Kenai Peninsula Borough
Legal Department

MEMORANDUM

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

FROM: Sean Kelley, Borough Attorney

DATE: December 30, 2021

RE: Setting the Remand Hearing Date ITMO: Beachcomber, LLC

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

On September 2, 2021, Kenai Superior Court Judge Jason M. Gist issued a *Memorandum Decision and Order* in the matter of *Hans Bilben, et al.* v. *Kenai Peninsula Borough, Planning Commission, and Beachcomber LLC, et al.*, Appeal Case No. 3KN-20-00034CI (the "decision"). The Court's decision is attached. Two excerpts from the remand decision, at page 15 of 17 and page 17 of 17, are provided to highlight the direction and guidance from the Court:

> "Having reviewed the record in this case, this court agrees that the findings of fact in Resolution 2018-23 are supported by substantial evidence. However, the court finds that the findings of fact related to the Buffer Zone in Section 17 of the Resolution are legally insufficient under KPB 21.29.050(A)(2). Under that Code section, "[t]he vegetation and fence shall be of sufficient height and density to provide visual and noise screening of the proposed use as deemed appropriate by the planning commission ... " The findings of fact in Section 17 of the Resolution detail what conditions are imposed on the CLUP, and those findings repeatedly indicate that some of the proposed conditions will "increase visual and noise screening."" (*See*, decision at page 15.)
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> ….
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> "The Commission did not specifically find whether the conditions imposed on the CLUP were *deemed appropriate* to satisfy the standards set forth in KPB 21.29.040. By all accounts from the record, it appears that the Commission operated under the incorrect assumption that KPB 21.29.040 was "necessarily satisfied" so long as the CLUP contained conditions in KPB 21.29.050. It is unclear from the record whether the Commission

> deemed the conditions appropriate to satisfy those standards. For these reasons, the case is REMANDED back to the Commission for further review and/or clarification. If the Commission does in fact deem the conditions set forth in Resolution 2018-23 appropriate to satisfy the standards set forth in KPB 21.29.040, then it shall grant the CLUP. If, however, the Commission finds that no conditions in KPB 21.29.050 could adequately minimize visual and noise impacts to the standards set forth in KPB 21.29.040, then it may deny the CLUP." (Emphasis original). (*See*, decision at page 17.)

It is recommended that as part of this scheduling discussion the Planning Commission consider scheduling a special meeting for the sole purpose of deciding two adjudicatory proceedings on remand, to wit: (1) the *Bilben v. Beachcomber LLC* remand hearing; and (2) the *Rosenberg v. Cook Inlet Region, Inc.* remand hearing. A special meeting for this purpose can be arranged for the week of January 17th or the week of January 24th.

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

HANS BILBEN, et al., Appellants, v. KENAI PENINSULA BOROUGH, PLANNING COMMISSION, and BEACHCOMBER LLC, et al. Appellees.	)	Appeal Case No. 3KN-20-00034CI

AGENCY CASE NO. 2019-01-PCA

MEMORANDUM DECISION AND ORDER

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

I. BACKGROUND

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

[1] The Appellants in this case consist of 29 owners of real properties that adjoin or surround the proposed 27.7-acre gravel pit situated in an area presently used for residential and recreational purposes.
[2] Excerpt of Record ("Exc."), pp.1-21.

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

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

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

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

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[3] Exc. 1-4.
[4] Exc. 36.
[5] Exc. 36.
[6] Exc. 227.
[7] The Planning Director stated that the Commission did not make sufficient findings to support its denial. Specifically, "[p]ursuant to KPB 21.29.050(A)(2) the planning commission determines the appropriate height and density of the buffers for a material site within the confines of the code section. However, no exploration or effort was made to determine whether the buffers proposed by staff, or different or additional buffers, could be fashioned to screen the material site. If the planning commission believed that buffers were not feasible it should have made findings to support that position and then waived the buffers under KPB 21.29.050(e). Further, the decision lacked any reference as to whether the other 14 conditions set forth in KPB 21.29.050 were also useless to afford any protection to the surrounding property owners." *See* Exc. 224.
[8] Exc. 60.

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

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

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

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

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[9] *Id.*
[10] Exc. 56.
[11] *Id.*
[12] March 25, April 8, April 22, June 10, June 24, 2019, with public comments heard only on June 10, 2019.
[13] Exc. 94-96.
[14] Exc. 115, 117-119.
[15] Exc. 113.
[16] Exc. 114-119.

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

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

II. PARTIES' ARGUMENTS

a. Standard of Review

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

[17] Exc. 115.
[18] Exc. 182.
[19] Exc. 177.
[20] *Balough v. Fairbanks North Star Borough*, 995 P.2d 245 (Alaska 2000).
[21] *State, Dep't of Health and Human Services, Div. of Public Assistance v. Gross*, 347 P.3d 116 (Alaska 2015).

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

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

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

b. Discretion of the Planning Commission

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

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

[23] KPB Code 21.25.050(b).

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

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

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

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

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[24] KPB Code 21.25.020 (emphasis added).
[25] KPB 21.25.050(B) (emphasis added).
[26] KPB Code 21.25.050(B) ("Before granting the permit, the commission must find at a minimum that the proposed activity complies with the requirements of this chapter.").
[27] KPB Code 21.25.020 ("It is the purpose of this chapter... to impose minimum standards for certain land uses which may be potentially damaging to the public health, safety and welfare...").
[28] Setting forth the list of six standards applicable to Material Site Permits.
[29] KPB 21.25.020.

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

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

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

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

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

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

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

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[31] *See* former KPB Code 21.13.
[32] *See* Warrington, Memorandum Decision and Order, 3KN-05-00206CI, at 8.
[33] *Id.* Bilben argues that Warrington is distinguishable because in that case the agency found that the proposed gravel mining pit would not affect the neighboring water sources.
[34] Exc. 12-13.

c. Substantial Evidence

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

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

III. DISCUSSION

A. Standard of Review

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

[35] Appellant's Brief at p.35-36; Exc. 184-85.
[36] Exc. 115.
[37] Exc. 116.
[38] Appellee's Brief at p.24.

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

B. Authority of the Planning Commission to Deny a CLUP

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

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

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[39] *Frank Griswold v. Homer Advisory Planning Comm'n, et.al.*, 484 P.3d 120, 127 (Alaska 2021) (internal citations and quotations omitted).
[40] *Id.*
[41] *State, Dep't of Nat. Res. V. Alaska Crude Corp.*, 441 P.3d 3939, 398 (Alaska 2018).
[42] *Griswold*, 484 P.3d at 127 (citing *Griswold v. City of Homer*,55 P.3d 64, 67-68 (Alaska 2002) (quoting *S. Anchorage Concerned Coal, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993)).
[43] Exc. 34.
[44] *Id.* at 35.

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

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

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

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[45] *Id.* Commissioner Carluccio eventually voted to deny the CLUP. *Id.* at 36.
[46] *Id.* at 36 (Commissioner Bentz noting that "I don't think these conditions will minimize noise disturbance...and the conditions won't minimize visual impacts either; Commissioner Morgan stated that she did not "see how the 50-foot buffer or berms are going to minimize visual impact or sound impact because of the unique topography."; Exc. 96 (Commissioner Whitney expressed concern that "I just don't think the berms that proposed and anything that's going on here is adequate to control the visual impact...").
[47] Exc. 46.
[48] Exc. 50.
[49] Exc. 90 (Commissioner Ernst expressed concern that "in this unique situation...[i]s there any possible buffer that could be reasonably used to protect the, you know, the noise levels and visual impact of this pit...?; Exc. 95, Commissioner Ecklund worried that while KPB 21.29.050(14) required consideration of the "best interest of the borough and the surrounding property owners," the limit of the Commission's authority gave them "no meat to help [surrounding property owners] in this ordinance.")
[50] Exc. 103.
[51] *Griswold*, 484 P.3d at 127 (citing *Griswold v. City of Homer*,55 P.3d 64, 67-68 (Alaska 2002) (quoting *S. Anchorage Concerned Coal, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993)).

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

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

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

[52] The parties agree that the proposed gravel pit in this case falls within the definition of a "material site," and that it is of sufficient magnitude to require a CLUP rather than a "Counter Permit" under 21.29.020.
[53] KPB 21.25.050(B).
[54] KPB 21.25.010.

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

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

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

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

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[55] KBP 21.29.040(A) (emphasis added).
[56] Exc. 50.
[57] *So. Anch. Concerned Coalition, Inc. v. Coffey*, 862 P2.d 168, 174-75 (Alaska 1993).
[58] KPB 21.29.050(A)(14).
[59] Exc. 117-18.
[60] KPB 21.29.050(A)(2)(i)-(iii) (emphasis added).

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

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

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[61] KPB 21.29.050(A)(2)(c).
[62] Exc. 50.
[63] *Id.* (emphasis added).
[64] The court is not persuaded by Appellee's argument that an "application cannot be denied based on inadequate buffers, when under KPB Code either enhancing the buffers or waiving the buffers are the authorized resolution to a situation where buffers are not feasible." *See* Appellee Brief, p.10, n.18. KPB 21.29.050(e) states that "*At its discretion,* the planning commission *may* waive buffer requirements where the topography of the property or the placement of natural barriers makes screening not feasible or not necessary." Waiving the buffer requirements are clearly within the discretion of the Commission. Moreover, it seems to this court that the Commission would be derelict in its duties to waive the requirements in this instance given that under that Code section, "[b]uffer requirements *shall* be made in consideration of and in accordance with existing uses of adjacent property at the time of the approval of the permit."
[65] Appellee's Brief, p.18.
[66] Memorandum Decision and Order, 3KN-05-00206CI, at 9-10 (May 31, 2006) (Appendix A to Appellee's Brief).

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

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

C. Why Remand to the Planning Commission is Necessary

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

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

[67] Exc. 095 (Commissioner Ecklund noted that the Planning Commission had only denied two gravel pits in the ten years he had been on the commission, noting that both of those denials had been overturned).
[68] *Warrington* Memorandum Decision and Order, 3KN-05-00206CI, at 6, 8 (recognizing the authority of the Planning Commission to deny a permit under KPB 21.25.050, and recognizing the authority of the Planning Commission to "consider the evidence, as they did in the case at hand, to determine whether gravel mining will negatively impact the quality and quantity of water" in a nearby aquifier.).
[69] *State, Dep't of Nat. Res. V. Alaska Crude Corp.*, 441 P.3d at 398.

deemed appropriate by the planning commission..." The findings of fact in Section 17 of the Resolution detail what conditions are imposed on the CLUP, and those findings repeatedly indicate that some of the proposed conditions will "increase visual and noise screening."[70]

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

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

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

[70] Resolution 2018-21, Sec 17, ¶¶H, I, J,M, N.
[71] *Id.*, ¶15.
[72] Exc. 35-36.
[73] Exc. 95.

Commissioner Ecklund voted to grant the CLUP. Commissioner Carluccio questioned "but is a 12-foot berm enough to minimize visual and noise impacts?"[74]

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

IV. CONCLUSION

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

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

JASON M. GIST
SUPERIOR COURT JUDGE

I certify that a copy of the foregoing was
✓mailed to KPB
__place in court box to_____
__faxed to_____
✓scanned to Elsner/Gottstein/Stone
AK 9-3-21
Clerk Date

[74] *Id.*

In the Supreme Court of the State of Alaska

Beachcomber, LLC,
Petitioner,

v.

Hans Bilben, Philip Brna, George Krier, Lawrence 'Rick' Oliver, Shirley Gruber, Todd Bareman, Xochill Lopez-Ayala, Richard Carlton, Marie Carlton, Mike Patrick, Linda Patrick, Joseph Sparkman, Vickey Hodnik, Gary Cutlip, John Girton, Linda Bruce, Steve Thompson, Lynn Whitmore, Donald Horton, Lori Horton, James Gorman, Linda Stevens, Gary Sheridan, Eileen Sheridan, Thomas Brook, Joshua Elmaleh, Christine Elmaleh, Angela Roland, Michael Brantley, Teresa Jacobson, David Gregory, Pete Kinneen, Lauren Isenhour, Allison Paparoa, Danica High, Gina Debardelaben, and Kenai Peninsula Borough Planning Commission,
Respondents.

Trial Court Case No. **3KN-20-00034CI**

Supreme Court No. **S-18187**

Order

Petition for Review

Date of Order: **12/29/2021**

Before: Winfree, Chief Justice, Maassen, Carney, Borghesan, and Henderson, Justices

On consideration of the Petition for Review filed on **11/16/2021**, and the Response filed on **11/29/2021**,

IT IS ORDERED:

The Petition for Review is **DENIED**.

Entered at the direction of the court.

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

cc: Judge Gist
Trial Court Clerk - Kenai

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