BEFORE THE FAIRBANKS NORTH STAR BOROUGH BOARD OF ADJUSTMENT

In the Matter of	)	
	)	
CONDITIONAL USE PERMIT	)	OAH No. 17-1189-MUN
CU2017-025	)	
	)	

DECISION

I. Introduction

The Fairbanks North Star Borough Planning Commission voted to award to AK Green Bee, Inc. a conditional use permit (CUP) for the operation of an "indoor marijuana cultivation facility (large)" within the General Use 1 zoning district. Christa Dyer, a homeowner who lives next door to the proposed facility and who, along with other neighbors, had opposed the CUP before the Commission, filed this appeal. Because the appellant has not shown that the Commission erred, its decision to award a CUP to AK Green Bee is affirmed.

II. Factual and procedural history

A. Zoning and conditional use overview

All first and second-class boroughs are required by state law to have a regional comprehensive plan "for the systematic and organized development of the borough."[1] The Fairbanks North Star Borough's Regional Comprehensive Plan "is a set of goal and policy statements … to guide the physical development of the borough."[2]

The Borough Assembly is charged with implementing the plan though the adoption of zoning ordinances, which are found in FNSBC Title 18. Through these zoning ordinances, borough properties are placed into zoning districts with varying degrees of restriction or permissiveness as to the scope of allowable uses.[3] Depending on the zoning district in which a parcel is located, certain uses may be allowable outright, others may be prohibited outright, and others may be allowable as a conditional use for which a permit is required.[4] Where a conditional use permit is required, the planning commission must determine the following:

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[1] AS 29.40.020.

[2] FNSBC 18.01.010.

[3] FNSBC 18.16.010.

[4] *See generally*, FNSBC 18.104.050(A) ("The development and execution of this title is based upon the division of the borough into districts. It is recognized, however, that there are conditional uses which, because of their unique character and special and unusual impact upon the use of adjacent property, cannot be properly classified in any particular district or districts without consideration, in each case, of the impact of those uses upon adjacent property and upon the public need for the particular use in a particular location. Conditional uses are those operated by a public agency or public utility or uses traditionally associated with the public interest, or uses entirely private in nature but of such a character that their operation may give rise to unique problems with respect to their impact upon adjacent property or public facilities.").

(1) Whether the proposed conditional use is consistent with the intent and purpose of Title 18 and other ordinances and state statutes;

(2) Whether there are adequate existing sewage capacities, transportation facilities, energy and water supplies, and other public services to serve the proposed conditional use; and

(3) Whether or not the proposed conditional use will protect the public health, safety, and welfare.[5]

B. The proposed project and surrounding neighborhood

This appeal concerns a proposed marijuana cultivation facility in a subdivision that is mostly residential in practice, but is zoned as General Use. The application was submitted by Monique Daigle, DBA AK Green Bee, Inc., who owns two adjoining lots in the Benshoof subdivision.[6] Ms. Daigle lives on one lot, and proposes to develop a marijuana cultivation facility on her adjacent vacant lot.[7]

The subdivision contains multiple residences, some vacant lots, two small businesses, and a church.[8] When the neighborhood was initially subdivided, most of the land was divided into small residential lots to encourage residential development, but seven parcels along Badger Road – including the subject parcel – were developed with small businesses in mind.[9] The subject property is located between Ms. Daigle's residential lot and a Total Toyo heating equipment and repair business.[10]

The neighborhood is zoned "General Use 1," defined in Title 18 as "the lowest and least restrictive" of the Borough's zoning districts.[11] The General Use district "is intended to be located in rural areas where community sewer and water systems are unavailable."[12] Title 18 sets few restrictions on General Use land. There is only one prohibited use – correctional facilities – and twelve conditionally allowable uses, which include "sexually oriented businesses," landfills, shooting ranges, nuclear power plants, outdoor marijuana cultivation facilities of any size, marijuana product manufacturing facilities of any size, and storage facilities for hazardous substances.[13]

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5 FNSBC 18.104.050(C).
6 R. 196, 206.
7 R. 257-269.
8 R. 445.
9 R. 92-93.
10 R. 210, 445.
11 R. 196, 420; FNSBC 18.16.010.
12 FNSBC 18.84.010.
13 FNSBC 18.84.020; *see also*, FNSBC 18.96.240(A)(6).

Prior to Ms. Daigle's application, the residents of the subdivision never sought to rezone the neighborhood, although there has since been such a request.[14]

The proposed conditional use is a "marijuana cultivation facility, indoor large." [15] Ms. Daigle describes the proposed project as "basically an unassuming building in a field that's not directly accessible from Badger Road."[16] There will be locked exterior doors, no windows, and "no visual indications of the use of this building on the outside."[17] The project plans include: carbon air filtration to prevent exterior odors, 24-7 security monitoring, DEC-approved waste water disposal, as well as necessary approvals from the Fire Marshall and from the Marijuana Control Board.[18]

C. Application and notice period

In the GU-1 zone, a conditional use permit is not required for indoor marijuana cultivation facilities under 1,500 feet.[19] Ms. Daigle initially planned to build a 2,400 square foot building, but only use 1,380 square feet for the marijuana cultivation facility, and was granted a zoning permit for this purpose.[20] After deciding to use the entire building for her marijuana cultivation facility, Ms. Daigle applied for a conditional use permit.[21]

Ms. Daigle submitted her application on June 30, 2017.[22] As part of the required notice process, the Community Planning Department mailed 186 "dear property owner" notices.[23] Ms. Daigle also posted a sign about the application along Badger Road, although during the notice period the sign became obscured by growing foliage.[24]

Planning Department staff contacted state and local agencies for comments on the CUP request. The Department contacted the State Fire Marshall, the North Star Volunteer Fire

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14 R. 275 (testimony of Geraldine Benshoof re: original intent to have businesses on the lots along Badger Road, and residents therefore never pursuing more restrictive zoning); R. 277-278 (testimony of Lyman Benshoof re: same, and that the seven non-residential lots were exempted from the neighborhood's restrictive covenants); R. 134 (Daigle brief noting post-application request to rezone portion of subdivision).

15 FNSBC 18.04(B) ("[A] legally licensed, fully enclosed commercial marijuana cultivation facility as defined by state law, in which all growing, preparation and packaging activities are conducted completely indoors. Net floor area of all cultivation facility structures does not exceed 10,000 square feet.").

16 R. 205-206, 416.

17 R. 206.

18 R. 206-207.

19 *See* R. 657, FNSBC 18.04.010, 18.96.240(A)(6).

20 R. 501.

21 R. 600. *See also,* R. 657.

22 R. 600.

23 R. 420.

24 *See* R. 249-252.

Department, the Alaska State Troopers, the Alaska Department of Transportation & Public Facilities, the FNSB 911 system, the Alaska Department of Environmental Conservation, the Alaska Department of Natural Resources, and Golden Valley Electric Association.[25] Several agencies responded by identifying agency permitting requirements that would attach to the proposed project, but no agency protested the permit application.[26]

D. Planning Commission hearings on CUP application

1. August 15, 2017 meeting

The Planning Commission first convened on August 15, 2017 to consider the AK Green Bee application. Planning Department staff testified in favor of the project, noting that Ms. Daigle had satisfied the application requirements; that the project did not conflict with the area's zoning and designation within the Comprehensive Plan; that existing infrastructure and services existed to meet the project's needs; and that the project was not adverse to the public health, safety, and welfare.[27]

Ms. Daigle testified about the project and answered Commission questions about security, lighting, air filtration, permitting, and building design/visibility.[28] Ms. Daigle testified:

- That the proposed facility was not a retail facility;[29]
- That security would be monitored 24/7;[30]
- That the building would be nondescript and secure;[31]
- That security lighting would be "mindfully placed" to minimize impact on neighbors;[32]
- That inline carbon filtration would be used to eliminate odors;[33]
- That she was working with an engineer and DEC on septic system issues, and with the Division of Fire and Life Safety on permitting requirements;[34] and

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[25] R. 420.

[26] R. 441. DOT&PF returned a comment indicating that direct access to Badger Road was prohibited from the subject property, and that an owner wishing to construct a driveway on a state-owned road must obtain a permit. R. 440. The Department of Public Safety, Division of Fire and Life Safety indicated that the Division had not yet received an application for the building, and provided a link where the applicant could submit a request for a plan review. R. 439.

[27] R. 196-204, 505-511.

[28] R. 204-208.

[29] R. 205.

[30] R. 205-206.

[31] R. 205-206.

[32] R. 206.

[33] R. 207.

[34] R. 207.

- That AK Green Bee would collaborate "with the planning department, the Alaska Department of Environmental Conservation, the State of Alaska Division of Fire and Life Safety, the North Star Fire Department, and the State of Alaska Marijuana Control Board" to meet the requirements for a conditional use permit.[35]

Multiple neighbors then testified against the project,[36] expressing concerns about possible impacts on crime,[37] adjoining properties,[38] and the residential character of the neighborhood,[39] and also arguing that the project might have negative environmental impacts.[40]

During the hearing, the appellant and other residents also raised concerns about notice, and whether the applicant had satisfied the posting requirements of FNSBC 18.104.011(C)(3).[41] At the same time, it became apparent that there was insufficient time to hear from all witnesses prior to the code-mandated adjournment time of midnight. Accordingly, the Commission adjourned to take up the matter at its next meeting.[42]

2. September 6, 2017 meeting

The Commission reconvened on September 6, 2017, to complete the hearing on the CUP application.[43] In the meantime, Ms. Daigle had reposted new notice signs to address the concerns raised about the first posting.[44] At the September 6 hearing, the Commission heard additional testimony from neighbors concerned about possible impacts of the proposed project on crime, traffic, nearby waterways, groundwater, local children, and the character of the neighborhood.[45]

The Commission then heard further testimony from Ms. Daigle in response to those concerns.[46] Ms. Daigle testified that the project "[has] and will continue to follow" the state and

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35 R. 205.

36 R. 208-241.

37 *See, e.g.,* R. 211 (testimony of William Black, expressing concern about, inter alia, "the negative traffic that it might bring and the potential criminal that it may target my business or, if anything, people trespass on my property to get to the grow operation").

38 *See, e.g.,* R. 220-221 (testimony of Christine Neff, expressing concerns about possibility that security lights would shine into her home, questioning whether an outside dumpster would be used and affect air quality, and criticizing lack of plan for a fence).

39 *See, e.g.*, R. 237 (testimony of Christa Dyer re: concerns that noise of commercial generator would negatively impact neighborhood).

40 *See, e.g.,* R. 221-222 (testimony of Christine Neff, expressing concern about whether proposed use would have sufficient septic system), R. 227-229 (testimony of Brad Erichson, expressing concern that unknown aspects of project construction plans might have negative environmental impacts).

41 R. 240-253.

42 R. 254-264.

43 R. 267.

44 R. 518-525.

45 R. 271-311. *See, e.g.,* R. 289 (Marchelle Someduroff: "This proposed controlled substance adult-oriented business does not fit in with the residential community.").

46 R. 311-314.

local "regulations and guidelines," as well as the requirements governing applicants for marijuana cultivation facility licensure.[47] She again described the design of the building and the outdoor lighting, indicating the latter would not point at neighboring homes and would be comparable to the lights on the neighboring Total Toyo building.[48] Ms. Daigle explained that the project would not increase traffic because it is not a retail operation and would have no visitors other than regulators and occasional deliveries.[49] Ms. Daigle reiterated that many of the concerns being raised – "concerns about potential circumstances such as lighting, traffic, odor, security, waste removal, [and] chemical contamination" – were "regulated by both state and local agencies," and would be adequately addressed through those separate processes.[50]

3. Deliberations and vote

The Commission then deliberated publicly about the project.[51] Commissioner Peterson expressed his view that, with the conditions in force, the proposed project conformed with Title 18.[52] Commissioner Perrault likewise expressed that the environmental and public safety concerns raised by residents would be satisfied by the conditions attached to the permit.[53] Commissioner Perrault opined that much of the opposition to this permit was due to the nature of the proposed use:

> If this was a peony grow operation or a plant nursery … there wouldn't be this significant and organized of an opposition. But the problem is that it's legal. It's legal in the state, it passed. It's legal in the borough, it passed. And it's legal in GU.[54]

Chairperson Presler expressed the view that the proposed conditional use conforms to the intent and purpose of Title 18 in that title's encouragement of economic development.[55] The Chair found that adequate transportation facilities exist to support the project, and reiterated the conditions requiring adequate sewage capacity and a DEC-approved well or other water service.[56] The Chair expressed confidence that the project was sufficiently equipped to meet security

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47 R. 310.
48 R. 310-311.
49 R. 311.
50 ` R. 310.
51 R. 318-327.
52 R. 320.
53 R. 320.
54 R. 322. *See also*, R. 322 (Commissioner Perrault: "The fact of the matter is that you've had 32 years to rezone your neighborhood. But you wanted it to be GU.").
55 R. 324.
56 R. 324-325; *see also*, R. 327.

concerns, given the various state licensing requirements in that regard.[57] And the Chair noted that the plan as approved required adequate odor mitigation, and would require ongoing upkeep to maintain the permit.[58]

E. Commission decision

At the close of the September 6 meeting, the Commission voted 7-1 to approve the conditional use permit with the three conditions proposed in the staff report.[59] The Commission issued its notice of decision on September 8, 2017, approving the permit with the three conditions.

Condition one requires AK Green Bee to comply with applicable land use and related laws, including

> (1)(a): ensuring the site meets all licensing requirements for a commercial marijuana cultivation facility;
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> (1)(b): obtaining a Department of Public Safety/Division of Fire and Life Safety formal plan review and complying with all resulting recommendations and/or requirements; and
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> (1)(c): obtaining a formal plan review from the Department of Environmental Conservation for the proposed septic system, and complying with all resulting recommendations and/or requirements.[60]

Condition two requires AK Green Bee to equip the facility with sufficient odor filtration systems such that the odor of marijuana is not detectable from outside the facility.[61] Condition three requires AK Green Bee to notify the Planning Department of any changes made to the site plan, floor plan, or other operational characteristics.[62]

The Commission then made express findings of fact that, with the above conditions imposed, the proposed conditional use conforms with Title 18; is supported by adequate pubic services; and sufficiently protects public health, safety, and welfare.[63] Ms. Daigle agreed to and signed the Agreement to Conditions.[64]

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57 R. 324.
58 R. 325-326.
59 R. 327-328.
60 R. 332.
61 R. 332-333.
62 R. 333.
63 R. 333-334.
64 R. 714.

F. Appeal

Ms. Dyer's seven-page appeal statement identified what she believes are ten errors in the Commission's decision. The allegations largely mirror the areas of testimony offered by Ms. Dyer and her neighbors during the Commission hearings, as follows:

- That the CUP application was incomplete;
- That Ms. Daigle had provided "false testimony" before the Commission about her compliance with public posting requirements;
- That the project poses a fire risk to the neighborhood;
- That AK Green Bee improperly began construction without required permits;
- That allowing the project in a residential neighborhood discriminates against children;
- That the project impermissibly encroaches on a school zone because there is a school bus stop within less than 500 feet;
- That the project is inconsistent with the FNSB Comprehensive Plan;
- That the project could pose a threat to local groundwater;
- That the project will create security concerns for the residential neighborhood; and
- That the project threatens the health and welfare of a neighborhood resident with allergies.[65]

The Borough referred this matter for decision by an Administrative Law Judge from the State of Alaska Office of Administrative Hearings (OAH). Pursuant to FSNBC 04.24.030, the parties submitted briefs on the record below. Ms. Dyer submitted her opening brief on December 15, 2017. The Planning Department and Ms. Daigle each submitted an opposition brief, and Ms. Dyer submitted a reply. The Borough Clerk transmitted the record and the parties' briefs to OAH on January 23, 2018.

III. Legal framework

A. Substantive requirements

Conditional uses for marijuana establishments are governed by FNSBC 18.104.050(C) and FNSBC 18.96.240. The code sets out requirements such as buffer zones from specific uses, items required to be provided with an application, and circumstances under which a conditional

[65] R. 2-7.

use permit is required. Relevant here, a conditional use permit is required for a large (greater than 1,500 square foot) indoor marijuana cultivation facility located next to a residential dwelling.[66]

Where Title 18 requires a conditional use permit – whether for a marijuana facility or for any other conditional use – the Commission must determine the following:

(1) Whether the proposed conditional use is consistent with the intent and purpose of Title 18 and other ordinances and state statutes;

(2) Whether there are adequate existing sewage capacities, transportation facilities, energy and water supplies, and other public services to serve the proposed conditional use; and

(3) Whether or not the proposed conditional use will protect the public health, safety, and welfare.[67]

B. Procedural requirements

Appeals of conditional use permit decisions are authorized under FNSBC 18.104.090, and are governed by the procedures set out in FNSBC 04.24.010 et seq. On issues of law, I may exercise my independent judgment.[68]

On disputed issues or findings of fact, I must defer to the Commission, and must accept its judgment if its decision on that disputed issue or fact is supported by substantial evidence in the record, unless I elect to substitute my independent judgment.[69] I may substitute my independent judgment for that of the Commission on any disputed issue of fact if that judgment is supported by substantial evidence in the record.[70] Substantial evidence is "such relevant evidence as a

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[66] FNSBC 18.96.240(6). ("Marijuana establishments other than marijuana cultivation facilities, indoor small and marijuana testing facilities located in GU-1 or GU-5 zoning and adjacent to a lot upon which a principal building used as a dwelling is located are a conditional use subject to the requirements of this title.").

[67] FNSBC 18.104.050(C). *See generally*, FNSBC 18.104.050(A) ("The development and execution of this title is based upon the division of the borough into districts. It is recognized, however, that there are conditional uses which, because of their unique character and special and unusual impact upon the use of adjacent property, cannot be properly classified in any particular district or districts without consideration, in each case, of the impact of those uses upon adjacent property and upon the public need for the particular use in a particular location. Conditional uses are those operated by a public agency or public utility or uses traditionally associated with the public interest, or uses entirely private in nature but of such a character that their operation may give rise to unique problems with respect to their impact upon adjacent property or public facilities.").

[68] FNSBC 4.24.010(I)(2), (I)(4).

[69] FNSBC 4.24.010(I)(3) ("The hearing officer shall, unless it substitutes its independent judgment pursuant to subsection (I)(4) of this section, defer to the judgment of the lower administrative body regarding disputed issues or findings of fact. Findings of fact adopted expressly or by necessary implication by the lower administrative body may be considered as true if they are supported in the record by 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.").

[70] FNSBC 4.24.010(I)(3).

reasonable mind might accept as adequate to support a conclusion," including where there is "a substantial basis of fact from which the fact in issue may be reasonably inferred."[71]

C. Evidentiary and process concerns

As a preliminary procedural matter, resolution of this appeal was complicated by the fact that both the appellant and the applicant support their arguments on appeal with claims and documents never previously submitted (including some that post-date the Commission's decision). These include:

- Ms. Dyer's descriptions of her experience with odors from other marijuana businesses;[72]
- Ms. Dyer's complaints about recent vehicle traffic relating to Ms. Daigle's property;[73]
- Ms. Daigle's description of her discussions with Planning Department staff about the application checklist;[74]
- Ms. Daigle's submission of further documentation of her compliance with state permitting requirements and correspondence with local fire officials – and Ms. Dyer's commentary on these subsequent events;[75] and
- Ms. Daigle's elaboration on various construction/design plans and newly-presented arguments of how these implicate odor issues.[76]

Appeals of conditional use permit decisions are governed by the procedures set out in FNSBC 04.24.010 et seq. Pursuant to those procedures, the appeal is taken based solely on the record developed below.[77] Thus, to the extent that either party supports their arguments on appeal with details or allegations not presented to the Commission, that new information is not properly part of the record and cannot be considered in the determination of this appeal.

IV. Discussion

The appellant raises numerous substantive and procedural arguments in opposition to the proposed use and to the Commission's decision to allow it. These are addressed in three broad categories, below, beginning with procedural arguments before arguments about the merits of the Commission's findings with reference to FNSBC 18.104.050(C).[78]

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[71] FNSBC 4.24.030(I)(3).
[72] App. Reply Br., pp. 4-5 (R. 169-170).
[73] App. Reply Br., p. 3 (R. 188)
[74] Applicant's Brief, pp. 1-2 (R. 130-131).
[75] Applicant's Brief, p. 11 and Ex. A-C (R. 140, 147-163); App. Reply Br., pp. 7-8 (R. 172-174).
[76] Applicant's Brief, p. 11 (R 140).
[77] FNSBC 4.24.010(l)(1).
[78] Arguments raised for the first time in Appellant's Reply Brief are considered waived and are not addressed.

A. Appellant's arguments that go to procedural requirements in the application process

1. Appellant's argument that the Conditional Use Permit application was incomplete

The appellant argues that the Commission erred in granting the permit application because the application was incomplete.[79] The basis for this argument is that Ms. Daigle did not completely fill out an internal Planning Department checklist that accompanies the application. The appellant further claims that failure to complete the checklist renders "false" Ms. Daigle's signature certifying the application's completeness.[80]

The Commission heard this argument at the hearing, and rejected it implicitly by acting on the merits of the application notwithstanding the "completeness" arguments.[81] Substantial evidence supports the Commission's determination. As was discussed at the hearing, the appellant's completeness argument fails because the checklist in question is not a required part of the application, but instead is an internal Planning Department document used to streamline the Department staff's review process.[82] The requirements for a conditional use permit are set forth in FNSBC 18.104.050(B) and FNSBC 18.96.240(A)(5). Completion of the internal Planning Department checklist is not required by Code, nor are all items listed on the checklist pertinent to every type of application.[83]

Any purported incompleteness of the optional internal checklist does not speak to the completeness of the actual CUP application. Because the record supports the conclusion that the application met the requirements of the Code, the Commission did not err when it considered the application on its merits.

2. Appellant's argument that Ms. Daigle provided "false testimony"

The appellant next argues that Ms. Daigle gave "false testimony" before the Commission.[84] Specifically, Ms. Daigle presented a sworn affidavit certifying she had posted notice as required under FNSBC 18.104.010. The appellant claims this was "false testimony" because the sign was not clearly visible from the road at the time appellant viewed it. The

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79 R. 2.
80 App. Br., pp. 4-5 (R. 14-15).
81 R. 234; FNSBC 4.24.030(I)(3).
82 R. 232-234.
83 *See* R. 232-234, 613.
84 R. 2.

appellant further argues the Commission should view this "false testimony" as presenting "a danger to our community."[85]

The appellant and her husband raised these allegations at the hearing.[86] In response, and upon questioning by the Commission, Ms. Daigle testified about the procedures she followed in posting the notices.[87] Planning Department staff member Manish Singh also testified to receiving documentation from Ms. Daigle at the start of the notice period in which the notice and required information were clearly visible.[88]

To the extent the appellant's concern is that Ms. Daigle gave "false testimony" either in her affidavit or before the Commission, the Commission heard those allegations at the meeting and did not credit them, instead accepting the less sinister possibility that the surrounding foliage had grown during the three weeks the sign was posted.[89] As the Commission was plainly in the best position to assess Ms. Daigle's credibility, its conclusions on this issue will not be disturbed on appeal.

To the extent to which the appellant's concern here is proper notice, and even if notice had been faulty for the first meeting (which does not appear to be the case), a second notice period ensued when the Commission rescheduled the remainder of the hearing for a second meeting. Thus, any concerns about notice itself are without merit both because the appellant unquestionably had sufficient notice, and because the posting requirements were unquestionably satisfied a second time for the second hearing.[90]

B. Appellant's arguments that go to whether the proposed conditional use is consistent with the intent and purpose of Title 18 and other ordinances and state statutes

In deciding whether to grant a conditional use permit, the Commission must determine whether the proposed use is consistent with the intent and purpose of Title 18 and other laws. A review of the appellant's arguments going to this broad question does not reveal any error in the

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85 App. Br., p. 3 (R. 13).
86 R. 240-242.
87 R. 248-249.
88 R. 250-251.
89 *See* R. 249-251.
90 R. 243 (Dyer testimony that she received "Dear Property Owner" letter); 251 (staff testimony that applicant had submitted photographs documenting clearly visible signage at start of notice period); 255 (Chair's description of other evidence of notice); 257-261 (discussion to ensure that any possible notice concern could be cured by posting for second meeting).

Commission's determination that the proposed use is consistent with the intent and purpose of Title 18 and other laws.

1. Appellant's argument that the permitted project does not conform to the FNSB Regional Comprehensive Plan

The appellant argues that it was error to approve the permit because the project is inconsistent with the FNSB Regional Comprehensive Plan.[91] Specifically, the appellant claims that the project is inconsistent with the land's designation under the Plan, and with the Plan's land use, economic development, and environmental goals. The Department responds that these arguments misunderstand or misconstrue the Plan's role as an evolving, long-range guidance tool, not a set of inflexible mandates, urging that "it is impossible to instantaneously implement all plan goals and policies in every designated area of the Borough, and there is no expectation that this be done."[92] Upon a review of the full record, and in light of the Plan's role as a broad guidance document rather than a set of rigid mandates, I agree that the Commission adequately considered the proposed project in the context of the Plan's guidance, and appropriately concluded that the use was consistent with the Plan.

a. Whether the use conflicts with the Plan's designation of the land

The Commission found that the proposed conditional use does not conflict with the actual designation of the land – perimeter area and preferred residential land – under the Plan.[93] Perimeter areas are "generally within a 10 to 20-minute travel time of urban destinations, and which contain primarily residential use; variable densities are encouraged providing they are compatible with the surrounding community, sensitive to natural systems and have adequate water and sewer facilities."[94]

Staff noted at the hearing that "perimeter area focuses on the availability of water and sewer," and that "the applicant has proposed well and septic on the property" as a means of addressing those concerns.[95] More broadly, there is nothing inherently inconsistent with locating a nondescript commercial or industrial building on perimeter land. The lot in question was one of

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91 R. 4-6; App. Br., pp. 4-5 (R. 14-15).
92 Department's Brief, p. 11 (R. 115).
93 R. 711. *See also*, R. 199, 42; AS 29.40.030 ("The Comprehensive Plan is a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public, of the borough, and may include, but is not limited to, the following: statements of policies, goals, standards, the land use plan, a community facilities plan, a transportation plan, and recommendations for implementation of the Comprehensive Plan.").
94 R. 81.
95 R. 199.

seven specifically intended by the subdivision's creators to be developed for commercial use, and the proposed use does not change the "primarily residential" character of the area any more than the other non-residential uses in the subdivision – let alone the many other "impactful" commercial and industrial uses that would be wholly permissible at this location without any review by the Commission.[96] There is no merit to the argument that the proposed use conflicts with the Plan's perimeter area designation.

Nor is the proposed use inconsistent with the preferred residential land designation. The designation of the land as "preferred residential" turns on the slope and other considerations relating to the land's "natural suitability" for development.[97] A parcel's designation as preferred residential is not a proxy for a residential zoning restriction or requirement. To the contrary, the land remains zoned GU – 1, Title 18's least restrictive use.

As observed by Commissioner Perrault, substantial evidence suggests that neighborhood objections to the proposed project are not based on the project's actual tangible impacts on the neighborhood, but rather on disapproval of the business activities being conducted *inside* the "nondescript business."[98] But marijuana is legal in Alaska and the use being proposed is well within the scope of acceptable conditional uses for this parcel. Neighbors' negative opinions about the marijuana industry are not an appropriate basis for the Commission to impose disproportionately higher standards on this application than on others.

b. Plan's land use goal

The appellant also argues that the Plan's land use goals are unmet "because this use creates conflict in our community by proposing a controlled-substance industrial facility that is not compatible with our established residential neighborhood."[99] Specifically, the appellant takes issue with the Commission's finding that development of the site as a marijuana cultivation facility enhances the Plan's land use goal 3 ("to have a variety of land uses that fit the diverse

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96 *See* Department's Brief, p. 14 (R. 118) ("Being zoned GU-1, this property could development as many impactful or industrial uses without a conditional use permit: a pig or chicken farm, with size only limited by logistics, a sawmill or an airport could operate 24 hours a day, seven days a week on this property, and a distillery (alcohol being a substance regulated like marijuana in the state of Alaska) would all be permitted uses.").

97 *See* R. 82 (Preferred Residential Land is "land determined to be more suitable than other lands for development because it is generally: a) on slopes of 20% or less, b) not designated wetlands, [and] c) has a lower probability of containing detrimental permafrost conditions."); R. 199 (Singh testimony).

98 R. 322 ("If this was a peony grow operation or a plant nursery … there wouldn't be this significant and organized of an opposition. But the problem is that it's legal. It's legal in the state, it passed. It's legal in the borough, it passed. And it's legal in GU.").

99 R. 4.

needs of the community"), arguing that use conflicts with certain strategies identified within that goal.[100]

As with all of the Plan's goals, within the broad "Goal 3" are several identified "strategies," each listing various action items associated with the proposed strategy.[101] The appellant's argument focuses on one such strategy – to "provide for commercial land use in both urban and non-urban areas," and its action item listing factors to consider in determining whether to "allow commercial facilities outside preferred commercial areas."[102] The appellant argues that the Commission erred in finding conformity with Goal 3 because the proposed use does not satisfy the criteria listed in this action item.[103]

But the appellant's argument overstates the Plan's role as far as whether a particular project must be rejected because it does not fit squarely within each strategy of a particular action item within one of the Plan's many diverse goals. The Plan contains numerous goals, and a project can be consistent with one while not satisfying another. The Plan is not a binding zoning ordinance, but a broad guide whose mandates are sometimes in conflict, in which case it is within the Commission's discretion to consider whether the overall spirit of the Plan is impaired by a proposed use.

Further, in this case the Commission *did* consider and address the majority of action items identified under Goal 3 pertaining to the placement of commercial facilities outside of preferred commercial areas. The Commission heard testimony and discussed the use's compatibility with the surrounding development, the types of buffering and landscaping that might minimize impacts on surrounding uses, the adequacy of fire protection and other public services, the plans to minimize lighting impacts on adjacent residential properties, and the applicant's commitment to coordinate with DEC to address wastewater issues. That the appellant is dissatisfied with the applicant's plans in these respects, or is otherwise opposed to a marijuana facility, is not evidence that the Commission failed to consider the facility's impacts on existing land use. The appellant

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[100] *See* R. 711.
[101] R. 77-79.
[102] R. 77.
[103] R. 25. The items listed for consideration include whether: "[a] need is served that cannot be met elsewhere in the preferred commercial areas;" "[u]se is compatible with other development and sensitive to natural systems in the area;" "[a]dequate landscaping and buffering is provided to minimize adverse impacts on surrounding land uses;" "[a]dequate fire protection/suppression and hazardous materials response is available;" "[a]rea lighting is shielded from residential and undeveloped areas;" and "[a] legal commitment is made to provide alternative water and wastewater facilities." R. 77.

has not shown that the Commission erred in determining that allowing this conditional use in the General Use zone will further the Plan's goal of having a variety of land uses fitting the community's diverse needs.

The appellant also argues that the proposed use is inconsistent with land use Goal 4 – "to enhance development opportunities while minimizing land use conflicts" – because "the marijuana grow facility is not compatible with the current residential neighborhood."[104] Appellant likens the proposed use to "other adult businesses, such as a liquor store, bar, strip club, or shooting range," and argues that any of these would be improper in this neighborhood. But all of these examples are retail businesses whose success relies on drawing customers to the location to engage in the identified "adult activity." The proposed use at issue here, by contrast, is a manufacturing facility that does not seek or draw customers, and where no "adult use" is expected to occur onsite. Beyond setting out her objection to an "adult-oriented, controlled substance business," the appellant fails to demonstrate that the proposed use runs afoul of the Comprehensive Plan. While the appellant has demonstrated that she and her neighbors have significant reservations about a marijuana-related business being permitted on the subject property, the majority of her objections are based on broad-based assumptions and speculation.

In cherry-picking items in the Plan as inconsistent with the proposed use, appellant seeks to enforce the Plan as a rigid set of mandates rather than an evolving and flexible long-term planning tool. The Plan is the latter, and the appellant has not shown that the Commission ignored land use goals in allowing this conditional use in the General Use zone.

c. <u>Plan's economic development goals</u>

The appellant argues that the Plan's economic development goals will be undermined by the proposed use because the neighborhood will be unable to attract and keep military families, who, the appellant claims, will resist moving into a neighborhood with a marijuana facility.[105] The appellant argues that this will in turn impact property values as well as other industries, such as the construction industry. But the appellant's predictions related to military families are too speculative to form a valid basis to overturn the Commission's decision. The specific economic development goal identified by the Commission – Goal 2 – is "to diversify the economy."[106] It is reasonable for the Commission to have determined that a cultivation facility in the developing

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104 App. Br., p. 16 (R. 26).
105 Appellant's Brief, pp. 16-17 (R. 26-27).
106 R. 85.

legal marijuana industry will promote diversification of the economy in the Borough as a whole.[107] The products cultivated by AK Green Bee will be sold to other businesses within the Borough, resulting in economic growth for not only the cultivation facility, but also a diversity of downstream economic activities, including testing facilities required to test the product, as well as retail facilities that will sell the products. Accordingly, substantial evidence supports the Commission's finding that the project will further the Plan's goal "to diversify the economy."

d. Plan's environmental goals

Finally, the appellant argues that the project ignores the Plan's environmental goals.[108] The appellant's arguments about this issue are the same as advanced elsewhere in her brief – namely, a concern about possible surface contaminants affecting the Chena Slough, and a concern about possible groundwater contamination.[109] As described in detail elsewhere in this decision, the Commission's determination about those issues reasonably found that the project, as restricted by the conditions of the permit, is sufficiently protective of environmental concerns. The bases for this conclusion includes the permittee's plans for addressing environmental concerns (such as an engineered, ADEC-approved wastewater system and not using any toxic chemicals[110]), as well as the separate requirements for permitting by the Department of Environmental Conservation. Substantial evidence supports the Commission's conclusion that the proposed use, as restricted by the conditions placed on the permit, is not in conflict with the Plan's environmental goals.

2. Appellant's argument that the permitted project has violated "state building official/fire marshal requirements"

The appellant also argues that AK Green Bee has violated various requirements of state law by beginning construction on the site in August 2017.[111] The "construction" at issue is AK Green Bee's laying down a gravel pad on the subject property.[112] Citing various websites and informational packets distributed by the Borough and State Department of Public Safety, appellant argues that state laws prohibit the commencement of any building construction without

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107 *See* R. 324 (Chairperson Presler: "The conditional use application does actually conform to the intent and purpose of Title 18. And that encourages – Title 18 encourages economic development. And while this isn't a retail facility, it will still add some boost to the economy and definitely to the state economy as I think the record has shown for the marijuana industry at this point.").
108 R. 6.
109 R. 6.
110 *See* Daigle Reply Brief, p. 7 (R. 136).
111 R. 3; App. Br., pp. 3-4 (R. 13-14).
112 R. 207, 229-230, 642-645.

approval by the State Department of Public Safety Division of Fire, and urges that construction of the gravel pad violates these restrictions.[113]

The Commission heard testimony about this issue at both meetings, with one neighbor questioning whether the gravel pad would provide a foundation adequate for various state permitting requirements,[114] and another arguing that no construction – including the gravel pad – should have begun prior to the facility receiving state Fire Marshal plan review and approval.[115] But Ms. Daigle testified that site construction on the facility was appropriately awaiting various permitting approvals.

> We cannot put the septic system in until we get that approval from DEC. I also have an application in with Fire and Life Safety, which we cannot put a foundation or the shell up until we receive that permit as well. So basically it's just a gravel pad and awaiting for additional approvals.[116]

Ms. Daigle also described more generally her commitment to follow the regulatory requirements:

> We have complied with all DEC, AMCO, and Fairbanks North Star Borough regulations to this point and will continue to do so. Our plans are in review with the ADEC. And we are working with engineers and administrators to complete our application for review with the state fire marshal's office. We will comply with their guidelines, their recommendations, and their rulings.[117]

The appellant has not demonstrated that the Commission erred in granting the CUP notwithstanding the construction of the gravel pad. It is outside the scope of the Commission's jurisdiction to determine whether construction of the gravel pad violated state law. (The Commission discussed at the hearing that there are no *borough* requirements prohibiting this construction or requiring a permit).[118] No state agency – including the Department of Public Safety – objected to the proposed conditional use. Additionally, the Commission included as an express condition of the permit that the applicant must obtain and comply with a plan review by the Department of Public Safety. Conformity with state statutes is also required as a condition for any licensing by the Marijuana Control Board. Under these circumstances, and given the Commission's decision to credit Ms. Daigle's testimony, appellant has not shown that the

[113] App. Br., p. 4 (R. 14).
[114] R. 226-230 (testimony of Brad Erichson).
[115] R. 303-304 (testimony of Zachary Kassell).
[116] R. 207.
[117] R. 313.
[118] R. 230.

Commission erred in concluding that the proposed conditional use will conform with state statutes.[119]

3. Appellant's argument that the permitted project disregards school zones

The appellant also argues that the permitted project "disregards school zones" – specifically, the 500-foot "buffer zone" established by both Title 18 and Marijuana Control Board regulations.[120] Because the school district enforces disciplinary expectations for students at bus stops, the appellant argues, a school bus stop qualifies as "school grounds."[121] Based on this expansive view of the term "school grounds," the appellant then claims that the proposed use – which sits 160 feet from a school bus stop – violates the 500-foot buffer zone required for school grounds.[122]

While creative, this argument cannot withstand legal scrutiny. Extending the definition of "school grounds" in the manner advocated here would turn vast swaths of the Borough into "school grounds," and drastically reduce the availability of locations for commercial marijuana establishments far beyond what is contemplated in the Code. There are many school bus stops throughout neighborhoods where, as here, the Code has been drafted to allow commercial marijuana establishments at least as conditional uses. Additionally, the school district enforces disciplinary expectations not only at the bus stop, but once students are on the buses traveling throughout the Borough.[123] Under the appellant's expansive reading, not only any area within 500 feet of a school bus stop, but also any area within 500 feet of the roaming school zone that exists as students ride the bus to school, are all off limits to marijuana establishments, notwithstanding the Code's stated approach to zoning for these establishments. Such a reading – drastically and unreasonably reducing if not eliminating available locations for marijuana establishments – would undermine the Assembly's purpose in implementing zoning parameters for marijuana establishments under Title 18.

Further, the appellant's reading is inconsistent with the Code's plain language. The buffer zone established by Title 18 does not refer to school grounds but to "school buildings."[124] The

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119 R. 712.

120 *See* FSNB Code 18.96.230(a)(3); 3 AAC 306.010; *see also* R. 656-663.

121 *See* R. 660-662.

122 App. Br. 16.

123 R. 661.

124 FNSBC 18.96.240(A)(3)(a) (500-foot buffer zone from "primary and secondary school buildings"); FNSBC 18.96.240(A)(3)(d) (measuring buffer zone from "outer boundaries of school buildings, including outdoor school facilities where students are regularly found"). While the Marijuana Control Board's regulation does refer to "school

plain language used in the buffer zone provision speaks to actual property that is permanently controlled by the school district and "where students are regularly found," rather than the many varied locations off school grounds where students may, under some circumstances and at certain very limited times of the day, be subject to the behavioral expectations of the district. This is what was intended in the Code, and expanding the school building buffer zone in the manner advocated by the appellant would be unworkable and unreasonable. The proposed project's proximity to a school bus stop does not violate the school building buffer zone.

C. Appellant's arguments that go to whether the proposed conditional use will protect the public health, safety, and welfare

The remainder of the appellant's arguments invoke issues of public health, safety, and welfare. The Commission found:

> [W]ith the conditions imposed, the proposed conditional use will protect public health, safety, and welfare as the facility will comply with Title 18 standards for the CU-1 zone, and Standards for Commercial Marijuana Establishments, as well as state requirements for a commercial marijuana facility.[125]

Arguments appearing to relate to these issues are discussed below.

1. Appellant's argument that the permitted project presents a threat to the health of neighborhood residents

The appellant argues that, because two nearby residents allegedly suffer from cannabis allergies, the decision to grant the conditional use permit "poses an immediate threat to the health and welfare" of neighborhood residents.[126] The Commission heard testimony about this concern at its September 6 meeting, with resident Crystal McCormick arguing that the project would impact one neighbor's "severe cannabis allergy," and another's "severe anaphylaxis reaction to mold spores and many flowering plants."[127] Ms. McCormick argued that the proposed conditional use would "force [these neighbors] out of their home," and asked that the permit be denied as violating a state environmental conservation regulation prohibiting injurious emissions.[128]

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grounds," that regulation is not binding on the Commission, and does not control the zoning decision here. Arguments about the MCB buffer zone would instead go to whether AK Green Bee's application for a marijuana cultivation license should be granted by the Marijuana Control Board, an entirely separate process from the CUP process, although MCB licensure remains a requirement for the CUP.

[125] R. 711.

[126] App. Br., pp. 7-8 (R. 17-18).

[127] *See* R. 306-307, 681.

[128] R. 306-307.

The appellant repeats these arguments in her brief, and points to several state laws she believes apply. The appellant notes that a state Marijuana Control Board regulation, 3 AAC 306.400(c)(2), prohibits marijuana cultivation facilities from emitting detectable odors, and that a separate state DEC regulation, 18 AAC 05.110, prohibits injurious or otherwise unreasonable emissions.[129]

This argument against a conditional use permit for the proposed project fails on multiple levels. Broadly, the conditional use permitting process considers *public* health and safety as a whole, not individual resident sensitivities or preferences.[130] As to the specific impacts of the proposed use on public health and safety, in her testimony before the Commission, Ms. Daigle testified that odor "just won't be a factor because everything has to be in a closed container," that the business would use "no toxic chemical … for any reason," and that the planned air filtration system "will clean and sanitize the air and scrub again before being vented out [and] has been proven to remove 99.9 percent of mold spores."[131] The Commission's decision also expressly requires the project satisfy the condition of employing sufficient air filtration systems such that no marijuana odor is detectable from outside the facility.[132] Substantial evidence supports the Commission's specific determination that, "with the conditions imposed, odor will be mitigated with appropriately sized odor filtration systems in cultivation, drying, and processing facilities," as well as its broader determination that the project will not injure public health.[133]

2. Appellant's argument that the permitted project poses a groundwater pollution risk

The appellant argues that specific aspects of AK Green Bee's planned operations pose groundwater pollution risks. Specifically, the appellant is concerned about the planned use of a septic system for wastewater instead of discharging wastewater into a holding tank.[134]

These concerns were raised by several witnesses at the hearing. Neighbor Cyrus Freeman, a former soils engineering technician, testified that he is concerned about insufficient planning to keep chemicals out of the groundwater and out of Chena Slough.[135] He argued that the plan provided insufficient details about what chemicals would be used for fertilizer, and how they

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129 App. Br., p. 8 (R. 18).
130 *See* FNSBC 18.12.010.
131 R. 311.
132 R. 332-334.
133 R. 712.
134 App. Br., p. 21 (R. 31).
135 R. 291-293.

would be kept out of the Slough. But on questioning from Commissioner Perrault, Mr. Freeman acknowledged that these details could be addressed by the DEC permitting process.[136] Neighbor Lois Maxwell similarly raised concerns in her testimony that the permit application contained insufficient details about the plans for wastewater disposal, and argued that this lack of specificity evidenced "disregard for the severity and gravity of potential contamination due to the chemicals … which will be used in the marijuana-growing system."[137]

Addressing these concerns before the Commission, Ms. Daigle testified that AK Green Bee's "engineered septic system report and proposal" was under evaluation by ADEC, and expressed her intent "to comply with their guidance, their recommendations, and their rulings."[138] She also testified that those plans provide for more efficient filtration of chemicals than in domestic wastewater systems, ameliorating the groundwater risks being raised.[139]

After hearing this testimony, the Commission appropriately resolved concerns about groundwater issues through a condition on the permit to address and ameliorate these concerns. AK Green Bee is required to obtain a formal plan review from ADEC for its onsite septic system, and to "comply with all recommendations and/or requirements resulting from the plan review."[140] The Commission, having been in the best position to weigh the credibility of witnesses and to evaluate Ms. Daigle's credibility, clearly accepted and credited Ms. Daigle's testimony about the planning that had gone into the project thus far, and about her intent to abide by the recommendations and requirements that emerged from the ongoing review process. The Commission was well within its discretion to credit this testimony, and substantial evidence supports its conclusion that the proposed use, as modified by the conditions placed on the permit, is adequately protective of environmental concerns.[141]

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136 R. 293 ("Q: Wouldn't that be filed under the DEC approved part of it? A: I suppose it might.").

137 R. 294-295.

138 R. 312-313.

139 R. 313.

140 R. 710.

141 To the extent the appellant's concern about the selection of septic over holding tanks is that use of septic could become problematic in the future if AK Green Bee expands its operations, this concern is too speculative to support denial of the CUP at this juncture. *See* App. Br. 21-22 (R. 31-32).

3. Appellant's argument that the permitted use poses a fire risk to a residential neighborhood

The appellant argues that the cultivation facility itself poses a fire risk due to the chemicals being used, insufficient road access for fire trucks, and insufficient fire protection planning.[142]

Because the appellant's brief does not expound on or otherwise explain her claims about the "volatile mix of chemicals," she has waived this claim. Even if not waived, these concerns were raised and rejected at the hearing. Specifically, neighbor Austin Someduroff argued that the mix of water, drying plants, and fertilizers posed an inherent fire risk.[143] The Commission found that existing review and permitting requirements by state and local agencies charged with assuring environmental compliance and fire safety were adequate to address these concerns.[144]

The appellant also advances the general argument that existing emergency services infrastructure is insufficient to support the project.[145] The appellant's concern about fire access is that the property is not directly accessible by Badger Road, and instead only by a frontage road driveway.[146] However, the Fire Department was invited to comment on the application, and raised no concerns about emergency access to the property.[147] And Ms. Daigle testified that the Fire Department had "been out to evaluate" the site and had given "a letter of approval" regarding sufficiency of access for fire protection.[148] Substantial evidence – namely, Ms. Daigle's testimony and the Fire Department's lack of opposition to the permit – supports the Commission's finding that, with the approved conditions, there is adequate emergency services access to support the proposed use.

The appellant's concerns about insufficient fire protection are the project's lack of a sprinkler system and fire dampers on the air ducting, as well as concerns as to the adequacy of a fire alarm system.[149] Ms. Daigle testified that the project's security system was "adequate enough

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[142] R. 2; App. Br., p. 8-9 (R. 18-19). Arguably, some of these claims go to the Commission's finding that adequate public services exist to serve the project (FNSBC 18.104.050(C)(2)), and others go to whether the proposed conditional use will protect the public health, safety, and welfare (FNSBC 18.04.050(C)(3)). Regardless, and as described below, the Commission's findings as to the issues raised are supported by substantial evidence.

[143] R. 280.

[144] *See* R. 708-709.

[145] R. 2; App. Br., p. 8-9 (R 18-19).

[146] *See* R. 504-505; R. 280-281.

[147] *See* R. 420; Planning Department Brief, p. 20 (R. 124).

[148] R. 312-313.

[149] Appellant's Br., pp. 8-9 (R. 18-19).

to notify the 9-1-1 system in the case of both a fire or an emergency situation."[150] As to the remaining issues, these are adequately addressed in the conditions placed on the permit. Recognizing the heightened risk of fire safety issues in marijuana cultivation operations, the staff report recommended, and the Commission adopted, a requirement for a formal plan review by the Department of Public Safety.[151] The appellant's speculative list of possible problems is not evidence that the plan review by the Division of Fire and Life Safety will be inadequate to address fire safety concerns associated with the proposed use. Substantial evidence supports the Commission's conclusion that fire safety issues are adequately addressed by the CUP.

4. Appellant's argument that the permitted project poses a security risk to the neighborhood

The appellant argues that allowing a marijuana facility in the neighborhood will create security concerns because "marijuana establishments [have been] well-publicized as cash businesses," which, in turn, "makes them prime targets for burglary."[152] The appellant is concerned that "targeting of these establishments will in turn increase the criminal element in and around our residential neighborhood."[153] The appellant further speculates that, to the extent to which "would-be thieves cannot break into the grow facility, they will turn to the surrounding residential properties in frustration looking for loot."[154] The appellant argues that a marijuana cultivation facility is inherently "high risk" and therefore inappropriate "in a residential community."[155]

The appellant's constellation of concerns about crime and security are based on speculation and assumption, not evidence. The Code allows marijuana cultivation facilities as a conditional use. Speculative stereotype-driven assumptions are not sufficient to override that authorization.

Ms. Daigle provided credible testimony in support of the plans for adequate security. The Commission found that "all marijuana and marijuana products will be secured inside the building to ensure the general public does not have access to them."[156] The Commission also found that, "with the conditions imposed, security systems, alarms, cameras, and lighting will meet state

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[150] R. 311.
[151] R. 426.
[152] R. 6.
[153] R. 7.
[154] App. Br., p. 20 (R. 30).
[155] App. Br., p. 21 (R. 31).
[156] R. 712.

regulations required to obtain a commercial marijuana cultivation license."[157] Substantial evidence supports the Commission's conclusion that safety and security issues are adequately addressed by the CUP.

5. Appellant's argument that the Commission's ruling "discriminates against children based on socioeconomic status"

The appellant also argues that the decision to grant the CUP discriminates against children based on socioeconomic status, because Title 18 provides for buffer zones around public housing facilities where children live, but this project is less than 500 feet from the homes of children who do not live in public housing.[158] The same argument was presented to the Commission at its September 6 hearing.[159]

The appellant's attempt to broaden the buffer zone beyond what is set forth in Title 18 fails as a matter of law. The arguments raised go to the wisdom of policy choices made by the Assembly in enacting FSNBC 18.96.240 – namely, the scope of the buffer zones – and are outside the scope of this proceeding. The Commission does not have the authority to create new exemptions or buffer zones beyond those that are written into the Code. And like other attempts to broaden existing exemptions and buffer zones, accepting the appellant's argument would radically reduce the scope of available zoning options for these facilities from the scope reflected in the Code. The Commission's charge is to implement the Code's buffer zones as they exist, not as the appellant wishes they existed, and it did so appropriately in this case. There is no merit to the argument that the Commission's decision to award a CUP for a legal business in the GU-1 zone discriminates against children based on socioeconomic status.

V. Conclusion

I may defer to the Commission's judgment where its factual findings are supported by substantial evidence in the record, and I see no basis in the record to override the Commission's sound and reasoned judgment as to these issues.[160] The vast majority of arguments raised against the proposed conditional use are based on speculation and assumption, and the Commission did not err in concluding that the proposed use, as modified by the conditions placed upon the permit,

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157 R. 712.
158 FSNBC 18.96.240(A)(3)(a); App. Br., pp. 15-16.
159 R. 289-290 (testimony of Marchelle Someduroff).
160 FNSBC 4.24.010(l)(3).

is appropriate and allowable under Title 18. Accordingly, the Commission's decision to award CUP No. 2017-025 is upheld in all respects.

DATED April 16, 2018.

By: *Signed*
Cheryl Mandala
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

This is a final decision. Pursuant to FNSBC 4.24.030(M), either party may appeal this decision to the superior court. A party wishing to appeal this decision 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 mailing of this notice to the parties, and may be made at the Alaska State Courthouse located at 101 Lacey Street, Fairbanks, Alaska, 99701.

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