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 deny a conditional land use permit to operate a sand, gravel, or material site for Parcel 169-010-67 described as Tract B, McGee Tracts – Deed of Record Boundary Survey (Plat 80-104) – Deed recorded in Book 4, Page 116, Homer Recording District, State of Alaska,	)	
BEACHCOMBER, LLC, Appellant.	)	OAH No. 22-0547-MUN Agency No. 2022-04-PCA

DECISION

I. Introduction

This case concerns the ongoing efforts of Beachcomber, LLC to develop a gravel mine on property it owns in Anchor Point. This case has a long and complex history dating back to 2018, when Beachcomber first applied for a conditional land use permit (CLUP) for a material site from the Kenai Peninsula Borough Planning Commission (Commission).[1] Efforts to develop the property have been contentious, with appeals of both an initial decision by the Commission to deny the CLUP in 2018 and a subsequent decision to approve it in 2019. Following a decision of the Kenai Superior Court remanding the matter back to the Commission, the Commission voted to disapprove the CLUP on April 11, 2022 by a vote of five to two.

Beachcomber, LLC, whose sole members are Emmitt and Mary Trimble, appealed the Commission's decision. Hans Bilben, who lives near the site and testified against the CLUP before the Commission, filed an entry of appearance seeking to participate in the appeal, along with thirty other owners of real property in close proximity to the proposed site.

The issues raised in this appeal are serious matters upon which reasonable people could have different opinions. In the limited context of an appellate review, however, no deficiencies in procedure or analysis have been shown that would support a decision to reverse the Commission's decision.

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[1] The area's zoning code requires a CLUP for material sites. KPB 21.29.020.B.

II. Facts and Proceedings

A. *The Permit Background*

The subject property is an irregularly-shaped, 41.72-acre parcel in Anchor Point. Beachcomber has owned the parcel since 2014. Residential and recreational properties border the parcel to the south and east and are at a higher elevation than the parcel itself, and vegetation in those areas is sparse.[2] Cook Inlet borders the property to the west.

On June 4, 2018, Beachcomber applied for a CLUP pursuant to Kenai Peninsula Borough (KPB) Code 21.29.030 to excavate and process gravel, sand, and peat in the easterly 27.2 acres of the parcel. The proposed development would occur in three phases over a 15-year period, beginning in the northeastern corner of the parcel, proceeding southerly, and eventually continuing westerly. Because the parcel is lower than the surrounding properties, the properties to the south and east would look down over activities occurring at the proposed site. Beachcomber's application contained information required by the KPB Code, including proposed vegetation buffers and berms to reduce impacts to the surrounding community.

B. *2018 Commission Decision*

The Commission convened a public hearing on the CLUP application on July 16, 2018. Numerous written comments were received, and more than thirty people testified at the hearing, most in opposition to the CLUP. At the conclusion of the hearing, the Commission disapproved a resolution to adopt the CLUP, Resolution 2018-23, by a vote of 6-3. The Commission issued a decision with two findings specifying the reasons for its decision: (1) under KPB 21.29.010(A)(4), "the noise will not be sufficiently reduced with any berm or buffer that could be added", and (2) under KPB 21.29.010(A)(5), "the visual impact to the neighboring properties will not be reduced sufficiently."

Beachcomber appealed the Commission's denial of the CLUP application on August 2, 2018. In briefing on the appeal, the Planning Director described the Commission's decision as "hasty and reactionary. . .made to accommodate the fears and concerns of the crowd" and asked that the CLUP either be approved or the decision be remanded to the Commission for further analysis.

A hearing on the appeal was held on December 6, 2018, with Hearing Officer Holly Wells presiding. In her written decision, Officer Wells examined the relationship between the

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[2] R. 27, T. 2.

standards for material sites in KPB 21.29.040, including protections against noise and visual impacts, and the mandatory permit conditions in KPB 21.29.050. Finding that the KPB Code "does not provide the Commission discretion to deny a permit that has been properly submitted," she concluded that the Commission exceeded the scope of its authority in denying the CLUP based on its determination that the permit, as conditioned, would not adequately protect against noise and visual impacts. She stated:

> The Code does not afford the Commission discretion to judge the effectiveness of the conditions identified in the Code. . . Instead, the Assembly, in adopting the Code, only granted the Commission authority to impose these conditions and ensure that any application complied with these application requirements. In other words, under the law as it currently stands, the Commission may only apply conditions under KPB 21.29.050 when issuing a material site conditional use permit.

Thus, Officer Wells remanded the CLUP application back to the Commission for findings regarding the mandatory conditions in .050.

C. ***2019 Commission Decision***

In 2019, the Commission again considered Beachcomber's CLUP application at several public meetings, with public comment taken on March 25, 2019 and June 10, 2019. Public interest in the application remained high, with a considerable number of written comments submitted and more than forty people testifying. KPB recommended a 50-foot vegetation buffer and 12-foot high berms along the southern and eastern property boundaries, and Beachcomber voluntarily added conditions to reduce the noise and visual impacts from the gravel site, including using roaming berms to be moved as the extraction proceeded, operating on-site equipment with "white noise" back-up alarms instead of traditional (beep-beep) alarms, and restricting operating hours for rock-crushing on holiday weekends during the summer. Although some Commissioners expressed concerns that the permit conditions would not sufficiently reduce the noise and visual impacts on the surrounding properties, the Commission approved the application by adopting Resolution 2018-23 in an 8-2 vote. The resolution adhered to the instructions on remand and contained a finding that "[c]compliance with the mandatory conditions in KPB 21.29.050, as detailed in the following findings, necessarily means that the application meets the standards contained in KPB 21.29.040.[3]

[3] R. 780.

Mr. Bilben appealed the Commission's approval of the CLUP. A hearing was held on October 30, 2019, with Hearing Officer L. Anmei Goldsmith presiding. Giving deference to the Commission's construction of the Code, Officer Goldsmith found that the Commission's interpretation "that compliance with KPB 21.29.050 necessarily means compliance with KPB 21.29.040, is reasonable." She also determined that the Commission's factual findings were supported by substantial evidence. Thus, she upheld the Commission's decision to approve the application.

Officer Goldsmith's decision was appealed to the Kenai Superior Court. Judge Jason Gist presided over the appeal and issued a decision and order on September 2, 2021. Contrary to hearing officers' conclusions, Judge Gist held that it is not enough for the Commission to find that a permit includes the conditions in KPB 21.29.050; the Commission must also determine whether the conditions are sufficient to meet the standards in 21.29.040. If not, the CLUP may be denied. Judge Gist remanded the matter back to the Commission to determine whether the buffers and berms in the permit were sufficient to meet the .040 standards regarding noise and visual impacts. He stated:

> The Commission did not specifically find whether the conditions imposed on the CLUP were *deemed appropriate* to satisfy the standards set forth in KPB 21.29.040. By all accounts from the record, it appears that the Commission operated under the incorrect assumption that KPB 21.29.040 was 'necessarily satisfied' so long as the CLUP contained conditions in KPB 21.29.050. It is unclear from the record whether the Commission deemed the conditions appropriate to satisfy those standards. For these reasons, the case is REMANDED back to the Commission for further review and/or clarification. If the Commission does in fact deem the conditions set forth in Resolution 2018-23 appropriate to satisfy the standards set forth in KPB 21.29.040, then it shall grant the CLUP. If, however, the Commission finds that no conditions in KPB 21.29.050 could adequately minimize visual and noise impacts to the standards set forth in KPB 21.29.040, then it may deny the CLUP. [4]

Beachcomber sought a petition for review of the Superior Court's remand decision with the Alaska Supreme Court, but the Supreme Court denied the petition on December 29, 2021.

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[4] R. 821.

D. ***2022 Commission Decision***

The Commission took up the remand matter at its regular meeting on January 10, 2022. It voted to hold a special meeting on January 25, 2022 but not to reopen public comment.[5] At the special meeting, the Commission voted unanimously to go into adjudicative session to deliberate, with the intent to vote on the CLUP at its regular meeting on February 14, 2022. At the February 14, 2022 meeting, a motion to adopt a resolution denying the CLUP failed by a majority vote.

The Commission returned to the matter at its next meeting on March 21, 2022. Once again, it voted unanimously to deliberate the matter in closed session at the end of the meeting.

On April 11, 2022, by the adoption of Resolution 2022-17, the Commission voted to deny the CLUP application by a 5-2 vote. The Planning Commission found that the permit, as conditioned, would not minimize noise disturbance to other properties as required by KPB 21.29.040(A)(4) and would not minimize visual impacts under .040(A)(5).

Beachcomber's appeal followed. The appeal was referred by the KPB Clerk to the Alaska Office of Administrative Hearings to supply a hearing officer as permitted by KPB 21.20.250.

A hearing by Zoom videoconference was held on November 7, 2022. In this context, a "hearing" consists of oral argument by the parties, with opportunity for the hearing officer to ask questions of the presenters. No witness testimony is allowed. The appeals points and arguments raised in the hearing and written filings of the parties are discussed below. Before turning to the merits of the parties' arguments, however, this decision will provide a short explanation of the process and legal standards for review.

III. Discussion

A. Procedure

Any "party of record" has the right to appeal the Commission's decision granting or denying a CLUP.[6] A party of record includes any person aggrieved by the decision who participated in the matter before the Commission and owns land within the notification radius, which in this case is within one-half mile of the subject property.[7] The appeal is to a hearing officer appointed by KPB.[8]

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5 T. 213-14.
6 KPB 21.20.250.
7 KPB 21.20.210(A)(5); KPB 21.25.060.
8 KPB 21.20.250(C).

Appeals of a CLUP are heard solely on the established record.[9] If changed circumstances or new evidence ought to be considered, or if there simply is not enough evidence in the record on a material issue, the remedy is to remand the matter to the Commission rather than take evidence at the appeal level.[10] After briefing and oral argument, a decision is issued.[11]

B. Substantive Requirements

Material sites are governed by KPB 21.29.040 and KPB 21.29.050. KPB 21.29.040 establishes the following six specific standards for material sites:

1. Protects against the lowering of water sources serving other properties;
2. Protects against physical damage to other properties;
3. Minimizes off-site movement of dust;
4. Minimizes noise disturbance to other properties;
5. Minimizes visual impacts; and
6. Provides for alternative post-mining land uses.[12]

KPB 21.29.050 contains a suite of fifteen mandatory conditions aimed at meeting the standards in KPB 21.29.040, including buffers zones around the excavation perimeter or parcel boundaries as required by .050(A)(2). The buffers shall consist of fifty feet of undisturbed natural vegetation, a minimum six-foot earthen berm, or a minimum six-foot fence.[13] The Commission shall designate "one or a combination of these buffers and berms as it deems appropriate." Additionally, the vegetation and fencing "shall be of sufficient height and density to provide visual and noise screening of the proposed use as deemed appropriate by the Commission."[14]

To satisfy the .040 standards "only the conditions set forth in KPB 21.29.050 may be imposed."[15] As the Kenai Superior Court has held, the Commission is required to determine

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[9] KPB 21.20.270(C). CLUP applications must be submitted to the KPB Planning Director. The application is reviewed, and once deemed complete, the Planning Director is required to schedule and notice a public hearing in front of the Commission. KPB 21.25.050(B). Following the public hearing, the Commission is required to act on the application and issue a decision that contains its writing findings and reasons in support of the decision. KPB 21.25.050(C).

[10] KPB 21.20.330.

[11] KPB 21.20.280, 21.20.310, 21.20.340.

[12] KPB 21.29.040(A).

[13] KPB 21.29.050(A)(2)(a).

[14] KPB 21.29.050(A)(2)(C).

[15] KPB 21.29.040(A).

whether the conditions in .050 are sufficient to meet the standards in .040.[16] The Court stated, "If the Commissions does in fact deem the condition in the [permit] appropriate to satisfy the standards set forth in KPB 21.29.040, then it shall grant the [permit]." If, however, the Commission finds that "no conditions in KPB 21.29.050 could adequately minimize . . . impacts to the standards set forth in KPB 21.29.040, then it may deny the [permit]."[17]

C. Standard of Review

The applicable standards of review governing this appeal are set by the KPB Code. On purely legal issues, the hearing officer will apply independent judgment, although "due consideration" shall be given to the Commission's experience and expertise in interpreting Titles 20 and 21 of the Code.[18] With regard to factual findings, the hearing officer "shall defer to the judgment of the Commission regarding findings of fact if they are supported in the record by substantial evidence."[19] "Substantial evidence" means "relevant evidence a reasonable mind might accept as adequate to support a conclusion."[20] Thus, the substantial evidence standard requires the reviewer to uphold the original factual findings if they are supported by substantial evidence, even if the reviewer may have a different view of the evidence. In reviewing whether a decision is based on substantial evidence, "[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."[21]

D. Points on Appeal

The specific points presented in Beachcomber's notice of appeal, as recast through its briefing and oral argument, are summarized below. These points concern procedural and constitutional issues, the Commission's factual findings, and its legal interpretation of relevant KPB Code provisions regarding noise and visual impacts.

1. Arguments Regarding the Open Meetings Act (Appeal Points 1-3)

Beachcomber contends the Commission's decision to deny the CLUP should be voided because the Commission violated the Open Meetings Act by: (1) discussing general legal advice about the separation of powers in closed session; and (2) discussing whether to enter into

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16 R. 222; *Bilben*, 3KN-20-00034 Cl at 17.
17 *Id*.
18 KPB 21.20.320(1).
19 KPB 21.20.320(2).
20 KPB 21.20.201(7).
21 *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

adjudicative session outside of the March 21, 2022 public meeting. These arguments fail for the reasons that follow.

a. *Overview of the Open Meetings Act*

Before analyzing Beachcomber's specific arguments, a brief overview of the Open Meetings Act (OMA) is warranted. The OMA requires that all meetings of a governmental body of a state public entity be open to the public. The Act, however, does not apply to a governmental body performing a "quasi-judicial function when holding a meeting solely to make a decision in adjudicatory session." An adjudicatory proceeding is generally one in which the rights of specific individuals or entities are being determined, such as an application for a conditional use permit.[22] Because a governmental body performing quasi-judicial functions is exempt from OMA, the body may meet in a session closed to the public, typically referred to as an adjudicative or deliberative session, to deliberate and make a decision.

The Act contains a separate section regarding executive sessions. An executive session is portion of a public meeting from which the public is excluded because of the nature of the subject matter to be discussed. Only specified subjects may be discussed in executive session. Those subjects include matters that would have a detrimental financial impact on the public entity, could prejudice a person's reputation and character, are required by law to be kept confidential, or involve consideration of government records precluded from public disclosure by law.

b. Discussions regarding "general legal advice"

The Commission's deliberations on Beachcomber's permit application was clearly a quasi-judicial function such that the Commission had the authority to enter into adjudicative session. Indeed, Beachcomber does not dispute this point, but instead maintains there are limits to what may be discussed in closed session, and the provision of "general legal advice" falls outside the scope of what is allowed. Beachcomber contends that statements made by Commissioner Ruffner and Commissioner Morgan during the April 11, 2022 public meeting show that general legal advice regarding the separation of powers of the executive and judicial branches was discussed in closed session "in stark contradiction of the law" and influenced the

[22] Although the Alaska statutes do not contain a definition of the term "quasi-judicial," the KPB Code defines "quasi-judicial" decisions as those in which "general law or policy are applied or affect an individual's property interest," including decisions on CLUPs. KPB 21.20.210(6).

Commissioners' decision-making. Citing the Alaska Supreme Court decision in *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993), Beachcomber claimed this "general legal advice" fell "outside the scope of the adjudicative exemption" because "while a governmental body enjoys the attorney-client privilege, the privilege is narrower in the context of the Act."

Beachcomber's argument splits hairs and misapprehends the nature of quasi-judicial decision-making. A governmental body engages in quasi-judicial functions when it acts as an adjudicator - i.e., when it applies the relevant law to the pertinent facts to reach a decision. It would be inappropriate and perhaps impossible to perform these duties without a discussion of what the applicable law is and the underlying legal principles. Such a discussion would be particularly important in a case like this, where a lay commission of the executive branch (the Commission) was considering a matter on remand from the judicial branch (the Kenai Superior Court) after the court interpreted ordinances (KPB 21.29.040 and .050) the Commission was required to apply in making a decision on the CLUP. A discussion of the distinct roles of the executive and the judiciary would help clarify that as an arm of the executive branch, the Commission was required to apply the Superior Court's interpretation of the Code, as the law of the case, in adjudicating the matter on remand. Indeed, that appears to be what happened. In explaining his vote to disapprove the CLUP, Commissioner Ruffner stated at the April 11, 2022 Commission meeting that he had "come to understand, the court is, you know, part of our three branches of government, and they get to weigh in on these things as well," and "I believe my role is to follow the judge's instructions."[23] Commissioner Morgan similarly stated, "[t]his has been a very, very difficult issue, but what was made very clear to me was the separation of powers and the executive and the judicial branch. And the judge has made a ruling on how the code should be interpreted. So it's our job to interpret it in that way." By helping the Commission understand the interpretation of the law it was required to apply, any discussion about the separation of powers fell squarely within the scope of the Commission's quasi-judicial functions. To the extent Beachcomber suggests that "general legal advice" about separation of powers should be treated differently from the other legal advice provided to the Commission during its deliberations, Beachcomber attempts to create an artificial distinction that simply does not exist.

[23] T. 247.

Moreover, Beachcomber's reliance on *Cool Homes* does not support its argument that discussion of the separation of powers in closed session violated the OMA. In *Cool Homes*, the Fairbanks Borough Board of Equalization convened to review a tax assessment of a party in litigation with the Borough. The Board went into executive session to obtain legal advice about board members' personal liability, which the taxpayer claimed violated the OMA. Finding that no OMA violation occurred, the Court held that attorney-client communications may be treated like an exception for the use of executive session, but only in limited circumstances that do not include the provision of "general legal advice."

Cool Homes is factually distinguishable from the case here, and its fact-specific holding does not control this case. Unlike the Commission in this case, the Board in *Cool Homes* was not performing quasi-judicial functions exempt under the Act. Nor was it seeking to convene in closed session to discuss any of the subjects expressly allowed in executive session. In that context, it was appropriate to construe the attorney-client privilege narrowly. But the same logic does not apply in this case, where the Commission was conducting exempt adjudicative duties, which necessarily encompassed discussion of the separation of powers, as explained previously. Given the significant distinctions between these cases, the holding in *Cool Homes* should not be extended to the circumstances here, and the restriction prohibiting the discussion of general legal advice in executive session is inapplicable.

c. Discussions regarding adjudicative session.

Beachcomber also contends the Commission violated the OMA because discussions about considering the CLUP in adjudicative session occurred outside of the public meetings.[24] In its opening statement, Beachcomber asserts:

> During multiple hearings it was evident from both actions by the Commission and the Commissioners' comments that there were violations of the Open Meetings Act. Specifically, a Commissioner advised prior to one of the meetings that the Commission intended to adjourn to executive session to further discuss the issue, demonstrating it had been discussed outside of the purview of the public.[25]

Beachcomber further states:

> . . . [G]iven the fact that a Commissioner was apprised that the matter would not be voted on in March 2022, but would adjourn to executive

[24] It is noteworthy that while Bilben objected to the Commission deliberating the CLUP in adjudicative session, Beachcomber expressed its non-objection to the use of adjudicative session.

[25] Beachcomber's Opening Statement, pp. 4-5.

> session ahead of the meeting, and when such vote came to the floor, was moved and seconded without discussion, it was evidence that discussion regarding the application had been held outside of the public purview.[26]

This argument is not persuasive. Beachcomber failed to identify either the Commissioner who allegedly "advised prior to one of meetings" that the Commission intended to deliberate in closed session, or the Commissioner who allegedly "was apprised" that this would occur. Nor does Beachcomber provide any other citations in the record to support its allegations. Such an unsupported appeal point is appropriately deemed waived.[27]

Even if the argument were not waived, however, and discussions about deliberating in adjudicative session did occur outside of the public purview, the OMA only applies to meetings of more than three members. Specifically, a "meeting" under OMA occurs when "more than three members or a majority of the members, whichever is less, are present" to consider a matter upon which the governmental body is empowered to make decisions. Beachcomber cites to nothing in the record showing that four or more members discussed going into adjudicative session outside of a public hearing. Beachcomber has not shown that any violations of OMA occurred.[28]

2. Constitutional Arguments (Appeal Points 4 and 6)

Article I, § 1 describes the rights inherent in the Alaska Constitution and states:

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Beachcomber claims the Commission committed two violations of this section by denying the CLUP: it violated Beachcomber's right to (1) equal protection under the law, and (2) enjoyment of the rewards of its own industry. These arguments lack merit, as set forth below.

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[26] *Id*. At 7.

[27] *State v. O'Neill Investigations, Inc*. 609 P.2d 520, 528 (Alaska 1980) ("When, in the argument portion of a brief, a major point has been given no more than cursory statement, we will not consider it further. Failure to argue a point constitutes an abandonment of it.") *Coppe v. Bleicher*, 318 P.3d 369, 378-79 (Alaska 2014) (upholding determination that issues were waived because the argument "lacked citation to authority or a legal theory to support it"); *Hagen v. Strobel*, 353 P.3d 799, 805 (Alaska 2015) (holding that argument "given only a cursory statement in the argument portion of a brief" was waived due to inadequate briefing.).

[28] Bilben contends that even if the Commission did violate the OMA, the administrative law judge lacks the authority to void the Commission's decision to deny the CLUP. Because no violations of OMA have been established, however, it is not necessary to address Mr. Bilben's argument here.

a. Equal Protection Claim[29]

The guarantee of equal protection under the Alaska Constitution requires "equal treatment of those similarly situated." [30] Where there is no unequal treatment, there is no violation of the right to equal protection.[31]

Here, Beachcomber contends the Commission treated it differently from similarly situated permit applicants. Beachcomber states:

> Chairman Ruffner admitted that the Commission violated the Equal Protection Clause, because he stated that the Commission had always interpreted the KPB Code in the same manner it did in previously granting Beachcomber its CLUP, and had always granted the CLUP applications accordingly. Further, the record confirms that Commissioner Ruffner was correct when he stated that the Commission had previously granted similar CLUPs. In fact, the denial of the CLUP at issue here was "inconsistent with the many decisions issued by the [Commission] where similar complaints had been raised."

Beachcomber's equal protection argument is unavailing. The entity asserting an equal protection claim bears the burden of identifying specific similarly-situated groups that are being treated disparately. Beachcomber suggests it is similarly situated to all applicants who had received permits under the Commission's interpretation of the Code when it approved the Beachcomber CLUP in 2019 – when the Commission believed it had no authority to deny a CLUP containing the conditions in KPB 21.29.050. But the Kenai Superior Court expressly rejected this interpretation of the Code. The Court described the Commission as "operat[ing] under the incorrect assumption that KPB 21.29.040 was 'necessarily satisfied' so long as the CLUP contained conditions in KPB 21.29.050" when it approved the CLUP in 2019. A valid equal protection claim cannot be based on an alleged right to the application of an incorrect Code interpretation.

Moreover, as support for its assertion that the Commission has "previously granted similar CLUPs," Beachcomber cites to a portion of the record that mentions another material site

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[29] While it is sometimes said that administrative bodies lack jurisdiction to consider constitutional issues, that limitation only applies to facial challenges to statutes and regulations. Beachcomber's constitutional argument is an as-applied challenge that must be heard, in the first instance, at this level. *See In re Holiday Alaska, Inc.,* OAH No. 08-0745-TOB (Dep't of Commerce, Community & Econ. Dev 2009), at 8-13 (published at https://aws.state.ak.us/OAH/Decision/Display?rec=6204).

[30] *Planned Parenthood of the Great Northwest v. State of Alaska*, 375 P.3d 1122, 1135 (Alaska 2016).

[31] *Matanuska-Susitna Borough School District v. State of Alaska,* 931 P.2d 391,397 (Alaska 1997).

in Anchor Point, the Blauvelt site, that was approved by the Commission.[32] Although the record indicates that the acreage of Blauvelt and Beachcomber sites is similar, it makes no mention of the topography, geography, or other features of the Blauvelt site that may have a bearing on the material site standards in KPB 21.29.040. Two sites are not similarly situated merely because they contain the same acreage. Beachcomber has not shown that the Blauvelt and Beachcomber sites are similarly situated.

Further, Beachcomber has not identified any instances where a CLUP was approved for a gravel mine in a residential area at a higher elevation than the mine. Indeed, the record supports the conclusion that there are no other similarly situated CLUP applicants because the Beachcomber site is unique. Commissioner Martin stated that "[i]t's the unique topography – what gets us into this corner right now. It's hard to foresee all the different ramifications of a crater." Commissioner Ernst similarly described the site as "a unique situation, we have a pit that's in the lowlands surrounded by affected properties." He questioned whether there "is any possible buffer that could be reasonably used to protect the, you know, the noise levels and visual impact of this pit since there are so many parcels around it?"[33] Commissioner Whitney likewise described the site as "one of the more unique gravel pit permits we've looked at," as most CLUPs are "usually more in a flat land area where you can put up a six-foot berm or a 10-foot berm or whatever and lose your visual impact;" but the site here "sits down low and there is adjoining properties, adjacent properties" that "are all close by, they are looking down into that area."[34]

Because Beachcomber has not shown that it was treated differently from other similarly situated CLUP applicants, its equal protection claim fails.

b. Rewards of Industry Claim

Beachcomber contends that the constitutional right to enjoyment of the rewards of industry includes a "guarantee that Alaskans can use their property to their own benefit, albeit with some regulation." Beachcomber argues that "by denying the CLUP application for reasons

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[32] R476. The reference to the Blauvelt site appears to is in what appears to be a brief from the Borough Legal Department in the administrative appeal of the Commission's original denial of the CLUP in 2018. The brief was written in support of Beachcomber's appeal, as the Borough was of the view at that time that the Commission lacked the authority to disapprove a CLUP, so long as the CLUP contained the conditions in KPB 21.29.050. This interpretation of the Code was rejected by the Superior Court in the Gist Decision, as explained previously.

[33] T154.

[34] T154.

that were unsupported by the evidence and the record, in contravention to the Commission's historical practices, the Commission prevented a KPB resident and citizen of Alaska, from using his own property to earn money, or stated differently, to enjoy the rewards of his industry." This argument is subsumed within Beachcomber's equal protection and substantial evidence claims analyzed under sections II.D.2 and II.D.3 and fails for the reasons stated in those sections.

3. Arguments that the Findings Were Arbitrary, Capricious and Not Supported by Substantial Evidence (Appeal Points 5 and 8)

Beachcomber contends that various factual findings of the Commission are arbitrary and capricious because they are not supported by substantial evidence. Beachcomber's criticisms concern primarily findings 16 and 17 in the Resolution 2022-17, which state:

> 16. This modification does not meet material site standard 21.29.040(A)(4): "Minimizes noise disturbance to other properties" as evidenced by:
>
> a. The Permit Conditions impose buffers around each side of the site.
>
> b. The majority of the residential properties near and thus impacted by the noise of the material extraction operations are located on the southern and eastern borders of the site. The developed property on the northern boundary of the site located within 300 feet of the proposed processing area (Parcel 169-022-04) is owned by the applicant's relative.
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> c. Topographic maps in the record of the site and surrounding properties make evident the unique amphitheater-like natural topography of the area due to the elevated ground level of the properties located to the south and east of the site.
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> d. Given the unique amphitheater-like quality of the area, sound from the material extraction operation will carry to the properties to the south and east of the site.
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> e. There are Permit Conditions prohibiting material extraction operations from 10:00 pm to 6:00 am and on Memorial Day weekend, Labor Day weekend, and the July Fourth holiday. However, this is only a slight minimization of noise to surrounding properties considering operations will be

permitted to take place from 6:00 am to 10:00 pm 358 days out of the year.

f. There is also a Permit Condition requiring the applicant to operate "his equipment onsite" with multi-frequency (white noise) back-up alarms rather than traditional (beep beep) back-up alarms. However, there was public testimony that while such a condition may minimize some noise from applicant's machinery, there was no assurance that equipment owned or leased by operators other than applicant performing material extraction on the site could or would adhere to the condition. As such, there may be little, if any, minimization of the noise disturbance to other properties by this Permit Condition.

g. Therefore, although the Permit Conditions impose every mandatory condition under KPB 21.29.050 and include additional voluntary conditions from the applicant, the Commission, in its discretion, finds that the conditions cannot adequately minimize the noise disturbance to other properties from the mineral extraction operations on the site.

17. This modification does not meet material site standard 21.29.040(A)(5): "Minimizes visual impacts" as evidenced by:

a. The Permit Conditions impose buffers around each side of the site.

b. The majority of the residential properties near and thus impacted by the noise of the material extraction operations are located on the southern and eastern borders of the site. The developed property on the northern boundary of the site located within 300 feet of the proposed processing area (Parcel 169-022-04) is owned by the applicant's relative.

c. The Permit Condition buffers for the southern and eastern borders of the site are a 50-foot vegetated buffer and a 12-foot high berm (except along the northern 200 feet of the propose [sic] excavation on the eastern boundary).

d. Topographic maps in the record of the site and surrounding properties make evident the unique amphitheater-like natural topography of the area due to the elevated ground

level of the properties located to the south and east of the site.

e. Photographs and GIS LIDAR profile mapping in the record provided by residents located on and near the eastern border of the site demonstrates that due to the higher elevation of the properties compared to the site, a 12-foot high berm set back 50-feet would provide very little, if any, minimization of the visual impact of the material extraction operation occurring at least 300 feet from the site boundary.

f. Similarly, photographs and GIS LIDAR profile mapping in the record provided by residents located on and near the southern border of the site demonstrates that due to the higher elevation of the properties compared to the site, a 12-foot high berm set back 50-feet would provide very little, if any, minimization of the visual impact of the material extraction operation occurring at least 300 feet from the site boundary.

g. Therefore, although the Permit Conditions impose every mandatory condition under KPB 21.29.050 and include additional voluntary conditions from the applicant, the Commission, in its discretion, finds that the conditions cannot adequately minimize the visual impacts from the mineral extraction operations on the site.[35]

Beachcomber's specific arguments challenging findings based on an absence of substantial evidence are discussed below.

a. LIDAR profile mapping

In findings 17(e) and 17(f), Beachcomber relied in part on Geographic Information System (GIS) Light Detection and Ranging (LIDAR) profile maps from residents in the vicinity of the site in determining that the buffers and berms in the CLUP were insufficient to minimize visual impacts. Beachcomber claims the Commission erroneously relied on the LIDAR evidence because LIDAR mapping is unreliable, as it "in no manner addresses the topography of the land;" it "looks only to the ground, it does not consider the trees and other structures which exist above the ground."[36]

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35 R. 786.

36 Beachcomber Opening Statement, pp. 5 and 11.

But Beachcomber supplies no record citation for this assertion or any argument as to why it is correct. Unsubstantiated assertions are insufficient to show the LIDAR maps in the record are unreliable. These maps – provided both by surrounding property owners and Beachcomber – show line-of-sight profiles from six surrounding residences to the proposed mine operations, by modeling elevations of the area topography.[37] The property owners used these profiles to show the height of the berms that would be needed to shield the gravel site from their view. Based on these profiles, the residents testified that a berm would have to be 43-feet tall on Pete Kinneen's property[38], 52-feet tall on Steve Thompson's property[39], 24-feet tall on Hans Bilben's property[40], 40-feet tall on Gary Gordon's and Richard Cline's properties[41], and 29-feet tall on Rick Oliver's property.[42] The Commission weighed this and other evidence in the record in concluding that the twelve-foot berms proposed in the CLUP would be insufficient to minimize the visual impacts of the site. In an appellate review, it is not the function of the judge to evaluate the strength of the evidence, but to "merely note of its presence."[43] Substantial evidence exists to support the Commission's reliance on the LIDAR maps for its findings of fact.

b. Photos

Findings 17(e) and 17(f) also reflect that Beachcomber relied in part on photographs in the record in reaching its conclusions regarding the ineffectiveness of the proposed buffers and berms to minimize visual impacts. Beachcomber suggests that these findings are not supported by substantial evidence because "the Commission relied on undesignated photographs, when there were a myriad of photographs and videos in evidence that demonstrate the utter lack of visual impact to surrounding neighbors."[44]

Again, Beachcomber does not cite to any photos or videos in the record to support its assertion.[45] Moreover, any such photos or videos that may exist would have been considered by the Commission along with the other photos in the record. The photos in the record include a

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37 R. 422, R. 598-602

38 R. 600, 686, and T. 127.

39 R. 602 and T. 136.

40 R. 601. The LIDAR profile map from Geovera, LLC, commissioned by Beachcomber to prepare its own GIS LIDAR profile "show line of sight from a point 20 feet above existing ground" on Hans Bilben's property.

41 R.420-422 and 598.

42 R. 662-664.

43 *Handley v. State, Dept. of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (citing *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 179, n.26 (Alaska 1986)).

44 Beachcomber's Opening Statement, pp. 11-12.

45 Nor is it clear what Beachcomber means by "undesignated photographs."

photo of property owner Rick Oliver standing holding a 10-foot-high board from roughly fifty feet inside the lot line of the gravel site. Stating that the photo was taken from his bedroom window, he explained:

> Grade level for my property is approximately 20 feet above grade level for the mine, and my house is classed as a 1½ story with a basement – this would put the view from my bedroom window at approximately 34 feet above the top of the 6 foot berm! The view from my living room would be approximately 24 feet above the top of the berm.[46]

Mr. Oliver also noted that his lot is at a "substantially lower elevation" than many properties to the south and east of the site, such that the other properties would be more affected by the visual and noise impacts than his. The record also includes photos showing that Hans Bilben's property overlooks the proposed site, and that Mark and Lee Yale's deck is fifteen feet from the site.[47] The Commission has already weighed the photographic evidence in the record, and it will not be reweighed here. The Commission reasonably relied on the photos in the record for its findings.

c. Amphitheater-like topography

Beachcomber contends there is insufficient evidence to support the Commission's findings regarding the "amphitheater-like" topography of the area, as set forth in findings 16(c) and 17(d), because the findings are based on "inference and conjecture," and there is "significant dispute about such characterization."[48] Beachcomber does not cite to any record evidence disputing this description of the area topography. But even assuming such evidence exists, the Commission already weighed that evidence against the other evidence in the record suggesting the topography of the area amplifies sound. That evidence includes the testimony of Pete Kinneen, who stated:

> And the uniqueness of this is that if you were in a helicopter flying up the coastline, you would see tall bluffs for a mile after mile almost all the way in from Homer and far north.
>
> The exception is there's a little amphitheater or bathtub that inundates right in here, and that was caused by the outflow of the Anchor River. And it's a small flat area surrounded by a bathtub, and the noise comes in primarily from the water.
>
> The atmospheric conditions of the body of water right there play havoc with the sound. I mean, sometimes you can hear any little things and other

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46 R451-453.
47 R52-57.
48 Beachcomber's Opening Statement, p. 2.

> times you don't hear. But the noise cannot be minimized, there's virtually nothing you can do. You can have all the buffers you want.[49]

Similarly, Mike and Linda Patrick wrote:

> This area of the Peninsula's coast provides natural land contours, cool moist air at sea level, and wind. These conditions serve to increase the speed and amplitude of sound. The commission is aware of the phrase amphitheater effect in verbal and written statements submitted to you. Noise that escapes the pit will reflect off of the hillsides above the 44ft pit level (Note: land around the pit site rises p to over the 100ft level.) These hillsides provide large sound amplifying structures. The unwanted sound, AKA Noise, will reflect off these hills, off houses located there and even tree trunks will contribute. When the noise reflects, it will collide with other sound waves causing constructive interference. This type of interference will serve to amplify other sound waves, which increase the noise level. These factors explain why noise will not be minimized.[50]

David Gregory claimed that a "[a] berm, evenly a fairly large one, would only deflect the noise UP. . . UP AND OVER, and up the AMPITHEATER type topography to the South and East of the proposed gravel operation, where my home and so many others are."[51] Christina Elmaleh testified that she could hear activities at the gravel pit "throughout the day," because "[i]t's a bit of, like, an amphitheater that kind of magnifies up to our house."[52] Hans Bilben claimed that "[n]o amount of berming or vegetated buffer will meet the standards pertaining to minimizing noise or visual impact on other properties. . . because of the steep rise in elevation to the north, the east, and the south of the proposed mine," which he claimed would impact 22 properties.[53] And Gary and Eileen Sheridan wrote:

> The topography surrounding the gravel pit does act like an "amphitheater" in that the gravel pit area is mostly a level area surrounded by upward phenomena, with noise rising to all the homeowner properties surrounding it. Last fall, when the Beachcomber LLC was working their gravel pit we could hear their loader dumping gravel into the gravel trucks, and we are well above the pit with trees and foliage between our home and the pit. Additional buffers at the pit site will not reduce or eliminate the noise disturbance their equipment produces.[54]

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49 T. 10.
50 R. 389.
51 R. 438.
52 R. 124.
53 T. 9.
54 T. 454.

The Commission had all of this information before it when it concluded that the area had "unique amphitheater-like topography. . . due to the elevated ground level of the properties located to the south and east of the site," and that sound from the site will carry to those properties.[55] Substantial evidence in the record supports these findings.

d. Same evidence in the record

Beachcomber contends the Commission's factual findings are unsupported by substantial evidence because the same evidence was in the record when the Commission approved the CLUP in 2019. Beachcomber alleges that the Commission acted arbitrarily in denying the CLUP in 2022 and finding that the buffers and berms "would no longer suffice to minimize any noise or visual impact."

Beachcomber is wrong and ignores the history of this case. Resolution 2018-23 approving the CLUP in 2019 did not contain any finding that the proposed buffers and berms would minimize the noise and visual impacts of the site. Indeed, numerous commissioners questioned whether the buffers and berms were sufficient to satisfy the noise and visual standards in KPB 21.29.040: Commission Whitney commented:

> I just don't think the berms that are proposed and anything that's going on her is adequate to control the visual impact that everyone is going to – the adjoining property owners are going to suffer.
>
> As far as noise, you know, we've heard lawn mowers make more noise than the equipment does and hand drills. And everything else. The difference with that is they don't run for 10 or 12 hours a day. . . So the heavy equipment, I think they are going to be able to hear it because most of the wind comes – direction is coming off the water. That has an effect on noise, it makes it travel. . . So I think those people that are living above that are going to continue hearing noise no matter what.[56]

Commissioner Eklund also expressed concerns that the surrounding property owners, stating commented:

> So there is these references to existing uses of adjacent properties and the surrounding areas and the surrounding property owners. But we let them all come and talk, but we have no meat to help them in this ordinance, because we are – we can put buffers, we can put vegetation, and we can

[55] R. 786, Findings of Fact 16.c, 16.d, and 17.d,
[56] T. 156.

> put fences, but who are we going to ask to put a 53-high earthen berm. I mean, we all know that's ridiculous.[57]

And Commissioner Bokendo-Carluccio questioned, "But is a 12-foot berm enough to minimize visual and noise effects?"[58] Despite these reservations, the Commissioners approved the CLUP in 2019 anyway, given the mandate from Hearing Officer Wells that they lacked the discretion to judge the effectiveness of the conditions in the permit and had only the authority to impose the conditions. In Paragraph 15 of Resolution 2018-23, the Commission found that "[c]ompliance with the mandatory conditions in KPB 21.29.050. . . necessarily means that the application meets the standards contained in KPR 21.29.040" - an interpretation the Kenai Superior Court subsequently and squarely rejected in its decision evaluating the Commission's approval of the CLUP in 2019.

Beachcomber is incorrect that the Commission was required to approve the CLUP in 2022 because it approved the CLUP in 2019. The Commission did not act arbitrarily in 2022 in finding that the CLUP would not meet the noise and visual standards in KPB 21.29.040 and denying the CLUP.

e. The reasons for denying the CLUP

Beachcomber also alleged that the Commission's decision is unsupported by substantial evidence because the Commission failed to articulate the reasons for its denial of the CLUP. This argument is unpersuasive. The Whereas clauses of Resolution 2122-17 make clear that the Commission reviewed the CLUP application in light of the Kenai Superior Court's decision. That decision directed the Commission to evaluate the conditions in the CLUP to determine if they were sufficient to minimize visual and noise impacts as required by KPB 2129.040. In findings 16(g) and 17(g), the Commission concluded that "although the Permit Conditions impose every mandatory condition under KPB 21.29.050 and include additional voluntary conditions from the applicant" the conditions cannot minimize the noise and visual impacts from the site. In the preceding paragraphs of the resolution, the Commissioners detailed the factual finding underlying their conclusions and articulated factors they considered in reaching their conclusions, including the "unique amphitheater-like natural topography of the area" due to the higher elevations of the properties to the south and east of the site; the mandatory and voluntary

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[57] T. 155.
[58] T. 155.

permit conditions; and the photographs and LIDAR profile maps suggesting the proposed buffers and berms would not be effective for properties at higher elevations. The record is over a thousand pages and contains hundreds of pages of transcripts from numerous public hearings. Before voting on the resolution on April 11, 2022, the Commissioners discussed their familiarity with the record and disallowed Commissioners who were not up to speed. The Commissioners adequately explained their reasons for denying the CLUP.

f. Commissioner Venuti's statements

Beachcomber claims the Commission's findings are arbitrary and capricious because comments Commissioner Venuti made at the April 11, 2022 public hearing suggest his decision to vote against the CLUP was not based on information in the record.[59] After describing the important recreational value of the area, Commissioner Venuti stated:

> I think I know what kind of local reaction would occur if a gravel pit was proposed to be adjacent to any of those locations. They are all special places and many ways have become a part of our collective culture. I know the value of gravel. It has been part of every project I've been involved with since arriving in Alaska. I know it's an important industry, and I believe in supporting property rights. But I think that having a gravel pit in this location is not in the best interest of the Anchor Point community.

Commissioner Venuti's comments do not mean the sole basis for his decision was the potential negative public reaction to a gravel mine in that location. But even if it were, and his vote was discounted on that basis, the CLUP would still have been disapproved. This is because the Commission's decision to deny the CLUP passed by a vote of 5-2. The Commission's findings are not rendered arbitrary and capricious merely based on the vote of one Commissioner.

4. Argument that the Commission's Decision is Based on an Errant Interpretation of KPB 21.29[60]

Beachcomber asserts that the Commission's incorrectly interpreted KPB 21.29 because that section "does not afford the Commission discretion to judge the effectiveness of the conditions identified in the code. . . instead, the Assembly. . . only granted the Commission

[59] Beachcomber claims Commissioner Venuti considered potential evidence rather than actual evidence in the record. Beachcomber's Opening Statement, p. 12.

[60] Although Appeal Point 7 in Beachcomber's Notice of Appeal asserts that the Commission's decision is based on an errant interpretation of "KPB 21.25", it is clear from Beachcomber's briefs that it was referring to the Commission's interpretation of KPB 21.29.

authority to impose those conditions. . . . [61] As authority for its assertion, Beachcomber cites to the interpretation of KPB 21.29 advanced by Hearing Officer Wells, which was specifically rejected by the Kenai Superior Court. As Judge Gist held, the Commission was required to determine whether the conditions in the CLUP were sufficient to satisfy the standards the standards in KPB 21.20.040(3) and (4) requiring noise and visual impacts to be minimized, which is what the Commission did.

Beachcomber further contends that the Commission erred by interpreting "minimize" to mean "eliminate." Beachcombers claims the CLUP "sufficiently minimized" the impacts on neighboring properties by including "all reasonably feasible measures."

The term "minimize" is not defined in the KPB Code, but the dictionary provides useful guidance regarding the meaning of the term. Merriam-Webster defines "minimize" as "to reduce or keep to a minimum."[62] The Cambridge Dictionary defines "minimize" "to reduce something to the least possible level or amount."[63] The Macmillan Dictionary defines "minimize" as "to reduce something harmful or unpleasant to the smallest amount or degree." [64] Each of these definitions means to do something more than to merely mitigate, cause a minor reduction, or reduce to the extent practicable.

The word "minimize" must be interpreted here in a manner consistent with the Kenai Superior Court's holding that there may be situations in which no conditions that could be reasonably imposed under KPB 21.29.050 will sufficiently reduce noise and visual impacts to the standards in KPB 21.29.040. Thus, "minimize" does not just mean that a party has taken steps to reduce impacts. The applicant must show that the mitigating measures will actually keep the impacts to a minimum. That is the approach the Commission applied here.

Interpreting "minimize" as to reduce something appreciably -i.e., by more than a minor amount - is consistent with Kenai Superior Court's acknowledgement that there may be situations in which no conditions that could be reasonably imposed under KPB 21.29.050 will sufficiently reduce noise and visual impacts to the standards in KPB 21.29.040. That appears to be the case here. As discussed previously, there is myriad information in the record supporting the Commission's factual findings regarding the unique topography of the proposed gravel site

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61 Beachcomber's Opening Statement, p. 13.
62 https://www.merriam-webster.com/dictionary/minimize. (Emphasis supplied).
63 https://dictionary.cambridge.org/us/dictionary/english/minimize
64 https://www.macmillandictionary.com/us/dictionary/american/minimize

and its unique location next to a residential neighborhood at a higher elevation than the site. There is substantial evidence, including the LIDAR profile maps and numerous public comments of neighboring landowners, that the surrounding residences are at too high of an elevation relative to the site for any combination of berms or buffers to make more than a minor reduction in the noise and visual impacts from the operations.

Moreover, that the noise and visual impacts from the operations cannot be appreciably reduced is reflected in the comments and concerns of multiple Commissioners who have evaluated the CLUP over the years. As Commissioner Ecklund stated in 2018 when the CLUP was initially denied, "I don't think the berms or the vegetation buffers will to justice to minimize the noise disturbance to other properties. . . and I don't think that the visual effects will be reduced sufficiently with buffers, berms."[65] Echoing Commissioner Ecklund's concerns, Commissioner Morgan stated in 2018, "I don't see how the 50-foot buffer or berms are going to minimize visual impact or sound impact because of the unique topography."[66] The comments of Commissioners in 2022 reflect similar concerns. As Commissioner Ruffner stated:

> a large percentage of the people that live on the south and east of this proposal are not going to have any mitigation for visual. It's not going to minimize the visual impacts in any way, shape, or form, because they are going to be looking straight down into it, and they have a straight line of shot. And evidence that the neighbors presented was compelling to me to believe that to be the case.[67]

Given the wealth of information in the record supporting the Commission's factual findings regarding the unique location and topography of the proposed gravel site, at the edge of a residential neighborhood with multiple surrounding residences overlooking it, the Commission reasonably concluded that the noise and visual impacts of the proposed operations could not be minimized under KPB 21.29.040(3) and (4).

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65 T. 26-27.
66 T. 28.
67 T. 247.

IV. Conclusion

None of the arguments raised in Beachcomber's appeal provide grounds to overturn the Commission's denial of the CLUP. The April 11, 2022 decision of the Commission approving the CLUP by adopting Resolution 2022-17 is AFFIRMED.

DATED this 6th day of December, 2022.

*Signed*_____
Lisa M. Toussaint
Administrative Law Judge

Right of Reconsideration

Pursuant to KPB 21.20.350, any party that participated in the hearing may request reconsideration of this decision by filing a motion for reconsideration with the Borough Clerk within fourteen (14) days after the date of distribution of this decision. A motion for reconsideration is governed by and shall comply with the requirements of KPB 21.20.350(A)-(D).

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 AS 29.40.060, KPB 21.20.350-21.20.360, and Alaska R. App. P. 602.

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