

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

**IN THE MATTER OF THE APPEAL
OF DENNIS BARNARD ET AL:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
APPROVING A CONDITIONAL USE
PERMIT FOR A GUIDE SERVICE AT
345 DOLCHOK LANE**

Case No. BA-21-01

DECISION ON APPEAL

I. INTRODUCTION

Dennis Barnard, joined by a group of residents living in the Dolchok and surrounding neighborhood appealed the DECISION of the City of Kenai Planning and Zoning Commission (“Commission”) approving a Conditional Use Permit for Dean Schlehofer to operate a Guide Service, located at 345 Dolchok Lane, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment REVERSES the DECISION of the Planning and Zoning Commission granting the Conditional Use Permit, thereby DENYING the Conditional Use Permit.

II. PROCEDURAL HISTORY

On April 15, 2021, the City of Kenai (City) received an application from Dean Schlehofer requesting a Conditional Use Permit to operate a lodge and guiding service at 345 Dolchok Lane. [R.33-38] The site is located in an area zoned Rural Residential (RR). [R. 19] Pursuant to KMC 14.22- Land Use Table, Guide Services and Lodging require a conditional use permit in the RR zone. The application was treated by the Planning Department as an application for two separate conditional uses, one for a guide service and one for lodging. [R. 25-32] This decision only addresses the guide service. A guide service is defined by KMC 14.20.320(b) as “any activity on any premises used for collecting or returning persons from recreational trips when remuneration is provided for the service.”

On May 12, 2021, the Commission held a public hearing on Resolution No. PZ2021-16, a resolution granting the Conditional Use Permit for a guide service. [R25-28.] At the public hearing, during the public comment time, Evelyn Dolchok Huff explained she was opposed to the conditional use permit because the area had always been a single-family neighborhood and she was concerned about the impact the conditional use could have on property values, neighborhood safety, increased traffic, and noise. [R. 103] Rick Baldwin opposed the conditional use permit, arguing that the proposed use was not compatible with the character of the neighborhood and that the Commission should consider the covenants prohibiting businesses in the neighborhood in its assessment of the neighborhood's character. [R.103] Jerry Huff also expressed concern that the use would affect the character of the neighborhood. [R.103]. Mylee Niederhauser expressed concerns about noise and trespass issues with guests. [R.104] Charlotte Coots explained it was a family-oriented neighborhood and some family activities would not be possible with the increased traffic and safety concerns. [R.104] She also asserted that the neighborhood covenants should be followed. [R.104] Elaine Larson also spoke about the family-centered character of the neighborhood and that the use would violate this, decrease their property values and set a precedent for change in the neighborhood. [R.104] Phil Daniel questioned whether the applicant met his burden of showing that property values would not be affected and noted that residents did not want to see the character of the neighborhood change. [R. 104] Mark Larson similarly indicated the use would set a precedent for change to the neighborhood. [R.104] Ron Rogalsky spoke against the use, along with Duane Myers and Amber Every, expressing concern for safety, noise, loss of privacy, and impacts to surrounding property values. [R.104] Barbara Baldwin read a letter of opposition into the record that was signed by over forty people in the neighborhood. [R.104] There were also numerous written documents submitted opposing the conditional use. [R.74-97] Duane Myers spoke in favor of Mr. Schlehofer, noting his integrity and success as a guide. [R.104] Mr. Schlehofer testified that he researched the neighborhood before moving in and had concern for his neighbors and explained how he intended to manage the business. [R. 104]

The City Planner presented a Staff Report recommending the Commission approve the application for a Conditional Use Permit. [R.19-24] After the close of the hearing the commission voted to approve Resolution PZ2021-16 with specific conditions as provided in the Resolution. The Commission made no additional findings. [R. 105]

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 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 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

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).

- (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 that Mr. Schlehofer previously operated a guide service and lodge at another location outside the City, but recently purchased the subject property with the intent of relocating his business. Mr. Schlehofer's application for the conditional use permit states that he operates his fishing and lodging business between May and September/ October. He anticipates his clients will check in around 6 p.m. and leave in the early mornings for fishing between 5 and 8 a.m. He anticipates between four and five clients per night, with a maximum of eight. He stated that clients will only be at the property in the mornings, evenings and night, otherwise they will be out fishing. He provided that the property is almost two acres in size and is nearly completely screened from adjacent parcels by natural vegetation and a fence on one side. He anticipates that his clients will only need one to three vehicle parking spaces.

He has proposed rules for his clients that include quiet hours after 10 p.m. and restrictions on roaming the property, asking his clients to respect the neighbors. He states that he and his family along with a helper will be staying at the property most of the time. The lodge will provide a continental breakfast, but otherwise clients are expected to do their own cooking in a common kitchen area. With respect to the guide business alone, Mr. Schlehofer explained that he would meet his clients off the property for daily fishing activities. He intends to keep two boats on the property. One drift boat and one power boat. He also has a trailer on the property used to house a deckhand.

Mr. Schlehofer's indicates that denial of a Conditional Use Permit will cause him economic harm and that he has already spent significant funds to accommodate the property for guests and guide business. He argues that the opinion of neighbor's who testified against him has been unfairly biased because of their experience with lodges and guide services on nearby Angler Drive. Mr. Schlehofer argues that he will run a different type of operation than those complained about on Angler Drive.

⁷ KMC 14.20.150(d)(1-6).

The Appeal from Mr. Barnard *et. al.* requesting the Board of Adjustment overturn the Planning and Zoning Commission's grant of the Conditional Use Permit for a guide service argues that the Appellants purchased their homes on Dolchok in an area zoned Rural Residential with an expectation of a stable and attractive residential environment. Mr. Barnard *et. al.* states that there are no other commercial uses of property in the neighborhood. Mr. Barnard *et. al.* argues that granting a conditional use for a guide service will destabilize the neighborhood and violate its residential character. The Appellants explained that the neighborhood is one where children play in the streets and most people sleep past 5 a.m. which is not compatible with a guide service starting that early, hooking up boats and trailers along with associated noise. The Appellants provided that many people in the neighborhood sleep with their windows open during the summer. They argue that guided clients would increase traffic and noise and treat the neighborhood differently than residents. The Appellants testimony and evidence described a close knit neighborhood environment with long time family residents, neat homes and yards with residents using Dolchok Lane for various recreational activities such as walking and children riding bikes.

Mr. Barnard *et. al.* argues that the value of the lots for residential purposes would be diminished along with the quality of life by the operation of a guide service in the neighborhood. The Appellants also argue that if this conditional use is granted, there is nothing to stop other conditional uses from being granted in the neighborhood which would eventually lead to the disintegration of the residential neighborhood as has occurred in other neighborhoods around the City.

Preliminarily, the Board of Adjustment notes its decision accounts for the burden on Mr. Schlehofer to show that the conditions for granting a conditional use permit are met. Further, the majority of the neighborhood expressed opposition to the granting of the conditional use, which while not conclusive does hold evidentiary weight in the Board's decision. Mr. Schlehofer must show that all six of the criteria for granting a conditional use are met, which in this case he has not done.

A. Mr. Schlehofer Did Not Meet His Burden to Show that the Use of the Property as a Guide Service is Consistent with the Purpose of the Zoning Code and Purposes and Intent of the Zoning District.

Mr. Schlehofer did not show through evidence or testimony that the use of his property as a guide service would be consistent with the zoning code and purpose of the Rural Residential Zone. While 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, a guide service is not consistent with the specific aspects of the rural residential neighborhood. The purpose and intent of the Rural Residential Zone is:

(a) *Intent.* The RR Zone is intended to provide for low density residential development in outlying and rural areas in a form which creates a stable and attractive residential environment. The specific intent in establishing this zone is:

- (1) To separate residential structures to an extent which will:
 - (A) Preserve the rural, open quality of the environment;
 - (B) Prevent health hazards in areas not served by public water and sewer.
- (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 proposed guide service is not compatible with the stable and attractive residential environment of Dolchok Lane and would violate the residential character of the neighborhood. The Appellants began their presentation to the Board with a video of the neighborhood, clearly showing its residential character, along with the families that lived in the neighborhood. The video showed that many of the residents had lived in the neighborhood for a long time, indicating a very stable environment. The video along with testimony described a relatively quiet, close knit, multi-generational neighborhood, where children played in the street, residents walked along the street and the neighbors generally knew each other. The neighborhood appears to be exclusively single family residences and there is not public river access even though many of the properties have private access to Beaver Creek.

The Appellants provided testimony of covenants for the neighborhood (found in the record at [R.94-97]) that prohibited commercial businesses and indicated that they relied on these covenants in choosing to locate in the neighborhood. While the covenants are not determinative in the Board's decision as the City does not enforce private covenants, coupled with the testimony of residents of their reliance on the covenants, the covenants are evidence that the neighbors expect

⁸ KMC 14.20.080

the neighborhood to be residential and free of commercial activity. Testimony indicated that there were not any current commercial uses on Dolchok Lane.

The Appellants also presented evidence comparing and contrasting the Dolchok Neighborhood with a nearby neighborhood that had many conditional use permits operating. The Appellants testified as to the loss or destabilization of the residential character of the nearby neighborhood because of the operation of commercial uses, including guide businesses compared to their neighborhood that retained its residential character and the benefits of that character that they enjoyed.

The Appellants argued that a guide business that began operations very early in the morning, with boats being loaded and guides and clients entering and exiting vehicles would be disruptive to the residential character of the neighborhood. Mr. Barnard provided that he lived adjacent to Mr. Schlehofer's property and that the early morning activities of moving boats had already disturbed his sleep. Other residents testified that they would no longer feel comfortable letting their kids play in the streets with a guide entering and exiting the road towing boats.

Mr. Schlehofer argued that his intention was to run a small operation that would not be disruptive to the other residents. He pointed out that his location is close to the exit of the neighborhood. He testified that he only had one power boat and one drift boat at the location. He noted that many of the current residents also had boats and participated in fishing activities. He argued that his activities would not be any more disruptive to the residents than their own current activities and that other residents got up early and left the neighborhood. Mr. Schlehofer testified that his intent was to meet his client's offsite for the guide service and that traffic would be minimal.

Mr. Schlehofer also provided that had been in the guide business for a long time and was well respected in the industry. He stated that he had been told by his realtor and the previous home owner that the property was suitable for a guide business and other business opportunities. Mr. Schlehofer's history as a guide and his interactions with private third parties are not persuasive to the findings of the Board.

The Board finds that the substantial evidence does shows that even though Mr. Schlehofer intends to run a small operation and meet clients offsite, the commercial use would violate the residential character of the neighborhood and jeopardize the stable and attractive residential environment. While other residents in the neighborhood may also participate in fishing activities

or have other reasons for leaving their houses early in the morning and throughout the day, Mr. Schlehofer's residential use of the property coupled with his commercial comings and goings as a guide service, and housing of a deckhand, presents a more consistent activity would likely have an impact on the neighborhood. His neighbors testified that their residential uses have already been disrupted by the guide activities. The neighbors testified that their expectations were for a residential neighborhood without any commercial uses and desired it to stay that way. The Appellants showed the impacts of conditional uses in a nearby neighborhood that had caused the loss of its residential character. As stated above, the purpose of the RR zone is to create a stable and attractive residential environment, and in this case, in this close knit, quiet neighborhood, with numerous long time residents, without any current commercial uses, the guide use as presented by Schlehofer would likely violate the residential character of this particular neighborhood and cause destabilization. This would be the first permitted commercial use in the neighborhood, and while this decision is just based on this use, the Board does note that in other neighborhoods the intrusion of numerous commercial uses has been shown by the Appellants to have caused significant change.

B. Mr. Schlehofer Did Not Meet his Burden to Show that the 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 value of adjoining property would not be significantly impaired by the use. In this case Mr. Schlehofer argued that the values of adjoining property would not be impaired. He argued that there were sufficient natural and fencing buffers surrounding his property to minimize impact and that he had made improvements to the home he purchased. The Appellants, on the other hand argued that their property would be significantly impaired. They testified that new buyers would be concerned about living in a residential neighborhood with existing commercial uses, compared to the current neighborhood without any commercial uses. The Appellants argued that this criteria was also not specifically limited to monetary values but that other aspects of the value of their property and the neighborhood would be significantly impaired, namely their use and enjoyment of their property and the neighborhood.

Neither party presented appraisal or assessment data, nor opinions from a realtor indicating one way or another how property values could be affected by commercial uses in a residential neighborhood. While the staff report by the City Planner also indicates adjoining property values

would not be affected, this conclusion is also not supported by satisfactory evidence. The Board finds that given the arguments by both parties, Mr. Schlehofer has not shown by substantial evidence that the value of adjoining property or the neighborhood would not be significantly impaired. To the contrary, the board finds that in this particular neighborhood, a commercial use in violation of the existing covenants, could make property in the neighborhood less attractive to potential buyers.

C. Mr. Schlehofer Did Not Show that a Guide Service in the Neighborhood Would Be in Harmony with the Comprehensive Plan.

Mr. Shlehofer did not present evidence to the Board or Commission related to the proposed use being in harmony with the City's Comprehensive Plan. In Mr. Schlehofer's application for a conditional use permit, where asked to explain how the use was consistent with the Comprehensive Plan, he only provided that there would be house rules to ensure the safety and harmony of all guests. The City Planner did note that one of the goals of the Comprehensive Plan is to promote economic development and support the fiscal health of the City. However, the Appellants testified that one of the other goals of the Comprehensive Plan is to promote and encourage quality of life in the City, including an objective to protect and rejuvenate the livability of existing neighborhoods and site compatible uses together. The Board finds that these goals are not mutually exclusive, however Goal 1 of the Plan, promoting and encouraging quality of life, is more applicable, especially in light of one of the objectives of the goal in protecting livability of existing neighborhoods. While Mr. Schlehofer has argued that his proposed guide use would have little to no impact on the neighborhood, numerous residents testified about the benefits of living in the residential neighborhood without any commercial uses. There was testimony about residents enjoyment of the neighborhood's private and public property attributes. The Appellants testified about the current privacy in the neighborhood, quietness, and use of the residential street by children and how these attributes contributed to their quality of life. A commercial use in this environment does not necessarily meet, nor is it in harmony with the objective in the Plan to protect the livability of neighborhoods. While economic development is certainly a goal of the Comprehensive Plan, it is less specific or applicable to this residential neighborhood. The proposed use is permitted in other zones in the City where it could be located to promote economic development. The Board also finds that locating a guide service in this neighborhood is

inconsistent with Goal 3 of the Comprehensive Plan which is to implement a forward looking approach to community growth.

The Board finds the argument by the Appellants more persuasive, that the Comprehensive Plan is intended to promote and encourage quality of life and protect the livability of neighborhoods through long term planning strategies, which is not served by allowing a guide service in this particular residential neighborhood. Mr. Schlehofer has not met his burden of showing by substantial evidence that the guide service on Dolchok Lane would be in harmony with the Comprehensive Plan.

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 guide service. The property is adjacent to a paved road maintained by the City. There is adequate police and fire response available, utilities are available and the property is large enough for onsite private water and sewer.

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. Mr. Schlehofer's description of his proposed operations do not give rise of concern for public safety, health or welfare. While the Appellants have raised safety concerns regarding risk to their children from vehicles related to the business towing boats and entering and exiting the roadway, as well as the suggestion of the influx of unknown clients of the business wandering off property, these concerns are not sufficient to show the use would be harmful to the public safety, health or welfare.

F. There are not 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 Guide Service.

This final criteria allows for the imposition of additional limitations or safeguards to be required in the operation of the proposed conditional use to ensure it meets the other five criteria

for granting a conditional use. Mr. Schlehofer testified and provided evidence that he would impose certain rules for his clients to restrict their impact on the neighborhood, such as quiet hours and restrictions on leaving his property. He also described his operation being small and utilizes few independent contractors that would be coming to the neighborhood, including meeting his clients offsite. He explained that he only would keep two boats on the property, and that his operation was seasonal.

The Board considered additional criteria that could be imposed to limit the impact of the commercial use on the neighborhood. However, ultimately the Board concludes that there are no reasonable limitations that can be placed on the operation that would allow the use without impacting the stable attractive and residential environment and character of the Dolchok Neighborhood. Further, considered limitations on guide service could not ensure there would not be significant affect on the values of adjacent property or the neighborhood given the evidence presented. Finally, these considered limitations would not bring the use into harmony with the City's Comprehensive Plan which strives to promote quality of life and livability and protect existing neighborhoods.


CONCLUSION

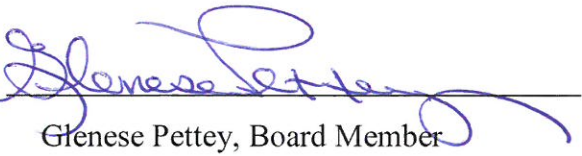
After reviewing the evidence and presentation of the parties, the Board of Adjustment REVERSES the decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and denies Dean Schlehofer's application for a Conditional Use Permit to operate a guide business at 345 Dolchok Lane. The Board concludes that Mr. Schlehofer did not present sufficient information showing that his proposed guide business would satisfy all six of the criteria required for granting a conditional use permit.

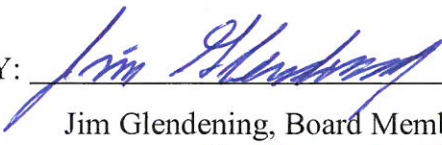
DATED this 19 day of August, 2021.

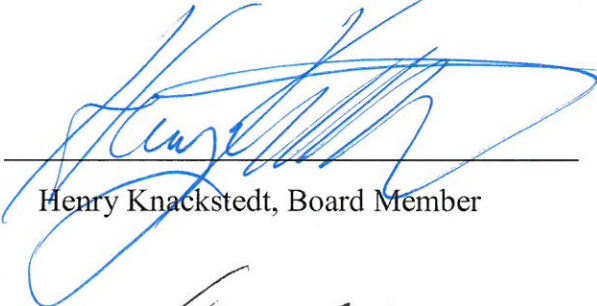
BY: B. G. Gabriel

Brian G. Gabriel, Board Chair

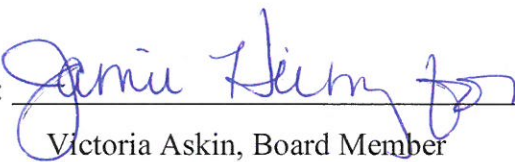
BY: 
Bob Molloy, Board Member

BY: 
Glenese Pettey, Board Member

BY: 
Jim Glendening, Board Member

BY: 
Henry Knackstedt, Board Member

BY:  for
Teea Winger, Board Member

BY:  for
Victoria Askin, 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).

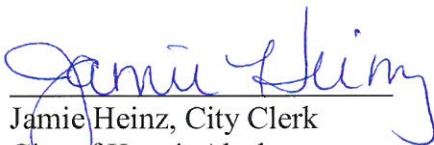
CERTIFICATE OF DISTRIBUTION

I certify that on ^{the} 19th day of August, 2021, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

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Jamie Heinz, City Clerk
City of Kenai, Alaska