aquifer upon which the neighboring residences, including McBride, depend for their household water.
8. The proposed removal of the aquifer in this large gravel pit is substantially likely to negatively impact the water quality of any down-gradient residences and the Kenai River.
9. The water flow is down-gradient toward the Kenai River when the nearby Kenai River is included and the aquifer in question is part of the Kenai River recharge buffer. Disturbing the aquifer damages Kenai River habitat. Aquifer discharge into the Kenai River is evident on the Gravier property wetlands bordering the Kenai River. See attached Gravier submission.
10. Addressing monitoring wells, the application is deficient in several regards: The monitoring well logs were not provided, and therefore we do not know where the screening has been done and hence where the water levels originate from. The groundwater levels are not represented, for example by a time stamp. The exercise of monitoring groundwater levels with time should include many groundwater maps, not one.
11. Protection of the City of Soldotna municipal water supply wellhead must be taken into account and evaluating that important potential impact cannot be done at this time due to a near-complete lack of pertinent investigation and data.

## **BACKGROUND CONTEXT**

- >There are many different resource users in this area, causing a growing list of resource conflicts.
- >This materials site is applying for a Modified Conditional Use Permit to allow for gravel excavation into the water table. This has the potential to affect other water users in the area, including the Kenai River, which are also matters of the public interest. This means per Appendix D, they will be required to obtain a Temporary Water Use Authorization (TWUA) Permit from State of Alaska ADNR. We also verified this was the case with the State of Alaska.
- >This materials site is problematic located in the unconfined aquifer and one of the future areas denoted for future Soldotna water supply (Coble, 2006). Arsenic in drinking water has been a well-known concern in Soldotna for at least two decades. Coble Geophysical identified the area of this materials site as a potential safe drinking water supply should rising groundwater temperatures cause increases in arsenic concentration (Coble, 2006).
- >That makes this materials site problematic, since excavation into an aquifer that feeds water to the Kenai River from storage would be removed. The Kenai River elevation near this materials site is ~60 feet above MSL, while the onsite groundwater levels are 20 feet higher than this (McLane Consulting, 2020/2021). Water flows downhill. The Gravier seepage face information also shows water moving towards the river from this aquifer providing sustaining water during low discharge periods. This fact means the proposed removal of this aquifer will be reviewed by ADF&G Habitat.
- >Coble Geophysical was professionally involved for many years to help reduce the concentration of arsenic in the Soldotna public water supply. Well E is one of the wells used to achieve the current acceptable levels. Well E gets water under a confining layer that has not been defined at the materials site where Well E drawdown exists. Changes in the dynamics within the Well E wellhead could therefore have serious effects on the City public water supply, and this is also subject to review by the ADEC Drinking Water program. Note that the nearby Swiftwater Campground wells are also in this confined aquifer system.
- >Figure 3 shows they are planning to excavate deeply into the aquifer through unidentified and undefined strata. The KPB would need elevation control of the existing groundwater table and active monitoring during all excavation activity in order to implement a program of monitoring acceptable excavation depths with this plan. Also, the KPB does not test for many of the parameters such as arsenic which would be of concern in this type of activity in an area where groundwater is being used in both confined and unconfined aquifers.
- >The monitoring well data is insufficient to explain water flow that might affect the neighboring properties. We have no information about water quality, well depths, well logs, well construction data which would validate this data. This data is grossly inadequate to determine effects on neighboring properties.

>Well E has produced up to 1,000 gpm for the City public water supply, and caused over 9 feet of drawdown on the other side of the Kenai River and measurable drawdown at wells over 7,000 feet away. It is incongruous to require such detailed information on water supply parameters at the same time gravel is being extracted in this same wellhead area with no effort to address the system in which it is operating.

>Excavation of this aquifer with an open pit having currently not excavated below the water table has still caused a significant swale, such that the surrounding aquifer can expect rapid recharge during heavy precipitation which could potentially increase groundwater levels in surrounding wells and wetlands. If the aquifer is excavated below the water table, it will not be replaced in reclamation; groundwater will have to potential to flow into any swale left, and under many circumstances groundwater levels will be lowered. Suffice it to say: there will always remain permanent and negative changes to the aquifer surrounding this material site over a large area, and more so if the aquifer itself is removed.



## **INTRODUCTION:**

This report was prepared by Coble Geophysical Services (CGS) and consists of a review of the planning, compliance and execution of the materials site referenced above located in Soldotna, Alaska. CGS has many years of experience working with groundwater resources in the Soldotna area.

Materials sites must follow the relevant KPB Ordinances, which have evolved during the time we have practiced in the State of Alaska to include 'water table' protection measures.

## **CURRENT PATSON PROPERTIES MATERIALS SITE**

The Patson Properties materials sites are located in Soldotna, Alaska as shown along the Kenai River in Figure 1. River Resources, LLC is the property owner of the denoted land in Figure 1, which are also the materials sites which have been operating on these premises as shown in Photo 1 and Photo 2 provided by your legal team.

These recent photos show a gravel pit operation, with overburden removed to berms on the side, and with a constructed water ponds at the bottom. The water ponds are most likely to be either from excavation into the water table, or from a gravel washing operation or both. Equipment is seen to have been operating out of the base of the pit with materials piles from gravel removal and screening spread out on the available surface area of development. No KPB elevation information to verify elevations at this site were available for compliance review.

# Soldotna



Alaska




Kenai Peninsula



Soldotna Alaska / Area of Interest

CGS COBLE GEOPHYSICAL SERVICES  
1000 W. 10TH AVE., SUITE 100, ANCHORAGE, ALASKA 99501  
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CLIENT	PROJECT	DRAWN BY	DESCRIPTION	FIGURE 1
Joe Kashi, Atty at Law 206 E Beluga Ave. Soldotna, Alaska 99669	River Resources, LLC Conditional Land Use Permit (CLUP) Application  Excavation within Patson Properties on Replat, KPB Parcel #13524313 and #13524329 Groundwater and Surface Water Impacts – East Soldotna		Location Maps	



*Photo 1. Approach or Takeoff Photo from Soldotna Airfield, Subject Materials Site on 8/17/21, courtesy of client*





*Photo 2. Approach or Takeoff Photo from Soldotna Airfield (Jeremy Pechtel),  
Subject Materials Site, 11/03/21*

## **COMPLIANCE**

The compliance of this gravel pit to KPB Ordinances is examined in Appendix C.

## **PLANNING:**

### **FUTURE PATSON PROPERTIES MATERIALS SITE**

It seems that River Resources contracted with McLane Consulting, Inc. to help manage an effort to excavate below the water table per KPB 21.29 (this would have been in 2020 or before). The record states that McLane Consulting then recommended to River Resources to install five monitor wells on their property to collect the data necessary to support such an application.

Foster Construction was then contracted to install these monitoring wells, which were installed in April 2020 and labeled as 'Monitor Wells 1, 2, 3, 4, and 5'. These wells were monitored on four separate occasions (according to the record) in order to make the 'water table' or groundwater potential determinations as shown in Table 1.

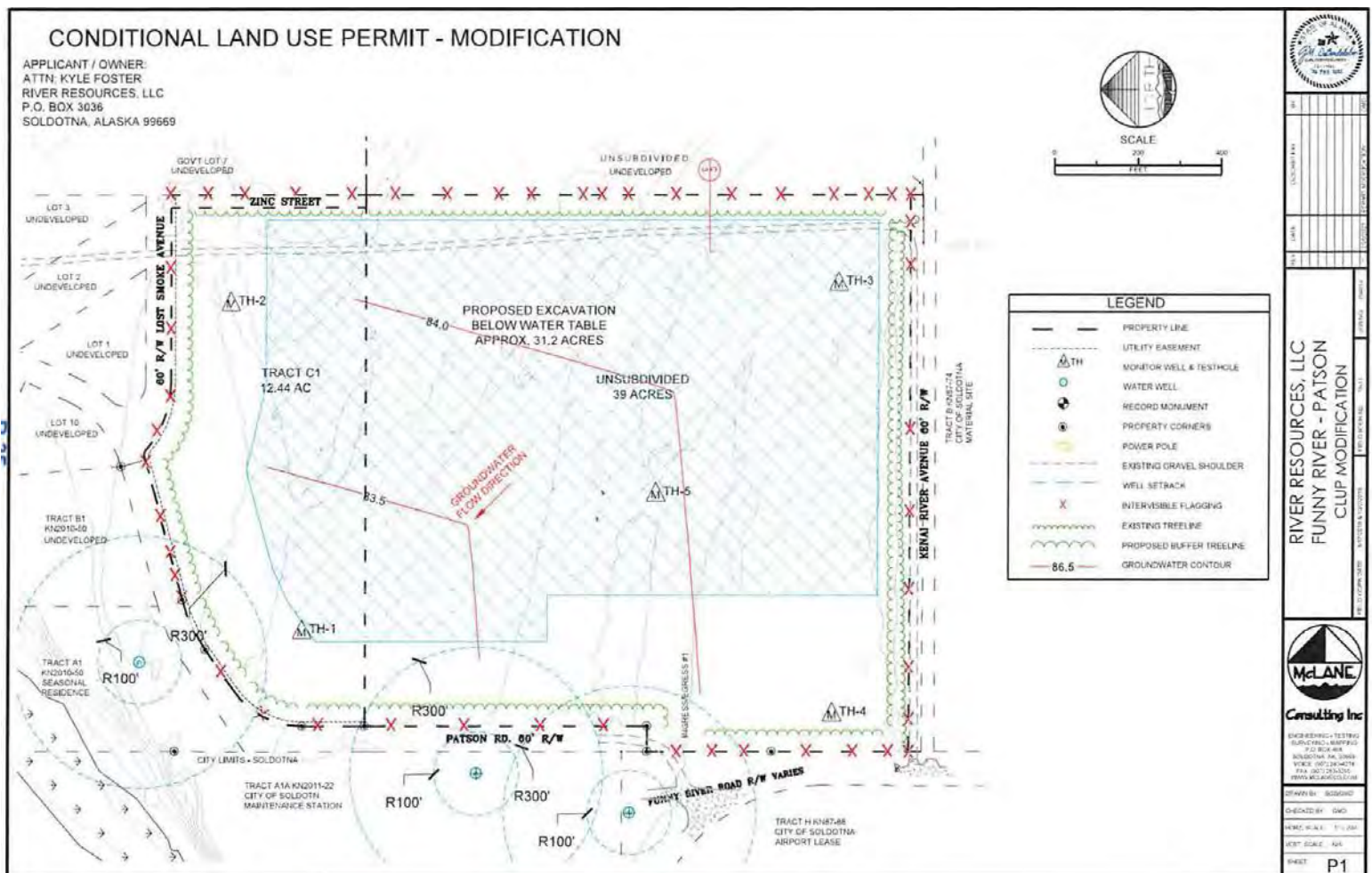
In 2021 River Resources LLC then hired McLane Consulting to file for a modification (a Modified Conditional Land Use Permit or MCLUP) with the KPB to be able to excavate below the water table at their materials site.



Table 1. McLane Consulting Monitoring Well Groundwater Potentials (total record of 8 ½ months)

Monitor Well	Ground Elevation	Top of MW	GW Elev. 5/4/2020	GW Elev. 7/14/2020	GW Elev. 10/15/2020	GW Elev. 1/18/2021
1	101.53	102.27	82.47	83.97	83.17	82.77
2	97.40	104.89	83.69	84.79	83.49	83.59
3	100.67	103.53	84.03	85.23	84.63	83.73
4	101.61	102.96	85.16	84.16	84.26	83.56
5	100.03	104.92	--	84.22	84.22	83.52

We could not find well logs or pumping test data attached to the MCLUP application – although the KPB does not require this. However well characterization *is* referenced by McLane, with the hydraulic conductivity (K) of these wells listed as ranging from approximately  $3 \times 10^{-6}$  to  $1 \times 10^{-1}$  ft/s. This range of K can represent a geologic range of silt to gravel as unconsolidated deposits (Freeze, 1979), and making it unlikely that all the wells were screened in gravel deposits.



We cannot be sure from the information provided, but it seems that the test hole designations TH-1 through TH-5 would make sense as the monitor wells used in Table 1 (noting that Figure 2 also references three unlabeled ‘water wells’ on the boundaries). The Figure 2 groundwater potentials are undated though, noting that Table 1 shows that in May Well 4 has the potential to flow towards Well 3, yet in July Well 3 just as strong a potential to flow in the opposite direction towards Well 4.

Therefore, if the point was to ‘show groundwater flow direction’, in order to ‘protect nearby wells’, then this exercise needs to be done to basic hydrogeologic standards: submit the well logs.

*The proposed excavation will be a major disturbance to this aquifer. Materials are not characterized as they are in well logs of the area in Figure 3.*

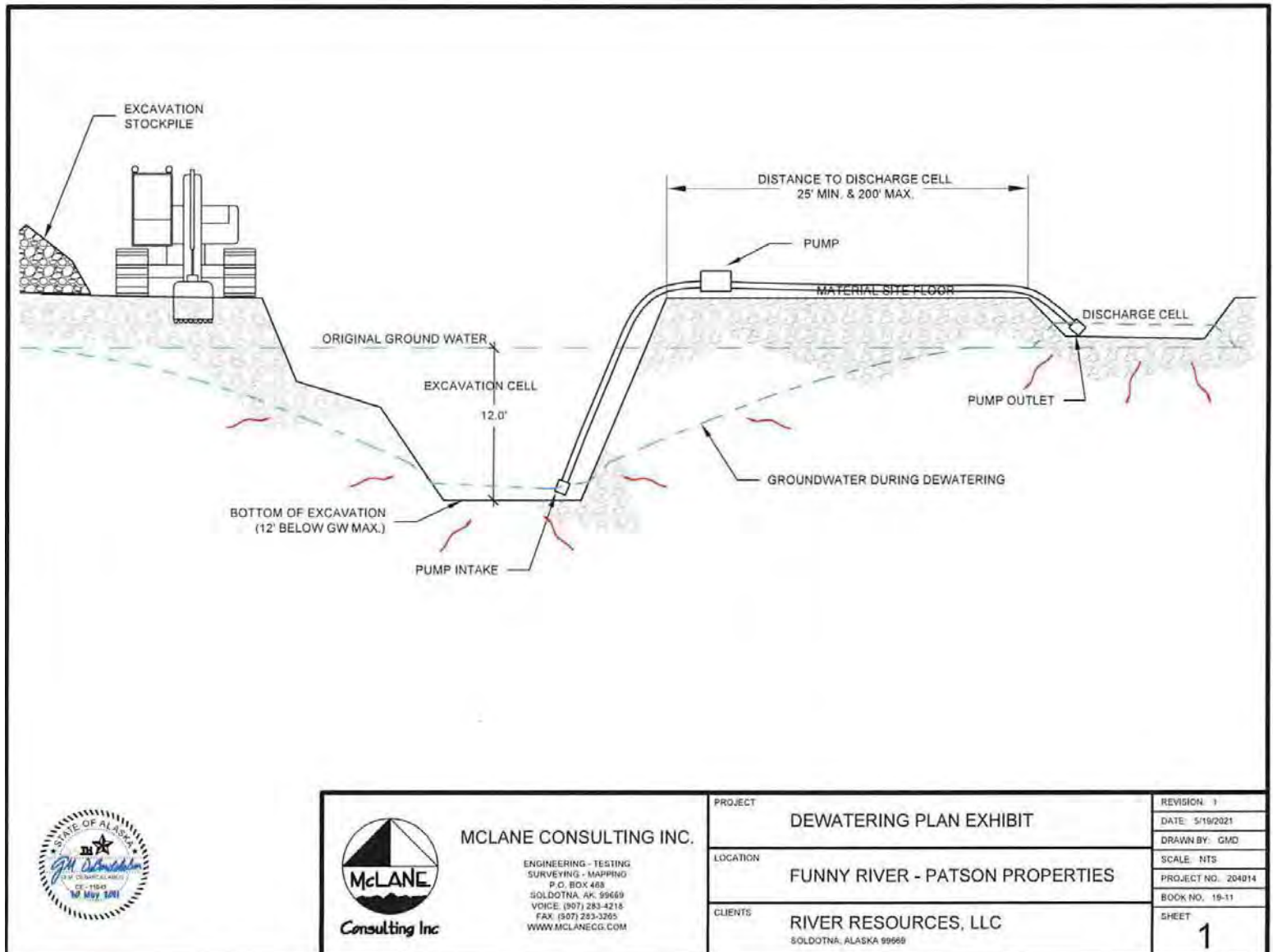


Figure 3. Dewatering Plan for River Resources, LLC filed with the MCLUP Application

Ponding is mentioned as a reclamation method within the newly created low areas, which could become part of a Patson Materials Site Reclamation Plan; but given the elimination of groundwater storage, fundamental change in surrounding aquifer behavior including aquifer damming, a changed unsaturated zone and a new near-surface confining layer located in a large artificial pit swale will all be conditions that contribute to a new *pond environment*. Such a profound change in landscape would seem to require an expert on ponding when the ordinance code for these case-by-case situations KPB requires *beneficial reclamation*.

## **WATER QUANTITY:** **SHALLOW WELLS & KENAI RIVER**

There are two end-members to aquifers, shallow unconfined aquifers, and deeper confined aquifers, so called because they are bounded by low-permeable layers called aquicludes.

Both aquifer types are present and spoken of in this report, since they are both well represented by the subject area.

Unconfined aquifers release far more water from storage per unit volume than confined aquifers. Water produced from ideal unconfined aquifers is replaced by air.

Water from confined aquifers is produced through the expansion of water from being under pressure and the compression of the aquifer, and very little from storage – which causes water to be drawn from a much wider area than in an unconfined aquifer situation.

In fact, confined aquifers can have drawdown that extends for miles in its surrounding aquifer; whereas unconfined aquifer drawdown is more limited to the dynamics of its immediate area.

Since unconfined aquifers are near-surface, they are often directly connected to streams and rivers through seepage faces or directly in gaining reaches of a river. This is why in areas where unconfined aquifers are used, rivers can be heavily impacted as a result of drawdown (e.g. Sophocleous, 1988). In areas where confined aquifers are heavily used, land subsidence from aquifer compression can cause drastic drops in land surface elevation; a well-publicized fact in Mexico City, but which occurs everywhere confined aquifers are heavily used.



## Unconfined Aquifer

As we know, groundwater has the potential to flow downhill like surface water does, so using the available water level information it gets mapped to flow towards the Kenai River as shown in Figure 4, since the Kenai River sits 20 feet lower in elevation from the water levels provided in Figure 2. This different flow direction could have a more profound affect on the water quality of wells along this flow pathway, noting the turbidity generated in the water of Photos 1 and 2.

The KPB ordinance may not require any more work than had been presented in Figure 2; but this level of groundwater mapping does not show how aquifer extraction would affect nearby wells and Kenai River water resources with these potentials divorced from the map.

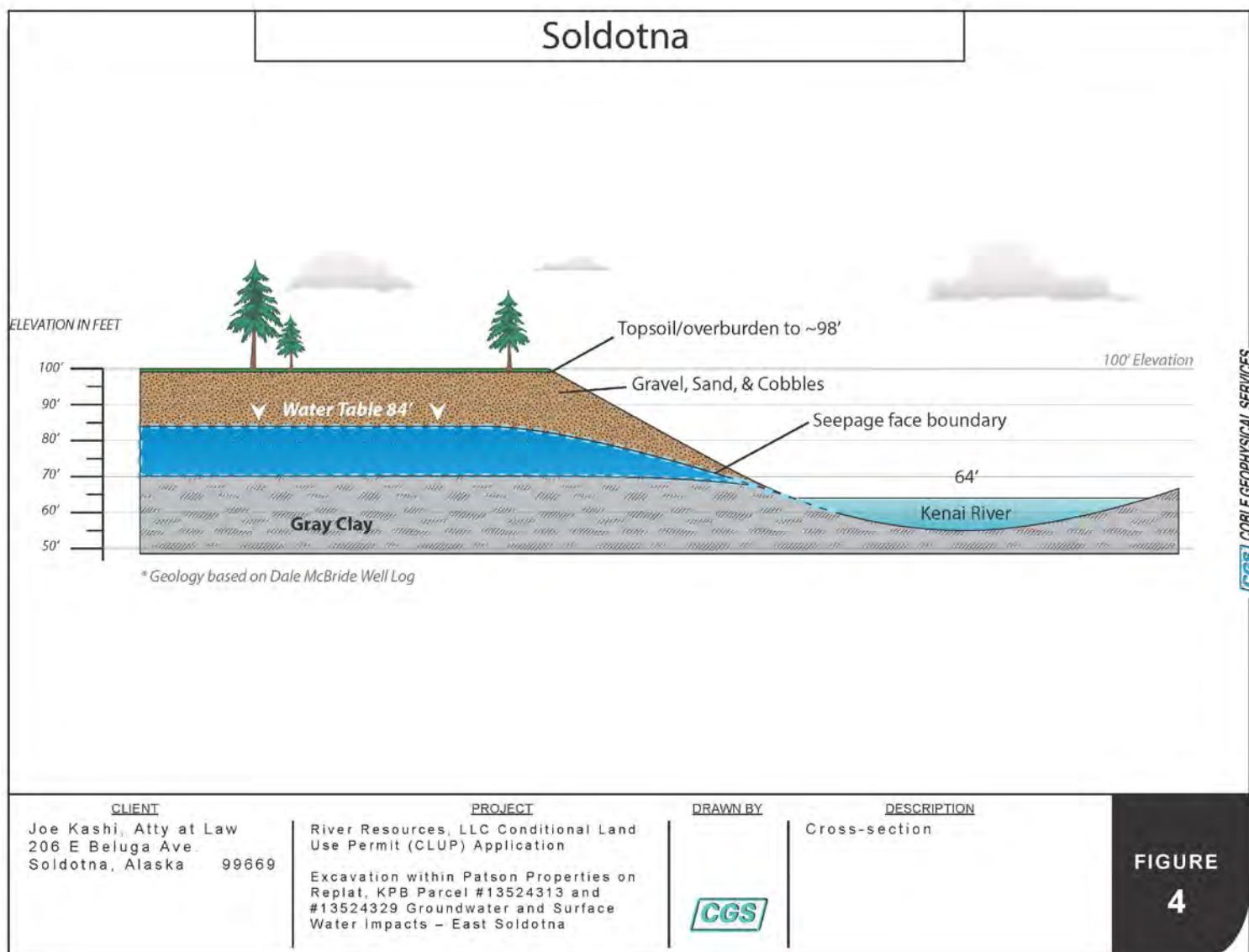


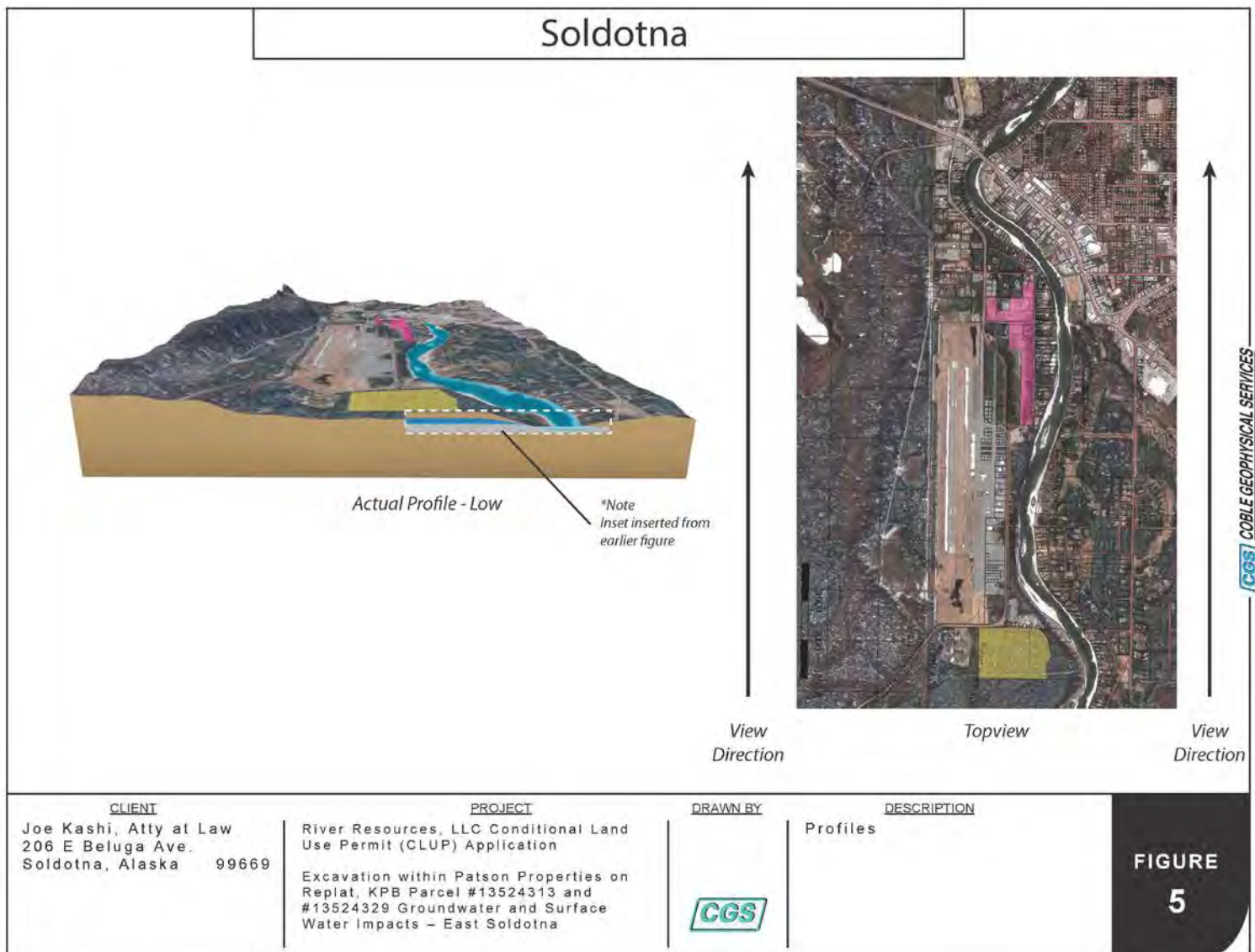
Figure 4 was created based on the well log of Dale McBride shown in Appendix A, the Gravier wetlands information from USACE partly referenced in Appendix A, elevations from the KPB parcel viewer, and the groundwater elevation information provided by McLane Consulting. We could not use the well logs from the materials site since they were not in the MCLUP application.

As can be seen in the cross section of Figure 4, the unconfined aquifer plays an extremely important role in preserving the flow of the Kenai River, as seepage faces are one of the ‘buffers’ which rivers and streams use to handle drought conditions. Permanently removing these structures damages the Kenai River, which is of concern to ADF&G Habitat Division.

In researching the impacts of long term gravel extraction on the Anchor River (Coble, 2002), it was shown that the primary regional effects on rivers caused by materials sites development practices are from:

- 1) Reduction in groundwater storage;
- 2) Reduction in groundwater recharge;
- 3) Increase in runoff from water diverted from groundwater recharge and evapotranspiration;
- 4) A lowering of the regional aquifer transmissivity where aquifer material is being removed.

Figure 5 shows the a true scale block diagram of the reality of this finite Kenai River buffer resource, that has apparently been permitted for gravel extraction in other areas as well adjacent to the Kenai River.



There have been many known cases of groundwater impacts from gravel extraction within the KPB, and quite a few in the Anchor Point/North Fork Road area. The amount of information collected in this case is inadequate at this point to rule out impacts.

The Gravier Well in Table 2 was drilled on the upland part of a property which is substantially wetlands bordering the Kenai River. Their wetlands were determined by USACE and are shown in Appendix A. The USACE determination includes looking at shallow onsite test pits, in which standing water was visible (this is the seepage face boundary that provides water to the Kenai River shown in Figure 4, which sits above river level). Gravier had started to notice a change in his wetland levels – and this can happen when an aquifer is backfilled with less permeable material causing a change in the overall ability for an aquifer to pass water.

.

## **WATER QUALITY AND WELLHEAD PROTECTION**

As mentioned, there are two end-members to aquifers, shallow unconfined aquifers, and deeper confined aquifers; both are present in the Patson material site and surrounding area.

*Unconfined aquifers* are more susceptible to pollution since they have a very direct connection to the surface, and some of the neighboring wells are located in this aquifer as shown in Table 2.

*Table 2. Selected Shallow Wells in the Vicinity of Patson Materials Site (Summary from Appendix A)*

<b>Well Name</b>	<b>Well Location</b>	<b>KPB Parcel #</b>	<b>Well Depth</b>
Hardy Well (now Jeremy Pechtel)	Lot 10 Block 3 River Park Estates	13524106	35 feet
McBride Well	Patson Road Tract A	13524330	107 feet
Gravier Well	Lot L1 Triangle J Subdivision	13524306	64 feet
Ferguson Well	Lot L2 Triangle J Subdivision	13524317	42 feet

While the McBride well location is 200 feet from the boundary of the materials site, there are many other lots which are also close to the materials site boundary and on the south bank of the Kenai River. Several of these lots already have residences on them.

### **Unconfined Aquifer**

The shallow unconfined aquifer is where gravel extraction is taking place. It is within this aquifer where we would see any direct impacts from gravel extraction on water quality. The usual concerns might include fuel spills and turbidity. Neighboring properties understand that an industrial activity is occurring *in* their water supply zone, already less protected from surface contamination than would be the local confined aquifer. That is, this materials site is operating within the recharge and aquifer zone used by existing shallow wells within 2,000 feet as shown in Table 2. This operation of aquifer removal will change the hydrogeology of the area: so using pre-existing groundwater potentials to predict future groundwater flow direction as a way of water quality assurance to neighboring properties in any development for permitting is a flawed concept.

However there is a much larger water quality concern here from the planning of community water supplies. As the public is aware, the City of Soldotna has spent considerable resources in groundwater exploration to reduce the amount of arsenic in its public water supply. This is partly why Well E (~ 1,500 feet from the Patson Materials Site) is a substantial water well, as opposed to its Reservoir Well.

Studies had shown that the shallow unconfined aquifer surrounding Well E had potential for groundwater supply as a future viable option for reducing the Arsenic in the overall public water supply. This location is important because it is already within the City water supply infrastructure.

In addition, water quality was expected to improve in the upgradient direction from Well E, into areas where the confining layer is less defined. The reasoning here is that Arsenic must come from the dissolution of minerals in

the aquifer matrix, and a shorter aquifer contact time over a large area has been shown to lower overall arsenic concentration along the Kenai River basin in this area (Coble, 2006).

This is just one public benefit resource conflict that needs to be addressed, noting that the City of Soldotna drinking water interests involve the whole community – and as community populations can increase, the demand for materials sites increases just as these areas for groundwater exploration had been cited as wise to set aside from a water quality perspective (Coble, 2006).

### **Confined Aquifer**

Wellhead protection seeks to reduce the incidence of groundwater pollution by activities ‘within a wellhead’ which can be loosely defined as the area where a well is extracting water.

The City of Soldotna Well E is a relevant well in this memorandum, as it has a large wellhead encompassing the Patson Materials Site and produces a significant amount of the water for the City. During a single pumping test in 2003 it produced over 9 feet of drawdown in a well *across the river in Swiftwater Park* (Coble, 2003), and measurable at three wells between 7,000 and 9,000 feet away. This is why we say the wellhead of Well E likely *does* impact confined aquifer levels under the Patson Material Site (e.g. the confined Foster Construction well of Appendix A) which is about 3,500 feet away.

This means we really rely on this confining layer. But what if contaminants did breach the confining layer...in other words, should a discussion be had about a potential fuel spill on top of a confining layer regarding public water supply? Confining layers are far from perfect; flow has been shown in KPB pumping tests between the unconfined and confined aquifers, especially close to the pumped well – and no such test was performed on Well E.

Given the long and expensive efforts by the City of Soldotna to reduce arsenic in its water supplies, we would benefit from looking at Soldotna’s wellhead protection. This would include subjects such as *Roles and Responsibilities*, or the individuals responsible for the development, implementation of the local public water supply (a resource that concerns everyone), basic *Wellhead Protection Area Delineation*, in order to identify and limit potential sources of contamination within the wellhead protection area, *Wellhead Protection Area Management* which would provide ways to prevent potential sources of contamination from reaching the public water supply wellfield, a *Contingency Plan* in case of a water supply emergency related to use of conflicting resources, *New Wells* to provide information on existing groundwater availability and future demands, and the vulnerability of the existing wells to contamination, as well as *Public Education and Outreach* to generate community awareness in wellhead protection.

So from a regulatory standpoint, there is at least some effort to determine how large the important public wellhead areas are, where future groundwater exploration may be in conflict with material sites, and how robust the confining layer is within the wellhead etc.

## **REFERENCES**

Coble, 2002. *Groundwater Contributions to the Lower Anchor River Watershed: An analysis of the relationships between communities and their watersheds*, by Coble Geophysical Services for Community Rivers Planning Coalition and Homer Soil and Water Conservation District, August, 2002, ~ 77pp.

Coble, 2003. *Final Report: Well E and Surrounding Aquifer Evaluation for the City of Soldotna*, prepared for City of Soldotna by Coble Geophysical Services, 3/05/03, 115 pp.

Coble, 2006. *Final Report: Mapping Aquifer Geometry For Groundwater Exploration for the City of Soldotna*, prepared for City of Soldotna by Coble Geophysical Services, July 2006, ~ 250 pp.

Freeze, R. Allan; Cherry, John A., 1979. *Groundwater*, by Prentice-Hall, Inc., Englewood Cliffs, N.J. 604 pp.

Sophocleous, M; Townsend, M.A.; Vogler, V.D.; McClain, T.J.; Marks, E.T.; and Coble, G.R., 1988. *Experimental studies in stream-aquifer interaction along the Arkansas River in Central Kansas - Field testing and analysis*, Journal of Hydrology V98, Issue 3-4, pp 249-273.

>*The State of Alaska reclamation requirement would be impossible to meet given the removal of the entire aquifer while using the standard of returning the property to a state that is 'as contemporaneously as possible' (Appendix E)*

>*The author's resume has been included in Appendix B at your request.*

# *APPENDIX A*

## WELL LOGS





STATE OF ALASKA 21186  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF MINING, LAND & WATER  
Alaska Hydrologic Survey

WATER WELL LOG

Drilling Started: / /		Completed: 1 / 1 / 1970		Pump Install: / /	
City/Borough	Subdivision	Block	Lot	Property Owner Name & Address	
Soldotna	TRIANGLE J		L2	BILL FERGUSON ,	
Well location: Latitude		Longitude			
Tendian S		Township 005N Range 010W Section 35 SW 1/4 of SW 1/4 of SW 1/4 of NW 1/4			
<b>BOREHOLE DATA:</b> (from ground surface) Suggest T.M. Hanna's hydrogeologic classification system* <a href="https://miv.nwra.org/NC/Product?id=a185000000BYub3AAD">https://miv.nwra.org/NC/Product?id=a185000000BYub3AAD</a>					
Depth		Drilling method: <input type="checkbox"/> Air rotary, <input type="checkbox"/> Cable tool, <input type="checkbox"/> Other			
From To		Well use: <input type="checkbox"/> Public supply, <input type="checkbox"/> Domestic, <input type="checkbox"/> ReInjection, <input type="checkbox"/> Hydrofracking			
		<input type="checkbox"/> Commercial, <input type="checkbox"/> Observation/Monitoring, <input type="checkbox"/> Test/Exploratory, <input type="checkbox"/> Cooling,			
		<input type="checkbox"/> Irrigation/Agriculture, <input type="checkbox"/> Grounding, <input type="checkbox"/> Recharge/Aquifer Storage,			
		<input type="checkbox"/> Heating, <input type="checkbox"/> Geothermal Exploration, <input type="checkbox"/> Other			
		Fluids used: _____			
		Depth of hole: 42 ft Casing stickup: _____ ft			
		Casing type: _____ Casing thickness: _____ inches			
		Casing diameter: _____ inches Casing depth: _____ ft			
		Liner type: _____ Depth: _____ ft Diameter: _____ inches			
		Note: _____			
		Well intake opening type: <input type="checkbox"/> Open end, <input type="checkbox"/> Open hole, <input type="checkbox"/> Other			
		Screen type: _____ Screen mesh size: _____			
		Screen start: _____ ft, Screen stop: _____ ft, Perforated <input type="checkbox"/> Yes <input type="checkbox"/> No			
		Perforation description: _____ Perf from: _____ ft, Perf to: _____ ft, Perf from: _____ ft, Perf to: _____ ft			
		Gravel packed <input type="checkbox"/> Yes <input type="checkbox"/> No Gravel start: _____ ft, Gravel stop: _____ ft			
		Note: _____			
		Static water (from top of casing): 33 ft on / / Artesian well <input type="checkbox"/>			
		Pumping level & yield: _____ feet after _____ hours at _____ gpm			
		Method of testing: _____			
		Development method: _____ Duration: _____			
		Recovery rate: _____ gpm			
		Grout type: _____ Volume _____			
		Depth: From _____ ft, To _____ ft			
		Final pump intake depth: _____ ft Model: _____			
		Pump size: _____ hp Brand name: _____			
		Was well disinfected upon completion? <input type="checkbox"/> Yes <input type="checkbox"/> No			
		Method of disinfection: _____			
		Was water quality tested? <input type="checkbox"/> Yes <input type="checkbox"/> No			
		Water quality parameters tested: _____			
		Well driller name: WAYNE WESTREB			
		Company name: M-W DRILLING INC			
		Mailing address: PO BOX 110378			
		City: Anchorage State: AK Zip: 99511			
		Phone number: (907) 345 - 4000			
		Driller's signature: _____			

Include description or sketch of well location (include road names, buildings, etc.):

AS 41.08.020(b)(4) and AAC 11 AAC 93.140(a) require that a copy of the well log be submitted to the Department of Natural Resources.



## Laboratory Analysis Report

Justin Nelson

2021.04.08

14:33:43

-08'00'

Kay Tauriainen  
Tauriainen Engineering & Testing  
35186 Spur Highway  
Soldotna, AK 99669

Results via Engage

Work Order: 1211389  
Ferguson Well  
Client: Tauriainen Engineering & Testing  
Report Date: April 08, 2021

EMAILED  
APR 08 2021

Enclosed are the analytical results associated with the above work order. The results apply to the samples as received. All results are intended to be used in their entirety and SGS is not responsible for use of less than the complete report. If you have any questions regarding this report, or if we can be of any other assistance, please contact your SGS Project Manager at 907-562-2343. This document is issued by the Company under its General Conditions of Service accessible at <http://www.sgs.com/en/Terms-and-Conditions.aspx>. Attention is drawn to the limitation of liability, indemnification and jurisdiction issues defined therein. Any holder of this document is advised that information contained hereon reflects the Company's findings at the time of its intervention only and within the limits of Client's instructions, if any. The Company's sole responsibility is to its Client and this document does not exonerate parties to a transaction from exercising all their rights and obligations under the transaction documents. Any unauthorized alteration, forgery or falsification of the content or appearance of this document is unlawful and offenders may be prosecuted to the fullest extent of the law.

SGS maintains a formal Quality Assurance/Quality Control (QA/QC) program. A copy of our Quality Assurance Plan (QAP), which outlines this program, is available at your request. The laboratory certification numbers are AK00971 (DW Chemistry & Microbiology) & 17-021 (CS) for ADEC and 2944.01 for DOD ELAP/ISO 17025 (RCRA methods: 1020B, 1311, 3010A, 3050B, 3520C, 3550C, 5030B, 5035A, 6020B, 7470A, 7471B, 8015C, 8021B, 8082A, 8260D, 8270D, 8270D-SIM, 9040C, 9045D, 9056A, 9060A, AK101 and AK102/103). SGS is only certified for the analytes listed on our Drinking Water Certification (DW methods: 200.8, 2130B, 2320B, 2510B, 300.0, 4500-CN-C.E, 4500-H-B, 4500-NO3-F, 4500-P-E and 524.2) and only those analytes will be reported to the State of Alaska for compliance. Except as specifically noted, all statements and data in this report are in conformance to the provisions set forth by the SGS QAP and, when applicable, other regulatory authorities.

*	The analyte has exceeded allowable regulatory or control limits.
!	Surrogate out of control limits.
B	Indicates the analyte is found in a blank associated with the sample.
CCV/CVA/CVB	Continuing Calibration Verification
CCCV/CVC/CVCA/CVCB	Closing Continuing Calibration Verification
CL	Control Limit
DF	Analytical Dilution Factor
DL	Detection Limit (i.e., maximum method detection limit)
E	The analyte result is above the calibrated range.
GT	Greater Than
ICV	Initial Calibration Verification
J	The quantitation is an estimation.
LCS(D)	Laboratory Control Spike (Duplicate)
LLQC/LLIQ	Low Level Quantitation Check
LOD	Limit of Detection (i.e., 1/2 of the LOQ)
LOQ	Limit of Quantitation (i.e., reporting or practical quantitation limit)
LT	Less Than
MB	Method Blank
MS(D)	Matrix Spike (Duplicate)
ND	Indicates the analyte is not detected.
RPD	Relative Percent Difference
TNTC	Too Numerous To Count
U	Indicates the analyte was analyzed for but not detected.

Note: Sample summaries which include a result for "Total Solids" have already been adjusted for moisture content.



**SGS Ref.#** 1211389001  
**Client Name** Taurainen Engineering & Testing  
**Project Name/#** Ferguson Well  
**Client Sample ID** Arctic Room Sink  
**Matrix** Drinking Water

**Printed Date/Time** 04/08/2021 10:21  
**Collected Date/Time** 03/30/2021 7:15  
**Received Date/Time** 03/31/2021 9:18  
**Technical Director** Stephen C. Ede

Sample Remarks:

Parameter	Results	LOQ	Units	Method	Container ID	Allowable Limits	Prep Date	Analysis Date	Init
<b>Metals by ICP/MS</b>									
Aluminum	ND	20.0	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Antimony	ND	1.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Arsenic	ND	5.00	ug/L	EP200.8	A	(<10)	04/01/21	04/01/21	ACF
Barium	2.23J	3.00	ug/L	EP200.8	A	(<2000)	04/01/21	04/01/21	ACF
Beryllium	ND	0.400	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Cadmium	ND	0.500	ug/L	EP200.8	A	(<5)	04/01/21	04/01/21	ACF
Calcium	8140	500	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Chromium	ND	2.00	ug/L	EP200.8	A	(<100)	04/01/21	04/01/21	ACF
Cobalt	ND	4.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Copper	245	1.00	ug/L	EP200.8	A	(<1000)	04/01/21	04/01/21	ACF
Iron	ND	250	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Lead	0.562	0.200	ug/L	EP200.8	A	(<15)	04/01/21	04/01/21	ACF
Magnesium	2250	50.0	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Manganese	2.42	1.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Mercury	ND	0.200	ug/L	EP200.8 M	B		03/31/21	04/01/21	ACF
Molybdenum	ND	2.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Nickel	1.09J	2.00	ug/L	EP200.8	A	(<100)	04/01/21	04/01/21	ACF
Phosphorus	ND	200	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Potassium	1100	500	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Selenium	ND	5.00	ug/L	EP200.8	A	(<50)	04/01/21	04/01/21	ACF
Silicon	9190	1000	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Silver	ND	1.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Sodium	6790	500	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Thallium	ND	1.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Tin	ND	1.00	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Titanium	ND	25.0	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Vanadium	ND	20.0	ug/L	EP200.8	A		04/01/21	04/01/21	ACF
Zinc	8.91J	10.0	ug/L	EP200.8	A	(<5000)	04/01/21	04/01/21	ACF





THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

## Department of Natural Resources

DIVISION OF MINING, LAND & WATER  
Water Resources Section

550 West 7th Avenue, Suite 1020  
Anchorage, AK 99501-3579  
Main: 907.269.8600  
TTY: 711 or 800.770.8973  
Fax: 907.269.8904

April 22, 2021

William & Karen Ferguson  
PO Box 261  
Soldotna, AK 99669

RE: Application for Water Right: Case File - LAS 33630

---

Dear Mr. & Mrs. Ferguson:

The Department of Natural Resources (DNR), Water Resources Section, received your "Application for Water Right" on April 19, 2021 and initiated case file LAS 33630. The provisional priority date of any eventual water right resulting from this application, when it is adjudicated and if a permit to appropriate water or a certificate of appropriation is granted, will be April 19, 2021.

It has been determined that your "Application for Water Right" is complete per 11 AAC 93.040. However, this does not prevent the DNR from requesting additional information in the future, before or while your case file is being adjudicated. Applications are generally adjudicated based on date of receipt.

Please be aware that this office has a backlog of applications and it cannot be determined at this time when a staff member will be able to begin adjudication of your application. If you have any questions concerning your application, please feel free to contact this office at 907.269.8600 and refer to the LAS number referenced above. Thank you for participating in securing water rights under the Alaska Water Use Act.

Sincerely,

Christine Ballard  
Natural Resource Specialist II

## Kranberger Drilling Co. Well Drilling Log

Well owner: Gravier, Mike Driller: RRK Completion: 5/31/00  
 Builder: \_\_\_\_\_ City: Soldotna  
 Road/Area: Funny River/Troys Rd  
 Legal 1: \_\_\_\_\_ Legal2: \_\_\_\_\_

Depth: <u>64</u>	Casing length: <u>66</u>	Diameter: <u>6</u>	Rig type: <u>RR</u>
Static level: <u>5</u>	Yield/GPM <u>15.0</u>	Finish of well: <u>open end</u>	

0-1 topsoil

23-27 wet gravel & sand

32-58 sticky gray clay

60-62 gray rocky clay

67-70 silty sand,gru,clay water

(8" to 36')

1-23 gravel & sand

27-32 wet silt,sand,gravel

58-60 brown clay,gru,rocks

62-667 sand,gravel,water

70-brown clay

POA-2016-439

Wetland delineation for planning purposes only.

**Legend**  
Delineation  
Reviewed area  
Wetland







## Darc Enterprises

### WELL DRILLING

*Licensed • Bonded • Insured*

Rex Bennett, Owner  
Caren Bennett, Bookkeeper

**(907) 283-4745**

404 Baker Street  
Kenai, Alaska 99611-8239

August 16, 2004

Joe & Billie Hardy  
Hardy's Alaskan Adventures  
PO Box 3391  
Soldotna, AK 99669

Dear Mr. & Mrs. Hardy:

The following is the well log for the well drilled August 11-16, 2004, at Lot 10 Block 3 River Park Estates:

0	-	4	clay soil and silty sand
4	-	26	silty gravel
26	-	35	water in clean gravel, 13' head

water static: 22'

pull down: negligible

set ¾ hp Gould pump at 23'; pumped @ 15 gpm for 10 minutes to check pull down,  
which was negligible

reset ¾ hp Gould pump at 34'; pumped @ 15 gpm for four hours until clean

Thank you for this opportunity to be of service.

Yours truly,

**Darc Enterprises**

Caren Ann Bennett

RDB/cab  
lg081104.ltr\_Hardy\_Lot10

**Dale McBride**

From:  
Sent:  
To:  
Subject:

*Well Drilling Log --- Kraxberger Drilling Inc. ---- (907) 262 - 4720*

48230 Gas Well Road  
Soldotna, Alaska 99669

Owner:	MCBRIDE, DALE	Road / Area:	FUNNY RIVER PATSON ROAD	Well log #	4973
Legal description	TRACK A				
		Builder:	CHENY EX HOLT BULDE		
City:	SOLDOTNA				

Depth:	107	Date completed	6/22/2011	Driller	RRK	Water sys. class:	
Yield (gpm)	100	Static level:	-10	Casing length:	109	Above ground:	2
Well completion:	30 FT 8 IN CASING FLOWED 50 GPM			Diameter(in)	6	Prim. casing typ	steel
				Rig type	AR	Grout:	none

0-2 TOP SOIL+CLAY  
2-17 SAND + GRAVEL  
17-25 SAND, GRAVEL, COBBLES  
25-92 GRAY CLAY  
92-104 GRAVEL+CLAY  
104-107 GRAVEL, SAND+ WATER

8" CASING 29'



Attachment B

**Smith Well Drilling**

35876 Isbell St.  
Soldotna, Ak 99669  
Ph(907)-262-3970

**Water Well Construction Log**

**Log ID 836**

**Well Owner:** Foster Construcion

**Date Completed:** 05/07/2021

**Nearest Community:** Soldotna

**Driller:** Tyler Smith

**Well Location:** Patson Rd.-Funny River

<b>Use of Well:</b>	Commercial	<b>Depth of Well:</b>	180ft	<b>Static Water Level:</b>	Above Ground Level
<b>Depth of Casing:</b>	165ft	<b>Casing Stickup:</b>	2ft	<b>Pumping Level:</b>	160ft <b>Duration:</b> 4hr(s)
<b>Casing Type:</b>	Steel	<b>Casing Dia:</b>	6in.	<b>Flow Rate:</b>	300GPM <b>Testing Method:</b> Air
<b>Casing Thickness:</b>	0.250in.	<b>Finish of Well:</b>	Screen	<b>Development Method:</b>	Air <b>Drilling Method:</b> Air Rotary
<b>Intervals and Size:</b>	12 Slot Stainless Steel Screen			<b>Drilling Fluid:</b>	Water
<b>From:</b>	165ft	<b>To:</b>	180ft		

**Drillers Material Log**

(Description of strata penetrated)

Depth Below Top  
Of Casing In Feet

<b>From</b>	<b>To</b>	<b>Material</b>
0	35	Brown Gravel
35	116	Blue Clay and Gravel
116	128	Blue Clay
128	140	Blue Silt and Sand
140	165	Blue Sand and Gravel
165	170	Blue Sandstone
170	180	Blue Sand

# *APPENDIX B*

## RESUME *for*

*Geoffrey R. Coble, MS PG*

**GEOFFREY R. COBLE**  
**MANAGER, COBLE GEOPHYSICAL SERVICES**

**ADDRESS**

Homer Professional Building  
910 East End, Suite #1  
Homer, Alaska 99603  
Work Phone: (907) 399-6366  
Email: [coblegeophysics@gmail.com](mailto:coblegeophysics@gmail.com)

**EDUCATION**

M.S. with Honors (1989)	Water Resources Science Department of Civil Engineering University of Kansas
B.S. (1989)	Geophysics Department of Geology University of Kansas
B.S. (1985)	Geology Department of Geology University of Kansas

**PROFESSIONAL EMPLOYMENT**

1994-2021	Manager, <b>COBLE GEOPHYSICAL SERVICES</b> . Projects have included solving groundwater, unsaturated zone and surface water problems, as well as shallow geophysics and groundwater-surface water interaction. Projects include environmental projects, pumping tests to obtain parameters and well characteristics, groundwater modeling and evaluation of shallow and deep aquifers, solving unsaturated zone and aquifer remediation design problems, implementing enhanced remediation techniques, and hydrogeologic assistance for engineering firms in Alaska.
1989-1994	Senior Water Resource Scientist, Environmental Science and Engineering, Inc. Projects completed as a professional consultant include: remediation design and implementation for numerous environmental projects, the development of a model to determine groundwater-surface water interactions altered by diversion for a major power utility, numerous (over 100) water resources related modeling projects for private sector and government projects, management of aspects of large water resources projects, field team leader for groundwater well installation and geophysical data collection, routine report writing and computer programming, verbal presentation of models to clients (such as other

## **PROFESSIONAL EMPLOYMENT (continued)**

consulting firms and private industry), and professional development including technical seminars and conferences.

- 1985-1989 Graduate Research Assistant, University of Kansas, Kansas Geological Survey, Geohydrology Section. Projects included research and field work for a large scale pumping test and for a groundwater recharge project, analyses and computer modeling of unsaturated flow data, computer modeling of pumping test data and numerous smaller projects.
- 1986 Computer programmer, University of Kansas, Kansas Geological Survey, Geohydrology Section. Computer programming for staff scientist Alan MacFarlane on a project-to-project basis. Duties included data management and computer graphics.
- 1984-1985 Student Research Assistant, University of Kansas, Kansas Center for Research Incorporated, Petrology Laboratory. Work involved using heavy liquids and a magnetic separator to obtain the mineral zircon for dating igneous rock. Duties included maintenance of detailed logs of laboratory work and frequent progress reports.
- 1983 Field Research Assistant. Duties were to assist in the analysis of the stratigraphy of the House Range complex near Delta, Utah. Field tasks included outcrop sketches, orientation measurements of the stratigraphy, sampling and photography.

## **PROFESSIONAL AFFILIATIONS**

American Geophysical Union (AGU)  
American Water Resources Association, Alaska Section (President, 2000)  
International Association of Hydrological Scientists  
AIPG Certified Professional Geologist # 9088  
Alaska Registered Professional Geologist # 376  
Hazardous Materials/Site Operations Training (OSHA 1910.120(e)(8) )

# *APPENDIX C*

## COMPLIANCE *of*

### *KPB Materials Site Ordinances*

## **COMPLIANCE**

Material sites are subject to a whole host of regulations, although most of the regulatory duties are assumed by the KPB, which is the principal regulatory body responsible for guiding materials sites activity in the KPB through its ordinances.

KPB ordinances provide regulation of materials sites which includes the gravel extraction at the Patson Properties referenced in this memorandum, and this ordinance code is found in **KPB 21.29 Material Site Permits** summarized as follows:

### **Chapter 21.29. – Material Site Permits.**

The regulations for materials sites are located in this chapter of the KPB Ordinances, which categorize materials sites as follows:

- >If a material site is less than 1 acre, and does not enter the water table, there is no permit required;
- >If a material site is no more than 2.5 acres in size, and does not enter the water table, a *counter permit* is required; these are approved by the planning director, and are not subject to the notice requirements or planning commission approval;
- >If a material site is over 2.5 acres then a *conditional land use permit* (CLUP) is required for material extraction which disturbs more than 2.5 cumulative acres. A CLUP is also required for material extraction of any size that enters the water table, and required for materials processing.

The CLUP application requires:

- A buffer plan;
- Reclamation plan;
- The proposed depth of excavation;
- Type of material to be extracted and type of equipment to be used;
- A site plan and field verification prepared by a professional surveyor licensed and registered in the State of Alaska, including the following information:
  - Location and depth of test holes, and depth of groundwater, if encountered;
  - Location of wells of adjacent property owners within 300 feet of the proposed parcel boundary;
  - Location of any water body on the parcel, including the location of any riparian wetland as determined by "Wetland Mapping and Classification of the Kenai Lowland, Alaska" maps created by the Kenai Watershed Forum;
  - Surface water protection measures for adjacent properties, including the use of diversion channels, interception ditches, on-site collection ditches, sediment ponds and traps, and silt fence; provide designs for substantial structures; indicate which structures will remain as permanent features at the conclusion of operations, if any;

**21.29.040. - Standards for sand, gravel or material sites** maintains that these material site regulations are intended to:

- > protect against aquifer disturbance;
- > Protect against the lowering of water sources serving other properties;
- > Protect against physical damage to other properties.

**21.29.050. - Permit conditions** are mandatory conditions which apply to counter permits and CLUPs issued for sand, gravel or material sites which include:

> *Buffer.* A minimum six-foot earthen berm with at least a 2:1 slope (or a minimum six-foot fence), although this buffer shall not cause surface water diversion which negatively impacts adjacent properties or water bodies, where surface water diversion is defined as erosion, flooding, dehydration or draining, or channeling;

> *Water source separation.*

- »No material extraction within 100 horizontal feet of any water source existing prior to original permit issuance.
- »counter permits require a four-foot vertical separation from the seasonal high water table be maintained.
- »CLUPS shall be issued with a condition which requires that a two-foot vertical separation from the seasonal high water table be maintained.
- »no dewatering either by pumping, ditching or some other form of draining unless an exemption is granted by the planning commission (exemption for dewatering may be granted if the operator provides a statement under seal and supporting data from a duly licensed and qualified impartial civil engineer, that the dewatering will not lower any of the surrounding property's water systems and the contractor posts a bond for liability for potential accrued damages).
- »*Excavation in the water table.* Excavation in the water table greater than 300 horizontal feet of a water source may be permitted with the approval of the planning commission based on the following:
  - 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.
  - The installation of a minimum of three water monitoring tubes or well casings as recommended by a qualified independent civil engineer or professional hydrogeologist adequate to determine flow direction, flow rate, and water elevation.
  - Groundwater elevation, flow direction, and flow rate for the subject parcel, measured in three-month intervals by a qualified independent civil engineer or professional hydrogeologist, for at least one year prior to application. Monitoring tubes or wells must be kept in place, and measurements taken, for the duration of any excavation in the water table.
  - Operations shall not breach an aquifer-confining layer.

> *Waterbodies.* No earth material extraction within 100 linear feet from a lake, river, stream, or other water body, including riparian wetlands and mapped floodplains as defined in KPB [21.06](#). *In order to prevent discharge, diversion, or capture of surface water, an additional setback from lakes, rivers, anadromous streams, and riparian wetlands may be required.*

> *Fuel storage.* A common source of groundwater contamination. Fuel storage for 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.

> *Other permits.* 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 flood plain, 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. Any violation of these regulations or permits reported to or observed by borough personnel will be forwarded to the appropriate agency for enforcement.

#### **21.29.060. - Reclamation plan.**

This part of the regulation *does not reclaim the function of the removed aquifer.*

The stated emphasis throughout this section is to create a vegetated area on the surface using overburden as backfill, graded and re-contoured using overburden and topsoil in such a way that allows for the 'reestablishment of renewable resources'. If this is the goal, then it needs to be more specific, and involve specialists who are aware of what those renewable resources require *and then planting them.*

Ponding is also mentioned as a reclamation method, but in a typical case where all the gravel has been extracted then it should be mentioned that there is *no equivalency among ponds*. Groundwater storage, surrounding aquifer behavior including aquifer damming, a shortened unsaturated zone and near-surface confining layer located in a large artificial pit swale all contribute conditions to ponds. A fundamental change in landscape is often what is being permitted – so an expert on ponding would be required in the ordinance code since these are case-by-case situations if the KPB is to get the most out of this type of reclamation.



# *APPENDIX D*

Alaska Department of Natural Resources  
Division of Mining, Land and Water

## TEMPORARY WATER USE AUTHORIZATION

*State of Alaska*

Title 11 of the State of Alaska Administrative Code specifies State of Alaska Regulations having to do with Natural Resources.

Chapter 11 is the part of the part of the code is where the State of Alaska has interests in natural resources and resource conflicts relating to mining and water.

A Temporary Water Use Authorization (TWUA) is issued by the State of Alaska ADNR for the temporary use of unappropriated water. A TWUA can be issued for any length of time up to 5 consecutive years. Water use includes water withdrawals (including dewatering activities), diversions, impoundments, and in source uses. One TWUA application can be used to request up to 5 separate water sources.

Per [11 AAC 93.035 \(a\) \(b\)](#) and [11 AAC 93.220](#), a temporary water use authorization must be received from DNR prior to:

- (1) the consumptive use of more than 5,000 gallons of water from a single source in a single day; or
- (2) the regular daily or recurring consumptive use of more than 500 gallons per day (gpd) from a single source for more than 10 days per calendar year; or
- (3) the non-consumptive use of more than 30,000 gpd (0.05 cubic feet per second) from a single source; or
- (4) any water use that may adversely affect the water rights of other appropriators or the public interest.

Authorized temporary water use is subject to amendment, modification or revocation by the department. A water right or priority is not established by a temporary water use authorization.

Please note the definition of non-consumptive use per [11 AAC 93.970 \(33\)](#): "non-consumptive water use" means the instream use of water, or the diversion of water where the quantity of water diverted is not diminished except by evaporation or transpiration and the water is returned to its original source at the original point of diversion immediately after its use;

If a proposed water use does not come within the definition of non-consumptive water use, then it will be a consumptive use of water relative to the requested water source. Consequently, water uses such as diversions of water for culvert installations, (including pump arounds), excavation dewatering, and other activities where the water itself is not being put to some specific use will still require an authorization from DNR if the quantities involved exceed the significant amount of water threshold of [11 AAC 93.035\(a\) \(b\)](#). Also, the term original point of diversion is interpreted to mean the initial point of water withdrawal, not simply the same water source, (i.e. taking water from a stream and putting the water back into the stream, but not at the same point the water was initially withdrawn from, does not satisfy the original point of diversion aspect).

To obtain a temporary water use authorization in Alaska, you need to submit an Application for Temporary Use of Water to DNR. The application *must* include (per [11 AAC 93.220](#)):

- The application fee prescribed by [11 AAC 05.010](#) (see below).
- A map identifying the section, township, range, and meridian, and indicating the location, of the property, the point of use and the point of withdrawal, diversion, dewatering and/or impoundment.
- A signed application form that includes:
  1. The legal description of the point of water withdrawal, impoundment or diversion
  2. The quantity of water to be used, with documentation and calculations justifying the request.
  3. The nature of the water use and project description.
  4. The daily duration and months of use (with an expiration date).
  5. The type and size of equipment used to withdraw, divert or impound the water.

Please consider applying for a multi-year TWUA in order to ensure the full scope of a project is covered. Once a complete application is received, an agency notice (to the Alaska Department of Fish and Game and Alaska Department of Environmental Conservation) is required prior to a decision to issue or deny an authorization. Please apply for a TWUA 60 days prior to the date the TWUA is needed to allow for the application review time and decision documentation. If a TWUA expires and a new one is required for an additional period of time, a new application will have to be submitted with a new application fee.

#### Authorization Costs

An application/request regarding temporary water use must be accompanied by the appropriate filing fee of \$450 per application (which includes up to 18 hours of staff time).

#### Amendments

An amendment to a TWUA may be required for a variety of reasons such as:

- Change in water source or addition of new sources
- Change in withdrawal volume per day or per season
- Change in water use or location of use
- Change in season of use

An amendment request goes through the same adjudication process as a new application, and should be submitted **prior** to the expiration of a TWUA. Please allow 60 days for adjudication.

**There is not a form for amendments. Simply send an email or letter with the requested change to the office that issued your TWUA.**

#### Amendment Costs

An amendment to a temporary water use authorization must be accompanied by the appropriate filing fee of \$350 (which includes up to 14 hours of staff time).

#### Extensions

[Download a Request for Extension of Permit or Authorization Form](#)

- A TWUA may be extended one time only.
- It may be extended so that the TWUA covers up to 5 consecutive years total duration when combined with the initial issuance period.
- It may only be extended when it is still active. If it has already expired, it cannot be extended. If a TWUA has already expired, a new application and application fee will need to be submitted.

As with an amendment, an extension also requires an agency notice.

#### Extension Costs

An extension to a temporary water use authorization must be accompanied by the appropriate filing fee of \$350 (which includes up to 14 hours of staff time).

#### Information

**For temporary water use application instructions or questions, please contact the following:**

For temporary uses of water, contact the Anchorage office at (907) 269-7495 or [DNR.TWUA@alaska.gov](mailto:DNR.TWUA@alaska.gov)

# *APPENDIX E*

Alaska Department of Natural Resources  
Division of Mining, Land and Water

## MINING RECLAMATION

*State of Alaska Statutes*

For the State of Alaska mining reclamation, including non-state land, the Reclamation Standard can be found in Alaska Statutes (AS 27.19.020):

*A mining operation shall be conducted in a manner that prevents unnecessary and undue degradation of land and water resources, and the mining operation shall be reclaimed as **contemporaneously as practicable** with the mining operation to leave the site in a stable condition.*

And the Reclamation Plan is outlined in AS 27.19.030. Here is a link to the on-line application for a Reclamation Plan or Letter of Intent. The bonding for a Reclamation Plan is if it is over 50,000 cubic yards of material in a year being removed and over 5 acres of disturbed land. The bonding is at \$750.00 per acre:

<https://dnr.alaska.gov/mlw/cdn/pdf/forms/Material-Sales-Reclamation-Plan.pdf>

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT KENAI

HANS BILBEN, et al., )  
)  
Appellants, )  
)  
v. )  
)  
KENAI PENINSULA BOROUGH, )  
PLANNING COMMISSION, and )  
BEACHCOMBER LLC, et al. )  
)  
Appellees. )

Appeal Case No. 3KN-20-00034CI

AGENCY CASE NO. 2019-01-PCA

**MEMORANDUM DECISION AND ORDER**

On January 10, 2020, Appellants, Hans Bilben et al.<sup>1</sup> (herein referred to solely as “Bilben”), filed a *Notice of Appeal* of a Hearing Officer Decision and Order in Kenai Peninsula Borough Planning Commission (“Commission”) Case 2019-01-PCA, which ultimately granted a conditional land use permit (“CLUP”) in favor of Beachcomber, LLC, for materials extraction on certain Beachcomber property.

**I. BACKGROUND**

On June 4, 2018, Beachcomber applied for a CLUP under Kenai Peninsula Borough Code (“KPB”) 21.29.30 to excavate and process materials on 27.7 acres of its 41.72-acre property in Anchor Point.<sup>2</sup> The proposed development would occur in phases over a 15-year period, two to five acres at a time. The proposed material site is surrounded by residential and recreational properties. The site is also topographically depressed, meaning that the surrounding properties look down over any activities occurring at the proposed gravel mine.

<sup>1</sup> The Appellants in this case consist of 29 owners of real properties that adjoin or surround the proposed 27.7-acre gravel pit situated in an area presently used for residential and recreational purposes.

<sup>2</sup> Excerpt of Record (“Exc.”), pp.1-21.

Beachcomber's CLUP application contained information required by the KPB Code, including a reclamation plan and proposed buffers to minimize impact on the surrounding community.<sup>3</sup>

Notice of the CLUP was posted and public comment was invited at a meeting set for July 16, 2018. Prior to the meeting, the Commission received nearly 200 documents for consideration. At the meeting, the Commission heard hours of public testimony from over 30 people affected by the CLUP. Due to the volume of testimony, the meeting continued beyond the Commission's ordinary adjournment time. Following the meeting, the Commission deliberated on the proposed gravel mine and voted to disapprove the application by a vote of 6-3.<sup>4</sup> The Commission identified two primary reasons under KPB Code 21.29.040 for disapproving the CLUP application: (1) the noise disturbance will not be sufficiently reduced with any buffer or berm that could be added, and (2) the visual impact to the neighboring properties will not be sufficiently reduced.<sup>5</sup>

On August 2, 2018, Beachcomber appealed the Commission's denial of the CLUP. In advance of the appeal proceeding, the Planning Director submitted a brief in which he described the Commission's decision to deny the CLUP as "hasty and reactionary [...] made to accommodate the fears and concerns of the crowd."<sup>6</sup> The Planning Director requested that the Hearing Officer either approve the CLUP or remand the decision back to the Commission for further analysis.<sup>7</sup>

On December 6, 2018, Hearing Officer Holly Wells was assigned to preside over the administrative appeal. In her decision, Officer Wells discussed KPB Code 21.29.050, and held that the Commission exceeded the scope of its authority in denying the CLUP application.<sup>8</sup>, Officer Wells found that:

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<sup>3</sup> Exc. 1-4.

<sup>4</sup> Exc. 36.

<sup>5</sup> Exc. 36.

<sup>6</sup> Exc. 227.

<sup>7</sup> The Planning Director stated that the Commission did not make sufficient findings to support its denial. Specifically, "[p]ursuant to KPB 21.29.050(A)(2) the planning commission determines the appropriate height and density of the buffers for a material site within the confines of the code section. However, no exploration or effort was made to determine whether the buffers proposed by staff, or different or additional buffers, could be fashioned to screen the material site. If the planning commission believed that buffers were not feasible it should have made findings to support that position and then waived the buffers under KPB 21.29.050(e). Further, the decision lacked any reference as to whether the other 14 conditions set forth in KPB 21.29.050 were also useless to afford any protection to the surrounding property owners." See Exc. 224.

<sup>8</sup> Exc. 60.



“the Code does not provide the Commission discretion to deny such a permit when the application has been properly submitted [...] The Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in the Code [...] the [Kenai Peninsula Borough] Assembly, in adopting the Code, only granted the Commission authority to impose these conditions and ensure that any application complied with these application requirements [...] the Commission may only apply the conditions under KPB 21.29.050 when issuing a material site conditional use permit.”<sup>9</sup>

Officer Wells remanded the CLUP application back to the Commission for further findings. In ruling on a *Motion for Reconsideration* by Bilben, Hearing Officer Wells reiterated that “the Commission’s findings were not sufficient to determine whether the denial was properly within the Commission’s authority.”<sup>10</sup> Bilben did not appeal Officer Wells’ decision. On remand, the Planning Department issued a staff report and provided background information to the Commission with excerpts from the hearing with Officer Wells.<sup>11</sup>

Beginning in March, 2019, the Commission again considered Beachcomber’s CLUP application at a series of hearings and deliberations held over five days.<sup>12</sup> Commissioners expressed ongoing concerns about the CLUP application, including that Beachcomber’s proposed buffer would not adequately reduce the noise disturbance and visual impact on the surrounding properties.<sup>13</sup>

Beachcomber voluntarily added conditions to mitigate the visual and noise impacts, including (1) using roaming (rather than stationary) berms to be moved as the extraction area expanded, (2) operating onsite equipment with multi-frequency (white noise) back-up alarms instead of traditional (beep-beep) back-up alarms, and (3) restricting operating hours for rock crushing on holiday weekends during the summer.<sup>14</sup> Following deliberations, the Commission voted to approve the application by a vote of 8-2.<sup>15</sup> The Commission adopted Resolution 2018-23, which included 30 findings of fact and outlined 22 permit conditions.<sup>16</sup> The

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<sup>9</sup> *Id.*

<sup>10</sup> Exc. 56.

<sup>11</sup> *Id.*

<sup>12</sup> March 25, April 8, April 22, June 10, June 24, 2019, with public comments heard only on June 10, 2019.

<sup>13</sup> Exc. 94-96.

<sup>14</sup> Exc. 115, 117-119.

<sup>15</sup> Exc. 113.

<sup>16</sup> Exc. 114-119.

Resolution adhered to the instructions provided on remand that “[c]ompliance with the mandatory conditions in KPB [Code] 21.29.050, as detailed in the following findings, necessarily means that the application meets the standards contained in KPB 21.29.040.”<sup>17</sup>

Bilben appealed the Commission’s approval of the CLUP. On October 30, 2019, Hearing Officer Goldsmith presided over the appeal. Officer Goldsmith gave deference to the Commission’s interpretation of the Code, and found that the “Commission’s interpretation that these two provisions must be read together, and that compliance with KPB 21.29.050 necessarily means compliance with KPB 21.29.040, is reasonable.”<sup>18</sup> Hearing Officer Goldsmith upheld the Commission’s decision, finding that the “Commission acted within the scope of its authority in approving the Application, and finding that “the additional facts presented at the Commission’s 2019 public meetings on this Application provide the evidence to support the Commission’s findings of fact.”<sup>19</sup>

## II. PARTIES’ ARGUMENTS

### a. Standard of Review

The parties agree on which standards of review are appropriate for administrative decisions, but disagree as to which should be applied in this case. Bilben argues that the court should apply the independent judgment standard, arguing that deference to agency decisions are not warranted where the matter is one of purely statutory interpretation for which no agency expertise or questions of fundamental policy are involved.<sup>20</sup> Bilben argues that the question of whether the Commission has authority to disapprove a completed permit application is one of purely statutory interpretation. Bilben notes that courts have accorded deliberative weight to “what the agency has done, especially where the agency interpretation is longstanding.”<sup>21</sup> However, Bilben asserts that the Commission’s final interpretation of the Code in this case (that compliance with KPB Code 21.29.050 necessarily means compliance with KPB Code

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<sup>17</sup> Exc. 115.

<sup>18</sup> Exc. 182.

<sup>19</sup> Exc. 177.

<sup>20</sup> *Balough v. Fairbanks North Star Borough*, 995 P.2d 245 (Alaska 2000).

<sup>21</sup> *State, Dep’t of Health and Human Services, Div. of Public Assistance v. Gross*, 347 P.3d 116 (Alaska 2015).

21.29.040) is due little deference based on longevity because (1) the final interpretation of the Code did not originate from the agency, but rather from Hearing Officer Wells, and (2) the Commission has not previously been required to approve a CLUP application in a residential area with overlooking surrounding properties where the standards in KPB Code 21.29.040 could not feasibly be met.

Bilben argues that if the court applies deference to agency interpretation, it should defer to the Commission's 2018 interpretation rather than the 2019 interpretation. Bilben argues that when the Commission voted to disapprove the CLUP application in 2018, the majority of the Commission understood that the Commission was authorized to determine whether the standards in KPB Code 21.29.040 had been met prior to approving the permit.

Conversely, Appellees argue that the court should apply the reasonable basis standard of review because (1) the Commission has expertise in approving or denying CLUPs pursuant to the KPB Code and should be afforded deference; (2) one of the Commission's core statutory functions is to consider and approve properly-submitted CLUPs; (3) the Commission has maintained a longstanding and continuous policy of approving CLUPs that comply with KPB Code; and (4) the Alaska Supreme Court has specifically directed courts to be deferential when considering a zoning board's determination.<sup>22</sup>

#### **b. Discretion of the Planning Commission**

Bilben argues that the instruction provided to the Commission on remand – that it lacked the discretion to judge whether the CLUP application met the KPB Code 21.29.040 standards and that it lacked the authority to disapprove a completed permit application – was incorrect. Bilben argues that KPB Code 21.25.050(b) explicitly provides the Commission with discretion to “either approve, modify, or disapprove the permit application.”<sup>23</sup> Bilben asserts that the purpose of Chapter 21.25 is to “require advance notice, to provide an opportunity for public

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<sup>22</sup> *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 173 n.12 (“When a planning agency does, in fact, provide its interpretation of an ordinance within its area of expertise, we will give that interpretation considerable deference.”); See also, *Griswold v. Homer Advisory Planning Commission et al.*, No. S-17669, Op. No. 7515 (Alaska Apr. 9, 2021).

<sup>23</sup> KPB Code 21.25.050(b).

comment, and *impose minimum standards*” for certain land uses, including CLUPs.<sup>24</sup> Bilben further asserts that “before granting the permit, the Commission must find *at a minimum* that the proposed activity complies with the requirements” of Chapter 21.25.<sup>25</sup> Therefore, Bilben argues that the standards outlined in the Code represent the floor of the Commission’s discretionary authority, not the ceiling.

Bilben contends that statutory construction indicates that the Commission does indeed have authority to disapprove a CLUP application that does not meet the KPB 21.29.040 standards. Bilben asserts that if the Commission were prohibited from denying a completed application, various portions of the Code would be rendered obsolete, including (1) the responsibility of the Planning Director to assess the completeness of an application provided in KPB 21.25.050(A); (2) the Commission’s authority to “either approve, modify or disapprove the permit application” provided in KPB 21.25.050(B); and (3) the utility and meaning of the standards in KPB 21.25.050(B),<sup>26</sup> 21.25.020,<sup>27</sup> and 21.29.040.<sup>28</sup>

A more straightforward interpretation, Bilben argues, is that the Legislature imposed minimum standards that must be met prior to granting permission to engage in activities on a parcel of land. To that end, Bilben asserts that the Legislature divided responsibility between the Planning Director, who is responsible for assessing completeness of an application, and the Commission, which is responsible for assessing whether the standards have been met.

Moreover, Bilben asserts that the Code’s stated purpose is to “provide advance public notice, to provide an opportunity for public comment, and impose minimum standards for certain land uses which may be potentially damaging to the public health, safety and welfare, in a manner that recognizes private property rights.”<sup>29</sup> As such, Bilben argues that it would be unreasonable to adopt an interpretation of the Code that prohibits the Commission from

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<sup>24</sup> KPB Code 21.25.020 (emphasis added).

<sup>25</sup> KPB 21.25.050(B) (emphasis added).

<sup>26</sup> KPB Code 21.25.050(B) (“Before granting the permit, the commission must find at a minimum that the proposed activity complies with the requirements of this chapter.”).

<sup>27</sup> KPB Code 21.25.020 (“It is the purpose of this chapter... to impose minimum standards for certain land uses which may be potentially damaging to the public health, safety and welfare...”).

<sup>28</sup> Setting forth the list of six standards applicable to Material Site Permits.

<sup>29</sup> KPB 21.25.020.

disallowing a CLUP, regardless of the outcome of public comment, public health, safety and welfare, or whether or not the application satisfies standards imposed by KPB 21.29.040.

Bilben concedes that the Commission's authority to impose standards on material site permits is limited by KPB Code 21.29. Specifically, KPB Code 21.29.050 provides sixteen permit conditions which the Commission may impose to meet the six specific standards outlined in KPB 21.29.040. However, Bilben argues that while KPB Code 21.29.040 states that "[o]nly the conditions set forth in KPB 21.29.050 may be imposed to meet the standards," it does not otherwise restrict or define the Commission's authority to deny an application in the event that the standards are, nevertheless, not met by the applicant. Bilben argues that the word "only" in KPB Code 21.29.040 serves to limit the universe of allowable conditions that the Commission could impose on a gravel mine operator, not eviscerate the Commission's discretion to deny an application altogether.<sup>30</sup> Therefore, Bilben argues that the Commission was not in error when it disapproved the CLUP in 2018 for failure to sufficiently reduce noise or visual impacts.

In opposition, Appellees argue that the word "only" in KPB Code 21.29.040 limits the Commission's discretion to deny a completed CLUP application. Namely, that the Commission may *only* impose conditions listed in KPB Code 21.29.050 to meet the standards outlined in KPB Code 21.29.040. Appellees note that KPB Code 21.29.040 provides a list of six goals, including minimizing noise disturbances and visual impacts. However, Appellees argue that KPB Code 21.29.040 illustrates the Legislative Assembly's aspirational intent; it does not seek to eliminate *all* noise disturbances or visual impacts - instead it only aspires to *minimize* them. Appellees argue that KPB 21.29.050(A)(2)(e) explicitly gives the Commission the ability to "waive buffer requirements" entirely "where the topography of the property [...] makes screening not feasible or necessary." Appellees contend that the Commission must view a CLUP application through the lens of KPB 21.29.050 while keeping the six aspirational goals of KPB 21.29.040 in mind. Appellees argue that because the six standards of KPB 21.29.040 are aspirational, it would be improper for the Commission to deny a CLUP based only on those standards if the applicant otherwise meets the sixteen mandatory conditions outlined in KPB 21.29.050.

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<sup>30</sup> KPB 21.29.040 ("Only the conditions set forth in KPB 21.29.050 may be imposed to meet these [six] standards").

Appellees argue that the Assembly crafted legislation that favors minimal restrictions on landowners to use and control their land. In support, they assert that in 1999 the Assembly removed a Code provision that required the Commission to deny a permit application if it was either detrimental to the public welfare or injurious to other property in the area.<sup>31</sup> Instead, the Assembly adopted Code provisions that limit the Commission's discretion to deny a CLUP solely to situations in which the application fails to meet the mandatory conditions of KPB Code 21.29.050.

Both parties agree that when various Code chapters conflict, the more specific chapter controls. Appellees argue that KPB 21.29, which outlines mandatory permit conditions, is more specific than the provisions in KPB 21.25. Therefore, Appellees argue, the discretion afforded to the Commission in chapter 21.25 to "either approve, modify or disapprove" a permit application gives way to the limited discretion provided to the Commission in KPB 21.29 to deny a permit application if and only if it fails to meet the mandatory conditions of KPB 21.29.050. Appellees assert that the Commission does not have authority to impose additional conditions or requirements beyond those listed in KPB 21.29.050.<sup>32</sup> Appellees argue that in 2019, the Commission found that Beachcomber's application met all of the mandatory conditions and that approval of the CLUP was, therefore, proper.

In reply, Bilben asserts that he is not seeking to impose *additional* conditions to the CLUP, but rather only aim to apply the standards already listed in the Code.<sup>33</sup> Bilben asserts that mapped depictions of the proposed CLUP area that were created using the Borough's mapping technology demonstrates that the visual and noise impacts will not be minimized.<sup>34</sup> He further insists that conditions listed in the CLUP may be ineffective at minimizing the visual and aural impact. For example, he argues, a condition that requires a screen or buffer to be placed near the material excavation site would do nothing to minimize the impacts for the transportation routes or processing sites. For those reasons, he argues that the Commission had authority to deny the CLUP.

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<sup>31</sup> See former KPB Code 21.13.

<sup>32</sup> See Warrington, Memorandum Decision and Order, 3KN-05-00206CI, at 8.

<sup>33</sup> *Id.* Bilben argues that Warrington is distinguishable because in that case the agency found that the proposed gravel mining pit would not affect the neighboring water sources.

<sup>34</sup> Exc. 12-13.

### **c. Substantial Evidence**

Bilben argues that substantial evidence does not support the Commission's findings in Resolution 2018-23 and that Hearing Officer Goldsmith's decision upholding the Resolution must be reversed. Bilben asserts that Officer Goldsmith reasoned that substantial evidence existed for the Resolution approving the CLUP because "due consideration must be given to the Commission's interpretation of the Code."<sup>35</sup> However, Bilben asserts that it cannot be discerned whether the Commission determined that the standards had been met in 2019 because the only finding relating to standards states that the standards in KPB 21.29.040 are "necessarily met" when the mandatory conditions in KPB 21.29.050 are imposed.<sup>36</sup> Bilben contends that the evidence presented in 2019 was not sufficiently different from the evidence presented in 2018 when the Commission denied the CLUP due to visual and noise impacts.

In opposition, Appellees argue that the Commission made factual findings concerning the topography of the properties, as well as the ability of buffers to minimize noise and visual impacts. Specifically, the Commission discussed how Beachcomber's CLUP could "mar the view," and recognized that the "material site cannot be conditioned so that all adjacent parcels are equally screened by the buffers."<sup>37</sup> Appellees argue that after reviewing the evidence and detailing the findings, the Commission "deemed appropriate" the conditions imposed on Beachcomber's CLUP application.<sup>38</sup>

## **III. DISCUSSION**

### **A. Standard of Review**

When the superior court sits as a court of appeal from an administrative decision, there are four principle standards of review. The court applies the "substantial evidence test to

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<sup>35</sup> Appellant's Brief at p.35-36; Exc. 184-85.

<sup>36</sup> Exc. 115.

<sup>37</sup> Exc. 116.

<sup>38</sup> Appellee's Brief at p.24.

questions of fact,”<sup>39</sup> the “reasonable basis test to questions of law involving agency expertise,”<sup>40</sup> the “substitution of judgment test” for questions of law that do not involve agency expertise, and the “reasonable and not arbitrary standard applies to review of administrative regulations.”<sup>41</sup> The Alaska Supreme Court has recognized that planning commissions “receive deference equal to that accorded to an administrative agency,” and that “their interpretations of zoning ordinances should be given great weight and...accepted whenever there is a reasonable basis for the meaning given by the board.”<sup>42</sup>

## **B. Authority of the Planning Commission to Deny a CLUP**

A significant dispute between the parties concerns the scope of the Commission’s authority in reviewing a CLUP application. Appellants argue that the Commission initially interpreted the Borough Code to allow them to deny an application that did not sufficiently satisfy the requirements of KPB 21.29.040 even after imposing conditions contained in KPB 21.29.050. As such, Appellants urge this court to defer to the Commission’s interpretation of the Borough Code at that time. Appellee’s urge the court to adopt the Commission’s interpretation of the Borough Code as it was during the 2019 hearings. Appellant’s respond that the Commission did not interpret the Borough Code in 2019, but rather, adopted the required interpretation as ordered by Hearing Officer Wells.

At the July 16, 2018, hearing before the Commission, the commissioners discussed whether they had the authority to deny the CLUP. Commissioner Ecklund believed that the Commission had “sufficient findings to deny this permit based on...the borough code as it is written now.”<sup>43</sup> Commissioner Ruffner felt otherwise, stating that “as commissioners, our hands are tied.”<sup>44</sup> Commissioner Carluccio questioned whether the intent of the law was to

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<sup>39</sup> *Frank Griswold v. Homer Advisory Planning Comm’n, et.al.*, 484 P.3d 120, 127 (Alaska 2021) (internal citations and quotations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> *State, Dep’t of Nat. Res. V. Alaska Crude Corp.*, 441 P.3d 3939, 398 (Alaska 2018).

<sup>42</sup> *Griswold*, 484 P.3d at 127 (citing *Griswold v. City of Homer*, 55 P.3d 64, 67-68 (Alaska 2002) (quoting *S. Anchorage Concerned Coal, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993))).

<sup>43</sup> Exc. 34.

<sup>44</sup> *Id.* at 35.



protect surrounding landowners, giving the Commission authority to deny the CLUP.<sup>45</sup> As evidence by the vote of 6-3 to deny the CLUP, Other Commissioners also interpreted the Borough Code in such a way that gave the Commission the authority to deny the CLUP due to their findings that any conditions imposed would fail to sufficiently minimize noise or visual impacts.<sup>46</sup>

On appeal, Hearing Officer Wells found that the Commission exceeded the scope of its authority in denying the permit based upon its determination that the conditions would not afford adequate protection from noise and visual blight.”<sup>47</sup> She further held that “the Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in the Code.”<sup>48</sup> On remand at the June 10, 2019, hearing, some commissioners continued to recognize that they did not believe the conditions in KPB 21.29.050 would sufficiently minimize the noise and visual impacts of the material site.<sup>49</sup> At the July 24, 2019, hearing, Commissioner Ruffner, however, expressed his long-held belief that “if a permit application comes in and it’s complete and it meets the conditions that have been set forth in 21.29, then those....if those conditions are met, then we don’t have the ability to deny the permit.”<sup>50</sup>

As noted above, this court is to apply its own independent judgment to questions of law that do not involve agency expertise, but is to give deference to planning commissions in interpreting their zoning ordinances involving agency expertise “whenever there is a reasonable basis for the meaning given by the board.”<sup>51</sup> Appellants argue that this court should apply its

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<sup>45</sup> *Id.* Commissioner Carluccio eventually voted to deny the CLUP. *Id.* at 36.

<sup>46</sup> *Id.* at 36 (Commissioner Bentz noting that “I don’t think these conditions will minimize noise disturbance...and the conditions won’t minimize visual impacts either; Commissioner Morgan stated that she did not “see how the 50-foot buffer or berms are going to minimize visual impact or sound impact because of the unique topography.”; Exc. 96 (Commissioner Whitney expressed concern that “I just don’t think the berms that proposed and anything that’s going on here is adequate to control the visual impact...”)).

<sup>47</sup> Exc. 46.

<sup>48</sup> Exc. 50.

<sup>49</sup> Exc. 90 (Commissioner Ernst expressed concern that “in this unique situation...[i]s there any possible buffer that could be reasonably used to protect the, you know, the noise levels and visual impact of this pit...?; Exc. 95, Commissioner Ecklund worried that while KPB 21.29.050(14) required consideration of the “best interest of the borough and the surrounding property owners,” the limit of the Commission’s authority gave them “no meat to help [surrounding property owners] in this ordinance.”)

<sup>50</sup> Exc. 103.

<sup>51</sup> *Griswold*, 484 P.3d at 127 (citing *Griswold v. City of Homer*, 55 P.3d 64, 67-68 (Alaska 2002) (quoting *S. Anchorage Concerned Coal, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993))).

independent judgment in interpreting the Borough Code in this instance, as the scope of the Commission's authority does not involve agency expertise. Appellees argue that the Commission's interpretation of the Borough Code is entitled to deference, as it does in fact involve agency expertise.

While both arguments have merit, this court finds that under either standard of review, the Commission has authority to deny a CLUP if it determines that the requirements of KPB 21.29.040 cannot be met. It is clear that the Commission interpreted the Borough Code in 2018 in such a way that provided it with the authority to deny the CLUP, as it voted 6-3 to deny the CLUP. While the Commission voted 8-2 in favor of the CLUP in June 2019, the record is not entirely clear as to whether this decision hinged on the commissioners' belief that they were obliged to do so per Hearing Officer Wells' decision, or whether they actually found that the visual impacts and noise levels were sufficiently minimized. Thus, if this court were to apply a deferential standard of review, it would defer to the agency's interpretation as it was in June 2018.

Applying the independent judgment standard, the court finds that the Commission had the authority to deny the CLUP if the standards in KPB 21.29.040 cannot not be satisfied. KPB 21.25 details the procedure for obtaining a CLUP. KPB 21.25.040 requires a permit for "material site pursuant to KPB 21.29."<sup>52</sup> Under KPB 21.25.050, there must be a public hearing where those wishing to contest the permit can be heard. Following the hearing, the Commission "*shall either* approve, modify, or disapprove the permit application."<sup>53</sup> KPB 21.25 contains general provisions, while KPB 21.29 are more specific provisions. While this court recognizes that "where the provisions of [KPB 21.25] and a CLUP chapter regulating a specific use conflict, the more specific chapter shall control,"<sup>54</sup> the court does not find a conflict between KPB 21.25.050's requirement that the Commission "approve, modify, or disapprove" and any provision in KPB 21.29. Simply put, there is no specific provision in KPB 21.29 that precludes

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<sup>52</sup> The parties agree that the proposed gravel pit in this case falls within the definition of a "material site," and that it is of sufficient magnitude to require a CLUP rather than a "Counter Permit" under 21.29.020.

<sup>53</sup> KPB 21.25.050(B).

<sup>54</sup> KPB 21.25.010.

the Commission from denying a CLUP when it finds that the conditions in KPB 21.29.050 will not satisfy the standards in KPB 21.29.040.

KPB 21.29.040 states that the material site regulations are “intended to protect against...noise and visual impacts,” listing six standards that include “minimiz[ing] noise disturbances to other properties,” and “minimiz[ing] visual impacts.” That section also states that “*Only* the conditions set forth in KPB 21.29.050 may be imposed to meet these standards.”<sup>55</sup> Appellees assert that this language requires the Commission to grant a CLUP application so long as the conditions in KPB 21.29.050 are met. This argument is supported by Hearing Officer Wells’ finding that “the Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in the Code.”<sup>56</sup>

The language in KPB 21.29.040(A) that “*Only* the conditions set forth in KPB 21.29.050 may be imposed to meet these standards” undoubtedly limits the Commission’s authority. If the Commission believes that certain steps must be taken to meet the standards set forth in KPB 21.29.040, the only tools at its disposal to meet such standards are those conditions listed in KPB 21.29.050. Planning authorities are “bound by the terms and standards of the applicable zoning ordinance, and are not at liberty to either grant or deny [permits] in derogation of legislative standards.”<sup>57</sup> CLUP applicants may voluntarily agree to additional types of conditions that are not contained in KPB 21.29.050, but the authority of the Commission to impose such conditions is legislatively restricted.<sup>58</sup> Indeed, Appellees agreed to a number of voluntary conditions in this case.<sup>59</sup>

While KPB 21.29.040 limits the types of conditions the Commission can impose, KPB 21.29.050 provides the Commission with some latitude as to those specific conditions. For example, material sites must maintain a “buffer zone” of at least “50 feet of undisturbed natural vegetation, *or* ... a minimum six-foot earthen berm, *or*... a minimum six-foot fence.”<sup>60</sup>

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<sup>55</sup> KPB 21.29.040(A) (emphasis added).

<sup>56</sup> Exc. 50.

<sup>57</sup> *So. Anch. Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 174-75 (Alaska 1993).

<sup>58</sup> KPB 21.29.050(A)(14).

<sup>59</sup> Exc. 117-18.

<sup>60</sup> KPB 21.29.050(A)(2)(i)-(iii) (emphasis added).

However, while only one type of these conditions is required, the Commission has the authority to designate “a combination of the above *as it deems appropriate*.”<sup>61</sup> While Hearing Officer Wells found that “the Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in the Code,”<sup>62</sup> this finding appears to be in direct conflict with KPB 21.29.050’s requirement that “[t]he vegetation and 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*.”<sup>63</sup> In other words, the Commission is specifically tasked with determining the effectiveness of the conditions that are to be imposed and whether they will meet the standards set forth in KPB 21.29.040. If after judging the effectiveness of the potential conditions in its toolbox under KPB 21.29.050(A)(2) the Commission finds that no combination of buffers could be “deem[ed] appropriate” to satisfy the standards set forth in KPB 21.29.040, the Commission is not required to approve the CLUP nonetheless. Nothing in KPB 21.29 suggests otherwise, nor do any of KPB 21.29’s provision conflict with KPB 21.25.050(B) grant of authority to “approve, modify, or deny” a CLUP.<sup>64</sup>

Appellees argue that the conclusion that the Commission is required to approve the CLUP is “consistent with the unzoned rural area at issue in this appeal, along with the general approval-oriented framework adopted by the Assembly.”<sup>65</sup> Appellees cite to *Warrington v. Kenai Peninsular Borough Board of Adjustments, Cecil Jones and In Jones*, where Judge Huguelet found that “[t]he Assembly has specifically adopted ordinances that are protective of material site operators,” and “could have chose a policy that favors residential property owners, but instead it chose to adopt a policy that favors material site operators.”<sup>66</sup>

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<sup>61</sup> KPB 21.29.050(A)(2)(c).

<sup>62</sup> Exc. 50.

<sup>63</sup> *Id.* (emphasis added).

<sup>64</sup> The court is not persuaded by Appellee’s argument that an “application cannot be denied based on inadequate buffers, when under KPB Code either enhancing the buffers or waiving the buffers are the authorized resolution to a situation where buffers are not feasible.” See Appellee Brief, p.10, n.18. KPB 21.29.050(e) states that “*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.” Waiving the buffer requirements are clearly within the discretion of the Commission. Moreover, it seems to this court that the Commission would be derelict in its duties to waive the requirements in this instance given that under that Code section, “[b]uffer requirements *shall* be made in consideration of and in accordance with existing uses of adjacent property at the time of the approval of the permit.”

<sup>65</sup> Appellee’s Brief, p.18.

<sup>66</sup> Memorandum Decision and Order, 3KN-05-00206C1, at 9-10 (May 31, 2006) (Appendix A to Appellee’s Brief).

Indeed, the Borough Code significantly favors material site operators. The Commission recognized as much in its June 10, 2019, hearing.<sup>67</sup> That favoritism is not unlimited, however. Nothing in the Borough Code requires the Commission to approve a CLUP even where it finds that the conditions imposed cannot possibly minimize the visual and noise impacts to surrounding neighbors. In fact, Judge Huguelet even recognized the interplay between KPB 21.25.050's grant of authority to "approve, modify, or disapprove" permit applications where certain conditions cannot be sufficiently satisfied.<sup>68</sup>

For these reasons, the court finds that the Commission does have the authority under KPB 21.25.050(B) to deny a CLUP if it finds that the standards set forth in KPB 21.29.040 cannot be sufficiently satisfied, even after implementing the tools at its disposal listed in KPB 21.29.050.

### **C. Why Remand to the Planning Commission is Necessary**

As noted above, this court finds that the Commission does have the authority under KPB 21.25.050(B) to deny a CLUP if it finds that the standards set forth in KPB 21.29.040 cannot be sufficiently satisfied by conditions in KPB 21.29.050. Under KPB 21.25.050(B)-(C), the Commission must detail their findings in writing by way of a resolution, which they did in this case in Resolution 2018-23. The court will uphold the Commission's factual findings if they are supported by substantial evidence.<sup>69</sup>

Having reviewed the record in this case, this court agrees that the findings of fact in Resolution 2018-23 are supported by substantial evidence. However, the court finds that the findings of fact related to the Buffer Zone in Section 17 of the Resolution are legally insufficient under KPB 21.29.050(A)(2). Under that Code section, "[t]he vegetation and fence shall be of sufficient height and density to provide visual and noise screening of the proposed use as

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<sup>67</sup> Exc. 095 (Commissioner Ecklund noted that the Planning Commission had only denied two gravel pits in the ten years he had been on the commission, noting that both of those denials had been overturned).

<sup>68</sup> *Warrington* Memorandum Decision and Order, 3KN-05-00206C1, at 6, 8 (recognizing the authority of the Planning Commission to deny a permit under KPB 21.25.050, and recognizing the authority of the Planning Commission to "consider the evidence, as they did in the case at hand, to determine whether gravel mining will negatively impact the quality and quantity of water" in a nearby aquifer.).

<sup>69</sup> *State, Dep't of Nat. Res. V. Alaska Crude Corp.*, 441 P.3d at 398.

*deemed appropriate by the planning commission...*” The findings of fact in Section 17 of the Resolution detail what conditions are imposed on the CLUP, and those findings repeatedly indicate that some of the proposed conditions will “increase visual and noise screening.”<sup>70</sup>

However, the findings in Section 17 do not detail whether the Commission found those conditions to in fact be *deemed appropriate* or sufficient to satisfy the standards set forth in KPB 21.29.040. Rather, the Resolution concedes that “Compliance with the mandatory conditions in KPB 21.29.050, as detailed in the following findings, necessarily means that the application meets the standards contained in KPB 21.29.040.”<sup>71</sup> This concession is well-founded only if the Commission did in fact deem the buffer zone appropriate and sufficient to satisfy the standards set forth in KPB 21.29.040.

Throughout the hearings in both 2018 and 2019, multiple commissioners questioned whether any buffers could adequately provide visual and noise screening of the material site. In 2018, a majority of the commissioners found that the neighboring properties could not be adequately screened, with similar conditions imposed. Commissioners Bentz, Morgan and Carluccio were adamant that they did not believe the buffer or berms would minimize the noise and sound impacts because of the “unique topography.”<sup>72</sup> As a result, the Commission denied the CLUP.

In 2019, commissioners again questioned whether buffers could adequately satisfy the noise and visual standards set forth in KPB 21.29.040. Commissioner Ecklund expressed great concern that the conditions imposed would not minimize the visual and noise impacts. While he recognized that the Commission would never ask an applicant “to put a 53 [foot] high earthen berm” into place (calling the proposal “ridiculous”), he also asked whether it was in their authority to do so if necessary, to which the Borough Planner replied “Yes, and staff did...propose a 12-foot berm in most locations.”<sup>73</sup> Despite these expressed concerns,

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<sup>70</sup> Resolution 2018-21, Sec 17, ¶¶H, I, J, M, N.

<sup>71</sup> *Id.*, ¶15.

<sup>72</sup> Exc. 35-36.

<sup>73</sup> Exc. 95.

Commissioner Ecklund voted to grant the CLUP. Commissioner Carluccio questioned “but is a 12-foot berm enough to minimize visual and noise impacts?”<sup>74</sup>

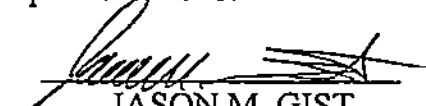
The Commission did not specifically find whether the conditions imposed on the CLUP were *deemed appropriate* to satisfy the standards set forth in KPB 21.29.040. By all accounts from the record, it appears that the Commission operated under the incorrect assumption that KPB 21.29.040 was “necessarily satisfied” so long as the CLUP contained conditions in KPB 21.29.050. It is unclear from the record whether the Commission deemed the conditions appropriate to satisfy those standards. For these reasons, the case is REMANDED back to the Commission for further review and/or clarification. If the Commission does in fact deem the conditions set forth in Resolution 2018-23 appropriate to satisfy the standards set forth in KPB 21.29.040, then it shall grant the CLUP. If, however, the Commission finds that no conditions in KPB 21.29.050 could adequately minimize visual and noise impacts to the standards set forth in KPB 21.29.040, then it may deny the CLUP.

#### IV. CONCLUSION

For the reasons stated herein, this case is REMANDED back to the Commission for further consideration consistent with this *Order*.

Dated at Kenai, Alaska, this 2nd day of September, 2021.

I certify that a copy of the foregoing was  
✓ mailed to KPB  
\_\_\_\_\_ place in court box to \_\_\_\_\_  
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AK 9-3-21  
Clerk Date

  
JASON M. GIST  
SUPERIOR COURT JUDGE

<sup>74</sup> *Id.*