

**KENAI PENINSULA BOROUGH PLANNING COMMISSION
RESOLUTION 2022-08
KENAI RECORDING DISTRICT**

A resolution granting modification to a conditional land use permit for a material site to allow for additional excavation are on property described as the East ½, the East ½ of the West ½, and the Northwest ¼ of the Northwest ¼, of Section 16, Township 5 North, Range 8 West, Seward Meridian, Alaska, excluding the Sterling Highway right-of-way

(DECISION ON REMAND)

- WHEREAS,** the KPB Planning Commission approved PC Resolution 2017-08 on March 27, 2017, which established a conditional land use permit for material extraction on KPB tax parcel ID# 065-081-18; and
- WHEREAS,** on June 22, 2021, the applicant, Cook Inlet Region, Inc., submitted an application to modify the existing conditional land use permit by expanding the area for excavation by 61-acres south of the Sterling Highway within KPB Parcel 065-081-18; and
- WHEREAS,** KPB Chapter 21.29.090 provides for the modification of material site permits when changes in operations approved in the original permit are proposed; and
- WHEREAS,** notice of the application was mailed on June 22, 2021, to the 255 landowners or leaseholders of the parcels within one-half mile of the subject parcels pursuant to KPB 21.25.060; and
- WHEREAS,** public notice of the application was published in the July 1, 2021 and July 8, 2021, issues of the Peninsula Clarion; and
- WHEREAS,** public notice was sent to the postmaster in Sterling requesting that it be posted at the post office; and
- WHEREAS,** a public hearing of the Planning Commission was held on July 12, 2021; and
- WHEREAS,** the Planning Commission's decision was appealed to a hearing officer pursuant to KPB 21.20; and
- WHEREAS,** by stipulation of the parties on appeal the matter was remanded to the Planning Commission to review its decisions and findings in light of the superior court's decision in *Bilben, et al., v. Beachcomber, LLC, et al*; and
- WHEREAS,** the Planning Commission recognizes that compliance with the mandatory conditions in KPB 21.29.050, as detailed in the findings, does not necessarily mean that the application meets the standards contained in the KPB 21.29.040.
- WHEREAS,** at its regularly scheduled meeting on January 10, 2022, the Planning Commission unanimously voted to deliberate this matter on remand during a special meeting scheduled

for January 25, 2022 and, through staff, provided email notice to all parties to the appeal in this matter; and

WHEREAS, the Planning Commission recognizes that it may “approve, modify, or disapprove” a permit application pursuant to KPB 21.25.050 and pursuant to the standards specific to material sand, gravel or material sites under KPB 21.29.040; and

WHEREAS, on January 25, 2022, at its special meeting, the Planning Commission deliberated this matter on remand;

WHEREAS, the special meeting on January 25, 2022 was open to the public but public hearing was not reopened and new evidence was not allowed; and

WHEREAS, this decision on remand rescinds, revokes and replaces Planning Commission Resolution 2021-26; and

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That PC Resolution 2021-26 is hereby revoked and replaced by this decision.

SECTION 2. That the Planning Commission makes the following findings of fact pursuant to KPB 21.25 and 21.29:

Findings of Fact

1. *Procedural Findings.*
 - a. 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.
 - b. KPB 21.29 governs material site activity within the rural district of the Kenai Peninsula Borough.
 - c. On March 27, 2017, the Planning Commission passed resolution 2017-08, which approved a conditional land use permit to Cook Inlet Region, Inc., for material extraction on KPB tax parcel #065-081-18.
 - d. On June 22, 2021, Cook Inlet Region, Inc., submitted to the KPB Planning Department an application to modify its existing conditional land use permit for parcel #065-081-18 to add an additional 61-acre excavation area.
 - e. 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.
 - f. A public hearing of the planning commission was held on July 12, 2021, and notice of the application was mailed on June 22, 2021, to the 255 landowners or leaseholders of the parcels within one-half mile of the subject parcels. Public notice was sent to the postmaster in Sterling requesting that it be posted at the Post Office. Public notice of the application was scheduled for publication in the July 1, 2021, & July 8, 2021, issues of the Peninsula Clarion.
 - g. That pursuant to the Order for Remand issued by Administrative Law Judge Rebecca Kruse on December 6, 2021, the Planning Department should augment the record in this matter by providing a list identifying the landowners within the notification radius.
2. *Parcel boundaries.* KPB 21.29.050(A)(1) provides that 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. Permit condition number 1 requires the placement of stakes. Borough staff has inspected the proposed site. With the original permit, the property boundaries near

- proposed excavation areas in the original permit were flagged.
3. *Buffer zone.* KPB 21.29.050(A)(2) provides that a buffer zone shall be maintained around the excavation perimeter or parcel boundaries.
 - a. Permit condition number 2 requires that the permittee maintain the following buffers for each excavation area identified on the site plan that will provide visual and noise screening to adjacent properties:
 - 50 feet of undisturbed natural vegetation with additional 6-foot earthen berms around the expanded 61-acre excavation area.
 4. *Processing.* KPB 21.29.050(A)(3) provides that any equipment which conditions or processes material must be operated at least 300 feet from the parcel boundaries.
 - a. The original permit site plan indicates a 4.8-acre processing area that is located greater than 300 feet from the parcel boundaries. Borough staff will regularly monitor the material site to ensure compliance with this setback requirement.
 5. *Water source separation.* KPB 21.29.050(A)(4) provides that 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. Excavation within the water table shall not be within 300 feet of a water source. There shall be no dewatering by either pumping, ditching or some other form of draining without an exemption from the planning commission. In the event an exemption is granted, the contractor must post a bond for liability for potential accrued damages.
 - a. The site plan shows no wells within 300 feet of an excavation area.
 - b. Borough staff will regularly monitor the material site to ensure compliance with the two-foot vertical separation from the water table requirement.
 - c. KPB 21.29.050(A)(5) provides that excavation in the water table greater than 300 horizontal feet of a water source may be permitted with the approval of the planning commission. This modification does not seek an exemption to excavate within the water table.
 6. *Waterbodies.* KPB 21.29.050(A)(6) provides that 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. There are no water bodies within 100 feet of the proposed extraction.
 7. *Protection against physical damage to other properties. Fuel storage.* KPB 21.29.050(A)(7) provides that 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.
 8. *Roads.* KPB 21.29.050(A)(8) provides that operations shall be conducted in a manner so as not to damage borough roads.
 - a. The original permit indicates that the material site haul route is Deniigi Way and Kenai Keys Road to Sterling Highway. The modified site plan also indicates a new secondary access directly to Sterling Highway. The permittee must provide dust suppression to the portion of the haul route that is located on site.
 9. *Subdivision.* KPB 21.29.050(A)(9) provides that 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. Borough planning staff reviews all subdivision plats submitted to the Borough to ensure compliance with this requirement.
 10. *Dust control.* KPB 21.29.050(A)(10) provides that dust suppression is required on haul roads within the boundaries of the material site by application of water or calcium chloride. If Borough staff becomes aware of a violation of this requirement, action will be taken to ensure compliance.
 11. *Hours of operation.* KPB 21.29.050(A)(11) provides that rock crushing equipment shall not be operated between 10:00 p.m. and 6:00 a.m.

12. *Reclamation.* KPB 21.29.050(A)(12) provides that 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. No modification of the reclamation plan was proposed. As in the original permit, 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(C3) and as approved by the planning commission. Borough staff will inspect the material site once the reclamation has been completed to ensure compliance with the reclamation plan.
13. *Other permits.* KPB 21.29.050(A)(13) provides that 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.
14. *Voluntary permit conditions.* KPB 21.29.050(A)(14) provides that conditions may be included in the permit upon agreement of the permittee and approval of the planning commission.
 - a. In addition to the 50-foot vegetation buffer, 6-foot earthen berms will be placed around the 61-acre expanded extraction area.
15. *Signage.* KPB 21.29.050(A)(15) provides that 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, the permittee shall post notice of intent on parcel corners or access.
16. Borough staff will inspect the material site to ensure compliance with all conditions and requirements applicable to this CLUP.
17. The proposed extraction meets material site standard 21.29.040(A1), "Protects against the lowering of water sources serving other properties", as evidenced by:
 - a. Permit condition number 6 requires that the permittee not extract material within 100 horizontal feet of any water source existing prior to issuance of this permit.
 - b. The submitted site plan shows several wells located within 300 feet of the parcel boundaries but none within 100 feet of the proposed excavation area.
 - c. Permit condition number 7 requires that the permittee maintain a 2-foot vertical separation from the seasonal high-water table.
 - d. The permit does not allow the applicant to dewater either by pumping, ditching or any other form of draining.
18. The proposed extraction meets material site standard 21.29.040(A2); "Protects against physical damage to other properties".
 - a. There is no evidence in the record to indicate that physical damage will occur to any other properties as a result of the operations of a material site at this location.
 - b. Condition number 5 provides that the permittee shall not operate any equipment which conditions or processes material within 300 feet of the property boundaries.
19. The proposed extraction meets material site standard 21.29.040(A3); "Minimizes off-site movement of dust", as evidenced by:
 - a. Permit condition number 12 requires that the permittee provide dust suppression on haul roads within the boundaries of the material site by application of water or calcium chloride.
20. The proposed extraction meets material site standard 21.29.040(A4); "Minimizes noise disturbance to other properties" as evidenced by:
 - a. Permit condition number 2 requires that the permittee maintain the following buffers that will minimize, or reduce, the noise disturbance to other properties:
 - Northern, southern, eastern and western boundaries – 50 feet of undisturbed natural vegetation. The addition of a 6-foot earthen berm around the perimeter for the 61-acre expanded extraction area.These buffers shall not overlap an easement.
 - b. Permit condition number 5 requires that the processing area be located greater than 300

- feet from the property boundaries.
- c. Permit condition number 19 requires that the permittee shall not operate rock crushing equipment between the hours of 10:00 p.m. and 6:00 a.m.
21. The proposed extraction meets material site standard 21.29.040(A5); "Minimizes visual impacts" as evidenced by permit condition number 2 that requires that the permittee maintain the following buffers that will minimize, or reduce, the visual impacts to other properties:
- a. Permit condition number 2 requires that the permittee maintain the following buffers that will minimize, or reduce, the noise disturbance to other properties:
- Northern, southern, eastern and western boundaries – 50 feet of undisturbed natural vegetation. The addition of a 6-foot earthen berm around the perimeter for the 61-acre expanded extraction area.
- These buffers shall not overlap an easement.
- b. Permit condition number 5 requires that the processing area be located greater than 300 feet from the property boundaries.
22. The proposed extraction meets material site standard 21.29.040(A6); "Provides for alternate post-mining land uses" as evidenced by:
- a. The submitted application contains a reclamation plan as required by KPB 21.29.060.
- b. Conditions 13 through 17 provide for reclamation and compliance with all applicable laws.

SECTION 3. That based on the above findings, the Planning Commission concludes as a matter of law that the application has met all the requirements of KPB 21.25 and 21.29, and through imposition of the conditions under KPB 21.29.050 and as imposed by Section 5 below, the Planning Commission concludes as a matter of law that the application meets the six standards found in KPB 21.29.040:

Conclusions of Law

1. Material site standard 21.29.040(A1) is met:
- The Planning Commission deems the conditions set forth above to be sufficient to protect against the lowering of water sources serving other properties.
2. Material site standard 21.29.040(A)(2) is met:
- The Planning Commission deems the conditions set forth below, and pursuant to the above findings of facts, to be sufficient to protect against physical damage to other properties.
3. Material site standard 21.29.040(A)(3) is met: b
- The Planning Commission deems the conditions set forth below, and pursuant to the above findings of fact, to be sufficient to minimize off-site movement of dust.
4. Material site standard 21.29.040(A)(4) is met:
- The Planning Commission deems the conditions set forth below, and pursuant to the above findings of fact, to be sufficient to minimize noise disturbance; primarily through the buffer zone/noise screening and processing conditions as well as the condition that any rock crushing equipment will not be operated between 10:00 p.m. and 6:00 a.m.
5. Material site standard 21.29.040(A)(5) is met:
- The Planning Commission deems the conditions set forth below, and pursuant to the above findings of fact, to be sufficient to minimize or reduce visual impacts, through the buffer zone/visual screening and processing conditions.

6. Material site standard 21.29.040(A)(6) is met:

The Planning Commission deems the conditions set forth below, and pursuant to the above findings of fact, to be sufficient to provide for alternate post-mining land uses and as provided in the reclamation plan.

SECTION 4. That the material site operations are described and shall be conducted as follows:

- A. A portion of KPB Tax Parcel Number 065-081-18. The expanded material site area overall within the parcel is approximately 131.7 acres.
- B. The East ½, the East ½ of the West ½, and the Northwest ¼ of the Northwest ¼, of Section 16, Township 5 North, Range 8 West, Seward Meridian, Alaska, excluding the Sterling Highway right-of-way.
- C. The applicant, Cook Inlet Region, Inc., proposes to:
 - 1. Extract gravel and sand from the subject parcel;
 - 2. Reclaim the site to a stable condition upon depletion of material.

SECTION 5. That the existing permit conditions are hereby replaced by the following:

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 as shown in the approved site plan:
 - Northern, southern, eastern, and western boundaries - 50 feet of undisturbed natural vegetation. The addition of a 6-foot earthen berm around the perimeter for the 61-acre expanded extraction area.
 - 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 not operate any equipment which conditions or processes material within 300 feet of the property 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 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.
- 9. 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.
- 10. 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.
- 11. 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.
- 12. The permittee shall provide dust suppression on haul roads within the boundaries of the material site by application of water or calcium chloride.
- 13. The permittee shall reclaim the site as described in the reclamation plan for this parcel and as

approved by the planning commission.

14. The permittee shall post a bond to cover the anticipated reclamation costs in an amount to be determined by the planning director. This bonding requirement does 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.
15. 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.
16. 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.
17. 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.
18. The modification does not change the effective date of the permit. The conditional land use permit is valid for five years from the effective date of the original permit. 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.
19. Rock crushing equipment shall not be operated between 10:00 p.m. and 6:00 a.m.

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON
THIS _____ DAY OF _____, 2022.

Robert Ruffner, Vice Chairperson
Planning Commission

ATTEST:

Ann Shirnberg
Administrative Assistant

PLEASE RETURN
Kenai Peninsula Borough
Planning Department
144 North Binkley St.
Soldotna, AK 99669