



**Kenai Planning & Zoning Commission -
Regular Meeting**

September 08, 2021 – 7:00 PM

Kenai City Council Chambers

210 Fidalgo Avenue, Kenai, Alaska

****Telephonic/Virtual Information on Page 2****

www.kenai.city

Agenda

A. CALL TO ORDER

1. Pledge of Allegiance
2. Roll Call
3. Agenda Approval
4. Consent Agenda
5. *Excused Absences

All items listed with an asterisk () are considered to be routine and non-controversial by the Commission and will be approved by one motion. There will be no separate discussion of these items unless a Commission Member so requests, in which case the item will be removed from the Consent Agenda and considered in its normal sequence on the agenda as part of the General Orders.

B. APPROVAL OF MINUTES

1. *Regular Meeting of August 25, 2021

C. SCHEDULED PUBLIC COMMENT

(Public comment limited to ten (10) minutes per speaker)

D. UNSCHEDULED PUBLIC COMMENT

*(Public comment limited to three (3) minutes per speaker;
thirty (30) minutes aggregated)*

E. CONSIDERATION OF PLATS

F. PUBLIC HEARINGS

1. **Resolution No. PZ2021-34** – Recommending the Kenai City Council Amend Kenai Municipal Code 14.20.150-Conditional Use Permits, to Clarify Roles and Responsibilities of Applicants, the Planning Director, and the Planning Commission in the Conditional Use Process and Make Housekeeping Changes.

G. UNFINISHED BUSINESS

H. NEW BUSINESS

I. **PENDING ITEMS**

J. **REPORTS**

1. City Council
2. Kenai Peninsula Borough Planning
3. City Administration

K. **ADDITIONAL PUBLIC COMMENT**

(Public comment limited to five (5) minutes per speaker)

L. **INFORMATIONAL ITEMS**

1. Board of Adjustment Decision - Barnard (BA-21-01)
2. Board of Adjustment Decision - Schlehofer (BA-21-02)
3. Board of Adjustment Decision - Jones (BA-21-03)

M. **NEXT MEETING ATTENDANCE NOTIFICATION**

1. September 22, 2021

N. **COMMISSION COMMENTS AND QUESTIONS**

O. **ADJOURNMENT**

The agenda and supporting documents are posted on the City's website at www.kenai.city. Copies of resolutions and ordinances are available at the City Clerk's Office or outside the Council Chamber prior to the meeting. For additional information, please contact the City Clerk's Office at 907-283-8231.

Join Zoom Meeting

<https://us02web.zoom.us/j/83831443627>

OR Call: (253) 215-8782 or (301) 715-8592

Meeting ID: 838 3144 3627 **Passcode:** 636242

**KENAI PLANNING & ZONING COMMISSION
REGULAR MEETING
AUGUST 25, 2021 – 7:00 P.M.
KENAI CITY COUNCIL CHAMBERS
210 FIDALGO AVENUE, KENAI, ALASKA
CHAIR JEFF TWAIT, PRESIDING**

MINUTES

A. CALL TO ORDER

Chair Twait called the meeting to order at 7:00 p.m.

1. Pledge of Allegiance

Chair Twait led those assembled in the Pledge of the Allegiance.

2. Roll Call

Commissioners present: J. Twait, J. Halstead, A. Douthit, D. Fikes, G. Woodard, G. Greenberg, R. Springer

Commissioners absent:

Staff/Council Liaison present: Planning Director R. Foster, Planning Assistant W. Anderson, Deputy City Clerk M. Thibodeau, Council Liaison J. Glendening

A quorum was present.

3. Agenda Approval

MOTION:

Vice Chair Fikes **MOVED** to approve the agenda as written and Commissioner Woodard **SECONDED** the motion. There were no objections; **SO ORDERED**.

4. Consent Agenda

MOTION:

Vice Chair Fikes **MOVED** to approve the consent agenda and Commissioner Douthit **SECONDED** the motion. There were no objections; **SO ORDERED**.

All items listed with an asterisk () are considered to be routine and non-controversial by the Commission and will be approved by one motion. There will be no separate discussion of these items unless a Commission Member so requests, in which case the item will be removed from the Consent Agenda and considered in its normal sequence on the agenda as part of the General Orders.

5. *Excused absences – None.

B. APPROVAL OF MINUTES

1. *Regular Meeting of August 11, 2021

The minutes were approved by the Consent Agenda.

C. SCHEDULED PUBLIC COMMENT – None.

D. UNSCHEDULED PUBLIC COMMENT – None.

E. CONSIDERATION OF PLATS – None.

F. PUBLIC HEARINGS – None.

G. UNFINISHED BUSINESS – None.

H. NEW BUSINESS

1. **Action/Approval** - Recommendation for Ordinance No. 3237-2021 - Increasing Estimated Revenues and Appropriations in the General Fund – Land Administration Department to Provide Funding for a Kenai Waterfront Revitalization Feasibility Study.

MOTION:

Vice Chair Fikes **MOVED** to recommend approval of Ordinance No. 3237-2021 for increasing estimated revenues and appropriations in the General Fund – Land Administration Department to provide funding for a Kenai waterfront revitalization feasibility study. Commissioner Douthit **SECONDED** the motion.

Planning Director Foster explained that on August 4, 2021 the City Council had held a work session to discuss the opportunity for Kenai waterfront revitalization with the community and waterfront property owners. The first step in the process would be to conduct a feasibility study with the help of a consulting firm, with the intention of taking a fresh look at the waterfront and reconsidering what this area could be. Foster shared his perspective as a city planner, noting that many communities both big and small utilize their waterfronts and this could be a great catalyst for the community. He explained that the study would take a multidisciplinary approach and would look at land use and economic development incentives, and if it moves forward to getting an RFP and a consultant on board, the Planning and Zoning Commission will continue to be involved.

Discussion involved the boundaries of the waterfront area and whether the areas planned to be stabilized through the Bluff Erosion Project would be part of this area, the involvement of the Army Corps of Engineers, whether the project can benefit from studies that were conducted for Cannery Road development; how waterfront landowners will be approached about the project, how the project can tie in with a Harbor Master Plan, bike path construction and harbor dredging. It was noted that the feasibility study would potentially look into many of these issues to determine how they would tie into waterfront revitalization.

Concerns were expressed about potential pushback from waterfront property owners, economic instability, and whether this would have the support of the fishing industry who may oppose having their commercial areas developed in a different direction. Clarification was provided that these concerns could be explored by a consultant during the feasibility study.

VOTE:

YEA: Halstead, Woodard, Greenberg, Douthit, Springer, Fikes, Twait
NAY:

MOTION PASSED UNANIMOUSLY.

I. PENDING ITEMS – None.

J. REPORTS

1. **City Council** – Council Member Glendening reported on the actions from the August 18, 2021 City Council meeting.
2. **Borough Planning** – Vice Chair Fikes reported on the actions from the August 23, 2021 Borough Planning Commission Meeting.
3. **City Administration** – Planning Director Foster reported on the following:
 - No applications have been submitted for the September 8th meeting, and there is one on the schedule for the meeting of September 22nd;
 - Administrative Assistant Willie Anderson is retiring, and her last meeting will be on September 22nd;
 - Two Board of Adjustment decisions will be provided as informational items for next packet;
 - Received notification from Kenai Peninsula Borough regarding the Black Gold Subdivision right of way vacation the Commission approved, which will be sent to Council for their September 15th meeting.

K. ADDITIONAL PUBLIC COMMENT – None.

Vice Mayor Bob Molloy noted that he had two purposes for coming to this meeting, first was to hear their discussion on the feasibility study, and the second is to inform them of Ordinance No. 3243-2021 which will be introduced during the City Council Meeting on September 1st and will come to the Planning & Zoning Commission for approval at their September 8th meeting. He noted that he has been working with the Planning Director and City Clerk to develop the ordinance, which will clarify the roles and responsibilities of applicants, the Planning Director, and the Planning Commission in the conditional use permitting process and also make housekeeping changes.

L. INFORMATIONAL ITEMS – None.

M. NEXT MEETING ATTENDANCE NOTIFICATION

1. September 8, 2021

N. COMMISSION COMMENTS & QUESTIONS

Commissioner Douthit noted he will be out of town on the September 22, 2021 meeting.

Commissioner Halstead said he appreciates the opportunity to work on the waterfront revitalization project and looks forward to it, and expressed confidence in the Planning Director's ability to get the project underway.

Commissioner Greenberg noted that he thinks this looks like a good project.

Council Member Glendening stated he was in support of the Commissions discussion, and expressed that he had heard broad but good ideas and questions during the meeting tonight. He also stated that the Harbor Master Plan fits in with the project as well, and encouraged the Planning & Zoning Commission and Harbor Commission to stay closely involved in the process.

O. ADJOURNMENT

There being no further business before the Commission, the meeting was adjourned at 8:33 p.m.

Minutes prepared and submitted by:

Meghan Thibodeau
Deputy City Clerk



**CITY OF KENAI
PLANNING AND ZONING COMMISSION
RESOLUTION NO. 2021-34**

A RESOLUTION OF THE PLANNING AND ZONING COMMISSION OF THE CITY OF KENAI **RECOMMENDING** THE COUNCIL OF THE CITY OF KENAI AMEND KENAI MUNICIPAL CODE 14.20.150-CONDITIONAL USE PERMITS, TO CLARIFY ROLES AND RESPONSIBILITIES OF APPLICANTS, THE PLANNING DIRECTOR, AND THE PLANNING COMMISSION IN THE CONDITIONAL USE PROCESS AND MAKE HOUSEKEEPING CHANGES.

WHEREAS, Kenai Municipal Code 14.20.150 describes the process for application and review of conditional use permits; and,

WHEREAS, the conditional use permit process is intended to recognize that some uses that are not permitted by the Land Use Table in certain zones may be conditionally allowed if certain conditions are met; and,

WHEREAS, the amendments below clarify that the grant or denial of a conditional use permit is a discretionary act by the Commission and the applicant has the burden of proof to show that a conditional use permit should be granted; and,

WHEREAS, the amendments also require a pre-application meeting with the Planning Director or designee prior to submittal of an application for public hearing to assist the applicant in preparing for the public hearing and providing the Commission with relevant information to make a decision; and,

WHEREAS, the amendments require the applicant to be present or available during the public hearing to present information to the Commission about the application; and,

WHEREAS, the amendments require the Commission to make findings specific to the six criteria that must be met to approve a conditional use permit and provide that the Commission may consider all relevant information in making its decision; and,

WHEREAS, the amendments describe the role of the Planning Director or designee in providing a staff report during public hearings and that the recommendations of the Planner may be considered, but are not accorded deference by the Commission.

NOW, THEREFORE, BE IT RECOMMENDED BY THE PLANNING AND ZONING COMMISSION OF THE CITY OF KENAI, ALASKA:

Section 1. Amendment of Section of the Kenai Municipal Code 14.20.150: That Kenai Municipal Code, Section 14.20.150 – Conditional Use Permits, is hereby amended as follows:

14.20.150 Conditional [U]Use [P]Permits.

(a) *Intent.* It is recognized that there are some uses that may be compatible with designated principal uses in specific zoning districts provided certain conditions are met. The conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings. The Commission may permit this type of use if the conditions and requirements listed in this chapter are met. The [ALLOWED] conditional uses are listed in the Land Use Table. Before a conditional use permit may be granted, the procedures specified in this chapter must be followed. The grant, denial, modification, or revocation of a conditional use permit is discretionary.

(b) *Pre-Application Meeting.* Every conditional use permit applicant must contact the Planning Director for a pre-application meeting with the Planning Director or designee before the application is submitted to the Commission in order to ensure applications are complete and the applicant is familiar with the conditional use permit public hearing process. If an application is determined to be incomplete by the Planning Director, the application may be re-submitted to the Planning Director with changes or new information as many times as necessary, or the applicant may request a review with the City Manager whose determination shall be final. The review by the Planning Director is to determine that sufficient information is presented to allow the Commission a meaningful review, and has no bearing on whether an application should be granted or denied by the Commission.

([B]c) *Applications.* Applications for a conditional use permit shall be filed in writing with the Planning Department. The application shall include, but is not limited to, the following:

- (1) Name and address of the applicant and name and address of the property owner if not the applicant;
- (2) Verification by the owner of the property concerned if other than the applicant;
- (3) The street address and [A] a legal description of the property involved;
- (4) A description of the proposed use and how the use satisfies the review criteria;
- (5) Dimensioned plot plans showing the location of all existing and proposed buildings or alteration, conceptual drawing and such data as may be required; and
- (6) The appropriate fee as set forth in the City's schedule of fees adopted by the City Council.

The application and its plans shall be posted to the City's website at time of publication of Commission packet.

([C]d) Public Hearing. If the application is in order, a public hearing shall be scheduled in accordance with the requirements of KMC [14.20.280](#). An applicant or representative of the applicant must be present in person or by remote device for the application to be considered at the public hearing.

([D]e) Review Criteria. Prior to granting a conditional use permit, it shall be established that the use satisfies all the following [CONDITIONS] criteria:

- 1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- 2) The economic and non-economic value of the adjoining property and neighborhood will not be significantly impaired;
- 3) The proposed use is in harmony with the Comprehensive Plan;
- 4) Public services and facilities are adequate to serve the proposed use;
- 5) The proposed use will not be harmful to the public safety, health or welfare; and
- 6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions [SHOULD BE MET BY THE APPLICANT]. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.

The Commission may approve, approve with conditions, or deny the application. The Commission must make specific findings in its decision addressing all six of the required criteria stated above. Any relevant evidence may be considered by the Commission in its decision.

(f) Burden of Proof. The applicant for a conditional use permit has the burden to show by substantial evidence that the six criteria above are satisfied. Substantial evidence is such relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(g) Staff Report. The Planning Director or designee will provide a staff report on the application to the Commission at the public hearing. The staff report may contain any information deemed pertinent by the Planning Director or designee, and may include a recommendation and proposed findings on whether the requirements of this Chapter have been met and whether any additional specific conditions are recommended. The Commission may consider the

recommendations of the Planning Director or designee, but shall accord it no deference. The staff report does not relieve the applicant's burden of proof.

([E]h) *Issuance of the Permit.* Following approval by the Commission, the administrative official shall not issue the permit until the expiration of the fifteen (15) day appeal period contained in KMC [14.20.290](#). After approval by the Commission and before the issuance of the permit, the administrative official must determine that the applicant is current on all obligations (e.g., sales tax, property tax, lease payments, utility payments) to the City or has entered into an approved payment plan with the City on any obligations owed and the applicant is in compliance with the payment plan and (if the permit is for a use required to collect sales tax) must show a valid borough sales tax account. If a timely appeal is filed pursuant to KMC [14.20.290](#), the permit shall not be issued unless authorized by the Board of Adjustment.

([F]i) *Yearly Reports.* The permit holder shall submit a yearly report between October 1st and December 31st to the administrative official. Such report shall include a summary of the on-site activity.

([G]j) *Revocation for Noncompliance/Compliance Notices.* If the Commission determines, based on the yearly review or any other investigation undertaken by the official, that the conduct of the operation(s) is not in compliance with: (1) the terms and conditions of the permit; (2) the provisions of the Kenai Zoning Code; (3) or that the permit holder is not current on any obligations (e.g., sales tax, property tax, utility payments, lease payments) to the City unless the applicant has entered into an approved payment with the City on any obligations owed and the applicant is in compliance with the payment plan, the Commission may revoke the permit. The Commission shall not revoke the permit until the permit holder has been notified and given reasonable opportunity to correct the deficiency(s) or to provide information relating to or rebutting the alleged deficiency(s). Appeals from decisions under this section shall be made in accordance with the provisions of KMC [14.20.290](#). If the administrative official determines the permit holder is in compliance with the conditions in this subsection, it shall send a notice of compliance to the Commission and the permit holder.

([H]k) *Modification of Final Approval.*

- 1) An approved conditional use permit may, upon application by the permittee, be modified by the Planning and Zoning Commission:
 - a) When changed conditions cause the conditional use to no longer conform to the standards for its approval,

New Text Underlined; [DELETED TEXT BRACKETED]

- b) To implement a different development plan conforming to the standards for its approval;

(2) The modification application shall be subject to a public hearing and the appropriate fee as set forth in the City's schedule of fees adopted by the City Council in order to help cover the costs of the public hearing notice.

([I]) Expiration—Extensions—Transferability.

- 1) An approved conditional use permit lapses twelve (12) months after approval if no building permit is procured or if the allowed use is not initiated.
- 2) A conditional use permit shall automatically expire if for any reason the conditioned use ceases for a period of one (1) year or longer.
- 3) The Commission may grant time extensions to stay the lapse or the expiration of a permit for periods not to exceed one (1) year each upon a finding that circumstances have not changed sufficiently to warrant reconsideration of the approval of the conditional use permit or that good cause exists to grant the time extension. A permittee must request a time extension in writing, and submit any supporting materials, within ninety (90) days of the date of the administrative official's written notice to the permittee that either the permit has lapsed under subsection [\(1\)](#) or that the permit has expired under subsection [\(2\)](#) by a date certain. If the administrative official does not issue a written notice concerning lapse or expiration, the permittee may request a time extension at any time within two (2) years of the date the permit was issued or the use ceased, whichever is later. A permittee may be granted time extensions not to exceed a total of two (2) years from the date of the Commission's grant of the first time extension. The Commission may, but is not required to, hold a public hearing prior to issuing a decision under this subsection.
- 4) A permittee who disputes the administrative official's determination that the conditioned use has not been timely initiated or has ceased for a period of one (1) year or longer may appeal the official's determination to the Board of Adjustment in accordance with KMC [14.20.290](#). If the permittee has requested a stay under subsection [\(3\)](#), above, the time for appeal of the administrative official's determination of lapse or expiration shall not run until such time as the Commission has made a final decision on the request for a stay.

- 5) A conditional use permit is not transferable from one (1) parcel of land to another. Conditional use permits may be transferred from one (1) owner to another for the same use, but if there is a change in use on the property, a new permit must be obtained.
- 6) Appeals from decisions of the Commission under this section shall be made in accordance with the provisions of KMC [14.20.290](#).

([J]m) A proposed conditional use permit shall not be considered if a substantially similar conditional use permit has been considered and denied within the nine (9) months immediately preceding.

Section 2. That a copy of Resolution PZ2021-34 be forwarded to the Kenai City Council.

PASSED BY THE PLANNING AND ZONING COMMISSION OF THE CITY OF KENAI, ALASKA,
this 8th day of September, 2021.

JEFF TWAIT, CHAIRPERSON

ATTEST:

JAMIE HEINZ, CITY CLERK

MEMORANDUM

TO: Planning and Zoning Commission

FROM: Ryan Foster, Planning Director

DATE: September 1, 2021

SUBJECT: **Resolution PZ2021-34 – Recommending the Kenai City Council Amend Kenai Municipal Code 14.20.150-Conditional Use Permits, to Clarify Roles and Responsibilities of Applicants, the Planning Director, and the Planning Commission in the Conditional Use Process and Make Housekeeping Changes.**

The Planning & Zoning Commission, the City Council, the Board of Adjustment, and public comments have identified issues in KMC 14.20.150 Conditional use permits that should be addressed regarding roles and responsibilities. Ordinance 3243-2021 addresses some of these issues and was introduced to Council on September 1, 2021 and postponed for a public hearing to September 15, 2021, and referred to the Planning and Zoning Commission for a public hearing on September 8, 2021.

Ordinance 3243-2021 proposes to amend KMC 14.20.150 Conditional use permits by clarifying the roles and responsibilities of applicants, the Planning Director, and the Planning and Zoning Commission in the conditional use permit process and to make some housekeeping changes. The proposed amendments include the following:

1. Add final sentence to paragraph **(a) Intent** to clarify and state that the Commission has discretion to grant, deny, modify or revoke a Conditional Use Permit (“CUP”).
2. Add a new paragraph **(b) Pre-application meeting** requiring the applicant to have a pre-application meeting with the Planning Director or designee. The purpose is to ensure the application is complete and the applicant is familiar with the conditional use permit public hearing process. The review by the Planning Director is to determine that sufficient information is presented with the application to allow the Planning Commission a meaningful review, and has no bearing on whether an application should be granted or denied by the Commission.
3. Make minor changes to the paragraph on **Applications** regarding the contents of the application, to be consistent with the online form for the

application and the practice that there be some kind of conceptual drawings for landscape and site plans and the dimensional plot plans.

4. Add a sentence to the paragraph on **Applications** that the application and plans will be posted to the City's website when the meeting packet is posted to the website. The City Clerk and Administration would create a page to list public hearings coming up on applications with a link to the applications and plans.
5. Add to the paragraph on **Public Hearings** the requirement that the applicant or representative must be present in person or by remote electronic device to present the application and the applicant's case.
6. Clarify the second condition or criteria of the **Review Criteria** to provide that the value is the economic and non-economic value, so the second criteria is that the economic and non-economic value of the adjoining property and neighborhood will not be significantly impaired.
7. Add a paragraph to the **Review Criteria** which further clarifies the Commission's discretion to the effect that: The Commission may approve, approve with conditions, or deny the application. The Commission will make findings on the six criteria in its decision. Any other relevant evidence may be considered by the Commission in its decision.
8. Add a new paragraph on **Burden of Proof**, clarifying and stating that the applicant has the burden of proof to show that the six review conditions or criteria are satisfied.
9. Add a new paragraph on **Staff report**, clarifying and stating that the Planning Director or designee will provide a staff report. The staff may include a recommendation and proposed findings on whether the requirements of this Code have been satisfied and whether any additional specific conditions are recommended. The Commission may consider the recommendations of the Planning Director or designee, but does not have to defer to the staff's recommendation. The staff report does not relieve the applicant from the applicant's burden of proof.

Thank you for your consideration.

Attachments

Ordinance 3243-2021

Memo #1 – Introduction, Postponement, and Referral

Memo #2 - Supporting





Sponsored by: Vice Mayor Molloy

CITY OF KENAI

ORDINANCE NO. 3243-2021

AN ORDINANCE OF THE COUNCIL OF THE CITY OF KENAI, ALASKA, AMENDING KENAI MUNICIPAL CODE 14.20.150-CONDITIONAL USE PERMITS, TO CLARIFY ROLES AND RESPONSIBILITIES OF APPLICANTS, THE PLANNING DIRECTOR, AND THE PLANNING COMMISSION IN THE CONDITIONAL USE PROCESS AND MAKE HOUSEKEEPING CHANGES.

WHEREAS, Kenai Municipal Code 14.20.150 describes the process for application and review of conditional use permits; and,

WHEREAS, the conditional use permit process is intended to recognize that some uses that are not permitted by the Land Use Table in certain zones may be conditionally allowed if certain conditions are met; and,

WHEREAS, the amendments below clarify that the grant or denial of a conditional use permit is a discretionary act by the Commission and the applicant has the burden of proof to show that a conditional use permit should be granted; and,

WHEREAS, the amendments also require a pre-application meeting with the Planning Director or designee prior to submittal of an application for public hearing to assist the applicant in preparing for the public hearing and providing the Commission with relevant information to make a decision; and,

WHEREAS, the amendments require the applicant to be present or available during the public hearing to present information to the Commission about the application; and,

WHEREAS, the amendments require the Commission to make findings specific to the six criteria that must be met to approve a conditional use permit and provide that the Commission may consider all relevant information in making its decision; and,

WHEREAS, the amendments describe the role of the Planning Director or designee in providing a staff report during public hearings and that the recommendations of the Planner may be considered but are not accorded deference by the Commission; and,

WHEREAS, on _____ the Planning and Zoning Commission met and recommended the City Council _____ this Resolution.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF KENAI, ALASKA, as follows:

Section 1. Amendment of Section of the Kenai Municipal Code 14.20.150: That Kenai Municipal Code, Section 14.20.150 – Conditional Use Permits, is hereby amended as follows:

14.20.150 Conditional ~~[U]~~Use ~~[P]~~Permits.

(a) *Intent.* It is recognized that there are some uses that may be compatible with designated principal uses in specific zoning districts provided certain conditions are met. The conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings. The Commission may permit this type of use if the conditions and requirements listed in this chapter are met. The ~~[ALLOWED]~~ conditional uses are listed in the Land Use Table. Before a conditional use permit may be granted, the procedures specified in this chapter must be followed. The grant, denial, modification, or revocation of a conditional use permit is discretionary.

(b) *Pre-Application Meeting.* Every conditional use permit applicant must contact the Planning Director for a pre-application meeting with the Planning Director or designee before the application is submitted to the Commission in order to ensure applications are complete and the applicant is familiar with the conditional use permit public hearing process. If an application is determined to be incomplete by the Planning Director, the application may be re-submitted to the Planning Director with changes or new information as many times as necessary, or the applicant may request a review with the City Manager whose determination shall be final. The review by the Planning Director is to determine that sufficient information is presented to allow the Commission a meaningful review, and has no bearing on whether an application should be granted or denied by the Commission.

~~[(B)c]~~ *Applications.* Applications for a conditional use permit shall be filed in writing with the Planning Department. The application shall include, but is not limited to, the following:

- (1) Name and address of the applicant and name and address of the property owner if not the applicant;
- (2) Verification by the owner of the property concerned if other than the applicant;
- (3) The street address and ~~[A]~~ a legal description of the property involved;
- (4) A description of the proposed use and how the use satisfies the review criteria;
- (5) Dimensioned plot plans showing the location of all existing and proposed buildings or alteration, conceptual drawing and such data as may be required; and
- (6) The appropriate fee as set forth in the City's schedule of fees adopted by the City Council.

The application and its plans shall be posted to the City’s website at time of publication of Commission packet.

([C]d) *Public Hearing.* If the application is in order, a public hearing shall be scheduled in accordance with the requirements of KMC [14.20.280](#). An applicant or representative of the applicant must be present in person or by remote device for the application to be considered at the public hearing.

([D]e) *Review Criteria.* Prior to granting a conditional use permit, it shall be established that the use satisfies all the following [CONDITIONS] criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The economic and non-economic value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and
- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions [SHOULD BE MET BY THE APPLICANT]. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.

The Commission may approve, approve with conditions, or deny the application. The Commission must make specific findings in its decision addressing all six of the required criteria stated above. Any relevant evidence may be considered by the Commission in its decision.

(f) *Burden of Proof.* The applicant for a conditional use permit has the burden to show by substantial evidence that the six criteria above are satisfied. Substantial evidence is such relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(g) *Staff Report.* The Planning Director or designee will provide a staff report on the application to the Commission at the public hearing. The staff report may contain any information deemed pertinent by the Planning Director or designee, and may include a recommendation and proposed findings on whether the requirements of this Chapter have been met and whether any additional specific conditions are recommended. The Commission may consider the recommendations of

the Planning Director or designee, but shall accord it no deference. The staff report does not relieve the applicant's burden of proof.

([E]h) *Issuance of the Permit.* Following approval by the Commission, the administrative official shall not issue the permit until the expiration of the fifteen (15) day appeal period contained in KMC [14.20.290](#). After approval by the Commission and before the issuance of the permit, the administrative official must determine that the applicant is current on all obligations (e.g., sales tax, property tax, lease payments, utility payments) to the City or has entered into an approved payment plan with the City on any obligations owed and the applicant is in compliance with the payment plan and (if the permit is for a use required to collect sales tax) must show a valid borough sales tax account. If a timely appeal is filed pursuant to KMC [14.20.290](#), the permit shall not be issued unless authorized by the Board of Adjustment.

([F]i) *Yearly Reports.* The permit holder shall submit a yearly report between October 1st and December 31st to the administrative official. Such report shall include a summary of the on-site activity.

([G]j) *Revocation for Noncompliance/Compliance Notices.* If the Commission determines, based on the yearly review or any other investigation undertaken by the official, that the conduct of the operation(s) is not in compliance with: (1) the terms and conditions of the permit; (2) the provisions of the Kenai Zoning Code; (3) or that the permit holder is not current on any obligations (e.g., sales tax, property tax, utility payments, lease payments) to the City unless the applicant has entered into an approved payment with the City on any obligations owed and the applicant is in compliance with the payment plan, the Commission may revoke the permit. The Commission shall not revoke the permit until the permit holder has been notified and given reasonable opportunity to correct the deficiency(s) or to provide information relating to or rebutting the alleged deficiency(s). Appeals from decisions under this section shall be made in accordance with the provisions of KMC [14.20.290](#). If the administrative official determines the permit holder is in compliance with the conditions in this subsection, it shall send a notice of compliance to the Commission and the permit holder.

([H]k) *Modification of Final Approval.*

- (1) An approved conditional use permit may, upon application by the permittee, be modified by the Planning and Zoning Commission:
 - (a) When changed conditions cause the conditional use to no longer conform to the standards for its approval,

(b) To implement a different development plan conforming to the standards for its approval;

(2) The modification application shall be subject to a public hearing and the appropriate fee as set forth in the City’s schedule of fees adopted by the City Council in order to help cover the costs of the public hearing notice.

~~([!])~~ *Expiration—Extensions—Transferability.*

(1) An approved conditional use permit lapses twelve (12) months after approval if no building permit is procured or if the allowed use is not initiated.

(2) A conditional use permit shall automatically expire if for any reason the conditioned use ceases for a period of one (1) year or longer.

(3) The Commission may grant time extensions to stay the lapse or the expiration of a permit for periods not to exceed one (1) year each upon a finding that circumstances have not changed sufficiently to warrant reconsideration of the approval of the conditional use permit or that good cause exists to grant the time extension. A permittee must request a time extension in writing, and submit any supporting materials, within ninety (90) days of the date of the administrative official’s written notice to the permittee that either the permit has lapsed under subsection (1) or that the permit has expired under subsection (2) by a date certain. If the administrative official does not issue a written notice concerning lapse or expiration, the permittee may request a time extension at any time within two (2) years of the date the permit was issued or the use ceased, whichever is later. A permittee may be granted time extensions not to exceed a total of two (2) years from the date of the Commission’s grant of the first time extension. The Commission may, but is not required to, hold a public hearing prior to issuing a decision under this subsection.

(4) A permittee who disputes the administrative official’s determination that the conditioned use has not been timely initiated or has ceased for a period of one (1) year or longer may appeal the official’s determination to the Board of Adjustment in accordance with KMC [14.20.290](#). If the permittee has requested a stay under subsection (3), above, the time for appeal of the administrative official’s determination of lapse or expiration shall not run until such time as the Commission has made a final decision on the request for a stay.

(5) A conditional use permit is not transferable from one (1) parcel of land to another. Conditional use permits may be transferred from one (1) owner to another for the same use, but if there is a change in use on the property, a new permit must be obtained.

(6) Appeals from decisions of the Commission under this section shall be made in accordance with the provisions of KMC [14.20.290](#).

([J]m) A proposed conditional use permit shall not be considered if a substantially similar conditional use permit has been considered and denied within the nine (9) months immediately preceding.

Section 2. Severability: That if any part or provision of this ordinance or application thereof to any person or circumstances is adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision, or application directly involved in all controversy in which this judgment shall have been rendered, and shall not affect or impair the validity of the remainder of this title or application thereof to other persons or circumstances. The City Council hereby declares that it would have enacted the remainder of this ordinance even without such part, provision, or application.

Section 3. Effective Date: That pursuant to KMC 1.15.070(f), this ordinance shall take effect 30 days after enactment.

ENACTED BY THE COUNCIL OF THE CITY OF KENAI, ALASKA, this 15 day of September, 2021.

BRIAN GABRIEL SR., MAYOR

ATTEST:

Jamie Heinz, MMC, City Clerk

Introduced: September 1, 2021
Enacted: September 15, 2021
Effective: October 15, 2021



KENAI

City of Kenai | 210 Fidalgo Ave, Kenai, AK 99611-7794 | 907.283.7535 | www.kenai.city

MEMORANDUM

TO: Mayor Brian Gabriel and Kenai City Council

FROM: Vice-Mayor Bob Molloy

DATE: August 26, 2021

SUBJECT: **Ordinance 3243-2021 – An ordinance amending KMC 14.20.150-Conditional Use Permits to clarify roles and responsibilities in the conditional use permit process and to make housekeeping changes**

- Memo #1 - Introduction, Postponement and Referral

The Planning & Zoning Commission, the City Council, the Board of Adjustment, and public comments have identified issues in **KMC 14.20.150 Conditional use permits** that should be addressed regarding roles and responsibilities. **Ordinance 3243-2021** proposes to amend **KMC 14.20.150 Conditional use permits** to address some of these issues by clarifying the roles and responsibilities of applicants, the Planning Director, and the Planning and Zoning Commission in the conditional use permit process.

The sponsor verbally presented the highlights of the proposed amendments to the Planning & Zoning Commission during Additional Public Comment at the Commission's 8/25/21 meeting. The Commissioners were very interested in and asked pertinent questions during the discussion of the highlights of the proposed amendments. It's the sponsor's understanding that the Commission has no other item at present for its 9/08/21 meeting.

At introduction, a request will be made for Council to postpone this ordinance to and for a public hearing at the Council's 9/15/21 meeting, and to refer this ordinance to the Planning & Zoning Commission for a public hearing at its 9/08/21 meeting, and for the Commission to make recommendations. If the Commission requests more time, then on 9/15/18 Council could refer the ordinance again to the Commission for its 9/22/21 meeting, and postpone to Council's 10/6/21 meeting for public hearing. There is some time; it's the sponsor's understanding that this ordinance later would fall off of the Council's agenda if no vote is taken at Council's 10/21/21 meeting.

Council's support of introduction and this referral request is respectfully requested.



MEMORANDUM

TO: Mayor Brian Gabriel and Kenai City Council

FROM: Vice-Mayor Bob Molloy

DATE: August 26, 2021

SUBJECT: Ordinance 3243-2021 – An ordinance amending KMC 14.20.150-Conditional Use Permits to clarify roles and responsibilities in the conditional use permit process and to make housekeeping changes

- Memo #2 - Supporting

The Planning & Zoning Commission, the City Council, the Board of Adjustment, and public comments have identified issues in **KMC 14.20.150 Conditional use permits** that should be addressed regarding roles and responsibilities. **Ordinance 3243-2021** addresses some of these issues.

Ordinance 3243-2021 proposes to amend **KMC 14.20.150 Conditional use permits** by clarifying the roles and responsibilities of applicants, the Planning Director, and the Planning and Zoning Commission in the conditional use permit process and to make some housekeeping changes. The proposed amendments include the following:

1. Add final sentence to paragraph **(a) Intent** to clarify and state that the Commission has discretion to grant, deny, modify or revoke a Conditional Use Permit (“CUP”).
2. Add a new paragraph **(b) Pre-application meeting** requiring the applicant to have a pre-application meeting with the Planning Director or designee. The purpose is to ensure the application is complete and the applicant is familiar with the conditional use permit public hearing process. The review by the Planning Director is to determine that sufficient information is presented with the application to allow the Planning Commission a meaningful review, and has no bearing on whether an application should be granted or denied by the Commission.
3. Make minor changes to the paragraph on **Applications** regarding the contents of the application, to be consistent with the online form for the application and the practice that there be some kind of conceptual drawings for landscape and site plans and the dimensional plot plans.
4. Add a sentence to the paragraph on **Applications** that the application and plans will be posted to the City’s website when the meeting packet is posted to the website. The City

- Clerk and Administration would create a page to list public hearings coming up on applications with a link to the applications and plans.
5. Add to the paragraph on **Public Hearings** the requirement that the applicant or representative must be present in person or by remote electronic device to present the application and the applicant's case.
 6. Clarify the second condition or criteria of the **Review Criteria** to provide that the value is the economic and non-economic value, so the second criteria is that the economic and non-economic value of the adjoining property and neighborhood will not be significantly impaired.
 7. Add a paragraph to the **Review Criteria** which further clarifies the Commission's discretion to the effect that: The Commission may approve, approve with conditions, or deny the application. The Commission will make findings on the six criteria in its decision. Any other relevant evidence may be considered by the Commission in its decision.
 8. Add a new paragraph on **Burden of Proof**, clarifying and stating that the applicant has the burden of proof to show that the six review conditions or criteria are satisfied.
 9. Add a new paragraph on **Staff report**, clarifying and stating that the Planning Director or designee will provide a staff report. The staff may include a recommendation and proposed findings on whether the requirements of this Code have been satisfied and whether any additional specific conditions are recommended. The Commission may consider the recommendations of the Planning Director or designee, but does not have to defer to the staff's recommendation. The staff report does not relieve the applicant from the applicant's burden of proof.

Council's consideration and support of Ordinance 3243-2021 is respectfully requested.





Kenai City Council - Regular Meeting

September 01, 2021 – 6:00 PM

Kenai City Council Chambers

210 Fidalgo Avenue, Kenai, Alaska

****Telephonic/Virtual Information on Page 4****

www.kenai.city

Action Agenda

A. CALL TO ORDER

1. Pledge of Allegiance
2. Roll Call
3. Agenda Approval
4. Consent Agenda (*Public comment limited to three (3) minutes) per speaker; thirty (30) minutes aggregated*)

All items listed with an asterisk () are considered to be routine and non-controversial by the council and will be approved by one motion. There will be no separate discussion of these items unless a council member so requests, in which case the item will be removed from the consent agenda and considered in its normal sequence on the agenda as part of the General Orders.

B. SCHEDULED PUBLIC COMMENTS

(Public comment limited to ten (10) minutes per speaker)

C. UNSCHEDULED PUBLIC COMMENTS

(Public comment limited to three (3) minutes per speaker; thirty (30) minutes aggregated)

D. PUBLIC HEARINGS

1. **ENACTED UNANIMOUSLY BY SUBSTITUTE. Ordinance No. 3234-2021** - Increasing Estimated Revenues and Appropriations in the Airport Improvements Capital Project Fund, Amending the City's Professional Services Agreement with HDL Engineering Consultants, Accepting Grant Funding from the Federal Aviation Administration, and Issuing a Purchase Order for Construction of the 2021 Airfield Drainage Rehabilitation Project at the Kenai Municipal Airport. (Administration)
 - **SUBSTITUTE Ordinance No. 3234-2021**
2. **ENACTED UNANIMOUSLY. Ordinance No. 3235-2021** - Accepting and Appropriating a Grant from the State of Alaska for the Purchase of Library Books. (Administration)
3. **ENACTED UNANIMOUSLY. Ordinance No. 3236-2021** - Amending the Official Zoning Map by Rezoning T 5N R 11W Sec 6 Seward Meridian KN North 150 Ft of Govt Lot 34 from Suburban Residential to General Commercial. (Administration)

4. **ENACTED AS AMENDED. Ordinance No. 3237-2021** - Increasing Estimated Revenues and Appropriations in the General Fund – Land Administration Department to Provide Funding for a Kenai Waterfront Revitalization Feasibility Study. (Administration)
5. **ENACTED UNANIMOUSLY AS AMENDED. Ordinance No. 3244-2021** - Increasing Estimated Revenues and Appropriations in the General and Municipal Roadway Improvement Capital Project Funds, awarding a Construction Contract, and Authorizing the Issuance of a Purchase Order for the 2021 Bryson Avenue Bluff Erosion Repair Project. (Administration)
 1. Motion for Introduction
 2. Motion for Second Reading (Requires a Unanimous Vote)
 3. Motion for Adoption (Requires Five Affirmative Votes)
6. **ADOPTED UNANIMOUSLY. Resolution No. 2021-56** - Approving the Vacation of 10' Utility Easements Along the Side Lot Lines of Lots, 19, 20, 21, Block 13, Carl F. Ahlstrom Subdivision (Plat KN-216) and Lot 22a, Block 13, Carl F. Ahlstrom Subdivision RPM's Replat (Plat KN-2017-66) Excluding the 15 Feet Adjoining Kenai Spur Highway and the 10 Feet Adjoining the Northeast Boundary, and as Set Forth on the Attached Exhibit "A" is Not Needed for a Public Purpose and Consenting to its Vacation. (Administration)

E. MINUTES

1. **APPROVED BY THE CONSENT AGENDA.** *Regular Meeting of August 18, 2021. (City Clerk)

F. UNFINISHED BUSINESS

G. NEW BUSINESS

1. **APPROVED BY THE CONSENT AGENDA.** *Action/Approval - Bills to be Ratified. (Administration)
2. **APPROVED BY THE CONSENT AGENDA.** *Action/Approval - Non-Objection to Marijuana License Renewals for Kenai River Cannabis, Herban Extracts, LLC, and Peninsula Botanicals. (City Clerk)
3. **INTRODUCED BY THE CONSENT AGENDA/PUBLIC HEARING SET FOR 9/15/2021.** *Ordinance No. 3238-2021 - Accepting and Appropriating an Interlibrary Cooperation Grant from the Alaska State Library for the Kenai Community Library Storywalk® Project. (Administration)
4. **INTRODUCED BY THE CONSENT AGENDA/PUBLIC HEARING SET FOR 9/15/2021.** *Ordinance No. 3239-2021 - Increasing Estimated Revenues and Appropriations in the General Fund – Police Department and Accepting a Grant From the Department of Justice Passed Through the Alaska Internet Crimes Against Children Task Force for the Purchase of Forensic Software. (Administration)
5. **INTRODUCED BY THE CONSENT AGENDA/PUBLIC HEARING SET FOR 9/15/2021.** *Ordinance No. 3240-2021 - Amending Kenai Municipal Code Section 23.55.030 – Qualification Pay, to Amend the Salary Ranges to Accurately Reflect Recognition Pay and Entitlements. (Administration)

6. **INTRODUCED BY THE CONSENT AGENDA/PUBLIC HEARING SET FOR 9/15/2021.**
*Ordinance No. 3241-2021 - Declaring that, T 5N R 11W Sec 6 Seward Meridian KN 0002970 Original Townsite of Kenai Lot 3 Blk 8, Also Known as 604 Inlet Street, Kenai, Alaska, Whose Last Record Owner Under Borough Assessment Records was Peter F. Mysing, Whose Address is, PO Box 8134, Nikiski, Alaska, 99635-8134 and Estate of Peter F. Mysing CO/ Dale Dolifka, PO Box 498, Soldotna, AK, 99669-0498, Shall be Retained by the City of Kenai for a Public Purpose. (Administration)
7. **INTRODUCED BY THE CONSENT AGENDA/PUBLIC HEARING SET FOR 9/15/2021.**
*Ordinance No. 3242-2021 - Declaring that, T 5N R 11W Sec 5 Seward Meridian KN 0002970 Original Townsite of Kenai Lot 3 Blk 20, Also Known as 905 Mission Avenue, Kenai, Alaska, Whose Last Record Owner Under Borough Assessment Records Was Keith K. Knight, General Delivery, Kenai, Alaska, Shall be Retained by the City of Kenai for a Public Purpose. (Administration)
8. **INTRODUCED AND PUBLIC HEARING POSTPONED UNTIL 9/15/2021. Ordinance No. 3243-2021** - Amending Kenai Municipal Code 14.20.150-Conditional Use Permits, to Clarify Roles and Responsibilities of Applicants, the Planning Director, and the Planning Commission in the Conditional Use Process and Make Housekeeping Changes. (Vice Mayor Molloy)
9. **INTRODUCED BY THE CONSENT AGENDA/PUBLIC HEARING SET FOR 9/15/2021.**
*Ordinance No. 3245-2021 - Authorizing a Budget Transfer in and Increasing Estimated Revenues and Appropriations in the Congregate Housing Fund for the Purchase and Installation of Equipment to Provide Residents Basic Television and Wireless Internet Service. (Administration)
10. **APPROVED CHANGE OF MEETING TIME TO 3:00 P.M. Action/Approval** - Revise the Council on Aging Meeting Time, Pursuant to Policy, from 4:30 p.m. to 3:00 p.m. (City Clerk)
11. **Discussion** - Set the Process for the Hiring a City Clerk. (Mayor Gabriel)

H. COMMISSION / COMMITTEE REPORTS

1. Council on Aging
2. Airport Commission
3. Harbor Commission
4. Parks and Recreation Commission
5. Planning and Zoning Commission
6. Beautification Committee
7. Mini-Grant Steering Committee

I. REPORT OF THE MAYOR

J. ADMINISTRATION REPORTS

1. City Manager
2. City Attorney
3. City Clerk

K. ADDITIONAL PUBLIC COMMENT

1. Citizens Comments (*Public comment limited to five (5) minutes per speaker*)
2. Council Comments

L. EXECUTIVE SESSION

M. PENDING ITEMS

1. **Ordinance No. 3224-2021** - Repealing and Reenacting Kenai Municipal Code Title 6 - Elections, to Provide Clarity, Housekeeping, and Process Improvements. (Vice Mayor Molloy and City Clerk)
[Clerk's Note: At the August 4 Council Meeting, this item was postponed to the September 15 Council Meeting for a second public hearing. A motion to enact is on the floor.]

N. ADJOURNMENT

O. INFORMATION ITEMS

1. Purchase Orders Between \$2,500 and \$15,000
2. Kenai Historical Society Newsletter - August 2021

The agenda and supporting documents are posted on the City's website at www.kenai.city. Copies of resolutions and ordinances are available at the City Clerk's Office or outside the Council Chamber prior to the meeting. For additional information, please contact the City Clerk's Office at 907-283-8231.

Join Zoom Meeting

<https://us02web.zoom.us/j/81610177632>

Meeting ID: 816 1017 7632 **Passcode:** 237472

OR

Dial In: (253) 215-8782 or (301) 715-8592

Meeting ID: 816 1017 7632 **Passcode:** 237472

**BEFORE THE BOARD OF ADJUSTMENT FOR THE
CITY OF KENAI, ALASKA**
210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF DENNIS BARNARD ET AL:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
APPROVING A CONDITIONAL USE
PERMIT FOR A GUIDE SERVICE AT
345 DOLCHOK LANE**

Case No. BA-21-01

DECISION ON APPEAL

I. INTRODUCTION

Dennis Barnard, joined by a group of residents living in the Dolchok and surrounding neighborhood appealed the DECISION of the City of Kenai Planning and Zoning Commission (“Commission”) approving a Conditional Use Permit for Dean Schlehofer to operate a Guide Service, located at 345 Dolchok Lane, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment REVERSES the DECISION of the Planning and Zoning Commission granting the Conditional Use Permit, thereby DENYING the Conditional Use Permit.

II. PROCEDURAL HISTORY

On April 15, 2021, the City of Kenai (City) received an application from Dean Schlehofer requesting a Conditional Use Permit to operate a lodge and guiding service at 345 Dolchok Lane. [R.33-38] The site is located in an area zoned Rural Residential (RR). [R. 19] Pursuant to KMC 14.22- Land Use Table, Guide Services and Lodging require a conditional use permit in the RR zone. The application was treated by the Planning Department as an application for two separate conditional uses, one for a guide service and one for lodging. [R. 25-32] This decision only addresses the guide service. A guide service is defined by KMC 14.20.320(b) as “any activity on any premises used for collecting or returning persons from recreational trips when remuneration is provided for the service.”

On May 12, 2021, the Commission held a public hearing on Resolution No. PZ2021-16, a resolution granting the Conditional Use Permit for a guide service. [R25-28.] At the public hearing, during the public comment time, Evelyn Dolchok Huff explained she was opposed to the conditional use permit because the area had always been a single-family neighborhood and she was concerned about the impact the conditional use could have on property values, neighborhood safety, increased traffic, and noise. [R. 103] Rick Baldwin opposed the conditional use permit, arguing that the proposed use was not compatible with the character of the neighborhood and that the Commission should consider the covenants prohibiting businesses in the neighborhood in its assessment of the neighborhood's character. [R.103] Jerry Huff also expressed concern that the use would affect the character of the neighborhood. [R.103]. Mylee Niederhauser expressed concerns about noise and trespass issues with guests. [R.104] Charlotte Coots explained it was a family-oriented neighborhood and some family activities would not be possible with the increased traffic and safety concerns. [R.104] She also asserted that the neighborhood covenants should be followed. [R.104] Elaine Larson also spoke about the family-centered character of the neighborhood and that the use would violate this, decrease their property values and set a precedent for change in the neighborhood. [R.104] Phil Daniel questioned whether the applicant met his burden of showing that property values would not be affected and noted that residents did not want to see the character of the neighborhood change. [R. 104] Mark Larson similarly indicated the use would set a precedent for change to the neighborhood. [R.104] Ron Rogalsky spoke against the use, along with Duane Myers and Amber Every, expressing concern for safety, noise, loss of privacy, and impacts to surrounding property values. [R.104] Barbara Baldwin read a letter of opposition into the record that was signed by over forty people in the neighborhood. [R.104] There were also numerous written documents submitted opposing the conditional use. [R.74-97] Duane Myers spoke in favor of Mr. Schlehofer, noting his integrity and success as a guide. [R.104] Mr. Schlehofer testified that he researched the neighborhood before moving in and had concern for his neighbors and explained how he intended to manage the business. [R. 104]

The City Planner presented a Staff Report recommending the Commission approve the application for a Conditional Use Permit. [R.19-24] After the close of the hearing the commission voted to approve Resolution PZ2021-16 with specific conditions as provided in the Resolution. The Commission made no additional findings. [R. 105]

III. STANDARD OF REVIEW

Kenai Municipal Code provides that "...the Board of Adjustment may reverse, remand or affirm, wholly or partly, or may modify the order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the body from whom the appeal is taken."¹ The Board reviews the appeal *de novo*.² Therefore, no deference is given to the decision by the Commission. While public testimony does hold evidentiary weight, the Board cannot base its decision solely on support or opposition by the public.³

The function of the Board is to determine whether the requirements for a conditional use permit have been met and grant or deny the conditional use permit on the conditions supported by the substantial evidence before it.⁴ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁵ The Board must make specific findings supporting its conclusions.⁶

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kenai Municipal Code 14.20.150(a) states in relevant part that: "[t]he conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings." The applicant for a conditional use permit has the burden of establishing that the conditional use meets the following six criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and

¹ KMC 14.20.290(f)(2).

² *Id.*

³ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

⁴ *Id.* At 931-932.

⁵ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

⁶ *Fields*, at 932. And KMC 14.20.180(c).

- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions should be met by the applicant. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.⁷

The evidence indicates that Mr. Schlehofer previously operated a guide service and lodge at another location outside the City, but recently purchased the subject property with the intent of relocating his business. Mr. Schlehofer's application for the conditional use permit states that he operates his fishing and lodging business between May and September/ October. He anticipates his clients will check in around 6 p.m. and leave in the early mornings for fishing between 5 and 8 a.m. He anticipates between four and five clients per night, with a maximum of eight. He stated that clients will only be at the property in the mornings, evenings and night, otherwise they will be out fishing. He provided that the property is almost two acres in size and is nearly completely screened from adjacent parcels by natural vegetation and a fence on one side. He anticipates that his clients will only need one to three vehicle parking spaces.

He has proposed rules for his clients that include quiet hours after 10 p.m. and restrictions on roaming the property, asking his clients to respect the neighbors. He states that he and his family along with a helper will be staying at the property most of the time. The lodge will provide a continental breakfast, but otherwise clients are expected to do their own cooking in a common kitchen area. With respect to the guide business alone, Mr. Schlehofer explained that he would meet his clients off the property for daily fishing activities. He intends to keep two boats on the property. One drift boat and one power boat. He also has a trailer on the property used to house a deckhand.

Mr. Schlehofer's indicates that denial of a Conditional Use Permit will cause him economic harm and that he has already spent significant funds to accommodate the property for guests and guide business. He argues that the opinion of neighbor's who testified against him has been unfairly biased because of their experience with lodges and guide services on nearby Angler Drive. Mr. Schlehofer argues that he will run a different type of operation than those complained about on Angler Drive.

⁷ KMC 14.20.150(d)(1-6).

The Appeal from Mr. Barnard *et. al.* requesting the Board of Adjustment overturn the Planning and Zoning Commission's grant of the Conditional Use Permit for a guide service argues that the Appellants purchased their homes on Dolchok in an area zoned Rural Residential with an expectation of a stable and attractive residential environment. Mr. Barnard *et. al.* states that there are no other commercial uses of property in the neighborhood. Mr. Barnard *et. al.* argues that granting a conditional use for a guide service will destabilize the neighborhood and violate its residential character. The Appellants explained that the neighborhood is one where children play in the streets and most people sleep past 5 a.m. which is not compatible with a guide service starting that early, hooking up boats and trailers along with associated noise. The Appellants provided that many people in the neighborhood sleep with their windows open during the summer. They argue that guided clients would increase traffic and noise and treat the neighborhood differently than residents. The Appellants testimony and evidence described a close knit neighborhood environment with long time family residents, neat homes and yards with residents using Dolchok Lane for various recreational activities such as walking and children riding bikes.

Mr. Barnard *et. al.* argues that the value of the lots for residential purposes would be diminished along with the quality of life by the operation of a guide service in the neighborhood. The Appellants also argue that if this conditional use is granted, there is nothing to stop other conditional uses from being granted in the neighborhood which would eventually lead to the disintegration of the residential neighborhood as has occurred in other neighborhoods around the City.

Preliminarily, the Board of Adjustment notes its decision accounts for the burden on Mr. Schlehofer to show that the conditions for granting a conditional use permit are met. Further, the majority of the neighborhood expressed opposition to the granting of the conditional use, which while not conclusive does hold evidentiary weight in the Board's decision. Mr. Schlehofer must show that all six of the criteria for granting a conditional use are met, which in this case he has not done.

A. Mr. Shlehofer Did Not Meet His Burden to Show that the Use of the Property as a Guide Service is Consistent with the Purpose of the Zoning Code and Purposes and Intent of the Zoning District.

Mr. Schlehofer did not show through evidence or testimony that the use of his property as a guide service would be consistent with the zoning code and purpose of the Rural Residential Zone. While the Zoning Code, through the conditional use process, is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property, a guide service is not consistent with the specific aspects of the rural residential neighborhood. The purpose and intent of the Rural Residential Zone is:

(a) *Intent.* The RR Zone is intended to provide for low density residential development in outlying and rural areas in a form which creates a stable and attractive residential environment. The specific intent in establishing this zone is:

- (1) To separate residential structures to an extent which will:
 - (A) Preserve the rural, open quality of the environment;
 - (B) Prevent health hazards in areas not served by public water and sewer.
- (2) To prohibit uses which would:
 - (A) Violate the residential character of the environment;
 - (B) Generate heavy traffic in predominantly residential areas.⁸

In this case, the substantial evidence shows that the proposed guide service is not compatible with the stable and attractive residential environment of Dolchok Lane and would violate the residential character of the neighborhood. The Appellants began their presentation to the Board with a video of the neighborhood, clearly showing its residential character, along with the families that lived in the neighborhood. The video showed that many of the residents had lived in the neighborhood for a long time, indicating a very stable environment. The video along with testimony described a relatively quiet, close knit, multi-generational neighborhood, where children played in the street, residents walked along the street and the neighbors generally knew each other. The neighborhood appears to be exclusively single family residences and there is not public river access even though many of the properties have private access to Beaver Creek.

The Appellants provided testimony of covenants for the neighborhood (found in the record at [R.94-97]) that prohibited commercial businesses and indicated that they relied on these covenants in choosing to locate in the neighborhood. While the covenants are not determinative in the Board's decision as the City does not enforce private covenants, coupled with the testimony of residents of their reliance on the covenants, the covenants are evidence that the neighbors expect

⁸ KMC 14.20.080

the neighborhood to be residential and free of commercial activity. Testimony indicated that there were not any current commercial uses on Dolchok Lane.

The Appellants also presented evidence comparing and contrasting the Dolchok Neighborhood with a nearby neighborhood that had many conditional use permits operating. The Appellants testified as to the loss or destabilization of the residential character of the nearby neighborhood because of the operation of commercial uses, including guide businesses compared to their neighborhood that retained its residential character and the benefits of that character that they enjoyed.

The Appellants argued that a guide business that began operations very early in the morning, with boats being loaded and guides and clients entering and exiting vehicles would be disruptive to the residential character of the neighborhood. Mr. Barnard provided that he lived adjacent to Mr. Schlehofer's property and that the early morning activities of moving boats had already disturbed his sleep. Other residents testified that they would no longer feel comfortable letting their kids play in the streets with a guide entering and exiting the road towing boats.

Mr. Schlehofer argued that his intention was to run a small operation that would not be disruptive to the other residents. He pointed out that his location is close to the exit of the neighborhood. He testified that he only had one power boat and one drift boat at the location. He noted that many of the current residents also had boats and participated in fishing activities. He argued that his activities would not be any more disruptive to the residents than their own current activities and that other residents got up early and left the neighborhood. Mr. Schlehofer testified that his intent was to meet his client's offsite for the guide service and that traffic would be minimal.

Mr. Schlehofer also provided that had been in the guide business for a long time and was well respected in the industry. He stated that he had been told by his realtor and the previous home owner that the property was suitable for a guide business and other business opportunities. Mr. Schlehofer's history as a guide and his interactions with private third parties are not persuasive to the findings of the Board.

The Board finds that the substantial evidence does shows that even though Mr. Schlehofer intends to run a small operation and meet clients offsite, the commercial use would violate the residential character of the neighborhood and jeopardize the stable and attractive residential environment. While other residents in the neighborhood may also participate in fishing activities

or have other reasons for leaving their houses early in the morning and throughout the day, Mr. Schlehofer's residential use of the property coupled with his commercial comings and goings as a guide service, and housing of a deckhand, presents a more consistent activity would likely have an impact on the neighborhood. His neighbors testified that their residential uses have already been disrupted by the guide activities. The neighbors testified that their expectations were for a residential neighborhood without any commercial uses and desired it to stay that way. The Appellants showed the impacts of conditional uses in a nearby neighborhood that had caused the loss of its residential character. As stated above, the purpose of the RR zone is to create a stable and attractive residential environment, and in this case, in this close knit, quiet neighborhood, with numerous long time residents, without any current commercial uses, the guide use as presented by Schlehofer would likely violate the residential character of this particular neighborhood and cause destabilization. This would be the first permitted commercial use in the neighborhood, and while this decision is just based on this use, the Board does note that in other neighborhoods the intrusion of numerous commercial uses has been shown by the Appellants to have caused significant change.

B. Mr. Schlehofer Did Not Meet his Burden to Show that the Value of Adjoining Property or Neighborhood Would Not Be Significantly Impaired.

The requirements for granting a conditional use permit require the applicant to show the value of adjoining property would not be significantly impaired by the use. In this case Mr. Schlehofer argued that the values of adjoining property would not be impaired. He argued that there were sufficient natural and fencing buffers surrounding his property to minimize impact and that he had made improvements to the home he purchased. The Appellants, on the other hand argued that their property would be significantly impaired. They testified that new buyers would be concerned about living in a residential neighborhood with existing commercial uses, compared to the current neighborhood without any commercial uses. The Appellants argued that this criteria was also not specifically limited to monetary values but that other aspects of the value of their property and the neighborhood would be significantly impaired, namely their use and enjoyment of their property and the neighborhood.

Neither party presented appraisal or assessment data, nor opinions from a realtor indicating one way or another how property values could be affected by commercial uses in a residential neighborhood. While the staff report by the City Planner also indicates adjoining property values

would not be affected, this conclusion is also not supported by satisfactory evidence. The Board finds that given the arguments by both parties, Mr. Schlehofer has not shown by substantial evidence that the value of adjoining property or the neighborhood would not be significantly impaired. To the contrary, the board finds that in this particular neighborhood, a commercial use in violation of the existing covenants, could make property in the neighborhood less attractive to potential buyers.

C. Mr. Schlehofer Did Not Show that a Guide Service in the Neighborhood Would Be in Harmony with the Comprehensive Plan.

Mr. Shlehofer did not present evidence to the Board or Commission related to the proposed use being in harmony with the City's Comprehensive Plan. In Mr. Schlehofer's application for a conditional use permit, where asked to explain how the use was consistent with the Comprehensive Plan, he only provided that there would be house rules to ensure the safety and harmony of all guests. The City Planner did note that one of the goals of the Comprehensive Plan is to promote economic development and support the fiscal health of the City. However, the Appellants testified that one of the other goals of the Comprehensive Plan is to promote and encourage quality of life in the City, including an objective to protect and rejuvenate the livability of existing neighborhoods and site compatible uses together. The Board finds that these goals are not mutually exclusive, however Goal 1 of the Plan, promoting and encouraging quality of life, is more applicable, especially in light of one of the objectives of the goal in protecting livability of existing neighborhoods. While Mr. Schlehofer has argued that his proposed guide use would have little to no impact on the neighborhood, numerous residents testified about the benefits of living in the residential neighborhood without any commercial uses. There was testimony about residents enjoyment of the neighborhood's private and public property attributes. The Appellants testified about the current privacy in the neighborhood, quietness, and use of the residential street by children and how these attributes contributed to their quality of life. A commercial use in this environment does not necessarily meet, nor is it in harmony with the objective in the Plan to protect the livability of neighborhoods. While economic development is certainly a goal of the Comprehensive Plan, it is less specific or applicable to this residential neighborhood. The proposed use is permitted in other zones in the City where it could be located to promote economic development. The Board also finds that locating a guide service in this neighborhood is

inconsistent with Goal 3 of the Comprehensive Plan which is to implement a forward looking approach to community growth.

The Board finds the argument by the Appellants more persuasive, that the Comprehensive Plan is intended to promote and encourage quality of life and protect the livability of neighborhoods through long term planning strategies, which is not served by allowing a guide service in this particular residential neighborhood. Mr. Schlehofer has not met his burden of showing by substantial evidence that the guide service on Dolchok Lane would be in harmony with the Comprehensive Plan.

D. Public Services and Facilities are Adequate to Serve the Proposed Use.

The Board finds that public services and facilities are adequate to serve the guide service. The property is adjacent to a paved road maintained by the City. There is adequate police and fire response available, utilities are available and the property is large enough for onsite private water and sewer.

E. The Proposed Use will not be Harmful to Public Safety, Health or Welfare.

The Board finds that the proposed use would not be harmful to public health safety or welfare. Mr. Schlehofer's description of his proposed operations do not give rise of concern for public safety, health or welfare. While the Appellants have raised safety concerns regarding risk to their children from vehicles related to the business towing boats and entering and exiting the roadway, as well as the suggestion of the influx of unknown clients of the business wandering off property, these concerns are not sufficient to show the use would be harmful to the public safety, health or welfare.

F. There are not Additional Conditions that Can be Imposed on the Conditional Use Permit that Would Allow the Use to Satisfy all of the Requirements for Granting a Conditional Use Permit for a Guide Service.

This final criteria allows for the imposition of additional limitations or safeguards to be required in the operation of the proposed conditional use to ensure it meets the other five criteria

for granting a conditional use. Mr. Schlehofer testified and provided evidence that he would impose certain rules for his clients to restrict their impact on the neighborhood, such as quiet hours and restrictions on leaving his property. He also described his operation being small and utilizes few independent contractors that would be coming to the neighborhood, including meeting his clients offsite. He explained that he only would keep two boats on the property, and that his operation was seasonal.

The Board considered additional criteria that could be imposed to limit the impact of the commercial use on the neighborhood. However, ultimately the Board concludes that there are no reasonable limitations that can be placed on the operation that would allow the use without impacting the stable attractive and residential environment and character of the Dolchok Neighborhood. Further, considered limitations on guide service could not ensure there would not be significant affect on the values of adjacent property or the neighborhood given the evidence presented. Finally, these considered limitations would not bring the use into harmony with the City's Comprehensive Plan which strives to promote quality of life and livability and protect existing neighborhoods.


CONCLUSION

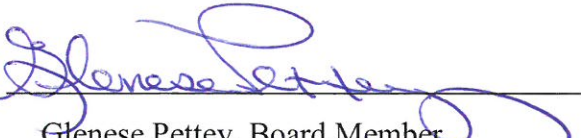
After reviewing the evidence and presentation of the parties, the Board of Adjustment REVERSES the decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and denies Dean Schlehofer's application for a Conditional Use Permit to operate a guide business at 345 Dolchok Lane. The Board concludes that Mr. Schlehofer did not present sufficient information showing that his proposed guide business would satisfy all six of the criteria required for granting a conditional use permit.

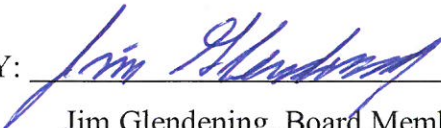
DATED this 19 day of August, 2021.

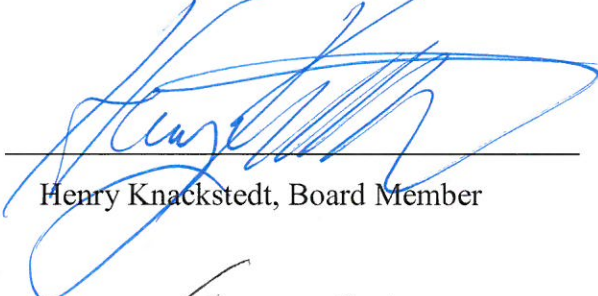
BY: Brian G. Gabriel

Brian G. Gabriel, Board Chair

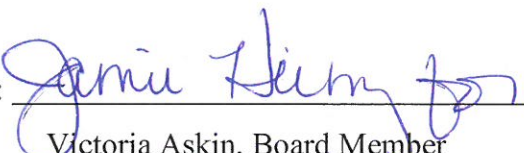
BY: 
Bob Molloy, Board Member

BY: 
Glenese Pettey, Board Member

BY: 
Jim Glendening, Board Member

BY: 
Henry Knackstedt, Board Member

BY:  for
Teea Winger, Board Member

BY:  for
Victoria Askin, Board Member

Notice of Right to Appeal

This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty (30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

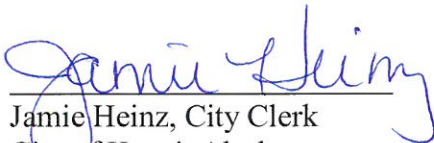
CERTIFICATE OF DISTRIBUTION

I certify that on ^{the} 19th day of August, 2021, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

Paul Ostrander, City Manager
City of Kenai
210 Fidalgo Ave
Kenai, AK 99611

David Barnard
335 Dolchok Lane
Kenai, AK 99611

Dean Schlehofer
345 Dolchok Lane
Kenai, AK 99611



Jamie Heinz, City Clerk
City of Kenai, Alaska

**BEFORE THE BOARD OF ADJUSTMENT FOR THE
CITY OF KENAI, ALASKA**

210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF DEAN SCHLEHOFER:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
DENYING A CONDITIONAL USE
PERMIT FOR A LODGE AT
345 DOLCHOK LANE**

Case No. BA-21-02

DECISION ON APPEAL

I. INTRODUCTION

Dean Schlehofer appealed the DECISION of the City of Kenai Planning and Zoning Commission (“Commission”) denying a Conditional Use Permit to operate a lodge, located at 345 Dolchok Lane, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment UPHOLDS the DECISION of the Planning and Zoning Commission denying the Conditional Use Permit.

II. PROCEDURAL HISTORY

On April 15, 2021, the City of Kenai (City) received an application from Dean Schlehofer requesting a Conditional Use Permit to operate a lodge and guiding service at 345 Dolchok Lane. [R.27-32] The site is located in an area zoned Rural Residential (RR). [R.23] Pursuant to KMC 14.22- Land Use Table, Guide Services and Lodging require a conditional use permit in the RR zone. The application was treated by the Planning Department as an application for two separate conditional uses, one for a guide service and one for lodging. [R. 97-100] This decision only addresses the lodge use. A lodge is defined by KMC 14.20.320(b) as “a building or group of buildings containing five (5) or fewer guest rooms used for the purpose of offering public lodging on a day-to-day basis with or without meals.” Mr. Schlehofer’s application indicates he has four rooms available for lodging, typically expects to have four or five guests spend the night with a

maximum capacity of eight. [R.29] He intends to serve guests a continental breakfast, otherwise his guests have access to a shared kitchen for meals. [R.32]

On May 12, 2021, the Commission held a public hearing on Resolution No. PZ2021-17, a resolution granting the Conditional Use Permit for a lodge. [R 99- 100] At the public hearing, during the public comment time Rick Baldwin testified that he was opposed to the granting of a conditional use permit for a lodge. [R.99] He argued that contrary to the City Planner's recommendations, the residential character of the neighborhood would be changed by the operation of a lodge due to the nature of its operations. [R. 99] Mr. Baldwin also argued that the goal of the Comprehensive Plan to support economic development should never override the other goal of the Plan of protecting quality of life. [R.99] Chuck Eubank also testified against the operation of a lodge in the neighborhood, questioning its impact on the neighborhood and the precedent for change it could bring. [R.99] Kelsey Daniel expressed concern for the safety of the neighborhood children, increased traffic, littering, increased noise and strangers in the neighborhood if the lodge was approved. [R.99] Amber Every testified that the operation of a lodge would be a violation of the neighborhood covenants, and that approval of this commercial operation would set a precedent to allow other businesses in the neighborhood. [R.100]. Written opposition was also provided by residents on Dolchok. [R. 41-44, 66-91]

Dean Schlehofer testified that he was aware of the neighbors concerns and he intended to operate the lodge in a safe manner. [R.100]

The City Planner presented a Staff Report recommending the Commission approve the application for a Conditional Use Permit. [R.44-65] After the close of the hearing the Commission made the following findings in denying the conditional use permit for a lodge:

1. Chair Twait was concerned that the character of the neighborhood would be altered by the operation of a lodge.
2. Commissioner Springer stated that this commercial activity was not appropriate in the residential Dolchok neighborhood.
3. Commissioner Halstead provided that the over-whelming feelings of the neighborhood were against the use, and the residents expressed valid concerns about traffic, a precedent to change the neighborhood, and the lodge not being compatible with the existing ambiance of the neighborhood.

4. Vice Chair Fikes stated that she was concerned about the health and safety of the neighborhood and increased traffic from the lodge. She also stated that the neighbors in the rural residential zone had a certain expectation of quality of life not compatible with a 24 hour a day business. She further noted that there were no other businesses in the neighborhood, and expressed her position that it shouldn't be changed.
5. Commissioner Woodward noted that every resident in the neighborhood was against the conditional use, and that approving the use could result in change to the neighborhood like what happened on Angler Drive.
6. Commissioner Greenberg explained that he was in favor of permitting the use, because it had been approved in other rural residential zones in the City and the code should be applied fairly. [R. 100]

III. STANDARD OF REVIEW

Kenai Municipal Code provides that "...the Board of Adjustment may reverse, remand or affirm, wholly or partly, or may modify the order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the body from whom the appeal is taken."¹ The Board reviews the appeal *de novo*.² Therefore, no deference is given to the decision by the Commission. While public testimony does hold evidentiary weight, the Board cannot base its decision solely on support or opposition by the public.³

The function of the Board is to determine whether the requirements for a conditional use permit have been met and grant or deny the conditional use permit on the conditions supported by the substantial evidence before it.⁴ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁵ The Board must make specific findings supporting its conclusions.⁶

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

¹ KMC 14.20.290(f)(2).

² *Id.*

³ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

⁴ *Id.* At 931-932.

⁵ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

⁶ *Fields*, at 932. And KMC 14.20.180(c).

Kenai Municipal Code 14.20.150(a) states in relevant part that: “[t]he conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings.” The applicant for a conditional use permit has the burden of establishing that the conditional use meets the following six criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and
- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions should be met by the applicant. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.⁷

The evidence indicates Mr. Schlehofer previously operated a guide service and lodge for his clients at another location outside the City of Kenai, but recently chose to purchase property on Dolchok Lane and move his business there. Mr. Schlehofer’s application for the conditional use permit states that he operates his fishing business between May and September/ October. His clients will check in around 6 p.m. and leave in the early mornings for fishing between 5 and 8 a.m. He anticipates between four or five clients per night with a maximum of eight. He stated that clients will only be at the property in the mornings, evenings and night, otherwise they will be out fishing. He stated that the property is almost two acres in size and is nearly completely screened from adjacent parcels by natural vegetation and a fence on one side. He anticipates that his clients will only need one to three vehicle parking spaces.

He has proposed rules for his clients that include quiet hours after 10 p.m. and restrictions on roaming the property, asking his clients to respect the neighbors. He stated that he and his

⁷ KMC 14.20.150(d)(1-6).

family along with a helper will be staying at the property most of the time. The lodge will provide a continental breakfast, but otherwise clients are expected to do their own cooking in a common kitchen area. A house cleaner will also be coming to the location.

Mr. Schlehofer's appeal indicates that denial of a conditional use permit will cause him economic harm and that he has already spent significant funds to accommodate the property for guests. He argues that the opinion of neighbor's who testified against him has been unfairly biased because of their experience with lodges and guide services on nearby Angler Drive. Mr. Schlehofer argues that he will run a different type of operation than those complained about on Angler Drive and that he should not be penalized for what occurred there.

During the public comment period of the hearing before the Board, Deidre Cheek showed a video of the neighborhood which highlighted the homes and long term residents of the neighborhood. Charlotte Coots explained that she and her family relocated to the Dolchok neighborhood to get away from noise and industrial activity encroaching on her prior home. She and her husband relied on the covenants in the neighborhood prohibiting businesses in choosing its location according to her testimony. She also provided that she relied on the City's zoning code in protecting their residence from noncompatible land uses. She stated that she enjoyed walks in the neighborhood and the residential neighborhood life. Concern was expressed that the proposed lodge was not a 9-5 business, but instead one that had vacationing guests all hours of the day and night. A comparison was made to Angler Drive which had numerous commercial uses permitted through the conditional use process and had lost its residential character. She asserted that the residents of Dolchok Lane's quality of life was at jeopardy and questioned whether the Board was listening to the wishes of the community.

Rick Baldwin argued that it would be poor planning to allow this business use in the Dolchok Neighborhood which planning and zoning regulations were set up to protect. He argued that this business use was not compatible with the residential Dolchok Neighborhood, and it was not merely a matter of allowing some flexibility in use. He argued that the business would operate consistently on an early fishing schedule, and that clients would be coming and going, and checking in and out causing inevitable noise and disturbance. He argued that the business would bring transient strangers into the neighborhood that were on a vacation schedule and would behave like vacationers as opposed to residents. He agreed that not all guest would be loud and boisterous, but that some certainly would, even if rules were in place. He stated that the number

of guests and activity of a lodge were not compatible with the neighborhood. He argued that the Comprehensive Plan promoted quality of life and that the City should protect the neighborhood environment that had been nurtured. He asserted that Comprehensive Plan provided a common theme of protecting neighborhoods. He argued that Angler Drive showed how granting conditional uses for a lodge in residential neighborhoods changed the character of the neighborhoods and devalued surrounding residential property. He reminded the Board the Mr. Schlehofer had the burden of proof and that every neighbor was against the proposed use.

During Mr. Schlehofer's presentation of his case, after the Planners staff report, Mr. Schlehofer noted the opposition from his neighbors. He provided that he had been misled by his realtor and the prior homeowner that the home would be appropriate for a lodge. He noted that the downstairs of the house had previously been rented out. Mr. Schlehofer argued that he would not be fostering a loud environment but that he would have strict rules in place for his guests and that his impact on the neighborhood would be minimal because it was so close to the entrance of the subdivision. He stated that his guests came to fish and were not there to party. He also noted that the business would not be run year round, but only seasonally. Mr. Schlehofer clarified that his plan would involve only minimal fish processing at the residence to include vacuum sealing. He asserted that granting his use would not result in the neighborhood changing like Angler Drive had.

Much like his written appeal, Mr. Schlehofer emphasized before the Board his lengthy career in the guide industry and that he was a responsible and respected operator. He also clarified that there was a trailer on the property which was used to house a deckhand, and he had a house cleaner, otherwise he only worked with other independent contractors. He stated that he wanted to be given a chance by the neighborhood and that his business would not interfere or disrupt the neighborhood, explaining that he also had his family living on the property.

Preliminarily, the Board notes that the burden is on Mr. Schlehofer to show that the conditions for granting a conditional use permit are met. Further, the majority of the neighborhood expressed opposition to the granting of the conditional use, which is not determinative of the Board's decision but does hold evidentiary weight. Mr. Schlehofer must show that all six of the criteria for granting a conditional use are met, which in this case he has not done.

A. Mr. Schlehofer Did Not Meet his Burden to Show that the Use of the Property as a Lodge is Consistent with the Purpose of the Zoning Code and Purposes and Intent of the Zoning District.

While the Zoning Code through the conditional use process is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property, the purpose and intent of the Rural Residential Zone is:

(a) *Intent.* The RR Zone is intended to provide for low density residential development in outlying and rural areas in a form which creates a stable and attractive residential environment. The specific intent in establishing this zone is:

- (1) To separate residential structures to an extent which will:
 - (A) Preserve the rural, open quality of the environment;
 - (B) Prevent health hazards in areas not served by public water and sewer.
- (2) To prohibit uses which would:
 - (A) Violate the residential character of the environment;
 - (B) Generate heavy traffic in predominantly residential areas.⁸

In this case, the substantial evidence shows that the proposed lodge is not compatible with the stable and attractive residential environment and would violate the residential character of the neighborhood. Public testimony provided through a video of the neighborhood, clearly shows the neighborhood's unique residential character. The video showed that many of the residents had lived in the neighborhood for a long time, indicating a stable environment. The video along with other public testimony described a close knit neighborhood where children played in the street, residents walked along the street and the neighbors generally knew each other. The neighborhood appears relatively neat with single family homes. The activity of operating a lodge, with clients leaving early every morning, and returning in the evening to cook and enjoy their vacations would likely disrupt the character of the neighborhood. Other activities such as a deckhand living on sight, and a cleaner coming to clean on a commercial basis would add to this disruption. The residents testified during public comment and in the record before the Board about the closeness of the residents in the neighborhood and their enjoyment of its livability. Having paying clients

⁸ KMC 14.20.080

staying at the property proposed for the lodge, on a daily or weekly basis could certainly detract from this, even if they were asked to stay on the property by the owner and observe quiet hours. Public testimony is persuasive that even if Mr. Schlehofer had strict house rules for his clients, not all could reasonably be expected to follow them, and Mr. Schlehofer cannot control the activity of his clients in their comings and goings to the residence. Having eight guests, plus Mr. Schlehofer's family, a deckhand and cleaning lady coming and going from the property can reasonably be expected to increase noise and traffic beyond a typical family residence. This is especially true of the earlier morning activities typical of fishing clientele as explained to the Board.

Covenants for the neighborhood (found in the record at [R.94-97]) prohibit commercial businesses and neighbors indicated that they relied on these covenants in choosing to locate in the neighborhood. While the covenants are not ultimately determinative in the Board's decision as the City does not enforce private covenants, coupled with the testimony by residents of their reliance on the covenants, they are evidence that the neighbors expect the neighborhood to be residential in character and free of commercial activity. The evidence indicates that there are not any other current commercial uses on Dolchok Lane.

Mr. Schlehofer provided that his intention was to run a small operation that would not be disruptive to the other residents. He testified and provided evidence that guests staying over would be expected to follow strict rules. He only had a small number of guest rooms and expected vehicle traffic from his clients to be limited. He also indicated that fish processing activities would be minimal. His business plan was to provide a small breakfast, otherwise clients would be responsible for cooking their own food in a shared kitchen area. This testimony and his plan for guests does not meet his burden of showing that the lodge operation would not destabilize the attractive residential environment of the neighborhood, or jeopardize its residential character.

Mr. Schlehofer also argued that he had been in the guide business for a long time and was well respected in the industry. He stated that he had been told by his realtor and the previous home owner that the property was suitable for a lodge business. While this may be true, it is not persuasive to the findings of the Board.

The Board finds that the substantial evidence shows that even though Mr. Schlehofer intends to run a small operation, with a small number of guests staying overnight, close to the exit of the neighborhood, the commercial use would violate the residential character of the neighborhood and not maintain a stable and attractive residential environment. Having up to eight

guests coming and going, staying overnight, cooking, and spending evenings and nights at the residence would likely have an impact on the neighborhood. While other neighbors could certainly have guests stay over or visit, consistent use of this property during the summer by clients, and two workers, along with the Mr. Schlehofer's family would be more of an impact in relation to traffic and noise than a typical household in the neighborhood would have.

The neighbors who provided public testimony and written comments in the record showed the impacts of similar conditional uses in a nearby neighborhood that had lost its residential character. The purpose of the RR zone is to create a stable and attractive residential environment, and in this case, in this close knit neighborhood, with numerous long time residents, without any current commercial uses, the lodge use as presented by Mr. Schlehofer would likely violate the residential character of this particular neighborhood and cause destabilization. This would be the first permitted commercial use in the neighborhood, and while this decision is just based on this use, the Board does note that in other neighborhoods the intrusion of numerous commercial uses has been shown to have caused significant change.

B. Mr. Schlehofer Did Not Meet his Burden to Show that the Value of Adjoining Property or Neighborhood Would Not Be Significantly Impaired.

The requirements for granting a conditional use permit require the applicant to show the value of adjoining property and the neighborhood would not be significantly impaired by the use. In this case Mr. Schlehofer argued that the values of adjoining property would not be impaired. He argued that there were sufficient natural and fencing buffers surrounding his property to minimize impact. He also provided that he has invested in the house to improve it. The public testimony and neighbor's arguments in the record on the other hand argue that their property would be significantly impaired. The neighbors testified that new buyers would be concerned about living in a residential neighborhood next to a lodge with unknown clients coming and going, as compared to the current neighborhood without any commercial uses. The neighbors testified that the criteria was also not specifically limited to monetary value but that other aspects of the value of their property and the neighborhood would be significantly impaired, namely their use and enjoyment of their property and the neighborhood.

Neither Mr. Schlehofer nor his neighbors presented appraisal or assessment data, nor opinions from a realtor indicating one way or another how property values could be affected by commercial

uses in a residential neighborhood. While the staff report by the City Planner also indicates adjoining property values would not be affected, this conclusion is also not supported by substantial evidence. The Board finds that given the contradicting opinions by both Mr. Schlehofer and his neighbors, the Applicant has not shown by substantial evidence that adjoining property or the neighborhood would not be significantly impaired.

C. Mr. Schlehofer Did Not Show that a Lodge in the Neighborhood would be in Harmony with the Comprehensive Plan.

Mr. Schlehofer did not present evidence related to the proposed use being in harmony with the City's Comprehensive Plan related to a lodge. In response to this criteria in his application for a lodge, he only indicated that he would have lodge rules in each room to ensure the safety and harmony at all guests. The City Planner did note that one of the goals of the Comprehensive Plan is to promote economic development and support the fiscal health of the City. However, neighbors publicly testified and provided written comment in the record that one of the other goals of the Comprehensive Plan is to promote and encourage quality of life in the City, including an objective to protect and rejuvenate the livability of existing neighborhoods and promote the siting and design of land uses that are in harmony and scale with surrounding uses.

The Board finds that these goals are not mutually exclusive, however Goal 1 of the Plan, promoting and encouraging quality of life is more applicable, especially in light of the objectives of the goal in protecting livability of existing neighborhoods and siting land uses in harmony with each other. While Mr. Schlehofer has argued that his proposed lodge use would have little to no impact on the neighborhood, numerous residents testified about the benefits of living in the residential neighborhood without any commercial uses. There was testimony about residents' enjoyment of the neighborhood's private and public property attributes. The neighbor's testified about the current privacy in the neighborhood, quietness, and use of the residential street by children and how these attributes contributed to their quality of life. A commercial use in this environment does not necessarily meet, nor is it in harmony with the objective of protecting the livability of neighborhoods and siting harmonious uses. While economic development is a goal of the Comprehensive Plan, it is less specific to this residential neighborhood and the attributes that are important to its residents. Economic development can be fostered in other areas of the City more appropriate for commercial uses. Additionally, the Comprehensive Plan in Goal 3 discusses

land use strategy to implement a forward-looking approach to community growth and development. Siting a lodge in this quiet residential neighborhood is not necessarily consistent with this goal.

The Board is more persuaded, that the Comprehensive Plan is intended to promote and encourage quality of life and protect the livability of neighborhoods, sitting compatible uses next to each other as opposed to economic development in residential neighborhoods. Mr. Schlehofer has not met his burden of showing by substantial evidence that a lodge on Dolchok Lane would be in harmony with the Comprehensive Plan. Mr. Schlehofer's presentation and evidence is almost completely silent as to how the use is in harmony with the Comprehensive Plan.

D. Public Services and Facilities are Adequate to Serve the Proposed Use.

The Board finds that public services and facilities are adequate to serve the lodge. The property is adjacent to a paved road maintained by the City. There is adequate police and fire response available, utilities are available and the property is large enough for onsite private water and sewer.

E. The Proposed Use Will not be Harmful to Public Safety, Health or Welfare.

The Board finds that the proposed use would not be harmful to public health safety or welfare. Mr. Schlehofer's description of his proposed operations do not give rise to concern for public safety, health or welfare. While the Appellants have raised safety concerns regarding risk to their children from increased vehicular traffic from overnight guests, as well as the suggestion of the influx of unknown clients of the business wandering off property, these concerns are not sufficient to show the use would be harmful to the public safety, health or welfare.

F. There are Not Additional Conditions that can be Imposed on the Conditional Use Permit that Would Allow the Use to Satisfy all of the Requirements for Granting a Conditional Use Permit for a Guide Service.

This final criteria allows for the imposition of additional limitations or safeguards to be required in the operation of the proposed conditional use to ensure it meets the other five criteria for granting a conditional use. Mr. Schlehofer testified and provided evidence that he would impose certain rules for his clients to restrict their impact on the neighborhood, such as quiet hours

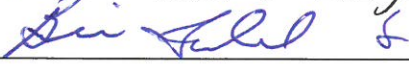
and restrictions on leaving his property while staying there. He also described his operation being small and utilizing few independent contractors that would be coming to the neighborhood.

The Board considered additional criteria that could be imposed to limit the impact of the lodge use on the neighborhood. These included requiring additional screening and limiting hours of operation. However, ultimately the Board concludes that there are not reasonable limitations that can be placed on the operation that would allow the use without impacting the stable attractive and residential environment and character of the Dolchok Neighborhood. Further, considered limitations on the lodge use could not ensure there would not be significant affect on the values of adjacent property or the neighborhood given the evidence presented. Finally, these considered limitations would not bring the use into harmony with the City’s Comprehensive Plan which strives to promote quality of life and livability and protect existing neighborhoods.

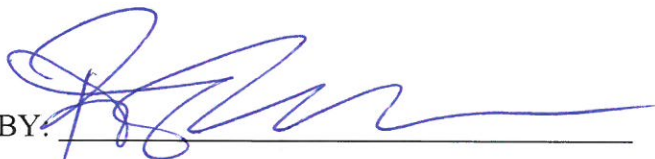
CONCLUSION

After reviewing the evidence and presentation of the parties, the Board of Adjustment Affirms the decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and generally those of the Commission in its decision and denies Dean Schlehofer’s application for a Conditional Use Permit to operate a lodge at 345 Dolchok Lane. The Board concludes that Mr. Schlehofer did not present sufficient information showing that his proposed lodge would satisfy all six of the criteria required for granting a conditional use permit.

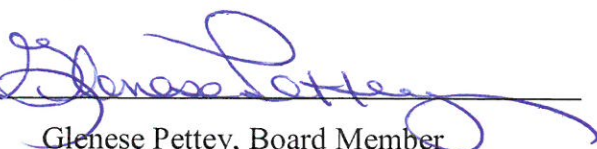
DATED this 19 day of August, 2021

BY: 

Brian G. Gabriel, Board Chair

BY: 

Bob Molloy, Board Member

BY: 

Glenese Pettey, Board Member

BY: Jim Glendening
Jim Glendening, Board Member

BY: Henry Knackstedt
Henry Knackstedt, Board Member

BY: Tea Winger
Tea Winger, Board Member

BY: Victoria Askin
Victoria Askin, Board Member

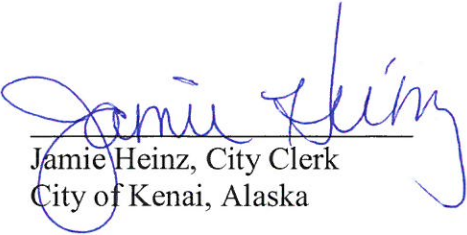
Notice of Right to Appeal

This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty (30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

CERTIFICATE OF DISTRIBUTION

I certify that on 14th day of August, 2021, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

Paul Ostrander, City Manager
City of Kenai
210 Fidalgo Ave
Kenai, AK 99611



Jamie Heinz, City Clerk
City of Kenai, Alaska

Dean Schlehofer
345 Dolchok Lane
Kenai, AK 99611

**BEFORE THE BOARD OF ADJUSTMENT FOR THE
CITY OF KENAI, ALASKA**

210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF WAYNE JONES ET. AL.:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
GRANTING A CONDITIONAL USE
PERMIT FOR EIGHT SINGLE
FAMILY DWELLING UNITS AT
1714 FOURTH AVENUE**

Case No. BA-21-03

DECISION ON APPEAL

I. INTRODUCTION

Wayne Jones, joined by thirty six other neighborhood residents appealed the DECISION of the City of Kenai Planning and Zoning Commission (Commission) granting a Conditional Use Permit for eight single family dwelling units, located at 1714 Fourth Avenue, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment UPHOLDS the DECISION of the Planning and Zoning Commission granting the Conditional Use Permit.

II. PROCEDURAL HISTORY

On April 30, 2021, the City of Kenai (City) received an application from TKC LLC requesting a Conditional Use Permit to build an eight single family dwelling units at 1714 Fourth Avenue. [R.21-22] The site is located in an area zoned Suburban Residential (RS). [R.8] Pursuant to KMC 14.22- Land Use Table, seven or more residential units on one lot require a Conditional Use Permit in the RS zone.

On May 26, 2021, the Commission held a public hearing on Resolution No. PZ2021-19, a resolution granting the Conditional Use Permit for eight single family residential units. [R 49- 50] At the public hearing the City Planner presented a staff report reviewing the criteria for granting Conditional Use Permits and recommended approval of the Conditional Use Permit with nine

additional requirements. [R. 49-50] At the public hearing, during the public comment time Wayne Jones expressed concerns about the proposed development, including the effect on neighboring property values, and increased traffic in the neighborhood. [R.50] Mr. Jones also raised concerns about the loss of natural wooded spaces in the neighborhood. [R. 50] Mr. Jones noted that there were already numerous rentals in the area and questioned whether there would be adequate screening for the project. [R. 50] Fred Braun testified that the project would fill a need for rental housing in the City and bring tax dollars into the City. [R.50] He also explained that the project was not low-end housing, but instead was intended to target professionals as renters. [R.50] Star McCloud stated her opposition to the project because of the potential negative effect on neighboring property values, increased driveways and effect on local wildlife. [R.50] Sharon Shin also shared the same concerns as Ms. McCloud. [R.50] Rob Coreson, the project builder, explained the details of the proposed construction and layout of the project, and emphasized that numerous similar quality projects like this had been completed locally. [R.50]

After the close of the public hearing, Commissioner Springer explained that he was going to vote in favor of the Conditional Use Permit because the property owner was currently pursuing a subdivision of the parcel into two separate parcels, each to contain four dwelling units, and the subdivision would negate the need for a Conditional Use Permit. [R.50] Clarification was provided by the Planner that screening would be required of the project. [R.50] Commissioner Douthit explained he would vote in favor of the project because he did not see a difference in effect on the neighborhood between this project and building one unit on eight separate lots. [R.50] He stated that the size of the buildings were adequate and the driveway plans conformed with City code. [R. 50] Commissioner Greenberg explained he would be voting in favor of the project as it was reasonable development of private property and the landscape site plan would require adequate screening. [R.50] Commission Halstead agreed with the rational of the other commissioners and favored the project because it met the requirements for a Conditional Use Permit. [R.50] Chair Twait also explained that he believed the project met the requirements for granting a Conditional Use Permit and he did not expect neighboring property values to be negatively impacted. [R.50] The Commission then voted unanimously to approve Resolution PZ2021-19 approving the Conditional Use Permit as provided in the record. [R.50]

On June 10, 2021 the City received an appeal from Wayne Jones, with a list of 36 other names and signatures¹, appealing the decision of the Commission. [R.54-56] The appeal explains that the project would damage the character, integrity and quality of the neighborhood threatening the safety and enjoyment of the neighborhood for residents. [R.54] The appeal also identifies increased traffic impairments in the neighborhood and long term negative impact on neighboring properties as reasons to overturn the Commission's decision. [R.54]

At the Hearing held before the Board on July 30, 2021 Mr. Jones was present to present his case, however, no official representative of TKC LLC was present to provide testimony or argument.

Numerous residents provided public comment in opposition of the Conditional Use Process before the presentation of the case. Concerns were expressed that the neighborhood was too small for the high-density project. Residents testified that crime was already an issue and were concerned this project would bring in more renters that would add to the existing neighborhood problems. Concern was raised about strangers living in the neighborhood. Residents argued that the lot was more suitable for development of four units instead of eight. They voiced concern that they did not like the aesthetics of the other projects the owner had developed nearby. It was also argued that renters wouldn't maintain their property in the same manner that resident owners nearby did. The neighbors stated they felt the project would bring down property values of adjoining property. One resident in particular who was a former realtor and lived adjacent to the proposed project testified that she already lived next to rentals in the area and that this particular project would be low income and impact surrounding property values. Others testified that there were already too many renters in the neighborhood and that more would not be a positive change. There was also concern that the project would result in a significant increase in traffic that the neighborhood was not designed to accommodate. The neighbors asserted that children that played in the streets would be endangered by the traffic from the development. It was also pointed out that there was only one fire hydrant on the street, and it was questioned whether this would be adequate for the new development.

Fred Braun provided public comment in favor of the project. He noted that he also owned property in the area. Mr. Braun, who is a realtor, argued that the project would increase the value of neighboring properties as it would be a nice development for the area. He explained that MLS

¹ Not all the names on the list of 36 have standing to appeal. However, Mr. Jones does have standing and presented his arguments. There was no objection to the list of Appellants by TKC LLC.

searches for rentals in Kenai indicated little availability. He provided that the intent of the project was to rent to professionals and that the property owner would provide adequate screening and site plan development.

During his presentation to the Board, Mr. Jones provide that the neighborhood was against the project. He argued that the density of the development was too much for the area, and that the increase in traffic would have a negative impact and jeopardize safety. He acknowledged that the local real estate market was currently high and that the project might not have an immediate impact on values, but over the long run it would decrease the value of surrounding properties according to his testimony. He argued that the area was already saturated with rentals and that these rentals have had a negative impact on the area which was impacted by drug use and thefts.

1. STANDARD OF REVIEW

Kenai Municipal Code provides that "...the Board of Adjustment may reverse, remand or affirm, wholly or partly, or may modify the order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the body from whom the appeal is taken."² The Board reviews the appeal *de novo*.³ Therefore, no deference is given to the decision by the Commission. While public testimony does hold evidentiary weight, the Board cannot base its decision solely on support or opposition by the public.⁴

The function of the Board is to determine whether the requirements for a Conditional Use Permit have been met and grant or deny the Conditional Use Permit on the conditions supported by the substantial evidence before it.⁵ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁶ The Board must make specific findings supporting its conclusions.⁷

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kenai Municipal Code 14.20.150(a) states in relevant part that: "[t]he Conditional Use Permit procedure is intended to allow flexibility in the consideration of the impact of the proposed

² KMC 14.20.290(f)(2).

³ *Id.*

⁴ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

⁵ *Id.* At 931-932.

⁶ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

⁷ *Fields*, at 932. And KMC 14.20.180(c).

use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings.” The applicant for a Conditional Use Permit has the burden of establishing that the conditional use meets the following six criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and
- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions should be met by the applicant. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.⁸

Preliminarily, the Board notes that the burden is on TKC LLC to show that the conditions for granting a Conditional Use Permit are met. Further, the majority of the neighborhood that testified expressed opposition to the granting of the conditional use, which is not determinative of the Board's decision but does hold evidentiary weight. In this case however, while many of the residents are against the project, their opposition is not necessarily supported in the narrow factors that the Board must base its decision on evaluating a Conditional Use Permit. Because TKC LLC must show that all six of the criteria for granting a conditional use are met, it was very close in this case given that TKC LLC did not present new evidence or argument to the Board. However, the evidence in the record before the Board along with public comment, shows that the proposed project does meet the criteria for granting a special use permit.

The evidence and testimony show that the neighborhood of the subject property is generally comprised of relatively small lots. There are already numerous multifamily structures in the area, and many rentals. The residents testified that there are already some problems with congestion and

⁸ KMC 14.20.150(d)(1-6).

even crime in the area. Much of the opposition from the neighborhood focused on the loss of green space that would result from development of the project. While this is a recognized concern by the Board, the Board can not prohibit a private property owner from developing private property in general. The property owner could build six units on the lot without a Conditional Use Permit as long as a landscape and site plan were approved by the City.

As the City planner noted, the development is not excessive given the relatively large size of the lot. The development is proposed to cover just over 12,000 square feet, while the maximum project footprint allowed given the size of the lot is well over 32,000 square feet. While the developer has chosen to pursue this project as one lot for this issue, the developer would be allowed to subdivide the property into additional lots and build the project without any Conditional Use Permits. The size of the lot would support subdivision without the lot sizes being out of character with adjacent properties in the neighborhood. The evidence indicates that the developer is actually pursuing a subdivision to divide the lot into two lots. If the subdivision is approved by the Kenai Peninsula Borough, which appears likely, this Conditional Use Permit will no longer be needed. While the Board recognizes that many of the neighbor's that testified feel the area is already congested and this project would only add to the congestion, the Board cannot prohibit development of private property, even if a Conditional Use Permit is currently required, when the criteria for evaluating the permit under City code are met.

A. The Record and Evidence Before the Board show that the Proposed Development is Consistent with the Purpose of the Zoning Code and Purposes and Intent of the Zoning District.

The Zoning Code through the conditional use process is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property. The purpose and intent of the Suburban Residential Zone is:

(a) *Intent.* The RS Zone is intended to provide for medium density residential development in areas which will be provided with common utility systems. The specific intent in establishing this zone is:

- (1) To separate residential structures to an extent which will allow for adequate light, air and privacy.
- (2) To prohibit uses which would:

- (A) Violate the residential character of the environment;
- (B) Generate heavy traffic in predominantly residential areas.⁹

In this case, the substantial evidence shows that the proposed use consistent with the purpose and intent of the Zoning District. The area is served by common utility systems and the density of the proposed development is consistent with surrounding properties given the large size of the lot and relatively small size of other lots in the neighborhood with single and multifamily dwelling improvements. The evidence and testimony show the character of the neighborhood is comprised of a mix of relatively small single family dwelling and multi family dwellings. Testimony indicates many, if not the majority of dwellings, are already utilized as rental properties. This proposed development would be consistent with the character of the neighborhood. While any new residential development on the street would increase traffic, this proposed development would not generate heavy traffic as compared to a businesses in the area and is consistent with other multifamily dwelling properties in the area. Given the lot size and project scope, any additional traffic does not appear unreasonable or heavy. Given the size of the lot proposed for the development, similarity of the use of the development to existing improvements and lot sizes in the neighborhood, the proposed project is consistent with the purpose of the Zoning Code and purpose and intent of the medium density residential zone.

B. The Value of Adjoining Property or Neighborhood Would Not Be Significantly Impaired by the Proposed Development.

The requirements for granting a Conditional Use Permit require the applicant to show the value of adjoining property and the neighborhood would not be significantly impaired by the use. While the Appellant and public testimony provided mixed analysis of the projects' effect on neighboring property values, the substantial evidence provided before the Board and in the record show that neighboring property values would not be significantly impaired by the project. The project as shown in the record would be new construction and suitable quality for the neighborhood. The size of the improvements and density of the improvements are consistent with much of what already exists in the neighborhood. Additionally the use of the property as rental units is similar to many of the other surrounding properties. While some testimony was that surrounding properties would

⁹ KMC 14.20.090

not be affected in the current real estate market but could affect prices in the long term, there was also testimony from a former realtor that neighboring property values would go down. On the other hand, another local practicing realtor testified that he believed the project would increase the value of adjoining lots. The Board finds that given the plans provided, this proposed new construction of suitable quality with a use and density consistent with other surrounding properties would not pose a significant impairment on adjoining property values or the neighborhood. This is especially true in light of the requirement that the City approve a landscape and site plan providing sufficient buffers between the subject property and neighboring properties.

C. The Project is in Harmony with the Comprehensive Plan.

The Comprehensive Plan (Plan) provides that “Suburban Residential land uses are typically single-family and multi-family residential uses that are urban or suburban in character. Typically, Suburban residential neighborhoods are developed at a higher density; lots are typically smaller; and, public water and sewer systems are required.” This medium density multifamily residential use is consistent with the Comprehensive Plan’s description of the zone.

Goal 1 of the Plan is “Quality of Life: promote and encourage quality of life in Kenai” with objectives including protecting and rejuvenating the livability of existing neighborhoods and promoting the siting and design of land uses that are in harmony and scale with surrounding uses. This new development is not inconsistent with the goal of rejuvenating and promoting the livability of this neighborhood. Newer development of a reasonable density attracting new renters to the area could improve the current neighborhood situation described by residents. Further, this land use is similar to and in scale with surrounding existing properties. Goal 3 of the Comprehensive Plan, implementing forward-looking approach to community growth and development with objectives of siting design standards in harmony and scale with surrounding uses and promoting the infill of existing improved subdivisions is also met by this proposed development. The project is in harmony and scale with surrounding uses and infills an existing improved subdivision.

D. Public Services and Facilities are Adequate to Serve the Proposed Use.

The Board finds that public services and facilities are adequate to serve the proposed use. The property is adjacent to paved roads maintained by the City. There is adequate police and fire

response available, utilities are available and the property is served by public water and sewer. While there was argument that there was already congestion in the area, it appeared part of the problem was caused by large vehicles parked on the road which could be subject to City enforcement action. The Plan submitted by the developer includes adequate off street parking for the units and adequate private snow storage. Aside from traffic generated by the new residences which appears reasonable for the size of the parcel, the project does not appear to unreasonably add to any existing congestion problems in the neighborhood. There was also concern expressed about the availability of adequate fire hydrants in the area. As provided below, the City's Fire Marshall will review the adequacy of the hydrants and other fire protection in the area prior to approving occupancy for the proposed new buildings.

E. The Proposed Use Will not be Harmful to Public Safety, Health or Welfare.

The Board finds that the proposed use would not be harmful to public health safety or welfare. While the Appellants have raised perceived safety concerns regarding increased vehicular traffic and the potential increase in the area to existing crime problems, these concerns are not sufficient to show the use would be harmful to the public safety, health or welfare. To the contrary, this newer construction of suitable quality could lead to decreased crime in the area. The evidence before the Board does not show that the proposed use which is consistent with other uses in the area, and would be of newer quality than existing rental units would be harmful to public health safety or welfare.

F. There Are Additional Conditions that can be Imposed on the Conditional Use Permit that Would Allow the Use to Satisfy all of the Requirements for Granting a Conditional Use Permit.

This final criteria allows for the imposition of additional limitations or safeguards to be required in the operation of the proposed conditional use to ensure it meets the other five criteria for granting a conditional use. The Board finds that the imposition of the following requirements in addition to the requirements placed on the Conditional Use Permit by the Commission are needed:

1. Developer is required to install a stop sign on private property near intersection of private access driveway and Haller Street.

2. City Fire Marshall and Public Works Department will conduct inspection of available fire hydrants and other firefighting resources to ensure adequacy of available resources prior to issuance of certificate of occupancy for dwelling units.
3. City will evaluate need for any additional public street signage on Haller Street.
4. In evaluation of landscape and site plan City is encouraged to consider children playing on private property next to 4th Avenue.
5. Any approved landscaping plan must comply with 14.25.010 (b) Which reads: “*Landscaping Plans*. It is the intent of this chapter to provide for landscaping and/or the retention of natural vegetation in conjunction with commercial, industrial and multifamily development within the City of Kenai to enhance the community environment and visual character and to provide attractive and functional separation between residential, commercial, and industrial uses and reduce erosion and storm runoff.”

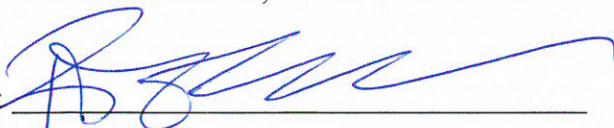
CONCLUSION

After reviewing the evidence and presentation of the Appellant, the Board of Adjustment Affirms the decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and those of the Commission in its decision to approve a Conditional Use Permit for an eight dwelling unit multifamily development at 1714 Fourth Avenue. The majority of the Board would prefer access to the property off of Fourth Avenue due to existing traffic patterns and the location of yards in the proposed development, but recognizes it does not have the authority to impose such a requirement. The Board also acknowledges that the property owner is pursuing a subdivision which will negate the need for this Conditional Use Permit.

Dated this 26th day of August, 2021

BY: 

Brian G. Gabriel, Board Chair

BY: 

Bob Molloy, Board Member

BY: Jim Glendening
Jim Glendening, Board Member

BY: Henry Knackstedt
Henry Knackstedt, Board Member

BY: Tea Winger
Tea Winger, Board Member

BY: Victoria Askin
Victoria Askin, Board Member

ADDITIONAL STATEMENT BY BOARD MEMBER MOLLOY

The applicant's representative, Rob Coreson, of Byler Contracting, was present and provided testimony supporting the application at the Planning Commission's public hearing on May 26, 2021, which is in the record. In this appeal, the applicant or representative did not provide testimony themselves supporting the application at the hearing before the Board of Adjustment. As I discussed during that public hearing, I was disappointed that neither an owner from TKC LLC, the applicant and property owner, nor from the applicant's representative, Byler Contracting, was present to provide testimony at the hearing before the Board.

As a result, the applicant or representative couldn't hear and consider the comments of the neighbors that were relevant to details for the applicant's landscape plan. Neighbors expressed concern over the lack of natural trees and shrubs that will result from clear-cutting the lot. Problems with the City's current code regarding landscape plans include that a plan with Code-required details may be submitted any time before a building permit is issued, and then there is a period of up to two years that is allowed for completion of the landscaping under the plan. The plan submitted for the hearing on the conditional use permit does not have to include all of the

Code-required detail, and there isn't a public hearing on the details of the landscaping plan that is submitted after the Commission's hearing on the conditional use permit where the neighbors (the public) can review and comment on the details of the landscape plan before its approval. The neighbors may be left uninformed for a long time period.

And as a result of the lack of applicant's supporting testimony, it was a close question whether the applicant met the applicant's burden of proof based on the record before the Planning Commission and the record made to the Board, which included that earlier record.

The City's Code should clearly require the applicant or representative to be present at the hearing held by the Planning Commission, and state that the applicant has the burden of proof. The Code also should require the applicant or representative to be present for the hearing held by the Board of Adjustment on an appeal, with the same burden of proof. And the Code should put the applicant on notice that the Planning Commission, or the Board, may dismiss the application if either the applicant or representative is not present to provide supporting testimony at the hearing.

But the City's Code does not give clear notice to the applicant of the applicant's burden of proof, or any notice that the applicant or representative must be present, or that dismissal of the application is a potential outcome if the applicant or representative is not present at the hearing to provide testimony in support of the application. If the City's Code included those notices to the applicant, then I would have voted to dismiss the TKC LLC application for applicant's or representative's failure to be present, which resulted in the lack of applicant's supporting testimony at the hearing before the Board of Adjustment. Public comment supporting the applicant should not be sufficient if the applicant or representative is not present to provide testimony supporting the application.

BY: 

Bob Molloy, Board Member

Notice of Right to Appeal

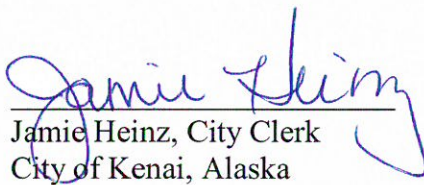
This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty

(30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

CERTIFICATE OF DISTRIBUTION

I certify that on the 27th day of August, 2021, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

Paul Ostrander, City Manager
City of Kenai
210 Fidalgo Ave
Kenai, AK 99611


Jamie Heinz, City Clerk
City of Kenai, Alaska

Wayne Jones
1805 4th Avenue
Kenai, AK 99611

TKC, LLC
P.O. Box 10658
Bakersfield, CA 93389