

**BEFORE THE BOARD OF ADJUSTMENT FOR
THE CITY OF KENAI, ALASKA**

210 Fidalgo Avenue
Kenai, Alaska 99611

IN THE MATTER OF THE APPEAL OF
SANDRA AND TROY MILLHOUSE:
APPEAL OF PLANNING AND ZONING
COMMISSION ACTIONS DENYING A
VARIANCE PERMIT TO OBTAIN RELIEF
FROM THE ORDINANCE FOR
STANDARDS FOR COMMERCIAL
MARIJUANA ESTABLISHMENT AS WELL
AS A CONDITIONAL USE PERMIT TO
OPERATE A MARIJUANA STORE, AT
11888 KENAI SPUR HWY, #3, KENAI, AK
99611

Case Numbers:

Variance Permit: BA24-02

Conditional Use Permit: BA24-03

DECISION ON APPEAL

I. INTRODUCTION

Sandra and Troy Millhouse (the "Millhouses") appealed the DECISION of the City of Kenai Planning and Zoning Commission ("Commission") denying a Variance Permit (PZ2024-18) and a Conditional Use Permit (PZ2024-19) for the Millhouses to operate a Marijuana Retail Store, located at 11888 Kenai Spur Highway, #3, Kenai, Alaska. For the reasons set forth below, the Millhouses' Appeal for a Variance Permit and a Conditional Use Permit is DENIED by the Board of Adjustment.

II. PROCEDURAL HISTORY

On February 28, 2024, the City of Kenai Planning Department received an application from Sandra Millhouse dba Canna Get Happy requesting a Conditional Use Permit to operate a Marijuana Retail Store at 11888 Kenai Spur Highway, #3, Kenai, Alaska. [R. 51-59] Pursuant to KMC 14.20.330-Standards for Commercial Marijuana Establishments, a Conditional Use Permit is required for all Commercial Marijuana Establishments in the City.

On May 21, 2024, attorney Richard R. Moses with Holmes Weddle & Barcott, PC, submitted an application on behalf of Troy Millhouse for a Variance Permit requesting an adjustment to the buffer requirement to allow a Marijuana Retail Store to exist within 500 feet from ball field(s) that may potentially qualify as a “recreation or youth center” in KMC 14.20.320. [R. 63-72]

On August 14, 2024, the Commission held a public hearing on the Variance Permit. [Minutes R. 75-79] At that public hearing, the Interim Planning Director provided an overview of the Staff Report included in the packet and attached to PZ2024-18 recommending the Commission deny the application for a Variance Permit due to not meeting the criteria for issuance of a Variance Permit as set forth in Kenai Municipal Code Section 14.20.180(c). [R. 39-50] At the public hearing five members of the public spoke in opposition to the Millhouses' application stating: she had been denied a conditional use permit to operate a marijuana store in the same location; tournaments held on the nearby fields were large family events and a marijuana establishment should not be close to the fields; property should have been put in escrow subject to receiving all necessary permits; results of a neighborhood poll conducted on the subject showed that the majority of respondents were not in favor and expressed concerns about drugs, homelessness, traffic, ATV use and child safety in the neighborhood; there was no reason to deviate from established system, after providing a history of the City's development of marijuana laws through community, City and State involvement. [R. 76] Richard Moses, representing the applicant, spoke in support of the Millhouses' application, stating that this was an issue of fairness, and a previous City employee had provided assurances that the applicant was compliant with code. Sandra Millhouse spoke in support of the application, stating she was unaware that a marijuana retail CUP had previously been denied when she purchased and renovated the property; she lived near the marijuana store she operated in Wasilla and did not experience public trespassing; and

the previous Planning Director told her she had measured wrong. [R. 77] After the public hearing period was closed, one Commissioner stated that he had not observed homelessness issues related to marijuana properties, and the City has code in place for handling these issues. Another Commissioner stated that she agreed with the staff's findings and did not support a variance from the established marijuana laws. [R. 77] The six Commissioners present unanimously voted to approve Resolution PZ2024-18 which denied the Variance Permit. [R. 77]

At the same meeting on August 14, 2024, the Commission held a public hearing on the Conditional Use Permit. [Minutes R. 75-79] At that public hearing, the Interim Planning Director provided an overview of the Staff Report included in the packet and attached to PZ2024-19 recommending the Commission deny the application for a Conditional Use Permit ("CUP") due to not meeting the criteria for issuance of a CUP. [R. 39-50] Richard Moses, representing the applicant, stated that he was available for questions. At the public hearing three members of the public spoke in opposition to the Millhouses' application stating: the need for due diligence and abiding by the rules as well as a history of the previous tenants and owners of the property; concerns about increased traffic and drug activity and previous issues with other businesses near the property; concern about drug use among the homeless and in her neighborhood, there was no written evidence of what the previous Planning Director told the applicant and the neighborhood was not in support of the proposed business. [R. 77] After the public hearing period was closed, it was moved and seconded to amend Criteria 5 to read as follows:

Given the preceding Variance Permit application not meeting required criteria (PZ2024-18), staff believes that pursuant to KMC 14.20.330(f)(2) the findings cannot be made and that the proposed retail marijuana store consisting of approximately 1,600 square feet would [not] be harmful to the public safety, health, or welfare. [R. 77]

The six Commissioners present unanimously voted to approve Resolution PZ2024-19 which denied the CUP. [R. 77]

The Millhouses timely appealed the Decision of the Commission to the Board Adjustment (the "Board"). [R. 18] The Board scheduled a hearing for the Appeal on October 15, 2025. [R. 25] The record before the Commission was submitted for the Board's consideration. [R. 37-185]

On October 15, 2024, Board Members Henry Knackstedt (Chair), Victoria Askin, Phil Daniel, Alex Douthit and Deborah Sounart were present for the hearing. Both the Appellant and Appellee agreed that the two issues on appeal could be consolidated into one presentation, with rebuttal and closing argument, allowing time for two separate staff reports. At the hearing, public comment was allowed and one member of the public addressed the Board of Adjustment in support of the Planning and Zoning Commission's denial of the Variance Permit and denial of the Conditional Use Permit, noting concerns about the proposed development near a neighborhood; the proximity to the Little League field and the Boys and Girls Club; safety impacts from increased ATV activity during the Dipnet fishery; and the presence of homeless individuals. She summarized that the Planning and Zoning Commission denied the proposals after careful consideration and asked the Board of Adjustment to uphold that decision. The Interim Planning Director summarized the Staff Report included on page 39 of the certified record. Attorney Richard Moses, representing the Millhouses, called Sandra Millhouse to testify and answer questions from the Board of Adjustment members. Attorney Moses also called James W. Browning, Ms. Millhouse's business partner, to testify and answer questions from the Board of Adjustment members. Attorney Moses represented Troy Millhouse during the Appellant Rebuttal and Closing. City Attorney Scott Bloom,

representing the City of Kenai Planning & Zoning Commission, provided testimony as well as the Appellee Rebuttal and Closing. The Interim Planning Director responded to questions during both the Appellant and Appellee Rebuttals.

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, 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 Variance Permit and a Conditional Use Permit have been met and grant or deny the Variance Permit and Conditional Use Permit on the conditions supported by the substantial evidence before it.⁴ Substantial evidence is such relevant evidence as a reasonable 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 LAW⁷

ISSUES RAISED BY APPELLANT AT APPEAL HEARING

There are two issues in this Appeal. They are (1.) whether the Planning Commission

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.

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 An application for a CUP had already been submitted to the City by a different applicant and the Board of Adjustment denied that application in 2016. In its Decision on Appeal the Board stated the reasons for denial. That Decision on Appeal is referenced herein as if fully incorporated in this Decision on Appeal. [174-182].

erred in denying a Variance Permit and (2.) whether the Planning Commission erred in denying the CUP. Regarding the variance, the first issue raised by the Appellants is whether the Planning Commission erred in denying the application for a variance. The Appellants submitted a variance permit application seeking relief from KMC 14.20.330(f), requesting the buffer distance be adjusted such that the proposed marijuana retail store be considered. For the Planning Commission to consider approving this variance application it must find that all the conditions have been met pursuant to KMC 14.20.180(c).

There are a total of five criteria and all five must be met. The Planning Director's Staff Report review of all five criteria determined that the first three criteria have not been met and that the fourth and fifth criteria have been met.⁸

First, the Planning Director's Staff Report found that criteria one was not met because it found that there were no special conditions or circumstances which are not applicable to other lands or structures in the zoning district. Appellants stated in their application that they would not have purchased the building had they not been assured that the property appeared to be outside the 500 foot buffer zone at issue.⁹

Second, criteria two considers whether any special conditions or circumstances were not caused by the applicants and that they do not merely constitute pecuniary hardship of inconvenience and cannot be caused by the actions of the applicant. The Planning Director's Staff Report points out that there are many other uses for the building within the zoning district. The Staff Report found "...that the requested variance is intended to redress a pecuniary hardship or inconvenience caused by actions of the Applicant." [R. 41] Appellants again raise

⁸ [R 39-43].

⁹ This issue, whether there was reasonable reliance will be addressed in the CUP section.

the reliance on the former Planning Director and that there is precedence in that the Board has granted a variance to another Commercial Marijuana Establishment (CME) applicant to operate withing 250 feet of a recreation or youth center.¹⁰

Third, criteria three reviews whether the variance would be for a use that is not in the permitted principal use in the zoning district. The Planning Director's Staff Report states that because KMC 14.22.010 (Land Use Table) shows that a CME is not a permitted principal use in that zoning district without a CUP the request for a variance does not meet this criteria.

Finally, the Planning Director's Staff Report did conclude that criteria four and five were met. However, the applicant must meet all the listed criteria for the variance permit. Appellants again raised the issue of there being precedent.¹¹

The Planning Director's Staff Report recommended that the application requesting buffer zone adjustments be denied because it does not meet the criteria for issuing a variance permit as set forth in KMC 14.20.180(c). During the Appeal Hearing Interim Planning Director McElrea presented the same findings to the Board. Interestingly, neither the City Attorney nor the Appellants' Attorney spent much time on this issue of a variance permit being denied by the Planning Commission.

The Appellants raise three issues on appeal regarding the Conditional Use Permit. The first issue is one of fairness because Ms. Millhouse allegedly relied upon advice from the former Planning Director that the property appeared to be outside of the 500 foot buffer zone at issue. The Appellants also argue that the Board has in the past granted CUPs to applicants where the measurements were later determined to be incorrect. In this regard, Ms. Millhouse

¹⁰ This issue, whether there is precedence will be addressed in the CUP section.

¹¹ This precedence issue will be address in the CUP section.

testified that she believed it was discrimination not to grant her a CUP.

Second, Ms. Millhouse believed that the City Code interpretation of the 500-foot buffer zone around the recreational and youth center is incorrect (i.e. in how the 500-foot buffer zone is measured). Regarding this second issue, the Appellants argue that the measurements are so flawed that they could lead to absurd outcomes.

The following is a review and analysis of the issues raised at the Appeal Hearing regarding the Conditional Use Permit.

THE FAIRNESS AND DISCRIMINATION ISSUES

As sophisticated business owners the Appellants knew that pursuant to the City Code, they would need to be granted a CUP to operate a CME. Ms. Millhouse testified that she had gone through the process in other municipal jurisdictions, and therefore she understood that the only body that is authorized to grant a CUP is the Planning and Zoning Commission. In other words, even if the former Planning Director recommended that the Board grant the CUP, the final decision is ultimately left to the Board.

The former City of Kenai Planning Director submitted a written statement confirming the conversations that she had with Ms. Millhouse. According to Linda Mitchell¹²:

I informed Mrs. Millhouse that it appears that the basic buffering requirement[s] are met but a conditional use is a discretionary permit, meaning there are no guarantees, subject to meeting the criteria for approval. I offered Mrs. Millhouse that when she is ready to submit a Conditional Use Permit application, I can assist with a submittal requirement as outlined in KMC 14.20.330(b) for an area map since it is a very specific map and generally requires assistance/guidance from staff.

The former Planning Director also submitted a follow-up email explaining that:

¹² [R. 81].

“I offered to provide a map with the measurements when she was ready or preparing a CUP application. I did not tell her that I would confirm the measurements and get back to her.”¹³

Accordingly, the Board finds that it was not reasonable for the Appellants as sophisticated buyers to assume the conversations with the former Planning Director Mitchell insinuated approval by the Planning Commission.

Moreover, during the Appeal Hearing Ms. Millhouse testified that they were having trouble getting information from the building sellers and was forced to hire a real estate agent to assist. In the end, Ms. Millhouse testified that they decided not to use the real estate agent and decided to pay cash for the building without a Purchase and Sale Agreement. A simple Purchase and Sale Agreement could have included a contingency that if the CUP was not granted then the Appellants could easily back out of the deal.

Finally, case law supports the approach used by the Utah Supreme Court.¹⁴ In *Jackson v. Kenai Peninsula Borough*,¹⁵ our Court wrote:

We agree with this approach. A business person in Alaska must bear a number of administrative burdens. He or she must obtain a business license, file and pay appropriate taxes, and obey all relevant laws. The burden of locating a business in an appropriately zoned site must fall on the business person.¹⁶

As for the fairness and discrimination issues, the Board finds no merit in Appellants’ argument that the BOA should grant the CUP based upon S. Millhouse’s conversation with the

¹³ [R. 83].

¹⁴ *Utah County v. Young*, 615 P.2nd 1265 (Utah 1980). (In this Utah case “...the Utah Court chose to place on the defendant the burden of determining whether a zoning ordinance applied to him in the absence of an affirmative assertion by the zoning authority that it did not. The issuance of a building permit, even though the issuer actually knew of the intended commercial use, was not sufficient to shift to the zoning official the duty of communicating permitted uses.” *Jackson*, 733 P.2nd 1038, 1042 (Alaska 1987).

¹⁵ 733 P.2nd 1038 (Alaska 1987).

¹⁶ *Id.* at 1042.

former Planning Director.¹⁷ As for the discrimination issue, the City is mandated to enforce its City Code. The fact that the BOA may have granted a CUP to other applicants based on incorrect measurements does not mean that the BOA is obligated to grant a CUP to the Appellants when it is clear to the BOA that the CUP application before the BOA does not meet all the criteria required by City Code. In fact, if the BOA granted the Appellants a CUP it would be violating its own Code and would result in an arbitrary and potentially discriminatory decision.

THE 500 FOOT BUFFER ZONE ISSUE

The Appellants assert that the interpretation of the 500-foot buffer zone is wrong and could cause absurd results. During the Appeal Hearing, the City Attorney explained that the Board had previously taken up an application for a CME back in 2016 on the very same building and determined that CME buffer requirement was not met.¹⁸ In its 2016 Decision on Appeal the Board made the following statement regarding the location of the Appellants building and the location of the Recreation of Youth Center:

The Board finds that the issue related to the buffer distances for both parcels containing ball fields turns on the meaning of “outer boundary” with regard to its use in KMC 23.20.330(f). If the “outer boundary” means to the edge of the ball fields themselves then the Isaacs’¹⁹ proposed business would be within the allowable buffer distance, however if “outer boundary” means the closest edge of the parcel on which the ball fields are on, then the proposed use violates the 500 foot buffer requirements. The Board finds that the City Planner’s measurements using the GIS system were sufficient given the circumstances. The Board concludes that the discussion of buffer distances by the City Council and City Staff at the January 20, 2016, Council meeting, at which the relevant code section on buffers was enacted, clearly shows that it was the intent of the City Council that “outer boundary” was intended to mean the outer edge or

¹⁷ The Board specifically finds that it was unreasonable for Appellants to rely on the conversation and that the Appellant’s should have used a Purchase and Sale Agreement with the CUP contingency before closing on the sale of the building.

¹⁸ [R. 174-183].

¹⁹ The Isaacs’ were the applicants for a CUP on the same building in 2016 where the Board denied the CUP due to the buffer zone requirement.

boundary of the parcel on which the use buffered from is located. This conclusion leads to the finding that the proposed business is located within 500 feet of the outer boundary of two parcels containing ball fields and does not meet the buffer requirements in KMC 14.20.330(f). Because the buffer requirements were established by the City Council as provided in Ordinance No. 2870-2016, out of a concern for public health, safety and welfare, the Board finds that the fifth element required in KMC 14.20.150(d) for granting a Conditional Use Permit, that the proposed use will not be harmful to the public safety, health or welfare, cannot be met.²⁰

Moreover, regarding the interpretation used by the City of Kenai, according to 3 AAC 306.010 titled License restrictions, the State of Alaska uses the exact same 500-foot buffer interpretation:

3 AAC 306.010 License restrictions

(a) The board will not issue a new marijuana establishment license, or approve an application for the transfer of a license to another location, if the licensed premises will be located with 500 feet of a school ground, a recreation or youth center, a building in which religious services are regularly conducted, of a correctional facility. The distance specified in this subsection must be measured by the shortest pedestrian route from the public entrance of the building in which the licensed remise would be located to the outer boundaries of the school ground, the outer boundaries of the recreation or youth center, the main public entrance of the building in which religious service are regularly conducted, or the main public entrance of the correctional facility.²¹

V. CONCLUSION

The City Code requires that all five criteria listed in KMC 14.20.180 must be met for a

²⁰ [R. 189-181].

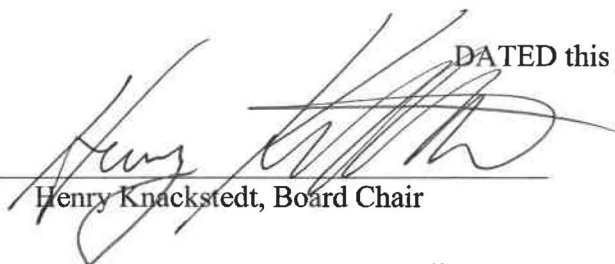
²¹ 3 AAC 306.010.

variance permit to be granted. According to the Planning Director's Staff Report this requirement was not met and therefore the application for a Variance Permit should not be granted. Accordingly, the Board finds that based on the Planning Director's Staff Report and the evidence at the Appeal Hearing, the Variance Permit applied for is DENIED.

City Code also requires that the CME's be located as 500 feet or greater from the outer boundary of Recreation or Youth Centers. The Board finds that the location of the Appellant's proposed CME is within 500 feet of two City parcels that contain ball fields, or athletic playing fields, which by definition are Recreation or Youth Center. Because the Board finds that the proposed location of the Appellant's business does not meet the buffer requirements of the City Code, the Conditional Use Permit applied for is Denied and the decision of the Planning and Zoning Commission is UPHELD.

DATED this 13th day of November, 2024

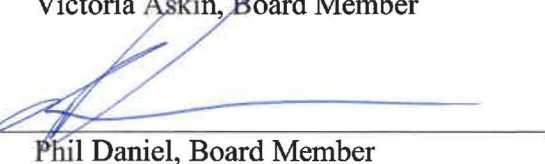
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BY:


Victoria Askin, Board Member

BY:


Phil Daniel, Board Member

BY:


Alex Douthit, Board Member

BY:


Deborah Sounart, 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 the 13th day of November 2024, a copy of this DECISION ON APPEAL was distributed by Email, First Class Mail to each of the following:

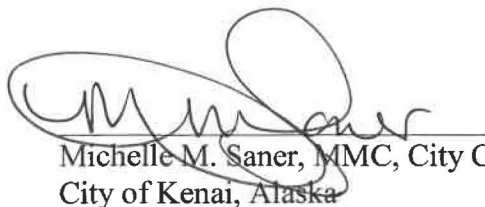
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