



October 30, 2019

10:00 AM

Assembly Chambers
George A. Navarre Kenai Peninsula
Borough Administration Building

Kenai Peninsula Borough Appeal Hearing Record

Case No. 2019-01-PCA: In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District.

Han Bilben,

Appellant

Emmitt Trimble,
Beachcomber, LLC

Applicant.

APPEAL & NOTICE OF APPEAL

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ENTRIES OF APPEARANCE AND ENTRIES OF
APPEARANCE

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NOTICE OF CERTIFICATION OF THE RECORD
AND NOTICE OF HEARING OFFICER AND
HEARING DATE

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NOTICE OF OPENING STATEMENTS AND
OPENING STATEMENTS

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MOTION TO EXPAND THE RECORD

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HEARING OFFICER'S DECISION ON MOTION TO
EXPAND THE RECORD

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NOTICE OF REPLY STATEMENTS AND REPLY
STATEMENTS

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Office of the Borough Clerk

144 North Binkley Street, Soldotna, Alaska 99669 • (907) 714-2160 • (907) 714-2388 Fax

Johni Blankenship, MMC
Borough Clerk

July 25, 2019

Notice of Appeal of Planning Commission Decision

Case No. 2019-01-PCA: In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District. *[Enclosed please find a copy of the appeal filed in this matter and the Notice of the Planning Commission's decision.]*

Please Complete the Following Steps:

- Step 1.** If you wish to participate in the appeal process, you **must** file an entry of appearance *(form enclosed)* with the Borough Clerk within 15 days of the mailing date of the notice of appeal by the Borough Clerk.
- Step 2.** Any party filing an entry of appearance **may** also file additional designations of error or other alternative requests for modification or reversal of the decision.
- Step 3.** The original Entry of Appearance **must** be filed with the Borough Clerk on or before **Friday, August 9, 2019**. Service shall be made by the Borough Clerk either by mail or personal delivery within two business days of the filing deadline. Service by email or facsimile is permitted when the party to be served has affirmed in writing the acceptance of alternated forms of service.

This notice is being sent to you because our records indicate you are a party of record in the subject Planning Commission decision.

Johni Blankenship, MMC
Borough Clerk
jblankenship@kpb.us

CERTIFICATE OF SERVICE

I, John Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that I mailed or caused to be mailed a Notice of Appeal, Entry of Appearance, and this Proof (Certificate) of Service.

X 
Signature

Dated this day of July 25, 2019.

Appellant BILBEN HANS & JEANNE PO BOX 1176 ANCHOR POINT, AK 99556 catchalaska@alaska.net	Applicant EMMITT AND MARY TRIMBLE BEACHCOMBER LLC PO BOX 193 ANCHOR POINT, AK 99556 emmitttrimble@gmail.com	ALAN AND LACRETIA BALLANCE 55535 PREVET CT #420 HOMER, AK 99603	ALASKA DNR KYLE KIDDER 550 W 7TH AVE SUITE 900C ANCHORAGE, AK 99501 kyle.kidder@alaska.gov
ALEXANDER TOM & PATTY 785 CASCADE CT PALMER, AK 99645 pmedic1568@yahoo.com	ALLISON TRIMBLE PAPAROA 3020 UPLAND WAY FERNDAL, WA 98248 allisontrimblerealestate@gmail.com	ANGELA ROLAND 4014 BEN WALTERS LN APT C6 HOMER, AK 99603 angelaroland@gmail.com	BAKER R O ROBERT O BAKER II TRUSTEE PO BOX 870 ANCHOR POINT, AK 99556 bobkleen@acsalaska.net
BLAIR GERALD PO BOX 978 ANCHOR POINT, AK 99556	BOB SHAVELSON 3734 BEN WALTERS LN HOMER, AK 99603 bob@inletkeeper.org	BRANTLEY MICHAEL PO BOX 950 ANCHOR POINT, AK 99556	BRNA PHILIP J 5601 E 98TH AVE ANCHORAGE, AK 99507 fisheyeak@gmail.com
BUZZ KYLLONEN PO BOX 49 ANCHOR POINT, AK 99556	CARLA MILBURN 66090 MOOSEWOOD CT ANCHOR POINT, AK 99556 cjm2@me.com	CARLTON RICHARD D & MARIE 722 W 45TH AVE KENNEWICK, WA 99337 seaburyroad@live.com	CARRIE HARRIS PO BOX 385 ANCHOR POINT, AK 99556 myalaska9.3@gmail.com
CHANDRA CAFFROY PO BOX 522 ANCHOR POINT, AK 99556	CHARITY JACOBSON PO BOX 21 ANCHOR POINT, AK 99556	CHRIS CRUMM PO BOX 375 ANCHOR POINT, AK 99556 christinecrum1@gmail.com	CLINE ANN AND RICHARD 61 TRILLIUM TRL UNDERWOOD, WA 98651 captrichie@icloud.com
COOWE WALKER KBNERR 2181 KACHEMAK DR HOMER, AK 99603 cmwalker9@alaska.edu	COSMAN TERESA PO BOX 563 ANCHOR POINT, AK 99556 sleepybear@alaska.net	CULLIP GARY L & SANDRA L 1523 SW 58TH LN CAPE CORAL, FL 33914 buffycody@msn.com	DAN & CATHY MILLARD 2266 PANORAMA WAY W GUNTERSVILLE, AL 35976
DAN SYME PO BOX 1457 ANCHOR POINT, AK 99556	DAPHANE MAXON 32977 HEATHER GLEN CT ANCHOR POINT, AK 99556 daphane50@gmail.com	DAVID DRAKE PO BOX 985 ANCHOR POINT, AK 99556 cope_10@yahoo.com	DAVID DRIGGERS PO BOX 745 ANCHOR POINT, AK 99556 david.driggers@gmail.com
DAVID S ANDERSON PO BOX 475 ANCHOR POINT, AK 99556	DEANNA L CHESSER PO BOX 515 ANCHOR POINT, AK 99556 rddcr@acsalaska.net	DEENA BENSON PO BOX 243 ANCHOR POINT, AK 99556 nosnebaneed@gmail.com	DON HORTON PO Box 2552 HOMER, AK 99603
DONALD MAXON PO BOX 3536 HOMER, AK 99603 donaldmaxon@hotmail.com	DRINKHOUSE MARIE L 5949 S HAYFIELD RD WASILLA, AK 99623	ED MARTIN III PO BOX 521 COOPER LANDING, AK 99572 keeconstructionllc@yahoo.com	ELMALEH JOSHUA L AND CHRISTINA PO BOX 542 ANCHOR POINT, AK 99556
EMILY MUNTER 404 ROGERS RD KENAI, AK 99611 munterej@gmail.com	GARY DRAKE PO BOX 2043 HOMER, AK 99603 wolverinerockndirt@gmail.com	GEORGE KRIER PO BOX 1165 ANCHOR POINT, AK 99556 vickey@gci.net	Gina M. DeBardelaben PO Box 468 SOLDOTNA, AK 99669 ginadebar@mclanecg.com
GIRTON JOHN & BARBARA PO BOX 869 ANCHOR POINT, AK 99556	GORDON GARY & PAMELA PO BOX 876130 WASILLA, AK 99687 garygordon4@gmail.com	GORMAN JAMES PO BOX 1239 ANCHOR POINT, AK 99556 captainboomer@hotmail.com	GREGG WIESER PO BOX 281 ANCHOR POINT, AK 99556
GREGORY DAVID & TERESA ANN JACOBSON PO BOX 904 ANCHOR POINT, AK 99556 davidgregory0754@gmail.com	HAHN DETRICIA PO BOX 475 ANCHOR POINT, AK 99556	HOLMES WEDDLE & BARCOTT STACEY C STONE 701 W EIGHTH AVE, SUITE 700 ANCHORAGE, AK 99501 sstone@hwb-law.com	HOMER SOIL & WATER CONSERVATION DIST 432 E PIONEER AVE, STE D HOMER, AK 99603 kyra@homerswcd.org
HORTON DON & LORI 221 ELLEN CIR ANCHORAGE, AK 99515 hortons6@gmail.com	ISENHOUR LAUREN PO BOX 317 ANCHOR POINT, AK 99556	J L JORGENSEN 1223 CEDAR AVE REDLANDS, CA 92373 jjorgens@sbccd.cc.ca.us	JACK D BLACKWELL PO BOX 1247 SOLDOTNA, AK 99669 jack.blackwell@alaska.gov

JAKE WISE 1930 E END RD # B HOMER, AK 99603 jakerwise@icloud.com	JAY ALAN WRIGHT PO BOX 916 LAKE HAVASU CITY, AZ 86405	JEANNE ENGLISHBEE PO BOX 201 ANCHOR POINT, AK 99556 jeanneenglishbee@gmail.com	JIM HALVERSON PO BOX 134 ANCHOR POINT, AK 99556 jrhalver27@gmail.com
JOHN McCULLOUGH PO BOX 393 HOMER, AK 99603 john_883@hotmail.com	JOSELYN BILOON ALASKA DOT&PF 4111 AVIATION AVE ANCHORAGE, AK 99519 joselyn.biloon@alaska.gov	JOSEPH ALLRED PO BOX 708 HOMER, AK 99603 hungryegret@outlook.com	JUDY AARON PO BOX 5511 CHINIAK, AK 99615
KATIE ELSNER 215 FIDALGO AVE, SUITE 201 KENAI, AK 99611 katie@907legal.com	KIM AND LIDIA WIERSUM 2808 244TH AVE SE SAMMAMISH, WA 98075 kimwiersum@gmail.com	LANNY KELSEY 13701 ERVIN RD ANCHORAGE, AK 99516 shirleytdx@yahoo.com	LARRY SMITH 320 ARTIFACT ST SOLDOTNA, AK 99669 dlconst.smith@gmail.com
LEAH & BILL SCOTT PO BOX 1193 ANCHOR POINT, AK 99556 naturesventures@gmail.com	LINDA FEILER PO BOX 148 ANCHOR POINT, AK 99556 akmoonlit@yahoo.com	LINDA R BRUCE PO BOX 39004 NINILCHIK, AK 99639 mlpatrick335@yahoo.com	LINDA STEVENS PO BOX 330 ANCHOR POINT, AK 99556 grizzlysafety@aol.com
LORRI L DAVIS 9801 HOMESTEAD TRAIL ANCHORAGE, AK 99507 homesteadart@aol.com	MARIA BERNIER PO BOX 421 ANCHOR POINT, AK 99556 maria.bleu.ak@gmail.com	MARIE HERDEGEN 69195 KAREN CIR ANCHOR POINT, AK 99556 marieherdegen@icloud.com	MARK SCHOLLENBERGER 69195 KAREN CIR ANCHOR POINT, AK 99556 msberger@horizonsatellite.com
MARY BARNETT PO BOX 2782 HOMER, AK 99603 maryjbw@gmail.com	MIKE BRADY 804 13TH AVE SO GREAT FALLS, MT 54905	MIKE JONES PO BOX 91865 ANCHORAGE, AK 99509 anchorrivier500@yahoo.com	OLIVER RICK PO BOX 1444 ANCHOR POINT, AK 99556 roliverb747@me.com
OVERSON ELDON PO BOX 1318 ANCHOR POINT, AK 99556	PATRICK MIKE & LINDA PO BOX 335 ANCHOR POINT, AK 99556 mlpatrick335@yahoo.com	PAUL MORINO 7360 WHITE HAWK DR ANCHORAGE, AK 99507	PETE KINNEEN PO BOX 810 ANCHOR POINT, AK 99556 Biocharalaska@gmail.com
REID JIM & SUSAN PO BOX 85 EVERGLADES CITY, FL 34139 ecapjimsue@gmail.com	RICHARD AND LORETTA STAPEL PO BOX 386 ANCHOR POINT, AK 99556 stapel6@live.com	ROBERT W CORBISIER 500 L ST SUITE 300 ANCHORAGE, AK 99501 rob@reevesamodio.com	ROGER MCCAMPBELL PO BOX 321 HOMER, AK 99603
RONALD PAULSON 3820 LOWER RIVER RD TRLR 7 GREAT FALLS, MT 54905	RYAN MUZZARELLI PO BOX 170 ANCHOR POINT, AK 99556	SHARON FROMONG PO BOX 849 ANCHOR POINT, AK 99556	SHERIDAN GARY L & EILEEN D PO BOX 661 ANCHOR POINT, AK 99556 twoshar@acsalaska.net
SHIRLEY GRUBER 13701 ERVIN RD ANCHORAGE, AK 99516 shirleytdx@yahoo.com	SILVER KING RV VILLAGE ASSOCIATION MARK CLAYPOOL PO BOX 242491 ANCHORAGE, AK 99524	SOPHIA, SAMUEL, AND WILLIAM WIERSUM 2808 244TH AVE SE SAMMAMISH, WA 98075 kimwiersum@gmail.com	SPARKMAN JOSEPH J & DENISE PO BOX 767 ANCHOR POINT, AK 99556 jay1332@att.net
STEFEN HAYNES PO BOX 3337 HOMER, AK 99603 stefenopolis@yahoo.com	STEVE HABER PO BOX 2429 HOMER, AK 99603	STEVE THOMPSON PO BOX 310 ANCHOR POINT, AK 99556 stevethompson1961@yahoo.com	TED GRAY PO BOX 490 ANCHOR POINT, AK 99556
TESAR DAVID J & BONITA G PO BOX 871567 WASILLA, AK 99687	THOMAS J BROOK PO BOX 39004 NINILCHIK, AK 99639 mlpatrick335@yahoo.com	TODD BAREMAN PO BOX 1462 ANCHOR POINT, AK 99556	TOM CLARK PO BOX 962 ANCHOR POINT, AK 99556
TONY HOZA PO BOX 1177 HOMER, AK 99603 tonyhoza@gmail.com	VICKEY HODNIK PO BOX 1836 HOMER, AK 99603 vickey@gci.net	WARTBURG MICHAEL G PO BOX 849 ANCHOR POINT, AK 99556	WAYLON JANOUSEK 2110 RIVER DRIVE NORTH GREAT FALLS, MT 59401
WHITMORE LYNN PO BOX 355 ANCHOR POINT, AK 99556	XOCHITL LOPEZ-AYALA PO Box 2552 HOMER, AK 99603	YALE MARK & LEE PO Box 429 ANCHOR POINT, AK 99556 markyale2001@yahoo.com	Kenai Peninsula Borough Max Best, Planning Director 144 N. Binkley Street Soldotna, AK 99669 mbest@kpb.us
Kenai Peninsula Borough Bruce Wall, Planner 144 N. Binkley Street Soldotna, AK 99669 bwall@kpb.us	Kenai Peninsula Borough Sean Kelley, Deputy Borough Attorney 144 N. Binkley Street Soldotna, AK 99669 skelley@kpb.us	NICK FINLEY nicfin23@hotmail.com	DANICA HIGH danicabrianne@icloud.com

Appeal of Planning Commission Decision
Kenai Peninsula Borough
Office of the Borough Clerk

144 N. Binkley Street
Soldotna, Alaska 99669-7599
assemblyclerk@kpb.us

Phone: (907) 714-2160
Toll Free: 1-800-478-4441
Fax: (907) 714-2388

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JUL 10 2019

Borough Clerk's Office
Kenai Peninsula Borough

For Official Use Only

Filing Fee: \$300.00

☐ Cash

☒ Check # 5263

Appeals must be filed within 15 days of the Planning Commission Decision.

The appropriate filing fee must be received at the time of filing.

Make Checks Payable to: Kenai Peninsula Borough

Any party of record may file an appeal of a decision of the Planning Commission within 15 days of the date of the notice of the decision with the borough clerk on the forms provided and by paying the filing and records preparation fee of \$300. An appeal may be filed by personal delivery or mail as long as it is complete and received in the clerk's office by 5:00 p.m. on the day the notice of appeal is due. All appeals shall be to the hearing officer and shall be conducted in accordance with the provisions of KPB Chapter 21.20 unless otherwise provided by the Kenai Peninsula Borough Code. [KPB 21.20.250]

Appellant: Hans Bilben

Mailing Address: PO Box 1176 Anchor Point AK 99556

Email Address: catchalaska@alaska.net Daytime Telephone No.: 907 398-6156

I agree to service via email: Yes ☒ Initials HB (provide email address above) No ☐

I hereby give notice that I am appealing a decision of the Kenai Peninsula Borough Planning Commission as set forth below. I understand that this appeal will not be accepted unless accompanied by a receipt verifying that the required fee has been paid.

1. Date and resolution number of the Planning Commission's written decision from which you are appealing:

Date of decision: June 24, 2019

Resolution No. 2018-23

Summary of Decision being appealed:

Material site CLUP for Parcel 169-010-67. Applicant Beachcomber LLC.

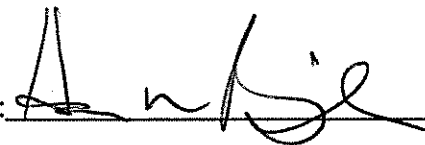
2. State specific errors asserted in the Commission's findings of fact or conclusions of law. (Attach additional sheets if necessary.)
See attached sheets:

3. State the relief you are requesting from the Board of Adjustment including whether you want the Planning Commission decision reversed, modified or remanded for further proceedings. (Attach additional sheets if necessary.)

Reverse the decision. If the Hearing Officer finds that reversal is not warranted, then modification is required to reflect conditions that will actually meet the requirements of 21.29.040 and 21.29.050. Proposed Findings of Fact are spelled out in Meeting Packet Volume 2, pages 40 - 49 of 686 for the 6/24/2019 PC Meeting.

Appeals to the Hearing Officer are governed by KPB 21.20.200-360. You will receive notice from the Borough Clerk informing you of the deadlines and requirements for filing written statements and a hearing date for the appeal.

Date: 7/10/2019

Appellant's Signature: 

2. SPECIFIC ERRORS...

The Hearing Officer remanded to the Planning Commission in December 2018 for **two** reasons. One was to list Findings of Fact referencing the Mandatory Conditions defined in KPB 21.29.050, and the other was to Provide the **substantial evidence** that supports those findings. The applicant failed to provide substantial evidence which would support the Findings. Those opposed to the permit provided substantial evidence using KPB's own technology to prove that mandatory standards in KPB 21.29.040 could not be met by the Conditions—both imposed and voluntary.

- A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT BUFFERS/BERMS MINIMIZE NOISE DISTURBANCE AND VISUAL DISTURBANCE.
- B. STAFF ERRED IN ADVISING THE PLANNING COMMISSION ON THE REQUIREMENTS OF THE CODE.
- C. THE PLANNING COMMISSION ERRED IN INTERPRETING THE CODE ON THE ISSUE OF DISCRETION AND AUTHORITY TO DENY A PERMIT.
- D. THE CONDITIONS IMPOSED ON THE PERMIT DO NOT PROVIDE SUFFICIENT VISUAL AND NOISE SCREENING.
- E. THE VOLUNTARY CONDITIONS DO NOT PROVIDE SUFFICIENT VISUAL AND NOISE SCREENING.
- F. MINIMUM STANDARDS FOR THE LAND USE WERE NOT MET IN THIS SITUATION WHICH CAUSES DAMAGE TO THE PUBLIC HEALTH, SAFETY, AND WELFARE.
- G. THE DECISION DOES NOT RECOGNIZE PRIVATE PROPERTY RIGHTS OF THE SURROUNDING USERS.

H. THE ISSUANCE OF THIS PERMIT IS IN VIOLATION OF THE REQUIREMENTS IMPOSED UNDER KPB 21.25 AND UNDER KPB 21.29.

I. ONE OR MORE COMMISSIONERS SHOULD HAVE RECUSED THEMSELVES BASED UPON DEMONSTRATED BIAS AND/OR CONFLICT OF INTEREST ISSUES.

J. ADDITION OF LAST MINUTE VOLUNTARY AND IMPOSED CONDITIONS SHOULD HAVE REQUIRED THAT PUBLIC COMMENT BE RE-OPENED, AS REQUESTED, AT 6/24 MEETING.

K. IN SEVERAL KPB CONDITIONS AND FINDINGS OF FACT THE WORD "ADJACENT" WAS SUBSTITUTED FOR THE CORRECT WORD "OTHER" FROM KPB 21.29.040. THIS SUBSTITUTION WRONGLY INFLUENCED COMMISSIONER'S DECISIONS.

L. COMMISSIONERS DELIBERATED VERBIAGE AT LENGTH ON SEVERAL MEANINGLESS VOLUNTARY CONDITIONS, BUT SPENT NO TIME DISCUSSING HOW OR IF THOSE CONDITIONS COULD ACTUALLY MEET THE MANDATORY STANDARDS OF KPB 21.29.

M. PRIOR TO THE 6/24 DELIBERATIONS TWO COMMISSIONERS ABSENT FOR THE 6/10 HEARING WERE SHOWN VIDEO PREPARED BY THE APPLICANTS DAUGHTER. THOSE TWO COMMISSIONERS WERE NOT SHOWN THE PRESENTATION PREPARED BY THOSE OPPOSED TO THE PERMIT WHICH CLEARLY DEMONSTRATED THE DEFICIENCIES IN THE APPLICATION USING GEOGRAPHIC INFORMATION SYSTEM (GIS) TECHNOLOGY OWNED BY KPB.

N. COMMISSIONER ECKLUND INDEPENDENTLY VISITED THE SITE AND QUESTIONED THE LACK OF VEGETATION IN THE 50 FOOT VEGETATED BUFFER. BRUCE WALL AGREED THAT GRASS WAS THE PRIMARY VEGETATION IN NEARLY 60% OF THE BUFFER AREA. KPB 21.29.050 MANDATES BUFFER/BERM TO BE OF SUFFICIENT **HEIGHT AND DENSITY**.

O. IN THE MINUTES BEFORE THEY VOTED, ONE COMMISSIONER ASKED WHAT A ROLLING BERM WAS. A ROLLING BERM IS NOT REFERENCED OR DEFINED IN KPB 21.29. CLEARLY THERE IS NO DEFINITION FOR WHAT A ROLLING BERM IS, WHEN IT WOULD BE MOVED (ROLLED), WHERE IT WOULD BE MOVED (ROLLED), WHAT OBJECTIVE METHOD WAS USED TO DETERMINE THE BERM HEIGHT, OR WHETHER IT COULD MEET THE STANDARDS OF KPB 21.29.040 IN EACH (OR ANY) OF THE THREE PHASES OF THE APPLICATION.

P. COMMISSIONERS ON SEVERAL OCCASIONS DURING DELIBERATIONS MADE COMMENTS INDICATING LACK OF KNOWLEDGE ON WORDING OF KPB CODE. THEY APPEARED TO JUDGE THE APPLICATION, AND VOTE, WITHOUT WITHOUT A CLEAR UNDERSTANDING OF THE CODE.

Q. DURING DELIBERATIONS THERE WAS CONFUSING OR CONFLICTING LOCATIONS OF MATERIALS IN THE RECORD. STAFF AND COMMISSIONERS APPEARED TO HAVE DIFFERING PAGE REFERENCING WHICH CREATED A SITUATION WHEREBY COMMISSIONERS HAD DIFFICULTY LOCATING EVIDENCE IN THE RECORD, AND VICE VERSA. THIS CONTRIBUTED TO UNINFORMED DECISION MAKING ON THE PART OF THE COMMISSION.



Planning Department

144 N. Binkley Street, Soldotna, Alaska 99669 • (907) 714-2200 • (907) 714-2378 Fax

June 26, 2019

Charlie Pierce
Borough Mayor

At their June 24, 2019 meeting, the Planning Commission approved a conditional land use permit for a material site that was requested for Parcel 169-010-67, Tract B, McGee Tracts - Deed of Record Boundary Survey (Plat 80-104) - Deed recorded in Book 4, Page 116, Homer Recording District.

This decision may be appealed within fifteen days of the date of the Notice of Decision. The appeal must be submitted to the borough clerk on forms provided by that office, along with a filing and records preparation fee of \$300.

If you have any questions or comments, please feel free to contact me (907) 714-2206.

Sincerely,

Bruce Wall, AICP
Planner
bwall@kpb.us

Enclosures

PERMIT CONDITIONS

1. The permittee shall cause the boundaries of the subject parcel to be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter.
2. The permittee shall maintain the following buffers around the excavation perimeter or parcel boundaries:
 - A 50-foot vegetated buffer adjacent to the south boundary of Parcel 169-022-03 (Brantley) with a six-foot high berm placed near the active extraction area.
 - A six-foot high berm between the extraction area and the 100-foot setback from the riparian wetland and floodplain
 - A 12-foot high berm along the rest of the northern boundary.
 - A 50-foot vegetated buffer adjacent to the southern parcel boundaries with a 12-foot high berm placed near the active extraction area.
 - A 50-foot vegetated buffer adjacent to the eastern most parcel boundary; and a 12-foot high berm placed near the active extraction area except along the northern 200 feet of the proposed excavation.
 - A greater than 50-foot vegetated buffer along the western most parcel boundary.These buffers shall not overlap an easement.
3. The permittee shall maintain a 2:1 slope between the buffer zone and pit floor on all inactive site walls. Material from the area designated for the 2:1 slope may be removed if suitable, stabilizing material is replaced within 30 days from the time of removal.
4. The permittee shall not allow buffers to cause surface water diversion which negatively impacts adjacent properties or water bodies.
5. The permittee shall operate all equipment which conditions or processes material at least 300 feet from the parcel boundaries.
6. The permittee shall not extract material within 100 horizontal feet of any water source existing prior to issuance of this permit.

7. The permittee shall maintain a 2-foot vertical separation from the seasonal high water table.
8. The permittee shall not dewater either by pumping, ditching or any other form of draining.
9. The permittee shall maintain an undisturbed buffer, and no earth material extraction activities shall take place within 100 linear feet from a lake, river, stream, or other water body, including riparian wetlands and mapped floodplains.
10. The permittee shall ensure that fuel storage containers larger than 50 gallons shall be contained in impermeable berms and basins capable of retaining 110 percent of storage capacity to minimize the potential for uncontained spills or leaks. Fuel storage containers 50 gallons or smaller shall not be placed directly on the ground, but shall be stored on a stable impermeable surface.
11. The permittee shall conduct operations in a manner so as not to damage borough roads as required by KPB 14.40.175, and will be subject to the remedies set forth in KPB 14.40 for violation of this condition.
12. The permittee shall notify the planning department of any further subdivision or return to acreage of this property. Any further subdivision or return to acreage may require the permittee to amend this permit.
13. The permittee shall provide dust suppression on haul roads within the boundaries of the material site by application of water or calcium chloride.
14. The permittee shall not operate rock crushing equipment between the hours of 10:00 p.m. and 6:00 a.m.
15. The permittee shall reclaim the site as described in the reclamation plan for this parcel with the addition of the requirements contained in KPB 21.29.060(C)(3) and as approved by the planning commission.
16. The permittee is responsible for complying with all other federal, state and local laws applicable to the material site operation, and abiding by related permits. These laws and permits include, but are not limited to, the borough's 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.
17. The permittee shall post notice of intent on parcel corners or access, whichever is more visible if the permittee does not intend to begin operations for at least 12 months after being granted a conditional land use permit. Sign dimensions shall be no more than 15" by 15" and must contain the following information: the phrase "Permitted Material Site" along with the permittee's business name and a contact phone number.
18. The permittee shall operate in accordance with the application and site plan as approved by the planning commission. If the permittee revises or intends to revise operations so that they are no longer consistent with the original application, a permit modification is required in accordance with KPB 21.29.090.
19. This conditional land use permit is subject to review by the planning department to ensure compliance with the conditions of the permit. In addition to the penalties provided by KPB 21.50, a permit may be revoked for failure to comply with the terms of the permit or the applicable provisions of KPB Title 21. The borough clerk shall issue notice to the permittee of the revocation hearing at least 20 days but not more than 30 days prior to the hearing.
20. Once effective, this conditional land use permit is valid for five years. A written request for permit extension must be made to the planning department at least 30 days prior to permit expiration, in accordance with KPB 21.29.070.
21. The permittee shall operate his equipment onsite with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms.
22. The permittee shall not operate the material site or haul material from the site on Memorial Day weekend (Saturday through Monday), Labor Day weekend (Saturday through Monday), and the 4th of July holiday to also include:
 - Saturday and Sunday if July 4th is on a Saturday, Sunday, Monday, or Friday
 - Saturday, Sunday, and Monday if July 4th is on a Tuesday
 - Saturday, Sunday, and Friday if July 4th is on a Thursday



Planning Department

144 N. Binkley Street, Soldotna, Alaska 99669 • (907) 714-2200 • (907) 714-2378 Fax

Charlie Pierce
Borough Mayor

NOTICE OF DECISION

At their June 24, 2019 meeting, the Planning Commission approved a conditional land use permit for a material site that was requested for Parcel 169-010-67, Tract B, McGee Tracts - Deed of Record Boundary Survey (Plat 80-104) - Deed recorded in Book 4, Page 116, Homer Recording District.

FINDINGS OF FACT

1. KPB 21.25 allows for land in the rural district to be used as a sand, gravel or material site once a permit has been obtained from the Kenai Peninsula Borough.
2. KPB 21.29 governs material site activity within the rural district of the Kenai Peninsula Borough.
3. On June 4, 2018, the applicant, Beachcomber LLC, submitted a conditional land use permit application to the Borough Planning Department for KPB Parcel 169-010-67, which is located within the rural district.
4. Land use in the rural district is unrestricted except as otherwise provided in KPB Title 21.
5. KPB 21.29 provides that a conditional land use permit is required for material extraction that disturbs more than 2.5 cumulative acres and provides regulations for material extraction.
6. The proposed disturbed area is approximately 27.7 acres.
7. Consistent with KPB 21.25.050(A) on June 21, 2018, the applicant submitted a revised site plan and application to the Planning Department that addressed issues raised by staff with the initial review of the application.
8. The submitted application with its associated documents was reviewed by staff for compliance with the application requirements of KPB 21.29.030. Staff determined that the application was complete and scheduled the application for a public hearing.
9. A public hearing of the Planning Commission was held on July 16, 2018. Public notice of the hearing was mailed on June 22, 2018 to the 200 landowners or leaseholders of the parcels within one-half mile of the subject parcel. Public notice was sent to the postmaster in Anchor Point requesting that it be posted at their location. Public notice of the hearing was published in the July 5, 2018 & July 12, 2018 issues of the Homer News. The notice requirements of KPB 21.25.060 for this meeting have been met.
10. Testimony was filed and heard regarding issues that are not addressed by the KPB 21.29.040 standards or 21.29.050 conditions. Staff and the Planning Commission in reviewing the application are not authorized by the code to consider those issues such as property values, water quality, wildlife preservation, a material site quota, and traffic safety.
11. A public hearing of the Planning Commission was held on March 25, 2019. Public notice of the hearing was mailed on March 4, 2019 to the 203 landowners or leaseholders of the parcels within one-half mile of the subject parcel. Public notice was sent to the postmaster in Anchor Point requesting that it be posted at their location. Public notice of the hearing was published in the March 14, 2019 and March 21, 2019 issues of the Homer News. The notice requirements of KPB 21.25.060 for this meeting have been met.
12. A public hearing of the Planning Commission was held on June 10, 2019. Public notice of the hearing was mailed on April 30, 2019 to the 203 landowners or leaseholders of the parcels within one-half mile of the subject parcel. Public notice was sent to the postmaster in Anchor Point requesting that it be posted at their location. Public notice of the hearing was published in the May 30, 2019 and June 6, 2019 issues of the Homer News. The notice requirements of KPB 21.25.060 for this meeting have been met.
13. At the June 10, 2019 hearing, the applicant volunteered to utilize a moving, or rolling, berm rather than a stationary berm. The berms will be placed near the active excavation area to be moved as the extraction area and reclaimed areas expand.
14. At the June 10, 2019 hearing, the applicant volunteered to operate his equipment onsite with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms.
15. 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.
16. Parcel boundaries. All boundaries of the subject parcel shall be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter.
 - A. The submitted site plan indicates the location of each of the parcel boundary stakes.
 - B. Planning staff has visited the site several times and has observed that the boundary stakes are in place.
17. *Buffer zone.* A buffer zone shall be maintained around the excavation perimeter or parcel boundaries.

- A. The applicant has proposed to maintain a six-foot high berm along all excavation boundaries except the western most boundary and along the east 400 feet of the northern boundary, where a 50-foot vegetated buffer is proposed.
 - B. There are 16 parcels adjacent to the proposed material site (adjoining or separated only by a roadway).
 - C. Eight of the adjacent parcels are vacant; one of the vacant parcels is a Prior Existing Use material site. Six of the adjacent properties have a dwelling. One of the adjacent properties has a recreational vehicle that is used as a seasonal dwelling. One of the adjacent properties contains commercial recreational cabins.
 - D. The elevation of the commercial recreational cabins is at a lower elevation than the proposed excavation area. Three of the adjacent residences are at about the same elevation as the proposed excavation area. Four of the adjacent residences are at a higher elevation than the material site parcel.
 - E. Farther away, there are additional residences in the vicinity that are at higher elevations than the adjacent properties. These parcels are less impacted by the material site than the parcels adjacent to the material site as sound dissipates over distance.
 - F. Per the site plan there is a greater than 50-foot native vegetated buffer along the western most boundary of the material site.
 - G. Along the southern and eastern property boundaries, where the applicant has proposed a six-foot high berm, staff recommends a 50-foot vegetated buffer along the property boundary with a 12-foot high berm between the extraction area and the vegetated buffer.
 - H. Over 40 percent of the southern and eastern property boundaries, where the applicant has proposed a six-foot high berm as the buffer, contains vegetation that can provide visual and noise screening of the material site for some of the adjacent uses.
 - I. For the remaining southern and eastern property boundaries, where the vegetation was previously removed, a 50-foot buffer will reduce the sound level for the adjacent properties.
 - J. A 12-foot high berm between the excavation perimeter and the vegetated buffer along the southern and eastern property boundaries will increase visual and noise screening of the proposed use beyond that of a six-foot berm along those boundaries.
 - K. The total buffer width, as recommended by staff, along the southern and eastern property boundaries is 98-feet.
 - L. As the excavation extends deeper, the visual and noise impacts will decrease because the height of the berm relative to the excavation will increase.
 - M. A six-foot high berm between the extraction area and the 100-foot setback from the riparian wetland and floodplain will provide additional visual and noise screening of the material site. The berm will also provide additional surface water protection.
 - N. A 12-foot high berm along the remaining northern property boundaries will increase visual and noise screening of the proposed use beyond that of a six-foot berm along those boundaries.
 - O. Borough staff will regularly monitor the material site to ensure that the required buffer will not cause surface water diversion that negatively affects adjacent properties or water bodies.
 - P. There has been testimony that the material site will mar the view of Mount Iliamna and Mount Redoubt. Condition 21.29.050(A)(2) is written to provide screening from the material site, not protect view sheds beyond the material site.
 - Q. Each piece of real estate is uniquely situated and a material site cannot be conditioned so that all adjacent parcels are equally screened by the buffers. The different elevations of the parcels, varying vegetation on the surrounding parcels and the proposed material site, and distance of the material site from the various surrounding parcels necessarily means the surrounding parcels will not be equally impacted nor can they be equally screened from the material site.
 - R. The applicant has volunteered a condition requiring the berm be placed near the active excavation area, dampening the noise and reducing the visual impacts at the source. The berm will be moved as excavation progresses.
18. *Processing.* Any equipment which conditions or processes material must be operated at least 300 feet from the parcel boundaries.
- A. The site plan indicates that the proposed processing area is 300 feet from the south and east property lines, and greater than 300 feet from the west property line. A processing distance waiver is being requested from the north property line.
 - B. The applicant proposed the following justifications for waiving the processing setback: "Although it is a large parcel, the configuration has limited potential process area. The waiver is requested to the north as 169-022-04 is owned by the applicant's daughter & 169-022-08 is not developed."
 - C. The 300-foot processing distance from the property lines is a mandatory condition imposed to decrease the visual and noise impact to adjacent properties.
 - D. The portion of the proposed processing area greater than 300 feet from the property line is very small, ranging from just a few feet wide to about 30 feet wide at the eastern edge of the proposed location.

- E. There is a larger area in proposed phase III of the project that meets the requirement for a 300-foot processing distance setback, as such, there is adequate room to accommodate processing on the parcel while complying with 300-foot processing setback.
19. *Water source separation.* All permits shall be issued with a condition that prohibits any material extraction within 100 horizontal feet of any water source existing prior to original permit issuance. All CLUPs shall be issued with a condition that requires that a two-foot vertical separation from the seasonal high water table be maintained. There shall be no dewatering by either pumping, ditching or some other form of draining.
- A. The submitted site plan and application indicates that there are not any wells within 100 feet of the proposed excavation. The 100-foot radius line on the site plan for the nearest well indicates that the proposed extraction is greater than 100 feet from this well.
 - B. Borough staff will regularly monitor the material site to ensure compliance with the two-foot vertical separation requirement.
 - C. Borough staff will regularly monitor the material site to ensure that dewatering does not take place in the material site.
20. *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.
- A. This permit approval does not allow excavation in the water table.
21. *Waterbodies.* An undisturbed buffer shall be left and no earth material extraction activities shall take place within 100 linear feet from a lake, river, stream, or other water body, including riparian wetlands and mapped floodplains. 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.
- A. The Cook Inlet lies about 600 feet west of the proposed material extraction.
 - B. The Anchor River, which is an anadromous stream, is located about 1,000 feet north of the proposed material extraction.
 - C. The "Wetland Mapping and Classification of the Kenai Lowland, Alaska" maps, created by the Kenai Watershed Forum, show a riparian wetland in the northeast corner of the property.
 - D. The FEMA maps adopted by KPB 21.06 indicates a mapped floodplain in the northeast corner of the property. This mapped floodplain approximately matches the mapped riparian wetland.
 - E. The site plan indicates that the proposed extraction is 104 feet from the mapped riparian wetland. There is approximately two feet difference between the mapped riparian wetland and the floodplain boundary. This places the proposed excavation at about 102 feet from the floodplain.
 - F. A portion of the required 100-foot buffer adjacent to the riparian wetlands and the floodplain is an existing stripped area.
 - G. Prior to permit issuance the applicant is required to restore the 100-foot buffer adjacent to the riparian wetlands and the floodplain to an undisturbed state.
 - H. As stated on the site plan the buffer will provide protection via phytoremediation of any site run-off prior to entering the surface water. The site plan also indicates that the Alaska DEC user's manual, "Best Management practices for Gravel/Rock Aggregate Extraction Projects, Protecting Surface Water and Groundwater Quality in Alaska" will be utilized as a guideline to reduce potential impacts to water quality.
 - I. Borough staff will work with the applicant and regularly monitor the material site to ensure that excavation does not take place within 100 feet of the mapped floodplain, riparian wetland, or other water body and that the restored buffer remains undisturbed.
22. *Fuel storage.* 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.
- A. Borough staff will regularly monitor the material site to ensure compliance with mandatory condition KPB 21.20.050(A)(7).
23. *Roads.* Operations shall be conducted in a manner so as not to damage borough roads.
- A. The submitted site plan indicates that the material site haul route will be Denver Road, which is maintained by the Borough, and then to Anchor River Road, which is maintained by the state.
 - B. There was a significant number of public comments concerning the condition of Anchor Point Road. Anchor Point Road is a paved State of Alaska maintained road for which this condition is not applicable.
 - C. If operations associated with the proposed material site damages borough roads, the remedies set forth in KPB 14.40 will be used to ensure compliance with this requirement imposing the condition that operations not damage borough roads.
24. *Subdivision.* Any further subdivision or return to acreage of a parcel subject to a conditional land use or counter permit requires the permittee to amend their permit.
- A. Borough planning staff reviews all subdivision plats submitted to the Borough to ensure compliance with this requirement.

25. *Dust control.* Dust suppression is required on haul roads within the boundaries of the material site by application of water or calcium chloride.
- A. If Borough staff becomes aware of a violation of this requirement action will be taken to ensure compliance.
26. *Hours of operation.* Rock crushing equipment shall not be operated between 10:00 p.m. and 6:00 a.m.
- A. If Borough staff becomes aware of a violation of this requirement action will be taken to ensure compliance.
- B. This condition reduces off-site noise impacts of the material site.
27. *Reclamation.* Reclamation shall be consistent with the reclamation plan approved by the planning commission. The applicant shall post a bond to cover the anticipated reclamation costs in an amount to be determined by the planning director. This bonding requirement shall not apply to sand, gravel or material sites for which an exemption from state bond requirements for small operations is applicable pursuant to AS 27.19.050.
- A. The submitted application contains a reclamation plan as required by KPB 21.29.060.
- B. The applicant has submitted a reclamation plan that omits KPB 21.29.060(C)(3), which requires the placement of a minimum of four inches of topsoil with a minimum organic content of 5% and precludes the use of sticks and branches over 3 inches in diameter from being used in the reclamation topsoil. These measures are generally applicable to this type of excavation project. The inclusion of the requirements contained in KPB 21.29.060(C)(3) is necessary to meet this material site condition.
- C. Permit condition number 15 requires that the permittee reclaim the site as described in the reclamation plan for this parcel with the addition of the requirements contained in KPB 21.29.060(C)(3) and as approved by the planning commission
- D. The application states that less than 50,000 cubic yards will be mined annually therefore the material site qualifies for a small quantity exception from bonding.
28. *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.
- A. Any violation federal, state or local laws, applicable to the material site operation, reported to or observed by Borough staff will be forwarded to the appropriate agency for enforcement.
29. *Voluntary permit conditions.* Conditions may be included in the permit upon agreement of the permittee and approval of the planning commission.
- A. The applicant has volunteered to operate his equipment onsite with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms.
- B. The volunteered condition concerning back-up alarms is in the best interest of the Borough and the surrounding property owners because the multi-frequency alarms better minimizes the noise impacts of the material site.
- C. The applicant has volunteered a condition requiring the berm be placed near the active excavation area, dampening the noise and reducing the visual impacts at the source. The berm will be moved as excavation progresses.
- D. The volunteered condition to place the berm near the active excavation area is in the best interest of the Borough and the surrounding property owners because this placement of the berm will better minimize the visual impacts of the material site.
- E. The applicant has volunteered a condition a condition that prohibits material site operations on holiday weekends during the summer months.
- F. The volunteered condition, to not operate on holidays, is consistent with the standard to reduce noise disturbance to adjacent properties.
- G. The volunteered condition, to not operate on holidays, is in the best interest of the Borough and the surrounding property owners because the Anchor River State Recreational Area has a significantly greater number of visitors on holidays and several of the neighbors and Alaska State Parks has expressed concern about the noise impacts to the recreational area.
30. *Signage.* For permitted parcels on which the permittee does not intend to begin operations for at least 12 months after being granted a conditional land use permit.
- A. If Borough staff determines that operations have not commenced after one year, action will be taken to ensure compliance

This decision may be appealed through the Borough Clerk within fifteen days of the date of the Notice of Decision.



Bruce Wall, AICP
Planner

June 26, 2019
Date



Office of the Borough Clerk

144 North Binkley Street, Soldotna, Alaska 99669 • (907) 714-2160 • (907) 714-2388 Fax

Johni Blankenship, MMC
Borough Clerk

August 12, 2019

Notice of Entries of Appearance filed in Case No. 2019-01-PCA: In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District. *[Enclosed please find a copy of the entries of appearance.]*

The following parties filed entries of appearance in the afore mentioned case:

- Holmes Weddle & Barcott, P.C.
- Gary Cullip
- Katherine Elsner, Ehrhardt, Elsner & Cooley
- Linda M. Stevens
- Tom Brook
- Linda Bruce
- Michael J. Brantley
- Shirley Gruber
- Pete Kinneen
- Joseph Sparkman
- David Gregory & Teresa Ann Jacobsen
- Lynn Whitmore
- Xochitl Lopez-Ayala
- Todd Bareman
- Vickey Hodnik
- G. George Krier
- Emmitt Trimble
- Mary Trimble
- Lauren Isenhour
- Allison Paparoa
- Danica High
- Lawrence "Rick" Oliver
- Hans and Jeanne Bilben
- Gary Sheridan
- Eileen D. Sheridan
- Steve P. Thompson
- Philip J. Brna
- Linda and Mike Patrick
- James Gorman
- Marie J. Carlton
- Richard Carlton
- Gina DeBardelaben
- Sean Kelley
- Max Best
- John Girton
- Joshua & Christina Elmaleh
- Donald L. & Lori L. Horton

This notice is being sent to you because our records indicate you filed an entry of appearance and continue to be a party of record in the subject Planning Commission decision appeal.

Johni Blankenship, MMC
Borough Clerk
jblankenship@kpb.us

Page -2-
August 12, 2019
To: Parties of Record
Re: Case No. 2019-01-PCA

CERTIFICATE OF SERVICE

I, John Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the foregoing notice and copies of Entries of Appearance filed.

X 
Signature

Dated this 12th day of August, 2019.

Appellant Hans and Jeanne Bilben catchalaska@alaska.net Agent Katherine Elsner Ehrhardt, Elsner & Cooley katie@907legal.com	Applicant Emmitt & Mary Trimble dba Beachcomber LLC emmitttrimble@gmail.com margetrimble@gmail.com Agent Holmes Weddle & Barcott, P. C. Stacey Stone: sstone@hwb-law.com Chantal Trink: ctrinka@hwb-law.com snichols@hwb-law.com	Allison Trimble Paparao allisontrimblerealestate@gmail.com	Sean Kelley, Deputy Attorney Max Best, Planner Kenai Peninsula Borough skelley@kpb.us legal@kpb.us mbest@kpb.us
Brna Philip J fisheyeak@gmail.com	Carlton Richard D & Marie seaburyroad@live.com noregretsm@live.com	Cullip Gary L buffycody@msn.com	Danica High highdanica@yahoo.com
G. George Krier georgerewards@gmail.com	Gina M. Debardeleben ginadebar@mclanecg.com	Girton John johnrgirton@aol.com	Gorman James captainboomer525@hotmail.com
Gregory David & Teresa Ann Jacobson davidgregory0754@gmail.com	Isenhour Lauren laurenttrimble@hotmail.com	Linda R Bruce lrb128@hotmail.com	Linda Stevens illuminaarts@aol.com grizzlysafety@aol.com
Oliver Lawrence "Rick" roliverb747@me.com	Patrick Mike & Linda mlpatrick335@yahoo.com	Pete Kinneen storagecondominiumsofalaska@gmail.com	Sheridan Gary Sheridan Eileen twoshar@acsalaska.net
Shirley Gruber shirleytdx@yahoo.com	Sparkman Joseph J jay1332@att.net	Steve Thompson stevethompson1961@yahoo.com	Thomas J Brook tbrook@ak.net
Todd Bareman tbareman@gmail.com	Vickey Hodnik vickey@gci.net	Whitmore Lynn lkwhitmore@acsalaska.net	Joshua Elmaleh jewish8josh@gmail.com Christing Elmaleh christycupp5@hotmail.com
Xochitl Lopez-Ayala PO Box 2552 Homer, Ak 99603	Brantley Michael PO Box 950 Anchor Point, Ak 99556	Donald L. & Lori L. Horton hortons6@gmail.com	

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AUG 08 2019

Borough Clerk's Office
Kenai Peninsula Borough

**Kenai Peninsula Borough
Office of the Borough Clerk
Kenai Peninsula Borough, Alaska
144 North Binkley Street
Soldotna, Alaska 99669**

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to disapprove a conditional use permit for
a material sited that was requested for
KPB Parcel 169-010-67; Tract B, McGee
Tracts – Deed of Record Boundary
Survey (Plat 80-104) - Deed Recorded in
Book 4, Page 116, Homer Reordering
District.

Hans Bilben,

Appellant,

Emmitt Trimble,
Beachcomber LLC,

Applicants.

Case No. 2019-01-PCA

ENTRY OF APPEARANCE


COMES NOW the law firm of Holmes Weddle & Barcott, P.C., and enters its
appearance on behalf of Applicants Emmitt Trimble and Beachcomber LLC in the above-
titled action and requests that copies of any and all future documents be mailed to its office
at 701 West Eighth Avenue, Suite 700, Anchorage, Alaska 99501. Undersigned counsel
agrees to service via email to the following addresses: ssstone@hwb-law.com,
ctrinka@hwb-law.com, and snichols@hwb-law.com.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

DATED this 8th day of August, 2019, at Anchorage, Alaska.

HOLMES WEDDLE and BARCOTT, P.C.
Attorneys for Applicants

By: _____


Stacey C. Stone

Alaska Bar No. 1005030

Chantal Trinko

Alaska Bar No. 1505034

ENTRY OF APPEARANCE
KPB Planning Commission Appeal

Case No. 2019-01-PCA
Page 2 of 2

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AUG 09 2019

Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to approve a conditional land use permit
for a material site that was requested for
KPB Parcel 169-010-67; Tract B, McGee
Tracts - Deed of Record Boundary Survey
(Plat 80-104) - Deed recorded in Book 4,
Page 116, Homer Recording District.

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name:

Gary Callip

x

[Signature]

PRINTED NAME

SIGNATURE

Mailing Address:

1523 SW 59th Ln Cape Coral FL 33914

Email Address:

butflycodg@gmail.com

I agree to service via email:

Yes ☒ Initials

GC

Name, Address and Signature of your Agent:

Heather Callip Dickens
9551 Matra Cr Anchorage AK 99518

X

Additional Designations of Error (attached additional pages if necessary):

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): Stop this!!!! It is so wrong

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

Service shall be made by the Borough Clerk either by mail or personal delivery within two business days of the filing deadline. Service by email or facsimile is permitted when the party to be served has affirmed in writing the acceptance of alternate forms of service.

RECEIVED

AUG 09 2019

Borough Clerk's Office
Kenai Peninsula Borough

KENAI PENINSULA BOROUGH

In the matter of the Kenai Peninsula)
Borough Planning Commission's)
decision to approve a conditional land)
use permit for a material site that was)
requested for KPB Parcel 169-010-67;)
Trace B, McGee Tracts – Deed of)
Record Boundary Survey (Plat 80-104) –)
Deed Recorded in Book 4, Page 116,)
Homer Recording District)
Emmitt and Mary Trimble dba)
Beachcomber LLC,)
Appellant.)

CASE NO. 2019-01-PCA

ENTRY OF APPEARANCE

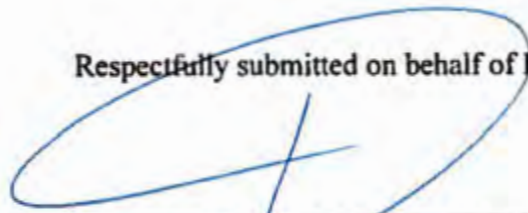
Katherine Elsner of Ehrhardt, Elsner & Cooley hereby enters her appearance on behalf of
Party of Record Hans Bilben. Service can be made on counsel at:

Ehrhardt, Elsner & Cooley
215 Fidalgo Ave, Suite 201
Kenai AK 99611
(907) 283-2876
Katie@907legal.com

I consent to service by email.

DATED August 9th, 2019.

Respectfully submitted on behalf of Hans Bilben



Katherine Elsner ABA #1411116

RECEIVED

AUG 09 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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to approve a conditional land use permit)
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KPB Parcel 169-010-67; Tract B, McGee)
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(Plat 80-104) - Deed recorded in Book 4,)
Page 116, Homer Recording District.)

Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: LINDA M. STEVENS X [Signature]
PRINTED NAME SIGNATURE

Mailing Address: P.O. BOX 330 ANCHOR POINT, AK. 99552

Email Address: illuminaarts@aol.com / grizzly safety@aol.com

I agree to service via email: Yes ☒ Initials LMS

Name, Address and Signature of your Agent: SELF

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary):

DETRIMENTAL TO TOURISM & PUBLIC SAFETY. WILL DESTROY CAMPGROUND ATMOSPHERE. CAUSE FURTHER ROAD & BRIDGE DAMAGE.

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Tom Brook x Tom Brook

PRINTED NAME

SIGNATURE

Mailing Address: PO Box 39004, Ninilchik, AK 99639

Email Address: thbrook@ak.net

I agree to service via email: Yes ☒ Initials TB

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): Everything
listed in Hans Bilben appeal plus lack of due process
for public after changes to conditions plus new
information submitted that public was denied
opportunity to comment on.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach
additional pages if necessary): Reverse the decision.

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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of the filing deadline. Service by email or facsimile is permitted when the party to be served has
affirmed in writing the acceptance of alternate forms of service.

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Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Linda Bruce x Linda Bruce

PRINTED NAME

SIGNATURE

Mailing Address: PO Box 39004 Ninilchik, AK 99639

Email Address: lrb128@hotmail.com

I agree to service via email: Yes ☒ Initials lrb

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): Everything listed in Hans Bilben appeal plus lack of due process for public after changes to conditions plus new information submitted that public was denied opportunity to consider and comment on.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): Reverse the decision.

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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Page 2 of 2

In the matter of the Kenai Peninsula
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Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: Michael J. Brantley x Michael J. Brantley
PRINTED NAME SIGNATUREMailing Address: P.O. Box 950, Anchor Point, AK 99556Email Address: ZZ49era@outlook.comI agree to service via email: ☒ Yes ☐ Initials _____

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): Reversal of Planning Commission DecisionThis Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

Service shall be made by the Borough Clerk either by mail or personal delivery within two business days of the filing deadline. Service by email or facsimile is permitted when the party to be served has affirmed in writing the acceptance of alternate forms of service.

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to approve a conditional land use permit
for a material site that was requested for
KPB Parcel 169-010-67; Tract B, McGee
Tracts - Deed of Record Boundary Survey
(Plat 80-104) - Deed recorded in Book 4,
Page 116, Homer Recording District.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: SHIRLEY Gruber x Shirley Gruber
PRINTED NAME SIGNATURE

Mailing Address: 13701 ERVIN Rd Anchorage AK 99516

Email Address: Shirleytdx@yahoo.com

I agree to service via email: Yes ☒ Initials SG

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): See attached

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): Reverse or at least send it back to Planning for fact Review by a different planner
2nd opinion - one Not so closely attached to Permit Applicant

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Attn: Hearing Officer

I hereby submit for consideration concerns relating to the conditional land use permit. This permit was approved with missing information, and incomplete knowledge of the permit, reclamation plan and inadequate understanding by the commissioners.

Procedural Concerns:

At the June 24, 2019 meeting which was an extension of the the June 10th meeting, where it was agreed that all testimony was final and that the commission would only discuss and place their vote at the beginning of the June 24th meeting, as a courtesy to the public.

However, at that June 24th meeting, the commissioners brought the permit requester to the podium, and did a question and answer session where the permit requester brought new information, expanded on old information and, voiced complaints about the public being allowed to submit topographical information from the KPB GIS System. Perception was this was a way for those commissioners who missed the previous meeting could catch up and give the appearance of a knowledgeable decision. The commissioners did not allow public comment on the new information or respond to the expanded old information or defend their documentation originally submitted. Those commissioners should have excused themselves, especially one particular commissioner. Obviously, this showed bias for the applicant.

In all appearance, the public's (mine) due process was stymied and the permit requester was shown favoritism, or special buddy buddy treatment.

Continuance of Errors or Omissions in the Findings of Facts and Permit Conditions.

Fact # 13 – Utilizing a rolling berm. A rolling berm is not detailed nor defined in the KPB code, the permit requester explained the concept but presented no actual details; like height, length or type of material it would consist of, or how it would be moved. Since there is no historical data to confirm its success as a mechanism to reduce the impact, it does not fulfill or meet code requirement.

Fact #14 – Volunteering to operate his equipment with white noise back up alarms...but not on any other contractor's equipment. (As stated by applicant during the meeting). This is a pointless fact since the requester only owns a bobcat, and all work would be "subbed out" with out the requested back up sound system. It appears that planning would like to show good will of applicant, not facts.

Fact #17 - Buffer zones. 18 items are listed, as facts yet when scrutinized, these listed facts are repetitive and incomplete as well as subjective in nature such as: Items D & E; the properties noted that are at a higher elevations will not be impacted as greatly as those adjacent is in error, since looking down you see over the berm, and into the site where as adjacent properties would need to look through the berm. Per the KPB GIS systems a 52ft berm would be required to meet the KPB standard. It continues to say that those parcels *further away*, (across the street and higher on a hill- which is not really father away) will be less impacted by noise is also flawed, since this gravel site is a natural amphitheater and the noise travels much further and remains louder than in other gravel sites.

Fact #17 - Buffer zones Item P: states that testimony was made to the fact that this site would mare the view of MT, Illiamna Redoubt, is not quite accurate... with out proper screening there would be a huge visual impact...and yes the KPB code does not provide scenery view protections, but the

code's goal is to reduce CLUP visual impact. Again the wording of this fact finding appears to view public concern in a negative form. Perhaps this particular planner has a conflict of interest or is unable to remain non judgmental.

Fact # 23 – Roads. Planning correctly states that part of the haul out is on borough road and then onto a state road. Per meeting discussions planning says it is only responsible to borough roads. The commission had to press planning to reach out to the state to address what concerns if any the state would have, since it is a state road, in need of repair, and an emergency access road. Question remains as to what liability if any could occur from this permit. No information is listed within the findings.

Fact # 29 items A through G. The permit requester volunteered 2 items, white noise alarms on his (only his) equipment, and not to haul on specific holidays. These two items get exaggerated reviews to give the appearance of grand gestures. This fact finding section seems to be written as a means to again show favorable bias to the permit applicant, where as some of the same fact finding are written to show negative bias to the public interest.

Permit condition #3: Discusses 2:1 slope from buffer to pit floor, but the fact findings do not list any information to the size of pit, or the water table at different times of the year. Other permit applicant have had to list their core sample finding but noting is noted here. The permit just requires the standard code of 100 ft from bodies of water and 2ft from the water table. This omission is of a concern since the discussion of a 25 foot gravel pit would have to have more than 4 " of top soil to make the reclamation process to have any value. As well as the idea that the deeper the pit the quieter it becomes and less visual it is, see fact finding #17 Item L. Seriously??

Permit Condition #21: Does not detail if "his" equipment means equipment he owns or as well as equipment he has (contracted) or control of while operating at the site. With out that detail this condition is of little value.

During the meetings it appeared that the commissioners were of the understanding that they lacked authority to do anything but approve all permits. One stated that they wished there was more that they could do. It appeared to me, that they were misled by planning, the applicants lawyers, and the hearing officer repeatedly saying: if the application was complete (minimum) it must be approved.

However, the code is explicit that the commission has the discretion to add to, or combine regulations to meet the conditions set out in the code. They even have the authority to remove code items that serve no value for the permit. Like berms that serve no one, do not have to be put into place.

This lack of confidence in their authority, is understandable, since the planning department questioned commissioner Foster of his understanding of the hearing procedures, in front of his peers and the public. (Embarrassing him) Then was coached so Commissioner Ruffner, who was not at the June 10th meeting to hear all given testimony, but was able to do a procedural request to question testimony and used a motion by substantives to walked a yes vote through the commission. This motion, made new questions appeared to become irrelevant, facts versus intent became blurred. Thus this permit was granted without enough due diligence, but an atmosphere of get it over with.

This permit needs to be placed on hold, and sent back to planning for a true review, a different planner who will look at only the facts, show no emotion or bias nor display favoritism for either side with subjective answers when presenting the written facts to create the permit conditions.

There are still too many unanswered questions, or the facts are not summarized sufficiently to show a thorough or complete permit application, one written in factual, unbiased fashion. Much of this permit hints that a conflict of interest exists, with planning, a couple of commissioners and the applicant. While attending the meetings it was most obvious that a conflict may exist, due to all the reassuring glances between the applicant and planning.

Please return this permit for a second opinion from a different planner. This gravel area is not like other gravel pits within Anchor Point. KBP needs to really be correct and sure and get it right.

In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts - Deed of Record Boundary Survey (Plat 80-104) - Deed recorded in Book 4, Page 116, Homer Recording District.

RECEIVED
AUG 09 2019

Kenai Peninsula Borough
Borough Clerk's Office
Kenai Peninsula Borough

Case No. 2019-01-PCA

Ans Bilben)
Appellant)

mitt Trimble,)
achcomber LLC)
Applicant.)

Entry of Appearance Form

Name: Pete Kinnneen x Pete Kinnneen
PRINTED NAME SIGNATURE

Mailing Address: P.O. Box 810 Anchorage AK 99556

Email Address: storagecondominiumsofAlaska@gmail.com

I agree to service via email: Yes ☒ Initials PK

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

Case No. 2019-01-PCA

In the matter of the Kenai Peninsula
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KPB Parcel 169-010-67; Tract B, McGee
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(Plat 80-104) - Deed recorded in Book 4,
Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: Joseph Spivak [Signature]
PRINTED NAME SIGNATURE

Mailing Address: RD. Box 767, Anchor Point AK 99556

Email Address: JAY1332@ATT.NET

I agree to service via email: Yes ☒ Initials JS

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: David Gregory

Teresa

Jacobsen

Gregory

Teresa

Mailing Address: PO Box 904

Email Address: davidgregory0754@gmail.com

I agree to service via email: Yes & Initials DGJ

Name, Address and Signature of your Agent: [Signature]

X

Additional Designations of Error (attached additional pages if necessary): There was
little or no discussion of The 6 Conditions
that must be met for a Material Site Permit
according to KPB codes.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach
additional pages if necessary): Reverse The decision
Modify so that The 6 conditions in The
KPB code is met.

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AUG 08 2019

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Kenai Peninsula Borough

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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: LYNN WHITMORE x [Signature]
PRINTED NAME SIGNATURE

Mailing Address: PO BOX 355 ANCHOR POINT, AK 99556

Email Address: LWHITMORE@ACSALASKA.NET

I agree to service via email: Yes ☒ Initials LW

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

THE APPELLANT HAS DONE A GREAT JOB IN SUMMARIZING
THE ERRORS

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): REVERSE DECISION OF PLANNING

COMMISSION BECAUSE SUDAY CANNOT BE MET DUE TO
EXISTING TOPOGRAPHY

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Kenai Peninsula Borough

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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: XOCHITL LUPEL-AYALA X Xalut
PRINTED NAME SIGNATURE

Mailing Address: PO BOX 2552 HOMER AK 99603

Email Address: XOCHITLUPELAYALA@YAHOO.COM

I agree to service via email: Yes ☐ Initials _____

Name, Address and Signature of your Agent: XOCHITL LUPEL-AYALA, (Signature)

PO BOX 2552 HOMER AK 99603

X Xalut

Additional Designations of Error (attached additional pages if necessary): _____

THERE WAS INSUFFICIENT EVIDENCE A BIRM WOULD MINIMIZE
NOISE AS THE LANDSCAPE IS A 'FISH BOWL' MAKING SAND
ELMO.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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WOULD LIKE TO SUBMIT THIS AS WELL.
I AGREE WITH THIS!

RECEIVED

AUG 08 2010

2. SPECIFIC ERRORS...

Borough Clerk's Office
Kenil Peninsula Borough

The Hearing Officer remanded to the Planning Commission in December 2018 for **two** reasons. One was to list Findings of Fact referencing the Mandatory Conditions defined in KPB 21.29.050, and the other was to Provide the **substantial evidence** that supports those findings. The applicant failed to provide substantial evidence which would support the Findings. Those opposed to the permit provided substantial evidence using KPB's own technology to prove that mandatory standards in KPB 21.29.040 could not be met by the Conditions—both imposed and voluntary.

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT BUFFERS/BERMS MINIMIZE NOISE DISTURBANCE AND VISUAL DISTURBANCE.

B. STAFF ERRED IN ADVISING THE PLANNING COMMISSION ON THE REQUIREMENTS OF THE CODE.

C. THE PLANNING COMMISSION ERRED IN INTERPRETING THE CODE ON THE ISSUE OF DISCRETION AND AUTHORITY TO DENY A PERMIT.

D. THE CONDITIONS IMPOSED ON THE PERMIT DO NOT PROVIDE SUFFICIENT VISUAL AND NOISE SCREENING.

E. THE VOLUNTARY CONDITIONS DO NOT PROVIDE SUFFICIENT VISUAL AND NOISE SCREENING.

F. MINIMUM STANDARDS FOR THE LAND USE WERE NOT MET IN THIS SITUATION WHICH CAUSES DAMAGE TO THE PUBLIC HEALTH, SAFETY, AND WELFARE.

G. THE DECISION DOES NOT RECOGNIZE PRIVATE PROPERTY RIGHTS OF THE SURROUNDING USERS.

H. THE ISSUANCE OF THIS PERMIT IS IN VIOLATION OF THE REQUIREMENTS IMPOSED UNDER KPB 21.25 AND UNDER KPB 21.29.

I. ONE OR MORE COMMISSIONERS SHOULD HAVE RECUSED THEMSELVES BASED UPON DEMONSTRATED BIAS AND/OR CONFLICT OF INTEREST ISSUES.

J. ADDITION OF LAST MINUTE VOLUNTARY AND IMPOSED CONDITIONS SHOULD HAVE REQUIRED THAT PUBLIC COMMENT BE RE-OPENED, AS REQUESTED, AT 6/24 MEETING.

K. IN SEVERAL KPB CONDITIONS AND FINDINGS OF FACT THE WORD "ADJACENT" WAS SUBSTITUTED FOR THE CORRECT WORD "OTHER" FROM KPB 21.29.040. THIS SUBSTITUTION WRONGLY INFLUENCED COMMISSIONER'S DECISIONS.

L. COMMISSIONERS DELIBERATED VERBIAGE AT LENGTH ON SEVERAL MEANINGLESS VOLUNTARY CONDITIONS, BUT SPENT NO TIME DISCUSSING HOW OR IF THOSE CONDITIONS COULD ACTUALLY MEET THE MANDATORY STANDARDS OF KPB 21.29.

M. PRIOR TO THE 6/24 DELIBERATIONS TWO COMMISSIONERS ABSENT FOR THE 6/10 HEARING WERE SHOWN VIDEO PREPARED BY THE APPLICANTS DAUGHTER. THOSE TWO COMMISSIONERS WERE NOT SHOWN THE PRESENTATION PREPARED BY THOSE OPPOSED TO THE PERMIT WHICH CLEARLY DEMONSTRATED THE DEFICIENCIES IN THE APPLICATION USING GEOGRAPHIC INFORMATION SYSTEM (GIS) TECHNOLOGY OWNED BY KPB.

N. COMMISSIONER ECKLUND INDEPENDENTLY VISITED THE SITE AND QUESTIONED THE LACK OF VEGETATION IN THE 50 FOOT VEGETATED BUFFER. BRUCE WALL AGREED THAT GRASS WAS THE PRIMARY VEGETATION IN NEARLY 60% OF THE BUFFER AREA. KPB 21.29.050 MANDATES BUFFER/BERM TO BE OF SUFFICIENT **HEIGHT AND DENSITY**.

O. IN THE MINUTES BEFORE THEY VOTED, ONE COMMISSIONER ASKED WHAT A ROLLING BERM WAS. A ROLLING BERM IS NOT REFERENCED OR DEFINED IN KPB 21.29. CLEARLY THERE IS NO DEFINITION FOR WHAT A ROLLING BERM IS, WHEN IT WOULD BE MOVED (ROLLED), WHERE IT WOULD BE MOVED (ROLLED), WHAT OBJECTIVE METHOD WAS USED TO DETERMINE THE BERM HEIGHT, OR WHETHER IT COULD MEET THE STANDARDS OF KPB 21.29.040 IN EACH (OR ANY) OF THE THREE PHASES OF THE APPLICATION.

P. COMMISSIONERS ON SEVERAL OCCASIONS DURING DELIBERATIONS MADE COMMENTS INDICATING LACK OF KNOWLEDGE ON WORDING OF KPB CODE. THEY APPEARED TO JUDGE THE APPLICATION, AND VOTE, WITHOUT WITHOUT A CLEAR UNDERSTANDING OF THE CODE.

Q. DURING DELIBERATIONS THERE WAS CONFUSING OR CONFLICTING LOCATIONS OF MATERIALS IN THE RECORD. STAFF AND COMMISSIONERS APPEARED TO HAVE DIFFERING PAGE REFERENCING WHICH CREATED A SITUATION WHEREBY COMMISSIONERS HAD DIFFICULTY LOCATING EVIDENCE IN THE RECORD, AND VICE VERSA. THIS CONTRIBUTED TO UNINFORMED DECISION MAKING ON THE PART OF THE COMMISSION.

RECEIVED

AUG 08 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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Hans Bilben

Appellant

Kenai Peninsula Borough

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: Todd Bareman X [Signature]

PRINTED NAME

SIGNATURE

Mailing Address: 73300 Tryagain Ave. Anchor Point AK 99556

Email Address: tbareman@gmail.com

I agree to service via email: Yes ☒ Initials TB

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): I don't feel there was any clarification or proper wording on a rolling berm. With the elevation issue of the neighboring properties the berms are very important and weren't addressed

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): There is no clause if the trucks destroy the road which so many people rely on. Anchor Point Road cannot handle the truck traffic, DOT has said so.

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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Vickey Hodnik x Vickey Hodnik
PRINTED NAME SIGNATURE

Mailing Address: P.O. Box 1836

Email Address: Vickey @ gci.net

I agree to service via email: Yes ☒ Initials UJH

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): Please note attached

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Kenai Peninsula Borough
Entry of Appearance Case # 2019-01-PCA
Borough Clerk
August 6, 2019

Specific Errors found in the Planning Commission's vote of 6/2019 in regard to
Beachcomber LLC request for permit parcel 169-010-67

1. The Planning Commission did not do as directed by the hearing officer, Holly Wells. This did not create "findings of fact" to support their original denial of the permit in 2018.
2. The Planning Commission does not appear to have a clear understanding of the borough codes which pertain to this issue.
3. The Planning Commission was ill informed in regard to berms and buffers and one member of the commission was asking, at the last minute, "what is a moving buffer again?"
4. The actual voluntary conditions do not reflect sufficient visual or sound screening for those who live close to the proposed site.
5. Public health, safety, welfare and well being have not been considered by the Planning Commission nor the Planning Department.
6. Private property rights are being ignored by the borough Planning Commission and the planning department.
7. The Planning department showed absolute bias in regard to this permitting process.
8. Loss of property value and peace and quiet should not be handed away by the Planning department. As citizens, we have a right to those commodities and it appears that no one at the borough is willing to support the common citizens.
9. The planning department, including the attorney, are changing language within the various materials, like the Planning Commission Handbook, to change how things read....in other words, to slant the codes or relevant information in their favor.
10. Our rights, as citizens, were not recognized when we were unable to reply to "new information" added to the Planning Commission meeting of 6/2019. Mr. Trimble's rebuttal was uncontested. His voluntary and imposed conditions should have required public comment.
11. The Planning Department had so much influence over the Planning Commission that it obviously is afraid to make decisions on their own.....in fact, to overlook the findings of the Hearing Officer and not properly respond.

In the matter of the Kenai Peninsula
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Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: G. George Krier x G. George Krier
PRINTED NAME SIGNATURE

Mailing Address: P.O. Box 1165

Email Address: georgesrewards@gmail.com

I agree to service via email: Yes ☒ Initials GCK.

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): Note attached

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Kenai Peninsula Borough
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Borough Clerk
August 6, 2019

Specific Errors found in the Planning Commission's vote of 6/2019 in regard to
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2. The Planning Commission does not appear to have a clear understanding of the borough codes which pertain to this issue.
3. The Planning Commission was ill informed in regard to berms and buffers and one member of the commission was asking, at the last minute, "what is a moving buffer again?"
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5. Public health, safety, welfare and well being have not been considered by the Planning Commission nor the Planning Department.
6. Private property rights are being ignored by the borough Planning Commission and the planning department.
7. The Planning department showed absolute bias in regard to this permitting process.
8. Loss of property value and peace and quiet should not be handed away by the Planning department. As citizens, we have a right to those commodities and it appears that no one at the borough is willing to support the common citizens.
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Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCV-E D

Emmitt Trimble,
Beachcomber LLC

Applicant.

AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

Entry of Appearance Form

Name: Emmitt Trimble

PRINTED NAME

X Emmitt O. Trimble

SIGNATURE

Mailing Address: Po Box 193 Anchor Point AK 99556

Email Address: emmitttrimble@gmail.com

I agree to service via email: Yes ☒ Initials ET

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA **RECEIVED**

AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

Entry of Appearance Form

Name: Mary Trimble x Mary E Trimble
PRINTED NAME SIGNATURE

Mailing Address: Po Box 193 Anchor Point AK 99556

Email Address: margetrimble@gmail.com

I agree to service via email: Yes ☒ Initials mt

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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KPB Parcel 169-010-67; Tract B, McGee)
Tracts – Deed of Record Boundary Survey)
(Plat 80-104) – Deed recorded in Book 4,)
Page 116, Homer Recording District.)

Hans Bilben)

Appellant)

Emmitt Trimble,
Beachcomber LLC)

Applicant.)

Kenai Peninsula Borough

Case No. 2019-01-PCA

AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

Entry of Appearance Form

Name: Lauren Isenhour x Jarvin Isenhour

PRINTED NAME

SIGNATURE

Mailing Address: PO Box 317 Anchor Point AK 99556

Email Address: laurenttrimble@hotmail.com

I agree to service via email: Yes ☒ Initials JJ

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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KPB Parcel 169-010-67; Tract B, McGee
Tracts – Deed of Record Boundary Survey
(Plat 80-104) – Deed recorded in Book 4,
Page 116, Homer Recording District.

Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2819001-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

Entry of Appearance Form

Name: Allison Paparosa x [Signature]
PRINTED NAME SIGNATURE

Mailing Address: 3020 Upland Way Ferndale, WA 98248

Email Address: allisontrimble.realestate@gmail.com

I agree to service via email: Yes ☒ Initials AP

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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KPB Parcel 169-010-67; Tract B, McGee)
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Page 116, Homer Recording District.)

Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: Danica Higl x dem

PRINTED NAME

SIGNATURE

Mailing Address: PO Box 776 Anchor Point 99556

Email Address: higldanica@yahoo.com

I agree to service via email: Yes ☒ Initials DH

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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RECEIVED

AUG 07 2019

Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

Case No. 2019-01-PCA

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to approve a conditional land use permit
for a material site that was requested for
KPB Parcel 169-010-67; Tract B, McGee
Tracts - Deed of Record Boundary Survey
(Plat 80-104) - Deed recorded in Book 4,
Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: LAWRENCE "Rick" Oliver x [Signature]

PRINTED NAME

SIGNATURE

Mailing Address: P.O. Box 1444 Anchor Point, AK 99556

Email Address: ROLIVER8747@ME.COM

I agree to service via email: Yes ☒ Initials LO

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

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Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: HANS AND JEANNE BILBEN x Hans Bil AND Jeanne Bilben
PRINTED NAME SIGNATURE

Mailing Address: PO BOX 1176 ANCHOR POINT AK 99556

Email Address: CATCHALASKA@ALASKA.NET

I agree to service via email: Yes ☒ Initials AKS

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

— SEE ATTACHED PAGE —

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Additional Designations of Error

1. In Notice of Decision #29 (A. and B.) the applicant volunteered to operate his equipment with multi frequency back-up alarms. KPB Planner Bruce Wall after several site visits and multiple conversations with the applicant is well aware that the applicant does not own any equipment, and that the the applicant is not an operator. Prior to the 6/24 PC hearing a request was made via email to Planner Wall to divulge this information to the Commission during deliberations, which he declined. A request was also made to reopen public comment concerning voluntary conditions which were clearly not in the best interests of the borough or of surrounding property owners as required by KPB Code—also denied. Misinformed Commissioners unknowingly accepted this Voluntary Condition which led to faulty decision making as the Record will show.

2. Notice of Decision #17 (Q.) is clearly an admission that this application cannot meet the Mandatory Standards of 21.29.040 utilizing the Conditions (Mandatory and Voluntary) as written. The Code in 21.29.050 states that adjacent, and other properties are to be protected with buffer zones of sufficient height and density to provide visual and noise screening of the proposed use. If Conditions do not meet the Standards the Planning Commission is instructed to Deny or Modify, and **not** to Approve an incomplete application. #17 (Q.) denies protections to many neighboring property owners in violation of the Code as written. No where in the Code does it give the applicant the option of protecting only those properties that are at (or nearly at) the same elevation as the proposed use, as #17(Q.) would imply.

RECEIVED

AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

Case No. 2019-01-PCA

In the matter of the Kenai Peninsula
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Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: GARY SHERIDAN

PRINTED NAME

X

Gary Sheridan

SIGNATURE

Mailing Address: PO BOX 661, ANCHOR POINT, ALASKA 99556Email Address: TWDSHAR@ALASKA.NETI agree to service via email: Yes ☒ Initials GSName, Address and Signature of your Agent: NONE.

X

Additional Designations of Error (attached additional pages if necessary): I plan to
submit further testimony in writing & verbally @ Hearing

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach
additional pages if necessary): As above.

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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AUG 06 2019

Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

Case No. 2019-01-PCA

In the matter of the Kenai Peninsula
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Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: Eileen D. Sheridan x Eileen D. Sheridan

PRINTED NAME

SIGNATURE

Mailing Address: PO BOX 661 Anchor Point, AK 99556-0661Email Address: twoshard@cs.alaska.netI agree to service via email: Yes ☒ Initials ERSName, Address and Signature of your Agent: None

X _____

Additional Designations of Error (attached additional pages if necessary): I plan ontest-fying against pt. gravel pit.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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RECEIVED

AUG 05 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
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Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Steve P. Thompson X Steve P. Thompson
PRINTED NAME SIGNATURE

Mailing Address: P.O. Box 310 Anchor Point, AK 99556

Email Address: stevethompson1961@yahoo.com

I agree to service via email: Yes ☒ Initials SP

Name, Address and Signature of your Agent: _____

N/A

X _____

Additional Designations of Error (attached additional pages if necessary): I do not agree with the planning commission's decision to allow the gravel pit. There (as specified) won't be sufficient berms built to cause the sight/noise of this pit in close proximity to our homes.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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AUG 01 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Philip J. Brna X Philip J. Brna
PRINTED NAME SIGNATURE

Mailing Address: 5601 E. 98th Ave, Anchorage, AK 99507

Email Address: fishyeak@gmail.com

I agree to service via email: Yes ☒ Initials (B)

Name, Address and Signature of your Agent: NONE

X _____

Additional Designations of Error (attached additional pages if necessary): Reverse

None. I agree with the appeal by Hans Bilben.

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): Reverse the planning commission decision and

deny the permit. The decision does not protect my
property rights on ~~my~~ the use and enjoyment of my property.

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RECEIVED

AUG 02 2019

Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

Case No. 2019-01-PCA

In the matter of the Kenai Peninsula
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KPB Parcel 169-010-67; Tract B, McGee
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(Plat 80-104) - Deed recorded in Book 4,
Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: LINDA AND Mike Patrick Linda Patrick / Mike Patrick
PRINTED NAME SIGNATURE

Mailing Address: PO Box 335 Anchor Point, AK 99556

Email Address: MLPATRICK335@yahoo.com

I agree to service via email: Yes ☒ Initials _____

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (c
additional pages if necessary): _____

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Borough Clerk's Office
Kenai Peninsula Borough

Kenai Peninsula Borough

Case No. 2019-01-PCA

In the matter of the Kenai Peninsula
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Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: James Gorman x James Gorman
PRINTED NAME SIGNATURE

Mailing Address: P.O. Box 1239 Anchor Point, AK 99506

Email Address: CapTamborner52@gmail.com

I agree to service via email: Yes ☒ Initials JS

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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AUG 02 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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Kenai Peninsula Borough

Hans Bilben

Appellant

Case No. 2019-01-PCA

Emmitt Trimble,
Beachcomber LLC

Applicant.

Entry of Appearance Form

Name: MARIE J CARLTON x Marie J. Carlton
PRINTED NAME SIGNATURE

Mailing Address: P.O. BOX 29 ANCHOR POINT, AK 99556

Email Address: seaburyroad@live.com

I agree to service via email: Yes ☒ Initials MJC

Name, Address and Signature of your Agent: Erhart, Elsner & Cosley, / Hans
Bilben

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Borough Planning Commission's decision
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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: RICHARD D. CARLTON

PRINTED NAME

x Richard D Carlton

SIGNATURE

Mailing Address: P.O. BOX 29 ANCHOR POINT, AK 99556

Email Address: noregretsrm@live.com

I agree to service via email: Yes ☒ Initials RDC

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Kenai Peninsula Borough

In the matter of the Kenai Peninsula
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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Gina DeBardelaben X Gina DeBardelaben
PRINTED NAME SIGNATURE

Mailing Address: McLane Consulting Inc. PO Box 468 SOLDOTNA AK 99669

Email Address: ginadebar@mclanecg.com

I agree to service via email: Yes ☒ Initials GMD

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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AUG 02 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula Borough
Planning Commission's Decision to Approve a
Conditional Land Use Permit for a Material Site
that was Requested for
KPB Parcel 169-010-67; Tract B, McGee Tracts -
Deed of Record Boundary Survey (Plat 80-104) -
Deed Recorded in Book 4, Pg. 116, Homer
Recording District.

Kenai Peninsula Borough
Office of the Borough Clerk

Hans Bilben,

Appellant,

Emmitt Trimble,
Beachcomber, L.L.C.,

Applicant.

Case No. 2019-01 - PCA

Entry of Appearance Form

Name: KENAI PENINSULA BOROUGH
PRINTED NAME

X SK
Sean Kelley, Deputy Borough Attorney

X Max Best
Max Best, Planning Director

Mailing Address: 144 N. Binkley Street - Soldotna, AK 99669

Email Address: legal@kpb.us

I agree to service via email: (Sean) Yes ☒ No ☐ Initials SK (Max) Yes ☒ No ☐ Initials MB

Email Address: SKelley@KPB.us; legal@KPB.us

Email Address: mbest@KPB.us

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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Kenai Peninsula Borough

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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: JOHN GIRTON x John Gorton

PRINTED NAME

SIGNATURE

Mailing Address: P.O. Box 869 ANCHOR POINT, AK 99556

Email Address: JOHNGIRTON@AOL.COM

I agree to service via email: Yes ☒ Initials JS

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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Postmarked
8-8-19 (13)
RECEIVED

AUG 12 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to approve a conditional land use permit
for a material site that was requested for
KPB Parcel 169-010-67; Tract B, McGee
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Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Joshua and Christina Elmaleh x [Signature]

PRINTED NAME

SIGNATURE

Mailing Address: PO Box 542 Anchor Point, AK 99556

Email Address: christycupp5@hotmail.com + jewish8josh@gmail.com

I agree to service via email: Yes ☒ Initials CE

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

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pastmarked on
8/7/19 (PB)
RECEIVED

AUG 12 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
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Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Donald L. Horton x Donald L. Horton
Lori PRINTED NAME L. Horton SIGNATURE Donald L. Horton

Mailing Address: 221 Ellen Circle Anchorage, AK 99515

Email Address: hortonsl6@gmail.com

I agree to service via email: Yes ☒ Initials DLH

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): see attached letter

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

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8/6/19

My wife and I strongly feel the Planning Commission should reverse their decision on this gravel pit, for all the same reasons you denied it the first time. Berms & Buffers will not stop the noise, dust & visual impact of this pit to our neighborhood. There are hundreds of reasons why we did not buy property next to a gravel pit. How many gravel pits does the Kenai Peninsula need? To develop one in the middle of a Residential/Recreational area is not only unfair to everyone who owns property there, and to everyone who visits the Anchor River Recreational area.

There is only 1 Anchor River
Recreational Area. Why
would you allow this to
proceed ??? If this was
in your back yard I doubt
it would!

Thank you,
Don & Lani
~~Hartman~~



Office of the Borough Clerk

144 North Binkley Street, Soldotna, Alaska 99669 • (907) 714-2160 • (907) 714-2388 Fax

Johni Blankenship, MMC
Borough Clerk

August 14, 2019

SUPPLEMENTAL Notice of Entries of Appearance filed in Case No. 2019-01-PCA: In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District. *[Enclosed please find a copy of the entries of appearance.]*

The following party filed a late entry of appearance in the afore mentioned case:

- Angela Roland

The reason given for filing late is reasonable and therefore the late entry is accepted.

This notice is being sent to you because our records indicate you filed an entry of appearance and continue to be a party of record in the subject Planning Commission decision appeal.

Johni Blankenship, MMC
Borough Clerk
jblankenship@kpb.us

CERTIFICATE OF SERVICE

I, Johni Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the foregoing notice and copies of Entries of Appearance filed.

X
Signature

Dated this 12th day of August, 2019.

Appellant

Hans and Jeanne Bilben
catchalaska@alaska.net

Agent

Katherine Elsner
Ehrhardt, Elsner & Cooley
katie@907legal.com

Applicant

Emmitt & Mary Trimble
dba Beachcomber LLC
emmitttrimble@gmail.com
margetrimble@gmail.com

Agent

Holmes Weddle & Barcott, P.
C.
Stacey Stone:
sstone@hwb-law.com
Chantal Trinko:
ctrinka@hwb-law.com
snichols@hwb-law.com

Allison Trimble Paparoa
allisontrimblerealestate@gmail
.com

Sean Kelley, Deputy Attorney
Max Best, Planner
Kenai Peninsula Borough
skelley@kpb.us
legal@kpb.us
mbest@kpb.us

Page -2-
August 12, 2019
To: Parties of Record
Re: Case No. 2019-01-PCA

Brna Philip J fisheyeak@gmail.com	Carlton Richard D & Marie seaburyroad@live.com noregretsrn@live.com	Cullip Gary L buffycody@msn.com	Danica High highdanica@yahoo.com
G. George Krier georgerewards@gmail.com	Gina M. Debardeleben ginadebar@mclanecg.com	Girton John johnrgirton@aol.com	Gorman James captainboomer525@hotmail.com
Gregory David & Teresa Ann Jacobson davidgregory0754@gmail.com	Isenhour Lauren laurentrimble@hotmail.com	Linda R Bruce lrb128@hotmail.com	Linda Stevens illuminataarts@aol.com grizzlysafety@aol.com
Oliver Lawrence "Rick" roliverb747@me.com	Patrick Mike & Linda mlpatrick335@yahoo.com	Pete Kinneen storagecondominiumsofalaska@gmail.com	Sheridan Gary Sheridan Eileen twoshar@acsalaska.net
Shirley Gruber shirleytdx@yahoo.com	Sparkman Joseph J jay1332@att.net	Steve Thompson steve.thompson1961@yahoo.com	Thomas J Brook tbrook@ak.net
Todd Bareman tbareman@gmail.com	Vickey Hodnik vickey@gci.net	Whitmore Lynn lkwhitmore@acsalaska.net	Joshua Elmaleh jewish8josh@gmail.com Christing Elmaleh christycupp5@hotmail.com
Xochitl Lopez-Ayala PO Box 2552 Homer, Ak 99603	Brantley Michael PO Box 950 Anchor Point, Ak 99556	Donald L. & Lori L. Horton hortons6@gmail.com	Angela Roland angelaroland@gmail.com

RECEIVED

AUG 13 2019

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to approve a conditional land use permit
for a material site that was requested for
KPB Parcel 169-010-67; Tract B, McGee
Tracts – Deed of Record Boundary Survey
(Plat 80-104) – Deed recorded in Book 4,
Page 116, Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula Borough

Case No. 2019-01-PCA

Entry of Appearance Form

Name: Angela Roland x Angela Roland
PRINTED NAME SIGNATURE

Mailing Address: 4014 Ben Walters #6, Homer, AK 99603

Email Address: angelaroland@gmail.com

I agree to service via email: Yes ☒ Initials R

Name, Address and Signature of your Agent: _____

X _____

Additional Designations of Error (attached additional pages if necessary): _____

Alternative Requests for Modification or Reversal of Planning Commission Decision (attach additional pages if necessary): _____

This Form Must Be Received by the Borough Clerk on or before **FRIDAY, AUGUST 9, 2019.**

Service shall be made by the Borough Clerk either by mail or personal delivery within two business days of the filing deadline. Service by email or facsimile is permitted when the party to be served has affirmed in writing the acceptance of alternate forms of service.



Office of the Borough Clerk

144 N. Binkley Street, Soldotna, Alaska 99669 • (907) 714-2160 • (907) 714-2388

Johni Blankenship, MMC
Borough Clerk

In the matter of the Kenai Peninsula
Borough Planning Commission's
decision to approve a conditional land
use permit for a material site that was
requested for KPB Parcel 169-010-67;
Tract B, McGee Tracts – Deed of
Record Boundary Survey (Plat 80-104) –
Deed recorded in Book 4, Page 116,
Homer Recording District.

Hans Bilben

Appellant

Emmitt Trimble,
Beachcomber LLC

Applicant.

Kenai Peninsula
Borough

Case No. 2019-01-PCA

NOTICE OF CERTIFICATION OF THE RECORD AND NOTICE OF HEARING OFFICER AND HEARING DATE

Please be advised that a hearing will convene on **Wednesday, October 30, 2019 at 10:00 a.m. in the Borough Assembly Chambers**. Anmei Goldsmith has been assigned as the hearing officer to hear this appeal.

Written opening statements ("opening statements") shall be filed no later than **5 p.m. on Tuesday, October 1, 2019** in the Office of the Borough Clerk and in accordance with KPB 21.20.280(A). An opening statement **must** be filed by the appellants (Hans Bilben), applicant (Beachcomber, LLC) and Borough staff. **Failure to timely file an opening statement shall result in your dismissal as a party to this appeal.** Multiple parties may preserve their party status by filing a single written statement; however, the written statement must clearly identify all parties filing the single statement. An opening statement may contain the following: 1) a statement of facts as derived from the record on appeal; 2) a statement of the party's perception of the correctness of the planning commission decision; 3) a list of asserted errors; and 4) any citations to applicable statutes, ordinances, regulations or other legal authority for the position taken by the party to the appeal. Service shall be made by the Borough Clerk either by mail or personal delivery within two business days of the filing deadline.

Each party filing an opening statement **may** submit a reply statement which must be limited to response to matters specifically raised in the statement to which the party is responding. A party shall file a single reply statement in response to all opening statements filed. Reply statements must be filed in the Office of the Borough Clerk no later than **5:00 p.m. on Monday, October 21, 2019** and in accordance with KPB 21.20.280(B). Service shall be made by the Borough Clerk either by mail or personal delivery within two business days of the filing deadline.

The indexed record and minutes on appeal, as certified by the planning director, were mailed to the appellants and applicant by the Borough Clerk on September 11, 2019. Any party may request a copy of the record at a cost of .25 cents per page. The total cost of the record is \$190.27 (\$179.50 plus 6% sales tax).

Any party may request an extension of time for filing an opening statement or reply statement before the deadline, which the Hearing Officer may grant, for good cause shown.

CERTIFICATE OF SERVICE

I, John Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the foregoing notice.

X 
Signature

Dated this 11th day of September, 2019.

Appellant Hans and Jeanne Bilben catchalaska@alaska.net Agent Katherine Elsner Ehrhardt, Elsner & Cooley katie@907legal.com	Applicant Emmitt & Mary Trimble dba Beachcomber LLC emmitttrimble@gmail.com margetrimble@gmail.com Agent Holmes Weddle & Barcott, P. C. Stacey Stone: sstone@hwb-law.com Chantal Trinka: ctrinka@hwb-law.com snichols@hwb-law.com	Allison Trimble Paparao allisontrimblerealestate@gmail.com	Sean Kelley, Deputy Attorney Max Best, Planner Kenai Peninsula Borough skelley@kpb.us legal@kpb.us mbest@kpb.us
Brna Philip J fisheyeak@gmail.com	Carlton Richard D & Marie seaburyroad@live.com noregretsrn@live.com	Cullip Gary L buffycody@msn.com	Danica High highdanica@yahoo.com
G. George Krier georgerewards@gmail.com	Gina M. Debardeleben ginadebar@mclanecg.com	Girton John johnrgirton@aol.com	Gorman James captainboomer525@hotmail.com
Gregory David & Teresa Ann Jacobson davidgregory0754@gmail.com	Isenhour Lauren laurenttrimble@hotmail.com	Linda R Bruce lrb128@hotmail.com	Linda Stevens illuminaarts@aol.com grizzlysafety@aol.com
Oliver Lawrence "Rick" roliverb747@me.com	Patrick Mike & Linda mlpatrick335@yahoo.com	Pete Kinneen storagecondominiumsofalaska@gmail.com	Sheridan Gary Sheridan Eileen twoshar@acsalaska.net
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Xochitl Lopez-Ayala PO Box 2552 Homer, Ak 99603	Brantley Michael PO Box 950 Anchor Point, Ak 99556	Donald L. & Lori L. Horton hortons6@gmail.com	



Office of the Borough Clerk

144 North Binkley Street, Soldotna, Alaska 99669 • (907) 714-2160 • (907) 714-2388 Fax

Johani Blankenship, MMC
Borough Clerk

October 3, 2019

Notice of Opening Statements filed in Case No. 2019-01-PCA: In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District. *[Enclosed please find a copy of the opening statements filed.]*

The following parties filed opening statements in the afore mentioned case:

- Pete Kinneen
- Appellant Hans Bilben by and through counsel, Katherine Elsner
- Kenai Peninsula Borough
- Gina DeBardelaben
- Applicant Emmitt Trimble and Beachcomber LLC by and through counsel of record, Holmes Weddle & Barcott, P.C.
- Emmitt and Mary Trimble
- Lauren Isenhour
- Allison Trimble

This notice is being sent to you because our records indicate you are a party of record in the subject Planning Commission decision appeal.

Johani Blankenship, MMC
Borough Clerk
jblankenship@kpb.us

Enclosed

Page -2-
 October 3, 2019
 To: Parties of Record
 Re: Case No. 2019-01-PCA

CERTIFICATE OF SERVICE

I, John Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the foregoing notice and copies of Opening Statements filed.

X 
 Signature

Dated this 3rd day of October, 2019.

Appellant Hans and Jeanne Bilben catchalaska@alaska.net Agent Katherine Elsner Ehrhardt, Elsner & Cooley katie@907legal.com	Applicant Emmitt & Mary Trimble dba Beachcomber LLC emmitttrimble@gmail.com margetrimble@gmail.com Agent Holmes Weddle & Barcott, P. C. Stacey Stone: sstone@hwb-law.com Chantal Trink: ctrinka@hwb-law.com snichols@hwb-law.com	Allison Trimble Paparao allisontrimblerealestate@gmail.com .com	Sean Kelley, Deputy Attorney Max Best, Planner Kenai Peninsula Borough skelley@kpb.us legal@kpb.us mbest@kpb.us
Brna Philip J fisheyeak@gmail.com	Carlton Richard D & Marie seaburyroad@live.com noregretsrmlive.com	Cullip Gary L buffycody@msn.com	Danica High highdanica@yahoo.com
G. George Krier georgerewards@gmail.com	Gina M. Debardeleben ginadebar@mclanecg.com	Girton John johnrgirton@aol.com	Gorman James captainboomer525@hotmail.com
Gregory David & Teresa Ann Jacobson davidgregory0754@gmail.com	Isenhour Lauren laurentrimble@hotmail.com	Linda R Bruce lrb128@hotmail.com	Linda Stevens illuminataarts@aol.com grizzlysafety@aol.com
Oliver Lawrence "Rick" roliverb747@me.com	Patrick Mike & Linda mlpatrick335@yahoo.com	Pete Kinneen storagecondominiumsofalaska@gmail.com	Sheridan Gary Sheridan Eileen twoshar@acsalaska.net
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Todd Bareman tbareman@gmail.com	Vickey Hodnik vickey@gci.net	Whitmore Lynn lkwhitmore@acsalaska.net	Joshua Elmaleh jewish8josh@gmail.com Christing Elmaleh christycupp5@hotmail.com
Xochitl Lopez-Ayala PO Box 2552 Homer, Ak 99603	Brantley Michael PO Box 950 Anchor Point, Ak 99556	Donald L. & Lori L. Horton hortons6@gmail.com	Angela Roland angelaroland@gmail.com

Blankenship, Johni

From: Pete Kinneen <biocharalaska@gmail.com>
Sent: Tuesday, October 01, 2019 4:23 PM
To: Blankenship, Johni
Subject: <EXTERNAL-SENDER> Opening Statement

CAUTION: This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

Opening Statement in CASE NO. 2019-01-PCA

Comes now party Pete Kinneen to file his opening statement.

Elements 1,11,111,1V, and V of the Bilben opening statement filed this 1st day of October, 2019 are hereby concurred with and augmented with the following.

1) KPB is guilty of repetitious prosecutorial misconduct.

2) Both applicant and KPB agree that instant application fails to meet standards of relevant ordinance. Without attaining the standards, the default position of the ordinance calls for DENIAL.

1-In this quasi-judicial proceeding the KPB is acting in the role of prosecutor, and as such, has rung up a terrible record of forcing decisions to meet their desired outcome which is to grant every application a permit whether it meets the standards necessary, or whether it fails completely, as it **does** in instant case.

For reasons which remain obscure the KPB administration has consistently steered the lay persons Planning Commission toward granting the application to extract gravel from anywhere at anytime. Whether it meets the standards or whether it does not. The prima facie evidence of this misconduct is the KPB record of public hearings in 97 cases heard before the Planning Commission. Of these hearings some were denied by the Commission even after being told, by the Borough, that they did not have authority to deny. (See Bilben Opening Statement.) In the cases of the Commission voting against instructions of KPB staff the administration opposed the commission and caused the permit to be granted regardless of whether it met standards or not. The current case falls into the category of not meeting the standards, being denied, and followed by KPB arm twisting the Planning Commission into changing their decision.

The sordid record stands at 97-0 in favor of granting applications even when they totally fail to meet conditions of the relevant ordinance. Is 97-0 of contested applications not prima facie evidence of misconduct?

Among issues of misconduct by KPB staff, again as witnessed in Bilben statement, are the conditioning of the laypeople Commissioners to believe that the default position of the ordinance is to Grant when the clear default position is to DENY.

KPB has also falsely mesmerized the Commissioners into believing that land owners with gravel on their land, in excess of one acre, have an as of Right to extract said gravel and that such imaginary Right exceeds the existing neighbors real right to peaceful enjoyment of their lands and homes.

In reality the KPB Assembly deliberated and on August 1, 2006 they codified the extinguishment of those as of rights. This is found at KPB Ord. No. 2006-01(S), Sec 1, 8-1-06.

They were replaced with the lower Privilege of applying for a conditional license, or permit, as found in KPB 21.29.020

Privilege is obviously of lower authority than as of right, as KPB understands, but they have continued to mesmerize the Commissioners into somehow believing the privilege to extract gravel trumps the as of right to protect existing neighbors as codified in relevant ordinance. 97-0

21.29.040 states the INTENT which is to protect neighbors against the negative impacts of gravel mining. It is not intended to protect gravel miners from existing neighbors. The burden of proof falls on gravel extractions, contrary to admonishment Of KPB perverting the ordinance to say the opposite.

Perhaps as a result of this atrocious case in Anchor Point the Planning Commission has awoken to the misconduct of KPB and have openly revolted. They are now demanding clarification of their rights to judge the merits of individual cases on their merits based on ordinance versus instructions of KPB staff. (Again see examples of this in Bilben, et al)

The lower court judges (Planning Commission) whose decision is being appealed here have voluntarily and subsequently admitted in publicly recorded admissions that they have been duped and misled into making decisions based on false understanding of the relevant law. (See Bilben) What stronger basis for repeal and remand could you ask for?

2-KPB Bruce Wall and Beachcomber engineer discuss the falsity of a six foot berm sufficiently minimizing the Yale home on the south end of the proposed open pit mine due to topography. They acknowledge that Yale is at ground zero while virtually all other properties are at higher elevations. If Yale can not be sufficiently minimized, how then is it possible to meet code on any of the higher elevations? See R-19, R-195, R-196
T-2 line 29 of page 3 and line 25.

Conclusion-for all the reasons stated in Bilben, and here, Justice calls for remand to Planning Commission to deliberate in consideration of their independent judgement based on relevant ordinance, not as instructed by KPB.

Submitted this 1st of October, 2019 by
Pete Kinneen

Sent from my iPhone

RECEIVED

OCT 01 2019

KENAI PENINSULA BOROUGH

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula)
Borough Planning Commission's)
decision to approve a conditional land)
use permit for a material site that was)
requested for KPB Parcel 169-010-67;)
Trace B, McGee Tracts - Deed or)
Record Boundary Survey (Plat 80-104) -)
Deed Recorded in Book 4, Page 116,)
Homer Recording District)

CASE NO. 2019-01-PCA

Hans Bilben)
Appellant)
Emmitt and Mary Trimble)
Beachcomber LLC,)
Applicant.)

OPENING STATEMENT

Comes Now Hans Bilben, by and through counsel, Katherine Elsner, and joined in filing – pursuant to KPB Code 21.20.280(A) – by Philip Brna, George Krier, David Gregory, Theresa Ann Jacobson, Rick Oliver, Shirley Gruber, Todd Bareman, Xochitl Lopez-Ayala, Richard and Marie Carlton, Mike and Linda Patrick, Joseph Sparkman, Vickey Hodnik, Michael Brantley, Gary Cullip, John Girton, Linda R. Bruce, Steve Thompson, Lynn Whitmore, Donald and Lori Horton, James Gorman, Linda Stevens, Gary and Eileen Sheridan, Thomas J. Brook, and Joshua and Christine Elmaleh, hereby files his opening statement.

The question presented in this appeal is whether to uphold the decision of the Planning Commission when it, having been misadvised as to the legal code, having received no compelling new evidence, having committed procedural error, having failed to make necessary findings, and having insufficient facts to support the findings that were made, determined to approve a

Conditional Land Use Permit sought for KPB Parcel 169-010-67 that it had disapproved a mere year earlier. The 2018 decision of the Planning Commission remains correct, the 2019 decision was incorrect and the Hearing Officer should exercise independent judgment in determining the interpretation of the Code is in error and should determine that there is not substantial evidence to support the findings of the Planning Commission, and, accordingly, find that the decision must be reversed.

I. Statement of Relevant Facts.

On June 4, 2018, Beachcomber LLC applied for a Conditional Land Use Permit (CLUP) under KPB Code 21.29.020 for Parcel 169-010-67. After investigation by the Planning Department, submission of Department recommendations, public notice and public comment from approximately 30 people at a hearing on July 16, 2018, the Planning Commission disapproved Beachcomber's CLUP application. The public comment and evidence submitted established that Parcel 169-010-67 sits in a depressed basin surrounded from above by the neighboring properties. In the shape of an amphitheater, the proposed extraction site is in the bottom, or the bowl, and the surrounding properties are in an elevated position looking down at the location of the proposed site. In disapproving the permit, the Commission made two findings:

1. noise will not be sufficiently reduced with any buffer or berm that could be added;
2. visual impact to the neighboring properties will not be reduced sufficiently.

Beachcomber LLC appealed this decision. KPB staff and its legal department argued that the Planning Commission did not have authority to disapprove a CLUP. The Hearing Officer apparently agreed and remanded the matter for further proceedings and findings of fact in early 2019.

Notice was again posted, and public comments and evidence were again presented. Various hearings were held on March 25, 2019, April 8, 2019, April 22, 2019, June 10, 2019, and June 24, 2019. The underlying factual circumstances surrounding the geographic situs of the proposed extraction site remained unchanged. The elevated position of surrounding property owners remained unchanged. The visual and aural impact of the proposed site remained unchanged. KPB staff and its legal department maintained its legal position that the Commission lacked authority to disallow a CLUP application and advised the Commissioners of the same. At the conclusion of deliberations, unfocused on how the current application and evidence presented in any way differed from the prior evidence that lead them to conclude that visual and aural impact were not minimized by the application, the Commission nevertheless approved Beachcomber's CLUP application. This appeal follows.

II. Statement of Relevant Law Governing the Appeal.

KPB Code 21.20.320 defines the scope of permissible appellate review of the decision of the Planning Commission:

After the hearing the hearing officer shall apply the following rules to its decision:

1. The hearing officer may exercise independent judgment on matters that relate to the interpretation or construction of ordinances or other provisions of law; however, due consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.
2. The hearing officer shall defer to the judgment of the planning commission regarding findings of fact if they are supported in the record by substantial evidence.
3. The hearing officer may revise and supplement the planning commission's findings of fact. Where the hearing officer decides that a finding of fact made by the planning commission is not supported by substantial evidence, the hearing officer may make a different finding on the factual issue, based upon the evidence in the record developed before the planning commission if it concludes a different finding was supported by substantial evidence, or may remand the matter to the planning commission as provided in KPB 21.20.330(B).

“Substantial evidence” is defined by KPB Code 21.20.210(A)(7) as “relevant evidence a reasonable mind might accept as adequate to support a conclusion.”

Accordingly, the questions presented are: whether KPB Code provisions relating to approval or disapproval of CLUP applications were properly interpreted such that it is correct that the Commission has no authority to disapprove a permit application; whether the Code requires independent consideration of the statutory standards set forth in 21.29.040; whether there were sufficient findings to justify the approval of the CLUP; and whether there was substantial evidence to support those findings. Because, despite KPB’s position, the Commission plainly has the authority to disapprove a CLUP application, because, despite KPB’s position, the Commission must consider the statutory standards set forth in 21.29.040, because there were insufficient findings to justify the approval and because there was not substantial evidence to support the findings that were made, the decision approving the CLUP must be reversed on both procedural and substantive grounds.

III. Argument Relating to Procedural Error.

1. Planning Commission Members Prejudging the Application Outcome Should Have Been Disqualified.

KPB Code provision 21.20.240 governs times at which a hearing officer may not hear or decide a case. 21.20.240(2) disqualifies a Commission Member where it is demonstrated that, “due to factors external to the case, the ability of the hearing officer to make an impartial decision is actually impaired.” Moreover, the Planning Commission Manual created and provided by KPB Staff to advise the individual members on policy and procedure states that:

Bias is prejudging a matter. There is not a borough ordinance prohibiting bias. However, quasi-judicial decisions resulting from prejudice, arbitrary decision making, or improper motives may be invalidated under case law.... The bias test is whether a commissioner has actually made up his mind regardless of any argument

that might have been advanced at the hearing. Indicators of prejudice include a commissioner making a clear statement suggesting that a decision has already been reached. The test is objective and queries whether a disinterested observer would conclude that the commissioner has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.¹

On January 4, 2019, Commissioner Ruffner was interviewed relating to the process of proposing amendments to the KPB Code relating to CLUP applications for material site extraction. Discussed in that interview was the instant application and the current law and procedure for CLUP applications for material site extraction. Commissioner Ruffner was quoted saying:

When an applicant comes in and applies to develop a gravel permit, there's a notification that goes to the surrounding landowners and often times those surrounding landowners will come to the borough with the expectation that if they really rally the troops, that the planning commission may say no to a permit. And I don't think that the borough has done a particularly good job of letting people know when those notices come out, that the planning commission doesn't have the authority to say no. [R. 595]

Commissioner Ruffner's comments clearly indicated that, no matter the facts or arguments presented at the hearing, when a notice has been sent out by the Borough for a material site CLUP hearing, the ultimate decision, in his view, is predetermined. His recusal was sought on this basis and it should have been granted. [R. 594]. Instead, he was permitted to deliberate on this application and voted in its favor. [T. 200].

2. The Planning Commission Improperly Disallowed Public Comments After Additional Testimony was Presented by the Applicant and Additional Voluntary Conditions were Proposed.

At the June 24, 2019 hearing, Borough Staff invited the Applicant to provide additional testimony in support of his application. [T. 192] Through that commentary, the Applicant addressed evidence previously presented² even though he had already taken the opportunity to

¹ Planning Commission Manual at 16-17.

² Mr. Trimble: "I had some rebuttal regarding the presentation that was drawn out over a two-hour period with the – one of the opponents sitting over here with the computer... We've previously rebutted those drawings and those assertions with the letter from a licensed land surveyor." [T. 192]

rebut evidence at the prior hearing at that prior hearing;³ proposed new voluntary conditions that had never previously been discussed;⁴ responded to new evidence that had not previously been presented;⁵ proposed a voluntary condition on back-up alarms after which Staff failed to clarify and the public was not allowed to comment on the ineffectiveness of such a voluntary condition;⁶ and testified relating to an issue that had never before been raised - the lack of aural impact from the use of "jake brakes."⁷

The public attempted to provide additional comment relating to this additional testimony and proffered voluntary conditions but was prohibited from doing so. [T. 194]. The Planning Commission Manual dictates the hearing procedures to be followed in order to allow a "fair" quasi-judicial hearing and states that at the time the Applicant presents its rebuttal to the Planning Commission during the hearing, "If new evidence or testimony is allowed, the Planning Commission may question staff regarding the same and take additional public comment regarding the new evidence."⁸ This allowance for additional public commentary would have been

³ Mr. Wall: "the procedures allow for the applicant to give a rebuttal as long as he is not providing any new information, just rebutting the testimony that's been given."
 Ms. Stone: "As a matter of procedure, I apologize because I was not making a further public comment but rather rebutting testimony offered." [T. 150]

⁴ Mr. Trimble agreed to not operate on Labor Day, Memorial Day, and the 4th of July to address concerns raised in a new and not previously provided letter to the Borough by the Alaska Division of Parks and Recreation and on which the public had no opportunity to comment. [T. 192]

⁵ See, e.g., id.

⁶ [R. 594]; Mr. Trimble: "And the - to clarify, Mr. Wall had a question regarding the back-up beepers, and he was clarifying with me that I said I was in agreement with that on my equipment. I can't govern what happens with a truck that's maybe one time going to come in there, but I would certainly try to accomplish that." [T. 193]

⁷ [T. 193-194].

⁸ Planning Commission Manual, at page 22.

particularly important where, in this instance, additional conditions were proposed and discussed. Pursuant to 21.29.050(14) there must be a finding that the “conditions will be in the best interest of the borough and the surrounding property owners.” Accordingly, the Commissioners made determinations as to what was in best interests of the surrounding property owners without giving them the opportunity to be heard on that subject.

The disallowance of additional public commentary was not brought to a vote by members of the Planning Commission and, considering the nature of Mr. Trimble’s comments and the subsequent discussion, the failure to allow further comment created an unfair proceeding.

IV. Argument Relating to Substantive Error.

1. The Planning Commission Can Disallow a Permit.

Chapter 21.25 of the KPB Code provides general regulation of all CLUPs and Chapter 21.29 provides more specific regulations relating to material site permits. Pursuant to Chapter 21.25.010:

Chapter 21.25 applies to all land within the rural district of the Kenai Peninsula Borough, as designated in KPB 21.04.010. This chapter sets forth general provisions applicable to all conditional land use permits (CLUPs) and definitions. The provisions in this chapter are in addition to the chapters set forth in title 21 addressing specific types of CLUPs and where the provisions in this chapter and a CLUP chapter regulating a specific use conflict, the more specific chapter shall control. (emphasis added).

That is, the regulations and requirements in chapter 21.25 are equally controlling across all CLUPs unless and until a specific conflict arises between a provision in 21.25 and a more specific chapter.

Pursuant to the general governance contained in chapter 21.25, KPB Code 21.25.050 sets forth the authority of the Planning Commission in considering CLUPs. 21.25.050(B) both authorizes and mandates the exercise of Planning Commission authority:

When the application is scheduled to be considered, the planning commission shall conduct a public hearing to consider the permit application, and shall either

approve, modify or disapprove the permit application. Those wishing to contest issuance of the permit may submit evidence and be heard at the hearing. Before granting the permit, the commission must find at a minimum that the proposed activity complies with the requirements of this chapter. Planning commission approval of these conditional land use permits shall be by resolution. Permits shall be conditioned upon compliance with this chapter and other applicable code provisions. (emphasis added).

KPB Code 21.25.020 sets forth the purpose of the CLUP chapter: “to require advance 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.” For that reason, and employing the same language,⁹ KPB Code 21.29.040 sets forth the specific standards that apply to CLUPs for material sites. Indeed, pursuant to KPB Code 21.20.040, while only the conditions authorized in 21.20.050 may be imposed by the Commission, those conditions are imposed in order to “meet” the standards set forth in 21.20.040.

At the time that the 2018 disallowance was remanded to the Commission for further findings and hearing, KPB Staff provided an updated report to the Commission Members. Contained within that Staff report were excerpts from the Hearing Officer’s Decision. Included in those excerpts was a clear message to the Commission Members that they expressly lacked the authority to disallow a permit. [R. 253]. The Commission Members were expressly directed by Staff through the Hearing Officer Decision that the “Code does not provide the Commission discretion to deny such a permit when the application has been properly submitted... While the Commission’s concerns may be valid, the Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in the Code. Instead, the Assembly, in adopting the

⁹ See, e.g., KPB Code 1.08.040(T), which requires that, in construing the provisions of the code, “technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.”

Code, only granted the Commission authority to impose these conditions and ensure that any application complied with the application requirements.”¹⁰

To read the KPB Code in a way to conclude that the Commission does not have the authority to disallow an application that the Planning Director has determined is complete is erroneous and necessarily renders the standards set forth in KPB 21.29.040 obsolete. The presumption of statutory interpretation is “that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.”¹¹ Any other statutory interpretation renders the fundamental underlying intent and purpose of the 21.29.040 standards meaningless because it would require granting a permit under ineffectual conditions even where it cannot be said that the standards are met. *See, e.g., Mech. Contractors of Alaska, Inc. v. State, Dep’t of Pub. Safety*, 91 P.3d 240, 248 (Alaska 2004) (“When we engage in statutory construction we will presume “that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.”) and *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) (“a reviewing court need not accept an interpretation which is unreasonable”).

The KPB Code simply does not have a provision that requires mandatory authorization of permit applications. In *Farley v. Utah County*, the Utah Court of Appeals was called upon to interpret the statutory language contained in Utah County’s zoning scheme. There, like here, the Utah applicant asserted that the statutory provisions created a scheme whereby Utah County lacked discretion to do anything more than approve a submitted application. In disagreeing with the

¹⁰ Id.

¹¹ *See, e.g., Mech. Contractors of Alaska, Inc. v. State, Dep’t of Pub. Safety*, 91 P.3d 240, 248 (Alaska 2004) (internal citations omitted).

Applicant, the Utah Court of Appeals noted that: “[t]he best evidence of the legislature’s intent is the plain language of the statute itself,” that “[i]f the criteria in section 17-45-305 could be mechanically applied and if approval followed automatically whenever those criteria were met, there would be little need for two agencies to separately review the application and make recommendations, and for the legislative body to hold a public hearing and then decide whether to ‘approve, modify and approve, or reject’ an application,” and that “[b]ecause the Act requires an evaluation of factors beyond those criteria listed in section 17-45-305, the statutory scheme as a whole does not support the conclusion that an application must be approved if those five criteria are ‘satisfied.’” Therefore, the plain language of the Act unambiguously grants Utah County discretion in deciding whether to approve and modify the creation of an agricultural protection area.”¹²

In enacting the KPB Code, the legislature included language on standards for permit applications. The legislature also limited the conditions that the Planning Commission could impose to meet those standards. The legislature provided for investigation into the permit application, recommendations to the Commission and public notice, hearing and deliberation. The legislature required the Commission to consider factors, including the public health, private property rights, safety and public welfare. The legislature explicitly authorized the Commission to disallow permits.

¹² *Farley*, 440 P.3d 856, 860 – 862 (Utah App. 2019). *See also, Da Vinci Investment, Limited Partnership v. City of Arlington, Texas*, 747 F. App’x 223, 226 (5th Cir. 2018) (“Da Vinci argues that the council members had no discretion to deny its development plan because it had met all the guidelines set forth in the ordinances. We again find no such mandatory language....Because there is no ‘explicitly mandatory language’ in the ordinances requiring city officials to approve a development plan, even where a plan meets all required guidelines, the city council had discretion to grant or deny the benefit.”)

The clear message given to Commission Members contained an erroneous interpretation of the law which conveyed to them they lacked the discretion to disallow this permit. The Commission Members themselves articulated an identical belief.¹³ The resulting decision must be reversed and remanded for reconsideration in the context of a correct interpretation of the law that explicitly and clearly grants Commission Members the authority to disallow a CLUP application for material site extraction.

2. The Planning Commission Must Independently Find that the Standards in 21.29.040 and Conditions in 21.29.050 Have Been Met.

KPB 21.29.040 sets forth certain standards that *must* be met in order to issue a CLUP. Pursuant to that provision, the standards require that the permit application: “Protects against the lowering of water sources serving other properties; Protects against physical damage to other properties; Minimizes off-site movement of dust; Minimizes noise disturbance to other properties; Minimizes visual impacts; and Provides for alternate post-mining land uses.” Relying on the erroneous interpretation of Chapters 21.25 and 21.29, the only finding relating to compliance with 21.29.040 is Finding of Fact 15: “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.” As discussed above, to conclude that independent consideration of the standards of 21.29.040 is unnecessary as they are only viewed in the context of compliance with 21.29.050 is erroneous.

The Commission was obligated to determine that the application did sufficiently protect against and minimize lower of water sources, physical damage, off-site dust movement, noise disturbance, and visual impacts. Indeed, 21.25.050 mandates a determination that the requirements

¹³ See, e.g., Commissioner Ruffner’s comments relating to the news report: “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 – and again, I’ll just repeat, if those conditions are met, then we don’t have the ability to deny the permit.” [T. 190].

of 21.25 are met prior to issuing a permit. 21.25.020 requires the Commission to send “advance 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.” That is, the Code requires that the standards set forth in the Code are met prior to issuance of a permit.

In 2018, the Planning Commission found that “The noise will not be sufficiently reduced with any buffer or berm that could be added;” and “[t]he visual impact to the neighboring properties will not be reduced sufficiently.” In 2019, no findings of fact relating to either of these standards was provided. Instead, the Commission found that purported compliance with 21.29.050¹⁴ “necessarily means that the application meets the standards contained in KPB 21.29.040” regardless of whether or not the Commission believed that the standards had *actually* been met. These findings are required under the Code and were not made by the Planning Commission before approving this application. The Hearing Officer should exercise independent judgment to determine that independent consideration of the standards set forth in 21.29.040 was required - and that there were insufficient findings relating to 21.29.050(A)(2)(c)’s requirement that the buffer zone be of “sufficient height and density” - prior to granting the permit and that the findings in the resolution approving this permit were insufficient as a matter of law.

3. The Applicant Did Not Present Substantial Evidence to Support the Findings.

In 2018, the Commission heard public comment from more than 30 people and received over 200 pages of documents against this application. After a hearing spanning two and a half hours, the Commission determined that they were unable to find that the application minimized

¹⁴ A contention that is not accepted, as the Finding of Facts are silent as to whether the buffers and berms are of “sufficient height and density to provide visual and noise screening of the proposed use as deemed appropriate by the planning commission or planning director” as required under 21.29.050(A)(2)(c).

noise and visual impact to surrounding property owners. The Commission then found that the noise will not be sufficiently reduced with any buffer or berm that could be added and that the visual impact to the neighboring properties will not be reduced sufficiently.

Having had the matter remanded in 2019, the Commission again received documentary evidence and heard public commentary. This application came before the Commission on 5 different days and public hearing was heard that spanned over seven hours. 125 people presented written or verbal contributions that were against the application. The vast majority of those people were within the ½ mile notification area immediately surrounding the proposed site. Of the 39 people presenting written or verbal statements in support of the application, the majority of these individuals were outside of the notification zone, were not neighboring property owners and were, instead, other gravel pit owners and/or operators.

Importantly and notably, none of the findings of fact indicate how the evidence presented shifted in such a way that there is now substantial evidence to undermine the Commission's prior findings and to determine that this site would be sufficiently screened from visual and aural impact. This finding of fact is absent because the evidence did not in fact shift.

Beachcomber presented a voluntary condition that contained a "rolling berm" which purported to solve the visual and noise impact problem. Much attention was focused on the rolling berm, however, the permit condition says nothing more than that the berm will be placed "near" the active excavation area and will be "moved" as excavation progresses. [R. 781]. It does not say how near the berm must be to the active area, within what time the berm needs to be moved, how much progression requires the berm to "roll," or how the berm will operate in fact. Indeed, as noted by Commissioner Ecklund, the only way the rolling berm would provide screening impact would be for it to start on the west side of Phase 3 and roll back to the east toward the hillside and the affected

properties. [T. 157]. Commissioner Bentz voiced similar thoughts that the rolling berm is more or less effective depending on where and in what direction excavation progressed. [T. 198]. However, even after understanding the utter ineffectiveness of the rolling berm under certain conditions, the Commission did not make any requirements about the order or direction of excavation progression. The voluntary condition imposing a berm “near” the active extraction site, accordingly, provides no assurance that the site will actually be visually or audibly screened to surrounding property owners.

The site location poses the same inability to minimize visual and noise impact in 2019 as it did in 2018. That these problems were not overcome with additional evidence was summarized by Commissioner Ernst:

I’m looking at the findings of fact on page 80, 15Q, and it says – I just need to understand this a little bit, because when I look at the GIS evidence, if you will, it doesn’t seem like there is any way – let’s see, it says ‘each piece of real estate is uniquely situated and a material site cannot be conditioned so that all adjacent parcels are equally screened by the buffers.’

Well, in this unique situation, we have a pit that’s in the lowlands surrounded by affected properties. Is there any possible buffer that could be reasonably used to protect the, you know, the noise levels and visual impact of this pit since there are so many parcels around it?

....

So equal protection under the law doesn’t apply?

Indeed, that the proposed buffers and berms do not adequately screen from noise and visual impact is conceded by the Applicant themselves. Mary Trimble submitted an email stating that the

‘opposition’ wants the right to protect their property but are unwilling to consider/accept the fact that they have a responsibility to do what they can to minimize visual and noise, if it is bothersome, by building a fence or berm on their property and/or installing blinds that raise up from the bottom so they still have their Inlet view. They do not have rights to our land, so we should not bear all the responsibility for mitigating their perceived discomfort for how we use it. [R. 378].¹⁵

¹⁵ Emmitt Trimble echoed this sentiment in a recorded statement, played for the Commissioners: “You are looking to the operator or the gravel pit owner to solve the other person’s problem on their property with

On the other hand, surrounding property owners presented objective and compelling evidence that noise and aural impacts will not be screened by the proposed buffers and berms, regardless of whether the berm does in fact move. Using the Borough's own data system, GIS profile drawings were prepared for the properties of Richard Cline, Gary Gordon, Pete Kinneen, Hans Bilben, Steve Thompson and Rick Oliver. [R.598-62, R662-664 726-728]. These profile drawings clearly demonstrate the ineffectiveness of the buffers and berms proposed by the application at reducing any visual and aural impact. Rather than refuting, the vector profile drawings prepared by Stephen Smith only validate the GIS profile drawings and, when read in conjunction with the GIS profiles, only further confirm the ineffectiveness of the berms. [R. 443-444]. This ineffectiveness remains confirmed in real life by Rick Oliver's visual depiction of the effect a 12' berm would have on reducing the sightline from his property into the proposed pit. [R451-453].

The geography of this site remains as it was at the 2018 hearing: a proposed gravel pit in a residential and recreational area that sits lower than surrounding property owners and has a higher propensity to be seen and heard by surrounding neighbors. Nothing presented by the Applicant undermined the conclusion that the Commission reached in 2018, and the Commission did not find otherwise. Substantial evidence does not support the issuance of this application and its allowance must be reversed.

V. Conclusion.

For the foregoing reasons, it is proper for this Hearing Officer to exercise independent judgment in the interpretation of the Code and determine that the Commission does, in fact,

their money instead of them solving their problem. Build a fence, get some blinds, get some ear plugs. So in answer to your question about responsibility if it is an unzoned area no." [R. 697].

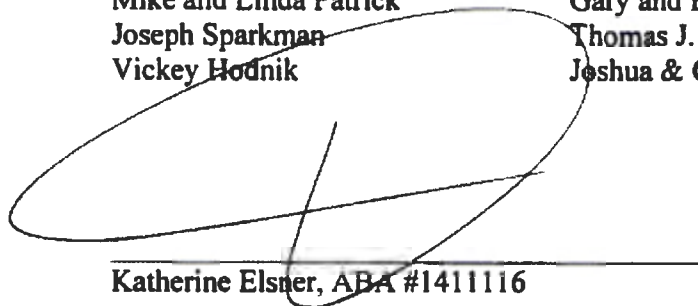
pursuant to the express mandate of the Code, have the authority to disallow material site CLUP applications. The Hearing Officer should determine that those Commissioners who had prejudged this issue should not be permitted to deliberate and decide. The Hearing Officer should determine that independent consideration of the standards set forth in 21.29.040 is essential and that those standards **are** not necessarily met by the mere submission of conditions set forth in 21.29.050, which were also not met. The Hearing Officer should determine that there is not substantial evidence to support the issuance of this permit but, instead, that the substantial evidence demonstrates that the permit should not be issued.

DATED October 1, 2019.

Respectfully submitted and filed on behalf of Hans Bilben

And joined in filing, pursuant to 21.20.280(A), by:

Philip Brna	Michael Brantley
George Krier	Gary Cullip
David Gregory	John Girton
Theresa Ann Jacobson	Linda R. Bruce
Rick Oliver	Steve Thompson
Shirley Gruber	Lynn Whitmore
Todd Bareman	Donald & Lori Horton
Xochitl Lopez-Ayala	James Gorman
Richard and Marie Carlton	Linda Stevens
Mike and Linda Patrick	Gary and Eileen Sheridan
Joseph Sparkman	Thomas J. Brook
Vickey Hodnik	Joshua & Christine Elmaleh



Katherine Elsner, ABA #1411116

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KENAI PENINSULA BOROUGH
OFFICE OF THE BOROUGH CLERK

APPEAL FROM THE PLANNING COMMISSION DECISION

In the matter of the Kenai Peninsula Borough)
Planning Commission's decision to disapprove)
a conditional land use permit for a material)
site that was requested for KPB Parcel 169-)
010-67; Tract B, McGee Tracts – Deed of)
Record Boundary Survey (Plat 80-104) – Deed)
recorded in Book 4, Page 116, Homer)
Recording District.)

Case No. 2019-01-PCA

Hans Bilben,)
Appellant)

Emmitt Trimble,)
BEACHCOMBER, LLC,)

Applicants.)

KENAI PENINSULA BOROUGH'S OPENING STATEMENT

PROCEDURAL AND FACTUAL BACKGROUND

A material site conditional land use permit (hereinafter "CLUP") application was received and processed pursuant to KPB chapters 21.25 and 21.29. [R.1-4]. The applicant and owner is Beachcomber LLC. [R.1]. The property is located at 74185 Anchor Point Road.¹ [R.19]. The submitted site plan indicated the material site haul route to be Denver Street, which is a borough maintained road. [R.8].

The application indicates that the depth to groundwater is 20 feet and that the depth of the proposed excavation is 18 feet. [R.2]. The site plan indicated that processing of material would take place more than 300 feet from the south, east, and west parcel

¹ Legal Description: Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District.

boundaries and 200 feet from the north boundary. [R.25]. A waiver to the 300-foot setback requirement for processing was requested in the application. [R.4]. The site plan indicated that there are several wells located within 300 feet of the property but none within 100 feet of the proposed excavation. [R.5]. The site plan indicates a 100-foot setback from the wetlands area located in the northeast corner of the property and that this setback will provide protection via phytoremediation of any site run-off prior to entering the surface water. [R.5]. The site plan also indicates that the Alaska DEC user's manual, *Best Management Practices for Gravel/Rock Aggregate Extraction Projects, Protecting Surface Water and Groundwater Quality in Alaska*, will be utilized as a guideline to reduce potential impacts to water quality. [R.5]. The applicant estimates a life span of 15 years for the site. [R.2].

Evidence of public notice and publication is in the record. [R.183-186; R.199-200; R.196; R.205-208]. Public notice of the application was mailed on June 22, 2018 to the 200 landowners or leaseholders of the parcels within one-half mile of the subject parcel. Application information was provided to pertinent KPB staff and other agencies on July 6, 2018. Comments were received from Alaska State Department of Environmental Conservation, Alaska State Department of Natural Resources, and the Donald E. Gilman River Center. [R.34; R.36; R.94-95; R.98-100]. The KPB also received comments from Kachemak Bay National Estuarine Research Reserve, Homer Soil and Water Conservation District, Kachemak Bay Conservation Society, and Cook Inletkeeper. [R.60-92; R.109-110; R.129-131; R.160; R.163-165]. Forty-two comment letters in opposition from area residents were received, one of which was inadvertently not provided to the commission. [R.28-165; R.218]. (Agency comments are not separated from area residents' comments in the record.) A petition in opposition was received that was signed by 17 area residents. [R.137-138]. Most of these comments were not available to the planning commission members until the night of the public hearing. At the hearing, an additional petition was submitted as were additional photos from area residents and from the applicant. [R.166-182].²

At the July 16, 2018 meeting, staff recommended that the commission take public comments and then continue the hearing to the next meeting to allow time for the

² 16 of the 20 signatures on this petition participated in the planning commission proceedings with either written or oral testimony.

commission members to read all of the written comments that had been received. [T.3]. At the meeting, 27 people spoke in opposition to the application or expressed concerns about the proposed project and one neighbor spoke in favor of the application. The applicant and the applicant's engineer also addressed the commission.

The primary concerns raised about the proposed material site through the correspondence and testimony were as follows: traffic volume, traffic safety, surface and subsurface water quality, property values, quality of life, visual impacts, noise, dust, wildlife habitat, and hours of operation. [T.3-19].

After close of the public comment period, a motion to continue the public hearing to the following month was made. The motion failed by a vote of four to five. [T.25-26]. Following the failed motion to postpone, a motion was made to approve the requested material site. Following discussion, the motion failed by a vote of three to six. [T.26-28]. The commission then adopted the following findings:

1. The noise will not be sufficiently reduced with any buffer or berm that could be added.
2. The visual impact to the neighboring properties will not be reduced sufficiently.

[T.28]

An appeal was filed with the Borough Clerk by Beachcomber LLC pursuant to KPB 21.20 on August 2, 2018. A hearing on the appeal was held on December 6, 2018. The hearing officer's decision and order was issued on December 26, 2018. [R.276-292]. The decision and order provided instructions for the planning commission:

The Commission shall reevaluate the application with respect to the mandatory conditions listed in KPB 21.29.050, as well as any voluntary conditions that Beachcomber may agree to. The Commission shall conduct a second public hearing at which it shall issue findings of fact, pertaining to the mandatory conditions listed in KPB 21.29.050, and shall reference specific evidence in the record in support of those findings. In issuing its findings, the Commission must comply with both local and common law requirements, which require the Commission to both issue findings supported by substantial evidence and to "articulate the reasons for their decisions."

[R.290-291]

Two parties filed timely motions for reconsideration in the matter and the hearing officer issued a decision denying reconsideration on February 5, 2019. [R.271-275].

The remand hearing was scheduled for March 25, 2019. Evidence of public notice of the hearing is in the record. [R.744-758]. Public notice of the remand hearing was mailed on March 4, 2019 to the 203 landowners or leaseholders of the parcels within one-half mile of the subject parcel. Public notice was sent to the postmaster in Anchor Point requesting that it be posted at the Anchor Point post office. Public notice of the remand hearing on the application was published in the March 14, 2019 and March 21, 2019 issues of the *Homer News*. Sixty-three comment letters and other documents were received from the public, the applicant, and Alaska Department of Transportation and Public Facilities prior to the meeting. [R.293-373, R.375-465]. The planning commission also received a request for a continuance from the applicant's representative. [R.374]. At the hearing, additional comments, documents, and photos were submitted from area residents and from the applicant. [R.466-495]. The public, the applicant, and their legal representatives provided testimony at the hearing. [T.52-103].

Following conclusion of public comments, the planning commission voted to continue the public hearing to May 28, 2019. [T.78]. At the regular meeting of the planning commission on April 8, 2019, the applicant addressed the planning commission during the time period set aside for public comment on items not on the agenda, stating that he had a scheduling conflict on May 28, 2019, and requested that the continuation of the hearing be rescheduled to a different date. The commission then voted to amend after adoption the date of the continuation of the hearing and to publicly notice it for discussion at its next meeting. [T.100-101]. A notice was mailed to landowners or leaseholders of the parcels within one-half mile of the subject parcel informing them of the meeting to take place on April 22, 2019.³

Prior to the April 22, 2019 meeting, 19 written comments were received concerning the continuation date of the hearing. At its April 22, 2019 meeting, the commission received testimony from the applicant and six members of the public. [T.105-108]. Following the testimony, the planning commission scheduled the continuation of the remand hearing for June 10, 2019. [T.108-110].

³ This document was inadvertently omitted from the record.

Notice of the June 10, 2019 planning commission meeting was mailed on April 24, 2019. There were errors with the printing and mailing of this notice and it was resent on April 30, 2019. [R.762-763]. Notice was sent to the Anchor Point post office for posting and was published in the May 30, 2019 and June 6, 2019 editions of the *Homer News*. [R.767]. Prior to the meeting, 33 comment letters were received from the public, the applicant, and from Alaska Department of Natural Resources. [R.584-675].

At the June 10, 2019 hearing on remand, the applicant and his representatives addressed the commission and provided a video presentation. [T.119-122]. The commission also heard testimony from 31 members of the public. [T.122-150]. During the public comments, Lynn Whitmore, a neighboring property owner, displayed a live interactive version of the written evidence that he had submitted that is included in the record. [R.598-602]. At the hearing, the applicant volunteered a condition concerning the placement of the berms (rolling berms) and a condition concerning the use of white noise backup alarms. [T.122, 158]. Following public testimony and rebuttal from the applicant, the planning commission closed the public hearing and began deliberation. [T.159]. After some time spent in deliberation the commission voted to continue the deliberation to its next meeting to be held on June 24, 2019. [T.157-159].

Prior to the meeting on June 24, 2019, planning staff became aware of and obtained a copy of a comment letter from Alaska State Parks, dated May 1, 2019. [R.725]. This letter had not previously been received by the planning department and so it was provided to the planning commission for its June 24, 2019 meeting. There was also a letter sent directly to several of the planning commission members from a neighboring property owner. [R.731-732]. A copy of this letter was provided to all of the commission members. The applicant also submitted an additional volunteered condition that would restrict operations of the material site on certain holidays. The revised resolution staff provided to the planning commission for consideration on remand contained 21 conditions for the proposed material site permit. [R.715-716].

At the June 24, 2019 meeting, at the request of the applicant, staff recommended to the planning commission a revision to proposed condition #2 concerning the buffer along the northern 200 feet of the eastern most boundary. Staff also recommended the addition of the volunteered condition restricting operations on certain holidays. [R.729]. The final

revised resolution provided by staff to the planning commission for consideration contained 30 findings of fact. [R.711-715].

Staff also recommended that, if the volunteered condition concerning holiday restrictions was imposed, the planning commission should also adopt additional findings in support of the volunteered condition. [R.729-730]. At the meeting, the applicant was given the opportunity to rebut the additional information that was presented. [T.192-194]. Following deliberations, the planning commission voted to grant the CLUP via KPB Planning Commission Resolution 2018-23. [T.196-200]. Resolution 2018-23 adopts 30 findings of fact and imposes 22 conditions for the approved CLUP.

DISCUSSION

1. KPB 21.29 ESTABLISHES THE STANDARDS AND THE ONLY CONDITIONS APPLICABLE TO A MATERIAL SITE CLUP

KPB 21.25.020 provides:

It is the purpose of this chapter to require 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.

KPB 21.29.040 is more specific and explicit: the only conditions that may be placed on a material site CLUP are those set forth in KPB 21.29.050.

KPB 21.29.040 provides:

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

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

In the rural zoning district of the borough, the assembly has attempted to balance the health, safety, and welfare of the property owners adjacent to material sites by providing a list of mandatory conditions in KPB 21.29.050 that must be applied to each material site permit. It is through these conditions that the assembly has determined the extent to which the health, safety, and welfare will be protected in the material site permitting process.

A superior court decision has upheld the borough assembly's authority to adopt an ordinance that favors material site operations. This order further held that it is the planning commission's responsibility to abide by the legislative standards the assembly has established:

"[P]lanning authorities are 'bound by the terms and standards of the applicable zoning ordinance, and are not at liberty to either grant or deny conditional use permits in derogation of legislative standards.' ...

The assembly has specifically adopted ordinances that are protective of material site operators and rejected proposed ordinances that make it more difficult for the same to receive project approval. In adopting the material site code language, the Borough Task Force rejected language that placed a larger burden on the permit applicant. ...

[T]he Planning Commission would have violated the KPB Code by imposing conditions not authorized by the code. The Assembly could have chosen a policy that favors residential property owners, but instead it chose to adopt a policy that favors material site operators. This court will not disturb a reasonable policy decision of local concern..."⁴

In the present case, the CLUP approved by the planning commission imposes every required and allowed condition under borough code. The authority of the assembly to determine policy decisions should not be disturbed by the hearing officer.

⁴ See, Memorandum Decision and Order, *Warrington v. KPB*, Case No. 3KN-05-206 CI, pgs. 8 -10 (Citing *South Anchorage Coalition v. Coffey*, 862 P.2d 168 (Alaska 1993)).

2. THE MANDATORY AND VOLUNTARY CONDITIONS IMPOSED BY THE PLANNING COMMISSION'S DECISION MEET OR EXCEED THE KPB 21.29.040 STANDARDS

After multiple public hearings and hours of public testimony and deliberation, the planning commission made 30 findings of fact and adopted 22 permit conditions to meet the standards found in KPB 21.29.040. The decision represents the end result of over a yearlong public process. The decision was deliberative and supported by substantial evidence. All the mandatory conditions found in KPB 21.29.050 are addressed and satisfied in the findings and permit conditions. Only the KPB 21.29.050 conditions may be imposed by the planning commission. The permit satisfied all code requirements and the approval of the permit was the correct decision in accordance with borough code.

The mandatory KPB 21.29.050 conditions and the corresponding finding of fact adopted and condition(s) imposed by the permit, set forth in Resolution 2018-23, are as follows:

1. *Parcel boundaries* – KPB 21.29.050(A)(1)
 - i. Finding 16: All boundaries of the subject parcel shall be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter.
 - a. The submitted site plan indicates the location of each of the parcel boundary stakes.
 - b. Planning staff has visited the site several times and has observed that the boundary stakes are in place.
 - ii. Condition #1: The permittee shall cause the boundaries of the subject parcel to be staked at sequentially visible intervals where parcel boundaries are within 300 feet of the excavation perimeter.
 - ii. Sufficiency: Meets or exceeds code requirement.
2. *Buffer zone* – KPB 21.29.050(A)(2)
 - i. Finding 17: A buffer zone shall be maintained around the excavation perimeter or parcel boundaries.
 - a. The applicant has proposed to maintain a six-foot high berm along all excavation boundaries except the western most boundary and along the east 400 feet of the northern boundary, where a 50-foot vegetated buffer is proposed.
 - b. There are 16 parcels adjacent to the proposed material site (adjoining or separated only by a roadway).
 - c. Eight of the adjacent parcels are vacant; one of the vacant parcels is a Prior Existing Use material site. Six of the adjacent properties have a dwelling. One of the adjacent properties has a recreational vehicle that

is used as a seasonal dwelling. One of the adjacent properties contains commercial recreational cabins.

- d. The elevation of the commercial recreational cabins is at a lower elevation than the proposed excavation area. Three of the adjacent residences are at about the same elevation as the proposed excavation area. Four of the adjacent residences are at a higher elevation than the material site parcel.
- e. Farther away, there are additional residences in the vicinity that are at higher elevations than the adjacent properties. These parcels are less impacted by the material site than the parcels adjacent to the material site as sound dissipates over distance.
- f. Per the site plan there is a greater than 50-foot native vegetated buffer along the western most boundary of the material site.
- g. Along the southern and eastern property boundaries, where the applicant has proposed a six-foot high berm, staff recommends a 50-foot vegetated buffer along the property boundary with a 12-foot high berm between the extraction area and the vegetated buffer.
- h. Over 40 percent of the southern and eastern property boundaries, where the applicant has proposed a six-foot high berm as the buffer, contains vegetation that can provide visual and noise screening of the material site for some of the adjacent uses.
- i. For the remaining southern and eastern property boundaries, where the vegetation was previously removed, a 50-foot buffer will reduce the sound level for the adjacent properties.
- j. A 12-foot high berm between the excavation perimeter and the vegetated buffer along the southern and eastern property boundaries will increase visual and noise screening of the proposed use beyond that of a six-foot berm along those boundaries.
- k. The total buffer width, as recommended by staff, along the southern and eastern property boundaries is 98-feet.
- l. As the excavation extends deeper, the visual and noise impacts will decrease because the height of the berm relative to the excavation will increase.
- m. A six-foot high berm between the extraction area and the 100-foot setback from the riparian wetland and floodplain will provide additional visual and noise screening of the material site. The berm will also provide additional surface water protection.
- n. A 12-foot high berm along the remaining northern property boundaries will increase visual and noise screening of the proposed use beyond that of a six-foot berm along those boundaries.
- o. Borough staff will regularly monitor the material site to ensure that the required buffer will not cause surface water diversion that negatively affects adjacent properties or water bodies.
- p. There has been testimony that the material site will mar the view of

Mount Iliamna and Mount Redoubt. Condition 21.29.050(A)(2) is written to provide screening from the material site, not protect view sheds beyond the material site.

- q. Each piece of real estate is uniquely situated and a material site cannot be conditioned so that all adjacent parcels are equally screened by the buffers. The different elevations of the parcels, varying vegetation on the surrounding parcels and the proposed material site, and distance of the material site from the various surrounding parcels necessarily means the surrounding parcels will not be equally impacted nor can they be equally screened from the material site.
 - r. The applicant has volunteered a condition requiring the berm be placed near the active excavation area, dampening the noise and reducing the visual impacts at the source. The berm will be moved as excavation progresses.
- ii. Condition #2: The permittee shall maintain the following buffers around the excavation perimeter or parcel boundaries:
- A 50-foot vegetated buffer adjacent to the south boundary of Parcel 169-022-03 (Brantley) with a six-foot high berm placed near the active extraction area.
 - A six-foot high berm between the extraction area and the 100-foot setback from the riparian wetland and floodplain
 - A 12-foot high berm along the rest of the northern boundary.
 - A 50-foot vegetated buffer adjacent to the southern parcel boundaries with a 12-foot high berm placed near the active extraction area.
 - A 50-foot vegetated buffer adjacent to the eastern most parcel boundary; and a 12-foot high berm placed near the active extraction area except along the northern 200 feet of the proposed excavation.
 - A greater than 50-foot vegetated buffer along the western most parcel boundary.
- These buffers shall not overlap an easement.
- iii. Condition #3: The permittee shall maintain a 2:1 slope between the buffer zone and pit floor on all inactive site walls. Material from the area designated for the 2:1 slope may be removed if suitable, stabilizing material is replaced within 30 days from the time of removal.
- iv. Condition #4: The permittee shall not allow buffers to cause surface water diversion which negatively impacts adjacent properties or water bodies.
- v. Sufficiency: Meets or exceeds code requirement.

3. *Processing* – KPB 21.29.050(A)(3)

- i. Finding 18: Any equipment which conditions or processes material must be operated at least 300 feet from the parcel boundaries.
 - a. The site plan indicates that the proposed processing area is 300 feet from the south and east property lines, and greater than 300 feet from the west property line. A processing distance waiver is being requested from the

north property line.

- b. The applicant proposed the following justifications for waiving the processing setback: "Although it is a large parcel, the configuration has limited potential process area. The waiver is requested to the north as 169-022-04 is owned by the applicant's daughter & 169-022-08 is not developed."
 - c. The 300-foot processing distance from the property lines is a mandatory condition imposed to decrease the visual and noise impact to adjacent properties.
 - d. The portion of the proposed processing area greater than 300 feet from the property line is very small, ranging from just a few feet wide to about 30 feet wide at the eastern edge of the proposed location.
 - e. There is a larger area in proposed phase III of the project that meets the requirement for a 300-foot processing distance setback, as such, there is adequate room to accommodate processing on the parcel while complying with 300-foot processing setback.
- ii. Condition #5: The permittee shall operate all equipment which conditions or processes material at least 300 feet from the parcel boundaries.
 - iii. Sufficiency: Meets or exceeds code requirement.

4. *Water source separation* – KPB 21.29.050(A)(4)

- i. Finding 19: All permits shall be issued with a condition that prohibits any material extraction within 100 horizontal feet of any water source existing prior to original permit issuance. All CLUPs shall be issued with a condition that requires that a two-foot vertical separation from the seasonal high water table be maintained. There shall be no dewatering by either pumping, ditching or some other form of draining.
 - a. The submitted site plan and application indicates that there are not any wells within 100 feet of the proposed excavation. The 100-foot radius line on the site plan for the nearest well indicates that the proposed extraction is greater than 100 feet from this well.
 - b. Borough staff will regularly monitor the material site to ensure compliance with the two-foot vertical separation requirement.
 - c. Borough staff will regularly monitor the material site to ensure that dewatering does not take place in the material site.
- ii. Condition #6: The permittee shall not extract material within 100 horizontal feet of any water source existing prior to issuance of this permit.
- iii. Condition #7: The permittee shall maintain a 2-foot vertical separation from the seasonal high water table.
- iv. Condition #8: The permittee shall not dewater either by pumping, ditching or any other form of draining.
- v. Sufficiency: Meets or exceeds code requirement.

5. *Excavation in the water table* – KPB 21.29.050(A)(5)
- i. Finding 20: Excavation in the water table is not permitted; meets or exceeds code requirements.
6. *Waterbodies* – KPB 21.29.050(A)(6)
- i. Finding 21: An undisturbed buffer shall be left and no earth material extraction activities shall take place within 100 linear feet from a lake, river, stream, or other water body, including riparian wetlands and mapped floodplains. 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.
 - a. The Cook Inlet lies about 600 feet west of the proposed material extraction.
 - b. The Anchor River, which is an anadromous stream, is located about 1,000 feet north of the proposed material extraction.
 - c. The "Wetland Mapping and Classification of the Kenai Lowland, Alaska" maps, created by the Kenai Watershed Forum, show a riparian wetland in the northeast corner of the property.
 - d. The FEMA maps adopted by KPB 21.06 indicates a mapped floodplain in the northeast corner of the property. This mapped floodplain approximately matches the mapped riparian wetland.
 - e. The site plan indicates that the proposed extraction is 104 feet from the mapped riparian wetland. There is approximately two feet difference between the mapped riparian wetland and the floodplain boundary. This places the proposed excavation at about 102 feet from the floodplain.
 - f. A portion of the required 100-foot buffer adjacent to the riparian wetlands and the floodplain is an existing stripped area.
 - g. Prior to permit issuance the applicant is required to restore the 100-foot buffer adjacent to the riparian wetlands and the floodplain to an undisturbed state.
 - h. As stated on the site plan the buffer will provide protection via phytoremediation of any site run-off prior to entering the surface water. The site plan also indicates that the Alaska DEC user's manual, "Best Management practices for Gravel/Rock Aggregate Extraction Projects, Protecting Surface Water and Groundwater Quality in Alaska" will be utilized as a guideline to reduce potential impacts to water quality.
 - i. Borough staff will work with the applicant and regularly monitor the material site to ensure that excavation does not take place within 100 feet of the mapped floodplain, riparian wetland, or other water body and that the restored buffer remains undisturbed.
 - ii. Condition #9: The permittee shall maintain an undisturbed buffer, and no earth material extraction activities shall take place within 100 linear feet from a lake, river, stream, or other water body, including riparian wetlands and mapped floodplains.
 - iii. Sufficiency: Meets or exceeds code requirement.

7. *Fuel storage* – KPB 21.20.050(A)(7)

- i. Finding 22: 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.
 - a. Borough staff will regularly monitor the material site to ensure compliance with mandatory condition KPB 21.29.050(A)(7).
- ii. Condition #10: The permittee shall ensure that fuel storage containers larger than 50 gallons shall be contained in impermeable berms and basins capable of retaining 110 percent of storage capacity to minimize the potential for uncontained spills or leaks. Fuel storage containers 50 gallons or smaller shall not be placed directly on the ground, but shall be stored on a stable impermeable surface.
- iii. Sufficiency: Meets or exceeds code requirement.

8. *Roads* – KPB 21.29.050(A)(8)

- i. Finding 23: Operations shall be conducted in a manner so as not to damage borough roads.
 - a. The submitted site plan indicates that the material site haul route will be Denver Road, which is maintained by the Borough, and then to Anchor River Road, which is maintained by the state.
 - b. There was a significant number of public comments concerning the condition of Anchor Point Road. Anchor Point Road is a paved State of Alaska maintained road for which this condition is not applicable.
 - c. If operations associated with the proposed material site damages borough roads, the remedies set forth in KPB 14.40 will be used to ensure compliance with this requirement imposing the condition that operations not damage borough roads.
- ii. Condition #11: The permittee shall conduct operations in a manner so as not to damage borough roads as required by KPB 14.40.175, and will be subject to the remedies set forth in KPB 14.40 for violation of this condition.
- iii. Sufficiency: Meets or exceeds code requirement.

9. *Subdivision* – KPB 21.29.050(A)(9)

- i. Finding 24: Any further subdivision or return to acreage of a parcel subject to a conditional land use or counter permit requires the permittee to amend their permit.
 - i. Borough planning staff reviews all subdivision plats submitted to the Borough to ensure compliance with this requirement.
- ii. Condition #12: The permittee shall notify the planning department of any further subdivision or return to acreage of this property. Any further subdivision or return to acreage may require the permittee to amend this permit.
- iii. Sufficiency: Meets or exceeds code requirement.

10. *Dust control* – KPB 21.29.050(A)(10)

- i. Finding 25: Dust suppression is required on haul roads within the boundaries of the material site by application of water or calcium chloride.
 - a. If Borough staff becomes aware of a violation of this requirement action will be taken to ensure compliance.
- ii. Condition #13: The permittee shall provide dust suppression on haul roads within the boundaries of the material site by application of water or calcium chloride.
- iii. Sufficiency: Meets or exceeds code requirement.

11. *Hours of operation* – KPB 21.29.050(A)(11)

- i. Finding 26: Rock crushing equipment shall not be operated between 10:00 p.m. and 6:00 a.m.
 - a. If Borough staff becomes aware of a violation of this requirement action will be taken to ensure compliance.
 - b. This condition reduces off-site noise impacts of the material site.
- ii. Condition #14: The permittee shall not operate rock crushing equipment between the hours of 10:00 p.m. and 6:00 a.m.
- iii. Sufficiency: Meets or exceeds code requirement.

12. *Reclamation* – KPB 21.29.050(A)(12)

- i. Finding 27: Reclamation shall be consistent with the reclamation plan approved by the planning commission. The applicant shall post a bond to cover the anticipated reclamation costs in an amount to be determined by the planning director. This bonding requirement shall not apply to sand, gravel or material sites for which an exemption from state bond requirements for small operations is applicable pursuant to AS 27.19.050.
 - a. The submitted application contains a reclamation plan as required by KPB 21.29.060.
 - b. The applicant has submitted a reclamation plan that omits KPB 21.29.060(C)(3), which requires the placement of a minimum of four inches of topsoil with a minimum organic content of 5% and precludes the use of sticks and branches over 3 inches in diameter from being used in the reclamation topsoil. These measures are generally applicable to this type of excavation project. The inclusion of the requirements contained in KPB 21.29.060(C)(3) is necessary to meet this material site condition.
 - c. Permit condition number 15 requires that the permittee reclaim the site as described in the reclamation plan for this parcel with the addition of the requirements contained in KPB 21.29.060(C)(3) and as approved by the planning commission
- ii. Condition #15: The permittee shall reclaim the site as described in the reclamation plan for this parcel with the addition of the requirements contained in KPB 21.29.060(C)(3) and as approved by the planning commission.
- iii. Sufficiency: Meets or exceeds code requirement.

13. *Other permits* – KPB 21.29.050(A)(13)

- i. Finding 28: Permittee is responsible for complying with all other federal, state and local laws applicable to the material site operation, and abiding by related permits.
 - a. Any violation federal, state or local laws, applicable to the material site operation, reported to or observed by Borough staff will be forwarded to the appropriate agency for enforcement.
- ii. Condition #16: The permittee is responsible for complying with all other federal, state and local laws applicable to the material site operation, and abiding by related permits. These laws and permits include, but are not limited to, the borough's 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.
- iii. Sufficiency: Meets or exceeds code requirement

14. *Voluntary conditions* – KPB 21.29.050(A)(14)

- i. Finding 29: Conditions may be included in the permit upon agreement of the permittee and approval of the planning commission.
 - a. The applicant has volunteered to operate his equipment onsite with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms.
 - b. The volunteered condition concerning back-up alarms is in the best interest of the Borough and the surrounding property owners because the multi-frequency alarms better minimizes the noise impacts of the material site.
 - c. The applicant has volunteered a condition requiring the berm be placed near the active excavation area, dampening the noise and reducing the visual impacts at the source. The berm will be moved as excavation progresses.
 - d. The volunteered condition to place the berm near the active excavation area is in the best interest of the Borough and the surrounding property owners because this placement of the berm will better minimize the visual impacts of the material site.
 - e. The applicant has volunteered a condition a condition that prohibits material site operations on holiday weekends during the summer months.
 - f. The volunteered condition, to not operate on holidays, is consistent with the standard to reduce noise disturbance to adjacent properties.
 - g. The volunteered condition, to not operate on holidays, is in the best

interest of the Borough and the surrounding property owners because the Anchor River State Recreational Area has a significantly greater number of visitors on holidays and several of the neighbors and Alaska State Parks has expressed concern about the noise impacts to the recreational area.

- ii. Condition #21: The permittee shall operate his equipment onsite with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms.
- iii. Condition #22: The permittee shall not operate the material site or haul material from the site on Memorial Day weekend (Saturday through Monday), Labor Day weekend (Saturday through Monday), and the 4th of July holiday to also include:
 - Saturday and Sunday if July 4th is on a Saturday, Sunday, Monday, or Friday
 - Saturday, Sunday, and Monday if July 4th is on a Tuesday
 - Saturday, Sunday, and Friday if July 4th is on a Thursday
- iv. Sufficiency: Meets or exceeds code requirement

15. *Other Signage* – KPB 21.29.050(A)(15)

- i. Finding 28: For permitted parcels on which the permittee does not intend to begin operations for at least 12 months after being granted a conditional land use permit.
 - a. If Borough staff determines that operations have not commenced after one year, action will be taken to ensure compliance
- ii. Condition #17: The permittee shall post notice of intent on parcel corners or access, whichever is more visible if the permittee does not intend to begin operations for at least 12 months after being granted a conditional land use permit. Sign dimensions shall be no more than 15" by 15" and must contain the following information: the phrase "Permitted Material Site" along with the permittee's business name and a contact phone number.
- iii. Sufficiency: Meets or exceeds code requirement

Other conditions imposed on the subject CLUP:

Condition #18: The permittee shall operate in accordance with the application and site plan as approved by the planning commission. If the permittee revises or intends to revise operations so that they are no longer consistent with the original application, a permit modification is required in accordance with KPB 21.29.090.

Condition #19: This conditional land use permit is subject to review by the planning department to ensure compliance with the conditions of the permit. In addition to the penalties provided by KPB 21.50, a permit may be revoked for failure to comply with the terms of the permit or the applicable provisions of KPB Title 21. The borough clerk shall issue notice to the permittee of the revocation hearing at least 20 days but not more than 30 days prior to the hearing.

Condition #20: Once effective, this conditional land use permit is valid for five years. A written request for permit extension must be made to the planning department at least 30 days prior to permit expiration, in accordance with KPB 21.29.070.

3. APPELLANT'S POINTS ON APPEAL

For purposes of this opening statement the Appellant's points on appeal have been grouped as follows:

Group #1: 'the buffers do not sufficiently minimize noise and visual impacts'
Appellant points on appeal A, B, D, E, L, N, and O

The appellant's points on appeal at paragraph "N" states that, "KPB 21.29.050 mandates buffer/berm to be of sufficient height and density." The appellant's statement is not entirely accurate. KPB 21.29.050(2)(c) provides, "[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 or planning director." (Emphasis added). Per KPB 21.29.040 the material site regulations "are intended to protect against aquifer disturbance, road damage, physical damage to adjacent properties, dust, noise, and visual impacts." (Emphasis added).

Minimization of impacts may only be accomplished through the imposition of KPB 21.29.050 mandatory conditions. A point of contention in this case is whether the term "minimize" should be read to mean "eliminate" or whether it should be read to mean "reduce". The borough interprets "minimize" to mean reduce. Elimination of all impacts of a gravel pit is impossible. The 22 conditions imposed by the planning commission satisfy the intent of the material site regulations by protecting against aquifer disturbance, road damage, physical damage to adjacent properties, dust, noise, and visual impacts. The approved permit imposes all conditions allowed or required under borough code.

Group #2: 'staff and planning commission interpreted the code and evidence wrong'
Appellant points on appeal B, C, F, G, H, K, L, and P

Appellant's points on appeal B, C, F, G, H, K, L and P are related to the idea that "minimize" should be interpreted to mean "eliminate" and that a CLUP should be a denial process under borough code. In other words, the Appellant advocates an interpretation of KPB Chapters 21.25 and 21.29 to mean that if an applicant cannot eliminate perceived negative impacts to surrounding properties then the permit should be denied. The borough

does not agree with such a restrictive reading. The borough's position is that the borough assembly did not intend the CLUP process to prohibit uses on private land within the largely unregulated rural zoning district of the borough. The purpose of the CLUP process, under borough code, is to allow uses to occur with reasonable project specific conditions that reduce, not eliminate, impact on surrounding uses.

There will always be at least some noise and visual impacts to adjacent properties from a material site operation. Many material sites could be denied based on "insufficient" screening. In the history of the material site ordinance there has never been an interpretation that all surrounding properties must not be able to see or hear the material site at all. Instead, the interpretation applied consistently to all 96 material sites permits issued since 1996 is that the goal of the material site regulations is to reduce certain negative impacts. Full elimination of negative secondary impacts has never been discussed or required, nor is it feasible. Attempting to judge whether a permit should be denied based on how many people claim they are not sufficiently protected ultimately will lead to arbitrary decision making. Rather than relying on evidence this approach relies on surrounding property owners stacking the hall—whether a permit is approved or denied becomes a numbers game. If a large number of people oppose the material site it will be denied, regardless of whether other material sites that may have similar attributes have been approved. Such "negative community sentiment" is not a valid reason to deny a permit.⁵

KPB 21.25 houses the general notice and hearing requirements for conditional uses but the more specific language regulating material sites (KPB 21.29) governs interpretation issues.⁶ Given the mandate from the assembly that material sites be subject only to certain mandatory conditions a denial based on a conclusory statement that the buffers are insufficient to protect against noise and visual impacts cuts against the grain of the code. The planning commission supported its decision with extensive findings. The buffer conditions imposed by the planning commission pursuant to KPB 21.29.050(A)(2) sufficiently meet the standards found in KPB 21.29.040.

The planning commission's findings are required to be supported by the substantial evidence in the record. The "substantial evidence" in the record required to support the

⁵ *South Anchorage Coalition v. Coffey*, 862 P.2d 168, 172 n.11 (Alaska 1993)

⁶ *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011)

planning commission's findings is not the same as a substantial number of people opposing the material site. Substantial evidence is defined as relevant evidence that a reasonable mind might accept to support a conclusion.⁷ While the record contains a substantial number of people testifying in opposition to the material site, unsupported conclusory statements about damage to property values and insufficiency of noise and visual impacts should not be considered substantial evidence. The borough will concede that the conditions will not eliminate all impacts of the proposed material site. Yet elimination is not the standard that must be met under borough code in order for the planning commission to approve a material site CLUP. The planning commission made specific findings regarding buffers that were supported by substantial evidence and imposed buffer conditions to protect against and minimize impacts of the proposed material site to the fullest extent allowed by code.

Group 3: 'procedural errors'
Appellant points on appeal I, J, M, O, P, and Q

Appellant's paragraph I. 'One or more commissioner should have recused'

Included in the desk packet for the meeting of March 25, 2019, was a memo from planning director, Max Best, and deputy borough attorney, Holly Montague, to the planning commission. [R.367-373]. The memo addresses two issues regarding planning commissioner conflict or bias. Prior to the opening of the hearing on March 25, 2019, Commissioner Brantley indicated that he had an appearance of a conflict of interest and asked to be recused and the chairman then recused him. [T.51]. Commissioner Venuti then indicated that he did not feel that he had a conflict of interest and felt that he could make a fair decision on the matter. He was not recused. [T.51].

Prior to the June 10, 2019 hearing, a comment letter was received alleging a bias on the part of Commissioner Ruffner, ex-parte communication on the part of Commissioner Foster, and the previously alleged bias or a conflict of interest on the part of commissioner Venuti. [R.594]. The allegation concerning commissioner Ruffner and Commissioner Foster was addressed at the Jun 24, 2019 meeting. [R.190]. Without more specifics from the Appellant, there is no indication that any planning commission member who voted on

⁷ KPB 21.20.210(A)(7).

Resolution 2018-23 should have been recused due to an impermissible conflict of interest or bias.

Appellant's paragraph J. 'Addition of last minute voluntary condition'

Throughout the public hearing process, many of the area residents expressed concerns about the impact of the proposed material site on the area campgrounds and RV parks. A comment letter was received from Alaska State Parks expressing concerns about the impact of the proposed material site on the nearby recreation area. [R.725]. The volunteered condition was in response to the concerns that had been expressed. It is a common practice of the planning commission to accept volunteered conditions, after close of public comments, which are offered as part of the rebuttal process to public comments. In this case, the applicant had not previously had an opportunity to rebut the comment letter from Alaska State Parks. [T.189-190]. The planning commission found that this volunteered condition was in the best interest of the borough and the surrounding property owners. [R.250-251].

Appellant's paragraph M. 'Absent commissioners did not see relevant evidence'

Slides of the presentation prepared by those opposed to the permit were provided to the planning commission. [R.598-601, 662-664, 726-728].

Appellant's paragraph O. 'failure to define rolling berm'

The applicant proposed the volunteered condition for the 'rolling berm' at the June 10, 2019 hearing. [T.121-122]. To reflect this volunteered condition, Resolution 2018-13 was changed to require that the berms be placed near the active extraction area rather than between the vegetated buffer and the extraction area. This change was discussed and explained at the June 24, 2019 meeting. [T.195]. Finding 17 contains the findings of fact concerning the adequacy of the buffers. [R.248-249].

Appellant's paragraph P. 'Commissioners did not understand code when voting'

Without specifics, it is not possible to respond to this point on appeal.

Appellant's paragraph Q. 'During deliberations there was confusing or conflicting page numbers in the record'

There was confusion concerning page numbering at the June 24, 2019 meeting. [T.197]. There is no reason to believe that the confusion was not quickly cleared up. [T.197].

4. HEARING OFFICER'S SCOPE OF APPELLATE REVIEW.

The hearing officer may remand, affirm, or reverse, or modify the planning commission's decision.⁸ Pursuant to KPB 21.20.320(A)(2), the hearing officer shall defer to the planning commission regarding findings of fact when they are supported by substantial evidence in the record. The hearing officer may exercise independent judgment on matters that relate to the interpretation or construction of ordinances; yet, due consideration will be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.⁹ If the hearing officer determines that a finding by the planning commission is not supported by substantial evidence in the record, the hearing officer may make a different finding on the factual issues or may remand to the planning commission, as provided in KPB 21.20.330(B).¹⁰

In the present appeal the planning commission's findings of fact are supported by substantial evidence in the record. Therefore, with due consideration given to the expertise and experience of the planning commission in its interpretation of the code it is charged with administering, the hearing officer should affirm the planning commission's decision in this case.

5. THE RURAL ZONING DISTRICT

The proposed material site subject of this case sits within the rural zoning district of the borough. Subject to the limited restrictions found in borough code, the borough assembly made a policy decision to allow unrestricted use of property within the rural zoning district.¹¹ Landowners may operate a dog kennel, hair salon, day care, a material site under one acre,

⁸ KPB 21.20.330.

⁹ KPB 21.20.320(A)(1).

¹⁰ KPB 21.20.320(A)(3)

¹¹ KPB 21.04.010(B).

and many other uses without notifying the borough or applying for a permit. In addition, building permits are not required in the rural district of the borough. Thus, there are very few restrictions placed on a landowner within the rural zoning district desiring to put his or her real property to its highest and best use. The requirement that under certain situations landowners must obtain a permit for material extraction is one of the few restrictions that apply to property within the rural zoning district.

Since the CLUP process imposes greater restrictions on the use of a landowner's property than that of surrounding properties, it is imperative that the restrictions imposed are objective, fair, and justified. A key component of the fairness element is the fact that the borough's planning commission possesses limited discretion in denying a CLUP and no discretion to add conditions beyond the conditions listed in KPB 21.29.050. The fact that the Appellant may want more zoning or may want the code to allow for broader discretion to deny a CLUP is not relevant to this appeal. Policy decisions are made by the borough assembly. The planning commission must enforce the borough code as written. The planning commission would have violated the code if it required permit conditions not found in code or if it read code to require elimination of all impacts of a material site.

CONCLUSION

The planning commission's approval of the material site should be upheld. Only the conditions found in KPB 21.29.050 may be imposed to meet the standards set forth in 21.29.040. All the protections afforded through the mandatory conditions found in KPB 21.29.050 have been imposed. In total, the planning commission adopted 30 findings of fact and imposed 22 conditions on the permit. Issuance of the permit complies with borough code.

Dated this 1st day of October, 2019.


Max J. Best
Planning Director


Sean Kelley
Deputy Borough Attorney

MCLANE

CONSULTING, INC.

October 1, 2019

Kenai Peninsula Borough Office of the Borough Clerk
144 N. Binkley Street
Soldotna, Alaska 99669

RECEIVED

OCT 01 2019

Borough Clerk's Office
Kenai Peninsula Borough

SUBJECT: PC Decision to Disapprove Conditional Use Permit for KPB Parcel 169-010-67
Case 2019-01-PCA

RE: Opening Statement

Dear Hearing Officer Anmei Goldsmith:

McLane Consulting, Inc. was hired by the appellant, Beachcomber, LLC, to survey the parcel and prepare the CLUP permit documents and exhibits.

McLane Consulting concurs with the Planning Commission's decision to approve the Conditional Land Use Permit. The proposed application meets the permit conditions required by KPB 21.29.050 which according to KPB 21.29.040 are the only conditions set forth that may be imposed to minimize noise and visual impacts. The Planning Commission decision should be upheld.

McLane Consulting will respond to any technical surveying and engineering questions regarding the permit preparation and the site conditions raised in opening statements in a response statement.

Sincerely,



Gina M. DeBardelaben, PE
Principle
McLane Consulting, Inc.

RECEIVED

OCT 01 2019

Borough Clerk's Office
Kenai Peninsula Borough

**Kenai Peninsula Borough
Office of the Borough Clerk
Kenai Peninsula Borough, Alaska
144 North Binkley Street
Soldotna, Alaska 99669**

In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) - Deed recorded in Book 4, Page 116, Homer Recording District.

Hans Bilben,

Appellant,

Emmitt Trimble,
Beachcomber LLC,

Applicant.

Case No. 2019-01-PCA

APPLICANT'S OPENING STATEMENT

COMES NOW the Applicants Emmitt Trimble and Beachcomber LLC, by and through counsel of record, Holmes Weddle & Barcott, P.C. and hereby submits their Opening Statement.

I. STATEMENT OF FACTS

Applicant Beachcomber LLC ("Beachcomber") owns real property located at 74185 Anchor Point Road, with the legal description Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District. Beachcomber applied for a Conditional Land Use Permit through the Kenai Peninsula Borough to conduct a sand, gravel, and peat extraction operation at the site of the real property, which was submitted on June 4, 2018. The Planning Commission held a public meeting and heard from community

members as to the application. Planning staff and Director stated that the application was appropriately completed and complied with all required conditions, and recommended approval. After a lengthy public hearing the Planning Commission hastily defeated a motion to extend hearing, and voted to deny the permit without any discussion, or establishment of legitimate Findings of Fact.¹

Following the Commission's denial, Beachcomber appealed in order to seek review of the decision. On January 8, 2019, the hearing officer issued a decision denying Beachcomber's request for issuance of the permit but remanded the permit application back to the Commission for further proceedings in accordance with its order. The basis for the remand was that the Commission exceeded its authority by finding that the permit conditions were insufficient to reduce noise and visual impact – rather that the Commission's role is only to determine whether the application complied with the requirements stated in the code, not to determine the effectiveness of those conditions. The Commission conducted a public hearing on June 10, 2019 to consider the issue on remand. The hearing was continued to June 24, 2019, wherein the Commission approved the permit.

II. PLANNING COMMISSION APPROVAL

Beachcomber asserts that the Kenai Peninsula Borough Planning Commission properly granted the Conditional Land Use Permit authorizing its material extraction at the proposed site.

¹ Beachcomber subsequently sought another application for extraction under the counter permit provision on July 30, 2018 for a smaller parcel on its property, which does not require public notice or approval by the Commission – this application was granted on August 15, 2018. Beachcomber has not taken any substantive action upon this permit to date, pending ongoing litigation.

III. ASSERTED ERRORS

Applicant asserts that the Planning Commission properly decided the matter before it and no errors were made.

IV. LEGAL AUTHORITY

- a. The Kenai Peninsula Borough Code 21.01.010 Allows for the Commission to Approve Applicant's Conditional Land Use Permit Application.

KPB 21.01.010 provides authority for the Borough to exercise all zoning powers on an areawide basis. As such, all zoning requests are submitted to the Borough Planning Commission for review, and the permit application filed by Beachcomber was properly considered by law by the Commission. The Commission approved the Conditional Land Use Permit on remand after the hearing officer found that the Commission had exceeded its authority by denying the permit based on two standards which it believed would not be adequately met. Applicant Beachcomber properly submitted the application and properly detailed how it would abide by the mandatory codes in accordance with KPB 21.29.040. Each condition was acknowledged by the Commission at its June 24, 2019 meeting.

Appellants appear to have the expectation that any proposed use of Beachcomber's property should be done so in a way that has no visual or noise impact on their property. The code does not require a complete prohibition on such impact. The Borough has established its desired means of regulating the activity occurring on its land areas, and is engaged in only "minimal zoning."² As such, it has no specified areas specifically zoned for strictly residential or strictly

² KPB Planning Commission Manual, at 7 (April 2019).

commercial use. It has only the code by which to govern its permitting procedure and regulations, limiting the Commission's authority only to ensuring the application procedure is fully followed.

Appellant's attempt to circumvent the Code and to persuade the Commission to act in a role beyond the scope designated by the Code must be denied. Appellant may have valid concerns for opposing the proposed use of the site; however, it is not the Commission's place to determine the effectiveness of the standards set forth; only that the standards mandated are sufficiently addressed in their application.

b. Appellants' Case Should Be Dismissed Upon Summary Judgment

Appellant no longer has a viable case available upon which to appeal. Appellant has made no argument that the Commission's decision upon remand was made inconsistent with the Code requirements of abiding by the permitting process. Summary judgment shall be granted when there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law.³ Applicant Beachcomber argues that no genuine factual disputes exist and that as such, this matter should be dismissed.

Appellants' dispute is based upon its assertion that the Commission improperly granted the permit without substantial evidence that the standards under KPB 21.29.040 could not be met. Again, the Commission's role is not to determine whether Beachcomber's measures could adequately reduce noise and visual disturbance and dust, only that it has properly submitted a valid

³ *Parson v. State, Dep't of Rev., Alaska Housing Fin. Corp.*, 189 P.3d 1032, 1036 (Alaska 2008) citing *Parker v. Tomera*, 89 P.3d 761, 765 (Alaska 2004).

application. The Commission does not have the capacity or duty to determine the effectiveness of Applicant's abatement measures.

III. CONCLUSION

Applicants Emmitt Trimble and Beachcomber, LLC maintain that the Kenai Peninsula Borough Planning Commission has properly approved its permit application. Beachcomber has submitted viable plans for its site to meet the required standards, as well as proposed voluntary standards to reduce the impact of its operations on neighboring properties. Beachcomber respectfully asserts that it has met all the standards set forth in the Kenai Peninsula Borough code such that Conditional Land Use Permit granted by the Commission should be upheld and Appellant's case dismissed summarily.

DATED this 18th day of October, 2019, at Anchorage, Alaska.

HOLMES WEDDLE and BARCOTT, P.C.
Attorneys for Applicant

By: _____



Stacey C. Stone
Alaska Bar No. 1005030
Chantal Trinko
Alaska Bar No. 1505034

Blankenship, Johni

From: Emmitt Trimble <emmitttrimble@gmail.com>
Sent: Tuesday, October 01, 2019 9:54 AM
To: Blankenship, Johni
Cc: Mary
Subject: <EXTERNAL-SENDER>Appeal of Planning Commission decision re: Beachcomber LLC

CAUTION: This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

Applicant's Opening Statement regarding Kenai Peninsula Borough Planning Commission decision approving the issuance of the CLUP applied for by Beachcomber LLC:

Beachcomber finds no errors or omissions in the decision made by the Kenai Peninsula Borough Planning Commission to approve and issue the CLUP applied for by Beachcomber for extraction of material from Tract B McGee Tracts - Deed of Record Boundary Survey (Plat 80-104) KPB Parcel 169-010-67.

Furthermore, as the Planning Staff and Commission determined, all conditions required by the application and ordinance have been met and complied with, including voluntary conditions. The Appellant has not provided any Substantial Evidence supporting Findings of Fact that would lead to a reversal of the Planning Commission's Findings and Decision, therefore the decision to issue the CLUP must be upheld.

--

Emmitt and Mary Trimble
907-299-1459

emmitttrimble@gmail.com

Blankenship, Johni

From: Lauren Isenhour <homegrownconstructionak@gmail.com>
Sent: Monday, September 30, 2019 1:32 PM
To: Blankenship, Johni
Subject: <EXTERNAL-SENDER> Beachcomber CLUP

CAUTION: This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

Hi Johni,

I want to send this email to, once again, show my support for the CLUP approved for Beachcomber LLC. I hope to see the planning commission's decision to approve the permit reinforced at the appeal hearing.

Thank you,

Lauren Isenhour

--

Lauren Isenhour
Home Grown Construction LLC
(907)435-7822

Blankenship, Johni

From: Allison Trimble <allisontrimblerealestate@gmail.com>
Sent: Monday, September 30, 2019 1:13 PM
To: Blankenship, Johni
Subject: <EXTERNAL-SENDER> Beachcomber LLC

CAUTION: This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

Hello,

I am writing in support of the decision of the Planning Commission, approving the CLUP for Beachcomber LLC.

Thank you.

--

Warmly,



ALLISON TRIMBLE.
COASTAL REALTY

1873 Main Street Suite #7
Ferndale, WA 98248
Phone: 360-961-5537

www.allisontrimble.com

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KENAI PENINSULA BOROUGH

In the matter of the Kenai Peninsula)
 Borough Planning Commission's)
 decision to approve a conditional land)
 use permit for a material site that was)
 requested for KPB Parcel 169-010-67;)
 Trace B, McGee Tracts – Deed or)
 Record Boundary Survey (Plat 80-104) –)
 Deed Recorded in Book 4, Page 116,)
 Homer Recording District)
)
 Hans Bilben)
)
 Appellant)
)
 Emmitt and Mary Trimble)
 Beachcomber LLC,)
)
 Applicant.)
)

CASE NO. 2019-01-PCA

MOTION TO EXPAND THE RECORD

Comes Now Applicant Hans Bilben, by and through counsel, Katherine Elsner, and pursuant to KPB 21.20.300, hereby requests that the Hearing Officer expand the record on appeal to include the following additional items:

1. Kenai Peninsula Borough Planning Commission Manual.¹
2. Transcript of the Commissioner Comments at the conclusion of the June 24, 2019 Planning Commission Meeting.²

¹ A true and correct copy of the Manual is attached hereto and available at https://www.kpb.us/images/KPB/PLN/Plan_Comm/2019_PC_Manual.pdf

² A true and correct copy of the relevant portion of the Minutes reflecting this exchange is attached hereto and can be found at https://www.kpb.us/components/com_papyruslist/document.php?d=2397690

3. Letter referenced by Commissioner Ecklund at the September 9, 2019 Planning Commission Meeting and Testimony of Commissioner Ecklund relating to that Letter.³

Central to procedural and substantive complaints of error raised by the applicant in this case is the question of whether Planning Commission members held erroneous views of the legal interpretation of the KPB Code relating to the disapproval of Conditional Land Use Permits for material site extractions and what affect that erroneous legal interpretation had on the outcome in this case.

At the conclusion of the June 24, 2019 hearing, additional comments were made relating to this CLUP application process that are not included in the verbatim transcript of the record.

Pursuant to the Minutes of that meeting the following occurred:

Commissioner Ecklund wanted to note that the Commission has denied material site extraction permits. Maybe they will have valid balanced reasons that can be used to represent all sides.

Commissioner Carluccio noted that several months ago she drove by the site that was reviewed earlier in the evening. She thinks it is a travesty that the Commission feels like it has to approve everything and that there does not seem to be anything that they can use to deny a gravel permit. She is disappointed that it was approved and the process. She agrees with some of the comments of the homeowners and it seems like that when there are so many people coming to try and protect their property that there should be a way to give them that protection.

Commissioner Foster noted he would be traveling but will be putting in his time on the Plat Committee. He noted that when they research the beginning of zoning, whether it is a community, as a city, or a borough, the bottom line was to preserve property rights and yet people don't want zoning. In the City where there are zoning powers there is a conditional use permit, it is a permitted use. Conditions are just put on it that help lessen the impact it might have. When there is no zoning the Commission's hands are tied. These are personal property rights that the individual wants to use his property. When he first got on the Commission it wasn't until he read through the entire Ordinance that he realized what conditions can be added to try to mitigate. It is an attempt to mitigate. He doesn't know if they can ever really say no. They have said no but the decision has been overturned. He would like to

³ A true and correct copy of the relevant portion of the Minutes referring to this Letter are attached hereto and can be found at https://www.kpb.us/components/com_papyruslist/document.php?d=2469557

see how Local Option Zoning, where some people are zoned and others are not and how that would work together.

These comments bear directly on a primary point on appeal: namely that the PC Members' held an erroneous belief on the limitations of the code and that this erroneous belief impacted the decision made. Moreover, these comments related specifically to this site application and were made at the same hearing where the CLUP application was approved. The transcript of this additional discussion must be included pursuant to 21.20.270(A)(8).

Subsequent to the June 24, 2019 decision, additional Planning Commission hearings have been held to address the amendment to the CLUP material site extraction codes. In addressing the Planning Commission's position on proposed amendments – not yet enacted nor submitted to the Assembly for consideration – Planning Commissioner Ecklund stated:

[S]he had issues with a long letter from a member of the borough staff that said the Planning Commission does not have the ability to disapprove a permit. The way it reads is that the Commission shall approve a permit that meets the mandatory conditions. That is what it said before and that is why staff said if it meets the conditions, they had to approve it.

As discussed above, KPB advisements to the Planning Commission members lack of authority to disapprove a CLUP for material site extraction were legally incorrect and apparently impacted PC Members determinations relating to this application. This letter is relevant and material to the question of what Commissioners received from Borough Staff in reaching their decision and the subsequent impact those submissions had on the Commissioners decision on this application. It must be included in the record pursuant to 21.20.270(A)(5). Similarly, the Planning Commission Manual is provided to individual members to instruct them on the procedure and policy to follow during this proceeding and is relevant to procedural errors raised by the Appellant. It is assumed that the Manual is expected to apply to all applications before the Commission. It should be included in the record on appeal.

Accordingly, the Applicant respectfully requests that the Record be expanded to include these additional items.

DATED October 1, 2019.

Respectfully submitted and filed on behalf of Hans Bilben



Katherine Elsner, ABA #1411116

Planning Commission Manual

April 2019

KENAI PENINSULA BOROUGH PLANNING COMMISSION

MANUAL

APRIL 2019



Max Best, Director of Planning
Holly Montague, Deputy Borough Attorney
Bruce Wall, Planner

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A. Planning Commission Responsibilities and Functions

1. Under state statute and borough code, what are the functions and responsibilities of the Planning Commission?

The Planning Commission serves in a quasi-judicial capacity regarding numerous petitions concerning individual land use and development. The Planning Commission also acts in an advisory role to the mayor and assembly for both administrative and legislative decisions regarding land use issues. (The distinction between the quasi-judicial and advisory roles of the Planning Commission are discussed in section A-2 of this manual.)

Under state statute the Planning Commission has the following responsibilities:

- A. The Planning Commission prepares and submits to the assembly a proposed comprehensive plan in accordance with AS 29.40.030 for the systematic and organized development of the borough. AS 29.40.030 provides that the comprehensive plan is a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public, of the borough and may include, but is not limited, to the following:
 - statements of policies, goals, and standards;
 - a land use plan;
 - a community facilities plan;
 - a transportation plan;
 - recommendations for implementation of the comprehensive plan;
- B. The Planning Commission reviews, recommends, and administers measures necessary to implement the comprehensive plan, including measures provided under AS 29.40.040. Under AS 29.40.040 these measures include, but are not limited to the following:
 - zoning regulations restricting the use of land and improvements by geographic districts;
 - land use permit requirements designed to encourage or discourage specified uses and construction of specified structures, or to minimize unfavorable effects of uses and the construction of structures;

- measures to further the goals and objectives of the comprehensive plan;
 - grant variances from land use regulations where the condition from which the applicant seeks relief was not caused by the applicant; where a use will not be permitted in a district where prohibited, the variance is not sought to solely relieve pecuniary hardship or inconvenience;
- C. The Plat Committee, as authorized by KPB 2.40.080 and AS 29.40.070, hears and decides cases involving platting. Four members of the Planning Commission must be present for the Plat Committee to meet.
- D. Pursuant to AS 29.40.170, the Planning Commission (or platting authority) where authorized by ordinance may delegate powers to hear and decide cases, including but not limited to:
- one or more members of the Planning Commission or platting authority;
 - other boards or commissions;
 - a hearing officer designated by the Planning Commission or platting authority.

Under the borough code, the Planning Commission has the following responsibilities:

- recommends school names (KPB 1.20.010);
- a Planning Commission member serves on the trails commission (KPB 2.75.020) (note: the trails commission is currently dormant);
- provides advice on solid waste disposal sites (KPB 10.04.020);
- names and renames streets outside cities (KPB 14.10.010);
- makes recommendations to the borough prior to acquisition of an interest in lands (KPB 17.10.040) and disposals (KPB 17.10.070(B));
- recommends the classification of borough lands to the borough assembly (KPB 17.10.080);
- makes recommendations to the assembly regarding petitions to modify deed restrictions (KPB 17.10.130(F)(3));
- recommends forest management plans to the assembly annually (KPB 17.50.010);

- holds public hearings and make recommendations to the assembly on forest management sale reports prepared by the administration (KPB 17.50.035(B));
- approves or rejects all plans, plats, or replats of land laid out in lots or plats, and the streets, alleys, or other dedications (KPB 2.40.070);
- may delegate authority to hear and decide plat cases by a committee composed of at least four Planning Commission members (KPB 2.40.080);
- the Planning Commission reviews decisions of the Plat Committee de novo (KPB 2.40.080(B));
- prepares plans for the systematic development and betterment of the borough as a place of residence or for business (KPB 2.40.040);
- may consider and investigate subject matter regarding the development and betterment of the borough and make recommendations as it considers advisable to borough departments and to the assembly; may make or have made surveys, maps or plans (KPB 2.40.050);
- investigate and report before final action is taken by the borough (or a borough department) on the location and design of any public building, dock, beach, ski ground, statue, memorial park, parkway, boulevard, street or alley, playground, public street, alley or the grade thereof (KPB 2.40.060);
- may by majority vote agree to serve as an incorporating sponsor and as a member of the Resource Conservation & Development District board with a Planning Commission member representative elected by the Planning Commission (KPB 2.40.100);
- hears and decides reconsiderations of the Planning Director's seizure of abandoned vehicles on borough or private property (KPB 12.06.020(C));
- hears appeals from Planning Director determinations regarding utility right-of-way permits (KPB 14.08.090);
- approves final plats where so requested by the Planning Director, a major redesign was a condition of preliminary approval, or final approval by the Planning Commission was a condition of preliminary plat approval (KPB 20.60.210-220);
- hears and decides exceptions to the platting regulations (KPB 20.50);

- denies vacation petitions or recommends approval of vacation petitions to the assembly (KPB 20.70.100);
- exercises jurisdiction within the rural and municipal districts regarding planning, platting, subdivision approval, siting of borough schools, buildings and other borough facilities, the planning and development of transportation networks and related facilities, the overall economic development of the borough, and regarding borough lands and natural resources taking into consideration any affected municipalities;
- grants variances to land use regulations in KPB Title 21 in accord with AS 29.40.040 and KPB 21.05;
- establishes a fee by resolution for rezoning applications in the municipal district (KPB 21.10.010(F));
- hold a public hearing and make recommendations regarding zoning amendments within the municipal district limited to the issue of whether the proposed amendment has a significant impact on land use and transportation in the area outside the municipal district. If there is significant impact, the Planning Commission shall recommend approval, denial, or modification of the amendment. If there is no significant impact outside the municipal district, the Planning Commission shall recommend to the assembly the action recommended by the city advisory Planning Commission. (KPB 21.10.020);
- initiate changes to rural district zoning, hold public hearings regarding the same, and make recommendations to the assembly (KPB 21.10.030);
- make recommendations to the assembly regarding changes to the comprehensive plans within the municipal districts (KPB 21.01.025);
- grants conditional use permits under KPB 21.18, anadromous habitat protection ordinance;
- hears and decides applications for conditional land use permits under KPB 21.25 (currently material site, and correctional community residential center permits);
- make recommendations to the assembly regarding the establishment or rezoning of local option zoning districts (KPB 21.44);
- hears appeals from nonconforming use determinations for local option zoning districts made by the Planning Director (KPB 21.44.110(B)).

2. What types of decisions does the Planning Commission make?

Most of the decisions the Planning Commission makes are classified as either advisory or quasi-judicial, although sometimes they may make legislative decisions. Advisory decisions are recommendations which are generally made to the mayor and/or assembly. The most common type of advisory decision is when the Planning Commission makes recommendations regarding ordinances pending before the assembly that affect land use issues. Other examples of advisory decisions include recommendations to the assembly regarding the acquisition and conveyances of land or recommendations regarding the approval of comprehensive plans. In these cases, another body (the assembly) is the final-decision maker; however, the advice and expertise of the Planning Commission is sought as part of that decision-making process.

Quasi-judicial decisions are those decisions where an adopted law or policy is applied to a specific person or property. The Planning Commission has decision-making authority and is not advisory on the quasi-judicial matters that come before it. Examples of quasi-judicial actions are plat applications and conditional use permits where the provisions of Titles 20 and 21 of the borough code are being applied to an individual's application.

The Planning Commission also occasionally makes quasi-legislative decisions. Examples of quasi-legislative decisions are when the Planning Commission has adopted resolutions that clarify and interpret the ordinances that govern the Planning Commission. Such resolutions, once adopted, should be consistently followed. Planning Commission Resolution 89-08 clarifying setback provisions under Title 20 is an example of such a quasi-legislative act.

Sometimes Planning Commission resolutions are more administrative in nature setting forth procedural rules for the conduct of the Planning Commission business that come before the Planning Commission. Resolution 96-12 establishing the meeting adjournment time and Resolution 89-04 (Sub) establishing a policy regarding Planning Commission absences are examples of such resolutions.

3. What is the purpose of the comprehensive plan and the Planning Commission's role in development of the plan?

The comprehensive plan serves as a long-range policy guide for development of the borough as a whole. Borough land use regulations are to be in accordance with the comprehensive plan. AS 29.40.040(a). Requiring zoning decisions to be in accord with the comprehensive plan helps to guard against prejudice, arbitrary decision making, and improper motives by providing substantive standards against which to measure individual zoning decisions. A comprehensive plan must be in place before borough zoning regulations can be implemented. This requirement is not a barrier to preexisting zoning regulations so long as they comply with the comprehensive plan.

AS 29.40.020(b)(1) mandates that the Planning Commission shall prepare and submit to the assembly a proposed comprehensive plan in accordance with AS 29.40.030 for the systematic and organized development of the borough. AS 29.40.030 provides that the

"comprehensive plan is a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public, of the . . . second class borough, and may include, but is not limited to, the following:

- (1) statements of policies, goals, and standards;
- (2) a land use plan;
- (3) a community facilities plan;
- (4) a transportation plan; and
- (5) recommendations for implementation of the comprehensive plan."

AS 29.40.030(a).

AS 29.40.030(b) provides that "[w]ith the recommendations of the Planning Commission, the assembly shall adopt by ordinance a comprehensive plan. The assembly shall, after receiving the recommendations of the Planning Commission, periodically undertake an overall review of the comprehensive plan and update the plan as necessary."

AS 29.40.030(b).

The Planning Commission and staff can reference the comprehensive plan in making recommendations and decisions on issues and applications that come before them. The

comprehensive plan can also be used for guidance and support in drafting legislation for the borough.

4. What is the Planning Commission's role in land use regulation and what is zoning?

AS 29.40.040(a) authorizes both geographical zones and the specific use approach to land use regulation. All land use regulation, whether it be by zoning or specific use regulation must be consistent with the comprehensive plan. AS 29.40.020 specifically delegates to the Planning Commission the tasks of reviewing, recommending, and administering 1) measures necessary to implement the comprehensive plan including zoning regulations, 2) land use permit requirements designed to encourage or discourage specified uses and construction of specified structures or to minimize unfavorable effects of uses and structures, and 3) measures to further the goals of the comprehensive plan. The role of the Planning Commission is critical and it cannot be ignored or truncated by attempting to submit land use regulations to a popular vote for approval thus bypassing the Planning Commission's input.

Zoning is a form of land use regulation. Zoning is governmental regulation within a community of land, buildings and structures in accordance with a general plan and for the purposes set forth in the state enabling statute. AS 29.40.040 provides for restricting the use of land by geographic districts. It is typical under zoning by geographic districts for land to be divided into districts for the purpose of promoting or protecting certain uses within the district-- a community may have residential, commercial, industrial and other types of districts designated by use. Zoning is a prevalent form of governmental land use regulation but it is not the only form. Specific use regulation places restrictions on a particular land use regardless of location. Often these uses are the type that may create negative secondary impacts such as odors, noise, unsightliness, excessive traffic, or dangerous situations. Slaughterhouses, alcohol establishments and junkyards are activities that have been subject to specific use regulation. The borough's material site ordinance (KPB 21.29) is a specific use regulation.

The borough has engaged only in minimal zoning. The borough is divided into two districts, the rural district and the municipal district. The rural district is comprised of all areas outside the cities which have been delegated land use powers; land use is

unregulated unless either an overlay district within the rural district is created or a specific use regulation is adopted. The municipal district is comprised of the six organized cities in the borough that have been delegated land use powers. The borough retains the comprehensive planning powers for all six cities, but has delegated land use regulation to five of the cities. Platting powers have also been partially delegated to the extent that the cities may adopt their own platting standards. KPB 20.25.050-060. The borough retains jurisdiction over the subdivision approval process in all cities.

Within the rural district the borough has created several other districts that do not encompass the entire rural district but regulate uses within a specific geographic area. These districts include KPB 21.18 anadromous waters habitat protection district and several local option zoning districts.

5. What are variances and exceptions and when can they be granted?

A variance is a departure from the underlying land use regulation without changing the zoning of the parcel or the land use regulation. There are two types of variances: use variances and area variances. Use variances allow a use in a district that is otherwise prohibited by the zoning ordinance. Area variances address issues like building height, dimensions, and setbacks. Alaska law prohibits the granting of use variances. Under AS 29.40.040 variances may not be granted if 1) special conditions that require the variance are caused by the person seeking the variance; 2) the variance will permit a land use in a district in which that use is prohibited, or 3) the variance is sought solely to relieve pecuniary hardship or inconvenience. If any of these three factors exist, the variance cannot be granted.

The Planning Commission also grants exceptions to subdivision requirements pursuant to KPB Chapter 20.50. This exception process was created by the borough code and does not have the strict statutory standards that need to be met for a variance from a Title 21 land use regulation authorized by AS 29.40.040. In order to obtain an exception 1) there must be special circumstances or conditions affecting the property; 2) the exception must be necessary for the preservation and enjoyment of a substantial property right and is the most practical manner of complying with the intent of Title 20; and 3) that granting the exception will not be detrimental to the public welfare or injurious to other nearby

property. All three factors must be met in order to qualify for an exception. If there is a design requirement addressed by a land use regulation then the variance procedures will need to be followed rather than the exception process, i.e., the more flexible exception process in Title 20 cannot be used to avoid or circumvent the stricter variance standards applicable to Title 21 applications. The burden is on the applicant to justify the exception, although it is appropriate for staff to suggest a subdivision applicant apply for an exception if staff's review finds such an exception would be supportable.

If exceptions or variances are frequently granted for the same type of situation it is best to seek a legislative change to allow for the variation in the routine application of the ordinance.

B. Planning Commission Procedural Matters

1. How should motions be made for quasi-judicial questions?

The best practice is to make the motion in the positive, e.g., to approve a material site application. Under Roberts Rules of Order, if there is a tie vote the motion fails; therefore, a motion made in the negative could have the result of approving an action that a majority does not favor. While not always necessary in straightforward cases, a second motion should be made to specifically adopt the findings. If the commission is in total agreement with staff's recommended findings, then the motion may be as simple as one to approve staff's findings. This motion can be amended to modify staff's proposed findings based on the evidence the Planning Commission reviewed and their discussion of the matter. If the Planning Commission disagrees with staff's recommendation, then it is necessary for the Planning Commission to state findings supporting the Planning Commission's decision. For particularly complicated or controversial matters, it may be advisable for the Planning Commission to call a recess or even postpone the matter to another date in order that commissioners may work on findings and present them at a later time for approval.

2. What are "findings of fact" and why must they be made?

Put simply, findings are the commission's reasons for a particular decision. Findings need to be in writing and distributed to the parties who participated before the commission so that parties can determine why an application was approved or denied. Findings must be based on the evidence presented to the commission and the findings must support the ultimate decision reached. Additionally, findings must be based on the standards found in applicable statutes, borough ordinances, or other planning documents; otherwise, the decision may be viewed as arbitrary or without foundation. Without findings, parties cannot determine the reasons for the Planning Commission's decision or the grounds for an appeal. A reviewing body, such as the administrative hearing officer ("hearing officer") or court, also has difficulty determining which pieces of a Planning Commission discussion and evidence presented formed the basis for the commission's decision if the decisional document is void of findings. When findings are made by the Planning Commission, it

means the hearing officer will not have to fumble through the record in search of the reasons for the commission's decision; likewise, when the hearing officer makes findings of fact, the reviewing court, if any, will not have to glean support for the hearing officer's decision from the evidence spread across a voluminous record.

The most frequent failures in making findings are making conclusory findings, not making findings at all, or making findings that are unrelated to the applicable standards. A conclusory finding typically states that a standard in the code has or has not been met without explaining how. When denying an application, the findings should specifically reference the code sections that are not being met by the application. Staff should include citations to these code sections in the staff report to assist the Planning Commission with its analysis of the application. Evidence and testimony submitted by citizens should be considered to the extent that information is related to the standards applicable to the particular matter before the board. However, it is not appropriate to deny or condition a permit based on negative community sentiment alone when the applicable standards do not address the concerns being raised by the testimony. Planning Commission decisions are not based on the principles of the majority rules. The citizenry stacking the hall against or in favor of a particular application should not determine whether the application is approved or denied; rather, the application must be consistent with the goals and standards of the applicable statute or ordinance. The Planning Commission's decision must be supported by the substantial evidence in the record. "Substantial evidence" is defined as that relevant evidence which a reasonable mind would accept as adequate to support a conclusion.

3. What is the purpose of permit conditions and when are they appropriate?

Conditions are placed on a permit in order to aid compliance with the spirit and letter of the law (i.e., the borough code.) The conditions must be authorized by statute or local law or policy and further the goals of the regulation. Conditions should not be unrelated or excessive to meet the goals of the ordinance. As an example, it would be inappropriate to require a material site applicant to test his water source for contaminants since the material site ordinance only addresses water quantity not quality issues. It is also not defensible for a condition or exaction to be placed upon a subdivider which is not related to the burden his subdivision might place on the community. For example, it is reasonable

to require dedication (and construction if authorized by ordinance) of streets to support the traffic a subdivision will create, but it would not likely be defensible to require a subdivider to construct roads to a much higher standard than that required by the traffic generated by his subdivision plan.

4. Who are parties before the Planning Commission in quasi-judicial proceedings?

The answer of who is an appropriate party before the Planning Commission is found in statute, borough ordinances, and case law. AS 29.40.060(a) eliminates taxpayer-citizen standing in land use cases. The Alaska Supreme Court has held that a business competitor is not an appropriate party to an appeal from a nonconforming use (grandfather rights) appeal; the purpose of zoning with reference to land use is the preservation of the public interest in certain neighborhoods against uses believed to be deleterious to neighborhoods, i.e., zoning ordinances may protect residences against business, but not business against business. Additionally, the Alaska Supreme Court has specifically held that the borough itself has standing to appeal a Planning Commission decision. The Alaska Supreme Court upheld a local ordinance that defines an "aggrieved person" as one who potentially suffers an adverse effect on the use, enjoyment, or value of real property owned by the person seeking to appeal the Planning Commission's action. The general law has long favored limiting standing in land use cases to those personally affected by a Planning Commission decision in order to prevent excessive litigation and undue delay of final dispositions which could work against the welfare of the community.

AS 29.40.130 addressing notice in platting actions requires that "each affected property owner who did not sign the petition" receive notice of a replat or alteration. KPB 20.25.090(A) defines "affected party" for platting purposes as property owners within a proposed subdivision and persons who own property within 600 feet of the boundaries of a proposed subdivision. The Planning Director has the discretion to determine whether there are additional affected property owners based on population, density, ownership data, topography, and facilities in the area of the subdivision. Pursuant to KPB 20.25.090(D), the borough also provides notice to beneficial interest holders in platted property. Only those affected property owners who commented in writing or in person

may appeal a Planning Commission decision on a plat to the hearing officer. KPB 20.25.120 and 20.90.010.

AS 29.40.060 provides that the assembly defines the proper parties to an appeal from an administrative decision related to the enforcement, administration, or application of a land use regulation. There appears to be flexibility in how the borough defines an "aggrieved party". The borough's practice has been to define a notification radius (for example, 1/2 mile for material site applications) and property owners within that radius will receive written notice. Anyone can comment or give testimony in writing or verbally to the Planning Commission even if they are not in the 1/2 mile notice radius. This allows for a maximum amount of evidence and participation at the Planning Commission level. Anyone who participates by either written or personal testimony before the Planning Commission is given the opportunity to appeal to the hearing officer. However, at the hearing officer level a party must be an affected property owner to maintain the appeal before the hearing officer. This rule limits participation to those individuals who have a genuine and unique concern based on their property ownership in close proximity to the applicant parcel. A party must then participate at the hearing officer level in order to preserve their right to appeal to superior court as an aggrieved party.

5. What is staff's role before the Planning Commission?

Staff's functions vary depending on the matter that is before the commission. On all matters before the commission it is staff who will assemble the packet of information and make recommendations regarding the matter. However, staff's role somewhat varies depending on whether the issue before the Planning Commission is advisory or quasi-judicial. For example, on land classifications and conveyances, the Planning Commission is advisory to the assembly. Staff will prepare a report and a recommendation on how land should be classified incorporating a discussion of the standards set forth in KPB 17.10. Staff will then inform the assembly of the Planning Commission's recommendations as the assembly has the final authority over these matters. On quasi-judicial matters such as plats and conditional use permit applications staff will prepare a report with findings based on the standards in Title 20 or 21 of the borough code applicable to the application pending before the Planning Commission. The Planning Commission sits as a judge on these matters and a further appeal of their decision may

be taken to the hearing officer or court depending on the type of application. Staff's role is the equivalent of a party before the commission advocating for the findings and recommendations in the staff report. Just as any other aggrieved party may appeal a quasi-judicial Planning Commission decision, so may staff.

A related question that arises is whether staff must support the Planning Commission decision where the Planning Commission has taken a different position from the staff recommendation. Is staff obligated to pursue their original position or are they obligated to support the Planning Commission's decision? Neither course of action is required. If staff made a strong recommendation and still believes that its position is correct and consistent with the code, and the Planning Commission's decision is not, then staff should defend its original recommendation and can even appeal the Planning Commission's decision. In the interest of warding against unproductive appeals and maintaining a harmonious relationship between staff and the commission the latter course of action should probably only be pursued where there is no other party available to appeal the decision and the decision may set a trend for future erroneous decisions. However, where the decision is fact dependent and the Planning Commission hears additional facts to those that were submitted to staff or where the commission can reasonably interpret the facts or applicable standards differently than staff, staff may change its position and support the commission if the matter is further appealed.

6. What is the legal department's relationship to staff and the Planning Commission?

Similar to staff the legal department's role varies with the matter that is before the commission. If it's a legislative matter (or an advisory matter upon which the assembly will ultimately act in its legislative capacity) the lawyer may give advice to the commission regarding the matter, and has often drafted or reviewed and revised the resolution or ordinance subject to Planning Commission approval or recommendation.

In specific quasi-judicial cases before the commission the lawyer may have assisted staff in the preparation of its recommendation for the commission; this is most likely to occur in the Planning Commission's review of a Plat Committee decision or in an adversarial multi-meeting proceeding. At the Planning Commission hearing the lawyer may assist

staff by clarifying the rationale for staff's position and answering legal questions. Ethics rules governing lawyers prohibits a lawyer advocating staff's position and also advising the judge in the matter (in this case the Planning Commission). Therefore, if the Planning Commission convenes in a closed adjudicative session to consider its decision the lawyer should not enter private session. Also if staff has strongly advocated a position with a lawyers help ethics rules would prohibit the lawyer from changing sides and assisting the Planning Commission in a decision contrary to staff's recommendation without first consulting staff. When such a situation occurs it is best to postpone the decision to allow staff to consult the attorney to clarify if it is reasonable to take a position different from the one originally taken by staff so that both the lawyer and staff can assist the commission in reaching the most defensible position possible by proposing supplemental findings to support the commission's position. (It would be important in such a case to publicly copy all parties of record with the changed staff recommendation, again to avoid ex parte contact between staff and the commission and to promote transparency in the decision making process.) The commission itself, however, would not have to meet in public to deliberate the findings and decision, although it is required that the final decision be issued in writing with supporting findings so that all parties can understand the basis for the Planning Commission's decision.

Also with regards to various matters before the Planning Commission it is not unusual for the commission or staff to seek a verbal or written legal opinion on issues involving the interpretation of applicable borough code and statutes as well as procedural issues.

Reasonable minds can differ on the interpretation of code. However, if the Planning Commission or staff chose to make a recommendation or decision that is clearly contrary to the borough code, a statute, or applicable case law it is the lawyer's responsibility to recommend against such course of action. Ultimately the legal department's role is to assist in the issuance of fair and defensible Planning Commission decisions that comply with the standards set forth in borough code or other planning documents.

7. When should a Planning Commission member be recused from voting due to bias?

Bias is prejudging a matter. There is not a borough ordinance prohibiting bias. However, quasi-judicial decisions resulting from prejudice, arbitrary decision making, or improper motives may be invalidated under case law. The integrity required of public office-holders demands that even an "appearance of impropriety" be avoided. Whether bias requires recusal may vary depending on whether the Planning Commission is performing a quasi-judicial function as opposed to a quasi-legislative function.

Not all prejudgment eliminates a commissioner's ability to debate and decide issues. Often the Planning Commission serves in an advisory capacity on legislative issues, e.g., recommending the passage of a code ordinance which the commission helps administer. For this advisory and quasi-legislative role, it is expected that commissioners have preconceived notions regarding issues of law and policy. For example, planning commissioners are often selected by region because of their familiarity with local conditions and concern regarding land use issues. This type of familiarity is likely to result in the formation of opinions on the ordinances, resolutions, and policies that will be placed before the board or commission, and it is not generally grounds for recusal, but is rather seen as an advantage as the commissioner can educate his colleagues about issues in his district.

The Planning Commission is acting in a quasi-judicial capacity when it applies adopted laws and policy to an individual's application. When acting in a quasi-judicial capacity, it is analogous to a judge who must fairly hear and weigh the evidence received and objectively apply the established standards to the facts of the case. Commissioners who have prejudged the facts of an individual case pending before it to the extent that they can no longer be impartial are biased, and their participation in decisions may invalidate the commission's decision. A commissioner voicing a general opinion regarding certain types of issues does not necessarily mean he will judge a particular application regarding that type of issue without regard to the applicable standards. However, land use decisions are particularly prone to bias because commissioners are drawn from the immediate geographical area and because of the legislative, adjudicative, and political nature of the land use and zoning process.

The bias test is whether a commissioner has actually made up his mind regardless of any argument that might have been advanced at the hearing. Indicators of prejudgment include a commissioner making a clear statement suggesting that a decision has already been reached. The test is objective and queries whether a disinterested observer would conclude that the commissioner has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. Some cases indicate that the *appearance* of bias, rather than actual bias, disqualifies the board member or commissioner.

Following are types of acts that have been found to constitute bias: (1) ex parte contact with board or commission members;¹ (2) making public statements or authoring letters regarding a particular case prior to the case coming before the board or commission;² (3) paying expenses of board member to make a site visit; (4) vote-trading; (5) soliciting persons to testify for or against a permit or application and (6) gifts given to influence a vote.

It is recommended that commissioners keep an open mind. Commissioners should judge the permit or application based on whether it meets the standards in the borough code or other applicable law or policy which the board or commission is expected to apply. Commissioners should not make conclusory statements on or off the record about someone's application or permit before the close of hearing and the matter being turned over to the board for discussion and decision. Commissioners should ask the applicant, interested parties, and staff questions about the permit application and how it relates to the applicable standards. Planning commissioners should explain their reasons on the record for voting for or against an application. The reasons should relate to the applicable standards.

If a commissioner feels strongly about an individual permit one way or another so that the commissioner cannot keep an open mind and apply the general standards to the individual application, the commissioner should recuse himself from voting.

¹ Ex parte contact occurs when a commissioner has discussions or correspondence with a party interested in a matter pending before the board outside the application and hearing process. While such private contacts are appropriate and even encouraged in advisory and legislative matters, such contact can fatally undermine a fair hearing process in a quasi-judicial matter.

² Please note that even when the remarks were made prior to the commissioner or board member's appointment, they may still constitute bias. Also, a letter written or statement made in an individual capacity, rather than as a commissioner or board member, showing prejudgment of a particular case may still result in disqualifying bias.

If a commissioner has made statements that indicate prejudgment of an individual permit or application, those statements should be declared on the record and the commissioner should indicate that he has an open mind and will still apply the applicable standards to the permit or application. Caution: Whether this will cleanse the bias will depend on how strong the statements made were, when and where they were made, and how controversial the particular permit or application is. Since even the “appearance of impropriety” should be avoided if statements indicating bias have been made it may be in the best interest of the decision-making process for a commissioner to recuse himself even if he thinks he can still be fair and impartial. Recusal will best protect the decision’s credibility and avoid reversal on appeal based on bias.

8. When should a Planning Commission member recuse themselves due to a conflict of interest?

Conflict of interest differs from bias. Bias is prejudgment of an issue pending before the Planning Commission, i.e., the potential inability to keep an open mind. Bias is not governed by any statute or ordinance. The borough has an ordinance governing conflict of interest which occurs when a Planning Commission member or an immediate family member has a financial interest in a matter pending before the Planning Commission. KPB Chapter 2.58 disallows a planning commissioner from entering a contract with the borough unless certain code requirements are met which involve filing a “notice of intent to do business” form with the borough clerk ten days before entering the contract disclosing the conflict, the nature of the business relationship, and specifying the department involved in the contract. Filing a notice of intent to do business, however, does not allow the affected member to vote on a matter where the member has a substantial direct or indirect financial interest in a matter pending before the board. A substantial financial interest is a pecuniary or material benefit accruing as a result of a private, business, or professional transaction with the borough. A planning commissioner is deemed to have an interest in the business affairs of your spouse, spousal equivalent, minor children or dependents, certain companies of which you are a member, employee, officer or director, or if you own more than 5 percent of the stock of a corporation. There are exceptions to the “substantial financial interest” provision including (1) where the Planning Commission member is only deemed to have an interest because they are an officer or employee of the contracting entity but their pay will not be directly affected by

the contract and their duties do not directly involve obtaining, preparing for, or performing the contract duties; (2) where the contract was entered before the Planning Commission member's appointment, but this would not authorize renewing the contract; (3) where the only interest is stockholdings and the stock is listed on the NY or American stock exchanges or less than 5 percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the official; and (4) a contract or sale where the total amount paid during the fiscal year does not exceed \$100.00.

Conflict issues are often not crystal clear. There are times where a conflict issue may be raised either by a commissioner about himself or by someone else about a commissioner. The chair can rule on whether the Planning Commission member has a substantial financial interest or refer the question of the commissioner's participation to the Planning Commission for a determination. If it is ruled that a commissioner has a conflict because of a substantial financial interest he must not vote on the issue.

9. When is a motion for reconsideration or a motion to rescind (amend after adoption) appropriate?

The motion for reconsideration under Robert's Rules may only be brought by a commissioner (or Plat Committee member) who voted on the prevailing side of a motion. It may be used when a member believes a decision was too hastily reached. The motion can fail for lack of a second. It must be made at the meeting in which the motion which is being reconsidered is approved. A committee of the whole (Planning Commission) would not reconsider a decision of a subcommittee (Plat Committee) under Robert's Rules. However, both Plat Committee and Planning Commission decisions are subject to this type of motion for reconsideration. If the motion to reconsider is adopted, then there is further consideration of the main motion.

A motion to rescind or to amend after adoption does not have to be brought by someone who voted on the prevailing side of the original motion, nor is it subject to the restrictive time frames of a motion to reconsider. The motion to rescind or amend after adoption may be made at any time prior to the meeting where the rescission will be considered. The motion to rescind or amend after adoption is not merely procedural as is the motion to reconsider; rather, the motion to rescind or amend after adoption directly gets to the

merits of the original motion. It may be amended and is debatable. If notice is given of the motion at the meeting where it will be considered, a 2/3 supermajority vote is required for it to pass. If prior notice is given, i.e., at a prior meeting or in the agenda for the meeting where the motion to rescind will be considered, then only a simple majority is required to adopt the motion. A motion to rescind or amend after adoption is not appropriate in any of the four instances: (1) when a motion for reconsideration has been made and the question can be reached by calling up the motion to reconsider; (2) when something has been done that would be impossible to undo as a result of the adoption of the main motion; (3) when the matter is of a contractual nature and the other party to the contract has been informed of the vote; (4) when a resignation, election, or expulsion of a member has been acted upon and the member was present or has been informed of the vote.³ Generally, unless the member wishes to rescind an action in its entirety, it is better to make a motion to amend after adoption because it provides the commission more flexibility to amend the original action rather than simply voting up or down to negate the original motion.

10. How does the Open Meetings Act apply to Planning Commission meetings?

The Open Meetings Act ("OMA") requires meetings of governmental bodies to be publicly noticed and open to the public. The OMA applies to the borough Planning Commission, although the applicability of the OMA may vary depending on the type of decision-making the Planning Commission is engaged in (i.e., quasi-judicial, legislative, or advisory). If more than three members are discussing an issue upon which the body is empowered to make a decision, the act applies, and the meeting must be noticed and open to the public. This is true even if the members involved did not plan to meet but just happen to bump into each other at the coffee shop. However, if the decision involved is merely advisory to another body, e.g. the assembly, then a violation only occurs if over three commissioners meet and the meeting was prearranged. However, if such an impromptu meeting occurs it should be terminated as soon as commissioners realize they are discussing business that should be conducted at a scheduled Planning Commission

³ Due to the nature of municipal government, it is unlikely that either the third or fourth instance would arise. With regard to Item 3, the mayor is the final contracting authority for the borough, so the Planning Commission's vote in such a case would most often be a recommendation to the mayor and or assembly. With regard to Item 4, the mayor appoints members of the Planning Commission, and, if necessary, removes members with assembly approval.

meeting. The best course of conduct is to not engage in “mini meetings” before or after regularly scheduled Planning Commission meetings. Also do not engage in serial meetings or play “telephone” by speaking to one after another of your fellow commissioners as it could lead to the deliberative process taking place outside the public process. It is likewise not appropriate to use someone who is not on the commission to poll or speak to other individual commissioners on your behalf.

The quasi-judicial deliberations the board enters are exempt from the act; the board’s deliberations are considered adjudicatory sessions and such deliberative sessions by commission members acting as judges do not have to be public. However, since quasi-judicial matters such as plats and conditional use permits still are subject to public hearings and notice requirements under AS 29 and/or provisions of the borough code, the actual hearing of such issues must be publicly held. These public notice and hearing requirements, of course, allow the Planning Commission to gather as much relevant information from the public as possible. Further, discussions of quasi-judicial matters should not be informally or privately held prior to the close of the public hearing process because of potential claims that due process was violated by some commissioners having more information or discussions to which other commissioners were not privy. Please note while quasi-judicial or adjudicatory decision-making allows Planning Commission members to deliberate with each other outside of a public meeting, it does not allow a member to discuss the issues with an individual party outside of a public meeting. This is known as *ex parte* contact and as discussed in section B-7 of this manual can lead to claims that the hearing process was unfair. While not required to be publicly held, it is recommended that the deliberative portion of a quasi-judicial process still be public because there are times where questions arise for participants before the board after the close of public hearing and all participants need to be aware of any questions or responses from the other participants. Additionally, the openness of deliberations assists the participants, including staff, in knowing the basis of the Planning Commission’s decision although the reasons for the decision should also be contained in written findings as discussed in Section B-2 of this manual.

Executive sessions, which exclude the public, are also exempt from the Open Meetings Act. However, it is rare that the Planning Commission would need to hold an executive session because of the advisory nature of the decisions they make which are not quasi-judicial. Executive sessions are allowed for (1) matters the immediate knowledge of which

would clearly have an adverse effect upon the finances of the borough; (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; (3) matters which are required by law to be confidential; and (4) matters involving consideration of government records that by law are confidential. Since the assembly is the ultimate decision-maker regarding financial matters, the Planning Commission does not supervise any employees, and most matters that come before the commission are by their nature subject to public participation, the need for an executive session is rare. If possible, the borough attorney's office should be consulted if an executive session is being contemplated in order that any such session be in compliance with the OMA.

11. What hearing procedures should be followed for quasi-judicial hearings?

The following guidelines allow a fair quasi-judicial hearing format:

- 1) The chair introduces the agenda item.
- 2) Staff presents a report and staff recommendation.
- 3) Presentation by the applicant and their representatives.
- 4) Testimony by members of the public.
- 5) Response by staff to any testimony that was given and an opportunity for the Commission to ask questions of the staff.
- 6) Rebuttal by applicant. The applicant can rebut evidence or testimony but should not present new testimony or evidence. (If new evidence or testimony is allowed, the Planning Commission may question staff regarding the same and take additional public comment regarding the new evidence.)
- 7) The chairperson closes the hearing and then entertains a motion. The Commission deliberates and makes a decision.

Following are the rules by which the Planning Commission conducts a public hearing:

- 1) Persons wishing to testify must wait for recognition by the Chair and state their name and address for the record at the microphone provided for public comment.
- 2) Each speaker is limited to five minutes unless they have a prepared statement in which case they may request additional time.
- 3) All questions will be directed to the Chair. All questions and comments will be kept to the subject at hand and shall not deal with personalities.
- 4) The public shall maintain decorum at all times and treat all testifiers with respect. No applause or verbal outburst will be allowed.

12. What is the Planning Commission's decision making authority when reviewing quasi-judicial applications?

The answer to this question varies based on the type of application being reviewed. The most common applications the Planning Commission reviews are discussed below:

A. Preliminary Plats - KPB Title 20: The approval of preliminary plats is pursuant to authority granted by AS 29.40 and AS 40.15. The purpose of the platting provisions is to promote an adequate and efficient street and road system, provide necessary easements, provide minimum standards of survey accuracy and proper preparation of plats and protect and improve the health safety and general welfare of the people. KPB 20.10.010. It is through the adoption of the remaining provisions of KPB title 20 that the assembly has chosen to what extent to protect public health, safety and welfare. KPB 20.25.100 grants the Planning Commission authority to approve, conditionally approve, or deny a plat. It is rare, that a plat can be denied because the standards for plat approval that must be met are minimal. Unlike many municipalities the borough does not require roads be constructed prior to final plat approval nor does it require installation agreements for utilities. It is generally not difficult to meet the boroughs basic standards regarding lot size, legal access to the subdivision, internal dedications, and the form and content requirements for a preliminary plat. The Planning Commission also has discretion to grant or deny exceptions pursuant to KPB 20.50. Exceptions from the building setback

requirements under KPB 20.30.240 are one of the more common type of exception requests; however, exceptions to other provisions of the code may be requested as well. For example, the exception process has been used to allow private tracts to be used as roads, rather than dedication of rights-of-way. In using its discretion to grant exceptions the Planning Commission still must ensure the public welfare is not undermined by granting the exception. Exceptions are further addressed in Section A-5 of the Planning Commission manual.

B. Anadromous Habitat Protection - KPB 21.18: The Planning Commission has discretion to approve or deny and condition permits within the anadromous habitat protection district under KPB 21.18.081. There is a list of 12 types of conditional uses that may be granted. There are five standards set forth in KPB 21.8.081(D) that must be met in order to grant a permit. However, the Planning Commission may condition the permit in order to meet those standards, for example, by approving mitigation measures that would further protection of anadromous habitat. KPB 21.28.081(E)

C. Material Site Permits: Material sites are subject to a set list of mandatory conditions. KPB 21.19.050. Only those mandatory conditions may be placed on a permit. KPB 21.29.040. KPB 21.25.050 which is the general procedural ordinance for all conditional land permits that are now adopted authorizes the Planning Commission to approve, deny, or condition a permit. However, KPB 21.25.010 requires that the more specific CLUP ordinances, such as KPB 21.29 to apply. Thus, the general language providing for denial or modification of a permit application is only allowed to the extent KPB 21.29 would allow such denial or modification. The only discretion in the material site code is to enhance or waive buffers, grant variances if the applicant meets the statutory standards of AS 29.40 and KPB 21.05, and deny a permit if the application doesn't meet the mandatory conditions. An incomplete application should not reach the commission as staff is authorized to not process an application until it is deemed complete. KPB 21.25.050(A). However, the Planning Commission serves as a check and balance in this instance in the event an incomplete application is processed by staff and makes it to the commission level. In such a case postponement to allow the applicant to complete the application is recommended. If the applicant refuses to submit a complete application denial may be warranted.

D. Variances - AS 29.40(a)(3)(b); KPB 21.05: A variance proceeding is required by state statute. The variance process is addressed at Section A-5 of the Planning Commission manual. The Planning Commission has the discretion to approve, deny, or condition a variance consistent with the standards set forth in KPB 29.40 and KPB 21.05. The Planning Commission may grant a lesser variance than requested by the applicant in order that the variance be as consistent with the applicable code as possible.

**Excerpt
Planning Commission
Minutes**

June 24, 2019

on the why would help. Commissioner Morgan felt that working with the group will help her understand it better.

Commissioner Bentz felt that a work session might be nice before the July meeting. If people did have alternate recommendations for the Ordinance they could review the memo on page 137. It goes through each change and shows the verbiage of the change but also the description. If someone is thinking about additional items such as safety they could come to the work session with some draft language and justifications to get it moving and have staff help.

Commissioner Brantley asked if the work session would be allowed. Mr. Best answered that it would be a public meeting with recordings and notice to the public.

Commissioner Ecklund wanted to clarify that the only Planning Commission meeting in July is July 15, 2019. She wanted to know if there was much scheduled yet. Ms. Hindman let her know that at this point there is a few things such as the Hazard Mitigation Plan and a street name change. Commissioner Ecklund asked if a work session could be scheduled at 4 prior to the plat committee. Mr. Best said it would be ideal for staff. Commissioner Ecklund asked how many could make a meeting at that time and by show of hands it appeared everyone could.

Commissioner Ecklund recommended that a work session be scheduled for 4:00 p.m. on July 15, 2019 to discuss the Material Site Ordinance.

SUBDIVISION PLAT PUBLIC HEARINGS

1. Commissioner Carluccio reported that the Plat Committee heard and approved 7 preliminary plats.

OTHER/NEW BUSINESS

K. OTHER/NEW BUSINESS

1. New Plat Committee (July, August, September 2019) – 5 Members / 2 Alternates

Ms. Hindman asked for 5 members and 2 alternates. Commissioner Whitney said he could attend all meeting but one in August.

New Plat Committee for July, August, September 2019 will be Commissioners Carluccio, Morgan, Foster, and Whitney. Commissioner Brantley is an alternate. Chairman Martin noted that all Commissioners may be called to sit as an alternate if needed.

DIRECTOR'S COMMENTS

Mr. Best noted that this was Ms. Montague's last meeting. He thanked her for her years of service and all the input she has given through the years.

COMMISSIONER COMMENTS

Commissioner Ecklund wanted to note that the Commission has denied material site extraction permits. Maybe they will have valid balanced reasons that can be used and represent all sides.

Commissioner Carluccio noted that several months ago she drove by the site that was reviewed earlier in the evening. She thinks that it is a travesty that the Commission feels like they have to approve everything and that there does not seem to be anything that they can use to deny a gravel pit. She is disappointed that it was approved and the process. She agrees with some of the comments from homeowners and it seems like that when there are so many people coming to try and protect their property that there should be a way to be give them that protection.

Commissioner Foster noted he would be traveling but will be putting in his time on the Plat Committee. He noted that when they research the beginning of zoning, whether it is a community, as a city, or a borough,

the bottom line was to preserve property rights and yet people don't want zoning. In the City where there are zoning powers there is a conditional use permit, it is a permitted use. Conditions are just put on it that help lessen the impact it might have. When there is no zoning the Commission's hands are tied. These are personal property rights that the individual wants to use his property. When he first got on the Commission it wasn't until he read through the entire Ordinance that he realized what conditions can be added to try to mitigate. It is an attempt to mitigate. He doesn't know if they can ever really say no. They have said no but the decision has been overturned. He would like to see how Local Option Zoning, where some people are zoned and others are not and how that could work together.

Commissioner Ruffner thanked Ms. Montague and said he learned a lot from her.

Chairman Martin also thanked Ms. Montague for her dedication and service to the borough.

ADJOURNMENT

MOTION: Commissioner Carluccio moved to adjourn the meeting at 11:08 p.m.

MOTION PASSED: Seeing and hearing no discussion or objection, the motion passed by unanimous consent.

Julie Hindman
Administrative Assistant

**Excerpt
Planning Commission
Minutes**

September 9, 2019

15	21.29.050 (A)(23)	Setback. Material site excavation areas shall be 250-feet from the property boundaries of any local option zoning district , existing public school ground, private school ground, college campus, child care facility, multi-purpose senior center , assisted living home , and licensed health care facility. If overlapping, the buffer areas of the excavation shall be included in the 250-foot setback.
15b	21.25.030	Assisted living home is a residential facility that serves three or more adults who are not related to the owner by blood or marriage, or that receives state or federal payment for services regardless of the number of adults served. The services and activities may include, but are not limited to, housing and food services to its residents, assistance with activities of daily living, and personal assistance, and that complies with Alaska Statutes 47.32.010—47.60.900, as currently written or hereafter amended.

Mr. Wall noted that items 16a and 16b would be an either / or situation. They are two different wordings to accomplish the same thing. These are in regards to language that was a concern to the Planning Commission. The language proposed by the working group is that the Planning Commission shall approve permit applications meeting the mandatory conditions. These two proposals will change the language. Item 16a it will add the additional wording "or shall disapprove permit applications that do not meet the mandatory conditions." Item 16b is drafted differently. The first sentence would be eliminated and replaced with "In order for a material site or counter permit to be approved the planning commission or planning director must conclude that the application meets the mandatory permit conditions." The table does not have it but it should say "as applicable" after planning director.

AMENDMENT 19 MOTION: Commissioner Ecklund moved, seconded by Commission Morgan, to approve item 16a, column 3.

Commissioner Bentz felt that the word disapprove was not the best choice and that maybe the word deny would be better. She thought that 16b read better. She asked legal if either of the options would be appropriate. Mr. Wall noted that "disapprove" was chosen because it mirrors the language in 21.25. that sets out the standards for conditional land use permits.

Commissioner Ruffner liked the language in 16b better but does not have strong feelings about either.

Commissioner Ecklund felt the difference between the two was that 16b was not strong enough in saying that the Planning Commission has the ability to deny or disapprove. It reads similar to how it has been read all along. If it meets the mandatory conditions then it needs to be approved. She wants something that says if the Planning Commission finds that the mandatory conditions are not meet, a permit can be disapproved.

Commissioner Bentz said she could see how that language sounds stronger but materially she did not see a lot of difference between the two options. It does not change the Planning Commission or Planning Directors powers. Chairman Martin noted that one is in the affirmative and the other is negative. The syntax is the same.

Commissioner Ecklund said she had issues with a long letter from a member of the borough staff that said the Planning Commission does not have the ability to disapprove a permit. The way it reads is that the Commission shall approve a permit that meets the mandatory conditions. That is what it said before and that is why staff said if it meets the conditions, they had to approve it. She wants the words included that say the Planning Commission has the power to disapprove a permit.

AMENDMENT 19 PASSED BY MAJORITY VOTE: 10 Yes, 1 No, 1 Absent

Yes: Bentz, Brantley, Carluccio, Ecklund, Ernst, Fikes, Morgan, Ruffner, Venuti, Whitney

No: Martin

Absent: Foster

**Kenai Peninsula Borough, Alaska
144 North Binkley Street
Soldotna, Alaska 99669**

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to disapprove a conditional use permit
for a material site that was requested for
KPB Parcel 169-010-67; Tract B, McGee
Tracts - Deed of Record Boundary Survey
(Plat 80-104) - Deed Recorded in Book 4,
Page 116, Homer Recording District

Hans Bilben,

Appellant

Emmitt and Mary Trimble / Beachcomber LLC,

Applicant.

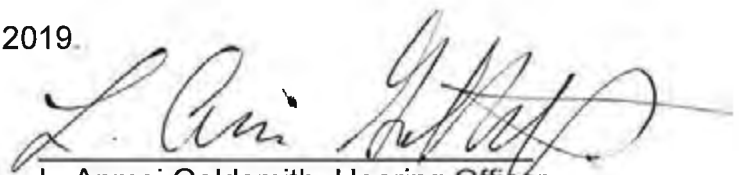
Case No. 2019-01-PCA

HEARING OFFICER'S DECISION ON MOTION TO EXPAND RECORD

Appellant Hans Bilben motioned the hearing officer to expand, or supplement, the record in this matter through a motion dated October 1, 2019. A copy of the motion is attached to this decision. Kenai Peninsula Borough Code (KPBC) 21.20.300 requires that the hearing officer shall allow a time for response to a motion by the nonmoving parties, within a time frame set by the hearing officer, after which the hearing officer shall render a decision.

The hearing in this matter is set for October 30. In order to prevent the parties from having to await the outcome of this motion before preparing their reply statements, the hearing officer shall provisionally accept the three documents put forth in Mr. Bilben's motion as additions to the record. Any party objecting to adding any of these three documents may make their objections in their reply statement, or in a stand alone response filed on or before the reply statement due date. After reviewing any objections, the hearing officer will make a final decision on whether each document shall be added to the record.

Dated this 2nd day of October, 2019.


L. Anmei Goldsmith, Hearing Officer

CERTIFICATE OF SERVICE

I, John Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the Hearing Officer's Decision on Appellant's Motion to Expand the Record.

X 
Signature

Dated this 3rd day of October, 2019.

Appellant Hans and Jeanne Bilben catchalaska@alaska.net Agent Katherine Elsner Ehrhardt, Elsner & Cooley katie@907legal.com	Applicant Emmitt & Mary Trimble dba Beachcomber LLC emmitttrimble@gmail.com margetrimble@gmail.com Agent Holmes Weddle & Barcott, P. C. Stacey Stone: sstone@hwb-law.com Chantal Trink: ctrinka@hwb-law.com snichols@hwb-law.com	Allison Trimble Paparoa allisontrimblerealestate@gmail.com	Sean Kelley, Deputy Attorney Max Best, Planner Kenai Peninsula Borough skelley@kpb.us legal@kpb.us mbest@kpb.us
Brna Philip J fisheyeak@gmail.com	Carlton Richard D & Marie seaburyroad@live.com noregretsrm@live.com	Cullip Gary L buffycody@msn.com	Danica High highdanica@yahoo.com
G. George Krier georgerewards@gmail.com	Gina M. Debardeleben ginadebar@mcianecg.com	Girton John johnrgirton@aol.com	Gorman James captainboomer525@hotmail.com
Gregory David & Teresa Ann Jacobson davidgregory0754@gmail.com	Isenhour Lauren laurenttrimble@hotmail.com	Linda R Bruce lrb128@hotmail.com	Linda Stevens illuminaataarts@aol.com grizzlysafety@aol.com
Oliver Lawrence "Rick" roliverb747@me.com	Patrick Mike & Linda mlpatrick335@yahoo.com	Pete Kinneen storagecondominiumsofalaska@gmail.com	Sheridan Gary Sheridan Eileen twoshar@acsalaska.net
Shirley Gruber shirleytdx@yahoo.com	Sparkman Joseph J jay1332@att.net	Steve Thompson stevethompson1961@yahoo.com	Thomas J Brook tbrook@ak.net
Todd Bareman tbareman@gmail.com	Vickey Hodnik vickey@gci.net	Whitmore Lynn lkwhitmore@acsalaska.net	Joshua Elmaleh jewish8josh@gmail.com Christing Elmaleh christycupp5@hotmail.com
Xochitl Lopez-Ayala PO Box 2552 Homer, Ak 99603	Brantley Michael PO Box 950 Anchor Point, Ak 99556	Donald L. & Lori L. Horton hortons6@gmail.com	Angela Roland angelaroland@gmail.com



Office of the Borough Clerk

144 North Binkley Street, Soldotna, Alaska 99669 • (907) 714-2160 • (907) 714-2388 Fax

Johni Blankenship, MMC
Borough Clerk

October 23, 2019

Notice of Reply Statements filed in Case No. 2019-01-PCA: In the matter of the Kenai Peninsula Borough Planning Commission's decision to approve a conditional land use permit for a material site that was requested for KPB Parcel 169-010-67; Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District. *[Enclosed please find a copy of the reply statements filed.]*

The following parties filed reply statements in the afore mentioned case:

- Pete Kinneen
- Hans Bilben, et al by and through counsel, Katherine Elsner
- Kenai Peninsula Borough
- Emmitt Trimble and Beachcomber LLC by and through counsel of record, Holmes Weddle & Barcott, P.C.
- Rick Oliver

This notice is being sent to you because our records indicate you are a party of record in the subject Planning Commission decision appeal.

Johni Blankenship, MMC
Borough Clerk
jblankenship@kpb.us

Enclosed

Page -2-
 October 23, 2019
 To: Parties of Record
 Re: Case No. 2019-01-PCA

CERTIFICATE OF SERVICE

I, John Blankenship, Clerk of the Kenai Peninsula Borough, do hereby certify that, I served the foregoing notice and copies of Reply Statements filed.

X 
 Signature

Dated this 23rd day of October, 2019.

Appellant Hans and Jeanne Bilben catchalaska@alaska.net Agent Katherine Elsner Ehrhardt, Elsner & Cooley katie@907legal.com	Applicant Emmitt & Mary Trimble dba Beachcomber LLC emmitttrimble@gmail.com margetrimble@gmail.com Agent Holmes Weddle & Barcott, P. C. Stacey Stone: sstone@hwb-law.com Chantal Trinka: ctrinka@hwb-law.com snichols@hwb-law.com	Allison Trimble Paparoa allisontrimblerealestate@gmail.com	Sean Kelley, Deputy Attorney Max Best, Planner Kenai Peninsula Borough skelley@kpb.us legal@kpb.us mbest@kpb.us
Brna Philip J fisheyeak@gmail.com	Carlton Richard D & Marie seaburyroad@live.com noregretsrm@live.com	Cullip Gary L buffycody@msn.com	Danica High highdanica@yahoo.com
G. George Krier georgerewards@gmail.com	Gina M. Debardeleben ginadebar@mcianecg.com	Girton John johnrgirton@aol.com	Gorman James captainboomer525@hotmail.com
Gregory David & Teresa Ann Jacobson davidgregory0754@gmail.com	Isenhour Lauren laurentrimble@hotmail.com	Linda R Bruce lrb128@hotmail.com	Linda Stevens illuminataarts@aol.com grizzlysafety@aol.com
Oliver Lawrence "Rick" roliverb747@me.com	Patrick Mike & Linda mlpatrick335@yahoo.com	Pete Kinneen storagecondominiumsofalaska@gmail.com	Sheridan Gary Sheridan Eileen twoshar@acsalaska.net
Shirley Gruber shirleytdx@yahoo.com	Sparkman Joseph J jay1332@att.net	Steve Thompson stevethompson1961@yahoo.com	Thomas J Brook tbrook@ak.net
Todd Bareman tbareman@gmail.com	Vickey Hodnik vickey@gci.net	Whitmore Lynn lkwhitmore@acsalaska.net	Joshua Elmaleh jewish8josh@gmail.com Christing Elmaleh christycupp5@hotmail.com
Xochitl Lopez-Ayala PO Box 2552 Homer, Ak 99603	Brantley Michael PO Box 950 Anchor Point, Ak 99556	Donald L. & Lori L. Horton hortons6@gmail.com	Angela Roland angelaroland@gmail.com

Blankenship, Johni

From: Pete Kinneen <biocharalaska@gmail.com>
Sent: Monday, October 21, 2019 4:47 PM
To: Blankenship, Johni
Subject: <EXTERNAL-SENDER> Kinneen Reply Statement

CAUTION: This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

Reply Statement in Case No. 2019-01-PCA

Comes now Pete Kinneen who hereby files his reply statement.

Kinneen is aware of the elements of the Bilben reply statement. Rather than repeat those elements he affirms each and conceptually incorporates each into his reply statement.

In addition, he adds the following elements.

Warrington case citation is deceitful

As in the first administrative hearing in this matter, KPB tosses in the Warrington case and erroneously represents it as saying something it does not. In that instance the Girton reply statement brilliantly dismissed the KPB assertion. With never a rebuttal to Girton, KPB again drags out this dead rat.

One of the falsities of KPB misuse of Warrington is their assumedly deliberate failure to update the historical context.

Warrington is a 2005 case resulting in formal conclusion and decision relayed to KPB in first half of 2006.

During the same time frame there was widespread public and legislative debate over the very subject of gravel extraction and the rights of existing neighborhoods.

KPB fails in their Opening Statement to tell the result of that lengthy public struggle.

After Warrington, the people's legislators enacted the withdrawal of landowner's rights to extract more than a single acre of gravel from their land. As cited in Kinneen Opening Statement, the Assembly codified the withdrawal of landowner's Rights to extract more than a single acre of gravel from their land. During the second half of 2006 KPB Assembly (August 1, 2006) clarified in 21.29.010 the conditions under which the Right to mine gravel was exercisable.

All other attempts to extract gravel, whether on one's own land or on land of others, was reduced from an as-of-Right to a mere Privilege.

If the distinction between Right and Privilege is not addressed this entire issue is a case of who can yell the loudest. Once distinguished, everything within subject ordinance falls into place. Resulting in the proper decision being remand or reversal of latest decision.

To illustrate graphically the hierarchy of rights you might envision a standing person raising their right hand level out from their shoulder. And their left hand as straight out, as they can, from their knees.

In above graphic, the right hand illustrates the RIGHT of a person.

The left hand illustrates mere PRIVILEGE.

On August 1, 2006 KPB Assembly relegated the rights of existing neighbors to be as-of-rights while the aspirations to mine gravel in excess of a single acre are to be merely privilege. Legally, as opposed to everything KPB planning administration misstates, the as of rights trump the privilege of those wishing to obtain the privilege of a permit.

No one is born with the right to drive an automobile on public roads. Or to engage in the authorized practice of law. Or medicine.

Those wishing to do so must ask for the Privilege of doing so through earning or qualifying for the permit or license. With evenly regulated requirements to be met first. If requirements are not met, the permit is withheld.

Incredibly, KPB says the Privilege of a gravel permit is held Higher than the Rights of existing neighbors. And if the application is insufficient, you waive the failings and issue regardless. KPB shameful record is 97-0.

This is in clear contradiction to the plain meaning of the legislative words in the relevant ordinances. Indeed, the ordinance plainly states that if you fail to meet the standards you do not receive the Gravel extraction permit. The INTENT is the umbrella under which the rest of the ordinance is hung. Or framed.

21.29.050 A. "These material site regulations are INTENDED to protect against" and "only conditions set forth in ...may be imposed."

Plain reading says the INTENT is to protect "adjacent properties". Not to protect prospective miners.

KPB falsely says next that only these certain conditions may be imposed and even if the conditions do not meet the sufficiently minimized standards, you issue the permit regardless.

Proper reading of the plain words says if you fail your driver's test you do not get your driver's license. Or bar license. Or medical license. Etc. including gravel extraction license or permit.

KPB Assembly has spoken. KPB administration has misspoken. The correct and plain reading of the history of subject case is to remand the latest coerced Planning Commission decision. Or reverse per Bilben.

Respectfully submitted and filed on this 21st day of October, 2019 by Pete Kinneen.

Sent from my iPhone

RECEIVED

OCT 21 2019

KENAI PENINSULA BOROUGH

Borough Clerk's Office
 Kenai Peninsula Borough

In the matter of the Kenai Peninsula)
 Borough Planning Commission's)
 decision to approve a conditional land)
 use permit for a material site that was)
 requested for KPB Parcel 169-010-67;)
 Trace B, McGee Tracts – Deed or)
 Record Boundary Survey (Plat 80-104) –)
 Deed Recorded in Book 4, Page 116,)
 Homer Recording District)
)
 Hans Bilben)
)
 Appellant)
)
 Emmitt and Mary Trimble)
 Beachcomber LLC,)
)
 Applicant.)
)

CASE NO. 2019-01-PCA

REPLY STATEMENT

Comes Now Hans Bilben, by and through counsel, Katherine Elsner, and joined in filing – pursuant to KPB Code 21.20.280(A) – by Philip Brna, George Krier, David Gregory, Theresa Ann Jacobson, Rick Oliver, Shirley Gruber, Todd Bareman, Xochitl Lopez-Ayala, Richard and Marie Carlton, Mike and Linda Patrick, Joseph Sparkman, Vickey Hodnik, Michael Brantley, Gary Cullip, John Girton, Linda R. Bruce, Steve Thompson, Lynn Whitmore, Donald and Lori Horton, James Gorman, Linda Stevens, Gary and Eileen Sheridan, Thomas J. Brook, and Joshua and Christine Elmaleh, hereby files his reply statement.

Beachcomber and the Borough continue to promote their argument that the Commission is disallowed from granting a permit application. They furthermore misconstrue Appellant's argument by reframing it as somehow reading into the Code a requirement that *all* visual and aural impact be eliminated prior to the Commission having authority to grant a material site CLUP. Both

the legal argument set forth by the Borough and Beachcomber, and the inaccurate reframing of Appellant's argument, are in error.

The argument that the 21.29.040 language that "only the conditions set forth in KPB 21.29.050 may be imposed to meet these standards" prohibits the Commission from disapproving a permit necessarily requires a "disapproval" be equated as a "condition." Otherwise the language plainly does not restrict the authority otherwise granted to the Commission to disapprove any CLUP application. This argument ignores the plain meaning of the words employed as well as the treatment of "conditions" throughout the rest of the Code.

The Code is replete with examples of how it is incongruous and illogical to read disapproval of a permit as a condition imposed upon the permit. For example, in discussing permit extensions, 21.29.07(c) allows a requested extension of a previously approved CLUP to be *denied* if "the permittee is otherwise in noncompliance with the original permit *conditions*." (emphasis added). In discussing permit termination, 21.29.080 directs that when "a permit expires, is *revoked*, or a permittee requests termination of their permit, a review of permit *conditions* and site inspections will be conducted by the planning department to ensure code compliance and verify site reclamation prior to termination." (emphasis added).

Moreover, this clear distinction between conditions to be imposed and the authority to approve, modify or disapprove an application for activity potentially *permitted* by the Code extends beyond just the material site permitting and conditional land use chapters. For example, 14.40.060 establishes a clear distinction between "conditions" and whether a permit should be *granted*: "A right-of-way construction permit may be *denied* if *conditions* cannot be placed on it to prevent damage to the rights-of-way, adjacent public or private property, or water bodies." (emphasis added).

Instead of requiring approval of the permit merely because the conditions are satisfied, the Code establishes and limits the box of tools available to the Commission to condition a permit. The Code does not allow the Commission to impose an infinite universe of conditions on a permit application. However, nowhere does the Code state that a permit application that is not capable of meeting the standards in 21.29.040 through employing the conditions in 21.29.050 must nevertheless be approved.

To the contrary, 21.25.050 specifically authorizes the Commission to disapprove a permit application. It requires that the proposed activity comply with the minimum requirements of 21.25. Through 21.25.010, the Chapter 21.25 requirements are applied to all CLUP applications, including those sought under Chapter 21.29. The clearly delineated purpose of the Code under 21.25.020 is to “require” that “minimum standards” are met prior to the issuance of any CLUP.

Although 21.25.010 provides that, if a conflict arises between the provisions of Chapter 21.25 and a CLUP chapter regulating a specific use, the more specific code provision applies, there is no conflict created between the language in 21.25.050 and 21.29.040. The provisions in 21.25.050 regulate the authority of the Commission to approve, disapprove and modify a permit application after measuring the application against the standards of the Code. The provisions in 21.29.040 limit the conditions that the Commission is allowed to impose on a material site application. There is no conflict in these provisions and they are clearly capable of being read in harmony.

By contrast, the provisions in 21.25.020 and 21.29.040 both address the “standards” and policy imposed by the Chapters. 21.25.050 generally imposes “minimum standards for certain land uses which may be potentially damaging to the public, health, safety and welfare....” By contrast, 21.29.040 more specifically imposes “regulations [which] are intended to protect against aquifer

disturbance, road damage, physical damage to adjacent properties, dust, noise and visual impacts.” As a result of this actual conflict in the purpose and standards created between application of 21.25.010 and 21.29.040, the requirements of 21.29.040 control. Because disapproval is simply not a condition imposed on a permit and because 21.25.050 and 21.29.040 are not in conflict, nothing in 21.29.040 supersedes 21.25.050 and disapproval is still a result the Commission is authorized reach.

It is also incorrect that Appellant’s position is that the impacts considered by 21.29.040 need to be eradicated completely before a permit can be approved. What the Code clearly and plainly requires is that the Commission determine whether the imposed conditions meet the standards set forth in 21.29.040 prior to approving a permit: that is, whether the impacts have been sufficiently *minimized*, as determined by the Commission. The Commission was improperly advised on the requirements of the Code when it was told that, no matter the decision it makes on the ability of the conditions to meet the standards, it completely lacks the authority to disapprove a permit once conditions are imposed. This erroneous interpretation of the Code led the Commission to grant this permit when it would not have done so if told it had the authority to disapprove— as it did in 2018 when presented with the same site plan and application.

Being unable to adequately explain how this permit and the associated conditions sufficiently minimize the visual and noise impact required by the Code, the Borough and Beachcomber reform Appellant’s argument into one that they can readily refute: that Appellant argues the Code mandates complete elimination of perceived negative impacts prior to approval. Instead, Appellant advocates a position that the Commission is both authorized and required to determine whether, after applying the 21.29.050 conditions to a permit application, such application is able to meet the 21.29.040 standards such that it should, under 21.25.050 be

approved. While the findings of fact recited by the Borough may set forth how the different permit conditions could result in some degree of reduction in the variably impactful and variably protected noise and visual repercussions to surrounding property, neither the Borough, Beachcomber, nor the adopted findings, are able to indicate how those impacts are *sufficiently* reduced so as to meet the standards imposed by 21.29.040 and to set forth a valid condition as required by 21.29.050(2)(c).

While the surrounding property owners submitted the greater quantity and volume of the evidence and testimony presented to the Commission, it is not urged that disapproval should have been decided based on numbers alone. It is the quality of that evidence - the documentary, visual and data-driven evidence - that supports the Commissions 2018 finding that the impact cannot be sufficiently minimized and is insubstantial to support the Commissions 2019 finding that the conditions imposed necessarily meet the standards set forth.

Finally, while accurate that the proposed material site sits within the rural zoning district, the Borough Assembly made a specific policy decision to explicitly limit a private property owner's ability to engage in material site extraction greater than 2.5 acres without public notice, comment and the approval of a quasi-judicial body *before* that extraction is allowed. Beachcomber acquired this property knowing that this restriction existed and knowing the geographic and topographical realities made this a location from which visual and aural impact to surrounding property owners could not possibly be sufficiently minimized or screened. When the Borough Assembly enacted regulations to support its policy decision to restrict free use of private property in this manner, it adopted code provisions specifically requiring the quasi-judicial body to ensure that the ~~standards~~ adopted by the Assembly and set forth in 21.29.040 are actually met and to disapprove any application where they are not.

As stated by the Commission in 2018, the noise from this site “will not be sufficiently reduced with any buffer or berm that could be added” and the “visual impact to the neighboring properties will not be reduced sufficiently.” Beachcomber’s application should be disapproved.

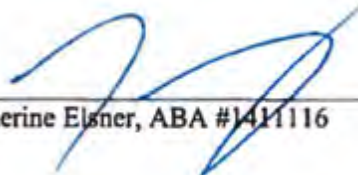
DATED October 15, 2019.

Respectfully submitted and filed on behalf of Hans Bilben

And joined in filing, pursuant to 21.20.280(A), by:

Philip Brna
George Krier
David Gregory
Theresa Ann Jacobson
Rick Oliver
Shirley Gruber
Todd Bareman
Xochitl Lopez-Ayala
Richard and Marie Carlton
Mike and Linda Patrick
Joseph Sparkman
Vickey Hodnik

Michael Brantley
Gary Cullip
John Girton
Linda R. Bruce
Steve Thompson
Lynn Whitmore
Donald & Lori Horton
James Gorman
Linda Stevens
Gary and Eileen Sheridan
Thomas J. Brook
Joshua & Christine Elmalch


Katherine Elsner, ABA #1411116

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OCT 21 2019

KENAI PENINSULA BOROUGH
OFFICE OF THE BOROUGH CLERK

Borough Clerk's Office
Kenai Peninsula Borough

APPEAL FROM THE PLANNING COMMISSION DECISION

In the matter of the Kenai Peninsula Borough)
Planning Commission's decision to disapprove)
a conditional land use permit for a material)
site that was requested for KPB Parcel 169-)
010-67; Tract B, McGee Tracts – Deed of)
Record Boundary Survey (Plat 80-104) – Deed)
recorded in Book 4, Page 116, Homer)
Recording District.)

Case No. 2019-01-PCA

Hans Bilben,)
Appellant)

Emmitt Trimble,)
BEACHCOMBER, LLC,)

Applicants.)

**KPB's PARTIAL OPPOSITION TO MOTION TO EXPAND RECORD AND
REPLY**

The Kenai Peninsula Borough (KPB) hereby files this reply statement and partial opposition, or request for clarification, of the Appellant's Motion to Expand the Record and provisional acceptance decision by the hearing officer.

I. Appellant's Motion to Expand Record

The Appellant requested the hearing officer expand the record on appeal to include the following additional items:

1. Kenai Peninsula Borough Planning Commission Manual

KPB response: No objection to inclusion of the manual, which is also available online.

2. Transcript of the Commission Comments at the conclusion of the June 24, 2019 Planning Commission Meeting.

KPB response: KPB would not object to inclusion of the comments. However, if the request is for a full transcript of the June 24, 2019 meeting, or even just the complete transcript of the commissioner's comments made near the conclusion of the meeting, the KPB requests that the Applicant pay for the cost of the transcript. The transcript of any comments made after public hearing, deliberation, and vote by the planning commission falls outside of KPB 21.20.270(8).

3. Letter referenced by Commission Ecklund at the September 9, 2019 Planning Commission Meeting and Testimony of Commissioner Ecklund relating to that Letter.

KPB response: It is unclear what is being added to the record by way of the hearing officer's provisional decision. The motion and provisional decision included a one page excerpt, at page 39 of 39 of the PDF, of the September 9, 2019 Planning Commission meeting. In the last paragraph of the excerpt provided by the Appellant, Commission Ecklund references a "long letter". The letter was not included as part of the motion or decision. It is the KPB's understanding that the Appellant seeks to include the referenced "letter" not the excerpt page but clarification is required.

The borough is not aware of any letter sent from borough staff to the planning commissioners. The "letter" referenced by Commission Ecklund likely refers to either the KPB's Opening Statement in Case No. 2018-02 or the statement provided by Mr. Trimble at the March 25, 2019 planning commission meeting quoting the KPB's Opening Statement in Case No. 2018-02. [T52-T55].

Further the KPB objects to inclusion of the "letter" if the "letter" is in fact the KPB's opening statement in Case No. 2018-02. That document is a matter of public record and available online. The opening statement in Case No. 2018-02 would not constitute part of the record pursuant to KPB 21.20.270. Multiple KPB opening statements in the same appeal may only lead to confusion. That said, Mr. Trimble did read a portion of the opening statement into the record at the March 25, 2019 Planning Commission meeting, which is included in the record for this appeal. [T52-55].

II. Reply to Appellant's Opening Statement

A. Appellant's Argument Relating to Procedural Error

1. Alleged bias

The Appellant cites KPB 21.20.240(2) as code authority for disqualification of a Planning Commission member. This is not correct. KPB 21.20.240 is specific to the hearing officer. It does not regulate alleged bias or conflicts of interest of a planning commission member. The Appellant also cites the Planning Commission Manual which was identified by the Appellant as a manual created by KPB Staff for the benefit of the Planning Commission – essentially a training manual. The manual is not codified in borough code.

Specific to Commissioner Ruffner's comments to the news outlet, the comments related to the material site work group process and not any specific permit. In addition, Commissioner Ruffner clarified his comments at the June 24, 2019 Planning Commission meeting as part of the following exchange:

Mr. Wall: ... Can you state for the record the context of that statement [to KBBJ]?

Commissioner Ruffner: Sure. Through the chair. Yeah, I don't know what I recall verbatim what the comments or the context, but in general I would say that a number of times when material sites have come before this body, since I've been on the commission, it's been pretty clear to me that our job as commissioners is to interpret what the code is that has been laid forward from the Assembly.

And with respect to a denial, if a permit application comes in and it's complete and it meets conditions that have been set forth in 21.29, then those – and again, I'll just repeat, if those conditions are met, then we don't have the ability to deny the permit.

So that's my understating of how that is, because those elements that address the conditions are pretty specific in 21.29.050 I believe. That would be my address back to staff and to the public for clarification on those comments.

Mr. Wall: So it's my understanding that was in the context of your role as the chair of the material site work group?

Commission Ruffner: Yeah. I mean, I know they called me and asked about – KBBJ that is called and asked to do an interview on that. And it wasn't specific to any one gravel pit, it was the entire suite of code that we address right now.

[T. 190].

Whether misquoted or taken out of context, it appears Commissioner Ruffner's full understanding and what he attempted to convey to the news outlet, is that a complete application that demonstrates the ability to comply with all mandatory code conditions set

forth in KPB 21.29.050 cannot be denied by the Planning Commission. Borough code, as it relates to uses in the rural zoning district of the borough, generally does not grant the Planning Commission discretion to deny a complete material site permit application that meets or exceeds all the conditions found in KPB 21.29.050.¹ Commission Ruffner's clarification provided at the July 24, 2019 meeting shows that he understands applicable code. The clarification also makes it clear that the comments were made in relation to his role on the material site work group and unrelated to any specific gravel pit.

2. Failure to re-open public hearing

The Appellant cites no authority for this alleged procedural error beyond a manual that does not in fact dictate Planning Commission members' roles and responsibilities. The manual is a guide, used for training and refresher purposes. It is not code or adopted policy. In addition, the portion of the manual cited to by the Appellant states that the Planning Commission may take additional public comment.

Throughout this process the Planning Commission heard hours upon hours of public testimony over multiple meetings. Many of the same speakers, including the Appellant, participated at every step of the process. The Planning Commission also received many letters and comments from the public and from other agencies on this issue. The record in this appeal is more than 700 pages. The objections and concerns of the landowners in the area of the subject material site were articulated and well-known. The statement that the failure to re-open public testimony after the Applicant was provided a rebuttal opportunity somehow created an unfair proceeding is without merit. At the July 24, 2019, the applicant was provided time to respond to prior testimony and offer clarification on the volunteered, or extra, conditions pertaining to not operating on holidays and clarification that the white noise sounds (in lieu of standard back-up beepers) would be on equipment owned by the Applicant. It is highly unlikely that after a yearlong process the Planning Commission's decision was swayed or changed by a brief discussion about the holiday hours condition and clarification that the white noise back-up beepers would be on the applicant's equipment but not third parties' equipment.

¹ This is not an absolute however. For example, if an applicant has other outstanding violations of borough code than the Commission could and should deny the permit due to outstanding violations of borough code even if the application meets or exceeds all KPB 21.29.050 conditions.

No provision of borough code or state law requires the Planning Commission open public testimony following the Applicant's rebuttal. If there was any error, it was de minimis and harmless. Importantly, a review on the merits of the decision, including whether the adopted findings were supported by substantial evidence, will cure any alleged procedural error.²

B. Argument Relating to Substantive Error

1. Planning Commission can disallow a permit

A complete application that demonstrates the ability to comply with or exceed all the conditions set forth in KPB 21.29.050 should be approved *with conditions* by the Planning Commission.

AS 29.40.040 provides, in part:

- (a) In accordance with a comprehensive plan adopted under AS 29.40.030 and in order to implement the plan, the assembly by ordinance shall adopt or amend provisions governing the use and occupancy of land that may include, but are not limited to,
 - (1) zoning regulations restricting the use of land and improvements by geographic districts;
 - (2) land use permit requirements designed to encourage or discourage specified uses and construction of specified structures, or to minimize unfavorable effects of uses and the construction of structures;
 - (3) measures to further the goals and objectives of the comprehensive plan.

In the rural zoning district, the borough assembly chose not to adopt zoning regulations restricting the use of land by geographic districts. Rather, the assembly made the purposeful decision to allow all uses and only require a permit for specified uses to minimize potential unfavorable effects of those specified uses. AS 29.40.040(a)(2). Thus, the borough's code is not written in a way, or intended to be interpreted in a way, that restricts or prohibits a land use in the rural zoning district. The material site permit code requires CLUP applicants meet code specified conditions intended to reduce, not eliminate, potential undesirable impacts of the material site. The Borough Assembly determined that if the specified conditions are met, and the applicant is otherwise in compliance with borough code, then the use should be permitted. The Borough Assembly did not grant the Planning Commission discretion to deny a complete application that demonstrates the ability to

² See generally, *Brooks v. Brooks*, 2000 WL 34545824, page 2 (Alaska 2000) (citing to *Sanuita v. Common Laborer's and Hod Carriers Union of America*, 402 P.2d 199 (Alaska 1965)).

comply with all KPB 21.29.050 conditions, so long as the applicant is otherwise in compliance with all other provisions of borough code.

The Appellant's reply provides, "[t]o read KPB Code in a way to conclude that the Commission does not have the authority to disallow an application that the Planning Director has determined is complete is erroneous and necessarily renders the standards set forth in KPB 21.29.040 obsolete."³ While it is true that a complete application does not automatically equal approval, a complete application that demonstrates the ability to comply all KPB 21.29.050 conditions and other legal requirements should be approved.

2. The Planning Commission must independently find KPB 21.29.040 standards are met

It is the borough's position that a permit that meets or exceeds all the conditions in KPB 21.29.050 necessarily meets the standards and the legislative intent of KPB 21.29.040. If the borough assembly desired to impose additional conditions to meet the KPB 21.29.040 standards and intent, then that would be accomplished through legislative action.

No language in KPB 21.29 grants the Planning Commission discretion to deny a material site permit that meets or exceeds all the KPB 21.29.050 conditions.⁴ Read together the provisions of KPB 21.29 are clear: (1) **Only** the conditions set forth in KPB 21.29.050 may be imposed to meet the KPB 21.29.040 standards, and; (2) permits that imposes all KPB 21.29.050 conditions, including a requirement to comply with all applicable law, should be *approved with conditions*.

The Appellant's opening statement seems to indicate that KPB 21.25.050 requires the Commission make a specific finding that the standards of KPB 21.29.040 are met. KPB 21.25 is a procedural chapter that is applicable to all permits. KPB 21.29 is the more specific chapter relating to material sites. KPB 21.29 would control to the extent there are conflicts between the two chapters. However, there is no code conflict applicable to this case.

The Appellant argues that KPB 21.25.050(B) authorizes denial and that the planning commission was incorrectly instructed by borough staff on this point. As an initial matter, the Appellant's opening statement at page 8-9, footnote 10, provides an "Id." cite that

³ Appellant's Reply at page 9.

⁴ Assuming, again, that the applicant is compliance with all other provisions of borough code.

appears to be a mistake.⁵ The quote that begins on page 8 of the Appellant's opening statement comes from pages 10 and 13 of the hearing officer's remand decision in Case No. 2018-02. The quote is not from borough staff. In the transcript of the March 25, 2019 meeting, the KPB Planner, Bruce Wall, refers to the staff report and the hearing officer decision but does not direct or admonish the Commissioners in any way. [T.51-52].

Substantively, the Appellant's opening statement misinterprets KPB 21.25. KPB 21.25.020 provides: "It is the purpose of this chapter to require 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." KPB 21.25 then provides the procedural requirements: application/permit, notice, hearing, and appeal rights. KPB 21.29 provides the requirements specific to material sites and conditions that may be placed on a permit application.

The Appellant's opening provides KPB 21.25.050(B) which includes the following language: "...Before granting the permit, the commission must find at a minimum the proposed activity complies with the requirements of this chapter." (Emphasis added by the Appellant.) "*This chapter*" refers to Chapter 25. The permit application and process in this case complied with KPB 21.25 and Resolution 2018-23 contains findings noting compliance. The Appellant has not argued on appeal that the borough failed to comply with KPB 21.25 procedural requirements. Rather, the Appellant appears to argue that KPB 21.25 should be read to mean: (i) the Commission has broad discretion to deny a permit that otherwise meets all requirements of KPB 21.29 and borough code, and that (ii) the Commission must make a specific finding pursuant to KPB 21.25.050 that the requirements of *Chapter 29* are met. That interpretation conflicts with a plain reading of KPB 21.25.050 and is logically flawed when Title 21 is read as a whole. Within Chapter 29, KPB 21.29.040 provides the purpose statement for material site permits.⁶ **Only** the conditions set forth in **KPB 21.29.050** may be imposed to meet the standards provided in KPB 21.29.040. No provision in KPB 21.29 provides the Commission unfettered denial authority.

⁵ The previous footnote in Appellant's opening statement cites to KPB 1.08.040(T) so the "Id" cite in footnote 10 would appear to incorrectly point to KPB 1.08.040(T).

⁶ KPB 21.29.040(A): "These material site regulations are intended to protect against..."

While the Appellant(s) may be unsatisfied with code protections against noise and visual impacts, neither the Commission nor the hearing officer have authority to change the code requirements for material site permits. The borough assembly chose to adopt a material site permit process that only limits material sites in the unzoned district of the borough to the extent provide for in KPB 21.29.050. Disagreement with that policy decision should be addressed before the assembly.

3. Applicant did not present substantial evidence to support findings

The Applicant is the proper party to defend the evidence it presented. As a preliminary matter, the Applicant provided a complete application and plan [R. 1-10]. The Planning Commission adopted 30 findings and attached them to the approval of the subject CLUP as the factual basis for the 22 conditions imposed on the permit. The findings are supported by substantial evidence in the record and speak for themselves. The hearing officer shall defer to the judgment of the planning commission regarding findings of fact if they are supported in the record by substantial evidence. KPB 21.20.320(2).

III. Conclusion

Planning authorities are “bound by the terms and standards of the applicable zoning ordinance, and are not at liberty to either grant or deny conditional use permits in derogation of legislative standards.”⁷ KPB 21.29.040 bars the Commission from imposing conditions in CLUPs that are not contained in KPB 21.29.050. The conditions set forth in KPB 21.29.050 are the exclusive conditions that may be applied. No additional conditions are required of the applicant by borough code and the Commission lacks the authority to impose additional conditions, unless voluntary conditions are offered by the applicant. Thus, compliance with KPB 21.29.050 necessarily means the applicant is in compliance with KPB 21.29.040.

Dated this 21 day of October, 2019.


Max J. Best
Planning Director


Sean Kelley
Deputy Borough Attorney

⁷ *S. Anchorage Concerned Coal, Inc. v. Coffey*, 862 P.2d 168, 174 (Alaska 1993).

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**Kenai Peninsula Borough
Office of the Borough Clerk
Kenai Peninsula Borough, Alaska
144 North Binkley Street
Soldotna, Alaska 99669**

Borough Clerk's Office
Kenai Peninsula Borough

In the matter of the Kenai Peninsula
Borough Planning Commission's decision
to approve a conditional use permit for
a material site that was requested for KPB
Parcel 169-010-67; Tract B, McGee Tracts
– Deed of Record Boundary Survey
(Plat 80-104) - Deed recorded in Book 4,
Page 116, Homer Recording District.

Hans Bilben,

Appellant,

Emmitt Trimble,
Beachcomber LLC,

Applicants.

Case No. 2019-01-PCA

**APPLICANT'S REPLY STATEMENT
AND OPPOSITION TO MOTION TO EXPAND THE RECORD**

COMES NOW the Applicants Emmitt Trimble and Beachcomber LLC (hereinafter
"Beachcomber"), by and through their counsel of record, Holmes Weddle & Barcott, P.C. and
hereby submits their Reply Statement and Opposition to Motion to Expand the Record.¹

I. STANDARD OF REVIEW

In appealing the Commission's decision, the hearing officer's review is limited to the
following:

1. The hearing officer may exercise independent judgment on matters that relate to the
interpretation or construction of ordinances or other provisions of law; however, due

¹ Beachcomber notes that of the eight opening statements filed, only two were adverse to the Planning Commission's
decision to grant the conditional land use permit. Therefore, this reply responds to the arguments raised in the
referenced two statements.

APPLICANT'S REPLY BRIEF AND OPPOSITION
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HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.

2. The hearing officer shall defer to the judgment of the planning commission regarding findings of fact if they are supported in the record by substantial evidence.
3. The hearing officer may revise and supplement the planning commission's findings of fact. Where the hearing officer decides that a finding of fact made by the planning commission is not supported by substantial evidence, the hearing officer may make a different finding on the factual issue, based upon the evidence, or may remand the matter to the planning commission as provided in KPB 21.20.330(B).²

II. REPLY STATEMENT

a. Planning Commission Members Overcame the Bias Test.

Appellant asserts that certain Planning Commission members should have been disqualified from voting on the application, but fails to demonstrate the bias upon which it makes its claim. Applicant does not dispute the manual's policy and procedure as to how bias is defined and treated;³ however, it does take issue with the quoted statement by Commissioner Ruffner as rising to a level of demonstrating bias. Commissioner Ruffner's statement appears to be a broad, blanket observation, without any implications as to Applicant's permit application. Appellant fails to add context to this comment, which, in the cited interview, is specific to the Commission's authority to deny a permit for extraction as long as it fits certain criteria surrounding noise, the

² KPB 21.20.320.

³ Planning Commission Manual – Rule 7 – The following acts are found to constitute bias: “(1) ex parte contact with board or commission members; (2) making public statements or authoring letters *regarding a particular case* prior to the case coming before the board or commission (emphasis added); (3) paying expenses of board member to make a site visit; (4) vote-trading; (5) soliciting persons to testify for or against a permit or applications, and (6) gifts given to influence a vote.”

visibility of the site and basic buffer zones among other standards.⁴ Further, Commissioner Ruffner was noted as having made inquiries at prior meetings regarding criteria which may result in a denial.

Appellant attempts to make the stretch to hold a Commissioner as biased on a particular permit based upon a statement which has no reference to Applicant; further, it does not demonstrate any prejudgment on the permit. When taken in its context, as it applies to the ordinance's requirements of the Planning Commission, it cannot be construed to amount to any particular bias in favor of Beachcomber, and certainly not to the level which would meet the bias test as laid forth in the Planning Commission Manual. Therefore, this argument has no merit and it was proper for Commissioner Ruffner to participate.

b. The Planning Commission Allowed Sufficient Public Comment.

Appellant posits that because public comment was not extended to address voluntary conditions discussed during Applicant's testimony, that the proceeding was unfair. Appellant appears to misunderstand the record cited in the transcript, as counsel for Beachcomber was rebutting evidence provided at that hearing – *not* submitting additional evidence. Additionally, the rebuttal offered by Applicant's counsel introduced absolutely no new voluntary conditions.⁵ No new facts or conditions came to light which would have invited further public comment. Applicant regards this attempt at misdirecting the hearing officer to new evidence that does not exist as a disingenuous effort to distract from the matter at hand.

Of greater consequence is the plain fact that the voluntary conditions mentioned were made during Applicant's rebuttal to the public comments made over the course of the meeting. Opening

⁴ Resolution 28-23 at 595.

⁵ Transcript 150 – 151.

public comment to every rebuttal would result in a never-ending loop of comment and rebuttal. The Planning Commission Manual at subpoint 11 lays out guidelines for a fair “quasi-judicial hearing format,”⁶ which does not provide for public comment at every occasion or mention of new evidence.

The Commission proceeded properly with regard to the hearing guidelines as to testimony and rebuttal.

c. The Planning Commission Can Disallow a Permit – and Has Determined in the Present Matter That the Permit is Authorized.

Appellant appears to believe that because the Commission did not find in its favor by denying the permit, that the Commission is acting in lockstep with the KPB Staff out of obligation. It was already found that the Commission’s denial of the permit in 2019 was improper, due to the Commission’s role as gatekeeper to ensure that the minimum standards are met. Appellant concludes that the Commission’s decision to approve the permit is based on a mandate from the Board telling it to decide in a particular way. This is inaccurate. The Commission made numerous findings of fact explaining its reasoning for voting in favor of the extraction site – none of the findings of fact cite to a directive from the Board to approve the permit. Appellant dismisses the

⁶ The guidelines state:

- 1) The chair introduces the agenda item.
- 2) Staff presents a report and staff recommendation.
- 3) Presentation by the applicant and their representatives.
- 4) Testimony by members of the public.
- 5) Response by staff to any testimony that was given and an opportunity for the Commission to ask questions of the staff.
- 6) Rebuttal by applicant. The applicant can rebut evidence or testimony but should not present new testimony or evidence. (If new evidence or testimony is allowed, the Planning Commission may question staff regarding the same and take additional public comment regarding the new evidence.)
- 7) The chairperson closes the hearing and then entertains a motion. The Commission deliberates and makes a decision.

Notably, these guidelines do in fact allow introduction of new testimony or evidence upon allowance by the Planning Commission, but it does not make allowances for new public comment to the rebuttal.

APPLICANT’S REPLY BRIEF AND OPPOSITION
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findings of fact and instead jumps straight to the conclusion that the Commission's reasons were illusory.

Appellant cites to *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240 (Alaska 2004) and *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407 (1992) in support of their argument that the legislative intent is that a precise and literal meaning be given to each word, sentence, or provision. This is undisputed. However, Appellant inflates that finding to encompass the KPB Code, claiming that the Commission finds itself bound to authorize permit applications. Appellant's argument lacks relevance, as there is no evidence to demonstrate that any Commissioners felt compelled to approve any and all permits. Appellant appears to disregard the core of the Commission's role, which is to determine whether the application is complete, and to authorize permits based upon the completion and compliance in the application. The quotes taken from individual Commission members and cited to within Appellant's opening statement are taken out of context and fail to point out that when a permit meets all of the requirements designated within the Code, the Commission does not, indeed, have blanket authority to deny it without reason.

It is notable that Appellant cited to *Farley v. Utah County*, 440 P.3d 856 (Utah App. 2019), which states that the County is given statutory discretion to approve, modify and approve, or reject an application based on the evaluation of certain factors in addition to listed criteria. Appellant also implicates *Da Vinci Investment, Ltd. P'ship v. City of Arlington, Texas*, 747 F. Appx. 223 (5th Cir. 2018)⁷ as supportive of its argument, quoting "there is no 'explicitly mandatory language' in the ordinances requiring city officials to approve a development plan,

⁷ *Da Vinci* is an unpublished decision and is from a different jurisdiction. Therefore, it is not binding on this tribunal and may only be considered as persuasive authority.

even where a plan meets all required guidelines, the city council had discretion to grant or deny the benefit.”

In the present matter, the Commission has undertaken precisely that burden of determining whether to grant or deny the permit application when reviewing Beachcomber’s application – in addition to the mandatory standards imposed, the Commission considered Applicant’s voluntary conditions as well, in an effort to creatively devise methods to further reduce any impact on surrounding properties. *Farley* specifically states that a decision is valid unless it is either illegal, or arbitrary and capricious.⁸ An illegal decision is one that is either “based on an incorrect interpretation of a land use regulation, or contrary to law.”⁹ Borrowing this definition from *Farley* and applying it to the Beachcomber permit authorization, any claim that the Commission incorrectly interpreted a land use regulation can be swiftly put to rest with a review of the relevant regulation and the legal procedure the Commission undertook throughout the course of this matter thus far: KPB Code 21.25.040(A)(2)

It shall be unlawful for any person to use land, or to assist another to use land, within the rural district of the Kenai Peninsula Borough for the following uses without first obtaining a permit from the Kenai Peninsula Borough in accordance with the terms of this ordinance. . . commercial sand, gravel, or material site pursuant to KPB 21.26.

Additionally, land use in the rural district is unrestricted unless otherwise provided in KPB Title 21. Clearly the Commission proceeded through the proper regulation in reviewing the permit by operating within its jurisdiction; holding the requisite public hearings; ensuring adequate notice was given; and proceeding with findings of fact in support its decision.

⁸ *Farley*, 440 P.3d 856, 860 (Utah App. 2019).

⁹ *Id.*

There are no plausible arguments that the Commission's decision is contrary to law, which leads the conclusion that Appellants deem the Commission's decision arbitrary and capricious. The only evidence Appellant provides in support of this argument is the volume of residents who wrote the Commission or appeared at the hearing in opposition of the material extraction site. As Appellant noted in bold and underlined text in its opening brief, the Commission in fact did find it within its authority in its July 16, 2018 decision to disapprove the permit. Only after appeal and remand, and a revisiting of all notice and public comment requirements, with additional voluntary conditions offered by Beachcomber to minimize impact on its neighbors, did the Commission then approve the permit. The Commission's findings of fact explicitly state in point 10 that "the Planning Commission in reviewing the application are not authorized by the code to consider those issues such as property values, water quality, wildlife preservation, a material site quota, and traffic safety." Applicant finds it incredulous that the Commission should be accused of arbitrary and capricious decision-making after it held numerous public hearings after remand, considered hours of testimony and large volumes of documentary evidence both in support of and against the proposed material extraction operation, and held a vote which was not even unanimously in favor of the permit.

Appellant's reference to *Da Vinci* in support of its argument that the Commission has the authority to deny a permit is also flawed – *Da Vinci* finds its genesis in a substantive due process argument, such that the appellants in that case claimed they had a constitutionally protected property right in an approval of a development plan.¹⁰ The court held that *Da Vinci*'s argument stating the council members had no discretion to deny a development plan because it met all

¹⁰ *Da Vinci* at 226.

ordinance guidelines was immaterial, as Appellants did not have a protected property right in the approval of its development plan.¹¹ Additionally, the appellants in *Da Vinci* sought to develop land specifically in a zoned area – in contrast to the property at issue in the present matter.¹² Because zoned land is subject to zoning regulations and restrictions, the governing body has far greater reach in determining what activity the subject parcel is exposed to. The property upon which Beachcomber sits is squarely within the unzoned area designated by the Kenai Peninsula Borough. As such, governmental reach is limited to what the ordinance requires and no more. Beachcomber has met the threshold of what the code requires, and no valid reason exists to deny the permit.

In considering the record, based on the evidence and testimony set forth in the record the application has met the standards required within the Code, and Appellant's argument lacks any merit.

d. The Planning Commission Independently Found the Standards in the Application to Have Been Met.

The Planning Commission is tasked by the KPB Code with determining that the standards set forth for issuance of Conditional Land Use Permits are sufficiently met as described within the Code.¹³ It charges the Commission with finding at a minimum that "the proposed activity complies with the requirements of [the] chapter."¹⁴ As discussed in Beachcomber's Opening Statement, there is no requirement that the Commission guarantee the standards eliminate any impact to surrounding areas; rather, the Code mandates that the CLUP *minimize* impact. In parcels where the land's composition may inhibit any measures taken to eliminate visual and auditory impact,

¹¹ *Id.*

¹² *Da Vinci* at 225.

¹³ KPB Code 21.25.050 – Permit considerations – public hearing required.

¹⁴ *Id.*

the applicant has a limited ability to change the topography but can nonetheless take measures to reduce any impact it may have. In fact, KPB Code 21.29.050(A)(2)(e) authorizes the Commission to waive buffer requirements if the land's topography makes those buffer permit conditions unnecessary or not feasible.¹⁵ The code as applied to Applicant's land may fall short of what the surrounding property owners would desire – but that is an issue which has no bearing on Beachcomber or its CLUP application. To further address the community's concerns, Beachcomber voluntarily imposed upon itself additional voluntary standards meant to reduce any impact it has on its neighbors, thus exceeding those standards set forth in the code.

Government restriction upon private property must be done in compliance with law in order to meet with constitutionally protected rights. Therefore, when considering permitting of developments upon privately owned land the Commission must carefully follow the law in order to ensure these rights are protected. Particularly the case wherein the code is written in an unzoned area to promote development and protect private property rights. Beachcomber has complied with the Code's standards and should be found to have met and even exceeded those minimum requirements.

e. Applicant Presented Substantial Evidence to Support the Findings

The Commission is responsible for determining whether the applicant has produced sufficient evidence to demonstrate that the proposed activity complies with the requirements of the Code in order to approve the permit application.¹⁶ Substantial evidence is defined as relevant evidence that a reasonable mind might accept to support a conclusion.¹⁷ The substantial evidence

¹⁵ KPB Code 21.29.050(A)(2)(e) states "Buffer requirements shall be made in consideration of and in accordance with existing adjacent property at the time of the approval of the permit."

¹⁶ KPB Code 21.25.050(B).

¹⁷ *Button v. Haines Borough*, 208 P.3d 194 (Alaska 2009).

test for administrative factual findings considers the “scope of review” to be findings supported by (1) the weight of the evidence, or (2) substantial evidence in light of the whole record.¹⁸

Applicant Beachcomber at the March 25, 2019 proceeding reminded the Commission that it presented substantial evidence to support approval of the permit;¹⁹ and this was reiterated in the KPB’s Opening Brief. The sheer number of opponents to development of a material extraction site is not substantial evidence against approving the permit if the basis of the opposition is emotionally fueled or speculation. Speculation does not rise to the level of evidence, least of all substantial evidence.

In the present case, Applicant has demonstrated the material extraction site is located in a rural, unzoned district of the borough. The extraction site proposal includes numerous measures attempting to minimize the impact on surrounding properties. The Commission has also acknowledged the challenge in reducing impact on neighboring and surrounding areas, however, in response to the same Applicant has included additional voluntary measures that exceed code requirements in order to further reduce any impact.

f. Allegations of Prosecutorial Misconduct Fall outside the Scope.

This argument is irrelevant to the present case and as such, has no reply beyond stating that this argument falls outside the scope of what the hearing officer is considering. Without further information, this point cannot be adequately addressed.

III. OPPOSITION TO MOTION TO EXPAND THE RECORD

Applicant opposes the request to expand the record beyond what was included in the hearing which occurred following the hearing officer’s remand. The motion asks the hearing

¹⁸ *State, Dep’t of Commerce, Community & Economic Development, Div. of Corp., Business & Prof. Licensing v. Wold*, 278 P.3d 266 (Alaska 2012).

¹⁹ T53.

officer to consider the Kenai Peninsula Borough Planning Commission Manual, the Transcript of the Commissioner Comments at the conclusion of the June 24, 2019 Planning Commission Meeting, and the Letter referenced by Commissioner Ecklund at the September 9, 2019 Planning Commission Meeting and Testimony of Commissioner Ecklund relating to that Letter.

The record is thorough insofar as it covers the facts and plans pertaining to Applicant's property and the surrounding the property, and community members' commentary. Appellants, had they found such records necessary and relevant to the proceedings while they occurred, had the opportunity to mention and bring such records into the proceeds. KPB Code 21.20.270 allows for particular materials to become a part of a record before the hearing officer.²⁰ Anything outside of that scope is not to be included. Specifically, the code cites to "all informational materials which were entered into the record or minutes of the proceeding before the commission." It should be noted that the Kenai Peninsula Borough Planning Commission Manual was not entered into the record or the minutes on the days referenced.

The hearing officer in the present matter is tasked with the duty of hearing and deciding appeals from quasi-judicial planning commission decisions.²¹ Appellants argue that the record should be expanded to include the comments made at the conclusion of the record. These

²⁰ KPB Code 21.20.270 - *Record; contents*. For the purposes of appeal, the record shall include:

1. The filed application or complaint which initiated the proceedings before the planning commission;
2. All informational materials supplied to the commission or relied upon by the planning director or staff in making its report or recommendations to the planning commission;
3. All informational materials which were entered into the record or minutes of the proceeding before the commission;
4. The report of the initial investigation by the planning department, and where applicable the enforcement order or decision of the planning director;
5. All testimony and all documents or other evidence received by the planning commission from the parties or other witnesses during the proceedings;
6. The decision of the planning commission;
7. The planning commission's findings of fact; and
8. The minutes of the planning commission and a verbatim transcript of the planning commission hearing.

²¹ KPB 21.20.220.

comments are not part of the record. Further, the comments which Appellant quotes in its motion cannot be considered anything more noteworthy than musings, none of which would be relevant to the vote that had just occurred. It appears these Commissioners are expressing personal opinion on the application and opinions on how the process should be altered, rather than statements reflecting the vote's legitimacy.

As to the letter referenced by Commissioner Ecklund, the letter itself does not appear to be submitted as part of the requested record expansion – without proper context, Applicant cannot adequately respond to the motion, and for that reason it should be denied. The link Appellant Bilben provided in its motion resolves to only the meeting minutes, without the letter.

For the foregoing reasons, Applicant objects to expanding the record beyond what is authorized by KPB 21.20.070.

IV. CONCLUSION

Applicant maintains that the Kenai Peninsula Borough Code authorizes not only the counter permit granted by the Kenai Peninsula Planning Department, but also the greater Conditional Land Use Permit which Beachcomber initially applied for. Beachcomber has submitted viable plans for its site to meet the required standards, as well as proposed voluntary standards to reduce the impact of its operations on neighboring properties. Appellant has failed to raise any argument that would defeat the determination by the Commission. Therefore, Beachcomber respectfully asserts that it has met all the standards set forth in the Kenai Peninsula Borough code such that Conditional Land Use Permit granted by the Commission should be upheld.

DATED this 21st day of October, 2019, at Anchorage, Alaska.

HOLMES WEDDLE and BARCOTT, P.C.
Attorneys for Applicant

By: 

Stacey C. Stone
Alaska Bar No. 1005030
Chantal Trinko
Alaska Bar No. 1505034

OCT 18 2019

Borough Clerk's Office
Kenai Peninsula Borough**Reply to Opening Statements, Case # 2019-01 PCA****Submitted by Rick Oliver**

KPB and Trimble both claim that no substantial evidence was submitted by the neighboring property owners.

This picture is in the Record (R451), and was submitted as evidence during the July 16th 2108 Planning Commission Hearing. The picture is taken from my bedroom window. Grade level for my property is approximately 20 feet above grade level for the mine, and my house is classed as a 1 1/2 story with a basement—this would put the view from my bedroom window at approximately 28 feet above the proposed 12 foot earthen berm! I believe that the Borough must consider my bedroom to be “property” as evidenced by the fact that the assessed valuation of my “property” is based in part on the number of levels in the structure.

Bruce Wall has been to my property, and he has seen this picture. My property is located directly east and **adjacent** to the proposed gravel mine. We are located on Danver Street (which shows at the bottom of the photo). I am six feet tall +or- an inch, and I am holding a 10 foot board while standing about fifty feet inside the proposed mine. Planning Staff has concluded that a 50 foot vegetated buffer and a 12 foot berm (where I'm standing) will sufficiently minimize the dust, noise, and visual impact from my property. **All trees** behind me are in the mine area and **will be gone**—that leaves **one tree in the 50 foot vegetated buffer**, and a twelve foot berm to protect me! I am also standing on what would become the primary access road to the mine and the potential 10,000 dump trucks that would travel it annually for fifteen years. 250 feet behind me is the proposed location for the rock crusher.

The proposed buffering is neither in “consideration of existing use”, or of “sufficient height and density to provide visual and noise screening” as required by Code. (KPB 21.29.050)

My property is at a substantially lower elevation than all other and adjacent properties east of Danver Street, and at a substantially lower elevation than two or more impacted properties that are west of Danver Street (south of mine site). All properties that are at higher elevation in the neighborhood are even more affected by the visual and noise impact that this mine will inflict because of the fact that berms and buffers proposed in the application are well below their line of site, and their line of earshot. Standards 21.29.040 (A4) & (A5) which are required by Code can not be met as proposed, and the Planning Commissions Findings of Fact are incorrect.

All of this begs the question, where is the substantial evidence to support granting this permit? The answer, there is none, except Bruce Wall (Planner) says so!

Following is a brief summary of the scope of the proposed gravel mine which explains why so many concerned neighboring property owners "stacked the hall" as KPB contends in their Opening Statement.

1. The mine would include 27.7 acres and will have a projected life expectancy of **15 years**. The mine would be accessed by Anchor Point Road, which is about one mile in length and in a very advanced state of deterioration. Anchor Point Road is the only access to the Anchor River State Recreation Area which includes five state park campgrounds, two private RV parks, and the area's only launch facility to access Cook Inlet by boat. It is also the only access road for most of the roughly 200 people who own property within 1/2 mile of the mine. The mine site is an irregular shape that is bordered on the north by recreation and residential properties that are at or near the grade level of the mine, to the east by residential properties that are all at substantially higher elevation than the mine, and to the south by residential and recreational properties some of which are at substantially higher elevations, and some at or near the same elevation as the mine. This proposed mine site is centered in the heart of a residential/recreational area that is the lifeblood of Anchor Point.
2. The mine would be permitted for removal of up to 50,000 cubic yards of material per year. That, by permit stipulation, could equate to 5,000 ten yard dump trucks hauling out of the mine, and 5,000 ten yard dump trucks returning, for a total of **10,000 ten yard dump trucks** rumbling through the neighborhood each summer for 15 years. The access to Anchor Point Road from the north is via a bridge across the Anchor River which has been condemned, and weight restricted to 11 tons which is approximately the weight of an empty ten yard dump truck. Loaded trucks are not allowed on the bridge, and will be required to travel the Old Sterling Highway with their load. This brings the noise of large diesel engines and engine brakes to another population area, many of whom are within 1/2 mile of the proposed mine.
3. The application has provision for a processing area which includes a rock crusher. All mining is by its nature dusty and noisy. Anytime you move rocks, or break rocks with steel or iron machinery, there is substantial noise and dust generated.

While trucks, loaders, dozers, and all construction equipment produce undesirable sounds and emissions that would be very detrimental to the residential health, safety, and welfare of the neighborhood, the rock crusher is by far the noisiest, and dustiest of all processing equipment

Reply to APPLICANT'S OPENING STATEMENT:

(page 5 of 5) states "The Commission does not have the capacity or duty to determine the effectiveness of Applicant's abatement measures".

KPB 21.25.050 states - **"Before granting the permit, the commission must find at a minimum that the proposed activity complies with the requirements of this chapter"**. In plain English doesn't this say that the commission is absolutely duty bound to determine that so-called "abatement measures" will effectively satisfy the Conditions and Standards laid out in KPB 21.29? As to the "capacity", by utilizing KPB's GIS technology objective decisions can be made versus the subjective and arbitrary methods used by KPB and the applicant in the design of this application.

In the case of this application, the Applicant has produced **zero** substantial evidence to prove that Mandatory Conditions and Standards will be met.

Reply to KPB's OPENING STATEMENT:

1. KPB speaks only to "adjacent" properties (P. 8-10, #2. Buffer Zone) in its findings of fact, but refuses to address protections to "other" properties as required in KPB Standards 21.29.040. The amphitheater like topography combined with the substantial elevation differences between the proposed site and properties to the South and East of it should dictate that while the buffer zone "shall be made in consideration of and in accordance with existing uses of adjacent property..." (KPB 21.29.050 A, 2,e), **other** properties are afforded protection under KPB 21.29.040 A. 4&5.
2. **P. 15, #14** Voluntary Conditions do not meet the requirements of KPB 21.29.050 (A, 14) as they are **not in the best interest** of surrounding property owners.

a. **Voluntary Condition a.** states: "The applicant has volunteered to operate **his** equipment onsite with multi-frequency (white noise) back-up alarms...". (emphasize "**his**")

The applicant **does not have** equipment, a fact which is known to Planner Bruce Wall through site visits and communications with the applicant. A request to disclose this fact to commissioners was submitted by Hans Bilben to Planner Wall via email (**attached as Exhibit #1, paragraph 2**) at 11:49 a.m. on June 23rd—one day prior to the Planning Commission hearing. Request was denied, no public comment was allowed at June 24th hearing, and commissioners were not informed by Planner Wall that no such equipment existed. A second email to Planner Wall from Hans Bilben (**attached as Exhibit #2**) submitted at 2:45 p.m. on June 24th requested that public comment be re-opened concerning voluntary conditions some of which were only made known to the public in the Desk Packet which was posted that afternoon. Both of these emails were submitted in a timely manner, and mysteriously, **neither** of them appear in the Record.

b. **Voluntary Condition c.** states: "The applicant has volunteered a condition requiring the berm be placed **near** the ~~active~~ excavation area, damping the noise and reducing the visual impacts at the source. The berm will be moved as excavation progresses." No definition of "**near**" renders this condition worthless, and further, this condition speaks only to "excavation" while ignoring other undesirable aspects of the proposed use such as hauling and processing.

c. In the Record (T157 p.163 7-19) Commissioner Ecklund states that in order to work rolling /moving berms must always move toward the impacted properties. Commissioner Bentz (T198 p.41 1-15) brings up similar concerns but neither follow up with their correct observations. In order to effectively screen visual and noise impact to other properties a moving berm must **always** be located between the excavation area and the impacted properties, must be of **sufficient height**, and **MUST** move/roll toward said properties.

d. **Exhibit # 3** (attached) is a site plan depicting the proposed material site and some of the surrounding properties. It is important to note that impacted properties to the East of the site, and some properties to the South are at **much higher** elevation than the proposed mine.

As per the application, the mine would proceed starting with Phase I (6.1 acres on northeast portion of mine), move to Phase II (3.9 acres on southeast portion of mine).

Upon completion of Phase I the berm will necessarily have moved to the Eastern edge of the 50 foot vegetated buffer along Denver Street, and to the northernmost boundary of Phase II. As work progresses into Phase II the berm would move in that area to the south and to the east. At the completion of Phase II the 12 foot earthen berm would necessarily be located totally on the eastern parcel boundary inside of the 50 foot vegetated buffer, and on the southern boundary of that phase inside the vegetated buffer.

Phase III at 15.8 acres is more than double the area of the previous two phases combined, will include processing (the noisiest, dirtiest aspect of mining), and because of the design of the project will have little or no screening of the proposed use. Nowhere in the application or during the Hearing was it mentioned just how a rolling/ moving berm will protect properties east and south of the site when the moving berm can only move away from them in Phase III. With a projected life expectancy of 15 years this would mean that surrounding property owners would have no protection under the design of this application for many years into the future!!!!

e. The six GIS profile drawings (**R599-602 and R663-664**) submitted as evidence by Lynn Whitmore (**T128 p.48-49**) and (**T145 p.117 & T146 p. 118-119**) depict this exact situation and clearly show that because of the significant elevation differences between the six properties and the proposed site there is not sufficient screening of proposed use as required in KPB 21.29.050, and as a result standards in KPB 21.29.040 are not met. The proposed use is material extraction which encompasses all activity on the site including excavation, hauling, and processing.

f. GIS (**Ge**ographic Information System) is used by the KPB Planning Department on a daily basis and is known to be accurate and reliable. KPB employs several people solely to utilize and design projects with this technology and could easily determine accurate **objective** designs for the Buffer Zone in material site applications, but for unknown reasons they choose to determine berm height using arbitrary, subjective decision making. In the case at hand the 12 foot berm has no mathematical or

scientific basis—its just an arbitrary number that the KPB Planner and the applicant think might get past the planning commission!

g. From **P. 17 #3 Appellant's Points...** KPB claims that buffer zone is of sufficient height and density when GIS profile drawings show otherwise. Minimization (reduction) of visual and noise impacts does not occur when line of sight profiles done with KPB's own technology clearly show the design defect of the application.

3. KPB falsely claims that ***"The approved permit imposes all conditions allowed or required under borough code"***.

a. KPB 21.29.050 (A2) (a&c) allows the buffer zone to be a combination of minimum 6 foot fence, 50 foot vegetated buffer, and **minimum 6 foot earthen berm**. Proposed Findings of Fact (R591-593) were developed using KPB's GIS technology to accurately and objectively design a Buffer Zone that would effectively minimize noise and visual impacts to adjacent and other properties by increasing berm heights as allowed under KPB Code. KPB claims that a 12 foot berm will meet the requirements of KPB 21.29 when in fact their own technology proves them wrong. There is no substantial evidence to support their Findings, while there is substantial evidence to prove otherwise.

4. **Page 19**, last paragraph addresses the bias displayed by Commissioner Ruffner and claims that more "specifics" were needed to make such determination. Again, an email sent to Planner Wall from Hans Bilben (**attached as Exhibit #1, paragraph 1**) addressed just such issues. This email was timely, and for unknown reasons, never entered into the record. The interviewer for the article (**R595-596**) in which Ruffner shows his bias specifically references contentious gravel pits in Anchor Point—Beachcomber was the only permit in the works at the time of the interview.

5. In the **Conclusion on Page 22** KPB again makes a **false statement** stating that "All the protections afforded through the mandatory conditions found in KPB 21.29.050 have been imposed". Code allows earthen berms of a **minimum 6 foot height**—**there is no maximum** and 12 foot is clearly not sufficient. Neighbors opposed to the permit did not ask for or expect permit conditions not found in the Code.

Conclusion

This application to place a large commercial mining operation in the heart of a residential/recreational neighborhood is poorly designed and incomplete in that it provides no substantial evidence or explanation as to how it will meet the requirements of the Code at all stages of development.

The Remand from 2018 came with instructions from the Hearing Officer to **Provide adequate findings of fact and provide the substantial evidence to support those findings**— This application does neither! Opponents to this permit proposed adequate Findings of Fact (**R588-593**) and included supporting substantial evidence in the form of profile and vector graphics (**R599-602 & R663-664**) designed with KPB owned GIS technology.

Conclusions made by the planning commission contain Findings of Fact which are not supported in the record by substantial evidence and as such the Hearing Officer must make a different finding, deny the application, or remand to the planning commission.

Rick Oliver

Anchor Point, AK

From: Hans Bilben catchalaska@alaska.net
Subject: Beachcomber Hearing 6/24
Date: June 23, 2019 at 11:49 AM
To: Bruce Wall bwall@kpb.us
Cc: mbest@kpb.us, Pierce, Charlie cpierce@kpb.us



Bruce,

A couple items that need your attention prior to and during the 6/24 Planning Commission decision concerning the Beachcomber material site application:

1. In the Record, Meeting Packet Volume 2, (pages 47-49) I submitted information concerning possible conflict of interest and bias issues with three Commissioners—Ruffner, Foster, and Venuti. Foster and Venuti either did not see the information that I submitted, or determined that no conflict or bias existed, and chose to not recuse themselves from the June 10th hearing. Commissioner Ruffner was absent from the June 10th hearing, but will apparently be present on the 24th. Ruffner's comment ("...the planning commission doesn't have the authority to say no.") in an interview with Renee Gross of KBBI Radio on January 4, 2019 clearly shows bias. The KPB Planning Commission Manual (p.17) states:

Indicators of prejudgement include a commissioner making a clear statement suggesting that a decision has already been reached. Following are types of acts that have been found to constitute bias (2) making public statements or authoring letters regarding a particular case prior to the case coming before the board or commission.

The article references "...contentious debate in rural neighborhoods near Anchor Point..." which would indicate that Ruffner has actually made up his mind regardless of any argument that might be advanced at the hearing. Commissioner Ruffner should recuse himself from this hearing based upon the bias that he has shown. This needs to be brought to the attention of Chairman Martin prior to the hearing.

2. Finding of Fact #14 on page 23 in Meeting Packet Volume 1 is not an enforceable or legitimate Voluntary Condition as the applicant does not own or operate equipment that would be used to mine gravel. As the KPB Planner you have made several site visits, and have spoken with the applicant on many occasions. You are very aware that the applicant is a realtor and not an operator, and that he does not own, and has stated that he does not plan to own mining equipment. Fact #14 "volunteers" that he would use white noise backup alarms on just "his" equipment—of which he has **NONE!!** You are aware of this, and the Commissioners apparently are not—during deliberations in order for KPB to remain **fair and impartial** shouldn't it fall upon you to make this clear to them? Some Commissioners mistakenly seem to be of the opinion that a white noise backup alarm is the "cure-all" for all noise generated by a mining operation, and may base their decision in part upon this blatantly ridiculous "voluntary condition". Further, the idea that an applicant might "ask" contractors to disconnect their traditional backup alarms is illegitimate because it is not enforceable under the Code, and quite likely illegal. Both "voluntary conditions" (#13 and #14) that have been offered in this application bring to mind the parable of The Emperor's New Clothes—no one dares to say that they do not see any clothes (in this case protections as required in the Code) for fear that they will be seen as stupid or incompetent....

Hans Bilben
Anchor Point

From: Hans catchalaska@alaska.net
Subject: Additional public comment requested tonight
Date: Jun 24, 2019 at 2:54:16 PM
To: Bruce Wall bwall@kpb.us
Cc: mbest@kpb.us, cpierce@kpb.us

Bruce,

The KPB Planning Commission Manual on page 22 #11 item 6.
"If new evidence or testimony is allowed, the Planning
Commission may question Staff regarding the same and take
additional public comment regarding the new evidence".

I realize that this was not included in his rebuttal, but the
applicant has added more voluntary conditions since that time.
The neighboring property owners have not had an opportunity to
comment on these conditions and in fairness to them public
comment should be re-opened to discuss just voluntary
conditions. To do otherwise allows the applicant to unfairly
influence the decision making ability of the Planning
Commission.

Hans Bilben
Anchor Point

Sent from my iPad

Rick Oliver

STEVE THOMPSON

PROCESSING AREA

