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 approve the modification of a conditional land use permit that was requested for KPB Parcel 06508118, legally described as he East ½, the East ½ of the West ½, and the Northwest ¼ of the Northwest ¼, Of Section 16, Township 5 North, Range 8 West, Seward Meridian,	)	
RICHARD SCHIEFELBEIN, Appellant.	)	
v.	)	
COOK INLET REGION, INC., Applicant.	)	OAH No. 22-0282-MUN KPB No. 2022-03-PCA

DECISION

I. Introduction

Cook Inlet Region, Inc. (CIRI) holds a conditional land use permit (CLUP) from the Kenai Peninsula Borough (KPB) Planning Commission (Commission) to extract gravel from a portion of property it owns near Soldotna, Alaska. CIRI now seeks to expand its extraction operations to an additional 61 acres on the property and applied for a modified CLUP (MCLUP) to do so. After two contentious public meetings to take testimony from members of the public, the Commission voted unanimously to approve the MCLUP on February 22, 2022 through the adoption of KPB Resolution 2022-08.

Richard Schiefelbein owns and lives on residential property in the vicinity of the subject parcel near the Kenai River. He testified against the MCLUP before the Commission and now appeals the Commission's decision.

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

II. Facts and Proceedings

The subject property consists of 492.2 acres directly east of the Bings Landing Subdivision and northeast of the Kenai River. At its closest point, the property is less than one-tenth of a mile from the river.[1] The Sterling Highway runs through the northern portion of the property.

A. The CLUP

On February 24, 2017, CIRI applied for a CLUP to extract gravel from two separate portions of the property, Area I and Area II, together comprised of 70.7 acres, and to process gravel in a 4.8 acre processing area.[2] The purpose of the proposal was to supply gravel for a large Alaska Department of Transportation project to improve the Sterling Highway.[3]

McLane Consulting, Inc. (McLane) assisted CIRI in preparing its application. The application and the accompanying site map identified the depth of the proposed excavation as 20 feet and the depth to groundwater as ">20ft."[4] The groundwater estimate was based on "32 test holes" in which CIRI "[d]id not encounter groundwater."[5] Thus, the proposal did not seek a permit modification to enter into the water table now or in the future.[6] The site map further indicated that there were no wells within 100 feet or 300 feet of the excavation area.[7]

Following a public hearing on March 27, 2017, the Planning Commission voted to approve the CLUP through Resolution 2017-08 on a vote of 5 to 4.[8] The decision was appealed to the KPB Board of Adjustment, and the Board affirmed.[9]

B. The MCLUP

1. Resolution 2021-26.

The excavation areas in the CLUP proved to have insufficient structurally-competent gravel for the highway improvement project.[10] Because of this deficiency, on

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1 R. 88.
2 R. 279-85.
3 R. 285.
4 R.280 and R. 282.
5 R. 280.
6 R. 280.
7 R. 282.
8 R. 367.
9 R. 225, n. 1.
10 R. 141.

June 21, 2021, CIRI applied for an MCLUP to extract gravel from a different part of the property: a 61-acre area bordered by Sterling Highway on the north, Kenai Keys Road on the east, Denigi Way on the south, and Tikhatnu on the west.[11] Other than the change in the excavation location and an additional buffer offered by CIRI, the activities proposed in the MCLUP mirrored those in the CLUP, including the proposed excavation depth of 20 feet.[12]

A public hearing on the June 2021 application was held on July 12, 2021. The Commission heard a staff report from the KPB Planning Department, and it heard testimony from some citizens that they had not had ample time to review the new proposal.[13] At the conclusion of the meeting, the Commission voted to postpone action on the application to allow for further testimony, give residents time to test their own wells, and allow for more dialog between the Planning Department and CIRI regarding a possible relinquishment of Area I, the site closest to the river and residential neighborhoods.[14] A follow-up hearing was scheduled for August 9, 2021.

Mr. Schiefelbein and Niki Pereira (a landowner who has been an active supporter of Mr. Schiefelbein's appeal) participated in the August 9, 2021 hearing and provided thoughtful testimony. Public interest in the application was high, with multiple commenters expressing opposition. At the end of the meeting, the Commission approved the MCLUP by a vote of 6 to 2 through the adoption of Resolution 2021-26, containing 22 findings of fact and 17 permit conditions.[15] In one of its procedural findings, the Commission stated that "[c]ompliance 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."[16]

The Commission's decision was appealed to the Office of Administrative Hearings (OAH) but, by stipulation of the parties, OAH remanded the matter to the Commission to review its decision and findings in light of the Superior Court's

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11 R. 45-50. Notice of the application was mailed to the 255 landowners with the ½ mile notification radius of the property, in accordance with KPB 21.25.060. R.89; R 265-269.

12 R. 45. The site map accompanying the MCLUP application appears to be the same site map enclosed with the CLUP application, only with the new excavation area highlighted in yellow. R. 48.

13 R. 157-58; R. 161-62.

14 R. 128.

15 R. 52-55; R. 167.

16 R. 52, Procedural Finding #1(F).

September 2, 2021 decision in *Hans Bilben, et al. v. Kenai Peninsula Borough Planning Comm'n and Beachcomber, LLC, et al*., Appeal Case 3KN-20-00034CI.

2. Resolution 2022-02

At its regularly scheduled meeting on January 10, 2022, the Commission met to schedule a remand hearing, set the procedure for the hearing, and decide whether to open the record for new evidence.[17] The Commission decided not to reopen the record or public comment, and it set the remand hearing for January 25, 2022.[18] On January 25, 2022, the Commission voted to go into adjudicative session and informed those in attendance that the Commission would issue its decision by resolution after a public vote of the body at its next regular meeting on February 14, 2022.[19]

On February 14, 2022, the Commission, through Resolution 2022-08, voted to approve the MCLUP, with 22 findings of fact, six conclusions of law, and 19 permit conditions.[20] The conditions included the maintenance of a 50-foot vegetation buffer around the site boundaries, a six-foot earthen berm around the perimeter of the excavation area, a prohibition on processing material within 300 feet of the property boundaries, a prohibition on extraction within 100 horizontal feet of any pre-existing water source, the maintenance of a two-foot vertical separation from the seasonal high-water table, and a prohibition on extraction within 100 linear feet of a water body or wetland.[21] In its conclusions of law, the Commission determined that the permit conditions were sufficient to meet each of the material site standards in KPB 21.29.040.[22]

Mr. Schiefelbein's appeal followed.[23] His appeal was supported by Ms. Pereira, who filed an entry of appearance. 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. The appeal was consolidated with the related appeal of Eric Rosenberg. On July 14, 2022, however, Mr. Rosenberg's case was dismissed, and the consolidation was dissolved.

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17 R. 1-2; R. 23; T. 19-22.
18 R 184-185; T. 19-20.
19 R. 185.
20 R. 1-8.
21 R. 6-7.
22 R. 5-6.
23 Eric Rosenberg also appealed the Commission's decision to adopt the MCLUP. *See Eric Rosenberg v. CIRI*, OAH No. 22-0281-MUN. Mr. Rosenberg's appeal was dismissed on July 14, 2022.

A hearing by Zoom videoconference was held on July 27, 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. Participants in the oral argument hearing were KPB staff, Mr. Schiefelbein, Ms. Pereira, CIRI, and their respective representatives.[24] The arguments raised in the hearing and written filings by the parties are discussed below. Before turning to the merits of the arguments raised by the parties, 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 an MCLUP.[25] 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.[26] The appeal is to a hearing officer appointed by KPB.[27]

Appeals of an MCLUP are heard solely on the established record.[28] 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.[29] After briefing and oral argument, a decision is issued.[30]

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24 Mr. Schiefelbein and Ms. Pereira requested that Mr. Rosenberg speak on their behalf at the oral argument, and their request was granted.

25 KPB 21.20.250.

26 KPB 21.20.210(A)(5); KPB 21.25.060.

27 KPB 21.20.250(C).

28 KPB 21.20.270(C). Applications for MCLUPs are required if a permittee seeks to revise its operations in a manner that would not be consistent with the original application. KPB 21.29.090. Applications for MCLUPs are processed in the same manner as CLUP applications and are 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).

29 KPB 21.20.330.

30 KPB 21.20.280, 21.20.310, 21.20.340.

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.[31]

KPB 21.29.050 contains a suite of fifteen mandatory conditions aimed at meeting the standards in KPB 21.29.040, including specific buffer zones, water source separation requirements, requirements for excavating into the water table, and separation from waterbodies. To satisfy the .040 standards "only the conditions set forth in KPB 21.29.050 may be imposed."[32] As explained in *Bilben*, the Commission is required to determine whether the conditions in .050 are sufficient to meet the standards in .040.[33] The Superior 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]."[34]

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

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31 KPB 21.29.040(A).
32 KPB 21.29.040(A).
33 R. 222; *Bilben*, 3KN-20-00034 Cl at 17.
34 *Id*.

expertise in interpreting Titles 20 and 21 of the Code.[35] 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."[36] "Substantial evidence" means "relevant evidence a reasonable mind might accept as adequate to support a conclusion."[37] 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."[38]

D. Arguments on Appeal

The arguments presented in Mr. Schiefelbein's appeal, as clarified through briefing and oral argument, are summarized below.[39] These arguments principally concern the potential effects of the proposed gravel site on the aquifer and residential wells. Ms. Pereira did not identify any additional designations of error by the Commission on her entry of appearance form. The parties presented their arguments to the hearing officer in written briefs called "opening statements."[40] Points presented in Mr. Schiefelbein's and Ms. Pereira's opening statements that raised new issues not covered in the notice of appeal are outside the bounds of this appeal and are not addressed here.[41] These include issues regarding the potential noise and visual impacts of the MCLUP.

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35 KPB 21.20.320(1).

36 KPB 21.20.320(2).

37 KPB 21.20.201(7).

38 *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

39 Mr. Schiefelbein filled out an appeal form supplied by the KPB and presented his points on appeal in three attachments to the form.

40 Mr. Schiefelbein's opening statement consists of the opening statement of Mr. Rosenberg in *Eric Rosenberg v. CIRI*, OAH No. 22-0281-MUN, which Mr. Schiefelbein incorporated by reference. Ms. Pereira's opening statement consists of a two-page written statement from her in addition to Mr. Rosenberg's opening statement, which she also incorporated by reference.

41 A party to an administrative agency decision waives any arguments not raised on initial agency appeal, so it is "inappropriate" for a court to review them. *West v. Alaska Mental Health Tr. Auth*., 467 P.3d 1064, 1071-72 & n.36 (Alaska 2020) (*quoting* Walker v. State, Dep't of Corr., 421 P.3d 74, 78 (Alaska 2018). *Pro se* appellants are not exempt from this rule but are held to a "less demanding form of it." *Thoeni v. Consumer Elec. Servs*., 151 P.3d 1249, 1257 (Alaska 2007). Alaska courts may consider an issue a *pro se* appellant did not explicitly raise in the lower court proceeding only if "the issue is (1) not

1. Appellant's argument that the KPB Code and the Commission's procedures are insufficient to adequately protect water rights and the aquifer.

Mr. Schiefelbein argues that the KPB Code and procedures of the Commission are insufficient for him to identify all errors in the Commission's findings of fact and conclusions of law because the Code and procedures do not adequately protect water rights and the aquifer. This argument is beyond the scope of this appeal. The jurisdiction of the hearing officer in this case is limited to conducting appellate review of Mr. Schiefelbein's arguments under the KPB Code as written. The hearing officer lacks the authority to set aside the Code or pass judgment on the policy choices the Code reflects. To the extent Mr. Schiefelbein seeks a legislative remedy for perceived inadequacies in the Code, his concerns would be more appropriately directed to the KPB Assembly, the legislative arm of the Borough with the authority to adopt and revise the Code.

2. Appellant's argument that the Commission erred by not requiring CIRI to establish the seasonal high-water table and how it will maintain the required two feet of separation.

Mr. Schiefelbein contends the Commission should have required CIRI to conduct studies or dig its test pits to establish the seasonal high-water table before beginning excavation so the water table will not be encountered. He also asserts that CIRI should have been required to provide information about the methods it will use to maintain the necessary separation.

The condition set forth in KPB 21.20.050(A)(4)(c), which is mirrored in Permit Condition #7 of the MCLUP, requires a permittee to maintain a two-foot vertical separation between excavation activities and the seasonal high-water table. Irrespective of the depth of the seasonal high-water table, the permittee must not come within two feet of it.[42] In the event the seasonal high-water table is breached, CIRI would be in

dependent on any new or controverted facts; (2) closely related to the appellant's trial court arguments; and (3) could have been gleaned from the pleadings." *Id*. (*quoting McConnell v. State, Dep't of Health & Soc. Servs., Div. of Med. Assistance*, 991 P.2d 178, 183 (Alaska 1999). The arguments concerning potential noise and visual impacts of the MCLUP here do not meet this standard because they are significantly different than the arguments in Mr. Schiefelbein's appeal, which pertain to water.

[42] R. 6.

violation of the permit and the Code, and would be subject to the remedies in KPB 21.50.040, including potential fines, restitution, and permit revocation.[43]

KPB 21.20.040 allows the Commission to impose only those conditions specified in KPB 21.29.050 to the meet the .040 standards.[44] Planning authorities are "bound by the terms and standards of the applicable zoning ordinances, and are not at liberty to either grant or deny [permits] in derogation of legislative standards."[45] Thus, to the exent Mr. Schiefelbein is arguing for an additional condition to be placed on the MCLUP, his argument does not provide grounds to reverse the Commission's decision to approve the MCLUP.

Clearly, however, for CIRI to comply with the existing condition that it not breach the two-foot vertical separation requirement, CIRI must know that its excavation depth is not within two feet of the high-water table. To the extent Mr. Schiefelbein is arguing that CIRI cannot meet the condition because it will not know when it is within two feet of the high-water table, the record does not contain evidence that breach will occur. As explained in greater detail under Point #6 below, CIRI is only proposing to excavate to 20 feet below ground[46]; the site map prepared by McLane states that there are no wells within 100 feet or 300 feet of the excavation area[47]; CIRI Land Manager Andrea Jacuk testified that more than 50 test pits were dug on the property to a "maximum 20 feet below ground[48]; she reported that groundwater was not detected in any of them[49]; the Commission found that KPB staff will regularly monitor the site to ensure compliance vertical separation requirement[50]; and the Commission found that the permit does not allow dewatering.[51] This information together constitutes substantial evidence that CIRI was aware of the need to protect groundwater and will take precautions against breaching the condition. This supports the Commission's decision regarding the sufficiency of Permit Condition #7.

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43 KPB 21.29.110.
44 KPB 21.29.040(A).
45 *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 174-75 (Alaska 1993).
46 R. 71.
47 R. 74.
48 R. 157.
49 R. 157.
50 R. 3, Finding of Fact #5(b).
51 R. 4, Finding of Fact #17(d).

3. Appellant's argument that the Commission should have required CIRI to conduct scientific studies, research, and monitoring of area aquifers.

Mr. Schiefelbein argues generally that the Commission should have required CIRI to conduct studies and research on the aquifers in the area. He contends that CIRI should be required to "drill and maintain a minimum of two test wells on the west side of the proposed excavation area prior to beginning site excavation," and the wells should be monitored throughout the life of the project to establish the condition of the aquifer and the effects of the excavation on it.[52] This argument suffers from a similar defect as Mr. Schiefelbein's argument regarding the seasonal high-water table. KPB 21.20.040 limits the types of conditions the Commission may impose to those specified in KPB 21.29.050. None of those conditions compels a permittee to conduct studies or groundwater monitoring for a project not seeking to excavate in the water table.[53] As detailed under Point #6 below, the Commission reasonably concluded, based on substantial evidence, that the proposed activities, as conditioned, are sufficiently protective of water sources in accordance with KPB 21.29.040(A)(1). To the extent Mr. Schiefelbein is troubled that the Commission did not require more of CIRI, his concern does not provide a valid basis to reverse the Commission's decision to adopt the MCLUP.

4. Appellant's arguments regarding transparency and sharing of test pit data.

Mr. Schiefelbein argues that the Commission should have required CIRI to be more transparent about its test pits. He questions the depths at which the pits were dug and the time of the year they were taken (i.e., during the time of the seasonal high-water table or otherwise), and he suggests that information should have been provided to the public.

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52 Schiefelbein Appeal, Attachment 3, ¶2)a (March 3, 2022).

53 "[I]f excavation in the water table greater than 300 horizontal feet of a water source" were at issue, a certification from an engineer or hydrologist that the excavation will not negatively impact the quantity of water serving other sources, the installation of monitoring wells, and quarterly well monitoring would be required. KPB 21.29.050(A)(5). But CIRI is not proposing to excavate into the water table and has not sought the Commission's approval to do so.

The Code requires CIRI to provide certain information on its application. That information includes the location and depth of test holes and the depth of groundwater, if encountered.[54] Here, CIRI disclosed on its MCLP application that the depth to groundwater at the property is greater than 20 feet.[55] It included a map from McLane indicating that 32 test holes had been dug – presumably the same 32 holes that had been dug in Areas I and II in support of the original CLUP, as the site map submitted with the MCLUP application is identical to the site map for the CLUP, but with the new excavation area highlighted.[56] Because the Commission later learned from Ms. Jacuk that more than 50 pits had been dug "on this additional area as well as the currently permitted areas" without encountering groundwater, it follows logically that 18+ test pits (50 – 32 = 18) must have been dug in the new excavation area. The Commission certainly could have inquired further of CIRI about the specific location of these new test pits, as the only test pits mentioned in the MCLUP application were the original 32. That information may have been useful to further informing the Commission's analysis. Nevertheless, because the new excavation area is part of the same property as Areas I and II where the 32 pits were taken, and the new exaction area appears to be farther away from residences, it was not unreasonable for the Commission to draw an inference from the data from the 32 test pits that groundwater would not be encountered in the new area. Mr. Schiefelbein's allegations regarding the lack of transparency by CIRI do not identify a deficiency in the Commission's analysis sufficient to reverse its decision to approve the MCLUP.

5. Appellant's argument that "[s]pecific requirements were not established or required to 21.29.040(A3), water aquifer-down stream well, protect damage to adjacent properties."

Mr. Schiefelbein states, "[s]pecific requirements were not established or required to 21.29.040(A3), water aquifer-down stream well, protect damage to adjacent properties."[57] To the extent Mr. Schiefelbein is suggesting the Commission failed to impose requirements to meet the standards in KPB 21.29.040(A)(3), which concerns dust

54 KPB 21.29.030(A)(8).
55 R. 29.
56 R. 74.
57 Schiefelbein Appeal, Attachment 2, ¶3 (March 3, 2022).

control, he is incorrect. The Commission imposed the condition specified in KPB 21.29.050(A)(10), which requires the application of water or calcium chloride to provide dust control on haul roads on the property. This condition is Permit Condition #12 in the MCLUP.[58] There is no information in the record suggesting that the application of these materials would be ineffective at controlling dust. The Commission reasonably concluded, based on substantial evidence, that the condition was sufficient to satisfy the standard in KPB 21.29.040(A)(3) that the permit "minimize off-site movement of dust."[59]

Additionally, to the extent Mr. Schiefelbein is suggesting that the Commission failed to require CIRI to protect against damage to other properties, the Commission included a condition in the permit, Permit Condition #5, that corresponds to the requirement of KPB 21.29.050(A)(3) prohibiting the operation of processing equipment within 300 feet of the property boundaries.[60] The Commission also included a condition, Permit Condition #4, that CIRI "not allow buffers to cause surface water diversion which negatively impacts adjacent properties or water bodies."[61] Thus, any assertion that the permit did not provide requirements to protect damage to adjacent properties is incorrect.

To the extent Mr. Schiefelbein is claiming that the Commission failed to impose sufficient conditions to protect the aquifer and down-stream wells, that point is addressed in the broader discussion under Point #6 below.

6. Appellant's argument that the Commission's decision is not sufficiently protective of aquifers and nearby wells.

Mr. Schiefelbein asserts that the Commission erred in that there was not sufficient "protection for neighboring wells within the aquifers that begin in or flow through the permitted property regardless of the one-half mile rule. Due to inadequate research on the peninsula, aquifer intrusion may result in damage to wells in the aquifer more than one-half mile away."[62] Mr. Schiefelbein's point reflects a theme throughout his appeal: a general concern that the MCLUP is not sufficiently protective of nearby aquifers and wells.

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58 R. 6.
59 R. 4, Finding of Fact #19; R. 5, Conclusion of Law #3..
60 R. 6.
61 R. 6.
62 Schiefelein Appeal, Attachment 2, ¶4 (March 3, 2022).

As stated above, the Commission was in possession of information and research when it voted to adopt the MCLUP. It had received CIRI's MCLUP application, which identified the depth of excavation as 20 feet below ground and the depth to groundwater as greater than 20 feet, based on the results of test pits dug at different locations on the property.[63] The Commission had also received written comments and taken testimony from multiple members of the public. They heard from Mr. Schiefelbein, who testified at the August 9, 2021 public hearing about the residential wells in the area.[64] He claimed the aquifers in the area flow from the gravel pit towards Bings Landing (west) and questioned the adequacy of the water testing done at the property. He reiterated the concerns of local resident Eric Rosenberg, who had previously pointed out to the Commission that no hydrology report or other studies had been prepared.[65] The Commission also heard from Charles Clasby, another Bings Landing resident who expressed concern for area wells because "[w]e sit downstream of the groundwater from where these pits are being proposed."[66] He acknowledged that his own well is "right about 70 feet. . . about 50 feet deeper than they drilled" and that his neighbor has a 200 to 300-foot well.[67] Further, the Commission heard from Gretchen Cuddy, who expressed concerns for an artesian well behind her cabin near the southwest corner of the CIRI property, but admitted when questioned that she had no data about her well because it has not been running.[68] And the Commission heard at the July 12 and August 9, 2021 public hearings from CIRI Land Manager Andrea Jacuk, who offered that five experienced operators had dug more than 50 test pits on the property to a maximum of 20 feet below ground, and none of them had encountered groundwater.[69] She testified that the new excavation area was further away from the river, further away from residential areas, and 30 feet higher vertically from the water table than the excavation areas in the original

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63 R. 44-50.
64 R. 161-162.
65 R. 127.
66 R. 162-163.
67 R. R. 163.
68 R. 143.
69 R. 157. Ms. Jacuk clarified at the oral argument that the 50+ test pits consisted of 32 test pits dug in Areas I and II in connection with the original CLUP application, and 18+ pits dug in the new excavation location. Notably, Gina DeBardelabin of McLane testified at the March 27, 2017 public hearing on the original CLUP that some of the test holes were taken at 30 feet below ground. R. 363-64.

CLUP.[70] She added that CIRI had selected a respected and experienced operator, Scarcella Brothers, Inc., (Scarcella), based on an operations plan "which meets or exceeds the requirements of the already approved conditional land use permit," and that Scarcella would be "contractually obligated to be in compliance with the borough code at all times."[71]

During the August 9, 2021 hearing, Commissioner Jeremy Brantley explained that he would support the MCLUP "because it's as far as I can tell, over half a mile away from any residences," rendering it preferable, in his view, to the previously approved excavation areas in the original CLUP.[72] At the end of the hearing, Commissioner Syverine Bentz spoke to the concerns Mr. Schiefelbein and others had raised about the sufficiency of water testing at the property. He stated:

> The other thing I wanted to mention about our code, and maybe this can help clarify a couple of the water questions, is that this permit, I believe, does not propose any excavation within the water table.
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> So in the application I think you stated there were something like 32 test holes were dug without encountering the water table. So that was the indication that excavation would be above the water table. And our code does say that for our water source separation conditions, that the conditional land use permits require two-foot vertical separation from the seasonal high water table to be maintained.
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> And just thinking through some of the testimony that we heard as well, usually the water monitoring isn't really required by the Planning Commission unless there is an application to excavate within the water table. And it's at that point that the applicant would be responsible of installing water monitoring tubes to really understand that groundwater elevation, flow direction, and flow rate for the parcel for the excavation area, and it needs to be monitored for a year prior to the application.
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> So if there was any excavation by this project in the water table, there would be requirement – or if it was modified future down the road, it would be a requirement to have those monitoring wells in place well in advance, a year in advance. So I just wanted to make

70 R. 141-42; R. 157.
71 R. 141.
72 R. 141.

> sure that the testifiers heard that and that those were kind of the conditions that the Planning Commission has to work with when we're applying the code for these types of applications.[73]

The Commission had all of this information before it when it evaluated the MCLUP under the applicable legal standards in the Code, including whether the activities would be sufficiently protective to meet the standards of KPB 21.29.040(A)(1). That standard is the only standard in .040(A) that pertains directly to water. It "protects against the lowering of water sources serving other properties."[74] The Commission made factual findings that give context for its assessment of whether the permit would satisfy this standard. These findings include that the site plan shows no wells within either 100 or 300 feet of the excavation area,[75] and CIRI was not proposing to excavate into the water table.[76]

The Borough imposed on the MCLUP each of the applicable conditions in KPB 21.20.050 to help achieve the .040(A)(1) standard. These include the condition in .050(A)(4)(a) prohibiting the extraction of gravel within 100 feet of any water source (Permit Condition #6 in the MCLUP); the requirement in .050(A)(4)(c) that a two-foot vertical separation from the seasonal high-water table be maintained (Permit Condition #7); and the requirement in .050(A)(6) that there be an undisturbed buffer and no extraction within 100 linear feet of any waterbody or wetland (Permit Condition #8).[77]

The Commission then applied its findings under the standard in KPB 21.29.040(A)(1) and concluded that the MCLUP, as conditioned, contained sufficient protections against the lowering of water sources. The Commission stated in Finding of Fact #17:

> 17. The proposed extraction meets material site standard 21.29.040(A1), "protects against the lowering of water sources serving other properties", as evidenced by:

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73 R. 165-66.

74 Although this standard is focused on water quantity rather than quality, water quality is addressed by Permit Condition #15. That condition requires CIRI to comply with all other applicable federal, state, and local laws, including pollution control laws such as the Environmental Protection Act, the Clean Water Act, and the Alaska Department of Environmental Conservation water quality regulations. R.19.

75 R. 3, Finding of Fact #5(a).

76 R. 3, Finding of Fact #5(c).

77 R. 6.

a. Permit condition number 6 requires that the permittee not extract material within 100 horizontal feet of any water source existing prior to issuance of this permit.

b. The submitted site plan shows several wells located within 300 feet of the parcel boundaries, but none within 100 feet of the proposed excavation area.

c. Permit condition number 7 requires that the permittee maintain a 2-foot vertical separation from the seasonal high-water table.

d. The permit does not allow the applicant to dewater either by pumping, ditching or any other form of draining.[78]

The Commission reasonably concluded that the MCLUP, with the conditions imposed, is sufficiently protective of water sources serving other properties to satisfy KPB 21.29.040(A)(1). I defer to the Commission's conclusion because it is supported by substantial evidence in the record. Mr. Schiefelbein's concern about the adequacy of permit to protect nearby wells and aquifers does not provide a valid basis to reverse the Commission's decision to approve the MCLUP.

E. Relief Requested

In his request for relief, Mr. Schiefelbein asks that the Commission's decision be denied, or alternatively, that CIRI be required to: (1) provide adequate well and water protection for residents whose wells may be damaged by the gravel extraction at the site; (2) drill and maintain a minimum of two test pits on the west side of the proposed excavation and monitor the wells throughout the extraction process to establish the condition of the aquifer and the effects of the excavation on it; (3) establish the seasonal high-water table and provide methods to be used to maintain the required two foot separation from the table; (4) require traffic control.[79]

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[78] R 4; Findings of Fact #17.

[79] Schiefelbein Appeal, Attachment 3 (March 3, 2022). To the extent the items in Attachment 3 are intended to suggest the Commission erred in not requiring CIRI to conduct heightened monitoring or require additional well protections, those matters are covered in the discussion under Arguments #3 and #6. Finally, if Attachment 3 is intended to suggest the Commission erred in not requiring adequate traffic control, although .040 requires minimization of dust and noise, there is no condition in KPB 21.29.050

Because Mr. Schiefelbein's appeal does not provide adequate grounds to reverse the approval of the MCLUP, I decline to reverse the Commission's decision as Mr. Schiefelbein requests. Regarding his alternative requests for relief, KPB 21.20.320 to .340 defines the scope of the appellate review in this case and limits the relief the hearing officer may provide. The hearing officer may remand, affirm, reverse, or modify the Commission's decision, but lacks the authority to impose the testing and other conditions Mr. Schiefelbein seeks. Mr. Schiefelbein's request for relief is denied.

IV. Conclusion

None of the arguments raised in Mr. Schiefelbein's appeal provide grounds to overturn the Commission's approval of the MCLUP. The Code limits the conditions the Commission may impose to ensure the standards in KPB 21.29.040 are met. Here, the Commission imposed the mandatory conditions in KPB 21.29.050, made specific findings based on substantial evidence in the record, and reasonably concluded that the MCLUP meets the .040 standards.

In reaching this conclusion, I do not wish to diminish the very legitimate concerns of Mr. Schiefelbein and Ms. Pereira regarding the presence of an operating gravel mine near their homes. But my obligation on appellate review is to determine whether the Commission's decision is supported under the standards in the KPB Code as written – a code that "significantly favors material site operators", as Judge Gist recognized in *Bilben*.[80] "It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people."[81] The Code as written compels the outcome here.

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requiring traffic control. There is a condition in .050(A)(8) concerning Borough roads (i.e., that operations be conducted in a manner that will not damage them), and that condition has been imposed in the MCUP as Permit Condition #10. It is the only condition the Commission was authorized to impose related to roads.

[80] R. 222; *Bilben*, 3KN-20-00034 Cl at 15..

[81] *Benavides v. State*, 151 P.3d 332, 336 (Alaska 2006) (quoting *Concerned Citizen of S. Kenai Peninsual v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974) (distinguished on other grounds by *DeVilbiss v. Matanuska-Susitna Borough*, 356 P.3d 290 (Alaska 2015).

The February 14, 2022 decision of the Commission approving the MCLUP by passing Resolution 2022-08 is AFFIRMED.

DATED this 11th day of August, 2022.

Signed
Lisa M. Toussaint
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 of 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.]