

**KENAI PENINSULA BOROUGH PLANNING COMMISSION
RESOLUTION 2022-17
HOMER RECORDING DISTRICT**

A resolution denying a conditional land use permit to operate a sand, gravel, or material site for a parcel described as Tract B, McGee Tracts - Deed of Record Boundary Survey (Plat 80-104) - Deed recorded in Book 4, Page 116, Homer Recording District, State of Alaska.

(DECISION ON REMAND)

- WHEREAS,** 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; and
- WHEREAS,** KPB 21.25.040 provides that a permit is required for a sand, gravel or material site; and
- WHEREAS,** KPB 21.29 provides that a conditional land use permit is required for material extraction which disturbs more than 2.5 cumulative acres; and
- WHEREAS,** on June 4, 2018, the applicant, Beachcomber LLC, submitted a conditional land use permit (CLUP) application to the Borough Planning Department for KPB Parcel 169-010-67, which is located within the rural district; and
- WHEREAS,** 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 pursuant to KPB 21.25.060; and
- WHEREAS,** public notice of the application was published in the July 5, 2018 & July 12, 2018 issues of the Homer News; and
- WHEREAS,** a public hearing of the Planning Commission was held on July 16, 2018 wherein the Planning Commission voted to deny the CLUP;
- WHEREAS,** following an administrative appeal to Hearing Officer Holly Wells in December 2018, the matter was remanded to the Planning Commission;
- WHEREAS,** on remand from the hearing officer, five additional public hearings were properly noticed and held on March 25, 2019, April 8, 2019, April 22, 2019, June 10, 2019, and July 24, 2019; and
- WHEREAS,** notice of the public hearings was mailed to 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 was published in the Homer News all as described in Resolution 2018-23 that was eventually voted on at the Planning Commissions June 24, 2019 meeting; and
- WHEREAS,** public comment was taken at all the public hearings but for the June 24, 2019 meeting where only the applicant was provided a final rebuttal opportunity after additional written were provided to the Planning Commission after close of the public hearing on June 10, 2019; and
- WHEREAS,** the Planning Commission voted to approve the CLUP at its June 24, 2019 meeting in Resolution 2018-23 attached as Exhibit A; and
- WHEREAS,** after the Planning Commission voted to approve Resolution 2018-23, the matter was appealed to a hearing officer and then to the Kenai Superior Court; and
- WHEREAS,** on September 2, 2021, Kenai Superior Court Judge Gist remanded the matter back to the Planning Commission; and
- WHEREAS,** the Kenai Superior Court's remand decision was subsequently appealed to the Superior Court which stayed any action before the Planning Commission on remand; and
- WHEREAS,** on December 29, 2021, the Alaska Supreme Court denied Beachcomber, LLC's Petition for Review; and
- 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 to hold an

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

WHEREAS, on January 25, 2022, at its adjudicative session, the Planning Commission deliberated this matter on remand; and

WHEREAS, at its next regularly scheduled meeting on February 14, 2022, the Planning Commission voted on Resolution 2022-07 to deny the CLUP; the vote failed; and

WHEREAS, at its next regularly scheduled meeting on March 21, 2022, the Planning Commission unanimously voted to further deliberate this matter on remand during an adjudicative session set for a later date following the meeting; and

WHEREAS, at its adjudicative session immediately following the regularly scheduled meeting on March 21, 2022, the Planning Commission deliberated this matter on remand; and

WHEREAS, the Planning Commission continued the March 21, 2022 adjudicative session to March 23, 2022, to continue deliberations; and

WHEREAS, during the adjudicative session, the Planning Commission reviewed the remand decision dated September 2, 2021, entered by Superior Court Judge Gist on appeal (Remand Decision) attached as Exhibit B;

WHEREAS, the Remand Decision held that “[n]othing 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”; and

WHEREAS, contrary to the conclusion reached by Hearing Officer Wells, the Remand Decision further held 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”; and

WHEREAS, the Remand Decision determined that “the findings in Section 17 [of Resolution 2018-23] 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”; and

WHEREAS, the Remand Decision further held that “[i]f 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”; and

WHEREAS, the Remand Decision did not instruct the Commission to allow the applicant or any other interested person to present additional evidence or testimony; and

WHEREAS, the Commission understands that the Remand Decision remanded the case back to the Commission “for further review and/or clarification” consistent with the Remand Decision and that the Commission has discretion to “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, this decision on remand rescinds, revokes and replaces Planning Commission Resolution 2018-23;

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

SECTION 1. That PC Resolution 2018-23 is hereby revoked and replaced by this resolution.

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

Findings of Fact and Conclusions of Law

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. KPB 21.29 provides that a conditional land use permit is required for material extraction that disturbs more than 2.5 cumulative acres.
5. The proposed disturbed area is approximately 27.7 acres.
6. 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.
7. A public hearing of the Planning Commission was first held on July 16, 2018 and notice of the meeting was published, posted, and mailed in accordance with KPB 21.25.060 and KPB 21.11.
 8. Five additional public hearings were held on March 25, 2019, April 8, 2019, April 22, 2019, June 10, 2019, and June 24, 2019. Notice of the meetings was published, posted, and mailed in accordance with KPB 21.25.060 and KPB 21.11.
 9. This application has been heard twice on remand, once after a hearing officer remand and then again after a superior court remand.
 10. The site plan indicates that the processing area is 300 feet from the south and east property lines and is greater than 300 feet from the west property line. A waiver was requested from the north property line.
 11. The site plan shows the proposed processing area being 200 feet south of Parcel 169-022-08, which is undeveloped. Parcel 169-022-04 is developed and located within 300 feet of the proposed processing area; this parcel is owned by the applicant's relative.
 12. 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.
 13. 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.
 14. If granted, the Planning Commission would have imposed every mandatory condition under code and pursuant to KPB 21.29.050. The applicant also offered two voluntary conditions related to rolling berms and white noise back-up alarms. Those conditions are set forth in the 22 Permit Conditions detailed in Resolution 2018-23.
 15. As outlined below the Planning Commission finds that even when all the Permit Conditions are imposed under KPB 21.29.050, the modification application does not meet the applicable standards under KPB 21.29.040.
 16. This modification does not meet material site standard 21.29.040(A4): "Minimizes noise disturbance to other properties" as evidenced by:
 - a. The Permit Conditions impose buffers around each side of the site.
 - b. The majority of the residential properties near and thus impacted by the noise of the material extraction operations are located on the southern and eastern borders of the site. The developed property on the northern boundary of the site located within 300 feet of the proposed processing area (Parcel 169-022-04) is owned by the applicant's relative.
 - c. Topographic maps in the record of the site and surrounding properties make evident the unique amphitheater-like natural topography of the area due to the elevated ground level of the properties located to the south and east of the site.
 - d. Given the unique amphitheater-like quality of the area, sound from the material extraction operations will carry to the properties to the south and east of the site.
 - e. There are Permit Conditions prohibiting material extraction operations from 10:00pm to 6:00am and on Memorial Day weekend, Labor Day weekend, and the July Fourth holiday. However, this is only a slight minimization of noise to surrounding properties considering operations will be permitted to take place from 6:00am to 10:00pm 358 days out of the year.
 - f. There is also a Permit Condition requiring the applicant to operate "his equipment onsite" with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms. However, there was public testimony that while such a condition may minimize some noise from applicant's machinery, there was no assurance that equipment owned or leased by operators other than applicant performing material extraction on the site could or would adhere to the condition. As such, there may be little, if any, minimization of the noise disturbance to other properties by this Permit Condition.
 - g. Therefore, although the Permit Conditions impose every mandatory condition under KPB 21.29.050 and include additional voluntary conditions from the applicant, the Commission, in its discretion, finds that the conditions cannot adequately minimize the noise disturbance to other properties from the mineral extraction operations on the site.
 17. This modification does not meet material site standard 21.29.040(A5): "Minimizes visual impacts" as evidenced by:
 - a. The Permit Conditions impose buffers around each side of the site.
 - b. The majority of the developed properties near and thus visually impacted by the material extraction operations are located on the southern and eastern borders of the site. The developed property on the northern boundary of the site located within 300 feet of the proposed processing area (Parcel 169-022-04) is owned by the applicant's relative.
 - c. The Permit Condition buffers for the southern and eastern borders of the site are a 50-foot vegetated buffer and a 12-foot high berm (except along the northern 200 feet of the propose excavation on the eastern boundary).
 - d. Topographic maps in the record of the site and surrounding properties make evident the unique amphitheater-like natural topography of the area due to the elevated ground level of the properties located to the south and east of the site.
 - e. Photographs and GIS LIDAR profile mapping in the record provided by residents located on and near the eastern border of the site demonstrates that due to the higher elevation of the properties compared to the site, a 12-foot high berm set back 50-feet would provide very little, if any, minimization of the visual impact of the material extraction operation occurring at least 300 feet from the site boundary.
 - f. Similarly, photographs and GIS LIDAR profile mapping in the record provided by residents located on and near the southern border of the site demonstrates that due to

the higher elevation of the properties compared to the site, a 12-foot high berm set back 50-feet would provide very little, if any, minimization of the visual impact of the material extraction operation occurring at least 300 feet from the site boundary.

- g. Therefore, although the Permit Conditions impose every mandatory condition under KPB 21.29.050 and include additional voluntary conditions from the applicant, the Commission, in its discretion, finds that the conditions cannot adequately minimize the visual impacts of the mineral extraction operations on the site.

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 KPB 21.29; notwithstanding, even after imposition of the conditions under KPB 21.29.050, and in accordance with the above findings of fact, the Planning Commission concludes as a matter of law that the application does not meet at least one of the standards set forth in KPB 21.29.040.

SECTION 4. That the material site conditional land use application filed by Beachcomber, LLC is denied.

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

Blair J. Martin, Chairperson
Planning Commission

ATTEST:

Ann Shirnberg
Administrative Assistant

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

EXHIBIT A

PLANNING COMMISSION RESOLUTION 2018-23



**KENAI PENINSULA BOROUGH PLANNING COMMISSION
RESOLUTION 2018-23
HOMER RECORDING DISTRICT**

A resolution granting a conditional land use permit to operate a sand, gravel, or material site for a parcel described as Tract B, McGee Tracts - Deed of Record Boundary Survey (Plat 80-104) - Deed recorded in Book 4, Page 116, Homer Recording District.

- WHEREAS,** 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; and
- WHEREAS,** KPB 21.25.040 provides that a permit is required for a sand, gravel or material site; and
- WHEREAS,** 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; and
- WHEREAS,** 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 pursuant to KPB 21.25.060; and
- WHEREAS,** public notice of the application was published in the July 5, 2018 & July 12, 2018 issues of the Homer News; and
- WHEREAS,** a public hearing of the Planning Commission was held on July 16, 2018 where public comment was taken and the Commission denied the approval of the conditional land use permit; and
- WHEREAS,** the denial was appealed, a subsequent appeal hearing was held, and the hearing officer remanded the application to the Planning Commission; and
- WHEREAS,** 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; and
- WHEREAS,** at the March 25, 2019 meeting, the Planning Commission continued the hearing to May 28, 2019, which was later rescheduled for 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; and
- WHEREAS,** a public hearing of the Planning Commission was held on Jun 10, 2019 where public comment was taken;

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

SECTION 1. That the Planning Commission makes the following findings of fact pursuant to KPB 21.25 and 21.29:

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

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

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON THIS 24th DAY OF JUNE, 2019.


Blair J. Martin, Chairperson
Planning Commission

ATTEST:


Julie Hindman
Administrative Assistant

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



EXHIBIT B

JUDGE GIST'S REMAND DECISION

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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:

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

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

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.

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

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

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

⁵⁵ KPB 21.29.040(A) (emphasis added).

⁵⁶ Exc. 50.

⁵⁷ *So. Anch. Concerned Coalition, Inc. v. Coffey*, 862 P.2d 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 Peninsular 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

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-05-00206C1, 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-05-00206C1, 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 aquifer.).

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

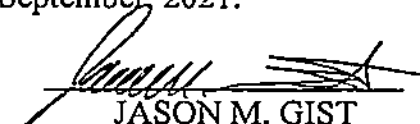
The Commission did not specifically find whether the conditions imposed on the CLUP were *deemed appropriate* to satisfy the standards set forth in KPB 21.29.040. By all accounts from the record, it appears that the Commission operated under the incorrect assumption that KPB 21.29.040 was “necessarily 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.

I certify that a copy of the foregoing was
✓ mailed to KPB
_____ place in court box to _____
_____ faxed to _____
✓ scanned to Flisner/Gottstein/Stone
AK 9-3-21
Clerk Date


JASON M. GIST
SUPERIOR COURT JUDGE

⁷⁴ *Id.*