

MEMORANDUM

TO: Blair Martin, Chair
Member, Kenai Peninsula Planning Commission

FROM: Sean Kelley, Borough Attorney

DATE: December 21, 2021

RE: Setting the Remand Hearing Date ITMO: Cook Inlet Region, Inc. CLUP modification application

The purpose of this scheduling discussion is for the Planning Commission to set a date to consider this matter consistent with the Court's remand decision. The Commission should not discuss the merits of the application during the scheduling discussion.

On December 2, 2021, Administrative Law Judge Rebecca Kruse entered an *Order for Remand* in the matter of *Rosenberg v. Cook Inlet Region, Inc.* (CIRI) regarding a conditional land use permit (CLUP) modification application filed by CIRI. The order highlights that the KPB Planning Commission decision on appeal states that “[c]ompliance 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 the KPB 21.29.040.”

The Order for Remand, at page 2-3, provides that:

“On remand, in light of the superior court's holding in *Bilben*, the Planning Commission should review CIRI's CLUP modification application to determine whether it meets the standards of KPB 21.29.040, not merely whether it includes the mandatory conditions in KPB 21.29.050 – similar to how the Commission reviewed CIRI's CLUP application in 2017.

It does not appear that the Commission's understanding of its discretion under KPB 21.29.040 impacted the development of the factual record. Thus Commission should be able to review CIRI's CLUP modification on remand without opening the record for

December 21, 2021

RE: ITMO: Rosenberg v. Cook Inlet Region, Inc. Remand Order

new evidence. If the Commission determines that it is has insufficient facts to proceed, however, the Borough Code does not prohibit opening the record.

One issue where the record is lacking relates to a procedural argument raised by CIRI in its opening statement. As CIRI points out, only a party of record may appeal a Planning Commission decision. One of the requirements to be a party of record is to own land within the "notification radii." It is thus unclear from the record whether Mr. Rosenberg had the right to appeal the Planning Commission's decision. A list of the landowners within the half mile radius who were mailed notice would clear up any question about who is a potential party of record."

The Order for Remand and the motion for joint stipulation filed by the parties in this matter are attached for review.

On January 10, 2021 the Planning Commission should determine when to set a remand hearing and the procedure that will be followed on remand, including whether or not the Commission finds it necessary to open the record for new evidence.

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE KENAI BOROUGH PLANNING COMMISSION**

In the matter of the Kenai Peninsula Borough)	
Planning Commission's decision to approve the)	
Modification of a conditional land use permit)	
That was requested for KPB Parcel 06508118,)	
legally described as the East ½, the East ½ of the)	
West ½, and the Northwest ¼ of the Northwest ¼,)	
Of Section 16, Township 5 North, Range 8 West,)	
Seward Meridian)	
)	
ERIC F. ROSENBERG,)	
Appellant.)	
)	
v.)	
)	
COOK INLET REGION, INC.,)	OAH No. 21-2058-MUN
Applicant.)	Agency No. 2021-03-PCA
)	

ORDER FOR REMAND

On December 6, 2021, Appellant Eric Rosenberg and Applicant Cook Inlet Region, Inc. ("CIRI") filed a joint motion and stipulation to remand this matter to the Kenai Peninsula Borough Planning Commission. The motion states that the Borough does not oppose the motion. Thus time for response does not need to be provided under KPB Code 21.20.300(B).

The parties have requested a remand in response to a September 2, 2021 superior court decision in *Hans Bilben v. Kenai Peninsula Borough, Planning Commission*, which Mr. Rosenberg attached to his Opening Statement.¹ In *Bilben*, the court explained that the Commission had previously interpreted KPB 21.29 as providing it discretion to approve or disapprove a Conditional Land Use Permit ("CLUP"), even when the application includes the mandatory conditions set forth in KPB 21.29.050.² In a 2018 appeal, a hearing officer held that the Commission did not have this discretion and remanded to the Commission for further findings.³ On appeal of the Commission's decision on remand, the superior court held that the Commission does, in fact, have discretion to adjudicate CLUP applications that include the mandatory conditions.⁴

¹ 3KN-20-00034CI (Sept. 2, 2021).

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.* at 10-15.

The record in this matter tracks the changing code interpretations at play in *Bilben*. The Planning Commission approved CIRI's CLUP in 2017 at a time when the Commission interpreted the code as providing discretion to approve or disapprove applications. Indeed, the Commission exercised that discretion in requiring an additional condition not included in the KPB 21.29.050 mandatory conditions.⁵ When CIRI applied to modify this CLUP in 2021, however, the Commission had received the hearing officer's decision in *Bilben* stating that it did not have discretion to scrutinize a CLUP application that complied with KPB 21.29.050. Thus the decision on appeal here states that "[c]ompliance 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 the KPB 21.29.040."⁶

When an appeal raises changed circumstances that could not have been presented to the Planning Commission, the matter will be remanded to the Commission for further proceedings.⁷ While changed circumstances would typically mean changes to the facts, there can also be a change to the law — or in how the Commission is to interpret the law. Here, the Commission reviewed CIRI's application and issued its decision August 9, 2021 based on how a hearing officer in *Bilben* had instructed it to interpret KPB 21.29. The superior court's decision a month later held the Commission needs to apply a different interpretation. That change in how the Commission should interpret the Borough Code is a changed circumstance that requires remand.

On remand, in light of the superior court's holding in *Bilben*, the Planning Commission should review CIRI's CLUP modification application to determine whether it meets the standards of KPB 21.29.040, not merely whether it includes the mandatory conditions in KPB 21.29.050 — similar to how the Commission reviewed CIRI's CLUP application in 2017.

It does not appear that the Commission's understanding of its discretion under KPB 21.29.040 impacted the development of the factual record. Thus Commission should be able to review CIRI's CLUP modification on remand without opening the record for new evidence. If the Commission determines that it is has insufficient facts to proceed, however, the Borough Code does not prohibit opening the record.

One issue where the record is lacking relates to a procedural argument raised by CIRI in its opening statement. As CIRI points out, only a party of record may appeal a Planning

⁵ R-38 (requiring CIRI's reclamation plan to include the requirements set forth in KPB 21.29.060(C)(3)).

⁶ R-10.

⁷ KPB 21.20.330(A).

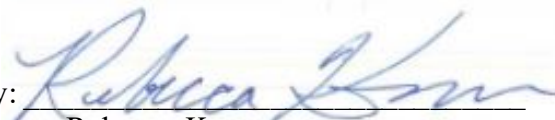
Commission decision.⁸ One of the requirements to be a party of record is to own land within the “notification radii.”⁹ The record states that notice was mailed to 255 landowners and leaseholders within a one-half mile radius of “subject parcels.”¹⁰ The record also includes a map depicting this notification radius.¹¹ The record indicates that Mr. Rosenthal is an attorney practicing law in Maryland, but also includes statements from Mr. Rosenthal that he owns and operates a business on Moonshine Drive in Soldotna.¹² CIRI argued that Mr. Rosenberg’s land is not within the notification radius and therefore he is not a party of record who could appeal.¹³ Mr. Rosenberg responded that he “lives on Moonshine Drive” and pointed to the notification radius map.¹⁴ But according to the map, not all parcels of land along Moonshine Drive are within the notification radius.¹⁵ It is thus unclear from the record whether Mr. Rosenberg had the right to appeal the Planning Commission’s decision. A list of the landowners within the half mile radius who were mailed notice would clear up any question about who is a potential party of record. Presumably the Borough has documentation of the notice it provided. On remand, the Commission is encouraged to add this information to the record.

Accordingly, Planning Commission Resolution 2021-26 is remanded to the Commission to review whether CIRI’s CLUP modification application meets the standards of KPB 21.29.040 in addition to including the mandatory conditions set forth in KPB 21.29.050. The Commission may, but is not required to, open the record for additional input from parties or the public. The Commission is, however, encouraged to add information to the record identifying the landowners within the notification radius.

This is not a final decision and therefore it is not appealable to superior court under KPB 21.20.360. Because this matter is remanded to the Commission, the hearing scheduled for December 7, 2021 is cancelled.

DATED: December 6, 2021.

By:



Rebecca Kruse
Administrative Law Judge

⁸ KPB 21.250(A); CIRI Opening Statement at 9.

⁹ KPB 21.20.210(A)(5).

¹⁰ R-10.

¹¹ R-47.

¹² R-53-55

¹³ CIRI Opening Statement at 9-10.

¹⁴ Rosenberg Reply at 3.

¹⁵ R-47.

Certificate of Service: I hereby certify that on the December 6, 2021 a true and correct copy of this document was served on the following by e-mail to the following listed below:

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BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON BEHALF
OF THE KENAI PENINSULA BOROUGH PLANNING COMMISSION

In the matter of the Kenai Peninsula Borough
Planning Commission's decision to approve the
Modification of a conditional land use permit That
was requested for KPB Parcel 06508118, legally
described as the East 1/2, the East 1/2 of the West
1/2, and the Northwest 1/4 of the Northwest 1/4,
Of Section 16, Township 5 North, Range 8 West,
Seward Meridian

ERIC F. ROSENBERG,
Appellant,

v.

COOK INLET REGION, INC.,
Applicant.

OAH No. 21-2058-MUN
Agency No. 2021-03-PCA

MOTION ON JOINT STIPULATION TO REMAND

Pursuant to KPB 21.20.300, Applicant Cook Inlet Region, Inc. ("CIRI") and Appellant Eric F. Rosenberg (together, the "Parties") hereby submit the following joint stipulation to remand of the Kenai Peninsula Borough Planning Commission's ("Commission's") approval CIRI's modification of its Conditional Land Use Permit, PC Resolution 2021-26. The Parties have agreed that PC Resolution 2021-26 should be remanded to the Commission in light of the September 3, 2021 order issued by the Alaska Superior Court in *Hans Bilben, et al. v. Kenai Peninsula Borough Comm'n and*

Beachcomber, LLC, et al., Appeal Case 3KN-20-00034CI¹ (hereinafter “*Beachcomber* decision”). The Parties request that OAH, pursuant to KPB 21.20.300.C, instruct the Commission on remand to determine whether it can make the necessary factual findings to ensure consistency with the *Beachcomber* decision based off the existing record or if it should augment the existing record with a public hearing.

The Parties have conferred with the Kenai Peninsula Borough and the other parties who entered appearances in this appeal, and the Parties have confirmed that there is no opposition to this stipulation. A proposed order granting remand is attached.

DATED: December 3, 2021.

PERKINS COIE LLP

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COOK INLET REGION, INC.

By: /s/ Eric F. Rosenberg
Eric F. Rosenberg
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Appellant

¹ See Appellant’s Opening Statement (Nov. 12, 2021), at Exhibit A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that
on December 3, 2021, a true and correct copy
of the foregoing document was served by
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