

BEFORE THE BOARD OF ADJUSTMENT FOR THE CITY OF KENAI

**IN THE MATTER OF THE APPEAL OF)
LYNFORD DISQUE REGARDING)
ENFORCEMENT ORDER FOR VIOLATION)
OF KMC 14.20.050(h) AND KMC)
AND 12.25.030.)
)
)
)**

Case No. BA-10-03

DECISION

This appeal concerns the decision of the City of Kenai to issue an enforcement order and to assess civil, administrative fines against Mr. Disque for his violation of two municipal ordinances. The appeal of Lynford Disque is denied; however, the enforcement order is amended, in part to modify the payment obligations of the administrative fines provided that Mr. Disque cure the violations on or before May 1, 2011.

I. PROCEDURAL HISTORY

Appellant Lynford Disque is the owner of property located at 2021 Wyatt Way in Kenai (the Property).¹ R. 2, 7. The Property has been the subject of various City of Kenai Code enforcement processes since 2006 after a citizen complained about the storage of multiple junk vehicles on the Property. R. 14, 17–20. Between 2006 and 2010, the City’s administration contacted Mr. Disque many times to encourage him to

¹ The Property is also described as KN E½ W½ NW¼ NW¼.

address the conditions on the Property. R. 14.

In September of 2008, the Kenai Police Department issued a citation to Mr. Disque for violation of City ordinances. R. 14, 17 (entry dated 4/14/2009). It is unclear what transpired in the City's prosecution of that citation, although the citation was eventually voided after the judge assigned to the case postponed a decision on the citation to provide Mr. Disque with an opportunity to apply for a Conditional Use Permit (CUP) for the Property. R. 14, R. 18 (entry dated 5/18/2010). Indeed, in May, 2009, Mr. Disque applied for a CUP and requested permission to operate a storage yard on the Property. R. 15, 19 (entry dated 5/19/2009). Mr. Disque also requested a variance to allow him to put fencing around the use on the Property to shield the use.² R. 15, 19 (entry dated 5/26/2009).

The City's Planning & Zoning Commission, through its orders designated as PZ 09-30 (CUP) and PZ 09-33 (variance), approved Mr. Disque's permit applications although the Commission conditioned the City administration's issuance of the CUP upon Mr. Disque taking certain actions by May 31, 2010. R. 15, R. 19 (entries dated 6/1/2009, 6/11/2009, 6/25/2009). Among these conditions were requirements that Mr. Disque obtain a variance to build a six-foot high sight-obscuring fence along Wyatt Way,

² The use of the Property for the outside storage of junk was allowed by CUP so long as an eight-foot sight-obscuring fence was constructed around the use. R. 15; KMC 14.20.050(h). Because the area was along a right-of-way, where only six-foot fences are otherwise permitted, at the same time he applied for the CUP, Mr. Disque also applied for a variance from the requirement of an eight-foot fence. R. 15.

that he remove a mobile home from the Property; that he remove all junk vehicles not pertaining to the “Dodge” restoration business (as identified from an inventory dated September 18, 2006); and, that he remove miscellaneous debris and junk from the Property. R. 15. The City administration also informed Mr. Disque that if he failed to meet the conditions, the City would commence a new enforcement action for unremedied Code violations.³ R. 17-18 (entries of 6/22/2009, 6/25/2009).

Unfortunately, Mr. Disque did not satisfy all of the conditions for issuance of the permit identified in PZ 09-30 by May 31, 2010. The City’s Planning & Zoning Commission revoked the authority to issue the permit on June 23, 2010. R. 15, R. 19 (entry dated 6/23/2010, revoking PZ 09-30).⁴ Thereafter, the City renewed enforcement action against the Property. R. 5, 7, 11, 19-20 (entries dated 6/24/2010, 10/19/2010). On October 15, 2010, the City administration inspected the Property and determined the Property was in violation of the City Code. R. 15, 20 (entry of 10/19/2010). On October 19, 2010, City staff again visited the Property and identified no changes in its condition.

As a result of the inspection, the City Planner, through her assistant, sent a Notice of Abatement & Enforcement Order (Enforcement Order) to Mr. Disque. R. 7-10. The Enforcement Order was served on Mr. Disque by certified mail. R. 8. The Enforcement

³ As reflected by the cessation of prosecution of the 2008 citation for Mr. Disque to apply for a CUP, the conditions under the CUP appear to be a method of providing an alternate route, and an extension of time, for Mr. Disque to address the City code violations on the Property that gave rise to the 2008 citation.

⁴ Mr. Disque unsuccessfully appealed that decision to the City’s Board of Adjustment. R. 15, 20 (entry dated 9/24/2010).

Order identified the City code violations and stated that the violations must be remedied by midnight, November 3. The Order further notified Mr. Disque that if he did not take action to cure the violations, the City would assess administrative fines beginning November 4, 2010. R. 7.

Consistent with the Enforcement Order, on November 5, 2010, after the City's administration conducted a third inspection of the Property and the Property showed no change in its condition, the City Planner sent to Mr. Disque a Civil Penalty and Assessment Form. R. 11-12. The City informed Mr. Disque that since he failed to remedy the code violations, an administrative fine (or civil penalty) of \$50 per day under KMC 14.20.260(d) would accrue until Mr. Disque brought the Property into compliance with KMC 12.25.030 and 14.20.050(h). R. 11.

Mr. Disque timely filed an appeal of the Enforcement Order to the City's Board of Adjustment. R. 2.⁵ The relief he seeks is limited. He asks the Board to waive any fines until "a determination has been made in case #3KN-10-1069 superior court appeal."⁶ R. 2. In his notice of appeal, he acknowledges that "there are things that need to be cleaned up," but challenges whether the vehicles on the Property are among them. R. 2.

⁵ The fines have continued to accrue during the appeal period. KMC 14.20.260(c)(6).

⁶ The Board takes official notice that on or about October 25, 2010, Mr. Disque appealed the Board of Adjustment's decision upholding the revocation of the authority to issue the CUP, PZ 09-30, to Kenai Superior Court, Case No. 3KN-10-1069 CI.

The Board of Adjustment held a public hearing on Mr. Disque's appeal on November 23, 2010. Mr. Disque attended the hearing and testified. No members of the public testified in person. One member of the public submitted a written statement supporting the enforcement action against Mr. Disque.⁷ The City administration made no formal presentation at the hearing, preferring to stand for questions based upon the City's administrative report and correspondence included in the administrative record.

The Board asked questions of Mr. Disque and of the City's staff. Mr. Disque recognized that he had made little progress to address code violations on the Property; and also discussed the Planning & Zoning Commission's prior action to revoke PZ 09-30 (the CUP) because of his failure to timely meet the conditions to the CUP. Mr. Disque acknowledged that he had not followed through with the original requirements for issuance of the CUP. In response to a question from a Board member, Mr. Disque testified that he had made some progress on cleaning up the Property and satisfying the conditions of the CUP. He testified that he had fallen trees, stacked lumber, and moved one vehicle. He agreed that there were at least six other vehicles that could go but that he did not have money to pay for disposal. When asked if he would sign title over to the vehicles to the City for removal he said that he would "absolutely" do so.

Mr. Disque also testified that the Property was purchased by him for his retirement. He has had only seasonal work opportunities in the last few years and, as a

⁷ Letter of November 19, 2010 from Tom Moore to City of Kenai, Board of Adjustment.

result, he has limited funds and time during the summer months to improve the Property. What free time he does have during the summer months when he is working seasonally is devoted to maintaining a different parcel he owns and uses as his primary residence. Mr. Disque implicitly acknowledged the existence of junk on the property and stated that he could put everything behind a tree line so the public could not see it. In addition to agreeing that at least six vehicles could or should go, Mr. Disque provided similar testimony about the mobile home that was in great disrepair—he would remove it if he could afford to do so. There was no progress because there was no money.

II. STANDARD ON APPEAL

An appeal of an enforcement order to the Board of Adjustment is a *de novo* appeal. The Kenai Municipal Code states that “[t]he Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as ought to be made, and to that end the Board shall have all the powers of the body from whom the appeal is taken.”⁸

III. ANALYSIS

A. City Authority to Order Enforcement and Abatement of Code Violations

The Kenai Municipal Code outlines the process for issuance of enforcement orders under the City’s zoning code. Under KMC 14.20.260, the administration and enforcement of the Kenai Zoning Code is a function of the City’s Planner under the

⁸ KMC 14.20.290(f)(2).

supervision of the City Manager. The Planner, and the Planner's assistant under general supervision of the Planner, shall have all functions and may exercise all powers necessary to administer and enforce the zoning code.⁹

The City Planner has the authority to issue enforcement orders.¹⁰ Among other things, the Planner may issue an enforcement order for the correction or abatement of a violation of KMC 12.25.030.¹¹ The City Planner may also issue enforcement orders to discontinue a use of land or of a structure, and/or for the abatement or removal of a structure maintained in violation of the Kenai zoning code.¹² Whenever a written enforcement order is in effect, whether or not appealed, and a violation of the Code persists, the City may assess an administrative fine not to exceed \$250 per day for failure to comply with the order.¹³

An enforcement order is immediately appealable to the Kenai City Council sitting as a Board of Adjustment.¹⁴ During such time that an enforcement order is under appeal, no further use or development contrary to the order may continue.¹⁵

⁹ KMC 14.20.260(b)(2).

¹⁰ KMC 14.20.260(b)(2) and (c)(1).

¹¹ KMC 14.20.190(c)(1)(G).

¹² KMC 14.20.260(c)(1)(A)-(B).

¹³ KMC 14.20.260(d).

¹⁴ KMC 14.20.260(c)(3); 14.20.290.

¹⁵ KMC 14.20.260(c)(4).

B. Notice of Abatement and Enforcement Order for Violation of KMC 12.25.030

Section 12.25.030 of the Kenai Municipal Code addresses the leaving of junked vehicles on both private and public property. As applicable here, the ordinance prohibits an owner of private property from allowing a junked vehicle to remain on the property for longer the 72 hours unless certain narrow exceptions apply:

(c) No person in charge or control of any property within the City, whether as owner, tenant, occupant, lessee, or otherwise, shall allow any junked vehicle to remain on such property longer than seventy-two (72) hours; and no person shall leave any such vehicle on any property within the City for a longer time than seventy-two (72) hours; except that this ordinance shall not apply with regard to a vehicle in an enclosed building; a vehicle on the premises of a business enterprise operated in a lawful place and manner, when necessary to the operation of such business enterprise; or a vehicle in an appropriate storage place or depository maintained in a lawful place and manner by the City.¹⁶

By definition, a “Junk vehicle” means a motor vehicle that is:

- (1) Not currently registered for operation upon the public roads of the City; or
- (2) In a condition which exhibits two (2) of the following elements:
 - (i) A substantial amount of broken or missing glass;
 - (ii) Missing two (2) or more wheels or tires;
 - (iii) Missing a body panel or body part, such as quarter panels, bumper, trunk lid or hood;

¹⁶ KMC 12.15.030(c).

(iv) Missing an essential component such as the engine, transmission, carburetor, distributor, brake or wheel cylinder, brake shoe, generator, or alternator, starter, front passenger seat, or drive shaft; or

(3) Stripped, wrecked or otherwise inoperable due to mechanical failure; or

(4) Has not been repaired because of mechanical difficulties or because the cost of repairs required to make it operable exceeds the fair market value of the vehicle.¹⁷

Mr. Disque acknowledged in his notice of appeal that there are things that need to be removed from the Property, although he claims the vehicles are not among the things in violation of the Code. R. 2. He does not specifically contest the City administration's determination that he stored vehicles on the Property in violation of KMC 12.25.030. In fact, he testified that there are at least six vehicles that could be removed and he had not removed them because of the cost of removal. He also recognized that he had not met the conditions of the CUP. Those conditions required the removal of vehicles improperly stored on the Property. R. 15.

Mr. Disque's testimony at the hearing is consistent with photographs of the Property taken on October 19 and November 4, 2010, and submitted to the Board by the City administration as evidence of code violations. The photographs show at least six vehicles, a school bus, a wrecked and dilapidated mobile home, and various debris deposited on the Property. R. 9, 10, 13. While the photographs are clearly taken at some distance, the photographs show vehicles that do not appear to be operational or that could

¹⁷ KMC 12.25.030(f).

be made operational with repairs that do not exceed the fair market value of the vehicle. A tan and brown vehicle with a white roof or topper is missing its hood, at least two tires, and the glass on the driver's side window.¹⁸ R. 9-10.

Another vehicle, a white pickup, does not appear to have a front grill, may be missing a window, and appears to sit upon the ground with no tires.¹⁹ R. 10. Four other vehicles appear to be in disrepair, although their specific defects are not noted by either the City or by Mr. Disque. R. 9-10. Mr. Disque offered no testimony that the vehicles were operable, could be made operable, and/or were current in their state vehicle registration as required by KMC 12.25.030(f)(1). The vehicles are not enclosed as illustrated by the photographs provided by the City.²⁰ R. 9, 10, 13. Accordingly, the evidence before the Board demonstrates that Disque is in violation of this ordinance.

C. Notice of Abatement and Enforcement Order for Violation of KMC 14.20.050(h)

Section 14.20.050(h) of the City's zoning code addresses non-conforming uses of properties and exceptions to certain uses. Subsection (h) is titled "Outside Storage of Junk." The ordinance prohibits the storing of a junked vehicle or junk outside. It further states that no unenclosed junk shall be maintained where it is visible from a City or State road in any zoning district:

¹⁸ KMC 12.25.030(f)(2).

¹⁹ KMC 12.25.030(f)(2)

²⁰ KMC 12.25.030(c).

(1) Outside Storage of Junk. Notwithstanding the provisions of this section, no junked vehicle or junk shall be stored outside and no unenclosed junk or wrecking yard shall be maintained in a location which is visible from a City or State road in any zone. However, the Commission may grant a conditional use permit under the procedure specified in this chapter allowing said use to continue for a specified period of time if an eight-foot (8') high sight-obscuring fence of good appearance has been provided around said use.²¹

Unfortunately, the City administration provided little evidence in the administrative record, or to the Board at the November 23 hearing, to explain the nature of the junk that is on the Property that the administration contends is in violation of this ordinance. However, as discussed above, there are vehicles on the Property that meet the definition of a "Junk Vehicle" as defined elsewhere in City ordinances. This is sufficient to demonstrate a violation of KMC 14.20.050(h)(1).

And, Mr. Disque does not contest that he had junk vehicles on the Property or that there was at least some visible junk on the Property. In addition, photographs show some debris on the foreground of the Property and a mobile home structure in extreme disrepair, that does not appear to be on a foundation, has exposed insulation, and that lacks windows, siding, and walls. The City's code does not define "junk." But, the common definition of the term provides us with an understanding that the Property's condition also includes "junk." Junk is "discarded material, such as glass, rags, paper, or

²¹ KMC 14.20.050(h)(1).

metal, that may be reused in some form” or “articles that are worn-out or fit to be discarded.”²²

With this common understanding, the Board finds that the debris identified in the photographs, including the dilapidated remains of the mobile home, is “junk” as that term is commonly understood and to maintain it as indicated in the photographs provided by City administration is a violation of KMC 14.20.050(h). The evidence before the Board demonstrates that Mr. Disque is also in violation of KMC 14.20.050(h)(1). There is junk and junked vehicles stored outside on the Property. There is junk being maintained on the Property that is not enclosed; and, that junk is visible to the public.

D. Assessment of Civil Penalties

The City’s code permits the assessment of administrative fines where there is an enforcement order in effect and the person to whom it is issued, here the owner of the Property, fails to comply with the order. The Enforcement Order was served on Mr. Disque by certified mail as required by KMC 14.20.260(c)(3). R. 8. The violations identified above each existed on October 19, the day that the City issued the Enforcement Order, and also on November 4, the day that the City began to assess civil penalty against Mr. Disque. R. 9, 10, 13. As of the date of the hearing, Mr. Disque had not done anything to remedy the code violations and he conceded as much. Accordingly, Mr.

²² The American Heritage Dictionary 978 (3d ed. 1992).

Disque is subject to administrative fines from November 4, 2010, until he cures the violations.

The Board is sensible to the concession Mr. Disque made at the hearing, however, that he acknowledges that at least six vehicles should be removed from the Property but he did not have the funds to do so. Mr. Disque also stated that other materials and equipment could be hidden from view behind trees and he recognized that the wrecked mobile home should be removed. Accordingly, if Mr. Disque completes all of the following on or before May 1, 2011, the City shall forgive the administrative fines that will otherwise accrue until Mr. Disque removes the violations:

- (i) Remove all of the debris in the foreground of the photographs at R. 9-10;
- (ii) Remove from the Property at least six vehicles from the Property. Mr. Disque may satisfy this requirement by signing over to the City the title to a vehicle or vehicles *and* authorizing the City to enter onto the Property at the City's convenience to remove and dispose of the vehicles.
- (iii) Remove from the Property or store any remaining vehicles, including the school bus, so that any vehicles that are not current in their state registration or that otherwise meet the City code definition of "junked vehicle" cannot be viewed from any public ways and neighboring properties, whether or not the vehicles are related to the Dodge restoration activities of Mr. Disque.

(iv) Remove the wreckage of the mobile home from the Property (the mobile home is pictured at R. 10, 13); and,

(v) Inform the City administration by contacting the City Planner or the City Manager on or before May 1, 2011, that he has met all of the above tasks and permit the City administration on the Property to inspect for compliance with these requirements.

It is Mr. Disque's responsibility to pay for the cost of this work with the exception that the City will pay for the cost of removal of up to six vehicles that Mr. Disque offered to sign over to the City at the hearing. The Board feels this is a practical, partial solution to meeting the ultimate objective of code enforcement—to obtain compliance.

This is, in fact, a "last chance" for Mr. Disque to avoid the consequences of administrative fines and the Enforcement Order. If Mr. Disque does not completely cure the code violations discussed herein by May 1, 2011, there will be no more extensions and the fines of \$9,000 (180 days x \$50 per day) shall be due to the City. The City administration may thereafter take any and all legal action permitted to the City by law to recover those fines and to forcefully abate the violations. These actions could include obtaining court judgments against Mr. Disque, filing liens against the Property, and entering the Property to remove the conditions identified above as may be allowed by law and/or court order.

IV. SUMMARY

The City has the burden of demonstrating that Mr. Disque is in violation of KMC 12.25.030 and KMC 14.20.050(h). Because we find that:

- (1) there are several junk vehicles as defined by KMC 12.25.030(f) on the Property;
- (2) the vehicles, the wreckage of the mobile home, and assorted debris visible in the photographs submitted by the City are junked vehicles and junk as described by KMC 14.20.050(h);
- (3) this junk and the junked vehicles are stored outside and are not enclosed;
- (4) the City complied with the notice provisions of its ordinances regarding issuance of enforcement orders and the assessment of administrative fines against Mr. Disque;
- (5) the Property was in violation of City code as of November 4, 2010, when the City began to assess administrative fines for the Code violations and the Property remains in violation of the City's code;

we AFFIRM the decision of the City administration finding that Mr. Disque is maintaining the Property in violation of KMC 12.25.030 and KMC 14.20.050(h) and to assess administrative fines of \$50 per day from November 4, 2010. The appeal of the Enforcement Order finding a violation of City code is, therefore, denied, subject to the modification identified in section III (D), above.

DATED this 23rd day of December, 2010.

BY: 
Pat Porter, Board Member

Joe Moore, Board Member

Robert J. Molloy, Board Member

Ryan Marquis, Board Member

Terry Bookey, Board Member

Brian G. Gabriel, Sr., Board Member

Concurring in part, dissenting in part.

I write separately to state that I concur in the determination that the violations exist. I dissent in that I disagree with the assessment of administrative fines in this matter. I would provide Mr. Disque with an extension of time, until September 30, 2011, in order to cure the violations before he would be subject to administrative fines. Even if I could agree with the imposition of the fines from the November 4 assessment date, I would still provide Mr. Disque one last extension of time to remedy the violations until September 30, 2011, so that Mr. Disque could benefit from one last summer working season to take action.

Mike Boyle, Chair

NOTE: This decision constitutes a final order under Alaska Appellate Rule 602. An appeal of this decision to the Alaska Superior Court must be filed within thirty days (30) days of the date of this decision.

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IN THE MATTER OF THE APPEAL OF)
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ENFORCEMENT ORDER FOR VIOLATION)
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)
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)

Case No. BA-10-03

AFFIDAVIT OF SERVICE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jacqueline Van Hatten, having been first duly sworn on oath, state:

- 1. that I am the Legal Administrative Assistant for the City of Kenai;
- 2. that on this date a copy of the decision of the Kenai Board of Adjustment was mailed to the following:

- LYNFORD B. DISQUE TOM MOORE
P.O. BOX 2201 P.O. BOX 944
KENAI, ALASKA 99611; KENAI, ALASKA 99611; and,

- 3. that a copy was given to the City Clerk for website publication.

DATED this 23^d day of December, 2010.



JACQUELINE VAN HATTEN
Legal Administrative Assistant
City of Kenai



Notary Public for Alaska
My Commission Expires: WITH OFFICE

