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

In the Matter of:	)	
	)	
TLR ADVENTURES, LLC	)	OAH No. 21-1845-MUN
	)	Kenai Peninsula Borough Case No.
	)	2021-02-PCA

DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION

The Kenai Peninsula Borough Code allows a party to request a hearing officer to reconsider a zoning appeal decision if (1) the hearing officer overlooked, misapplied, or failed to consider a controlling code provision; (2) the hearing officer overlooked or misconceived a material fact; (3) the hearing officer overlooked or misconceived a material question; or (4) a party committed fraud or misrepresentation.[1] TLR Adventures, LLC argues each of the first three bases for reconsideration of the November 10, 2021 decision affirming the Kenai Peninsula Borough Planning Commission ("Decision"). But to support those claims, TLR largely misconstrues the Decision, the record, and the law. Accordingly, TLR's motion for reconsideration is denied and the Decision is reiterated in its entirety as if fully set forth herein.[2]

I. Neither Alaska Law Nor the Borough Code Protect Long-Abandoned Nonconforming Uses.

TLR repeats legal arguments from its written statements that it has a right to continue nonconforming uses, regardless of whether TLR was using the property in that manner at the time the LOZD was adopted. These are not new arguments.[3] Nor, as explained in the Decision, are they supported by the law.[4]

TLR claims Alaska law gives property owners the right to continue any property use conducted by a prior owner in perpetuity, regardless of later zoning law changes, and that a use is "grandfathered" when property passes from one owner to the next.[5] That is not Alaska law, nor do any of the cases TLR cites support this assertion. As the Supreme Court pointed out in language cited by TLR, "A landowner may have a 'grandfathered' right to use his property in a way that current zoning would not allow because he had put the land to that 'nonconforming use'

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1 KPB 21.20.350.

2 In response to TLR's Motion, Craig Cutler requested a modification to one of the factual findings. Mr. Cutler did not timely move for reconsideration or show grounds for reconsidering this factual finding.

3 *See*, *e.g.*, TLR Adventure LLC's Opening Statement at 9-11.

4 Decision at 7.

5 TLR Adventures LLC's Motion for Reconsideration ("TLR Reconsid. Mot.") at 4-5.

before it was barred."[6] TLR misses two critical aspects of this statement. First, the court stated that a nonconforming use "may" be grandfathered in — it is not an automatic right, it is a right that may continue under the applicable zoning laws.[7] Second, the grandfathering takes place when a landowner's use of the land goes from being lawful to unlawful. TLR argues "prior uses by the prior owners were grandfathered when TLR acquired the property," but there is no provision of the Kenai Peninsula Borough Code or general concept of property law that creates a "grandfathering" of land use rights upon disposal of property. An already grandfathered land use may run with the land, as the Borough Code here provides.[8] But there is nothing to be grandfathered until a use becomes unlawful. The ability to continue a land use that has since become prohibited is something that may happen when the law changes — which is the process that is at issue here.[9]

TLR similarly claims the Borough Code "does not impose a time limit" and therefore any prior use at any time must be approved as a nonconforming use.[10] By TLR's logic, if land had once been strip mined, reclaimed, built over with housing, and later zoned as a single-family residential LOZD, the owner of one of those houses could apply to turn their backyard into a strip mine. The Borough Code does not allow such resurrection of long abandoned uses. The Code states that "[n]onconforming uses *in effect on the date of initial adoption* of the LOZD are allowed to *continue* operation."[11] This language imposes a specific time — the date the LOZD is adopted.[12] And it requires uses be "in effect" on that date in order to "continue" — phrases that

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6 *Rush v. State, Dep't of Natural Res.*, 98 P.3d 551, 555 (Alaska 2004).

7 None of the cases TLR cites state that Alaska law provides for grandfathered prior uses of land. These cases reference or discuss local zoning laws. *See Rush v. State, Dep't of Natural Res*., 98 P.3d at 555 (discussing rights of disposal and referencing similar concepts in zoning laws); *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 261-62 (Alaska 2000) (discussing North Star Borough zoning laws); *Earth Movers of Fairbanks, Inc. v. Fairbanks North Star Borough*, 865 P.2d 741 (Alaska 1993) (appellant lacked standing to appeal decision involving North Star Borough zoning laws).

8 KPB 21.44.110(H).

9 *See*, *e.g.*, *Balough v. Fairbanks North Star Borough*, 995 P.2d at 262 (lawful use that would be unlawful under new zoning became vested right that could not be denied without due process "at the time of rezoning").

10 TLR Reconsid. Mot. at 5.

11 KPB 21.44.110(A) (emphasis added).

12 In his opposition to TLR's reconsideration motion, Don Pitcher analogizes this time restriction to a property tax assessment that examines the property existing on January 1 of a given year, without regard to what property existed December 31 or January 2. The analogy is apt, but imperfect. Yes, the Borough Code looks to use in effect on the date a LOZD is approved. But "in effect" provides some latitude to consider uses that are current, but that may not have occurred on the specific day the LOZD was approved. Indeed, the Planning Directors and Planning Commission here did not inquire whether TLR was housing bed and breakfast guests on January 7, 2020 itself, but whether TLR was operating a bed and breakfast as of that date. That inquiry looks to a broader time range that just January 7, 2020. The further away from January 7, 2020, however, the less indicative evidence will be of how TLR was using the property as of that date. Notably, once a nonconforming use is approved, it will be lost if not exercised for 365 days. KPB 21.44.110(C).

indicate the nonconforming use is a current use, not one that ceased many years ago. TLR's position that any prior use at any time in the past can constitute a current nonconforming use is contrary to this code language.

Because TLR's arguments are not supported by the law, TLR has not shown that the Decision overlooked a material question or code provision.

II. TLR's Waiver Arguments are Not Supported by Law or the Record and Thus Fail to Demonstrate Grounds for Reconsideration.

TLR reiterated due process objections to the Planning Commission's review process, taking issue with the fact that the Decision did not address the merits of these objections.[13] The Decision determined that these arguments were waived because TLR failed to raise them to the Commission.[14] A decision maker need not address the merits of a waived argument; such is the nature of waiver.

As to waiver itself, TLR offers no new or compelling argument:

- TLR repeats its complaints about time limits in the hearing before the Commission but fails to show how these limits kept it from raising an objection to the Commission at any point, within its allotted time or at another point in the proceedings — particularly when the Commission instructed parties to raise any objections at the hearing.[15]
- TLR repeats its claim that it was deprived a neutral decision maker because two Commissioners made comments that TLR considers tantamount to testimony.[16] But, as the Decision pointed out, claiming a decision maker is not neutral requires a showing of bias beyond mere speculation.[17] The propriety of two Commissioners making factual statements is irrelevant if it did not affect the outcome or evince bias on the part of those Commissioners. As the Decision notes, TLR made no showing of bias.
- TLR claims the Decision "overlooked" *Trustees for Alaska v. State, Department of Natural Resources*, but that case involved a factual finding that a substantive argument had been raised to an agency, not whether procedural arguments are waived if not raised in timely manner.[18] The case is not relevant to TLR's waiver.

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13 TLR Reconsid. Mot. at 2-3, 6-8.
14 Decision at 14-16.
15 TLR Reconsid. Mot. at 6-7; R-16.
16 TLR Reconsid. Mot. at 8.
17 Decision at 15.
18 TLR Reconsid. Mot. at 6; *Trustees for Alaska v. State, Dep't of Natural Res.*, 865 P.2d 745, 747-48 (Alaska 1992).

- TLR points to other objections it made in the record — to the time limits for the Planning Commission hearing and to the Director conducting a reconsideration process in its appeal to the Planning Commission.[19] But "due process" is no magic talisman that one may utter once and preserve all procedural objections for all time. These two examples of objections show TLR preserved those objections — not the myriad other procedural and due process arguments it made to the hearing officer here.
- Nonsensically, TLR also claims its due process arguments are not waived because it raised them to the hearing officer — the very objections the hearing officer found were waived.[20] The purpose of requiring timely due process objections is for a tribunal to hear them at a time when a due process violation can be remedied — *i.e.*, to the Planning Commission.[21] As the Borough laid out, TLR had multiple opportunities to raise concerns to the Planning Commission at times when the Planning Commission could have considered whether to modify its processes, but TLR chose not to object.[22] Waiting and objecting now on appeal, when it is too late for the Commission to act, does not preserve those objections.

TLR did raise one new procedural argument, but this one suffers from waiver as well. TLR argues that the Borough Code procedures for appeal from a Planning Commission decision, KPB Code 21.20, should not apply to this appeal of a Planning Commission decision.[23] Yet TLR did not raise this argument when filing this appeal under 21.20 or in its briefing on the appeal. To the contrary, TLR filed an "Objection" early in this process, arguing the "appeal procedure is governed by KPB 21.20."[24] TLR later filed a motion to supplement the record and noted that the "motion is brought pursuant to KPB 21.20.270."[25] Thus not only did TLR fail to timely object to the hearing officer conducting this appeal under KPB 21.20, TLR *insisted* on it, arguing those appeal procedures apply and then taking advantage of them to file a motion. TLR's newfound objection to the hearing officer following KPB 21.20 for this appeal was waived.

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19 TLR Reconsid. Mot. at 7 (citing R-195 and R-272.)

20 TLR Reconsid. Mot. at 7.

21 *See*, *e.g.*, *Alaska State Housing Authority v. Riley Please, Inc.*, 586 P.2d 1244, 1248 (Alaska 1978) ("A party may not obtain a second hearing by silently collecting his objections for the contingency of a loss in the first one."

22 Kenai Peninsula Borough's Response to Appellant's Motion for Reconsideration at 1-3.

23 TLR Reconsid. Mot. at 2-3.

24 TLR Objection at 1. The hearing officer held a status conference with the parties to go over procedures for the appeal under 21.20, obviating the need to address TLR's "objection."

25 Motion to Supplement Record on Appeal at 1.

TLR has not shown that the Decision overlooked or misconstrued facts, material questions, or code provisions related to its waived due process arguments.

III. Misconstruing the Decision and the Record Does Not Provide Grounds for Reconsideration.

For many of its arguments for reconsideration, TLR misconstrues the Decision or the record and thus these arguments are not grounds for reconsideration.

TLR claims the Decision disregarded all evidence of prior uses. But the Decision discussed that evidence — as little as there was — at length, pointing out only that evidence from seven or more years ago was of limited use in demonstrating the property's use when the LOZD was adopted.[26]

TLR claims that "the Hearing Officer relies upon the Borough code on home occupations when affirming several conditions."[27] But the Decision explicitly states "[t]he home occupation provisions do not apply directly to TLR's nonconforming use."[28] The Decision further points out that conditions adopted by a Planning Director and the Planning Commission were drawn from the home occupation provisions, but goes on to explain how those same conditions are within the scope of code provisions that do apply to TLR — namely, the provision prohibiting TLR from expanding a nonconforming use.[29] Thus the Decision did not rely on the home occupation provisions or treat them as applicable to TLR.

TLR claims the Decision misrepresented the record by finding that its evidence of events were all events hosted by guests or live-in employees. To make this assertion, TLR points to the one and only event it has evidence of holding in the four years it owned the property prior to the LOZD approval — a murder mystery party — and argues there is no evidence in the record the host "was already a guest when it rented the lodge."[30] But the Decision did not state that TLR's evidence was limited to events booked by people who were guests at the time of the *booking*. The Decision pointed out that the few events TLR could provide evidence of were all hosted by people who were also either live-in employees or guests.[31] Indeed, TLR's lone event, the murder mystery party, was booked along with rooms for the participants to stay at the lodge.[32]

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26 Decision at 8-10.
27 TLR Reconsid. Mot. at 10.
28 Decision at 11-12.
29 *Id.* at 12.
30 TLR Reconsid. Mot. at 8-9.
31 Decision at 9-10.
32 R-257.

TLR also claims evidence was missing from the record. Yet the only missing "evidence" TLR describes are two meetings it attended with Borough planning directors.[33] It is not unusual for applicants to meet with regulators and not record those meetings. That is what apparently happened here. The fact that there are no transcripts of those meetings does not mean the record is incomplete. Notably, TLR does not identify any evidence relayed in those meetings that is not in the record. If there was any, TLR had the opportunity to add evidence to the record before the Commission, and indeed did add evidence to the record at that time.

None of these arguments show the Decision overlooked or misconstrued facts, material questions, or controlling code provisions.

IV. Decision and Order

For the reasons discussed above, TLR failed to show that the Decision overlooked, misapplied, or failed to consider a controlling code provision, overlooked, or misconceived a material fact, or overlooked or misconceived a material question. Accordingly, TLR's motion for reconsideration is denied. The Decision itself is incorporated by reference in its entirety as if fully set forth herein.

DATED: December 8, 2021.

By: *Signed*_____
Rebecca Kruse
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 21.20.350(E) and Alaska Rule of Appellate Procedure 602.

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

[33] TLR Reconsid. Mot. at 10. TLR also cites to the transcript before the Commission in which a Borough attorney stated that one of the challenges it had faced were incomplete records from the Director that had to be worked out with TLR. The Borough attorney did not, as TLR now claims, "admit[] that it lost some of the TLR's evidence in this case." TLR Reconsid. Mot. at 10. Importantly, TLR has not described or identified a single piece of evidence that it submitted to a Planning Director or the Planning Commission that is not included in the record here.