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

In the matter of the Kenai Peninsula Borough Planning Commission's decision to adopt the request for modification to a conditional land use permit to allow for excavation below groundwater for KPB Parcels 135-243-13 and 135-243-29, Tract C1, Patson Properties 2019 Replat, according to Plat 2019-68, and the Northwest ¼, Southeast ¼, Section 34, Township 5 North, Range 10 West, Seward Meridian, excluding Patson Road right-of-way Kenai Recording District,	)	
DALE MCBRIDE,	)	
Appellant,	)	
v.	)	
RIVER RESOURCES, LLC,	)	
Applicant.	)	OAH No. 22-0058-MUN Agency No. 2022-01-PCA

DECISION

I. Introduction

River Resources, LLC, was granted a conditional land use permit ("CLUP") by the Kenai Peninsula Borough Planning Commission to extract material from its property near Soldotna, Alaska. It then applied for a modified conditional land use permit ("MCLUP") to excavate below the groundwater elevation on the property and for an exemption from the KPB Code dewatering prohibition.

The Planning Commission initially denied the MCLUP based on concerns about the amount of bond required, the independence and impartiality of the engineering firm River Resources hired, and the well monitoring timeline provided. The Commission's decision was appealed, and it was ultimately remanded back to the Commission to provide further reasoning and findings supporting its decision.

Following the remand, the Planning Commission adopted a resolution granting River Resources' MCLUP and entered detailed findings of fact, conclusions of law and conditions. That decision was also appealed. The case was fully briefed, and oral argument occurred. Based on the briefing and argument, the Planning Commission's decision approving River Resources' MCLUP is affirmed.

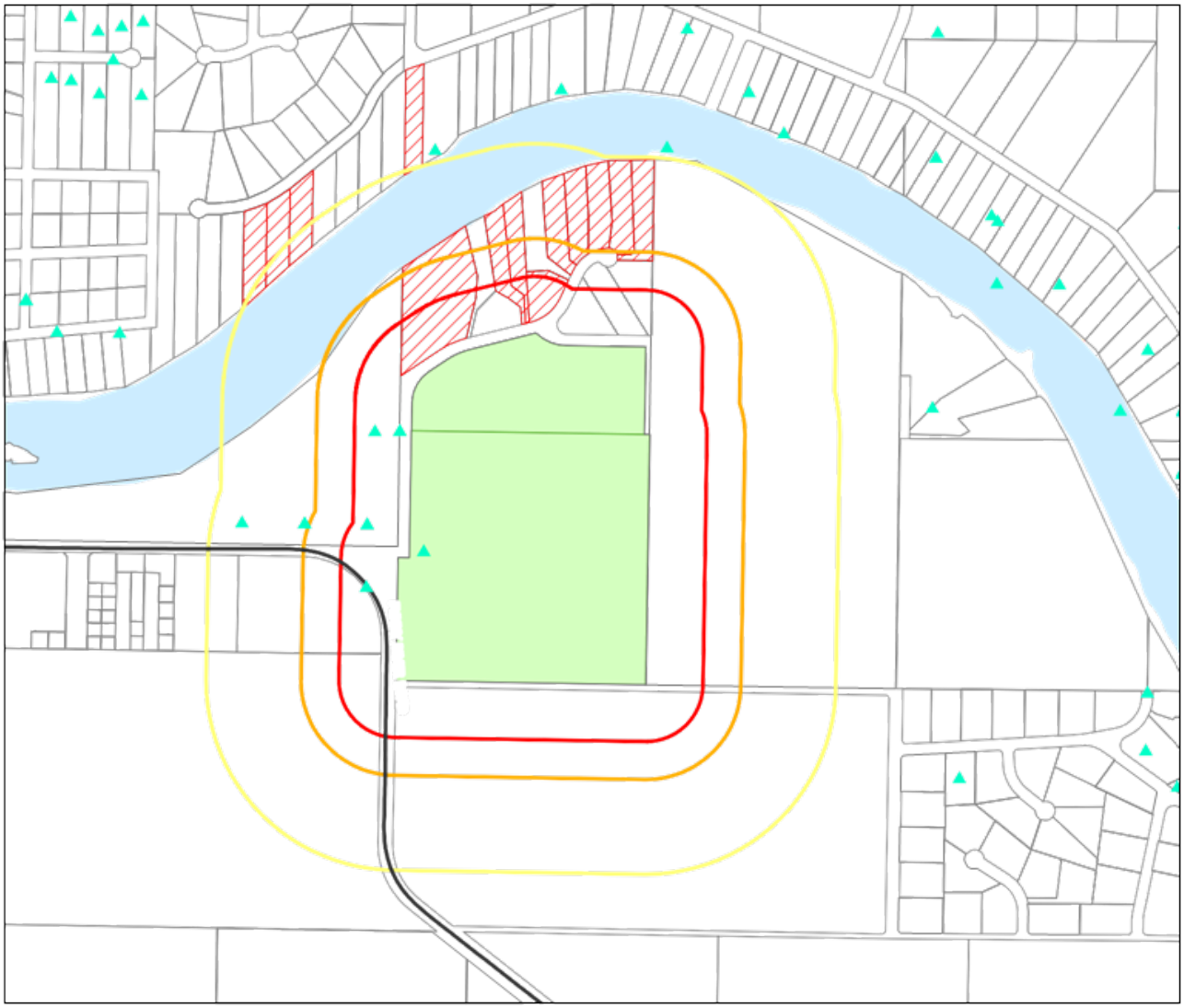
II. Facts and Proceedings

A. The Property at Issue and River Resources' CLUP

River Resources owns two adjoining parcels of real property in the Kenai Peninsula Borough, KPB parcel 135-243-13 (39 acres) and KPB parcel 135-243-29 (12.44 acres) ("the Property").[1] The Property is located approximately 500 feet at its nearest point from the Kenai River, directly east and adjacent to the Soldotna airport, and northeast of the intersection of Funny River Road and Kenai River Avenue.[2] Below, highlighted in yellow, is a satellite image of the Property in relation to the City of Soldotna and its airport.[3]

Also below is a larger-scale geographic information system image of the Property in relation to the Kenai River, surrounding properties, and wells, including test wells. The Property's distance from the Kenai River is referenced in increments of 300, 500 and 1,000 feet.[4]

1 Record (R.) 2, 6 (Vol I).
2 R. 37-41 (Vol. I).
3 R. 65 (Vol. II).
4 R. 18 (Vol. II).



In October 2019, River Resources applied to the KPB Planning Department for a CLUP to conduct sand, gravel, or material site operations on the Property. The Planning Commission granted its application (KPB Resolution 2019-39) in December 2019.[5] In doing so, the Commission made detailed findings and imposed at least 19 separate permit conditions. Condition 7 required River Resources to maintain a 2-foot vertical separation from the seasonal high-water table. Condition 8 prohibited River Resources from dewatering the site by pumping, ditching or any other form of draining.[6]

[5] R. 2 (Vol. II).

[6] *See* https://www.kpb.us/images/KPB/PLN/Plan_Comm/Resolutions/2019/Resolution_2019-39_2020-003546-0.pdf, p 3.

B. MCLUP Application and Initial Planning Commission Decision

In February 2021, River Resources applied for a modified conditional land use permit ("MCLUP") to allow it 1) to excavate below the groundwater elevation on the Property;[7] and 2) obtain an exemption from the dewatering prohibition found in KPB Code 21.29.050(A)(4)(d).[8] Specifically, River Resources seeks to excavate within the upper, unconfined aquifer and groundwater table[9] on approximately 31.2 acres of the Property. The excavation would occur at a depth no more than 32 feet below the original ground level and at least 3 feet above the estimated confining layer of the confined aquifer.[10]

To assist in satisfying permitting requirements, River Resources retained the engineering firm of McLane Consulting, Inc. ("McLane") McLane installed five monitoring wells and took measurements from the wells from September 2019 through September 2021 to determine water flow direction, flow rate and elevation.[11]

The MCLUP application was initially scheduled to be heard at a Planning Commission meeting on April 12, 2021.[12] In advance of the meeting, the Commission received a staff report from the KPB Planning Department concluding that the requirements for the modification were met and recommending the Commission approve the MCLUP subject to certain conditions.[13]

Prior to the meeting, the Commission also received written comments from the public and requests asking that the meeting be postponed so interested parties would have more time to formulate their comments and work with experts to assess the possible effects of the MCLUP.[14] Nevertheless, the applicant, its engineer, and members of the public testified at the April 12,

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7 R. 1-7 (Vol. I).

8 Transcript (T.) 3 (Vol. I); R. 32 (Vol. I).

9 "A water table--or unconfined--aquifer is an aquifer whose upper water surface (water table) is at atmospheric pressure, and thus is able to rise and fall. Water table aquifers are usually closer to the Earth's surface than confined aquifers are, and as such are impacted by drought conditions sooner than confined aquifers." *See* https://www.usgs.gov/faqs/what-difference-between-confined-and-unconfined-water-table-aquifer#:~:text=A%20confined%20aquifer%20is%20an,the%20top%20of%20the%20aquifer.

10 R. 4 (Vol. I). "A confined aquifer is an aquifer below the land surface that is saturated with water. Layers of impermeable material are both above and below the aquifer, causing it to be under pressure so that when the aquifer is penetrated by a well, the water will rise above the top of the aquifer." *See* https://www.usgs.gov/faqs/what-difference-between-confined-and-unconfined-water-table-aquifer#:~:text=A%20confined%20aquifer%20is%20an,the%20top%20of%20the%20aquifer.

11 Opening Statement, McLane (March 7, 2022); R. 4 (Vol. I).

12 R. 133-36 (Vol. I).

13 R. 20-25 (Vol. I).

14 R. 47-78 (Vol. I).

2021, Commission meeting.[15] The Commission did, however, agree to postpone consideration of the MCLUP until its meeting on Mary 24, 2021.[16]

Prior to the May 24, 2021, meeting, the Commission received additional materials from Planning Department staff.[17] It also received additional written comments from the public.[18]

At the May 24, 2021, meeting, the Commission again received testimony from the applicant, its engineer, and the public.[19] Ultimately, the Commission denied River Resources' MCLUP.[20] It did so based on the following specific findings of fact: "1. The bond was not high enough based on the number of surrounding wells. 2. KPB Code needs to define impartial and independent more clearly. 3. The well monitoring timeline is in question as to whether or not it meets borough code."[21]

C. The First Appeal, Remand and Subsequent Approval of the MCLUP

The KPB Planning Commission's May 24, 2021, denial of the MCLUP was appealed by River Resources.[22] It was then referred by the KPB Borough to the Office of Administrative Hearings for adjudication.[23] That case, designated as *In re River Resources, LLC,* OAH 21-1682-MUN, is separate and distinct from this appeal.[24]

Shortly after the record was certified, a joint motion was filed by River Resources and the Borough, seeking to have the case remanded to the Commission to provide more detailed findings and conclusions supporting its decision.[25] Briefing was then invited on the issue.[26] After briefing, the case was remanded back to the Planning Commission to supply reasoning and detailed findings for its decision.[27]

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15 *See generally* T. 1-17 (Vol. I).
16 T. 14-17 (Vol. I); R. 137-38; 145-50 (Vol. I).
17 R. 83-85 (Vol. I).
18 R. 86-126 (Vol. I).
19 *See generally,* T. 30-48 (Vol. I).
20 R. 14-16, 151-63 (Vol. I).
21 R. 15 (Vol. I).
22 *In re River Resources, LLC,* OAH 21-1682-MUN; Appeal of Planning Commission Decision by River Resources (June 16, 2021).
23 *In re River Resources, LLC,* OAH 21-1682-MUN, Case Referral Notice to Office of Administrative Hearings from KPB (June 29, 2021).
24 *In re River Resources, LLC,* OAH 21-1682-MUN; Order Following Remand (December 17, 2021).
25 *In re River Resources, LLC,* OAH 21-1682-MUN, Memorandum of Law in Support of Motion for Remand (August 3, 2021).
26 *In re River Resources, LLC,* OAH 21-1682-MUN, Order Inviting Response and Withdrawing Opening and Reply Statement Briefing Deadlines (August 6, 2021).
27 *See In re River Resources, LLC,* OAH 21-1682-MUN, Order Denying Motion for Stay and Granting Motion for Remand to the Kenai Peninsula Borough Planning Commission (August 25, 2021).

Initially, the Planning Commission chose not to take additional public testimony and instead, simply addressed the remand at its October 18, 2021, meeting.[28] In anticipation of that meeting, a memorandum was presented to the Commission by the deputy Borough attorney addressing the remand order from OAH.[29] After going into adjudicative session, the Commission decided to reopen public testimony and evidence at a meeting to occur on December 13, 2021.[30] In providing notice of the December meeting, and in light of the remand order, the Commission directed River Resources and its engineer to provide the following:

1. A best effort to identify known wells within 300', 500' and 1000' of the proposed dewatering;
2. Anticipated impacts, if any, to nearby wells;
3. Potential impacts to nearby wells in a worst-case scenario and the possible remedial costs of those impacts on a per-well basis;
4. The dates of measurements for the monitor [sic]wells done pursuant to KPB 21.29.050(A)(5);
5. The amount of the bond proposed by River Resources, LLC; and
6. Any other information or documentation that River Resources, LLC would like to provide for consideration in support of its applications and requests.[31]

It directed interested parties and nearby landowners to provide information regarding:

1. Well tests performed to-date;
2. Professional opinions, if any, regarding potential impacts that may occur as a result of the Applicant's (i) request to allow for excavation in the water table; and (ii) localized dewatering exemption request during excavation below groundwater elevation; and
3. Any other expert opinions or information that nearby landowners or interested parties would like to provide for consideration in this matter.[32]

The Commission also directed the Planning Department staff to address all issues above that both the applicant and interested parties/nearby owners were asked to address.[33]

Before the December meeting, the Commission received a staff report addressing the issues it had been tasked to discuss, as well as additional information, and comments from the applicant, its engineer and the public.[34] There was also testimony by these same parties at the

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28 R. 200 (Vol. II).
29 R. 163-85 (Vol. II).
30 R. 187-202 (Vol. II).
31 R. 13 (Vol. II).
32 R. 13 (Vol. II).
33 R. 13 (Vol. II).
34 R. 10-162 (Vol. II).

December meeting.[35] At the close of the December 13, 2021 meeting, the Commission voted unanimously to pass Planning Commission Resolution 2021-37, granting River Resources' MCLUP.[36] Among other things, it made specific factual findings regarding the standards and requirements contained in KPB Code 21.29.040 and 21.29.050. It also found that those standards and conditions were satisfied.[37]

D. The Second Appeal

After the KPB Planning Commission's decision, OAH issued an order in *In re River Resources, LLC,* OAH 21-1682-MUN. It indicated that based on the Commission's December decision, all issues raised in the earlier appeal appeared moot. To the extent any parties wished to take issue with Resolution 2021-37, they were required to follow the appeal procedures set out in the notice of decision from the Planning Department.[38]

The Commission's decision was appealed by Dale McBride on December 20, 2021.[39] Mr. McBride owns real property containing a well that is near the boundary of River Resource's materials site.[40]

Once again, the KPB referred the appeal to the Office of Administrative Hearings for adjudication.[41] The case has now been fully briefed and oral argument occurred on May 4, 2022.

III. Discussion

A. Procedure

Applications for MCLUPs are required when a permittee intends to revise operations so that they are no longer consistent with the original application. They are processed in the same manner as CLUPs.[42] Once deemed complete, the planning director is required to schedule and notice a public hearing in front of the Planning Commission. Following the public hearing, the Commission is required to act on the application and issue a decision that contains its written findings and reasoning supporting the decision.[43]

An appeal of a KPB Planning Commission decision may be filed by the applicant, any party or person aggrieved by the decision who appeared before the Commission with

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35 *See generally* T. 1-23 (Vol. II).
36 R. 2-9, 193-97 (Vol. II).
37 R. 2-6 (Vol. II).
38 *In re River Resources, LLC,* OAH 21-1682-MUN, Order Following Remand (December 17, 2021).
39 Appeal of Planning Commission Decision (December 20, 2021).
40 R. 18, 28, 35 (Vol. II).
41 Case Referral Notice to Office of Administrative Hearings from KPB (January 20, 2022).
42 KPB Code 21.29.090.
43 *Id.* at 21.25.050(C).

either written or oral presentation, or any government agency affected by the decision who appeared before the Commission with either written or oral presentation.[44] Appeals are heard by a hearing officer possessing experience in quasi-judicial proceedings and the administration of land use regulations.[45]

Appeals are heard solely on the established record, unless "there exists cause for supplementing the record and that even with due diligence the new evidence could not have been provided at the public hearing before the planning commission and a reasonable opportunity is provided for all other parties of record to submit comments on the request prior to the hearing officer's decision."[46] After briefing, an oral argument is held, and a decision issued.[47] The KPB Code permits the hearing officer to remand the case to the Planning Commission as a remedy for changed circumstances, or a lack of, or inadequate findings or conclusions.[48]

B. Standard of Review

The applicable standards of review on appeal are set by the KPB Code. The standard of review on purely legal issues is one of independent judgment, however, "due consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21."[49] As to findings of fact, the hearing officer shall defer to the Planning Commission if they are supported in the record by substantial evidence.[50] "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion."[51] In a case reviewed on the substantial evidence standard, "[i]t 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."[52]

C. Points on Appeal

Mr. McBride filed 18 separate points on appeal.[53] They are summarized as follows:

1. The Planning Commission decision was not supported by substantial evidence.

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44 *Id.* at 21.20.250(A), 21.20.210(A).
45 *Id.* at 21.20.250(C), 21.20.220, 21.50.110.
46 *Id.* at 21.20.270(C).
47 KPB Code 21.20.280, 21.20.310, 21.20.340.
48 *Id.* at 21.20.330.
49 *Id.* at 21.20.320(1).
50 *Id.* at 21.20.320(2).
51 *Id.* at 21.20.210(7).
52 *Interior Paint Co. v. Rodgers,* 522 P.2d 164, 170 (Alaska 1974).
53 Appellant McBride's Appeal of Planning Commission Decision.

2. The Planning Commission erred by failing to set an adequate bond to protect surrounding homeowners and the Kenai River watershed resources.

3(A). The Planning Commission erred in failing to consider the negative public and private impacts of mining gravel below the water table, limiting homeowners in their ability to present testimony about potential negative public and private impacts, including as noted in the Coble report and McBride and Gravier submissions.

3(B). The Planning Commission erred in failing to provide appropriate mitigation measures in its decision.

4. The Planning Commission decision and reversal is inconsistent with the August 2021 order upon remand.

5. The Planning Commission erred in that its referral to historical practice does not provide an adequate definition or basis for determining the appropriate degree of well-monitoring that should apply in this instance.

6. The Planning Commission erred by basing its findings upon demonstrably insufficient and inadequate data.

7. The Planning Commission erred in that it failed to adequately ensure protection of the well head for City of Soldotna Well E, a major component of the City of Soldotna municipal water supply.

8. The Planning Commission erred in that its decision failed to balance the competing private and public interests and the property rights of all parties involved.

9. The Planning Commission erred by making its decision without having a proper quorum of the 14-member Planning Commission as then provided by recent KPB Code of Ordinances changes expanding the Planning Commission from its prior 9 members to 14.

10. The Planning Commission erred by failing to provide adequate findings of fact and conclusions of law consistent with the evidence presented.

11. The Planning Commission erred in that it failed to provide the homeowners adequate opportunity to be heard and to present their evidence in this factually and scientifically complex matter, denying the homeowners adequate due process and equal protection of the law.

12. The Planning Commission erred in that it failed to account for mandatory state regulations which restrict/prohibit the mining of gravel below the water table within 1,000 feet of known hazardous wastes sites.

13. The Planning Commission erred in that it failed to address the concerns and questions raised by the OAH order for remand, such as, the overall impacts upon the surrounding properties and the costs of such impacts and the mitigation of them.

14. The Planning Commission erred in that the submitted well monitoring data does not meet minimum legal requirements and in fact is not even collected nor maintained by the KPB Planning Department despite the obvious monitoring, regulatory and evidentiary need to collect such data.

15. The modification to conditional land use permit process was misapplied in that the application to modify the permit was filed very shortly after the initial CLUP was approved and prior to minimal well-monitoring.

16. The permit contravenes the conditions and representations upon which the original plat for the subject parcel and surrounding parcels was granted as well as the underlying conditional land use permit itself in that the proposal to mine gravel below the water table effectively precludes the building of the platted cross-street and maximum block length.

17. The record is this matter is incomplete in that Appellant McBride was denied the pre-hearing opportunity to clarify the submitted geophysics report, contains only a single short pre-hearing document, and fails to include certain items alluded to by the Applicant in the hearing that were not entered in the record.

D. Analysis

For ease of analysis, Mr. McBride's points on appeal are grouped into three general categories, legal, procedural, and factual, although it is acknowledged that many of these points raise mixed issues of law and fact or fact and procedure.

1. Legal Challenges

a. In Approving the MCLUP, was the Planning Commission required to ensure protection of all potential water-quality impacts to nearby water sources, including the City of Soldotna Well E, and did it fail to do so? (Appeal point 7)

Mr. McBride has raised concerns regarding this project's potential water-quality impacts to the City of Soldotna's Well E.[54] However, under the applicable KPB code sections, 21.29.040 and 21.29.050, the Planning Commission, in consideration of the application, is not required to ensure against all potential water-quality impacts to nearby water sources. Instead, its consideration of impacts to nearby water sources is relatively limited. Contrary to what Mr.

[54] Appellant McBride's Appeal of Planning Commission Decision at 3; Appellant McBride's Opening Statement (March 7, 2022) at 4, 7, 9-10; Appellant McBride's Reply Statement (March 29, 2022) at 2-3.

McBride seems to suggest, it is not required to address *any and all potential impacts* to neighboring water sources.

Instead, KPB Code 21.29.040 provides standards for sand, gravel and material sites and is generally intended to protect against aquifer disturbance, road damage, physical damage to adjacent properties, dust, noise, and visual impacts.[55] Although not specifically raised, it is possible that Mr. McBride was intending to rely on the language in KPB 21.29.040(A) regarding "protection against aquifer disturbance" or "physical damage to other properties." However, as analyzed below, given the specific monitoring that took place, the determination of flow direction, rate and elevation, and the distance to other nearby water sources, including Well E, substantial evidence supports the Planning Commission's findings that KPB 21.29.040(A) and 21.29.050(A)(5) were satisfied.

KPB Code 21.29.040(A)(1) also provides that KPB Code 21.29.050 may impose permit conditions to, among other things, protect "against the *lowering of water sources* serving other properties."[56] As applicable here, KPB Code 21.29.050(A)(5) addresses excavation within the water table. As it provides, such excavation may occur if it: 1) is greater than 300 horizontal feet from water sources; 2) there is a certification by a qualified independent civil engineer or professional hydrologist that the excavation will not negatively impact the "*quantity"* of the aquifer serving existing water sources; 3) a minimum of three monitoring tubes or wells are established to determine flow direction, rate and elevation; 4) monitoring takes place in three-month intervals for at least one year prior to application; and 5) the operations not breach an aquifer confining layer.[57]

In asserting concern over the potential water-quality impacts to the City of Soldotna's Well E, Mr. McBride has relied on a geophysical report submitted by certified professional geologist and geophysicist, Geoffrey Coble.[58] As Mr. Coble notes, Well E is important because it was developed, in part, to address concerns over arsenic concentrations in the City of Soldotna's water supply. Well E has produced up to 1,000 gallons of water per minute for Soldotna.[59] While there are specific code provisions that prohibit material extraction within 100

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55 KPB Code 21.29.040.
56 *Id.* at 21.29.040(A)(1) (emphasis added).
57 *Id.* at 21.29.050(A)(5) (emphasis added).
58 R. 60-101 (Vol. II).
59 R. 62-63, 76 (Vol. II).

horizontal feet of existing water sources, here, there are no existing water sources within that distance.[60] Further, Well E is approximately 1,500 feet away from the Property.[61]

As to KPB Code 21.29.040(A)(1), the Commission concluded that the MCLUP "must be conducted in a manner to protect against the lowering of water sources serving other resources by complying with any applicable federal, state, and local laws and by complying with the required permit conditions set forth in Section 3 of this resolution."[62] It also addressed each of the other five standards contained in KPB Code 21.29.040(A) and specifically concluded that "the application meets the six standards found in KPB 21.29.040."[63] As addressed below, there was also substantial evidence in support of these findings and conclusions.[64]

As to KPB Code 21.29.050(A)(5), the Planning Commission concluded that all the appropriate neighboring landowners were noticed and notified, including the City of Soldotna. It also found that McLane performed the appropriate well testing and monitoring, analyzed the data, determined the flow rate and direction, and certified that River Resources' excavation plan will not negatively impact the *quantity* of the aquifer.[65] There was also substantial evidence supporting these findings including the certification provided by McLane itself, and the monitoring/test well data and information and measurements occurring at each of the five wells over a two-year period.[66]

Finally, as to Well E itself, in addition to the City of Soldotna's failure to provide any formal input on this project through the normal public meeting notice process, the City was also informally contacted regarding the project by Mr. McBride's counsel.[67] When that occurred, the City indicated that it had no major concerns with the project and raised no issues at all regarding the impact dewatering at the Property might have on the quantity of water at Well E.[68]

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60 R. 3 (Vol. II) (finding of fact 19(a)).
61 R. 76 (Vol. II).
62 R. 5 (Vol. II) (finding of fact 39).
63 R. 5 (Vol. II).
64 *See generally, infra.*
65 R. 3 (Vol. II) (findings of fact 6-16) (emphasis added).
66 R. 4-7 (Vol. I), R. 134-39, 143-50 (Vol. II). It has been noted that the original letter provided by McLane contained an error concerning the original date of installation of the test wells. However, that date was later corrected and noted that the original monitoring wells were established in September 2019. *See* River Resources' Opening Statement (March 7, 2022) at 9.
67 KPB Reply Statement (March 29, 2022) at 3-4.
68 T. 5, 8 (Vol. II). As indicated by Mr. Kashi, "[w]e did make contact with the City of Soldotna Water and Sewer Department. They didn't feel that this groundwater table or dewatering would affect them." T. 8 (Vol. II).

Additional information in the record further confirms that Soldotna was on notice of this project and did not believe that the proposed dewatering would affect it.[69]

Given this information, it is concluded that the Planning Commission was simply not required to specifically address each and every conceivable impact from this project, no matter how distant, remote or unlikely. Instead, KPB Code limits its analysis under these circumstances to water quantity impacts from the proposal, aquifer disturbance and physical property damage. Here, the Planning Commission properly considered substantial evidence concerning the potential impacts it was required to address, and reasonably concluded that adequate protections existed.

b. In Approving the MCLUP, was the Planning Commission required to balance the competing private and public interests and property rights of all involved? (Appeal point 8)

Mr. McBride asserts that the Planning Commission erred in failing to balance the competing public and private interests and property rights associated with this application.[70] But, in so stating, again Mr. McBride misconstrues the legal requirements the Planning Commission must follow in deciding whether to grant an MCLUP.

As noted above, KPB Code 21.29.040 KPB provides standards for sand, gravel and material sites and is generally intended to protect against aquifer disturbance, road damage, physical damage to adjacent properties, dust, noise, and visual impacts.[71] KPB Code 21.29.050, specifies the conditions the Commission may impose to achieve the standards in .040.[72] Notably absent from what the Planning Commission is required to consider, however, is any general obligation to balance competing private and public interests or property rights as Mr. McBride suggests.

Because the Planning Commission is not legally tasked with a general obligation to balance private and public interests and property rights and because Mr. McBride has not alleged with specificity any such interests the Planning Commission has failed to consider, this appeal point is unavailing.

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69 R. 151-54 (Vol. II).

70 Appellant McBride's Appeal of Planning Commission Decision (December 20, 2021) at 3; Appellant McBride's Opening Statement at 4; Appellant McBride's Reply Statement at 3.

71 KPB Code 21.29.040.

72 *Id.* at Code 21.29.050.

c. Did the Planning Commission err in failing to account for state regulations that restrict/prohibit the mining of gravel below the water table within 1,000' of known hazardous waste sites? (Appeal point 12)

Mr. McBride asserts that the Planning Commission erred in failing to account for state regulations that restrict/prohibit the mining of gravel below the water table within 1,000' of known hazardous waste sites.[73] This argument fails because it misconstrues the applicable KPB Code requirements and lacks citation to any legal obligation by the Planning Commission to consider this point.

Like the analysis above, there is no requirement contained in either KPB Code 21.29.040 or 21.29.050 that requires the Commission to account for state regulations that restrict/prohibit the mining of gravel within 1,000' of known hazardous waste sites. Nor has Mr. McBride provided legal citation to his assertion that the Commission is required to provide such an analysis. Instead, he relies solely on Mr. Coble's report and the Planning Commission transcript of proceedings where Mr. Coble has, without citation to authority, also suggested the same.[74] It is axiomatic in the law that where legal authority is asserted without citation, it is waived.[75] There is simply no apparent authority to contend the Commission was obligated to consider contaminated sites.

Even if such authority did exist, it is not binding on the Planning Commission in this instance. In determining whether approval of a MCLUP is warranted, the Commission is not required to consider any and all State and federal regulations that might conceivably apply to the Property or River Resources' gravel extraction operations. Instead, the Commission is required to follow its own Code provisions regarding the evaluation and approval of the MCLUP. As to contaminated sites, there is no evidence or authority that it failed to do so.

d. Did the Planning Commission err in accepting well-monitoring data that does not meet minimum legal requirements and was not collected or maintained by the Planning Department? (Appeal point 14)

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[73] Appellant McBride's Appeal of Planning Commission Decision at 4; Appellant McBride's Opening Statement at 2, 4, 10; Appellant McBride's Reply Statement at 3.

[74] Appellant McBride's Opening Statement at 2, 4, 10; Appellant McBride's Reply Statement at 3.

[75] *Coppe v. Bleciher*, 318 P.3d 369, 378–79 (Alaska 2014) (upholding a determination that certain issues were waived because the argument "lacked citation to authority or a legal theory to support it"); Cf. *Hagen v. Strobel*, 353 P.3d 799, 805 (Alaska 2015) (holding that an argument that was "given only a cursory statement in the argument portion of a brief" was waived due to inadequate briefing).

Mr. McBride also contends that the Planning Commission erred in that the submitted well monitoring data does not meet minimum legal requirements and was neither collected nor maintained by the KPB Planning Department despite the obvious monitoring, regulatory and evidentiary need to do so.[76] However, Mr. McBride has cited no legal authority and virtually no explanation regarding how the well monitoring in this instance failed to satisfy monitoring requirements in KPB Code 21.29.050.[77]

Mr. McBride generally alleges that the monitoring well logs were not provided, the groundwater levels were not represented, and that the monitoring of groundwater levels with time data and the supplied documentation should have included many groundwater maps, not just one.[78] Notably missing, however, is citation to where these alleged shortcomings are required by the applicable KPB Code provisions.[79]

Instead, the applicable well-monitoring requirements of the KPB Code are clear. KPB Code 21.29.050(A)(5) requires that there must be a certification by an independent civil engineer or professional hydrologist that the excavation will not negatively impact the quantity of an aquifer serving existing water sources, and that three monitoring tubes or wells are installed and measured in three-month intervals for at least a year prior to application to determine groundwater elevation, flow direction and flow rate. Absent from the KPB Code is any requirement that the Planning Department itself perform the well monitoring, that any groundwater maps be included, or that time data be supplied.

In this instance, the Commission concluded that the engineer retained by River Resources, McLane, is a certified civil engineer and based on historical application of Borough Code, should be considered an independent engineer.[80] Mr. McBride suggested, however, that McLane is not an independent engineer for purpose of KPB Code 21.29.050(A)(5).[81] While Mr. McBride provided little, if any basis for this contention, counsel for Mr. McBride clarified during the hearing that McLane lacks the requisite independence because it was retained by River Resources for both the CLUP and MCLUP applications as well as the well-monitoring. In other words, to ensure "independence" of the monitoring engineer, it is alleged that River

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76 Appellant McBride's Appeal of Planning Commission Decision at 4.
77 Appellant McBride's Opening Statement at 5, 7, 9-10; Appellant McBride's Reply Statement at 3.
78 Appellant McBride's Opening Statement at 9.
79 *Id.*
80 R. 5 (Vol. II).
81 Appellant McBride's Opening Statement at 5, 10.

Resources was required to retain different engineers for the well monitoring than for general assistance with the application process. Because this did not occur, it is alleged that McLane is not an "independent engineer" as required by 21.20.050(A)(5).

Mr. McBride's argument on this point is unpersuasive. There has been no compelling legal or factual support provided. Further, a common dictionary defines "independent" to mean "not affiliated with a larger controlling unit" and "not easily influenced: showing self-reliance and personal freedom."[82] Although McLane was undeniably *hired* by River Resources to perform the monitoring at issue in this case and to assist with the CLUP and MCLUP application process, there is nothing to suggest that River Resources in any way controlled or dictated McLane's findings. As such, there is simply no support for the contention that McLane is not an independent engineer for purpose of the monitoring work.

Not only was the Commission satisfied that McLane was independent, it also concluded that the test wells and monitoring McLane performed satisfied the requirements of KPB Code 21.29.050(A)(5).[83] This finding was supported by substantial evidence in the record, including a certification letter, survey field notes, well logs, photos, dewatering plan and drawings.[84] As these materials reflect, five monitoring wells were installed in September 2019.[85] The wells were monitored on September 17, 2019, May 4, 2020, July 15, 2020, October 15, 2020, January 18, 2021, April 13, 2021, and September 28, 2021.[86] The work was performed by a qualified engineer, Gina Debardelaben, of McLane.[87] Using the measurements and monitoring information obtained, Ms. Debardelaben and McLane established the flow direction, flow rate and water elevation on the Property.[88]

Consequently, there is no evidence to suggest that the Planning Commission accepted well-monitoring data that does not meet the minimum legal requirements of the KPB Code, nor was there any requirement that the data itself be collected by the Planning Department.

e. Did the Planning Commission err by accepting the application for a MCLUP so shortly after the approval of the CLUP and before minimal well-monitoring is alleged to have occurred? (Appeal point 15)

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82 *The Merriam-Webster Dict. Third New Int'l Dict.* (Merriam-Webster, Inc. 1997) at 380.
83 R. 3-4 (Vol. II).
84 R. 119-26 (Vol. I); R. 41-44 (Vol. II).
85 R. 119 (Vol. I).
86 R. 16, 44 (Vol. II).
87 R. 4 (Vol. I); R. 25, 44, 47 (Vol. II).
88 R. 4 (Vol. 1); R. 41-44 (Vol. II).

Next, appellant McBride asserts that it was somehow improper for the Planning Commission to accept the MCLUP application so shortly after approval of the CLUP and before minimal well-monitoring had occurred.[89] This is an uncited and unsupported appeal point and is appropriately deemed waived.

Even if this issue were considered, however, River Resources' original CLUP was granted on December 16, 2019. It subsequently submitted its MCLUP application on February 26, 2021.[90] Absent from KPB Code is any requirement that an applicant must wait a certain amount of time before filing a MCLUP after a CLUP has been granted.

KPB Code 21.29.050(A)(5)(b) and (c) require the installation of at least three test wells or monitoring tubes a year or more prior to application and that the monitoring must occur at three-month intervals. However, as indicated above, when River Resources filed its MCLUP application, the five monitoring wells had already been in place for 15 months and had been monitored on five separate occasions.[91] Consequently, even if Mr. McBride's argument were not waived, the application pre-filing monitoring requirements were clearly met.

f. Does the MCLUP contravene the conditions and representations of the original plat and the CLUP in that the proposal to mine gravel below the water table effectively precludes the building of the platted cross-street and maximum block length? (Appeal point 16)

Appellant McBride also contends that the MCLUP contravenes the conditions and representations of the original plat and the CLUP in that the proposal to mine gravel below the water table effectively precludes the building of the platted cross-street and maximum block length.[92] Although this issue was raised as an appeal point in Mr. McBride's appeal, it was not cited, supported, or further argued in his briefing in this case or at the hearing. Consequently, it is deemed waived and is not addressed further.[93]

2. <u>Procedural Challenges</u>

a. Did the Planning Commission err by allegedly deciding the MCLUP without a quorum? (Appeal point 9)

Mr. McBride contends that the Planning Commission erred by approving the MCLUP at its December 13, 2021, meeting because the resolution was only passed by 5 of the 14-member

89 Appellant McBride's Appeal of Planning Commission Decision at 4.
90 R. 2 (Vol. I); R. 2, (Vol. II).
91 R. 119 (Vol. I); R. 16, 44 (Vol. II).
92 Appellant McBride's Appeal of Planning Commission Decision at 4.
93 *Supra* at n.75.

Planning Commission.[94] He argues that this is not a quorum but barely 1/3 of the Planning Commission as expanded by the KPB Assembly.[95] This argument is unpersuasive.

Immediately prior to the December 13, 2021, Planning Commission meeting approving the MCLUP, the KPB Assembly voted on December 7, 2021, to increase the potential membership of the Commission from 11 to 14.[96] After this occurred, the newly amended KPB Code provided that "[t]he planning commission shall consist *of a maximum* of fourteen members."[97]

This provision addresses the *maximum* membership of the Planning Commission, not its minimum membership. It is undisputed that at the time the Planning Commission met on December 13, 2021, there were only eight members who were both seated and appointed.[98] At the meeting itself, only five Commission members attended and participated, with all five voting to approve the MCLUP.[99]

It is further undisputed that at the time of the Planning Commission meeting, KPB Code did not define what constitutes a quorum.[100] However, years earlier, the Planning Commission passed Resolution 93-14, adopting Robert's Rules of Order, Newly Revised (1990 Edition), "as the parliamentary procedure to be used in the conduct of its business."[101]

The Borough cited extensively, without challenge, from that edition of *Robert's Rules of Order*.[102] As it notes: "a quorum in an assembly is the number of members entitled to vote who must be present in order that business can be legally transacted."[103] *Robert's Rules of Order* defines a "member of an assembly, in the parliamentary sense" as "a person having the right to full participation in its proceedings, that is . . . the right to make motions, to debate on them, and to vote."[104] It further provides that whenever the term "member" is used, "it refers to full

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94 Appellant McBride's Appeal of Planning Commission Decision at 3; Appellant McBride's Opening Statement at 2-3; Appellant McBride's Reply Statement at 4.
95 Appellant McBride's Reply Statement at 4.
96 KPB Ordinance 2021-40; KPB Code 02.40.015(A).
97 KPB Code 02.40.015(A) (emphasis added).
98 KPB Opening Statement (March 7, 2022) at 4; Appellant McBride's Opening Statement at 2-3; KPB Reply Statement at 4.
99 *Id.*; R. 7-9, 193-97 (Vol. II).
100 KPB Reply Statement at 4.
101 *See also* KPB Reply Statement at Attachment 1.
102 KPB Reply Statement at 5.
103 *Id.* (citing *Robert's Rules of Order, Newly Revised* (1990 Ed.).
104 *Id.*

participating membership in the assembly unless otherwise specified. Such members are also described as 'voting members' when it is necessary to make a distinction."[105]

Accordingly, in this instance, there were only eight Planning Commission members eligible to vote at the December 13, 2021, meeting. Because only three of those voting members were absent, a quorum of 5 Commission members eligible to vote was present. That quorum voted unanimously in favor of the MCLUP.

b. Did the Planning Commission err by failing to provide homeowners adequate opportunity to be heard and present their evidence, denying them dues process and equal protection of the law? (Appeal point 11)

Mr. McBride has also challenged the Planning Commission's action contending that he was deprived of due process and equal protection. Specifically, he asserts that:

> The Planning Commission erred in that it failed to provide the homeowners adequate opportunity to be heard and to present their evidence in this factually and scientifically complex matter, denying the homeowners adequate due process and equal protection of the law. In particular, and without limitation, while the applicant gravel pit operator was allowed an initial 15 minutes plus rebuttal to make their presentation while Appellant McBride and two homeowners were each allowed only 3 minutes in which to present their detailed scientific evidence and to rebut assertions by the Applicant gravel pit operator.[106]

He also contends he was not allowed an adequate amount of time at the Planning Commission meetings to present his entire case, he received inadequate notice of the May 24, 2021, Planning Commission meeting, and there was inadequate notice that the Planning Commission's May 24, 2021, decision might be reversed.[107]

As to equal protection, the United States Constitution guarantees equal protection of the law so that no person can be deprived of the laws which are enjoyed by other persons in like circumstances, particularly regarding life, liberty, property, and the pursuit of happiness.[108] Simply stated, constitutional equal protection means that similarly situated persons must receive similar treatment under the law.[109]

Mr. McBride has framed his due process concerns in terms of procedural due process.

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105 *Id.*
106 Appellant McBride's Appeal of Planning Commission Decision at 3.
107 Appellant McBride's Opening Statement at 2, 3, 5, 6; Appellant McBride's Reply Statement at 4.
108 *People v. Jacobs,* 27 Cal.App.3d 245, 258 (Cal. Dist. Ct. App. 1972).
109 *Dorothy v. Solomon,* 435 F.Supp. 725, 734 (D Md. 1977).

Procedural due process requires that parties whose rights are to be affected are entitled to be heard, and to enjoy the right, they must be notified.[110] The procedures such parties are to be given requires a balancing analysis based on the specific factual context.[111]

As to his contention that he was not timely notified of the May 24, 2021, meeting, this claim is not supported by the record. Instead, the record reflects that River Resources' MCLUP application was initially noticed and scheduled to be heard at a Planning Commission meeting on April 12, 2021.[112] However, prior to the meeting, the Commission received requests asking that the meeting be postponed so that the interested parties would have more time to formulate their comments and work with experts to assess the possible effects of the MCLUP.[113] Based on these requests, consideration of the MCLUP was postponed to May 24, 2021.[114] This 42-day postponement afforded Mr. McBride and others an even greater opportunity for participation than occurred at the April 12, 2021, meeting alone.

Prior to the May 24, 2021, Planning Commission meeting, the Commission received additional materials from Planning Department staff, and additional written comments from the public.[115] As it had already done at the April 2021 meeting, the Planning Commission again received testimony from the River Resources, its engineer, and the public.[116] Accordingly, Mr. McBride was given a full opportunity to participate both at the April 12, and May 24, 2021, Planning Commission meetings. Even if it were true that Mr. McBride was somehow deprived of an opportunity to meaningfully participate at these meetings, his argument is flawed for another reason.

This is because this appeal concerns the Planning Commission's actions at its December 13, 2021, meeting, not its earlier meetings.[117] It was at the December 13, 2021, Planning Commission meeting that the MCLUP was granted, not the earlier meetings. Consequently, Mr. McBride has failed to demonstrate that he was deprived of either equal protection or procedural due process even if he did somehow have inadequate notice or opportunity to participate at the May 24, 2021, Planning Commission meeting.

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110 *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972).
111 *Goldberg v. Kelly,* 397 U.S. 254, 268-71 (1970).
112 R. 128-38 (Vol. I).
113 R. 47-76 (Vol. I).
114 T. 14-17 (Vol. I); R. 137-38; 140-50 (Vol. I).
115 R. 83-126 (Vol. I).
116 *See generally,* T. 30-48 (Vol. I).
117 R. 7-9, 193-97 (Vol. II).

As to Mr. McBride's contention that his equal protection and due process rights were deprived based on a lack of notice that the Commission's May 24, 2021, decision might be reversed, this argument is also unavailing. In the public notice provided for the meeting, the meeting was broadly characterized as being for the purpose of a "remand hearing" on River Resources' MCLUP application.[118]

Regarding the remand order itself, it in no way prevented the Planning Commission from reversing its earlier denial of the MCLUP.[119] Instead, it specifically provided that the remand order:

> *should not be construed to suggest that the Planning Commission's decision was otherwise in error or that the Commission must reach a different outcome. A decision on that point is left for another day*. Instead, this order simply concludes that the Planning Commission's decision was not adequately reasoned and supported by specific factual findings. To be upheld, the KPB Code requires such findings. The record may or may not already contain the information needed to make the necessary findings. If sufficient facts are already in the record, then the Commission will simply need to articulate in writing specific factual findings based on that information and as addressed in detail in the order inviting response. If the record does not contain sufficient factual detail allowing the Commission to do so, then it may be required to schedule another hearing for such information to be provided.[120]

Because Mr. McBride participated in the earlier appeal and received the above-referenced remand order, he cannot contend that he had no notice that a different outcome might be reached.

Finally, Mr. McBride also takes issue with the fact that he was provided a limited opportunity to be heard and present evidence before the Planning Commission made its decision. In making this argument, Mr. McBride focuses too much on the form rather than the substance of the opportunity to be heard. Here, as already noted, Mr. McBride was provided a wealth of opportunities to be heard in this case including at the April 12, May 24 and December 13, 2021, Planning Commission meetings. The meetings were duly noticed and as the notices provide: *"[a]nyone* wishing to testify. . . may *come to the meeting*, attend through Zoom to give testimony, or *submit a written statement*. . ."[121] As such, Mr. McBride was not limited to participation through oral testimony alone.

He was also afforded the opportunity to provide written statements to the Commission.

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118 R. 191-92 (Vol. II).

119 *See generally, In re River Resources, LLC,* OAH 21-1682-MUN, Order Denying Motion for Stay and Granting Motion for Remand to the Kenai Peninsula Borough Planning Commission.

120 *Id.* at 6.

121 R. 191-92 (Vol. II).

In fact, he extensively availed himself of this opportunity by providing written comments and materials expressing his concerns to the Planning Commission. These included a letter in opposition to the MCLUP application from his attorney, and a report and analysis from Geoffrey Coble, including multiple appendices, and attachments.[122] These written materials totaled over sixty-seven pages and comprised over a third of the record designated as the "December 13, 2021, PC Meeting Packet."[123]

In addition to the opportunity to provide written documentation opposing the MCLUP in advance of all three Commission meetings, Mr. McBride was also given an opportunity to testify at each of the meetings.[124] It is true River Resources was allotted 15 minutes to speak at the December 13, 2021, Planning Commission meeting, and any other interested parties were limited to three minutes each.[125] However, this limitation is reasonable, given that interested parties had virtually an unrestricted opportunity to also submit written documentation in advance of the meeting. It is also reasonable based on what could result if such a time limitation were not imposed.

It is easy to envision a Commission meeting where there is one applicant and dozens of members of the public speaking against the proposal. In such a situation, if the applicant were limited to 15 minutes and the public was limited to three minutes each, a very lopsided allowance would occur in favor of the project's opponents. As such, in choosing to allow 15 minutes for the applicant and three minutes each for the interested parties, the Commission was applying a reasonable approach. This is particularly true given the nearly unlimited opportunity for interested persons to provide written documentation - an opportunity that Mr. McBride and his counsel certainly employed.

The Alaska Supreme Court faced a similar issue in *Zenk v. City & Borough of Juneau,*[126] a 2017 Memorandum Opinion and Judgment that, while not precedential, provides good example of how issues like this should be reviewed on appeal. In that case, an applicant for a CLUP sought to build a commercial greenhouse in a residential neighborhood. The application was opposed by many of the applicant's neighbors, and they

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122 *Id.* at 49-55, 60-77, 79-101 (Vol. II).
123 *Id.;* R. 48-56, 60-118 (Vol. II).
124 T. 5, 33 (Vol. I); T. 3 (Vol. II)
125 T. 3 (Vol. II).
126 S-16118, 2017 WL 28225797 (Alaska MOJ 2017) (unpublished). MOJs are not as formal as published opinions and do not create legal precedent.

were provided an opportunity to give the Planning Commission their written information before the public hearing. At the subsequent public hearing before the Commission, each member of the public was limited to three minutes of testimony while the applicant was given an unlimited time.[127] Ultimately, the Commission approved the CLUP application, and the decision was upheld on appeal by the superior court.[128]

In his appeal to the Alaska Supreme Court, appellant Zenk asserted that the CLUP application was incomplete, and the Commission's decision was not supported by substantial evidence.[129] He also argued that he was deprived of due process because: 1) each member of the public was limited to three minutes of testimony, as opposed to the applicant who was given an unlimited amount of time, including rebuttal; 2) those opposing the application were not given an opportunity to rebut what they saw as "false and/or misleading statements made by the applicant"; and 3) "administrative efficiency took precedence over fair and just procedures."[130]

As to the issue of the application's completeness, and importantly for our purposes here, the Supreme Court's main concern was that the CLUP application provided "sufficient detail for neighbors to comment and for Planning Commission members to question staff and [the applicant] about the proposed land use."[36] It held that the application fulfilled its purpose of giving neighbors and the Planning Commission adequate information about the proposed use for neighbors to make their concerns known and for the Commission to address them.[131]

As to the specific issue of the alleged due process violation, the Court held that the process used was more than sufficient to protect Zenk's interests. He received notice of the meetings about the CLUP, had the opportunity to and did submit written comments, testified in opposition to the CLUP at the public hearing, and was afforded the opportunity to appeal the decision first to the City Assembly, next to the superior court, and then to the Alaska Supreme Court. The Court noted that the record reflected the Commission considered the neighbors' objections and imposed a number of conditions based on that information.

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127 *Id.* at *2, 6, 8.
128 *Id.* at *3.
129 *Id.* at *5, 6.
130 *Id.* at *8.
131 *Zenk v. City and Borough of Juneau,* 2017 WL 28225797, at *6.

The Alaska Supreme Court also cited approvingly to a Maine Supreme Court case addressing the same issue. In that case, the Maine Supreme Court held that the landowner's due process rights were protected because the landowner "was able to participate meaningfully throughout the permit approval process."[132]

Here, Mr. McBride has also been provided an ample opportunity to participate meaningfully throughout the entire MCLUP and appeal process. He provided the Commission voluminous written comments to the proposal. He was given an opportunity to offer testimony on three separate occasions and did so, at least once, through his attorney.[133] He participated during the initial appeal of the MCLUP after which the matter was remanded to the Planning Commission to make more detailed findings. There is simply no support for suggesting that Mr. McBride's due process or equal protection rights were violated or that he was not provided a meaningful opportunity to participate throughout the MCLUP process. Accordingly, Mr. McBride has been afforded adequate equal protection and due process in this case.

c. Was Appellant McBride denied the opportunity to clarify documentation in the record and did the Planning Commission err in its reference to and inclusion of information in the record? (Appeal point 17)

Next, Mr. McBride argues that the record in this case is incomplete because it only contains "a single short pre-hearing document and no other information between the Borough Planning Department and the KPB Planning Commission. He contends he was denied the pre-hearing opportunity to clarify the submitted geophysics report, and that certain items alluded to by Applicant in the hearing were apparently not entered in the record."[134] Such a characterization is inaccurate.

Instead, the record is voluminous and contains a wealth of information, not only from the Planning Department itself, but also from Mr. McBride and Mr. Coble. The record is comprised of two volumes, containing approximately 275 pages of documents and transcripts of testimony presented at the three hearings in this case.[135] Contrary to what Mr. McBride suggests, this information and documentation was presented to the Commission in advance of the December 13, 2021, meeting. It included the application information provided by River Resources, KPB Planning Department staff reports, and the voluminous written comments

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132 *Id.* at *8 (citing to *Glasser v. Town of Northport,* 589 A.2d 1280, 1281, 1284 (Me. 1991)).
133 T. 7 (Vol. II).
134 Appellant McBride's Appeal of Planning Commission Decision at 4.
135 R. 1-163, T. 1-48 (Vol. I); R. 164-202, T. 1-23 (Vol. II).

offered both in support and opposition to the project.[136] It also included the public testimony on the MCLUP offered at the two earlier Planning Commission Meetings on April 12, May 24, and in advance of the December 13, 2021, meeting.[137]

Further, the report from geologist and geophysicist Mr. Coble was prepared and provided to Mr. McBride's attorney, Joe Kashi on December 3, 2021.[138] It was included in the KPB Planning Commission meeting packet given to the Commission members prior to the December 13, 2021, meeting.[139] As already noted, Mr. McBride had an opportunity to attend, participate and testify at the December 13, 2021, meeting, and in fact did so, at least through his attorney, Mr. Kashi.[140] He also had the opportunity to submit additional written comments specifically about the Coble report between the date of its creation on December 3, 2021, and December 10, 2021, the deadline for submission of written comments in advance of the December 13, 2021 meeting.[141] Finally, and importantly, Mr. Coble himself presented testimony at the December 13, 2021, Planning Commission meeting. Accordingly, in addition to the opportunities afforded to Mr. McBride and his attorney, Mr. Coble himself was allowed to address and clarify information contained in his report previously given to the Commission before the Commission made its decision at the December 13, 2021, meeting.[142]

Mr. McBride also suggests that there were items alluded to by River Resources in the hearing that were not included in the record in this case.[143] However, once again, there is no factual or legal support offered for this contention. Consequently, assertion is waived.[144]

Mr. McBride has failed to establish that he was denied the opportunity to clarify documentation in the record, and that Planning Commission erred in its reference to and inclusion of information in the record.

3. *Factual Challenges*

a. *Did the Planning Commission fail to support is decision with substantial evidence? (Appeal point 1)*

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136 R. 1-7, 17-126 (Vol. I); R. 10-192 (Vol. II).
137 T. 1-48 (Vol. I); T. 1-23 (Vol. II).
138 R. 60 (Vol. II).
139 R. 10, 60-101 (Vol. II).
140 T. 7 (Vol II).
141 R. 192 (Vol. II).
142 T. 8-9.
143 Appellant McBride's Appeal of Planning Commission Decision at 4.
144 *Supra* at n.75.

Mr. McBride argues that the Planning Commission erred in this case by reversing its prior denial and that the reversal is both contrary to the evidence and not supported by substantial evidence.[145] However, as the record in this case makes clear, this contention is inaccurate.

As referenced above, the factual considerations in this case are reviewed under the substantial evidence standard.[146] The Alaska Supreme Court has held that "[z]oning board decisions are generally accorded a presumption of validity" and that "[a] Commission's findings will be sustained if they are supported by substantial evidence."[147]

As already discussed at length above, there was substantial evidence in this case and the Commission made its decision based on that substantial evidence.[148] Further, what occurred with the Planning Commission's decision approving the MCLUP is in direct contrast to its earlier denial of the MCLUP. In its earlier denial, the Commission based its decision on three separate, one sentence findings. However, as already held in the order for remand from the Office of Administrative Hearings, those "purported findings were not factual findings, but instead, were more accurately characterized as conclusions, statements, and questions. They do not provide a reasoned basis for the Commission's decision based on factual findings from substantial evidence in the record, as the KPB Code requires."[149]

In subsequently approving the MCLUP, the Commission did so after considering a record of approximately 275 pages, including staff reports, written comments and public testimony occurring over the course of three separate Commission meetings.[150] It also issued 40 very detailed findings of fact and conclusions of law, and additionally imposed 18 separate and detailed permit conditions.[151] Mr. McBride's more specific factual contentions will be addressed below. However, unlike the sparse factual findings underlying the initial denial of the MCLUP, it cannot be said that approval of the MCLUP was not based on specific and detailed findings and substantial evidence.

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145 Appellant McBride's Appeal of Planning Commission Decision at 2.
146 *Supra* at 8.
147 *Griswold v. Homer Advisory Planning Commission*, 484 P.3d 120, 128 (Alaska 2021).
148 *Supra* at 10-16, 25-26.
149 *In re River Resources, LLC,* OAH 21-1682-MUN, Order Denying Motion for Stay and Granting Motion for Remand to the Kenai Peninsula Borough Planning Commission at 6; R. 15 (Vol. I).
150 R. 1-163, T. 1-48 (Vol. I); R. 164-202, T. 1-23 (Vol. II).
151 R. 2-6 (Vol. II).

b. Did the Planning Commission err by failing to set an adequate bond to protect surrounding homeowners and the Kenai River watershed resources? (Appeal point 2)

Although Mr. McBride asserts in his points on appeal that the Planning Commission failed to set an adequate bond to protect surrounding homeowners and the Kenai River watershed, that point is not further addressed in his briefing.[152] River Resources contends that the bond was adequate and has cited to the extensive evidence in the record demonstrating the lack of foreseeable impacts to neighboring wells or water sources.[153]

Further, after the remand, the Commission did specifically address issues regarding the posting of a bond. This occurred regarding both dewatering activities (finding number 19) and reclamation activities (finding number 27). As to dewatering, it specifically imposed a bond requirement of $30,000 before an exemption is granted to allow dewatering.[154] The dewatering activities bond was also specifically addressed as part of condition 8. It provides that:

> Prior to dewatering, the permittee shall post a bond for liability for potential accrued damages pursuant to KPB 21.29.050(A)(4)(d) in the amount of $30,000. No dewatering activities shall create a sound level when measured at or within the property boundary of the adjacent land that exceed 75 decibels dB(A). The applicant must adhere to the dewatering plan as proposed and shall request a modification if a change to the plan is necessary.[155]

Given this information, the Planning Commission's decision on the bond aspects of the MCLUP is afforded a presumption of validity. Appellant McBride has failed to demonstrate why the Planning Commission's decision on this point should not be upheld.

c. Did the Planning Commission err by failing to consider the negative public and private impacts of mining gravel below the water table as noted in the Coble report and McBride and Gravier submissions? (Appeal point 3A)

Mr. McBride contends that the Planning Commission erred by failing to consider the negative public and private impacts of mining gravel below the water as noted in the Coble report and McBride and Gravier submissions.[156] In his supporting briefing, he relies heavily on the information contained in the Coble report and submissions by the Graviers.[157]

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152 Appellant McBride's Appeal of Planning Commission Decision at 2.
153 River Resources' Opening Statement (March 7, 2022) at 13-15.
154 R. 2-6 (Vol. II).
155 R. 6 (Vol. II).
156 Appellant McBride's Appeal of Planning Commission Decision at 3.
157 Appellant McBride's Opening Statement at 9-10; Appellant McBride's Reply Statement at 2-4.

There are two flaws with Mr. McBride's assertion. First, the Planning Commission was only required to consider the specific standards set forth in KPB 21.29.040 and 21.29.050. To the extent that Mr. Coble or the Graviers raise issues addressing matters outside of those standards, the Commission was not required to consider them. That is true no matter how appropriate Mr. McBride now contends it would have been for the Commission to do so.

Here, when Mr. McBride frames the issue by suggesting that the Planning Commission failed to consider "the negative public and private impacts of mining gravel below the water," it is extremely difficult to equate that appeal point to the Commission's alleged failure to appropriately consider any of the standards contained in KPB 21.29.040 and 21.29.050. Is it being suggested that, as a general principle, the Commission failed to consider *all* negative public and private impacts of mining below the water as raised by Mr. Coble and the Graviers, or just some? Again, the points raised by Mr. Coble and the Graviers need to be tied to the specific considerations in KPB 21.29.040 and 21.29.050. In the way that this appeal point has been framed, it is not possible to do that.

Further, there is no evidence that the Planning Commission failed to take the information provided by Mr. Coble and the Graviers into consideration. Here, the Commission's passage of the MCLUP included very specific factual and legal findings and imposed detailed permit conditions.[158] These items all referenced and related to the specific standards set forth in KPB 21.29.040 and 21.29.050.[159] Further, the findings, conclusions and permit conditions were based on the extensive record in this case, including the information provided by Mr. Coble and the Graviers. As such, and without further specificity, it is difficult to conclude that the Commission erred in considering the information provided by Mr. Coble and the Graviers.

Second, arguing that the Commission failed to consider certain facts is wholly distinct from saying that the evidence should be re-evaluated or reassessed. Here, as just indicated, there is no evidence that the Mr. Coble or Gravier materials were not properly considered and assessed. But seeking to have the Planning Commission consider and assess these materials is wholly different than effectively asking that this evidence be re-evaluated, reassessed, or reconsidered. That is essentially what is being sought here.

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158 R. 2-6 (Vol. II).

159 *Id.*

This same approach was taken in the *Zenk,* the case referenced above.[160] As was ultimately concluded in that case, if the CLUP application was properly submitted and supported by substantial evidence and permissible interpretations of the applicable zoning ordinances and documents, the Court was not going to overturn the Commission's decision.[161] In this instance, there is nothing to suggest that this application was not properly submitted, and that the Planning Commission's decision was not supported by substantial evidence. It would be improper to re-evaluate or reconsider that evidence no matter how prudent the appellant contends it might be to do so.

d. Did the Planning Commission err by failing to provide appropriate mitigation measures? (Appeal points 3B, 13)

It is next asserted that the Planning Commission erred by failing to provide appropriate mitigation measures.[162] Specifically, Mr. McBride contends that in failing to address mitigation, the "decision provided for a generic approval and generic permit without adequate findings."[163] But once again, as addressed above, there is no requirement contained in either KPB Code 21.29.040 or 21.29.050 for mitigation specifically. Because no requirement exists, it is not something that the Commission was obligated to address. Mr. McBride has also failed to suggest specific mitigation measures that he believes should have been applied and legal support for those. Instead, he speaks in terms of "mitigation" in a general sense. Of course, if it is mitigation in the general sense that he claims should be addressed, it is arguable that the entire list of permit conditions are mitigation measures because they have the effect of mitigating the impacts of the MCLUP.[164] Consequently, the Planning Commission did not err in failing to impose mitigation measures as asserted by Mr. McBride.

e. Is the Planning Commission's decision inconsistent with the August 21, 2021, order for remand? (Appeal points 4, 13)

Mr. McBride argues that the Commission erred in reversing its earlier decision. He contends this occurred because the decision was inconsistent with the order for remand and that the Commission failed to address the points raised in the order for remand.[165] However,

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160 *Zenk v. City and Borough of Juneau,* 2017 WL 28225797, at *5.
161 *Id.* at *8.
162 Appellant McBride's Appeal of Planning Commission Decision at 3, 4.
163 Appellant McBride's Opening Statement at 4.
164 R. 2-6 (Vol. II).
165 Appellant McBride's Appeal of Planning Commission Decision at 3, 4.

this is inaccurate. As already addressed above, the order for remand did not require that the Planning Commission either approve or deny the MCLUP application. Instead, as noted, it concluded that a decision on that point was left for another day.[166] Instead, it merely requested that the Planning Commission:

1. Make factual findings supporting its decision based on substantial evidence in the record regarding the:
   a. bonding requirements;
   b. well monitoring timeline;
   c. qualifications and independence of McLane Consulting, Inc.; and
   d. specific criterion contained in KPB Code §§ 21.29.040 and 21.29.050.
2. To the extent that factual information does not presently exist in the record, the Commission shall augment the record by conducting an additional hearing.[167]

Nothing contained in Planning Commission Resolution 2021-37, granting the River Resources' MCLUP, appears inconsistent with the order for remand. Instead, the KPB Planning Commission appears to have substantially complied with the order for remand.[168]

f. Did the Planning Commission err by its referral to "historical practice" concerning independent well monitoring? (Appeal point 5)

Mr. McBride contends that the Commission erred by referring to "historical practice" concerning independent well monitoring.[169] Here, as previously noted, the Commission concluded that the engineer retained by River Resources, McLane, is a certified civil engineer "*and based on historical application of borough code*," should be considered an independent engineer.[170] However, as already analyzed, there is no merit to the contention that McLane lacks the requisite independence under the Borough Code to perform the well monitoring simply because it was retained by River Resources for purposes of assisting with the CLUP and MCLUP applications *and* the well-monitoring.[171] The Planning Commission did not err in its conclusion irrespective of whether it may have done so on the basis of historical practice or simply applying a common understanding or definition of "independence" as was done earlier in this decision.

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166 *Supra* at 20-21.
167 *In re River Resources, LLC,* OAH 21-1682-MUN, Order Denying Motion for Stay and Granting Motion for Remand to the Kenai Peninsula Borough Planning Commission at 8.
168 R. 2-6 (Vol. II).
169 Appellant McBride's Appeal of Planning Commission Decision at 3.
170 R. 5 (Vol. II) (finding of fact no. 34) (emphasis added).
171 *Supra* at 14-16.

g. Did the Planning Commission err by basing its findings on demonstrably insufficient and inadequate data and by failing to provide adequate findings of fact and conclusions of law consistent with the evidence? (Appeal points 6 and 10)

Mr. McBride contends that the Planning Commission erred in basing its findings on demonstrably insufficient and inadequate data.[172] He also asserts that the Commission failed to provide adequate findings of fact and conclusions of law consistent with the evidence.[173]

But, as already discussed at length, the standards the Planning Commission was required to consider for approval of the MCLUP were not unlimited nor as broad as Mr. McBride contends.[174] Instead, Borough Code considerations are relatively narrow and specific.[175] The MCLUP's findings of fact, conclusions of law and conditions all provide a great amount of detail in addressing how the Borough Code considerations are satisfied in this instance.[176]

As already referenced in detail, the Commission based its findings and conclusions on substantial evidence.[177] Any suggestion that the Commission erred by basing its findings on demonstrably insufficient and inadequate data or that it failed to provide adequate findings of fact and conclusions of law consistent with the evidence is unsupported.

IV. Conclusion

Since this case involves both a CLUP and MCLUP and has now involved two separate appeals, it is more procedurally complicated than most. There were also numerous points raised in the appeal. However, what is key to the analysis is focusing on the precise requirements of KPB Code for approval of a CLUP and MCLUP. Those requirements are not as broad as Mr. McBride suggests. Further, it is important that when challenges are made to the Commission's actions, those challenges are specific and detailed so that a meaningful review can occur.

In this instance, the Planning Commission's original denial of the MCLUP was inadequate regarding the findings and conclusions supporting the denial. That, in turn necessitated the order for remand. The Commission honored the spirit and intent of the remand in its subsequent proceedings, resolution, and decision. In doing so, it reached a different conclusion than it originally had. That said, however, its decision closely mirrors the

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172 Appellant McBride's Appeal of Planning Commission Decision at 3; Appellant McBride's Opening Statement at 1-4, 9; Appellant McBride's Reply Statement at 3.
173 Appellant McBride's Appeal of Planning Commission Decision at 3.
174 *Supra* at 10-14.
175 KPB Code 21.29.040 and 21.29.050.
176 R. 2-6 (Vol. II).
177 *Supra* at 10-16, 25-26.

requirements that it needed to follow pursuant to KPB Code 21.29.040 and 21.29.050. It was also based on substantial evidence in the record. This record was created without violating Mr. McBride's equal protection and provided him ample opportunities for due process. Consequently, the December 13, 2021, decision of the Planning Commission approving the MCLUP in this case and passing Resolution 2021-37 is AFFIRMED.

DATED this 19th day of May, 2022

Signed
Z. Kent Sullivan
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

This is a final decision. If you wish to appeal this decision, you must file an administrative appeal to the Alaska Superior Court within 30 days from the date this decision is distributed to you. *See* KPB 21.20.360 and Alaska Rule of Appellate Procedure 602.

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