

**BEFORE THE BOARD OF ADJUSTMENT FOR THE
CITY OF KENAI, ALASKA**
210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF ROBERT MOLLOY AND
KRISTINE SCHMIDT: APPEAL OF
PLANNING AND ZONING
COMMISSION ACTION GRANTING A
CONDITIONAL USE PERMIT FOR A
DAY CARE FACILITY AT 502 ASH 34
AVE, KENAI**

Case No. BA-22-02

DECISION ON APPEAL

I. INTRODUCTION

Robert Molloy and Kristine Schmidt appealed the DECISION of the City of Kenai Planning and Zoning Commission (“Commission”) approving a Conditional Use Permit to operate a Day Care Center, located at 502 Ash Ave, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment UPHOLDS and MODIFIES the DECISION of the Planning and Zoning Commission approving the Conditional Use Permit and imposes ADDITIONAL CONDITIONS.

II. PROCEDURAL HISTORY

On April 25, 2022, the City of Kenai (City) received an application from Stephanie Nella Lenzini-LeBaron requesting a Conditional Use Permit to operate a day care center at 502 Ash Avenue. [R.32-33] The site is located in an area zoned Suburban Residential. [R.27] Pursuant to KMC 14.22- Land Use Table, day care centers require a conditional use permit in the Suburban Residential Zone. A day care center is defined by KMC 14.20.320(b) as “an establishment where child care is regularly provided for children for periods of less than twenty four (24) hours, including the building housing the facility and adjoining areas, and where tuition, fees or other compensation for the care of children is charged.” Ms. Lenzini-LeBaron’s application and testimony indicate she desires to operate a state licensed childcare facility for up to 12 children, with one additional employee during daytime hours in a portion of her residence. [R.32-33, R.67]

On May 11, 2022, the Commission held a public hearing on Resolution No. PZ2022-11, a resolution granting the Conditional Use Permit for a day care center. [R 65- 68] At the public hearing, during public comment, both Bob Molloy and Christine Schmidt spoke against the approval of the conditional use permit citing concerns with neighborhood safety, increased traffic, violation of covenants in the residential neighborhood and the City’s Comprehensive Plan. [R.66-67] Ms. Lenzini-LeBaron spoke in support of her application, noting the great need for childcare in the community and the standards she would follow. [R.67]

After adjourning into adjudicative session, the Planning and Zoning Commission Considered a motion to reduce the number of children allowed at the day care center on a fulltime basis, but the motion did not pass. [R.67-68] After further discussion, the Planning and Zoning Commission approved Resolution No. PZ2022-11, with three yes votes and two no votes.

On May 25, 2022, Robert Molloy and Christine Schmidt submitted an Appeal of the Decision by the Planning and Zoning Commission to the Board of Adjustment. [R.4-6] The Board of Adjustment held an adjudicatory hearing on June 20, 2022, where both the Appellants and Appellee appeared and presented evidence and argument.

III. STANDARD OF REVIEW

Kenai Municipal Code provides that “...the Board of Adjustment may reverse, remand or affirm, wholly or partly, or may modify the order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the body from whom the appeal is taken.”¹ The Board reviews the appeal *de novo*.² Therefore, no deference is given to the decision by the Commission. While public testimony does hold evidentiary weight, the Board cannot base its decision solely on support or opposition by the public.³

The function of the Board is to determine whether the requirements for a conditional use permit have been met and grant or deny the conditional use permit on the conditions supported by the substantial evidence before it.⁴ Substantial evidence is such relevant evidence as a reasonable

¹ KMC 14.20.290(f)(2).

² *Id.*

³ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

⁴ *Id.* At 931-932.

mind might accept as adequate to support a conclusion.⁵ The Board must make specific findings supporting its conclusions.⁶

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kenai Municipal Code 14.20.150(a) states in relevant part that: “[t]he conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings.” The applicant for a conditional use permit has the burden of establishing that the conditional use meets the following six criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The economic and noneconomic value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and
- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions should be met by the applicant. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.⁷

The evidence indicates Ms. Lenzini-LeBaron lives at 502 Ash Avenue with her family. Her intentions are to run a state licensed child care facility in the bottom half of her residence. She intends to have up to eight fulltime children with room for four more on a less frequent basis. The subject house has both a front and back yard that are intended to be used by the day care facility. The property also has two driveways, one paved and one gravel that can be used for client parking. Ms. Lenzini-LeBaron indicated that she intendeds to employ one employee besides herself and

⁵ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

⁶ *Fields*, at 932. And KMC 14.20.180(c).

⁷ KMC 14.20.150(d)(1-6).

regularly operate between the hours of 7:30 or 8:00 am and 5:00 pm. The residence was inspected by the City's fire marshal and meets the needs of the intended use.

During public comment before the Board, Ms. Lenzini-LeBaron's next-door neighbor's testified that they welcome the use in their neighborhood and think the day care facility will have a positive impact on the neighborhood. Public testimony in support of the use was also provided by a current client and employee, noting the great need for day care in the community and their high opinions of Ms. Lenzini-LeBaron's ability to operate a day care center.

After the City Planner presented his staff report in support of the conditional use permit, Mr. Molloy and Ms. Schmidt presented their case. They noted that they were long-time residents of the neighborhood, and chose to live in the subdivision due to its residential character and covenants that restricted commercial uses of the properties. They testified that they have recently noticed increased traffic in the area, and attributed this to an erosion of the residential use of the properties, noting there were other licensed and unlicensed day cares in the area. They testified that they understood the need for day care facilities, but that there were more appropriate locations for such operations in other zones within the City. The Appellants also testified that the layout of the subject subdivision with curved roads made traffic combined with kids in the streets a safety hazard. They argued that the one more day care center would only increase the already noticeable traffic. They also testified that the lot sizes in the neighborhood were small, and that the noise and increased traffic would affect the economic and noneconomic value of other nearby properties. They also noted that the Decision of the Planning and Zoning Commission failed to require compliance with off street parking requirements required in City Code.

After reviewing the requirements for a conditional use permit and noting their disagreement that the conditions were met, the Appellants also provided additional requirements they desired to mitigate the impacts of the proposed use if the use were to be permitted. These included limiting the number of children to 8, employing no more than one other employee, restricting the use to 30% of the gross floor area of the house, limiting use of the front yard, requiring only the use of off street parking, and imposing regular business hours.

Ms. Lenzini-LeBaron argued that her proposed use would not cause a noticeable increase in vehicle traffic in the area, especially in front of the Appellant's residence. She reviewed the various reequipments to obtain a conditional use permit, and indicated how she believed she met those requirements with her proposed plan. Ms. Lenzini-LeBaron indicated that she planned to

fence the front yard in the future. In response to the requests from the Appellants for further conditions, she stated that she was not willing to reduce the number of children to 8, that she only planned to have one additional employee, she planned to have regular business hours, that they day care center would only use a portion of the house, and that off street parking was available.

A. Ms. Lenzini-LeBaron Met her Burden to Show that the Use of the Property as a Day Care Facility is Consistent with the Purpose of the Zoning Code and Purposes and Intent of the Zoning District.

The Zoning Code through the conditional use process is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property. The purpose and intent of the Suburban Residential Zone is:

(a) *Intent.* The RS Zone is intended to provide for medium density residential development in areas which will be provided with common utility systems. The specific intent in establishing this zone is:

- (1) To separate residential structures to an extent which will allow for adequate light, air and privacy;
- (2) To prohibit uses which would:
 - (A) Violate the residential character of the environment;
 - (B) Generate heavy traffic in predominantly residential areas.⁸

In this case, the substantial evidence shows that the use of a day care facility would not violate the purpose and intent of the RS Zone. The record and testimony indicate that the residential medium density character of the neighborhood would be maintained. The use would be primarily limited to the property with some supervised activities in the roads within and trails adjacent to the subdivision. The use would not modify the structure in a way that jeopardizes the light, air and privacy of the residences. Children present in the area are consistent with a residential neighborhood. While there was disagreement between the parties as to traffic impacts, the Board finds that heavy traffic would not be generated by the proposed use. The Board notes that there are various streets to be used for entering the area, and that the streets are of sufficient width and condition to handle the relatively small increased use. It was noted that the proposed day care

⁸ KMC 14.20.090

center would not generate similar traffic compared to a retail or other commercial use, that could be considered heavy. The Board also finds that the imposition of a limitation on the number of children using the facility will reduce risk of heavy traffic.

B. Ms. Lenzini-LeBaron Met her Burden to Show that the Economic and Noneconomic Value of Adjoining Property or Neighborhood Would Not Be Significantly Impaired.

The requirements for granting a conditional use permit require the applicant to show the economic and noneconomic value of adjoining property and the neighborhood would not be significantly impaired by the use. The presence of children in a residential neighborhood is to be expected and is consistent with the intended purpose and use. It does not appear that any modifications are planned to the facility that would make its outward appearance significantly different from other residences in the neighborhood. The only directly adjacent neighbors indicated that the presence of children in the area would improve their enjoyment of their property and that they welcomed the increased activity. Imposing conditions on the number of children and hours of operation will further alleviate any impairment of value to the neighborhood. The Board acknowledges that there are already existing day care uses in the subdivision that this use would add to, however, the evidence and testimony, while somewhat contradictory, indicate that these existing uses have had minimal impact.

Mr. Molloy and Ms. Schmidt provided evidence and testimony regarding existing covenants in the subdivision that limit commercial use. While the Appellants acknowledge that these covenants are not enforced by the City and are not uniformly followed by existing property owners, they argue these covenants are evidence of the property owner's expectations and vision for the neighborhood. However, unlike other decisions where this Board has accorded covenants more evidentiary weight, it appears in this case that the covenants are frequently violated without significant objection, and other than the testimony of the applicants, there is no additional evidence that property owners in the subdivision value these covenants. The only comment received by the Board in this regard other than from the Appellants, was from a neighbor that welcomed the proposed use, and the Appellee's testimony that the covenants were not consistent with her view of the neighborhood.

C. Ms. Lenzini-LeBaron showed that the Proposed Use is in Harmony with the Comprehensive Plan.

Both the Appellants and Appellee cite to the number one goal of the City's Comprehensive Plan which is to promote and encourage quality of life in the City. The Appellee argues that good childcare is fundamental to quality of life. It allows parents to work and provide food and housing, and especially in her case, teaches important life skills to children. The Appellants on the other hand argue that an additional day care in the area will only increase traffic and impact the livability of their residential neighborhood. The Board finds that with the additional conditions imposed below, the day care center will improve quality of life within the City, providing a safe environment for children where they are taught life skills, and allowing parents the opportunity to work or take on other endeavors. Ms. Lenzini-LeBaron has also shown that the proposed use provides economic development supporting the fiscal health of the City. The proposed use generates income and sales tax, and facilitates the ability of parents to pursue their careers. The Appellants argument and evidence that there are already lots of day cares in the City and that the use would be better located in a commercial district is not persuasive. Finally, both parties addressed the third goal of the Comprehensive Plan which is to use land use strategies to implement a forward-looking approach to community and development. Ms. Lenzini-LeBaron argues that a mixed-use approach to land use is forward-looking. Mr. Molloy and Ms. Schmidt argue that the neighborhood is already maxed out on daycares, and that businesses should be located in commercial districts. The Board finds that the proposed use is consistent with the third goal of the Comprehensive Plan, as it promotes a forward-looking approach to community growth and development by allowing for quality childcare, working parents, and with additional imposed conditions has minimal impact. The Board finds that there is little evidence to show that existing day care uses in the subdivision have had a significant negative impact.

D. Public Services and Facilities are Adequate to Serve the Proposed Use.

The Board finds that public services and facilities are adequate to serve the proposed day care center. The property is adjacent to a paved road maintained by the City. There is adequate police and fire response available and utilities are available including water, sewer and natural gas.

E. The Proposed Use Will not be Harmful to Public Safety, Health or Welfare.

The Board finds that the proposed use would not be harmful to public health safety or welfare. The proposed use is required to be licensed by the state, and has been inspected by the fire marshal. The Applicant testified that the children are supervised, and that additional fencing will be placed in the front yard. Ms. Lenzini-LeBaron provided testimony that safety, including how to walk in streets, and cross streets is one of the skills to be taught to the children at her facility. The Appellants provided concerns with increased traffic, road design, and children playing and darting into the streets. The evidence and testimony indicate that the safety of the children at the facility, and other users of the subdivision will not be impaired by this use, especially given the conditions below and described operations plan for the day care center. The Board does not agree with the Appellants that traffic is relatively heavy in the area or that the proposed location is on a busy intersection increasing the risk to children.

F. There are Additional Conditions that can be Imposed on the Conditional Use Permit that Would Allow the Use to Satisfy all of the Requirements for Granting a Conditional Use Permit for a Day Care Center.

In Addition to the conditions imposed by the Planning and Zoning Commission on the conditional use permit. The Board finds that the following additional conditions are necessary:

1. No more than 12 children are allowed to receive services at the day care center at any one time.
2. Regular hours of operation are limited to 7:30 am to 6:00 pm, Monday through Friday.
3. No more than one employee outside Ms. Lenzini-LeBaron's immediate family may be employed at the location.
4. The off street parking requirements described in KMC 14.22.010 must be complied with.

G. The Requirements of KMC 14.22.010 Ft. Note 12(a) Are Met.

Kenai Municipal Code 14.22.010 ft. note 12(a) requires that the proposed location of the use and the size and characteristics of the site will maximize its benefit to the public. The Board finds that this relatively small-scale daycare in the subject neighborhood maximizes the benefit to the public. The size of the subject parcel with a relatively large house is compatible with the

proposed use. As discussed in further detail above the proposed use is compatible with the zone and characteristics of the neighborhood, with the conditions imposed. Finally, providing day care services for the intended cliental while also allowing for a private residential use maximizes public benefit.

H. Procedural Errors.

The Appellants raised procedural errors with regard to notice and timing of posting the property and publication of the public hearing. The Board finds that any errors in procedure were harmless and did not cause any prejudice to the parties.

CONCLUSION

After reviewing the evidence and presentation of the parties, the Board of Adjustment Affirms the Decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and imposes additional conditions on the approval of the Conditional Use permit as provided in this Decision.

Dated this 8th day of July, 2022

BY: Brian G. Gabriel Sr.
Brian G. Gabriel Sr., Board Chair

BY: James Baisden
James Baisden, Board Member

BY: Deborah Sounart
Deborah Sounart, Board Member

BY: Jim Glendening
Jim Glendening, Board Member

BY: Henry Knackstedt
Henry Knackstedt, Board Member

Notice of Right to Appeal

This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty (30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

CERTIFICATE OF DISTRIBUTION

I certify that on 8th day of July, 2022, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

Robert Molloy & Kristine Schmidt
513 Ash Avenue
Kenai, AK 99611

Stephanie Nella Lenzini-LeBaron
502 Ash Avenue
Kenai, AK 99611

Paul Ostrander, City Manager
City of Kenai
210 Fidalgo Avenue
Kenai, AK 99611

Max Best, Interim Planning Director
City of Kenai
210 Fidalgo Avenue
Kenai, AK 99611


Shelli Saper, City Clerk
City of Kenai, Alaska