

Kenai Peninsula Borough Planning Commission

Betty J. Glick Assembly Chambers, Kenai Peninsula Borough George A. Navarre Administration Building

May 24, 2021

6:00 P.M.

UNAPPROVED MINUTES

APPEAL TO THE PLANNING COMMISSION: The appeal of the Planning Director's decision on reconsideration to uphold a prior Director's decision approving a nonconforming use application with C & H Estates Local Option Zone District.

CALL TO ORDER

Chair Martin called the meeting to order at 6:00 p.m.

ROLL CALL

Commissioners Present

Paulette Bokenko-Carluccio, City of Seldovia
Jeremy Brantley, Sterling
Cindy Ecklund, City of Seward
Pamela Gillham, Ridgeway
Blair Martin, Kalifornsky Beach
Virginia Morgan, East Peninsula
Robert Ruffner, Kasilof/Clam Gulch
Franco Venuti, City of Homer

With 8 members of an 11-member commission in attendance, a quorum was present.

Staff Present

Melanie Aeschliman, Planning Director
Sean Kelly, Deputy Borough Attorney
Patty Burley, Deputy Borough Attorney
Bryan Taylor, Borough Planner
Ann Shirnberg, Administrative Assistant
Avery Harrison, Administrative Assistant

Absent

Syverine Bentz, Anchor Point/Ninilchik
Davin Chesser, Northwest Borough
Diane Fikes, City of Kenai

HEARING

Chair Martin opened the hearing.

2. Deputy Borough Attorney Sean Kelley – Presentation of Issue

Due to an error, the recording was started late and the first minute of Mr. Kelley's presentation was not recorded. The first part of Mr. Kelley's presentation was a brief timeline of events related to the decision under.

Mr. Kelley stated that some of the issues faced related when reconsidering the decision were:

- An incomplete file from the prior decision. The applicant had informed us that there were items that they had submitted that were not in the file.
- There were also competing decisions from two prior directors, one from Max Best who had retired and one from an acting director.
- The landowner also had objected to the process
- Establishing what the established use of the property on January 6, 2020.

3. **Planning Director Melanie Aeschliman – Presentation of Director’s Decision**

The timeline laid out by Deputy Borough shows a lengthy review and history of C & H Estates Local Option Zone District (LOZD) situation. I was asked to issue a reconsideration of the previous director’s decision. I opened the process back up to ensure all were aware that I was reconsidering this decision and that I would be issuing a final decision on this matter. The residents within the LOZD were officially noticed. After all comments were received, I reviewed all the information from all parties, as well as planning department staff and with legal.

The issue on appeal appears to be the term “event center”. I did spend some time researching on the internet and found several bed & breakfasts, hotels, and motels that advertise as venues for a perfect place to hold a small event. Since this is in fact an established commercial bed & breakfast, I struggled to see how I could take away their rights.

As an appraisal director and manager for many years, as well as holding a master’s degree in public administration, I was extremely concerned with the limiting/taking of a commercial property owner’s first amendment rights to advertise. I also had concerns regarding the limiting/taking of a commercial property owner’s rights of ownership also known as their bundle of rights. If government is going to take away someone’s ownership rights, as in eminent domain, that has to be negotiated and paid out by the government, and can only be done under very strict guidelines.

KPB Code 21.44.010 states the intent of LOZD was to provide property owners in rural areas an opportunity to request the borough adopt greater restrictions on the land. To control building sites, placement of structures and land use through:

- a. Separating conflicting land uses,
- b. Regulating certain uses detrimental to residential areas,
- c. Setting minimum lot sizes, widths & setback standards
- d. Setting standards for the number and type of structures developed on a parcel.

The establishment of a LOZD in KPB code was not intended to take away someone’s existing rights. Therefore, I found prior Planning Director Max Best’s decision, which was the one made closest in time to the LOZD formation date of January 7, 2020, to be a sound decision. I concluded that staying with Planning Director Max Best’s findings was logical and found no compelling reason to reverse that decision.

4. **Appellant Meyer Opening Presentation - Scott Meyer; 40210 Alpenglow Circle, Homer, AK 99603**

We have several concerns regarding the director’s decision. The residents of the LOZD did not object to the original decision issued in April of 2020 because the finding that the property has been used as commercial lodging for transient guests was consistent with their observations of the property. There were also no findings related to event use. They were also comfortable with the conditions placed on use in that decision. We filed our appeal to the March 2021 decision because the applicant did not submit proof of any prior nonconforming uses related to events. The Planning Director assumed the applicant’s burden of proof and relied on criteria that did not prove past use in order to grant a nonconforming use for events. The applicant did not provide evidence of a nonconforming use consisting of commercial events in the initial January 2020 application nor in four subsequent requests of information over the next 13 months. The applicant appealed the original decision because they objected to the conditions placed on event use. Their stated goal was to obtain a decision that confirmed nonconforming prior existing uses and support for an amendment to LOZD code to remove conditions on uses of B&B and an event center. The applicant has complained about the length of time that the public process was taking in spite of filing two extensions and electing to participate in

the reconsideration process. Mr. Meyer then made several accusations of inappropriate actions taken by Planning Department staff, the borough mayor and TLR Corporation. Since our appeal has been filed, the applicant has produced the first documentation regarding past use of the property for events. He would ask the commission to consider this recent information in light of the following points. First, the applicant states that a lodging and event business has been operated on this lot continuously since 1993 under different names, which is not true. The IRS owned this property for two years prior to the purchase by the applicant. The business that held the property before the IRS had a lien against them for two years before their license was revoked. For many years, the property was occupied intermittently with no commercial use and had frequent visits to it by Alaska State Troopers. Second, advertising hosting for events on a website does not constitute proof of use. Third, the applicant submitted photos of an indoor wedding reception. A letter from the manager at the time and the description by the applicant indicate the managing couple hosted their own wedding reception while they lived there. There is no record of payment for that event so there is no proof that it was a commercial nonconforming event. Fourth, a letter from the past manager of property states that they hosted other catered weddings but without dates or payment details there is no proof of a nonconforming use. Fifth, there are photos of one other wedding but again no record of payment. Sixth, there is a letter confirming a murder mystery dinner for 12 with a payment of \$450.00 in November 2019. This event occurred only two months before the application was submitted, yet no receipt was submitted upon request. Instead, the applicant only recently obtained documentation from a customer. Presumably, the applicant would have business records of individual events to calculate and pay borough sales tax. If the applicant paid no sales tax for the last quarter of 2019 then that event may not qualify as a prior nonconforming use, per the ordinance that requires that prior use be legally established. The documentation of prior use is sparse, anecdotal, ambiguous and in some cases irrelevant. The applicant has complained about the difficulty of the process but all they had to do was to provide dates, descriptions and receipts. Only one documented event is included in all this documentation and that event only qualifies if it was held legally which cannot be known without examining sales tax records. Our concern is the expansion of use beyond the poorly documented level consistent with the expansion ordinance. None of the photos or other documentation show outdoor events. Given the low frequency of events and the lack of documentation over the last 28 years it is not surprising that none of the submitted comments can confirm this use. The ordinance governing expansion is vague. The applicants are already advertising hosting special events like weddings, reunions and company events. The applicant states that the lodge building's main floor can accommodate 50 or more guests and that number exceeds any documented prior use. Our concerns are increased traffic and noise related to an expansion of use. We have had a handful of experiences with B&B guests on this property partying late into the night disturbing our sleep. They can hear talking on the lodge's deck from their bedroom. Sound carries beyond the range of visibility. Other LOZD members have also submitted letters expressing concerns about the increase of noise and dust from traffic. One resident has a medical condition that is exacerbated by dust. We do not

see how a handful of poorly documented small indoor gatherings could meet the burden of proof to allow unrestricted commercial use of the property for events. They hope that the commission will carefully consider the information and overturn the director's decision to allow events.

5. Appellant Cutler Opening Presentation – Craig Cutler; 40130 Portlock Dr., Homer AK 99603

He would request the planning commission re-impose the conditions that were rescinded by the March 8, 2021 decision of reconsideration. The previous decision's conditions related to hours of operation, excessive noise, traffic and the creation of nuisances were very reasonable. He would request that further conditions be imposed as permitted by code to ensure public health and safety of the neighboring residents as well as for the guests of the lodge. These additional conditions can be found in my letter dated March 26, 2021, which is in the desk packet. Due to the increase in activities related to the nonconformity event use, that have resulted in complaints to the borough compliance officer and calls to the State Troopers, he would request that a condition be placed by the authority of the commission's quasi-judicial/legislative capacity to revoke all approvals for commercial event activities on this parcel. Increasing nonconforming uses on a parcel can constitute a violation of several KPB codes. The number of people allowed in the lodge should be constrained to capacities as regulated by the various governing authorities. For example, standards that regulate the capacity of the septic system outputs by the DEC. These standards restrict output flows to a calculated formula; a maximum output rate per gallons is typically calculated by product of the number of rooms, up to two persons each, by 75 gallons for each room per day. The lodge has nine rooms so the maximum flooding of the septic field cannot legally exceed 675 gallons. If the lodge is filled to capacity and daytime guests crowd the parcel that capacity could be quickly exceed causing legal problems as well as the obvious health and safety hazards. The drainage in the creek that is adjacent to the septic field travels downhill through several neighborhoods past East End Road on the way to Kachemak Bay. Within days of the enactment of the LOZD, the applicant filed for the approval of a nonconforming use of the former B&B as an event center. Since the original denial of the nonconforming use, guest lodging has been approved. However, due to the lack of evidence provide to the planning department by the applicant, multiple director determinations have concluded that an event center had not been approved as a pre-existing land use. In the recent director's decision that is under appeal right now the director stated, "the staff report on reconsideration found that a full-scale "event center" is a separate type of use and that the use of the property was not consistent with the term "event center". It has taken the applicant over a year to present comments and new graphic presentations of so-called special events being held at the guest lodge. One of the documents provided testifying to a stay at the lodge in 2019, provides no proof in the form of tax records or receipts, the document was not even signed. Another exhibit showed no more than 12 people attending an indoor event, which did not take place under the current owner, but under one of the previous owners. Another exhibit is a photo of a guest ledger, possibly from a previous owner, it shows signatures of visitors from 5 years ago or longer, again these stays did not happen under the present owner. This ledger is not accompanied by any other

supporting evidence or legal documentation. Whether any of these images were manipulated by graphic editing software is not known and should require a legal forensic examination. Another photo exhibit submitted by the applicant shows an agricultural high tunnel with a graphic overlay that incorrectly identifies the parcel as owned and operated by my wife and myself. There are several errors and omissions in the exhibits provided by the applicant. If they are admitted as evidence, they should be thoroughly investigated for truth, accuracy and validity. There is no creditable testament to the existence of events containing more people than what could occupy the lodge. Therefore, any increase in crowd capacity for future events would constitute an increase in the nonconformity use as outline in the LOZD code. It should also be noted that any and all of these breaches would also constitute a violation of the rights of the other parcels owners in the LOZD.

- 6. Appellant Pitcher Opening Presentation – Donald Pitcher; 40168 Alpenglowl Circle, Homer AK 99603** Mr. Pitcher and his wife have lived in the area since 1999. They had the privilege of raising their two children in this wonderful neighborhood. C&H Estates is a neighborhood of homes on large lots and his home was one of the first built in the area in the 1980s. His property borders Flat Fish lodge on two sides. His property is L shaped because he purchased an adjoining lot to prevent development and to protect their view. A corner of the applicant's land is directly behind their house, is in full view from windows in his home on both floors and from their deck and lawn. Increases in use at Flat Fish Lodge will directly impact their property values. We have never developed our land behind Flat Fish Lodge, but are concerned over what an out-of-state corporation may try do while developing their property. The neighbors vote to establish create this LOZD in 2019 to prevent exactly this type of development. He would ask that the commission step into his shoes and imagine a corporation spending a million dollars with plans to develop an event center. Where they can put in a hot tub with a tall fence directly in front of your house. Where they want no restrictions on the number of people or the type and frequency of events, on the number of cars parked along the road, how late they can go into the night or how much noise they can make. Mr. Pitcher then made an accusation of inappropriate behavior by the manager of Flat Fish Lodge. Since TLR Corporation purchased this property 5 years ago, they have become increasingly antagonistic. Mr. Pitcher then made several accusations of inappropriate actions by Planning Department staff, the Mayor's Office and TLR Corporation. Flat Fish's air bnb listing dates from December 2019 but does not show a single comment posted from anyone in the last 17 months. As someone who stays in air bnbs, he finds that odd. He suspects that it shows the minimal use they have witnessed. There have been extended periods of time where they have not seen any vehicles at Flat Fish Lodge. If TLR Corporation gets their way, they will be able to build tall fences directly in front of our house and shine bright lights at our house. They can have large outdoor events as frequently as they want, as late as they want and as noisy as they wish. As a wedding photographer, he knows how noise and traffic can affect an area. Homer businesses that feature outside events are located away from areas that have single-family homes. These are business like, Land's End Resort at the end of the Spit, Kenai Peninsula Suites at

the top of Bay Crest Hill, Second Star across from the boat yard, Diamond J Ranch that is far out East End Rd. and Driftwood Inn, which is in historic old town. The place now called Flat Fish Lodge has gone through multiple owners and has a set unused for long periods through much of the last decade. When we first moved into the neighborhood 22 years ago, it was a low-key B&B called Chocolate Drop. TLR provided records of B&B guests from 1993 to 2008. He found only one time, on July 3, 2007, where the number of guest reached nine people. Most nights the B&B was either empty or had only one or two guests. Apparently, there is not guestbook or log for the last 13 years. Even when Chocolate Drop B&B was in operation with a small number of guests, they has issues with noise, with people drinking, talking loudly at night and with light shining into their windows. If TLR gets their way, things will become much worse. A week ago, TLR started a big construction project behind the building. Multiple truckloads of dirt have been dumped off just today and they are clearly pushing ahead with development without waiting for tonight's planning commission meeting. The building now known as Flat Fish Lodge has seen minimal use for many years. TLR Corporation should be allowed to operate as a B&B but should not be allowed to have events outside the lodge and especially after 9:00 PM. They should not be building fences or structures that can affect surrounding properties. Events should be limited to 12 people and noise kept to a minimum. Many of the residents have spent sleepless nights because of the actions of TLR Corporation. He and his neighbors are taking action because they care about the place they live and they should not have to expend so much emotional energy and time just to defend the peace and quiet of their neighborhood. Please do the right thing and follow the law.

7. **Applicant Opening Presentation – Kristine Schmidt, Molloy & Schmidt LLC: 110 S. Willow Street, Suite 101, Kenai AK 99669** Ms. Schmidt is the legal representative for the applicant, TLR Adventures LLC. The nonconforming use application from January 2020 as seen on appeal packet page 3 states that the prior existing use as, "This building has been a bed and breakfast for over 10 years. This has included special events for different groups". The decision being appealed as seen on pages 139-140 of the appeal packet states "The applicant's statements and other supporting information indicate that small special events do occurred at the property. Additionally, one prior KPB Planning Director, on KPB Acting Planning Director, and one prior KPB Planner all determined that the special events use was in operation prior to January 7, 2020". Later the decision states, "The use of the property is that of a bed and breakfast and the entire lodge structure and area may be rented to hold smaller-scale special events. That is the use that I find was in operation prior to January 7, 2020". TLR Adventures requests that the Planning Commission uphold the Planning Director's decision. TLR provided enough evidence to a prior existing use of a bed & breakfast, including special events for different group to obtain a nonconforming use determination in its favor from the former Planning Director. The current director did not rescind that earlier decision. To support the current director's decision TLR provided additional evidence in the desk packet that the bed and breakfast included special events before the LOZD was adopted. Those exhibits include:

- Exhibit 16 – a statement and wedding photos from the prior lodge managers from the period of 2012-2013.
- Exhibit 17 – photos of a wedding event at the lodge prior to 2016.
- Exhibit 18 – a letter about a murder mystery dinner in November 2019.
- Exhibit 19 – showing that TLR started advertising as an event center in September 2019.

TLR did provide evidence that led to the original decision but as Mr. Kelley pointed out the records have been lost and it is not clear what documents were in those records or not. What is currently in the desk packet is now a part of that record. The Planning Director found that there was sufficient evidence for this use and granted the bed and breakfast designation in which TLR said included special events. The appellant's primary objection in the paperwork submitted was to the words 'event center' and they claim they never observed any special events at Flat Fish Lodge in the years they have lived there. Their statements prove that the special events that have been held there in the past did not bother them. Some of the appellants are not in the position to observe whether there have been events as they live too far away and their view is blocked by vegetation, particularly appellant Meyer. This can be seen in the photos that TLR submitted which are Exhibits 8, 9, 10 & 11 in the desk packet. In addition, the director's approval of special events, which she described as smaller scale special events, did not use the term event center. Just because some of the appellant say they did not see the events at the lodge does not mean that the events did not happen. No one says they had a camera on Flat Fish Lodge 24/7/365 since 1993. The appellants want new conditions added. One new point raised tonight was to bring back the eight conditions from the original approval, but the appellants have not submitted any evidence to support their request. They criticize the fact that TLR did not provide their tax records to show that they collect sales tax for the murder mystery dinner, but they do not provide any evidence of any excessive noise or other disturbances that they claim happened. If weddings, receptions and dinners held at the lodge in the past, with their parking issues did not bother the appellants at the time; there is no need to apply additional restrictions now. Since many of the restrictions requested such as a protective screen or septic regulation are not the type of restrictions allowed by the LOZD. The appellants are asking for the original eight conditions to be imposed but they did not ask for that in their appeal and she believes that the commission should not consider this request. One appellant claims that the bed & breakfast was not legally established prior to the adoption of the LOZD because it allegedly violated the C&H covenants. However, the borough's use of the term, legally established, in the LOZD ordinance does not refer to private covenants but that the use violates a law adopted by a federal, state or local government. Private covenants are not laws. TLR's bed & breakfast business with special events does not violate any laws and the borough does not enforce private covenants. Therefore, the commission should disregard this objection. It is important to understand that C&H Estates is not some exclusive single-family residential subdivision. There are numerous business in C&H subdivision as well as multi-family residences, which are listed on pages 9 & 10 in the desk packet. Exhibit 3 in the desk packet provides business license information

showing that numerous business have been operating for years in the subdivision, before the formation of the LOZD. One of the commenters in the packet mentions the hypocrisy of the commercial business complaining about another commercial business in the subdivision. The commission should uphold the director's decision because there is no reason to reverse the decision or send the decision back to the director. There is no reason to bar TLR Adventures from engaging in the same business on Lot 26 of a bed & breakfast, including special events for different groups, as requested in the application, since TLR and the prior owners operated this type of business for many years on Lot 26 before the formation of the LOZD. She noted that the LOZD ordinance does not require that any particular owner operate the business at any particular time, it just states that it has to be prior existing use.

Commissioner Venuti has a question for Ms. Schmidt. He understands that TLR Adventures obtained this property in IRS sale. He wondered if when the property was purchased did they contact the state fire marshal to obtain approval for their intended use. There has also been noted that there are DEC regulations for septic systems and wondered if TLR has confirmed that their septic system meets state standards. Ms. Schmidt stated that is not the topic for tonight and that information has never been requested. She does not feel that this is relevant in this case but she will ask the Manager Ron Schmidt to answer the questions.

Ron Schmidt, Flat Fish Lodge Property Manager; 57745 Taku Ave., Homer AK 99669: Mr. Schmidt stated that in February of 2016 the property was closed with the IRS. Within 30 days, they were in contact with the fire marshal's office. In July of 2016, the state fire marshal informed us of new state regulations requiring that all bed & breakfasts have fire sprinkler systems. It took them almost three years to put in a sprinkler system. They are one of two bed & breakfasts on the peninsula, that has a fire sprinkler system in each guest room with a separate storage tank for water. The septic system on the property was the first capital improvement. They had a \$30,000 state of the art, environmental septic system put in the spring of 2016.

8. **Appellant Meyer Closing Statement:** This is issue is clearly one of balancing the rights of the applicant against the rights of other LOZD residents. The applicant states that regulation of use represents a taking of property rights. They are not advocating taking anything from the applicant, we want them to generate revenue at a level similar to proven past uses as is consistent with the LOZD ordinance. Largely they have had no complaints over past use of this property being used as a B&B. What they have objection to is an expansion of that use into an event center. They are also concerned with the applicant's objections to the regulation of conditions that they feel take their rights. Moving forward they would propose a working definition for event to be, the use of the property with remuneration for activities not associated with lodging. Their observations is that this property has been used as a B&B and the prior legal use for commercial events has not been demonstrated. The

information presented on past use for events is sparse and ambiguous. Their recommend actions will be conditional on the commission findings. However, if the planning commission finds no evidence of a prior existing use of an event center, they would request that the prior authorization of April of 2020 be reinstated with a finding that states there was no legal proof of prior existing use for events. The would also want to prohibit commercial events involving non-lodging guests. They would also request condition #8 be modified to prohibit outdoor use by the B&B guests between 9PM and 9AM. If the commission should find that there is legal proof of a prior nonconforming use of events, they would recommend a condition prohibiting outdoor events since there is no documented prior use of outdoor events and to allow them would constitute an expansion. They would also request for conditions prohibiting parking on the road and outdoor B&B use between the hours of 9PM and 9AM. If the commission decides to allow outdoor events, they recommend that they place conditions to protect the residential character of the LOZD. Specifically they ask that you would limit the use to past documented use levels by limiting attendance, parking on the road, amplified music and limiting outdoor events to 9AM to 9PM. It is their hope by having specific limitations on types of uses will inform the owner or future owners, as well as local residents as to what is exactly expected to maintain the residential nature of the LOZD.

- 9. Appellant Cutler Closing Statement:** Everyone knows what events are and everyone know what a residential neighborhood is. His reasons for wanting the eight conditions from the previous director's decision can be found in his letter in the appeal packet dated February 26, 2021. All parcel owners should be subject to the same restrictions and provision of the code. Which includes his small farm, which is more like a garden, not the commercial operations as alluded to by the applicant's lawyer. He again noted that the photograph overlay submitted as an exhibit by the applicant is incorrect – that is not his property or high tunnel. Evidence submitted by the applicant needs to be examined for truthfulness and integrity. He and his wife operate the small family farm on his property. We do not have a storefront, we do not have delivery trucks coming and going nor do we advertise. They donate or consume the bulk of their crop yeild except of a small portion. There were no dissenting comments made to the planning department on their application for approval of continued operations. All legal proofs, such as tax records were provided as required. Their farm is organic and has virtually no impact on the residential character of the neighborhood. If they let their business license go, they could easily convert their status to a home occupation of cooking and preserving, which are allowed without any special approvals under the LOZD code. He and his wife were the first couple to purchase a parcel and build a home in the C&H Subdivision some 40 years ago. Again, he would ask that the conditions for commercial operation within the residential neighborhood be restored to those that were thoughtfully placed by the previous director. It will make the homesteaders happy and will look good on the Borough's long-term comprehensive plan.

- 10. Appellant Pitcher Closing Statement:** There is a long and difficult history related to this property, it

has been sort of like a cancer in this neighborhood. He hopes that the commission can see that in the history of this property. This whole situation has been very difficult for the neighborhood. It has destroyed relationships and caused a lot of dissension. He agrees with Mr. Meyer's recommendations in that there needs to be a set of controls put in place that keeps this property from becoming anything other than what it was. This was a small B&B with very little use and that is all it ever was. They may have had an indoor wedding, which was probably the family's that lived there. For the applicant to use this as a launching point to expand into something very different from what it ever was is inappropriate. The applicant states that other business are located in the area, he is one of those businesses. He is a photographer and travel writer and he also works for the court system. His job and the other business are allowed under the R1 zoning and covenant because they are home based. They do not have customers coming and going to their homes, they do not bring in extra traffic and they do not change the character of the neighborhood. The applicant's proposed business is a very different situation. He would like to see them continue as a B&B, which he believes is an appropriate use. He does not want to see them operate as an event center that would be an expansion of the prior use.

- 11. Applicant Closing Statement (Kristine Schmidt):** The planning director found that there was enough information to support TLR application for a nonconforming use as a bed and breakfast that included special events. That this was a prior existing use before January of 2020. The appellants have not provided any evidence to negate the director's findings in that decision. The appellants have not provided evidence to support their argument that TLR use was not legally established prior to January 7, 2020. The appellants have not provided any evidence to justify additional or arbitrary restrictions they have requested tonight. They have not provided any evidence to support imposing on TLR conditions that are outside the limits of the LOZD ordinance such as fencing. The commission should uphold the Planning Director's decision. She noted that Mr. Cutler stated that his request to reinstate the original eight conditions was in his appeal, they are not. Mr. Cutler believe that information contained in any of his communications should be included in the appeal. The appeal is limited in scope to what was submitted with their appeal application. People are blaming the business for not being operational in the last year, which was during a pandemic. It is clear that most businesses, especially tourist related businesses, were not operating at full capacity. The business should not be punished just because they have not been in full force in the last year or so. They should not be restricted to only the number of guests that they had during that period. The restrictions you are being asked to impose, which have never been before the director, are arbitrary and should not be imposed. Restrictions placed on business should be based on facts, and should have been provided to the Planning Director so they could be included in the decision process. She would ask the commission to disregard the many new and arbitrary conditions that have been brought forth tonight.

12. Planning Director Melanie Aeschliman Closing Statement: Planning Director Aeschliman stated she stands by her opening statement and made herself available for any questions.

PLANNING COMMISSION DELIBERATIONS & DECISION

MOTION: Commissioner Ruffner moved, seconded by Commissioner Carluccio to uphold the current planning director's decision.

Commissioner Ecklund stated she agreed with former Planning Director Best's decision from April 2020 as shown on page 48 of 164 of the appeal record, which included eight conditions. She then asked Ms. Burley if that is the same decision that our current Planning Director is asking to uphold. Ms. Burley replied that it was not. Ms. Aeschliman added that much of her decision was the same but she removed those items she believed to be arbitrary and pulled from other sections of code. She then noted that copy of her decision could be found on page 138 of 164 of the appeal record.

Commissioner Ruffner asked for clarification regarding permit conditions. It is his understanding the current director's decision rescinded the eight conditions of the prior director's decision, and replaced those conditions with the three conditions found on page 140 of 164 of the packet. He then asked if his understanding was correct. Ms. Burley replied that he was correct.

Commissioner Ecklund stated that she has encouraged many residential areas to form LOZDs because it is the correct way to control what they would or would not like in their communities. She stated that she is in favor of this LOZD and believes the intent of it was to be an R1. There was then a request for a nonconforming use / prior existing use to be approved. However, from some of the statements tonight there appears to have been no sales tax collected or receipts showing the prior existing use for the event center. She believes the approval of any prior existing uses should be a legal use. She believes the bed & breakfast business is a prior existing use, all though she is not sure, that she does not have the sales tax records in front of her. However, from what she has heard, no evidence has been presented that the event center was a prior use.

Commissioner Ruffner stated not many of these LOZD have been enacted. He is most interested in the commission being consistent in their decisions. He then asked counsel if there is a precedent in imposing conditions with the intent of trying to keep existing nonconforming uses in place. Ms. Burley replied it is a slippery slope adding conditions that were not asked for. She would point out what they are reviewing is the decision of the planning director. The commission is not here to add their own conditions necessarily. If they choose to do so, they will need to make findings of fact to support their conditions. One of the arguments tonight was the event center was not asked for in the original application. Commissioner Ruffner then asked if they did not uphold the current director's decision, would it revert to the original decision with

the eight conditions. Ms. Burley stated she was not sure and will have to think about that before answering. She did note one of the current conditions in the present director's decision is to follow KPB code 21.44.110. She would point out that it states you cannot expand the use beyond what is already allowed. Therefore, if it is limited to small events then you cannot have large events.

Commissioner Ecklund stated she supports using the eight conditions from prior director Best's decision. In that decision, he mentions that the use thereafter must conform to the provision of KPB code 21.44. He mentions that section of code twice in his decision, which includes 21.44.110. Therefore, it would still include the current planning director's recommendations if they chose to revert to the prior director's decision. She understands the eight conditions may be broader than what the current planning director wanted. It appears she wanted to narrow the scope. She noted that Ms. Aeschliman stated she felt some of the prior conditions were arbitrary. Which conditions did Ms. Aeschliman feel were arbitrary? She does not want those conditions to go forward if it is going to lead to another appeal. Mr. Kelley replied the conditions from Director Best's decision they were concerned with were, condition #3 related to the outside appearance of the building, #5 about sign sizes, #6 no street parking allowed, and condition #8 restricting the hours of operation for outdoor events. These conditions were borrowed from other sections of code. They believed by saying comply with all laws, and do not be a nuisance, that it would cover those areas of concern. Obviously, the appellants did not agree with that stance. In addition, some of the conditions were just a parrot of code such as #2 that stated that the nonconforming use could not be increased. They believed by stating they had to comply with KPB 21.44.110 (Nonconforming Uses) that particular condition was already covered. The conditions related to signage size, street parking and hours of operation are not addressed in this section KPB code but from other outside sources.

Commissioner Ecklund then asked if the Director Aeschliman compared the conditions she removed from Director Best's decision to the requirement of a R1 Zone. In her opinion, the conditions from his decision sound like things that would be in a R1. Mr. Kelley replied he believed the intention of those conditions was to try to protect the residential character of the neighborhood. The R1 section of code does not cover most of the conditions from his decision. He believed that Director Best was drawing from the home occupation section of code. The current director saw these as two separate sections of code. There are prior existing uses, and then there is the application for a permit for home occupations that comes after the creation of an LOZD.

Commissioner Carluccio stated she is trying to determine if the event center was a prior existing use. From what she sees they can continue to operate as a bed & breakfast and are limited to small indoor events. So a small indoor event based on the information she has before her is 16-20 people. Would she be correct in her understanding? Director Aeschliman replied she does not believe they are limited to indoor events only. She did want the applicants to keep it to smaller scale events. An event to some people could be a large-scaled civic type of event. What she was looking at in her decision was a smaller venue with a smaller

sized crowd, something like a religious retreat or a small wedding. The argument here seems to be over the definition of event. Commissioner Carluccio then replied that if the event were going to spill over to the outside then in her opinion, it would no longer be a small-scaled event. She sees no reason why the applicant should not be able to continue business as a bed & breakfast but she does not believe they should be able to expand their present business. She does not believe that they should be able to build additional things that would expand the business to include an event center. In order for the applicant to prove the event center was prior existing she would want to see some kind of tax records and not just over the past year, but prior to the existence of the formation of the LOZD. She personally owns a small business, a small lodge. She stated that she could give you the name of every person who has stayed there and paid a bill. She can provide tax records for her business confirming that. She finds it unusual that the applicant has not supplied this type of information. Therefore, she is reluctant to believe that there were any consistent events supporting the determination that this was a prior existing use.

Commissioner Venuti stated he is familiar with this neighborhood. He remembers when the Chocolate Drop Inn was built. At the time, he was a contractor working on a project in the same area. His business as a building inspector has also brought him into this community on more than one occasion. He recalls when this LOZD was proposed, it was because there were concerns that this property was going to be used as a drug treatment center. While he understands drug treatment centers are needed, he also understood there was resistance in the committee to that type of use. He has been in and out of this subdivision for over 40 years and at one time, he thought this place was abandoned. While he does not live in the subdivision, he is pretty attuned to what happens within the community and he does not have any knowledge of any large events being held there. He agrees perhaps this should be a bed & breakfast but he does not see that it has a valid history of being an event center.

Commissioner Gillham stated that she has looked at all the information before her and she definitely believes that this was a bed & breakfast. What concerns her is that she does not see anything like a plan of operations showing how their business functions will not impinge on the local residents. She also does not see any information that shows that this was an event center in the past or that it could in the future operate as an event center and not imping on their neighbors.

Commissioner Ruffner stated it seems the heart of this issue are the conditions as found on page 52 of 164. There seems to be no issue with condition #2 as it come straight out of code. All the conditions that come after that, 3, 4, 5, 6, 7 & 8 - it would seem to him if any of those things happened they would be outside of condition #2. The neighbors would be right to appeal if there were any changes to the buildings, signs, street parking etc... If any of those changed from what has happened in the past then the applicant would be out of compliance. He believes that this was what the prior director's decision was trying to get at. If there were any intensifying changes to those things listed in the conditions, it would not be consistent with the prior use. He was having a little difficult time with the new conditions in the current director's

decision. They seem to be saying the same thing – if any of the things happened in the original eight conditions, the neighborhood could appeal and complain that applicant did not comply with KPB code 21.44.110 regarding changing the character of the business. He tends to agree with the original decision and findings that tried to constrain those changes or expansion of use compared to what existed before the creation of the LOZD.

Commissioner Ecklund stated she is thinking along the same lines as Commissioner Ruffner. She likes how it was spelled out in the original decision even though she believes the current director's decision includes all that by saying they must comply with code. If code states they cannot expand the use then they cannot put up a bigger sign etc... She believed former Planning Director Best wanted to include conditions from the home occupation and R1 code to address some of the particular types of expansion activities. She stated that she would like to see the original decision from Director Best upheld.

Commissioner Brantley asked for clarification from legal. It is his understanding that what the commission is being asked to do is review the current director's decision. The commission is not being asked to reinstate or revert to the old decision correct. Ms. Burley replied that former Planning Director Best made a decision to grant the nonconforming use with conditions. Director Aeschliman upheld that decision but modified the conditions. The appeal before you states that Director Aeschliman made a mistake in finding that there was sufficient evidence showing that the property was used for special events and that her decision should not be upheld.

Commissioner Ecklund asked Ms. Burley if Director Aeschliman's decision is not upheld whose decision would be. Ms. Burley stated that it would go back to Planning. The appellants have stated that she made a mistake in finding that there was special events.

Commissioner Ruffner stated he is a bit confused about the process. He is going to skip and not go into the timeline stuff, as there was the pandemic and staff changes during that have occurred. It seems to him if there was going to be a change or a modification to an LOZD it would come back to the Planning Commission and not be handled by the Director. Now the commission is being put into the position of having to arbitrate between a former director and a current director's decisions. Ms. Burley replied that both directors agree that there is an LOZD; the question is how far that LOZD can go. Can this property in the LOZD host special events. Commissioner Ruffner replied that LOZD code does requires that we allow prior existing uses but not allow them to expand. The prior director's decision really constrained the expansion, more so than the current director's decision, by listing eight conditions. If any of those things happened then the neighbors could appeal and say that it is an expansion of the prior use.

Commissioner Ecklund stated the third second whereas statement of the PC Resolution 2021-13 states the "three property owners within the C&H Estates Local Option Zoning District have appealed the planning

director's decision to uphold the prior approval". The way she reads it, both decisions are being appealed. The appellants do not wish for either decision to be upheld, would she be correct? Ms. Burley replied that what is being appealed here is an LOZD with special events. Commissioner Ecklund then restated what is being appealed is a nonconforming using of a B&B that holds special events within the LOZD. Ms. Burley replied that is correct.

Commissioner Carluccio stated she was confused. If the commission declines to uphold the current director's decision, what do we do? Can we reinstate the prior director's decision? Does the whole thing come back to the planning commission to make a decision? She asked if legal could state what their options are. Ms. Burley stated they could uphold the current Planning Director's decision, which upheld Planning Director Best decision that found that there was an LOZD with special events. You can choose to not uphold the current planning director's decision and find that the planning director was in error. You could also decide to remand for additional findings based on lack of clarity on the record. The last option should not be taken lightly; there should be strong reasons as to why it is being sent back, such as the record is lacking. However, what the commission has before them now is the whole record; you have the same information that the directors had to make their decision. Commissioner Carluccio then stated that it appears to her as that they have a lot of documentation but none of it proves it was an event center.

Commissioner Morgan stated she feels like she going to ask the same questions that several of the other commissioner have already asked. She is still very confused. From what she has read in the record, it is her understanding that this was the appeal of the current director's decision, which was a slight change from the prior director's decision. She wants to understand why if they choose to not uphold the current director's decision, why it would not revert to the prior director's decision.

Commissioner Ecklund wanted to know if they could amend their motion to state, they uphold the current planning director's decision but use the conditions attached to Director Best's decision, and not the conditions on the current decision. Ms. Burley replied they could deny Director Aeschliman's decision because they find that she was in error or you can uphold her decision. Planning Director Aeschliman reviewed Director Best's decision and found under her interpretation that he made no error in finding that this was an LOZD with special events. She then made a decision to revise the conditions. The commission is reviewing her decision and not Director Best's. The appellants were not able to appeal Director Best's decision in a timely fashion. Director Best left and other things happened that did not allow for an appeal of his decision. Director Aeschliman then revisited the decision and that is the decision under appeal.

Commissioner Morgan then asked Ms. Burley what would happen if they choose not to uphold Director Aeschliman's decision. Ms. Burley replied they would be finding there was not a basis to find that there was a special event center and the special event would be denied. Commissioner Morgan replied that she was still confused. She thought the event center was in the original decision by Director Best. Ms. Burley

replied that Director Best did find that there was an LOZD with special events. Ms. Aeschliman found that there was an LOZD with special events. Then the appeal before the commission tonight, the appellants state Director Aeschliman made an error by finding there are special events. They stated that the applicant had provided insufficient evidence to make that determination. Ms. Burley stated if the commission would like they could take a brief recess and she would reread the documents to be 100% sure. Commission Morgan replied that should would like that.

Commissioner Carluccio asked before they recess she would like to know why the decision was sent back to the planning director. Was Director Best's decision appealed? Mr. Kelley replied that there was an appeal of Director Best's decision filed by the applicant. Unfortunately, due to the changeover in staff, it was shuffled around and no action was taken. A new director comes in a year later and there was a reconsideration of the matter and a decision was be made. That is the decision being appealed tonight. Mr. Kelley also added that he believed code allow the Planning Commission to have the authority to review this decision and reverse, uphold or modify the decision.

Chairman Martin then called for a five-minute break.

Chairman Martin called the meeting back to order at 7:52 PM.

AMENDMENT MOTION #1: Commission Ruffner moved, seconded by Commissioner Carluccio to amend the motion to include the eight conditions from the previous director's decision.

Commissioner Carluccio asked how the amendment reinstating Director Best's conditions address the issue of whether or not the event center was a prior existing use. One of the problems the appellants have with the current director's decision is that it allows for an event center. That Director Aeschliman did find that events did take place establishing the prior existing use. Does this amendment negate that finding? If it does not then she thinks that should be addressed in the amendment.

Commissioner Ruffner replied in his opinion he did not believe that was necessary. They may have had events in the past but that going forward any events will be constrained by the reinstatement of the eight conditions. This would make any event consistent with what was prior existing.

Commissioner Carluccio asked for a legal opinion on this. Ms. Burley stated that by modifying the decision that was previously made you are not negating the decision that was previously made.

Commissioner Ecklund noted on page 48 of 164 in the appeal packet that the staff report states that the applicant said, "the building on the property has been used as a bed & breakfast for over 10 years and this this use has included special events for different groups". In the staff report, it states that the

nonconforming use is for Flat Fish Lodge B&B and Event Center. Director Best's decision stated the use could not be intensified or expanded and put conditions on times. Director Best included special events in his decision.

Commissioner Ruffner stated he believed the amendment upholds both directors' decisions. That there were events there and the appellants appeal is to strike out all events. He is comfortable with staying with the directors' decision with the addition of the eight conditions. He stated that he would be supporting this amendment.

Seeing and hearing no objection or further discussion, the motion was carried by the following vote:

AMENDMENT MOTION PASSED BY UNANIMOUS VOTE:

Yes	8	No	0	Absent	3
Yes	Brantley, Carluccio, Ecklund, Gillham, Martin, Morgan, Ruffner, Venuti				
Absent	Bentz, Chesser, Fikes				

Commissioner Carluccio stated once again that she did not see any proof there were events of any magnitude or consistency so she will not be supporting the motion.

Commissioner Morgan stated she tends to agree with Commissioner Carluccio about the events, but what does it mean at this point if they do not support the motion. Ms. Burley replied it would mean they could operate as a B&B but not have events. Commissioner Morgan then asked which decision would they be reverting to. Ms. Burley stated they are currently voting on upholding the current directors' decision and adding the eight conditions. If you choose to not uphold the motion, you are not upholding the directors' decision and you are not adding eight conditions. The directors' decision was to allow events, if it is not upheld there will be no nonconforming use allowing events. Commissioner Morgan then asked just to make sure, that a vote no would allow the B&B, it would not add the eight conditions nor allow events. Ms. Burley replied that she was correct. Commissioner Morgan then stated the no vote would mean there would be no conditions at all on the nonconforming use. Ms. Burley replied they would still be subject to all the conditions in code.

Commissioner Ecklund stated the original request from the applicant was to allow a B&B and an event center. She wanted to know at the time of the application was the B&B considered the nonconforming use or was the event center the nonconforming use for the R1 LOZD. Mr. Kelley replied that the application was for a nonconforming use determination based upon it being a B&B and an event center prior to the formation of the LOZD. In his view the commission hearing this de novo because code did not provide for us to be on the record. Therefore, the commissions' decision should be on the application filed by TLR unless it is being remanded to the Planning Director to make another decision consistent with your decision. He would encourage the commission to make a decision on this application as it has been out there for

over a year now.

Commissioner Ecklund asked if a B&B is a nonconforming use for an R1 LOZD. Mr. Kelley replied that code does not list all the various uses that qualify as prior existing uses. The prior existing use can be anything that was in place before the formation of the LOZD, for example, it could be a bowling alley. The applicant is saying the B&B and the event center existed before the formation of the LOZD and they are requesting that those uses be approved. Commissioner Ecklund then asked if B&B are specifically addressed as not being allowed in a R1 LOZD or are they not addressed at all. Mr. Kelley replied that section of code does not address B&Bs at all. However, the applicants are claiming that the B&B with the event center was in existence before the LOZD was created. It does not matter if the R1 does not allow them as it existed prior to the LOZD.

Commissioner Carluccio then stated she does not support the motion as it stands, but from comments, she has heard from both the commissions' attorney and staffs' attorney, they could pass a motion that would give the applicant B&B rights but not the event center. The event center seems to be the point of contention here. She then asked Ms. Burley if the commission could do that. Ms. Burley replied they could. Commissioner Carluccio stated that she believed that it would be cleaner if they voted on the motion on the floor. Then there could be a new motion that approves the nonconforming use application for the B&B with the addition of the eight conditions. Ms. Burley agreed that it would be cleaner to deal with the motion on the floor and then make a new motion.

Seeing and hearing no objection or further discussion, the motion was carried by the following vote:

MOTION #1 FAILED BY DUE TO A TIE VOTE:

Yes	4	No	4	Absent	3
Yes	Brantley, Gillham, Ruffner, Martin				
No	Carluccio, Ecklund, Morgan, Venuti				
Absent	Bentz, Chesser, Fikes				

MOTION #2: Commissioner Carluccio moved, seconded by Commissioner Ecklund to grant TLR a nonconforming use to operate as a B&B only.

Commissioner Morgan asked if this would be the time to add the eight conditions to the permit. Chair Martin replied yes.

AMENDMENT MOTION: Commissioner Ecklund moved, seconded by Commissioner Morgan to amend the motion to add the eight conditions listed on page 50 of 162 of the appeal record, listed in prior Planning Director Bests' April 8, 2020 decision.

Seeing and hearing no objection or further discussion, the motion was carried by the following vote:

AMENDMENT MOTION PASSED BY UNANIMOUS VOTE:

Yes	8	No	0	Absent	3
Yes	Brantley, Carluccio, Ecklund, Gillham, Morgan, Martin, Ruffner, Venuti				
No					
Absent	Bentz, Chesser, Fikes				

Commissioner Ruffner stated that he would not be voting in favor of this motion, as he believed by adding the eight conditions to the earlier motion it would cover any events whether they were large or small by not allowing them to expand the existing use.

Seeing and hearing no objection or further discussion, the motion was carried by the following vote:

MOTION #2 PASSED BY MAJORITY VOTE:

Yes	6		No	2	Absent	3
Yes	Brantley, Carluccio, Ecklund, Gillham, Morgan, Venuti					
No	Ruffner, Martin					
Absent	Bentz, Chesser, Fikes					

Chair Martin then read the appeal process into the record found at the bottom of the hearing agenda.

ADJOURNMENT – The hearing was adjourned at 8:20 PM.

Ann E. Shirnberg
Administrative Assistant