

**BEFORE THE FAIRBANKS NORTH STAR BOROUGH
BOARD OF ADJUSTMENT**

In the Matter of)
)
 ROBERT RIDDLE) OAH No. 16-0987-MUN
) Agency No. CE2015-021/CU2008-005
_____)

DECISION ON APPEAL

I. Introduction

Robert Riddle is the holder of Fairbanks North Star Borough (FNSB) Conditional Use Permit CU2008-005, which allowed him to spread septage and sewage sludge on his property. The FNSB Department of Community Planning (Community Planning) initiated an action to revoke that permit. A hearing was held on May 3 and June 7, 2016 before the FNSB Planning Commission (Commission). The Commission then revoked Mr. Riddle’s permit. Mr. Riddle appealed the revocation to the FNSB Board of Adjustment. Because there is substantial evidence supporting the Commission’s revocation of Mr. Riddle’s Conditional Use Permit, the revocation is AFFIRMED.

II. Facts and Proceedings

A. The Permit Application

Mr. Riddle owns and operates a septic pumping and hauling business known as “Fairbanks Pumping and Thawing,” which he purchased in 1988.¹ In the mid 1990’s, he owned property located on Badger Road, which he originally purchased for farming purposes. However, the property was not suitable for farming. He then built and operated a “septage receiving facility for our septic” on the property. As he explained it, “[w]e had nonevaporative lagoons there. We dewatered and had a huge leach field.”² He subsequently purchased acreage off Eielson Farm Road for farming.³

In 2007, Mr. Riddle applied for a conditional use permit from the FNSB for his Eielson Farm Road property.⁴ The purpose of those permits was to allow him to apply biosolids upon

¹ Trial Transcript, Superior Court Case No. 4FA-11-03117-CI, Record, Vol. VI, p. 3682.

² Trial Transcript, Record, Vol. VI, p. 3683.

³ Trial Transcript, Record, Vol. VI, pp. 3863 – 3688.

⁴ Mr. Riddle also applied for and obtained a permit from the Alaska Dept. of Environmental Conservation (ADEC). However, because the facts and circumstances surrounding the ADEC permit are not necessary for resolution of this appeal, they are not discussed.

the subject property.⁵ The biosolids consisted of sewage sludge and untreated septage.⁶ Community Planning recommended approval of his permit subject to the following conditions: the primary use of the property be agricultural and not the disposal of biosolids, that Mr. Riddle comply with state and federal standards, and that the terms of Mr. Riddle's preexisting ADEC permit be incorporated in his conditional use permit.

A public hearing on Mr. Riddle's conditional permit application was held on September 18, 2007. During the application hearing, Mr. Riddle explained the process of applying the biosolids for crop fertilization.⁷ The following statements are of particular relevance:

- He would be receiving sewage sludge and compost from Golden Heart Utilities.⁸
- He would also be receiving septage from septic systems.⁹
- He had a 50,000 gallon tank for management of the sludge/septage, and hoped to have other tanks so that he would not have to use an open holding spot for storage.¹⁰ There would be a small holding cell for storage which would be approximately the size of an Olympic swimming pool.¹¹ He specifically stated that "it's a holding . . . it's not a la . . . a lagoon is for treatment. This is a storage."¹²
- When asked about the year-round use of the property, he stated that there would not be year-round use of the property. In response to the Chairperson's statement that there would not be hauling of biosolids during the winter, Mr. Riddle's response was "No. You can't .. apply it; you can't use it."¹³
- Mr. Riddle stated that the holding cell would not be used during the winter:
The Chairperson: Right. Because it has to be applied to work. If this
. . .
Mr. Riddle: Correct.
The Chairperson: . . . swimming pool holding facility would only be
used in the summertime as you're transitioning stuff
around.

⁵ Record, Vol. II, pp. 360 – 389.

⁶ Septage is the waste product removed from septic tanks. Sewage sludge is waste which has been processed by a sewage plant.

⁷ Planning Commission Application Hearing Transcript: Record Vol. II, pp. 397- 403.

⁸ Planning Commission Application Hearing Transcript: Record Vol. II, p. 406.

⁹ Planning Commission Application Hearing Transcript: Record Vol. II, p. 408.

¹⁰ Planning Commission Application Hearing Transcript: Record Vol. II, p. 403.

¹¹ Planning Commission Application Hearing Transcript: Record Vol. II, pp. 410 – 411.

¹² Planning Commission Application Hearing Transcript: Record Vol. II, p. 410.

¹³ Planning Commission Application Hearing Transcript: Record Vol. II, p. 411.

Mr. Riddle: Correct.

The Chairperson: It's not stored there throughout the winter, stockpiling waiting for spring thaw?

Mr. Riddle: No. no.¹⁴

- When asked about what amount the approximate 900 acres in the subject property would have biosolids applied to it, Mr. Riddle did not provide a specific answer, only stating that it was contingent upon the “flow,” was cyclical, and possibly three to four hundred acres when fully complete.¹⁵

The FNSB Planning Commission approved Mr. Riddle's application and a conditional use permit was issued subject to the following conditions:

1. As long as biosolids are being applied to the property the principal use of the property must be agricultural in nature, with the beneficial application of biosolids remaining a conditionally-approved accessory use in support of the agricultural use. The disposal of biosolids cannot become the principal use of the property.
2. All state and federal standards contained in 40 CFR Part 503 and 18 AAC 60.500 et seq are part of this conditional use approval.
3. The stipulations contained in ADEC Solid Waste Permit No. SWZA047-12 are part of this conditional use approval.¹⁶

B. The Nuisance Lawsuit

Mr. Riddle subsequently faced a private nuisance lawsuit from Eric Lanser, an adjoining property owner and real estate developer, who complained about the smell from Mr. Riddle's operation. The initial judge who heard that lawsuit denied a preliminary injunction against Mr. Riddle, based in part on the Alaska Right to Farm law.¹⁷ The case was subsequently reassigned to a different trial court judge. After hearing the case, the trial court found that Mr. Riddle's operation was a private nuisance.¹⁸

C. Post-permit Facility Development

In 2015, Mr. Riddle's storage pond contained a total of five sections, or cells, for a total 2.162 million gallons. The pond was used, according to the ADEC, for storage and dewatering.¹⁹

¹⁴ Planning Commission Application Hearing Transcript: Record Vol. II, p. 412.

¹⁵ Planning Commission Application Hearing Transcript: Record Vol. II, p. 413 – 414.

¹⁶ Record, Vol. II, p. 420.

¹⁷ Record, Vol. X, pp. 6774 – 6788.

¹⁸ Record, Vol. XIV, pp. 10475 – 10497. That decision is now on appeal, Alaska Supreme Court Case S15780.

¹⁹ Record Vol. II, p. 430.

At trial, Mr. Riddle testified that his storage pond took up two acres.²⁰ An acre measures 43,560 square feet.²¹ By contrast, an Olympic-sized swimming pool measures 13,455 square feet in surface area and contains approximately 660,000 gallons.²² There were also two holding tanks, with a total capacity of 64,000 gallons.²³

D. Permit Revocation

Eric Lanser made multiple complaints to the FNSB Department of Community Planning (Community Planning) regarding Mr. Riddle's facility. He began requesting that Community Planning revoke Mr. Riddle's permit beginning in February 2011. He repeated that request in November 2012, and January 2014. He filed a formal complaint on June 4, 2015. That complaint referenced property odors affecting the entire neighborhood. It also mentioned the final judgment entered in Mr. Lanser's lawsuit against Mr. Riddle.²⁴

Community Planning notified Mr. Riddle on November 20, 2015 that it had concerns about his conditional use permit.²⁵ Community Planning then initiated the process to revoke his permit on March 22, 2016. Its revocation letter advised Mr. Riddle that he was in violation of his permit for the following reasons:

- That there was a material change in the conditional use.
- There were violations of State and Federal regulations, and that he did not have a current Solid Waste Disposal Permit from the ADEC.
- The principal use of the property was no longer agricultural.
- That there were "errors, misstatements, or misrepresentations of material facts" when he applied for the conditional use permit.²⁶

The allegations were considered at a public hearing before the FNSB Planning Commission on May 3 and June 7, 2016.

The Community Planning information packet provided to the Commission members alleged three independent grounds for revoking Mr. Riddle's permit:

²⁰ Trial transcript, Record, Vol. VI, p. 3690.

²¹ *Black's Law Dictionary* 27 (9th ed. 2009).

²² https://en.m.wikipedia.org/wiki/Olympic-size_swimming_pool.

²³ Record Vol. II, p. 430.

²⁴ Record, Vol. II, pp. 549 – 558.

²⁵ Record, Vol. II, pp. 449 – 450.

²⁶ Record, Vol. II, pp. 451 – 452.

1. That there was a material change in the conditional use, without the permit being amended. The alleged material change was that the primary use of the property was for collection and store of biosolids, rather than the approved use of biosolid application for agricultural purposes.
2. That there was a material noncompliance with the permit's conditions, specifically: the principal use of the property was no longer agricultural; the ADEC solid waste permit had expired, making the facility noncompliant with both federal and state requirements incorporated in the permit; and the expiration of the ADEC solid waste permit violated the FNSB permit's condition that required compliance with the terms of the ADEC permit.
3. That there were errors, misstatements, or misrepresentations of material facts made by Mr. Riddle regarding his proposed conditional use at the application hearing. The specific allegations were that Mr. Riddle misrepresented how he was going to store the septage, the number and size of his storage lagoons, the seasonal nature of the operation, how the septage and sewage sludge would be applied, and that he would control the odors from the operation.²⁷

The Community Planning information packet provided the Commission with proposed Findings of Fact consistent with its allegations.²⁸

Six Commission members were present at the May 3 revocation hearing: Mr. Guinn, the Chair; Mr. Reilly; Mr. Whitaker; Mr. Peterson; Ms. O'Neill; and Mr. Perreault. Testimony was taken at the May 3 hearing. Two additional Commission members were present at the June 7 revocation hearing: Ms. Thayer and Mr. Billingsley. The Commission held its deliberations on June 7. Following those deliberations, a motion was made to revoke Mr. Riddle's permit, as follows:

FINDINGS OF FACT:

1. There have been errors, misstatements, or misrepresentations of material facts by the permittee as to the nature of the conditional use to be conducted.
 - A. The Permittee misrepresented the manner in which he would store septage, indicating that he would mainly be using enclosed tanks instead of in lagoons. Instead, he expanded the number and capacity of the lagoons and they became the primary storage method with a 2,162

²⁷ Record, Vol. II, pp. 346 – 354.

²⁸ Record, Vol. II, pp. 355 – 357.

million gallon capacity compared to the 64,000 gallon capacity of the two on-site storage tanks.

- B. The Permittee misrepresented the number and size of lagoons that he would use. Instead of one “*small holding cell*” about the size of an Olympic swimming pool, he now has five lagoons that “*cover an area significantly large than an Olympic-sized swimming pool.*”
- C. The Permittee misstated or misrepresented that the septage dumping would not be a year-round operation. In fact, he has operated, a year-round septage dumping business with a dramatic increase in volume of septage dumped into the lagoons during the winter of 2009-2010.
- D. The Permittee misrepresented the manner of septage/sludge spreading, giving the impression that it would be received and promptly injected or spread onto the land and then tilled by a tractor. Instead, the vast majority of material accepted was domestic septage that was collected and stored in the lagoons and never spread.
- E. The Permittee misrepresented that he would use approved methods to reduce odors including commercial products (such as counteractants, neutralizing agents or oxidizing agents) to deal with odors that are not controlled by other methods. While he may have employed some of these methods, they ultimately proved inadequate to prevent creating a private nuisance from odors emanating from the storage lagoons.
- F. The permittee suggested he would apply biosolids to 1/4 to 1/3 of 900 acres. Instead he has applied septage to only about two acres.²⁹

Several of the Commissioners commented on the motion to revoke. Commissioner Perreault stated:

Yes, I seconded the motion and intend to vote to revoke the conditional use. We, as a body, and myself look at the misrepresentations, and whether or not they're willful seems immaterial to the fact that the nature and size of the operation, currently, does not match that which was proposed when the permit was issued. The two things do not match.

Mr. Riddle has every right and ability to operate his farm and the biosolids facility in whatever capacity he deems necessary. The appropriate permits can be acquired. The simple and, I think, obvious fact is that the conditional use that was issued and the statements that were made at that time in 2007, do not match the size and nature of what's going on right now.³⁰

Commissioner Reilly did not supply any specific underlying reasoning for his vote.

Instead, he raised general concerns about the process, and stated that there “seemed like to be a

²⁹ The Commission's oral findings are contained in the June 7, 2016 Transcript: Record, Vol. I, pp. 254 – 259. See Record, Vol. I, pp. 9 – 10 for the written notice of the Commission's decision.

³⁰ June 7, 2016 Transcript: Record, Vol. I, pp. 259 – 260.

lot of other competing interests going on, especially with the resident testimony. There was --- just seemed to be a lot of other issues that were going on that didn't necessarily seem proper.”³¹

Commissioner Billingsley stated that he was not swayed by the residents' testimony regarding the odor from Mr. Riddle's operation. He further stated that he would have supported revocation of the permit based upon “all the bases proposed by the Planning Department.”³²

Commission Chair Guinn stated:

I'll also vote for the revocation and my reasons are that I do not feel that the operation which Mr. Riddle has or had until recently, is in any way what the original conditional use permit was granted for. It's kind of morphed on its own and taken on a whole new life.³³

Commissioner Thayer stated that “I agree what the original intent and size of what the conditional use permit was for is different than it is today.”³⁴

Commissioner O'Neill stated:

So I just wanted to say that there's – there's nothing wrong with growing a business. What I find wrong about this is taking the liberty in the conditional use permit that doesn't apply to the growth that the business is experiencing. And, in this case, the two hangups for me were the size and the operation of time.³⁵

The eight Commissioners then unanimously voted to adopt the motion revoking Mr. Riddle's permit.³⁶

III. Discussion

A. Procedure and Standard of Review

The FNSB Code provides three possible reasons for revoking conditional use permits:

- a. A material change in the conditional use without an amendment; or
- b. Material noncompliance with the conditions prescribed upon issuance of the conditional use permit; or
- c. An error, misstatement, or misrepresentation of a material fact by the permittee as to the nature of the conditional use to be conducted.³⁷

The Planning Commission hears actions to revoke conditional use permits.³⁸ Appeals from the Commission's revocation of a conditional use permit are held in front of either the Board of

³¹ June 7, 2016 Transcript: Record, Vol. I, p. 261.

³² June 7, 2016 Transcript: Record, Vol. I, pp. 261 – 262.

³³ June 7, 2016 Transcript: Record, Vol. I, p. 262.

³⁴ June 7, 2016 Transcript: Record, Vol. I, pp. 262 – 263.

³⁵ June 7, 2016 Transcript: Record, Vol. I, p. 263.

³⁶ June 7, 2016 Transcript: Record, Vol. I, pp. 263 – 264.

³⁷ FNSB Code § 18.104.050(F)(1).

³⁸ FNSB Code § 18.104.050(F).

Adjustment or a hearing officer appointed for that purpose.³⁹ On August 18, 2016, the Board of Adjustment appointed Lawrence A. Pederson, an administrative law judge with the Alaska Office of Administrative Hearings, to serve as the hearing officer for this appeal.⁴⁰ Appeals from Commission decisions are heard solely on the established record, without oral argument.⁴¹

The applicable standards of review on appeal are set by the FNSB code. The standard of review on purely legal issues is one of independent judgment.⁴² The standard of review for factual findings is one of substantial evidence.

Substantial evidence for the purpose of this subsection means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the record affords a substantial basis of fact from which the fact in issue may be reasonably inferred, it shall be considered that the fact is supported by substantial evidence.⁴³

The substantial evidence standard requires the reviewer to uphold the original factual findings if they are supported by substantial evidence, even if the reviewer may have a different view of the evidence. “It is not the function of the [hearing officer] to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists.”⁴⁴

It should be noted that the evidence clearly shows that Mr. Riddle’s biosolids operation expanded considerably from the biosolid operation described to the Planning Commission at the application hearing in 2007. However, the Commission’s revocation findings were not premised on “a material change in the conditional use without an amendment.”⁴⁵ Instead, the revocation was based on the Commission finding that Mr. Riddle made errors, misstatements, or misrepresentations of material facts.⁴⁶ Accordingly, this decision will only address the Commission’s misrepresentation and misstatement findings.⁴⁷

³⁹ FNSB Code § 18.104.090(2).

⁴⁰ See FNSB Code § 4.24.010.

⁴¹ FNSB Code § 4.24.030(H) and (I)(1).

⁴² FNSB Code § 4.24.030(I)(2).

⁴³ FNSB Code § 4.24.030(I)(3).

⁴⁴ *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

⁴⁵ FNSB Code § 18.104.050(F)(1)(a).

⁴⁶ See FNSB Code § 18.104.050(F)(1)(c).

⁴⁷ The trial court, after hearing this case, found that Mr. Riddle made misrepresentations regarding his operation to the Planning Commission. It specifically found that “he misrepresented the manner in which the septage would be stored,” “misrepresented the size of the lagoons, claiming that there would be only one lagoon that would [be] the size of a swimming pool,” and “misrepresented the scope of the septage dumping . . . claiming that dumping would only occur in the summer.” Record, Vol. II, p. 471. Community Planning did not argue that the trial court’s findings were conclusively established under the doctrine of non-mutual offensive collateral estoppel. See *State v. United Cook Inlet Drift Ass’n*, 895 P.2d 947, 950 – 951 (Alaska 1995). Accordingly, this decision does not rely

B. Points on Appeal

Mr. Riddle initially filed an appeal challenging the permit revocation for five separate reasons. He has not addressed two of those points in his briefing, so they are deemed abandoned.⁴⁸ The remaining points are as follows:

1. The Fairbanks North Star Borough Planning Commission and the Fairbanks North Star Borough do not have jurisdiction to either issue or revoke a conditional use permit for a farm. Rather, under the State of Alaska's Right to Farm Act, AS 09.45.235(a) and (c), agricultural facilities and agricultural operations are exempt from regulation by the Borough with respect to bio-spreading.

2. Three of the eight Commissioners who, on June 7, 2016, voted in favor of revoking the conditional use permit were not present at the testimony which took place during the May 3, 2016, Planning Commission hearing. During the May 3 testimony, those five Commissioners present were able to judge and observe the demeanor of the witnesses testifying and were also furnished with a significant amount of exhibits, to include over 1,000 pages of transcript, over 700 exhibits, and the complete record on appeal on the case of *Lanser v. Riddle*. Robert Riddle respectfully submits that it is extremely unlikely that the three Commissioners who were present at the decision process of June 7, 2016, actually reviewed all exhibits in the case, or even had those exhibits made available to them. Robert Riddle therefore requests a formal statement by these Commissioners that they have, in fact, reviewed all of the record in the matter. Otherwise, the decision of the Commissioners was arbitrary, capricious, unsupported by the record, and against the substantial weight of the evidence.

3. The decision of the Commissioners was against the substantial weight of the evidence. Mr. Riddle's testimony when applying for the conditional use permit in 2007 was not misleading. Moreover, the Notice of Decision misstates and/or misunderstands Mr. Riddle's representations to the Borough. Furthermore, the finding that stated that "only 2 acres" had been farmed is against the substantial weight of the evidence, as well, and has no factual basis.⁴⁹

In short, the first point is that the Alaska Right to Farm Act controls, which divests the Commission of jurisdiction to revoke the permit. The second point on appeal is that it was error

upon the trial court's findings, but only upon the evidence presented to the Commission, which includes the trial court transcripts lodged by Mr. Riddle.

⁴⁸ Mr. Riddle's fourth point on appeal argued that the Commission violated the Alaska Open Public Meetings Act. (Mr. Riddle's *Notice of Appeal: Points on Appeal*. Record, p. 3). His fifth point on appeal argued that the Commission erred in not allowing supplemental evidence to be introduced. (Mr. Riddle's *Notice of Appeal: Points on Appeal*. Record, p. 4). These points, as noted by Community Planning, were not argued in Mr. Riddle's opening brief. (See Community Planning's *Response Brief* at 11; Record, p. 81). Community Planning also argued that Mr. Riddle did not address appeal points 1 and 2. As Mr. Riddle's reply brief noted, these points were addressed in his opening brief. However, that same reply brief did not argue that points four and five were addressed in the opening brief, therefore implicitly conceding that they were not addressed. (See Mr. Riddle's *Reply Brief* at 9; Record, p. 97). Accordingly, they are abandoned. See *Wetzler v. Wetzler*, 570 P.2d 741, n. 2 at 742 (Alaska 1977).

⁴⁹ Mr. Riddle's *Notice of Appeal: Points on Appeal*. Record, pp. 2 – 4.

for all eight Commissioners to vote on the revocation motion when only six were present for the evidentiary hearing.⁵⁰ In his briefing, Mr. Riddle stated that he was no longer pursuing this point on appeal: “[t]his point was not pursued because Mr. Billingsley and Ms. Thayer stated on the record that they had reviewed the May 3 hearing.”⁵¹ Accordingly, he has waived it. Mr. Riddle’s remaining appeal point is that the Commission’s decision was arbitrary and capricious and not supported by substantial evidence.

C. Disposition of Points on Appeal

1. The Alaska Right to Farm Act does not apply.

Mr. Riddle argued that the FNSB lacks jurisdiction to revoke his permit. His argument is based upon the Alaska Right to Farm Act, AS 09.45.235, which provides that “[a]n agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance . . .”⁵² That statute further provides that “[t]he provisions of (a) of this section supersede a municipal ordinance, resolution, or regulation to the contrary.”⁵³ However, the Alaska Supreme Court clearly stated that the Alaska Right to Farm Act “is designed to provide a defense against a nuisance action, not against a permit revocation under city ordinances.”⁵⁴ Accordingly, because this case involves a governmental body revoking a permit which it issued, the Alaska Right to Farm Act does not apply.

2. The Commission’s Factual Findings

The Commission made six separate findings. On one of those findings, (F) -- that Mr. Riddle only applied septage to two acres -- Community Planning conceded that the finding was erroneous. That concession, after a review of the record, is well founded. Accordingly, this Decision will only address the remaining five factual findings. Each of those findings stated that Mr. Riddle made specific misrepresentations or misstatements to the Commission when he applied for his permit.

The FNSB code does not define the term “misrepresentation.” Misrepresentation is generally defined as “[t]he act of making a false or misleading assertion about something,

⁵⁰ Although Mr. Riddle’s stated point on appeal argues that only five of the eight commissioners were present at the May 3, 2016 evidentiary hearing, the transcript shows that six were present. Record, Vol. I, p. 13.

⁵¹ Mr. Riddle’s *Reply Brief* at 9; Record, p. 97.

⁵² AS 09.45.235(a).

⁵³ AS 09.45.235(c).

⁵⁴ *Gates v. City of Tenakee Springs*, 822 P.2d 455, 463 (Alaska 1991, reh. den.).

[usually] with the intent to deceive.”⁵⁵ There are three forms of misrepresentation: fraudulent, negligent, and innocent. Fraudulent misrepresentation requires the statement be made with knowledge or belief that it is untrue, or that the maker ““does not have the confidence in the accuracy of his representation that he states or implies,”” or that there is a reckless disregard for the truth (““knows that he does not have the basis for his representation that he states or implies.””)⁵⁶ A negligent misrepresentation is a careless statement of fact, or one that the speaker makes without a reasonable basis for knowing whether it is true or not: the speaker ““must have failed to exercise reasonable care when making the statement.””⁵⁷ An innocent misrepresentation is one made not fraudulently or negligently, but rather innocently or unknowingly.⁵⁸

The FNSB code also does not define the term “misstatement.” The general dictionary definition is “to state or report (something) incorrectly.”⁵⁹ It includes not only intentional, reckless, or careless misstatements, but also innocent and unknowing misstatements.

The Commission’s findings will be examined to determine whether there is substantial evidence for each.

a. Misrepresentation as to storage methods.

The Commission found that:

The Permittee misrepresented the manner in which he would store septage, indicating that he would mainly be using enclosed tanks instead of in lagoons. Instead, he expanded the number and capacity of the lagoons and they became the primary storage method with a 2,162 million gallon capacity compared to the 64,000 gallon capacity of the two on-site storage tanks.

The minutes from the application hearing contain a discussion where Mr. Riddle informed the Commission that he had a 50,000 gallon storage tank, and that there would be a small open holding or storage cell, approximately the size of an Olympic swimming pool, which would not be used for treatment. That holding or storage cell would not be used for year-round storage, but would rather be for seasonal use (“thaw to freeze”). That discussion illustrates that the storage of biosolids was a material fact considered by the Commission when it granted Mr. Riddle’s permit.

⁵⁵ *Black’s Law Dictionary* 1091 (9th ed. 2009).

⁵⁶ *Lightle v. State, Real Estate Commission*, 146 P.3d 980, 983 – 984 (Alaska 2006) (quoting from the Restatement (Second) of Torts § 526).

⁵⁷ *Southern Alaska Carpenters Health and Sec. Trust Fund v. Jones*, 177 P.3d 844, 857 (Alaska 2008).

⁵⁸ *Bevins v. Ballard*, 655 P.2d 757, 762 (Alaska 1982).

⁵⁹ <https://www.merriam-webster.com/dictionary/misstate> (accessed on March 8, 2017).

In the preliminary injunction hearing held in the *Lanser* suit, Mr. Riddle testified that he had one small storage cell which he started filling before he applied for the permit:

Q. So when did you start filling these lagoons?

A. One of them I believe was in 2006, be – even before – we were going ahead with the permit issue. It – we only had a real small – small one, because we didn’t actually know where we were going to go yet.⁶⁰

Mr. Riddle began constructing the lagoons in 2005.⁶¹ He began filling one in 2006 and continued to fill the lagoons in 2007 through 2011. He began spreading biosolids on the property in 2010. He further explained that he could not use tanks for storage during the winter because of the potential for them breaking due to issues from freezing.⁶² He also stated that he could store biosolids for up to two years before using them.⁶³

Mr. Riddle’s testimony during the preliminary injunction hearing, as provided above, paints a different picture from the representations made to the Commission. He stated to the Commission that he could not use the storage lagoon year-round. His preliminary injunction testimony was that he started filling one of the holding cells (lagoons) in 2006, and continued to fill them throughout the next several years. In other words, the holding cells were the primary storage method year-round.

Given the disparity between Mr. Riddle’s representations to the Commission regarding storage methods compared to his actual use of the holding cells, which started prior to his permit being granted, there is substantial evidence to support the Commission’s finding that he misrepresented the manner in which he was going to store his biosolids. This was a misrepresentation of a material fact. At a minimum, his representations were made with reckless disregard for their truth, if not actual knowledge that they were untrue.

b. Number and size of storage lagoons.

The Commission found that:

The Permittee misrepresented the number and size of lagoons that he would use. Instead of one “*small holding cell*” about the size of an Olympic swimming pool, he now has five lagoons that “*cover an area significantly larger than an Olympic-sized swimming pool.*”

⁶⁰ Transcript of Preliminary Injunction hearing, Record, Vol. XIII, p. 9261.

⁶¹ Trial Transcript, Record, Vol. VI, p. 3738.

⁶² Transcript of Preliminary Injunction hearing, Record, Vol. XIII, pp. 9281 – 9285.

⁶³ Transcript of Preliminary Injunction hearing, Record, Vol. XIII, p. 9261.

Mr. Riddle told the Commission that he would have a holding cell for limited storage. He was asked to quantify the size of that holding cell, and stated it would be approximately the size of an Olympic swimming pool. Mr. Riddle's holding cells, or lagoons, regardless of whether they are considered to be one unit with five sections, or five separate units, exceed the size of an Olympic swimming pool, by both volume (over three times) and surface area square footage (over six times).

Given the questioning by the Commission at the application hearing on this specific point, the size of the storage cell was a material factor in the granting of Mr. Riddle's permit. The question then arises as to whether Mr. Riddle misrepresented the size of his holding cell or storage lagoon. Given the fact that Mr. Riddle started using the holding cell in 2006, he would have had some basis for providing the Commission with an estimate of its size in 2007, when he applied, and would have had some idea of his future expansion needs. His estimate of the size was at a minimum careless, or possibly even reckless. At a minimum, he negligently misrepresented the size of his storage lagoon or lagoons.

c. Year-round operation.

The Commission found that:

The Permittee misstated or misrepresented that the septage dumping would not be a year-round operation. In fact, he has operated, a year-round septage dumping business with a dramatic increase in volume of septage dumped into the lagoons during the winter of 2009-2010.

During the application hearing, Mr. Riddle was asked about whether he would be hauling biosolids year-round. His response was that there would not be year-round use of the property. In response to the Chairperson's statement that there would not be hauling of biosolids during the winter, Mr. Riddle's response was "No. You can't .. apply it; you can't use it."⁶⁴ Given the questioning by the Commission at the application hearing on this specific point, the seasonal duration of Mr. Riddle's operation was a material factor in the granting of Mr. Riddle's permit.

In Mr. Riddle's trial court testimony, in response to a statement by one of the attorneys that "we know you're storing in the lagoons year round and you're dumping year round," he responded "[y]es, I am doing that."⁶⁵ That and his other testimony, that he started construction of the lagoons in 2005, started filling them in 2006, and continued in subsequent years, is

⁶⁴ Planning Commission Application Hearing Transcript: Record Vol. II, p. 411.

⁶⁵ Trial Transcript, Record, Vol. VI, p. 3864.

substantial evidence showing a continuous year-round usage of the property for septage dumping. His representation at the application hearing, after he had started utilizing the property, was at a minimum a careless misstatement, supporting a finding of misrepresentation. Alternatively, it was a simple misstatement.

d. Promptness of biosolids applications.

The Commission found that:

The Permittee misrepresented the manner of septage/sludge spreading, giving the impression that it would be received and promptly injected or spread onto the land and then tilled by a tractor. Instead, the vast majority of material accepted was domestic septage that was collected and stored in the lagoons and never spread.

Mr. Riddle gave the clear impression at the application hearing that there would be a very prompt processing of the biosolids once they came to his property. When his testimony is carefully reviewed, it is clear that he is speaking about sludge processing. He specifically references picking up treated sewage sludge from Golden Heart Utilities, and speaking about the sludge being put in the holding cell or lagoon as a very short-term interim measure when the sludge was being spread on his fields.⁶⁶ However, he also stated that he would be using septage, but that it would need to be treated, an area in which he was experienced:

You treat it through either a lime, you – I’ve been treating and have my own treatment systems and I build them – we’ve treated millions of gallons.⁶⁷

The Commission’s questioning on this point demonstrates that the manner/timeliness of the septage/sludge application to the property was a material factor in the granting of his permit.

In the revocation hearing, Mr. Riddle explained that he was not able to obtain the sludge from Golden Heart and then he moved to the septage option.⁶⁸ His testimony implies that he did not have an intention of using the septage when he first applied for the permit, and that the conditions changed after he obtained the permit. However, this belies his application testimony where he stated that he would be processing both septage and sludge.

Septage processing, unlike treated sludge, is not a simple case of hauling the septage to the property and spreading it on the fields. Mr. Riddle testified at his revocation hearing that septage processing involves “filling these cells, if you will, and decanting the water off of it to get the

⁶⁶ Planning Commission Application Hearing Transcript: Record Vol. II, pp. 404 – 406.

⁶⁷ Planning Commission Application Hearing Transcript: Record Vol. II, p. 408.

⁶⁸ Transcript of May 3, 2016 Planning Commission Revocation Hearing, Record, Vol. I, p. 148.

nutrients that I need and the solid amendments, takes a while.”⁶⁹ Mr. Riddle’s expert, John Hargesheiner, testified at the revocation hearing that septage has both a liquid and a solid component. He testified that the liquid component

comes off all the time and, typically, gets applied annually. The solids, it takes six – five to seven years to accumulate – accumulate enough solids in one lagoon in order to process the solid.⁷⁰

Another of Mr. Riddle’s witnesses, Mr. Smyth, explained that Mr. Riddle’s operation had five storage lagoons or cells, and that four were used to pump the septage into.⁷¹ It takes two to three years of pumping septage into a storage cell to fill it, and at that point there is “only about two percent – one or two percent solids in – in typical septage. So you have a lot of water.” The storage cell is then taken “out of service and they decant that water into – if you saw the pictures, there’s that one long cell, the fifth cell. That’s where the liquids go.”⁷²

Mr. Riddle had experience with septage processing, as shown by the fact he had a septage processing facility off Badger Road, which predated his purchase of the subject Eielson Farm Road property. And as discussed above, Mr. Riddle testified during his preliminary injunction hearing that he first started using a storage cell on the subject property in 2006.

Substantial evidence therefore supports a finding that Mr. Riddle was fully aware of the prolonged nature of septage processing, and the need for its long-term storage in the storage cell, when he told the Commission, at the application hearing, the biosolids would be received and promptly applied to the fields. This was at a minimum, a reckless statement regarding a material fact, meeting the definition of a misrepresentation.

e. Odor Control

The Commission found that:

The Permittee misrepresented that he would use approved methods to reduce odors including commercial products (such as counteractants, neutralizing agents or oxidizing agents) to deal with odors that are not controlled by other methods. While he may have employed some of these methods, they ultimately proved inadequate to prevent creating a private nuisance from odors emanating from the storage lagoons.

⁶⁹ Transcript of May 3, 2016 Planning Commission hearing, Record, Vol. I, p. 149.

⁷⁰ Transcript of May 3, 2016 Planning Commission hearing, Record, Vol. I, p. 126.

⁷¹ Transcript of May 3, 2016 Planning Commission hearing, Record, Vol. I, pp. 140 – 141.

⁷² Transcript of May 3, 2016 Planning Commission hearing, Record, Vol. I, p. 129.

Mr. Riddle testified at the application hearing about application of lime to the soil, about tilling the applied biosolids into the soil to help prevent odors, that the storage lagoon would help mitigate a lot of the odors, and applying commercial deodorizers to make it more “palatable.”⁷³ There was testimony at both the *Lanser* trial and the revocation hearing that Mr. Riddle made efforts to control the odors, using lime, and specialized equipment.⁷⁴ Given the history of odor complaints, made beginning in 2010 and the trial court finding that his operation was a nuisance due to odor issues, it is clear that he was not able to control the odors.

However, Mr. Riddle only told the Commission was that he would apply measures to mitigate the odors and render them more palatable. He did apply measures to mitigate them and render them more palatable. While he never completely controlled the odors, he did not tell the Commission either explicitly or implicitly that they would be completely controlled. Accordingly, there is not substantial evidence to support this finding.

IV. Conclusion

There is substantial evidence supporting the Commission’s findings that Mr. Riddle misrepresented or misstated several material facts: the storage methods for his biosolids, the overall size of the storage lagoons, the seasonal operation of his facility, and that the biosolids would be promptly applied to the property. Any one of these misrepresentations or misstatements justify the revocation of Mr. Riddle’s conditional use permit. Consequently, the revocation of the conditional use permit is AFFIRMED.

DATED this 13th day of March, 2017.

Signed _____
Lawrence A. Pederson
Hearing Officer

NOTICE OF APPEAL RIGHTS

This is a final decision. If you wish to appeal the Board’s decision, you must file an administrative appeal to the Alaska Superior Court as provided by the rules of court applicable to appeals from the decisions of administrative agencies. Such filing must be made within 30 days of the mailing of this notice and may be made at the Alaska State Courthouse located at 101 Lacey Street, Fairbanks.

[This document has been modified to conform to the technical standards for publication.]

⁷³ Planning Commission Application Hearing Transcript: Record Vol. II, pp. 400 – 404.

⁷⁴ May 3, 2016 Permit Revocation Hearing Transcript: Record, Vol. I, pp. 162 – 164; Trial Transcript: Record Vol. VI, pp. 3935 – 3936, 3950.