

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

In the matter of:)	
)	
Conditional Land Use Permit for KPB)	
Parcel 058-032-31; T 5N R 10W SEC 23)	–
Seward Meridian KN N1/2 NE1/4 Kenai-)	
Recording District.)	
)	
TREVOR FARRINGTON,)	
)	
Appellant,)	
)	
v.)	
)	
MARK ROZAK,)	
)	
Applicant.)	OAH No. 21-0015-MUN
)	Agency No. 2020-03-PCA
)	

DECISION AND ORDER OF DISMISSAL

Applicant Mark Rozak has filed a motion to dismiss this appeal. The motion notes that no party seeking to overturn the decision on appeal filed an opening statement by the deadline for doing so. It relies on Kenai Peninsula Borough (KPB) Code § 21.20.280(A), which provides: “Failure to timely submit the opening written statement will result in dismissal of that party from the appeal.” With all adverse parties dismissed, the appeal would be moot.

A. Procedural History

On December 15, 2020, the KPB Planning Department issued a written Notice of Decision setting out the approval of the borough’s Planning Commission of the Conditional Land Use Permit at issue in this case. The permit approved, with a number of conditions, a 39.2-acre sand, gravel, and peat extraction site on Pine Street.

On December 30, 2020, the last day of the appeal period for the permit, a single individual, Trevor Farrington, filed a notice of appeal. In a one-page attachment to the appeal form, Mr. Farrington listed concerns about traffic safety on Pine Street and about the potential environmental impact of the proposed pit. The borough referred the case to the Alaska Office of Administrative Hearings to furnish a hearing officer and administer most aspects of the appeal, as permitted by AS 44.64.030(b) and 44.64.055.

In accordance with KPB Code § 21.20.250(E), the borough clerk gave notice to all parties of record to the Planning Commission proceeding. Several individuals filed entries of appearance by the deadline for doing so, January 21, 2021. As permitted by the Code, entries from Lindsey Hannevold, Sam Larsen, and Melinda Kay contained additional designations of error beyond those raised by Mr. Farrington.

The Planning Director filed the certified record for appeal on January 25, 2021. All parties were sent the Notice of Certification of Record on January 27, 2021. In addition, the record itself was furnished to all parties on that date, waiving the handling charge authorized by the Code.

Under KPB Code § 21.20.280, written opening statements were due from all parties 20 days after issuance of the Notice of Certification of Record, without further notice or instructions. As an extra step to ensure that participants would not overlook the deadline, on January 28, 2021 the undersigned issued a Notice of Briefing Procedure and Tentative Hearing Date, stating that February 16, 2021 would be the “Deadline for Opening Statements by all parties, including Mr. Rozak, Mr. Farrington, and the staff.” It was sent to all parties at their emails of record.

Mr. Rozak, his engineer (who was separately entered as a party), and the borough planning staff filed opening statements on February 16, 2021. No other opening statements were filed.

Recognizing that no party had stepped forward in support of the challenge to the permit, Mr. Rozak moved on February 24, 2021 to dismiss the appeal. The undersigned issued a notice the following day giving all parties of record until March 3, 2021 to oppose the motion. One party, Lindsey Hannevold, filed a timely response opposing dismissal. Her response purported to be made on behalf of several other parties, including appellant Trevor Farrington, but she is not an attorney and it is not clear that she is authorized to represent them. None of the other individuals submitted any form of authorization or joinder in Ms. Hannevold’s response. Ms. Hannevold’s response first addressed the issue of dismissal, and then included a one-and-a-half page late-filed opening statement.

B. Ms. Hannevold’s Argument Against Dismissal

Writing from the very same email address to which the January 27 and January 28 notices were sent, Ms. Hannevold makes an unsworn assertion that “not all of us,” apparently

including herself, received the January 28 Notice of Briefing Procedure and Tentative Hearing Date. She makes no mention of the January 27 Notice of Certification of Record, which under the KPB Code was independently sufficient to trigger the obligation to submit an opening statement within 20 days.

Next, Ms. Hannevold says that “many of us” assumed the entries of appearance documents qualified as opening statements. It is true that two or three of the entries of appearance contained moderately detailed listings of appeal points, but they were not tied to the record on appeal which, of course, had not yet been circulated when they were written. It may have been reasonable, in some circumstances, to file an opening statement cross-referencing points made in the entries of appearance, but to file nothing at all at the opening statement phase is not consistent with the KPB appeal system.

Finally, Ms. Hannevold argues that “[s]ubmitting letters and e mails back and forth is not how we thought this hearing would be handled and to put it politely it is an odd way of conducting such a matter.” Of course, odd or not, it is the way that the people of the Kenai Peninsula Borough have chosen to conduct appeals of this kind. In contrast to some other jurisdictions, the borough has elected to have all evidence taken at the Planning Commission level. The appeal to a hearing officer is an on-the-record appeal, in which no new evidence is taken. Such appeals fundamentally take place on paper; the oral component is simply an oral argument about the written record and submissions. In such a structure, failure to submit an opening brief is the most basic of omissions.

C. Ruling on Motion

The KPB Code leaves no room for uncertainty about what will occur to any party that fails to submit an opening statement on time: the failure “will result in dismissal of that party from the appeal.”¹ The Code could easily have left some discretion by, for example, saying “may result in dismissal,” but it does not. If the opening statement is late or not submitted at all, the party’s participation is over.

What the Code does grant is discretion to extend the deadline for opening statements. Code § 21.20.280(C) provides:

The hearing officer, upon good cause shown, may grant an extension of time to any party or legal representative for the completion of any act required under [the

¹ KPB Code § 21.20.280(A).

section relating to briefs], except for the filing of the notice of appeal, where the remaining parties will not appear to be unduly prejudiced by the delay. An extension permitted one party shall be extended to all parties by notice from the borough clerk. Motions for extensions shall comply with the provisions of KPB 21.20.280(D) and 21.20.300.

There is some question whether this section can be used to extend a deadline *retroactively*—that is, whether an opening brief submitted untimely so that it “will result” in dismissal can be rendered timely after the fact, with the dismissal requirement undone. Assuming that it can, the motion for extension must still demonstrate “good cause.” Ms. Hannevold’s request consists of unsupported assertions about what “not all of us” received and “many of us” assumed, and a general critique of the KPB appeal system as “odd.” This is not good cause, and no extension will be granted.

D. Dismissal

Trevor Farrington, Lindsey Hannevold, Robert Edler, Michael Morris, Melinda Kay, Sam Larsen, and Jamie Larsen are dismissed as parties to this appeal. Because no party who opposes the underlying decision of the Planning Commission at issue in this appeal remains as a party to the appeal, the instant appeal is DISMISSED.

DATED March 15, 2021.

By: Signed
Christopher Kennedy
Administrative Law Judge

Appeal Rights: Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 29.40.060 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this Decision and Order. Reconsideration and appeal procedures are found at Kenai Peninsula Borough Code §§ 21.20.350 – 21.20.360.

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