

MEMORANDUM

TO: Blair Martin, Chair
Member, Kenai Peninsula Planning Commission

FROM: Sean Kelley, Deputy Borough Attorney

DATE: September 13, 2021

RE: Setting the Remand Hearing Date ITMO: River Resources, LLC

The purpose of this scheduling discussion is for the Planning Commission to set a date to consider this matter consistent with the Hearing Officer's remand order. The Commission should not discuss the merits during the scheduling discussion.

On August 25, 2021, Z. Kent Sullivan, Administrative Law Judge / Hearing Officer in the matter of the appeal filed by River Resources LLC, issued an *Order Denying Motion to Stay and Granting Motion to Remand to the Kenai Peninsula Borough Planning Commission (Hereinafter "remand order")*. The remand order is attached and provided to the Planning Commission as part of this memorandum. In addition, an early order title *Order Inviting Response and Withdrawing Opening and Reply Statement Briefing Deadlines* is provided for the Commission's awareness and benefit. The remand order provides, in part, that the matter is remanded to the Planning Commission to:

- "1. Make factual findings supporting its decision based on substantial evidence in the record regarding the:
 - a. bonding requirements;
 - b. well monitoring timeline;
 - c. qualifications and independence of McLane Consulting, Inc.; and
 - d. specific criterion contained in KPB Code §§ 21.29.040 and 21.29.050.
 2. To the extent that factual information does not presently exist in the record the Commission shall augment the record by conducting an additional hearing.
- ...

The motion seeking to remand this case to the KPB Planning Commission so that the Commission may provide reasoning and detailed factual findings supporting its decision in this matter is GRANTED." (See, pages 7-8 of Hearing Officer's remand order).

This memo recommends that the planning commission: (1) discuss whether or not it will reopen this matter for public hearing and take new evidence consistent with the above quoted portion of the Hearing Officer's Decision; and (2) set a date certain for the remand hearing and/or public hearing, whatever the case may be.

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON BEHALF
OF THE KENAI PENINSULA BOROUGH**

In the matter of the Kenai Peninsula Borough)
Planning Commission's decision to deny the)
request for modification to a conditional land use)
permit for a material site to allow for excavation)
within the water table on properties described at)
Tract C1, Patson Properties 2019 Replat, according)
to Plat 2019-68, and the Northwest ¼, Southeast ¼,)
Section 34, Township 5 North, Range 10 West,)
Seward Meridian, excluding Patson Road)
right-of-way Kenai Recording District,)

RIVER RESOURCES, LLC,)

Appellant.)

OAH No. 21-1682-MUN
Agency No. 2021-01-PCA

**ORDER DENYING MOTION FOR STAY AND GRANTING MOTION FOR REMAND
TO THE KENAI PENINSULA BOROUGH PLANNING COMMISSION**

On August 3, 2021, the Appellant, River Resources, LLC, and the Kenai Peninsula Borough Planning Department, jointly filed a motion seeking to remand this matter to the Kenai Peninsula Borough Planning Commission for supplementation of the record with additional findings pursuant to KPB Code Section 21.20.320(3).¹ Following that motion, an order was issued indicating how this Administrative Law Judge was inclined to rule and inviting responses from the parties who had entered appearances in this case, but are neither the appellant, the applicant, nor the Borough Planning Department.²

Several parties submitted responses generally supporting and seeking adoption of the Planning Commission's original decision, but not specifically addressing the motion to remand itself.³ Party Dale McBride, by and through his attorney, did file an opposition to the motion for

¹ Motion to Remand to Planning Commission (August 3, 2021); Memorandum of Law in Support of Motion for Remand (August 3, 2021); and Motion for Extension of Time to File Opening Statements (August 3, 2021).

² Order Inviting Response and Withdrawing Opening and Reply Statement Briefing Deadlines (August 6, 2021).

³ Patrick Nolden Email in Support of Planning Commission's Decision (August 18, 2021); Carol Nolden Email in Support of Planning Commission's Decision (August 18, 2021); William and Karen Ferguson Email Seeking Affirmance of the Planning Commission's Decision (August 19, 2021); Joseph and Billie Hardy Email Seeking Affirmance of the Planning Commission's Decision (August 21, 2021).

remand and a motion seeking to stay this appeal pending the outcome of a Superior Court case in an unrelated proceeding.⁴ This order addresses both the motion seeking to stay this case by Mr. McBride and also, the motion for remand by River Resources and the Planning Department.

A. Order Denying Stay Pending the Outcome of a Superior Court Case in an Unrelated Proceeding.

In his motion seeking to stay this matter, Mr. McBride claims that this case is on all fours with an unrelated matter previously before the KPB Planning Commission and that is now on appeal to Superior Court, titled *Bilben v. Beachcomber, LLC*, 3KN-20-00034CI. Accordingly, he asks that this case be stayed pending the outcome of the *Bilben v. Beachcomber, LLC*, based on judicial comity and efficiency.⁵

The *Bilben* case involves separate appeals from matters before the KPB Planning Commission. The first concerned the Commission's decision to grant Beachcomber's application for a conditional land use permit (CLUP).⁶ That decision was appealed to a hearing officer who ultimately upheld the Commission. The hearing officer's decision was then appealed to the Superior Court.⁷

While the appeal of the CLUP was pending before the Superior Court, Beachcomber applied for a modified conditional land use permit (MCLUP). The MCLUP was approved by the Commission. In doing so, it entered extensive findings. However, the decision was administratively appealed and ultimately, an Administrative Law Judge within the Office of Administrative Hearings (OAH) was asked to decide the appeal.⁸ A decision was then issued concluding that similarities in the factual issues between the *Bilben* CLUP and MCLUP proceedings warranted issuance of a stay of the MCLUP appeal based on considerations of judicial comity, law of the case, and judicial economy and efficiency.⁹ Accordingly, the MCLUP proceeding before OAH in *Bilben v. Beachcomber, LLC*, OAH 20-0673-MUN was stayed pending the outcome of the issues concerning the CLUP appeal before the Superior Court in *Bilben v. Beachcomber, LLC*, 3KN-20-00034CI.¹⁰

⁴ Opposition to Remand and Request for Stay Pending Superior Court Decision (Minor Corrections) (August 23, 2021).

⁵ See generally *id.*

⁶ *Bilben v. Beachcomber, LLC*, OAH 20-0673-MUN, Order Staying Case at 1-4 (September 30, 2020).

⁷ *Id.*

⁸ *Id.* at 4-7.

⁹ *Id.* at 7-23.

¹⁰ *Id.*

Mr. McBride now argues that this case should be similarly stayed pending the outcome of the Superior Court case in *Bilben v. Beachcomber, LLC*, 3KN-20-00034CI.¹¹ He justifies doing so by pointing to the similarities between this case and the *Bilben* cases. Specifically, that:

1. both cases involve interpretation of the same KPB ordinances;¹²
2. both involve CLUP and MCLUPs for materials sites; and
3. the Commission has somehow been operating under a regulatory scheme circumscribed by an OAH interpretation of the KPB Code and that until the Superior Court case in *Bilben* is decided, it would be inappropriate to remand this case back to the Commission.¹³

However, the alleged similarities between this case and *Bilben* have been wholly misconstrued. It is true that both cases involve application of the CLUP and MCLUP provisions of the KPB Code. It is also true that both involve material extraction sites adjacent to neighboring residential properties. But that is where the similarities end. Further, those few similarities are inconsequential when one takes into consideration the reasons behind grant of the stay in *Bilben v. Beachcomber, LLC*, OAH 20-0673-MUN.

In that case, the stay was granted because there were active appeals occurring in separate cases, in separate forums, involving the same materials extraction site, the same applicant, the same appellant, the same Planning Commission and most of the same involved parties. Further, the specific legal issues being appealed before OAH involving the MCLUP and in the Superior Court case involving the CLUP, were largely the same. Under such circumstances, it made no sense from a judicial comity and judicial economy/efficiency standpoint to have both cases occur concurrently, particularly given the risk of different outcomes and the fact that the Superior Court case was likely precedential.¹⁴

But here, other than the limited similarities already mentioned, this case and the *Bilben* case are wholly unrelated. They each involve different sites, facts, parties, and legal issues. There is simply no reason to stay this case based on anything occurring in *Bilben*.

Finally, it is also incorrect to suggest that OAH is somehow responsible for restricting the KPB regulatory scheme regarding material sites and gravel pits and that it would therefore be

¹¹ See generally Opposition to Remand and Request for Stay Pending Superior Court Decision (Minor Corrections).

¹² *Id.* at 1.

¹³ *Id.* at 6, 8.

¹⁴ See generally *Bilben v. Beachcomber, LLC*, OAH 20-0673-MUN, Order Staying Case.

inappropriate to remand this case back to the Commission until after OAH's interpretation of that regulatory scheme is construed by the Superior Court.¹⁵

Specifically, it is alleged that:

As a result of the provisions of order 2018 – 02, the Kenai Peninsula Borough Planning Commission has been proceeding upon prior instruction to the planning commission in OAH order 2018 – 02, at Judicial Notice Materials Bates # 14-16 that the discretion of the KPB planning commission is highly circumscribed by the OAH interpretation of the wording of the KPB Code in the broadest sense.

The KPB planning commission, in deciding sub-water table gravel pit gravel pit permits, has been operating under the OAH statutory construction interpretation and instruction that the KPB Planning Commission does not have the authority to deny an conforming application once filed, about which commissioners commented in the matter underlying the Anchor Point matter currently before the Kenai Superior Court.

...

Under the current circumstances, Superior Court is currently hearing a comprehensive challenge to the entire OAH-ordered interpretation underlying the Kenai Peninsula Borough Planning Commission's authority and the OAH legal interpretation that restricts the entire regulatory scheme and authority for material sites/gravel pits. Until this precedent-setting appeal is resolved by the Superior Court at Kenai, the proposed remand is inefficient, likely superfluous, and potentially mischievous.¹⁶

What is misconstrued is that the decision referenced for the above-referenced statements is from Hearing Officer, Holly C. Wells. Ms. Wells is not an Administrative Law Judge and is not affiliated with OAH. The decision by Ms. Wells was made in the original *Bilben* appeal of the CLUP, Kenai Peninsula Borough Case No. 2018-02.¹⁷ The decision by Hearing Officer Wells was not part of *Bilben v. Beachcomber, LLC*, OAH 20-0673-MUN, and was in no way binding on the Administrative Law Judge in that case, or in this case. As such, the above-referenced assertions that OAH somehow foist an interpretation of the KPB Code on the Commission, and that the Commission is now saddled with that interpretation until such time as a decision is rendered in *Bilben v. Beachcomber, LLC*, 3KN-20-00034CI, are incorrect and without merit. Simply stated, the only substantive decision made by an Administrative Law

¹⁵ Opposition to Remand and Request for Stay Pending Superior Court Decision at 6, 8.

¹⁶ *Id.*

¹⁷ Request to Take Judicial Notice (August 20, 2021), Att. A.

Judge from OAH in any of the *Bilben* proceedings was the order staying the appeal regarding the MCLUP in *Bilben v. Beachcomber, LLC*, OAH 20-0673-MUN.

For these reasons, there is no basis to stay the present case pending the outcome of the Superior Court case in *Bilben v. Beachcomber, LLC*, 3KN-20-00034CI. While there are minor similarities between the two cases, those similarities are limited and of no consequence concerning the present appeal and the matters presently at issue in this case. Consequently, the motion seeking to stay this proceeding is denied.

B. Order Granting Remand to the KPB Planning Commission

Modification applications for conditional land use permits are submitted to the Kenai Peninsula Borough Planning Director. The application is reviewed, and once deemed complete, the Planning Director is required to schedule and notice a public hearing in front of the Planning Commission.¹⁸ Following the public hearing, the Commission is then required to act on the application and issue a decision. In doing so, the Commission may approve, modify, or disapprove the modification application.¹⁹ However, the Commission's decision on the modification application must contain written findings and reasoning for its approval, disapproval, or modification.²⁰

A person aggrieved by the Planning Commission's decision then has a right to appeal.²¹ The appeal is conducted by a hearing officer.²² In this case, this appeal has been referred to OAH and this Administrative Law Judge is serving as the hearing officer.²³

Appeals are heard solely on the established record, unless changed circumstances or new evidence should be considered.²⁴ If there is not enough evidence in the record on a material issue, or if the Commission's findings are insufficient to support its decision, the remedy is to remand the matter to the Commission rather than to take new evidence at the appeal level.²⁵ The KPB Code specifically permits the hearing officer to do so in order to address procedural errors or gaps in the evidence.²⁶

¹⁸ KPB Code §§ 21.25.050, 21.29.020(B), 21.29.090.

¹⁹ *Id.* at § 21.25.050(B).

²⁰ *Id.* at § 21.25.050(C).

²¹ *Id.* at § 21.25.100.

²² *Id.* at § 21.20.220(A).

²³ OAH Administrative Hearings Case Referral Notice (June 29, 2021); Notice of Assignment (July 2, 2021).

²⁴ KPB Code §§ 21.20.340(A), 21.20.320, 21.20.330(A).

²⁵ *Id.* at §§ 21.20.320, 21.20.330, 21.20.340(A).

²⁶ *Id.* at § 21.20.330(B).

The previously issued order inviting response and withdrawing opening and reply statement briefing deadlines is incorporated in its entirety in this order. As it already addressed in detail, there was a lack of factual findings and reasoning supporting the Commission's decision denying the application by River Resources for modification of its conditional land use permit.²⁷ In issuing its decision, the Commission only purported to make three separate, single sentence findings. However, even these purported findings were not factual findings, but instead, were more accurately characterized as conclusions, statements, and questions. They do not provide a reasoned basis for the Commission's decision based on factual findings from substantial evidence in the record, as the KPB Code requires.²⁸

That said, this order should not be construed to suggest that the Planning Commission's decision was otherwise in error or that the Commission must reach a different outcome. A decision on that point is left for another day. Instead, this order simply concludes that the Planning Commission's decision was not adequately reasoned and supported by specific factual findings. To be upheld, the KPB Code requires such findings. The record may or may not already contain the information needed to make the necessary findings. If sufficient facts are already in the record, then the Commission will simply need to articulate in writing specific factual findings based on that information and as addressed in detail in the order inviting response. If the record does not contain sufficient factual detail allowing the Commission to do so, then it may be required to schedule another hearing for such information to be provided.

The order inviting response gives examples of the many questions the Commission may want to consider having addressed and the answers to which may allow the Commission to make factual findings supporting its decision. However, as it now stands, and per KPB Code Section 21.20.330(C), the Planning Commission has not made sufficient findings of fact and conclusions to support its denial of the application for modification of the conditional land use permit. Instead, it must make findings addressing the matters contained in KPB Code §§ 21.29.040 and 21.29.050.

For instance, as to KPB Code Section 21.29.040, the Planning Commission may wish to specifically address whether the project:

- protects against the lowering of water sources serving other properties;

²⁷ See generally Order Inviting Response and Withdrawing Opening and Reply Statement Briefing Deadlines.

²⁸ *Id.*; KPB Code §§ 21.20.330(B), 21.20.320(2), 21.25.050(C).

- protects against physical damage to other properties;
- minimizes off-site movement of dust;
- minimizes noise disturbance to other properties; and
- minimizes visual impacts?

Also, one of the concerns raised by the Planning Commission was regarding the adequacy of the bond for the project.²⁹ The bonding requirement is addressed by KPB Code Section 21.29.050(A)(4)(d).³⁰ It provides that dewatering may occur, if among other things, the contractor/applicant posts a bond for liability for potential accrued damages.

Here, while the Planning Commission determined that the bond was too little, it is unclear what the potential liability may be for accrued damages. In other words, there are no findings of fact to support what potential liability might exist regarding this project or what an appropriate bond might be. Some of the questions the answers to which might help to support a conclusion that the bond is inadequate are:

- how many wells are within 300', 500' and 1000' of the proposed dewatering;
- while the applicant's engineer has concluded that nearby wells will be unimpacted, what sort of impacts might potentially occur assuming a worst-case scenario;
- what might the costs of those impacts be to remedy, on a per-well basis; and
- what is the amount of the bond that the applicant is proposing?³¹

The Planning Commission may wish to consider posing these questions to the applicant and its engineer and have them provide answers. Doing so would then potentially allow the Planning Commission to make appropriate findings of fact regarding the bond issue based on those answers. The answers should also be included in the record in this case.

For these reasons, the motion seeking to remand this matter to the KPB Planning Commission is granted. It is remanded requesting that the Planning Commission:

1. Make factual findings supporting its decision based on substantial evidence in the record regarding the:

²⁹ R. 162.

³⁰ KPB Code § 21.29.050(A)(4)(d).

³¹ It appears that, based on the documentation in the record, the proposed bond may be \$30,000. However, there has not been a factual finding by the Planning Commission identifying that this is proposed bond amount and that, given the answers to the other questions above, it considers this amount too little.

- a. bonding requirements;
 - b. well monitoring timeline;
 - c. qualifications and independence of McLane Consulting, Inc.; and
 - d. specific criterion contained in KPB Code §§ 21.29.040 and 21.29.050.
2. To the extent that factual information does not presently exist in the record, the Commission shall augment the record by conducting an additional hearing.

Conclusion

The motion seeking to stay this case pending the outcome of the Superior Court case in *Bilben v. Beachcomber, LLC*, 3KN-20-00034CI is DENIED. The two cases each involve different sites, facts, parties, and legal issues. Accordingly, there is no justification for entry of a stay.

The motion seeking to remand this case to the KPB Planning Commission so that the Commission may provide reasoning and detailed factual findings supporting its decision in this matter is GRANTED. All further proceedings in this case will be held in abeyance until such time as those findings are issued.

DATED this 25th day of August 2021.



Z. Kent Sullivan
Administrative Law Judge

Certificate of Service: I hereby certify that on August 25, 2021 a true and correct copy of this document was served on the following by e-mail to the following listed below:

Katherine Elsner, Esq.
katie@907legal.com

Joseph L.Kashi
kashi@alaska.net

Shannon McCloud
Shannonmccloud1@gmail.com

Michael & Ann Gravier
michael.gravier@yahoo.com
aygravier@yahoo.com

Billie & Joseph Hardy
jnbhardy@yahoo.com

Lindsay VanHoose
LindseyVanhoose@gmail.com

William & Karen Ferguson
bkakdream@yahoo.com

Bill Elam
belam@kpb.us

Jeremy Pechlel
jermypechel@msn.com

Mike & Karol Pomplin
j3cubpilot@yahoo.com

Bridget Geckles-Appow
Bgappow@aol.com

Kenai Peninsula Borough
Patty Burley
Legal@kpb.us

Gina Debardeleben
ginadebar@mclanecg.com

Kalyn & Tod McGillivray
Kalyn.mcgillivray1@gmail.com
Todmcgillivray@gmail.com

Kenai Peninsula Borough
Melanie Aeschliman,
Planning Director
maeschliman@kpb.us

William Ferguson
bkakdream@outlook.com

Kodi McGillivray
Mcgillivraykodi1@gmail.com

Johni Blankenship
JBlankenship@kpb.us

Patrick & Carol Nolden
pnolden@alaska.edu
Carol3nold3n@gmail.com

John Bunge
LMRI2@aol.com

By: Stephanie Peterson

Stephanie Peterson
Office of Administrative Hearings

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON BEHALF
OF THE KENAI PENINSULA BOROUGH**

In the matter of the Kenai Peninsula Borough)
Planning Commission's decision to deny the)
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right-of-way Kenai Recording District,)
RIVER RESOURCES, LLC,)
Appellant.)
_____)

OAH No. 21-1682-MUN
Agency No. 2021-01-PCA

**ORDER INVITING RESPONSE AND WITHDRAWING
OPENING AND REPLY STATEMENT BRIEFING DEADLINES**

On August 3, 2021, the Appellant, River Resources, LLC, and the Kenai Peninsula Borough Planning Department, jointly filed a motion and memorandum in support seeking to remand this matter to the Planning Commission and a motion for extension of time to file opening statements in this case.¹ This order addresses issues raised in both motions. As detailed below, it indicates how I am presently inclined to rule on the motion for remand. Nevertheless, before doing so and based upon due process considerations, responsive briefing is invited from the parties who have entered appearances in this case, but are neither the appellant, the applicant, nor the Borough.

I. Motion Seeking Remand to the Planning Commission

In the parties' memorandum in support of remand to the Planning Commission, they indicate that the Planning Commission issued three findings of fact, none of which was supported or supplemented by KPB ordinances or the record in this case.² Those findings were as follows:

¹ Motion to Remand to Planning Commission (August 3, 2021); Memorandum of Law in Support of Motion for Remand (August 3, 2021); and Motion for Extension of Time to File Opening Statements (August 3, 2021).

² Memorandum of Law in Support of Motion for Remand at 1.

1. The bond was not high enough based upon the number of surrounding wells;
2. KPB Code needs to define impartial and independent more clearly; and
3. The well monitoring timeline is in question as to whether or not it meets the Borough Code.³

As a result, River Resources and the Department contend that “[t]he findings are vague, do not clearly relate to the testimony and/or evidence presented, do not correlate to the KPB Code and appear to be suggestions for Code revision rather than findings. As such, they are difficult to reconcile with the requirements of a CLUP modification.”⁴

KPB Code Section 21.20.330(B) provides that “[a]ppeals from planning commission decisions which lack findings of fact and conclusions by the planning commission or contain findings of fact and conclusions which are not supported by substantial evidence shall be remanded to the planning commission with an order to make adequate findings of fact and conclusions.” In this instance, the Planning Commission’s findings of fact in support of its denial of River Resource’s modification of its conditional land use permit appear to be limited to the three items cited above.⁵

The matters relevant to considering whether to approve or deny an application for modification of a conditional land use permit are contained within KPB Code Sections 21.29.040 and 21.29.050. Consequently, for a decision of the Planning Commission to be upheld, and based on KPB Code Section 21.20.330(B), it should make factual findings and conclusions specifically addressing whether the requirements contained KPB Code Sections 21.29.040 and 21.29.050 are met. Here, that has not yet occurred. In denying the application, the Planning Commission has clearly reached the conclusion that the requirements in these Code Sections are not met, but it has made no factual findings supporting why it believes that to be the case.⁶

Factual findings are important for a variety of reasons. Chief among them is that they provide a reviewing court or judge a clear understanding of the basis for the decision maker’s ruling and enable the reviewing court or judge to determine the grounds on which the decision

³ *Id.*

⁴ *Id.* at 1-2.

⁵ RR. 153-163.

⁶ *Id.*

was made.⁷ But, not all statements made by the decision maker are findings of fact. Instead, “findings of fact” are determinations by the decision maker of facts supported by the evidence in the record, usually presented at trial or hearing.⁸

Here, Planning Commission’s finding number three, as referenced above, simply raises a question. It does not, however, make a finding.⁹ It may be that ultimately, the Planning Commission might conclude that the well monitoring timeline does not satisfy the KPB Code. That would be a conclusion that could be supported by factual findings if those findings are contained in the record. However, that is not the statement made here. Instead, Planning Commission finding number three simply suggests that there is a question regarding the existence of a fact. But a question concerning the existence of a fact is neither a finding, nor even a conclusion.

Similarly, as to Planning Commission finding number two, this statement merely suggests a potential revision to the KPB Code. Once again, however, it does not make a finding. Further, rather than raising a question of fact, it merely poses an interpretation of the law. Interpretations of the KPB Code and legal issues are squarely within the purview of the hearing officer.¹⁰ As such, this purported finding, while not a finding of fact, is also not required for the hearing officer to make a determination in this case on appeal. To the extent that the Planning Commission wishes to make factual findings related to this topic, it certainly can.

For instance, if it concludes that McLane Consulting, Inc. was not a qualified independent engineer for purposes of KPB Code Section 21.29.050(A)(5)(a), it could reach this conclusion. However, once again, and as noted above, findings *and* conclusions need to be supported by the record.¹¹ Further, should the Planning Commission reach such a conclusion, it would be helpful if it made ancillary findings fact justifying this conclusion. For instance, if it ultimately determines that McLane Consulting, Inc. is not a qualified independent engineer for purposes of KPB Code Section 21.29.050(A), it should specify the factual findings it reached in coming to this conclusion. Or, because of its concerns regarding the lack of clarity in the Code, it may not be comfortable in making a conclusion that McLane Consulting, Inc. is not a qualified

⁷ *Fletcher v. Trademark Const., Inc.* 80 P.3d 725, 730 (Alaska 2003).

⁸ *Black’s Law Dictionary* (11th ed. 2019).

⁹ R. 162.

¹⁰ KPB Code Section 21.20.320.

¹¹ KPB Code Section 21.20.320(2) and 21.20.330(B).

independent engineer. However, it could make factual findings regarding the degree of qualifications and independence that McLane does or does not possess. But, simply indicating that the present KPB Code does not adequately define “impartial” or “independent” does not provide a factual finding supporting its denial of the application.

Finally, Planning Commission, finding number one does make a conclusion.¹² However, the challenge with this conclusion is whether it is supported by substantial evidence in the record and in turn by factual findings.¹³ The bonding requirement is addressed by KPB Code Section 21.29.050(A)(4)(d).¹⁴ It provides that dewatering may occur, if among other things, the contractor/applicant posts a bond for liability for potential accrued damages. Here, while the Planning Commission determined that the bond was too little, it is unclear what the potential liability may be for accrued damages. In other words, there are no findings of fact to support what potential liability might exist regarding this project or what an appropriate bond might be. Some of the questions the answers to which might help to support such a finding are:

- A. How many wells are within 300’, 500’ and 1000’ of the proposed dewatering?
- B. While the applicant’s engineer has concluded that nearby wells will be unimpacted, what sort of impacts might potentially occur assuming a worst-case scenario?
- C. What might the costs of those impacts be to remedy, on a per-well basis?
- D. What is the amount of the bond that the applicant is proposing?¹⁵

The Planning Commission may wish to consider posing these questions to the applicant and its engineer and having them provide answers. Doing so would then potentially allow the Planning Commission to make appropriate findings of fact regarding the bond issue based on those answers. The answers should also be included in the record in this case.

The above are simply an example of questions that might be asked and the answers to which might then allow the Planning Commission to make a factual finding that the proposed bond is not high enough. However, as it now stands, it might be difficult to draw such a conclusion based on the facts in the record and the lack of any findings based on those facts.

¹² R. 162.

¹³ *Id.* at 21.20.330(B) and 21.20.320(3).

¹⁴ *Id.* at 21.29.050(A)(4)(d).

¹⁵ It appears that, based on the documentation in the record, the proposed bond is \$30,000. However, there has not been a factual finding by the Planning Commission identifying that this is proposed bond amount and that, given the answers to the other questions above, it considers this amount too little.

Based on the above, and per KPB Code Section 21.20.330(C), I am presently inclined to find that the Planning Commission has not made sufficient findings of fact and conclusions to support its denial of modification of the conditional land use permit. I will likely ask that it do so and that it specifically make findings pursuant to KPB Code Sections 21.29.040 and 21.29.050. For instance, in addition to the matters already addressed above, as to KPB Code Section 21.29.040, the Planning Commission may wish to specifically answer whether the project:

1. Protects against the lowering of water sources serving other properties?
2. Protects against physical damage to other properties?
3. Minimizes off-site movement of dust?
4. Minimizes noise disturbance to other properties?
5. Minimizes visual impacts?

As with the questions posed above, the detailed answers to these questions may allow the Planning Commission to make factual findings supporting its decision denying the requested modification. As indicated with the bonding example, the answers to these questions will allow the Planning Commission to make conclusions. However, each conclusion should be supported by specific factual findings.

For instance, and merely as a potential example as to item 2 above, it may be that the Planning Commission will conclude that the project does not protect against physical damage to other properties. But that is simply a conclusion, not a factual finding. A factual finding would be the factual details supporting that conclusion. For instance, there are X number of wells within Y feet of the proposed project and the Planning Commission believes those wells are at risk of physical damage by the project in specific ways. Once again, however, the findings need to be supported by documentation in the record.¹⁶ In addition to the above addressing KPB Code Section 21.29.040, these same types of questions and the answers to the questions should be considered regarding proposed findings concerning whether the application complies with KPB Code Section 21.29.050.

The above discussion should not be construed as an order in this case. Instead, it merely addresses the issues raised by River Resources and the Planning Department in their joint motion and present impressions concerning that motion. It also addresses how I am presently inclined to rule on the motion. However, because the parties who have made entries of appearance in this

¹⁶ KPB Code Section 21.20.320(2).

case have not yet had an opportunity to weigh in on this issue, they are now invited to do so. All such responses to the joint motion to remand to the Planning Commission are due on or before the close of business on August 23, 2021. No further briefing will be allowed and a ruling on the motion will promptly follow.

II. Motion for Extension of Time to File Opening Statements

The potential remand of this case to the Planning Commission will likely have a significant impact on the timing of these proceedings. Even if this case is not ordered to be remanded to the Planning Commission, it is inappropriate to require River Resources and the Department to prepare opening statements in this matter as was previously ordered without first knowing whether a remand will occur. Consequently, the motion for extension of time to file opening statements is granted. All dates and requirements previously set forth in the notice of briefing procedure and tentative hearing date¹⁷ are withdrawn.

Conclusion

Based on the above considerations, I am presently inclined to grant the motion by River Resources and the Department seeking to remand this matter to the Planning Commission per KPB Code Section 21.20.330(B). In doing so, the Planning Commission would be asked to make specific factual findings supporting its denial of the application for modification of the conditional land use permit. Before making such a ruling, however, any parties who have entered appearances in this matter are invited to respond to the motion for remand, and the above discussion, and explain any opposition to a remand. In doing so, such responses should not attempt to address whether it was appropriate for the Planning Commission to approve or deny the application at issue. Opportunity for that will occur later. Instead, the responses should be limited to whether it is appropriate for this case to be remanded back to the Planning Commission, per KPB Code Section 21.20.330(B), to make specific factual findings supporting its denial of the application.

All such responses are due on or before the close of business on **August 23, 2021**.¹⁸ No further briefing will be allowed and a ruling on the motion will promptly follow.

¹⁷ Notice of Briefing Procedure and Tentative Hearing Date (July 30, 2021).

¹⁸ For instructions on filing documents in this case, please see the Notice of Assignment (July 2, 2021).

Finally, the opening and reply statement briefing deadlines previously imposed are ordered withdrawn. The tentative hearing date is also withdrawn.

DATED this 6th day of August 2021.



Z. Kent Sullivan
Administrative Law Judge

Certificate of Service: I hereby certify that on August 6, 2021, a true and correct copy of this document was served on the following by e-mail to the following listed below:

Katherine Elsner, Esq.
katie@907legal.com

Dale McBride
dmcbride@fmwrubber.com

Shannon McCloud
Shannonmccloud1@gmail.com

Michael & Ann Gravier
michael.gravier@yahoo.com
aygravier@yahoo.com

Billie & Joseph Hardy
jnbhardy@yahoo.com

Lindsay VanHoose
LindseyVanhoose@gmail.com

William & Karen Ferguson
bkakdrearn@outlook.com

Bill Elam
belam@kpb.us

Jeremy Pechlel
jermypechlel@msn.com

Mike & Karol Pomplin
j3cubpilot@yahoo.com

Bridget Geckles-Appow
Bgappow@aol.com

Kenai Peninsula Borough
Patty Burley
Legal@kpb.us

Gina Debardeleben
ginadebar@mclanecg.com

Kalyn & Tod McGillivray
Kalyn.mcgillivray1@gmail.com
Todmcgillivray@gmail.com

Kenai Peninsula Borough
Melanie Aeschliman,
Planning Director
maeschliman@kpb.us

William Ferguson
bkakdrearn@outlook.com

Kodi McGillivray
Mcgillivraykodi1@gmail.com

Johni Blankenship
JBlankenship@kpb.us

Patrick & Carol Nolden
pnolden@alaska.edu
Carol3nold3n@gmail.com

John Bunge
LMRI2@aol.com

By: Stephanie Peterson

Stephanie Peterson
Office of Administrative Hearings