

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

In the Matter of:)
)
ERIC F. ROSENBERG V. COOK INLET) OAH No. 21-2058-MUN
REGION, INC.) Agency No. 2021-03-PCA

ORDER FOR REMAND

On December 6, 2021, Appellant Eric Rosenberg and Applicant Cook Inlet Region, Inc. (“CIRI”) filed a joint motion and stipulation to remand this matter to the Kenai Peninsula Borough Planning Commission. The motion states that the Borough does not oppose the motion. Thus, time for response does not need to be provided under KPB Code 21.20.300(B).

The parties have requested a remand in response to a September 2, 2021 superior court decision in *Hans Bilben v. Kenai Peninsula Borough, Planning Commission*, which Mr. Rosenberg attached to his Opening Statement.¹ In *Bilben*, the court explained that the Commission had previously interpreted KPB 21.29 as providing it discretion to approve or disapprove a Conditional Land Use Permit (“CLUP”), even when the application includes the mandatory conditions set forth in KPB 21.29.050.² In a 2018 appeal, a hearing officer held that the Commission did not have this discretion and remanded to the Commission for further findings.³ On appeal of the Commission’s decision on remand, the superior court held that the Commission does, in fact, have discretion to adjudicate CLUP applications that include the mandatory conditions.⁴

The record in this matter tracks the changing code interpretations at play in *Bilben*. The Planning Commission approved CIRI’s CLUP in 2017 at a time when the Commission interpreted the code as providing discretion to approve or disapprove applications. Indeed, the Commission exercised that discretion in requiring an additional condition not included in the KPB 21.29.050 mandatory conditions.⁵ When CIRI applied to modify this CLUP in 2021, however, the Commission had received the hearing officer’s decision in *Bilben* stating that it did not have discretion to scrutinize a CLUP application that complied with KPB 21.29.050. Thus, the decision on appeal here states that “[c]ompliance with the mandatory conditions in KPB

¹ 3KN-20-00034CI (Sept. 2, 2021).

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.* at 10-15.

⁵ R-38 (requiring CIRI’s reclamation plan to include the requirements set forth in KPB 21.29.060(C)(3)).

21.29.050, as detailed in the following findings, necessarily means that the application meets the standards contained in the KPB 21.29.040.”⁶

When an appeal raises changed circumstances that could not have been presented to the Planning Commission, the matter will be remanded to the Commission for further proceedings.⁷ While changed circumstances would typically mean changes to the facts, there can also be a change to the law — or in how the Commission is to interpret the law. Here, the Commission reviewed CIRI’s application and issued its decision August 9, 2021 based on how a hearing officer in *Bilben* had instructed it to interpret KPB 21.29. The superior court’s decision a month later held the Commission needs to apply a different interpretation. That change in how the Commission should interpret the Borough Code is a changed circumstance that requires remand.

On remand, in light of the superior court’s holding in *Bilben*, the Planning Commission should review CIRI’s CLUP modification application to determine whether it meets the standards of KPB 21.29.040, not merely whether it includes the mandatory conditions in KPB 21.29.050 — similar to how the Commission reviewed CIRI’s CLUP application in 2017.

It does not appear that the Commission’s understanding of its discretion under KPB 21.29.040 impacted the development of the factual record. Thus, Commission should be able to review CIRI’s CLUP modification on remand without opening the record for new evidence. If the Commission determines that it is has insufficient facts to proceed, however, the Borough Code does not prohibit opening the record.

One issue where the record is lacking relates to a procedural argument raised by CIRI in its opening statement. As CIRI points out, only a party of record may appeal a Planning Commission decision.⁸ One of the requirements to be a party of record is to own land within the “notification radii.”⁹ The record states that notice was mailed to 255 landowners and leaseholders within a one-half mile radius of “subject parcels.”¹⁰ The record also includes a map depicting this notification radius.¹¹ The record indicates that Mr. Rosenthal is an attorney practicing law in Maryland, but also includes statements from Mr. Rosenthal that he owns and operates a business on Moonshine Drive in Soldotna.¹² CIRI argued that Mr. Rosenberg’s land is not within the

⁶ R-10.

⁷ KPB 21.20.330(A).

⁸ KPB 21.250(A); CIRI Opening Statement at 9.

⁹ KPB 21.20.210(A)(5).

¹⁰ R-10.

¹¹ R-47.

¹² R-53-55

notification radius and therefore he is not a party of record who could appeal.¹³ Mr. Rosenberg responded that he “lives on Moonshine Drive” and pointed to the notification radius map.¹⁴ But according to the map, not all parcels of land along Moonshine Drive are within the notification radius.¹⁵ It is thus unclear from the record whether Mr. Rosenberg had the right to appeal the Planning Commission’s decision. A list of the landowners within the half mile radius who were mailed notice would clear up any question about who is a potential party of record. Presumably the Borough has documentation of the notice it provided. On remand, the Commission is encouraged to add this information to the record.

Accordingly, Planning Commission Resolution 2021-26 is remanded to the Commission to review whether CIRC’s CLUP modification application meets the standards of KPB 21.29.040 in addition to including the mandatory conditions set forth in KPB 21.29.050. The Commission may, but is not required to, open the record for additional input from parties or the public. The Commission is, however, encouraged to add information to the record identifying the landowners within the notification radius.

This is not a final decision and therefore it is not appealable to superior court under KPB 21.20.360. Because this matter is remanded to the Commission, the hearing scheduled for December 7, 2021 is cancelled.

DATED: December 6, 2021.

By: Signed
Rebecca Kruse
Administrative Law Judge

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

¹³ CIRC Opening Statement at 9-10.

¹⁴ Rosenberg Reply at 3.

¹⁵ R-47.