

**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 proposed 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.

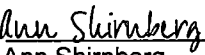
SECTION 3. That based on the above findings, the Planning Commission concludes as a matter of law that the application has met all the requirements of KPB 21.25 and KPB 21.29; notwithstanding, even after imposition of the conditions under KPB 21.29.050, and in accordance with the above findings of fact, 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 11th DAY OF APRIL, 2022.


Blair J. Martin, Chairperson
Planning Commission

ATTEST:


Ann Shirnberg
Administrative Assistant

PLEASE RETURN
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