

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 FOR RECONSIDERATION

Hans Bilben, by and through counsel, hereby moves for reconsideration of the Hearing Officer Decision and Order, distributed November 15, 2019 pursuant to KPB Code 21.25.350 because the Hearing Officer, in reaching its decision, overlooked, misapplied and failed to consider a code provision that was directly controlling and the Hearing Officer overlooked or misconceived a material question in the case.

A hearing was held on this administrative appeal on October 30, 2019. The central questions posed on appeal were whether the Code interpretation imposed on the Planning Commission was correct and whether there was substantial evidence presented to justify the findings that were made. In resolving both questions presented in favor of the Applicant, the Hearing Officer determined that “the Commission acted within the scope of its authority in approving the Application. Due consideration must be given to the Commission’s expertise and experience in interpreting KPB titles 20 and 21, and the additional facts presented at the

Commission's 2019 public meetings on the Application provide the evidence to support the Commission's findings of fact."¹

1. In Reaching its Decision, the Hearing Officer Overlooked, Misapplied or Failed to Consider KPB Code Chapter 21.20.320(1).

In detailing the scope of appellate review, the KPB Code provides that "The hearing officer may exercise independent judgment on matters that relate to the interpretation of ordinances of 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." In determining that the Commission's interpretation of the interplay between 21.29.040 and 21.29.050 is "reasonable," the Hearing Officer deferred to the Planning Commission's 2019 interpretation of those provisions. However, the record evidence in this case indicates that, in the Commission's experience and expertise, it does not interpret the Code to read that "[c]ompliance with the mandatory conditions in KPB 21.29.050, as detailed in the following findings, necessarily means that the application meets the standards contained in KPB 21.29.040."

The Commission first heard this application in 2018. At the conclusion of that hearing, the Commission determined that the application *did not meet* the standards articulated in 21.29.040 – a determination that did not turn on the application's compliance with the conditions set forth in 21.29.050. Six of the Planning Commissioners determined to disapprove this material site permit. Importantly, the entire panel of the nine Commissioners present at that July 16, 2018 meeting adopted a resolution that referred only to the standards contained in 21.29.040(A)(4) and (A)(5) as the unanimous basis to support the disapproval of the permit application. That is, in 2018 the Commission unanimously interpreted the Code to allow for disapproval of a permit

¹ November 15, 2019 Hearing Officer Decision and Order at 4.

application where it did not meet the standards set forth in 21.29.040 without consideration of whether the application complied with the 21.29.050 conditions.

Accordingly, this is not a situation where the Commission has routinely interpreted these particular code provisions in this particular manner. *National Bank of Alaska v. State, Dept. of Revenue*, 642 P.2d 811, 815 (Alaska 1982) (noting that where the agency interpretation being reviewed is neither longstanding nor consistent, it cannot play a strong role in reviewing the issue of statutory construction). Indeed, no evidence in the record was presented or supported any similar instance where the Commission previously interpreted the Code to require approval of an application because it contained 21.29.050 conditions even though it could not otherwise meet the standards in 21.29.040. To the contrary, the history of Commission experience and expertise in interpreting the Code in this record indicates that, before 2019, the Commission did not require 21.29.050 compliance to necessarily mean that the standards contained in 21.29.040 had been met.

The Hearing Officer misconceived the experience and expertise of the Planning Commission in interpreting the interplay between 21.29.040 and 21.29.050 and should have exercised its own independent judgment in construing and interpreting the Code – which expressly mandates that the Commission disapprove permit applications that do not meet the standards set out in the Code. This is especially true where, as here, the issue presented is one of pure statutory construction. *Id.*

2. In Reaching its Decision, the Hearing Officer Overlooked, Misapplied or Failed to Consider KPB Code Chapter 21.29.050(A)(2)(c) and Overlooked a Material Question of the Case.

Although the Appellant maintains that the Commission has the authority to deny a permit that does not meet the 21.29.040 standards, even under the interpretation adopted between 2018

and 2019 that compliance with 21.29.050 necessarily means compliance with 21.29.040, it is clear that the permit must comply with the mandatory conditions set forth in 21.29.050.

21.29.050(A)(2)(c) requires a determination that the “vegetation and fencing [contained in the buffer zone] *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.” Notably absent from the findings of fact adopted by the Commission was a finding of fact that the Commission determined that 21.29.050(A)(2)(c) had been met. In reaching its decision that the findings of fact were sufficient and that they were supported by substantial evidence in the record, the Hearing Officer overlooked this Code provision and mandatory condition and, therefore, overlooked a material question in the case.

The language in 21.29.050(A)(2)(c) is mandatory. The 21.29.050 conditions regulating counter permits and CLUPs are “mandatory.” The Hearing Officer states that “Appellant does not call out any specific finding of fact that is allegedly unsupported by substantial evidence in the record.”² However, Appellant’s position was both that this finding of fact was required as a mandatory permit condition and that there was no substantial evidence in the record to support this finding.

When the 2018 Hearing Officer remanded the original decision back to the Planning Commission, it was with the instruction that it refer to *specific* substantial evidence in the record to support its findings. While the 2019 Hearing Officer notes that there was additional public comment presented in the 2019 hearings, neither the Planning Commission nor the Hearing Officer delineates what *specific evidence* supports a finding that there was sufficient noise and

² Decision at 9.

visual screening presented by the buffer zone proposed by the application that was not presented and did not exist when the same application was heard and addressed in 2018.

Instead, Lynn Whitmore, a surveyor and engineer with over 40 years' experience, developed substantial evidence using the Borough's own GIS technology to demonstrate the *ineffectiveness* of the proposed buffer zone at providing *sufficient* visual and noise screening.³ The GIS mappings of various adjacent and surrounding properties demonstrated that these properties would receive little to no screening from the uses proposed by the application: excavation, processing and transportation.

The Planning Commission was never asked to determine, as it must, whether or not there was substantial evidence to support the finding that the buffer zone presented sufficient visual and noise screening. The Planning Commission was not presented with substantial evidence to support this finding it did not make. In failing to address the omission of the mandatory condition contained in 21.29.050(A)(2)(c), the Hearing Officer overlooked or misconceived this question in the case.

3. Where there are a Lack of Findings, KPB Code 21.20.330 Mandates Remand.

Under 21.20.330(B): "Appeals from planning commission decisions which lack findings of fact and conclusions by the planning commission or contain findings of fact and conclusions which are not supported by substantial evidence *shall be remanded* to the planning commission with an order to make adequate findings of fact and conclusions."

As previously discussed, 21.29.050(A)(2)(c) contains mandatory language and is included as a mandatory condition which must be met before an application can be approved by the Commission. Because 21.29.050(A)(2)(c) was not imposed as a permit condition and because

³ R 599-602 and R 663-664.

the Commission made no findings of fact as to how it reached the conclusion that the proposed buffer zone provides sufficient visual and noise screening of the proposed use, this appeal must be remanded to the Commission. On remand, the Hearing Officer should instruct the Commission to make specific findings of fact detailing the specific evidence that allows it to reach the conclusion that the buffer zone sufficiently screens the proposed uses from nearby property owners.

4. Conclusion.

Reconsideration is appropriate where, as here, the Decision overlooks a directly controlling provision of law and overlooks a material question in the case. The Hearing Officer should not defer to a Commission interpretation that was adopted within the past year and which is directly opposed to the interpretation employed in 2018. The Commission is not allowed to approve an application that does not meet the mandatory conditions set forth in 21.29.050 and may not approve an application without detailing findings of fact and permit conditions demonstrating that all 21.29.050 mandatory conditions have been met. The Hearing Officer should reconsider the due consideration given to the Commission's interpretation of the interplay between 21.29.040 and 21.29.050 and should remand the appeal to the Planning Commission for further findings and conclusions relating to mandatory condition 21.29.050(A)(2)(c).

DATED December 2, 2019.

Respectfully submitted and filed on behalf of Hans Bilben



Katherine Elsner, ABA #1411116