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

IN THE MATTER OF THE APPEAL OF JULIE KIM GARRETSON REGARDING DENIAL OF PZ15-26, A CONDITIONAL USE PERMIT FOR THE PURPOSE OF AN EMOTIONAL SUPPORT ANIMAL (HORSE) ON A PARCEL OF LESS THAN 40,000 SQUARE FEET

Case No. BA-15-01

DECISION ON APPEAL

I. INTRODUCTION

Julie Kim Garretson has appealed a decision by the City of Kenai ("City" or "Kenai") Planning and Zoning Commission ("Commission") denying her application for a conditional use permit to allow her to keep and maintain an emotional support horse on the property located at 1107 4th Avenue, Kenai, Alaska 99611 (the "Property"). For the reasons set forth herein, Ms. Garretson's appeal is GRANTED.

II. PROCEDURAL HISTORY

Ms. Garretson owns the subject Property, which is legally described as Lot 1, Block 1, McCann Subdivision. [R. 21, 38] The Property is situated within the City's Suburban Residential District ("RS"). [R. 30] On August 24, 2015, Ms. Garretson submitted an application for a conditional use permit to the City planning department, which sought approval of her plan to keep and maintain a horse on the Property. [R. 38-40] Both in the application, and in an attached letter, Ms. Garretson explained that the horse served as an emotional support animal for her daughter, Cristal Barton, described

by Ms. Garretson as a "Disabled Adult" who resides with her on the Property. [R. 38, 41] Ms. Garretson's application indicated that her application should be granted not only because her proposed use met each of the criteria required for such permits under the City's zoning scheme, but also because the use constituted a reasonable accommodation required by the federal Fair Housing Act ("FHA").[1] [R. 38-41] Ms. Garretson's application included copies of a certificate and badge issued by Register My Service Animal, LLC, which purported to show that Major had been registered as an emotional support animal. [R. 42-44]

On August 26, 2015, City Planner Matt Kelley prepared a staff report ("Report") to the Commission regarding Ms. Garretson's application. [R. 21-55] The report explained that the Kenai Municipal Code ("KMC" or "City Code") generally provides that horses may be kept on lots within the zoning district in which the Property is situated that are 40,000 square feet or greater in size, but that the Property is "approximately 29,982 square feet less than" the 40,000-square-foot minimum requirement. [R. 21-22]

Nonetheless, the Report recommended that the Commission grant the application subject to several conditions, which it concluded would make Ms. Garretson's proposed use consistent with the requirements of the City Code. [R. 23-28] The City Planner's Report stated that the FHA required the City to make reasonable accommodations to its zoning ordinances to permit handicapped adults to keep emotional support animals at their residences. [R. 73] Mr. Kelley also prepared and submitted Draft Resolution No.

[1] Ms. Garretson's application also stated that her application should be granted as a reasonable accommodation under the Americans with Disabilities Act ("ADA"); however, the Board does not address this point because it finds that this appeal may be resolved by considering the requirements of the City Code and the FHA only.

PZ15-25, which included the findings set forth in his Report, and set forth 10 recommended conditions of approval. [R. 27-32]

The Commission initially considered Ms. Garretson's application at its September 23, 2015 meeting. [R. 2, 73] Several members of the public submitted testimony to the Commission with respect to Ms. Garretson's application. [R. 73-74] As reflected by the minutes for the meeting, the Commission voted to table a final vote as to Ms. Garretson's application until its next regular meeting, so that it could conduct a site inspection of the Property. [R. 74]

The Commission again considered Ms. Garretson's application at its October 14, 2015 meeting. [R. 150-154] As before, several members of the public submitted testimony to the Commission regarding Ms. Garretson's application. [R. 138-147, 151] In addition, the City Planner, City Attorney, and Chief Animal Control Officer made presentations regarding the application, and each recommended that the Commission adopt an amended version of Draft Resolution PZ15-26, which included an additional condition proposed by Mr. Kelley. [R. 68; 150-154] Both the City Planner and the City Attorney advised the Commission that the FHA requires municipalities to make reasonable accommodations to zoning ordinances in order to permit disabled adults to keep emotional support animals at their residences. [R. 151-152]

The Commission ultimately voted to deny Ms. Garretson's application. [R. 154] Although the Commission did not issue written findings to support its decision, the commissioners' reasoning is apparent from the meeting minutes, and may therefore be made subject to the Board's meaningful review. The two commissioners who voted to approve Ms. Garretson's application cited the information submitted by the City's Chief

Animal Control Officer, Ms. Barton's physician, and Major's veterinarian. [R. 153] The commissioners who voted to deny the application citied various reasons, including lingering concerns regarding the applicability of the FHA to the specific circumstances, the need for clarification regarding emotional support animals and what may constitute a "reasonable accommodation" under the FHA, the size of the Property, the applicant's past history of noncompliance, and the potential effect that the presence of a horse might have upon neighboring properties, including the possibility of adverse odors, aesthetics, and diminished property values. [R. 153-154] One member cited a perceived incongruity between the proposed use and the City's comprehensive plan. [R. 154]

Ms. Garretson timely appealed the Commission's decision to the City Board of Adjustment, and asked that it reverse the Commission's decision. [R. 159] The Board scheduled a hearing regarding Ms. Garretson's appeal for December 8, 2015. [R. 161-162] Prior to the hearing, both Ms. Garretson and the City submitted new evidence and argument for the Board's consideration. [R. 173-201] The evening before the hearing, Ms. Garretson, acting through counsel, requested that the Board permit her to supplement her points on appeal, arguing that the Commission's decision was invalid due to a member's failure to disclose a substantial financial interest in the matter of Ms. Garretson's application. [Tr. 11:11-17:16]

Board of Adjustment members Pat Porter, Brian Gabriel, Robert Molloy, Henry Knackstedt, and Mike Boyle were present for the hearing.[2] At the hearing, the Board

[2] Mayor Pat Porter, the Chair of the City Board of Adjustment, disclosed at the hearing that, after receiving complaints from community members that there was a horse on the Property that was tied to a tree, she drove by the Property, confirmed that a horse was present upon it, and reported it to the City's Animal Control Department. Mayor Porter explained that she believed that she could participate in the appeal in an unbiased

permitted Ms. Garretson and the City Attorney to submit argument regarding Ms. Garretson's late-filed request. [Tr. 11:9-34:6] However, Ms. Garretson withdrew her request before the Board had an opportunity to render a decision regarding it. [Tr. 34:9-34:24] Consequently, the Board proceeded with the appeal hearing, during which time three members of the general public submitted testimony regarding Ms. Garretson's application. [Tr. 36:15-44:18] Two of these individuals testified in support of the application, [Tr. 36:15-39:7; 43:12-44:17] and one individual opposed it. [Tr. 39:12-43:5] Both Ms. Garretson and the City submitted testimony and oral argument in support of the application. [Tr. 47:13-94:1]

III. STANDARD OF REVIEW

The KMC 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."[3] Thus, the Board reviews appeals from the City Planning & Zoning Commission *de novo*.[4] As a consequence, the Board is not required to defer to the Commission's conclusions, and may instead exercise its independent judgment as to whether a conditional use permit should be granted. Finally, while the testimony of Ms. Garretson's

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manner, but asked that the Vice Chair make a determination as to whether, based upon those facts, her participation in the hearing had the potential for creating an appearance of impropriety, and if so, that she be excused from participation. [Tr. 5:9-8:11] The Vice Chair determined that, although he believed that she was capable of unbiased participation in the appeal hearing, it could potentially create an appearance of bias, and accordingly granted Mayor Porter's request. [10:1-10:12] Consequently, Vice Chair Gabriel assumed the authority and duties of Acting Board Chair. No other Board members reported any conflict of interest, bias or ex parte contact.

[3] *Id.*

[4] KMC 12.20.290(f)(2).

neighbors does hold evidentiary weight, Alaska law prohibits the Board from basing its decision to grant or deny the permit she has requested solely upon whether her neighbors support or oppose a particular outcome.[5]

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Applicable Provisions of the Kenai Municipal Code.

1. KMC 3.10.070 generally provides that individuals may only "keep or maintain livestock within the City" if in accordance with the requirements of that section. The ordinance's definition of "livestock" includes horses.[6] A person's ability to keep or maintain livestock is subject to a number of conditions. Among other things, livestock ordinarily may not be kept on any property that is zoned as RU, RS1, RS2, or TSH, or that is less than "forty thousand (40,000) square feet" in size.[7]

2. The City Code does not absolutely ban the keeping of livestock on those properties that do not meet the requirements of KMC 3.10.070. For example, the Chief Animal Control Officer is vested with authority to issue temporary permits of not more than fourteen days for exhibition or entertainment purposes on lots of less than 40,000 square feet in all zones where livestock are allowed.[8] In addition, the Officer may issue permits of up to two years in all zoning districts other than the RU zone "for the keeping of livestock for educational or youth activities...."[9]

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[5] *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n. 11 (Alaska 1993).
[6] KMC 3.10.070(c).
[7] KMC 3.10.070(b).
[8] KMC 3.10.070(d)(1).
[9] KMC 3.10.070(d)(2).

3. Further, the City Code provides that, "A person seeking relief from the provisions of this section may apply for a conditional use permit under KMC 14.20.150."[10] Thus, although the regulations pertaining to the keeping and maintenance of livestock are not set forth at Title 14 with the rest of the City's zoning ordinances, the Board finds that by fashioning relief that necessitates the application of the City's procedures for regulating land uses, the City intended to incorporate KMC 3.10.070 into its land use scheme.

4. The procedures by which applicants may obtain conditional use permits from the City are set forth at KMC 14.20.150. As the ordinance explains, the City's conditional use permitting process "recognize[s] that there are some uses that may be compatible with designated principal uses in specific zoning districts provided certain conditions are met."[11] It 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."[12]

5. Six criteria must be met before the City may grant an application for a conditional use permit. To that end, the City Code states in pertinent part that:

> Prior to granting a conditional use permit, it shall be established that the use satisfies the following conditions:
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> (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
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> (2) The value of the adjoining property and neighborhood will not be significantly impaired;
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> (3) The proposed use is in harmony with the Comprehensive Plan;
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> (4) Public services and facilities are adequate to serve the

[10] KMC 3.10.070(h).
[11] KMC 14.20.150(a).
[12] *Id.*

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.

6. However, even if the City determines that each of the criteria have been met with respect to an application, it retains complete discretion to deny it. This is made clear by KMC 14.20.150(a), which provides that the City "**may** permit [the requested] use if the conditions and requirements listed in this chapter have been met." Consistent with the Alaska Supreme Court's decision in *South Anchorage Concerned Coaltition, Inc. v. Coffey*, "By its plain language, the ordinance requires that the [City] deny permit applications if it finds that any standard is not met. However, the use of the term 'may approve' indicates that the [City] also has discretion to deny the permit even if it finds that the standards are met."[13]

B. The Federal Fair Housing Act.

7. Among other things, the FHA prohibits the "refus[al] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [persons with handicaps] equal opportunity to use and enjoy a dwelling."[14]

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[13] *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 173 n.13 (Alaska 1993).
[14] 24 C.F.R. § 100.204(a) (2011).

8. This requirement has been made applicable to municipal zoning decisions and practices, and may require a municipality to in certain instances relax specific zoning standards when it would amount to a reasonable accommodation under the FHA.[15]

9. An individual is only entitled to a reasonable accommodation if he or she is "handicapped." A person qualifies as having a "handicap" under the FHA if he or she has: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of having such an impairment; or, (3) been viewed as having such an impairment.[16] Whether a particular person meets this definition is a fact-sensitive inquiry that takes into consideration the totality of the circumstances.[17]

10. The Board finds that the evidence before it establishes that Ms. Barton experiences autism, that it substantially limits one or more of her major life activities, and that she qualifies as "handicapped" under the FHA. Ms. Garretson has submitted documentation from Ms. Barton's physician and counselor clearly demonstrating that she has been diagnosed with and treated for autism, and that it has impacted her ability to engage in one or more life activities, such as communicating with others and caring for herself. [R. 144-145, 175-180] No person has asserted, and no evidence supports any conclusion that Ms. Barton does not experience a handicap as defined by the FHA.

11. Both the U.S. Department of Housing and Urban Development ("HUD") and courts have consistently maintained that the keeping of an emotional support animal may

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[15] *See, e.g., Warren v. Delvista Towers Condominium Ass'n, Inc.*, 49 F. Supp. 3d 1082, 1088-89 (S.D. Florida 2014); *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015); U.S. DOJ & U.S. Department of Housing and Urban Development, *Reasonable Accommodations Under the Fair Housing Act*, 12-14 (2004).
[16] 42 U.S.C. § 3602(h).
[17] *See, e.g., Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959, 962 (7th Cir. 1996).

be a reasonable accommodation under the FHA.[18] The FHA does not limit the types of animals (i.e., dogs) that may qualify as emotional support animals.[19] Further, "the [FHA does not] require[] an assistance animal to be individually trained or certified."[20]

12. Although Alaska's courts do not appear to have addressed this particular issue, other courts have held that the FHA requires municipalities "to afford...disabled citizens reasonable accommodations in [their] municipal zoning practices if necessary to afford such persons equal opportunity in the use and enjoyment of their property."[21] "A reasonable accommodation can involve changing some [generally applicable] rule...to make its burden less onerous on the handicapped individual."[22] Thus, when an individual requests that a municipality make an exception to a local zoning ordinance to permit the individual to keep an emotional support animal at their dwelling, the FHA may require the municipality to do so, so long as that accommodation is reasonable under the circumstances.

13. The FHA does not mandate that an emotional support animal must serve a particular medically related function in order to warrant a reasonable accommodation; instead, the Act requires only that there exist "an identifiable relationship, or nexus,

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[18] *See Anderson v. City of Blue Ash*, 798 F.3d 338, 361 (6th Cir. 2002); *Morgan v. Fairway Nine II Condominium Association, Inc.*, LEXIS 38041 (D. Idaho Mar. 24, 2015); *U.S. v. Jackson*, 318 F.Supp.2d 395 (S.D. Miss. 2004); FHEO-2013-01.

[19] FHEO-2013-01 ("Disabled individuals may request a reasonable accommodation for assistance animals in addition to dogs, including emotional support animals, under the [FHA]....").

[20] FHEO-2013-01, at 2. *See also, Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015).

[21] *See, e.g., Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002).

[22] *See Morgan v. Fairway Nine II Condominium Association, Inc.*, (internal quotations omitted).

between the requested accommodation and the individual's disability."[23] This exists when the evidence tends to show: (1) that the requesting individual is disabled; and, (2) there is some link between the individual's ability to function and the emotional support provided by the animal in question.[24]

14. The Board finds that the evidence before it overwhelmingly demonstrates that there does exist some nexus between Ms. Barton's handicap and her ability to function and engage in life activities when she has access to her horse, Major. Ms. Garretson has consistently testified that, since Major has been on the Property, Ms. Barton has become calmer, speaks and interacts with others more often and with greater facility, and is more willing to engage in daily occupational tasks. [R. 74; Tr. 54:20-58:25] Ms. Barton's physician, counselor, and a member of the public who personally knows Ms. Barton also submitted evidence on this point. [R. 175-181; Tr. 43:17-44:18]

15. A requested accommodation is considered reasonable if: (a) it imposes no undue financial or administrative hardships on the party from whom it is requested; and, (b) it does not undermine the basic purpose of the [challenged] requirement. [25] Accommodations are not considered unreasonable or unduly burdensome simply because they would alter the way in which a regulation is applied to the requesting party.[26] Instead, a requested accommodation is viewed as imposing an undue financial or administrative burden "if its costs are clearly disproportionate to the benefits it will

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[23] U.S. DOJ & U.S. Department of Housing and Urban Development, *Reasonable Accommodations Under the Fair Housing Act*, 6 (2004).
[24] *Id.*
[25] *Id.*
[26] *Id.*

produce."[27] Based upon the evidence of City staff members at the hearing, [Tr. 92:25-93:8] the Board finds that the costs associated with the City's administrative permitting and appeals processes do not create an undue financial or administrative burden.[28]

16. Courts have held that a requested accommodation is also considered reasonable where it: (a) is consistent with the predominant permitted uses in a zoning district; (b) would not require rezoning; (c) there is no tangible proof that the proposed use would diminish property values or pose safety risks; and, (d) the permit application otherwise meets the criteria for obtaining the requested permit.[29] Thus, in this context, a requested accommodation will likely be considered unreasonable if it undermines the City's purpose in implementing KMC 3.10.070 by fundamentally altering the City's zoning scheme or changing the nature of the surrounding area.[30] For the reasons discussed herein, the Board finds that Ms. Garretson's requested accommodation is reasonable.

17. Accordingly, the Board finds that the FHA requires that, because Ms. Barton experiences a handicap that impacts one or more of her major life activities, and because there exists some nexus between her handicap and the presence of her emotional support horse on the Property, the City is required to grant her a reasonable accommodation with respect to its ordinances.

18. However, the City Code also prohibits the Board from approving conditional use permits unless it finds that each of the criteria set forth at KMC 14.20.150(d) have been met. Because the Board must employ an analysis that takes into account both the

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[27] *Id.*
[28] *See also U.S. v. Jackson*, 318 F.Supp.2d 395 (S.D. Miss. 2004).
[29] *Id.*
[30] *Id.*

City Code and the FHA, it finds that it must adopt an analysis that relaxes the requirements of the criteria set forth at KMC 14.20.150(d) in order to ensure that it meets its specific obligations as mandated by the FHA. That analysis follows.

C. The Proposed Use Is Consistent With the Purposes and Intent of the Zoning District.

19. The RS zone was established to "provide for medium density residential development...."[31] The zone is intended to provide sufficient area between residential structures to permit adequate light, air and privacy, and to prohibit uses that would either violate the zone's residential character, or generate heavy traffic in predominantly residential areas of the zone.[32]

20. The proposed use is the keeping and maintenance of an emotional support animal on the Property for the benefit of an adult with a disability, in this instance a horse that is approximately 35 years old. [R. 85-90] Ms. Garretson persuasively explained at the hearing that the purpose for having the horse on the Property is restricted to the therapeutic benefit that its presence has on Ms. Barton's emotional wellbeing, and her ability to engage in day-to-day functions, such as her ability to engage in common residential life tasks, such as caring for herself. [Tr. 56:20-58:7]

21. Although the Commission did receive written comments that called into question Ms. Garretson's motives for seeking to keep the horse on the Property, [R. 143] the Board finds that evidence unpersuasive in light of the fact that no alleged ulterior motive or theory was submitted in support of that general assertion. The Board notes that

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[31] KMC 14.20.090(a).
[32] *Id.*

no facts before it tend to indicate or even suggest that Ms. Garretson's purpose is anything other than to ensure that Ms. Barton has safe and reasonable access to Major and the companionship, emotional support, and therapeutic benefit that he provides to her, and Ms. Garretson submitted persuasive testimony to the Board on this point. [Tr. 56:24-58:7]

22. Consequently, the Board finds that the proposed use is essentially residential in nature, and is compatible with the other permitted residential uses within the RS district. Ms. Garretson's proposed use – the keeping and maintenance of their horse Major on their Property where their dwelling is located – is essentially residential in nature because this 35-year-old-horse is an emotional support animal to Ms. Barton, and Major gives Ms. Barton the same opportunity to enjoy living with her mother that a non-disabled person would have in the RS Zoning District. Therefore, the FHA requires the City to make a reasonable accommodation for Ms. Garretson and Ms. Barton in its zoning practices. This conditional use permit granted in his appeal, with the conditions recommended by the City Planner, as modified by the Board, is a reasonable accommodation under the specific circumstances of this case.

23. Ms. Garretson's proposed use is also consistent with the residential character of the surrounding land uses, as well as with the area's general environment. For example, the City Code does generally permit the keeping of horses on those parcels within the RS district that are 40,000 square feet or greater in size.[33] At least one nearby parcel in the RS district already has two horses that are kept and maintained upon it. [Tr. 69:25-70:19] No evidence submitted to the Planning & Zoning Committee or to the Board

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[33] KMC 3.10.070(a).

tends to show that the presence of an emotional support horse on the Property would generate any increase in the traffic within the surrounding area.

24. Further, the conditions that the City Planner has recommended, and which Ms. Garretson has accepted, would serve to protect the surrounding area from any unreasonable impacts that may threaten its residential character, or otherwise cause the use to become inconsistent with the intent of the RS district. This conclusion is in large part based upon Major's particular characteristics, most notably his advanced age, which the testimony by the City's Chief Animal Control Officer persuasively demonstrated reduces his need for a larger living space. [Tr. 67:21-69:13] The Board notes that other horses may have characteristics that would necessitate a different conclusion under similar circumstances.

25. For these reasons, the Board finds that Ms. Garretson's proposed use of the Property is consistent with the purposes and intent of the RS zoning district, and that the first criterion has been met.

D. <u>The Proposed Use Will Not Significantly Impair the Value of Adjoining Properties or the Neighborhood</u>.

26. The public comments submitted to the Commission and to the Board in opposition to Ms. Garretson's proposed use uniformly argued that it could have an adverse effect upon the values of other properties in the area, and generally focused upon the proposed use's potential for negative aesthetic impacts on other properties in the neighborhood. [R. 143; Tr. 43:1-43:5]

27. For example, one commentator stated to the Commission that the presence of horses, stables and manure next to her adjoining property would "undoubtedly have a

negative impact when I put those lots up for sale." [R. 29] In a subsequent statement to the Commission, the same commentator indicated that all trees had been cleared from the Property, and that she believed that potential buyers might not want to live next to it, especially if there were a horse upon it. [R. 143] However, the commentator did not submit any additional facts that purported to confirm her conclusion. [*Id.*]

28. Another commentator testified at the Commission's September 23, 2015 meeting that she opposed approving Ms. Garretson's application because she was concerned that it would affect her ability to sell her house. [R. 74] She appears to have provided no specific examples of the ways in which the proposed use could potentially impact her property's value. As a result, the Board does not find the testimony persuasive.

29. Another commentator testified to both the Commission and the Board that he owned an adjacent property, and was opposed to the proposed use because he believed that the visual appearance of the Property would have a negative impact on his property's value. [R. 151; Tr. 43:1-43:5] Again, the commentator did not submit any additional facts tending to substantiate his opinion, and the Board therefore finds his testimony on this point to be unpersuasive.

30. A local real estate agent also submitted testimony to the Commission in opposition to the proposed use. [R. 146-147] The commentator stated that her real estate group "can have difficulty selling homes that have horses next door even if they are on larger lots, due to odors and the unsightly yards, not to mention the lack of sanitary conditions." [*Id.*] However, the commentator did not submit any other evidence to substantiate her opinion, and the Board consequently finds that it is essentially speculative in nature, and unpersuasive in light of other evidence in the record.

31. Although the public comments opposing the proposed use also cited concerns relating to the potential for waste runoff, odors, and that it would make the Property unsightly, [R. 143, 146-147; 151; Tr. 41:24-42:3] the Board finds that, even if these comments did establish a factual basis for reasonably concluding that the proposed use presented some risk to the values of adjoining or neighboring properties, the conditions recommended by the City Planner are sufficient to effectively mitigate that risk.

32. For example, the City Planner's recommended conditions require that: (a) the horse stall area be cleaned every day; (b) all manure be bagged, stored in airtight containers, and disposed of weekly; (c) all water runoff be kept on site and that no runoff containing horse waste products be permitted to enter rights-of-way or neighboring properties; and, (d) all horse waste be immediately removed from rights-of-way during periods when the horse is walked or ridden. [R. 97-104] The Board finds as especially persuasive on this point the testimony of an adjoining property owner, who testified to both the Commission and the Board that he has never experienced an unpleasant odor coming from the Property, and that the horse's current enclosure appears to be well maintained. [R. 151; Tr. 41:24-42:3]

33. Accordingly, the Board finds that, so long as Ms. Garretson adheres to the conditions recommended by the City Planner in Substitute Resolution PZ15-26, the proposed use will not significantly impair the values of adjoining properties or the neighborhood, and that the second criterion has been satisfied.

E. <u>The Proposed Use is in Harmony With the Comprehensive Plan</u>.

34. The 2003 City of Kenai Comprehensive Plan classifies the Property as Neighborhood Residential, which is intended to largely consist of single-family and multi-

family residential dwellings, public outdoor spaces, and small home-based business are generally deemed to be compatible with the district.[34] The district also permits neighborhood institutional uses, such as schools, churches, and daycare facilities.[35]

35. As previously noted, the proposed use is necessary for Ms. Barton to enjoy equal opportunity in the use of the Property as her residence, and is required by the Fair Housing Act; thus, the Board finds that the use is residential in nature.

36. Accordingly, the Board finds that the proposed use is consistent with the Comprehensive Plan, and that the third criterion of KMC 14.20.150(d) has been satisfied.

F. Public Services and Utilities Are Adequate to Serve the Proposed Use.

37. The City Planner's Report indicates that the Property is currently served by the City's water and sewer utilities, and that the Property is abutted by Fourth Avenue, which is a paved city street, and Aspen Street, which is a gravel city street. [R. 25; Tr. 63:17-63:22] The City Planner stated to both the Commission and to the Board that these public services and utilities met the requirements of KMC 14.20.150(d)(4). [R. 25; Tr. 63:17-63:22] No argument, testimony, or other evidence to contrary appears to have been submitted to the Commission or to the Board.

38. Therefore, the Board finds that the existing public services and facilities are adequate to support the proposed use, and that the fourth criterion has been satisfied.

G. The Proposed Use Will Not Be Harmful to the Public Safety, Health, or Welfare.

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[34] 2003 City of Kenai Comprehensive Plan, at 28-29.
[35] *Id.*, at 29.

39. The City Planner's Report concluded that the proposed use does not present any particular hazard to the public's health, safety, or welfare. [R. 89] That conclusion was in large part based upon the determinations of the City's Chief Animal Control Officer, who found that, in light of the horse's advanced age of 35 years, it could be adequately monitored and cared for so long as Ms. Garretson adhered to the recommended conditions. [R. 88-89; Tr. 68:18-69:10] With respect to this criterion, the Board agrees with the assessments of both the City Planner and the Chief Animal Control Officer as set forth in the Report, and as explained to the Board at the hearing.

40. Although one commentator asserted to the Commission that the proposed use would create unsanitary conditions on the Property, [R. 146] the Board does not find that testimony to be persuasive, in light of the substantial evidence submitted by the City Planner and the Chief Animal Control Officer. No other individual presented any evidence on this point to the Commission or to the Board, and none of the evidence tends to suggest that Major may in any way present any risk of danger to any person.

Further, the Board finds that any potential sanitation threats to the public health are adequately addressed by the recommended conditions requiring the cleaning of Major's stall, the collection and disposal of his waste, and the prohibition against permitting water runoff to escape the Property.

41. Consequently, the Board finds that, in light of the conditions set forth in Substitute Resolution PZ15-26, the proposed use does not present any specific risk of harm to the public's health, safety or welfare, and that the fifth criterion has been met.

H. Ms. Garretson Has Satisfied the City Planner's Recommended Conditions.

42. The sixth criterion requires the Board to consider whether Ms. Garretson has satisfied "[a]ny and specific conditions deemed necessary" by the approving authority, as well as whether any additional conditions should be imposed.[36]

43. In total, the City Planner recommended that eleven conditions be imposed upon any conditional use permit granted to Ms. Garretson. [R. 103; 68] Those conditions are as follows:

> 1. Further development of the property shall conform to all Federal, State, and local regulations.
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> 2. Prior to issuance of the Conditional Use Permit, property owner shall obtain a building permit for the existing horse barn.
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> 3. Property owner shall install rubber matting to the entire floor within the existing horse stall.
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> 4. Property owner shall remove or fence off the existing medium stump present near the corner of the house located within the horse turn out area to prevent horse injury.
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> 5. Property owner shall provide daily cleaning of horse stall area including the horse paddock and turn out area. All horse manure shall be bagged and stored in an air tight container to prevent odor accumulation. All horse manure shall be taken to an appropriate Kenai Peninsula Borough landfill for disposal weekly.
>
> 6. Horse turn out and paddock areas shall be leveled and compacted to prevent horse injury. Both areas shall be covered by up to one foot of fine sand to provide proper horse footing.
>
> 7. All water runoff from the horse areas shall be kept on site. At no time shall the property owner allow water runoff containing horse feces, urine, or other waste products to enter the City rights-of-way or onto neighboring properties.

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[36] KMC 14.20.150(d)(6).

8. While walking or riding the subject horse in or on any City of Kenai rights-of-way any horse waste that is deposited shall be immediately removed by the property owner. Any costs incurred by the City of Kenai in removing any horse waste deposited in or onto any City of Kenai rights-of-way shall nbe paid by the property owner.

9. The subject Conditional Use Permit shall automatically expire if for any reason the subject horse (Major) is removed or leaves the subject property on a permanent basis. Upon expiration, any items relating to the keeping of the horse (Major) including but not limited to: fencing, feed, related livestock husbandry items shall be removed from the subject property. Prior to placing any new, additional, or replacement animals for the subject horse (Major) on the subject property a new Conditional Use Permit must be obtained from the City of Kenai.

10. Pursuant to Kenai Municipal Code Section 14.20.150(f) the property owner shall submit an annual report to the City of Kenai.

11. The Chief Animal Control Officer or designee may inspect the subject parcel to observe the conditions to ensure that the subject horse (Major), horse barn, horse paddock and horse turn-out area are being kept in a clean and sanitary condition and free from objectionable odor, pursuant to Kenai Municipal Code 3.10.030, Maintenance and Sanitation. [R. 103; 68]

44. Both Ms. Garretson and the City Planner testified at the hearing that each of these conditions has been met. [Tr. 61:1-61:8]

45. The Board concurs with the City Planner's recommended conditions; however, it finds that it is necessary to amend Condition #5 as it relates to the method by which Ms. Garretson is required to dispose of horse manure. At the hearing, Ms. Garretson testified that she had been informed that the disposal of manure in Kenai Peninsula Borough landfills is prohibited. [Tr. 82:25-83:16] Consequently, Condition #5 is amended as follows:

> Property owner shall provide daily cleaning of horse stall area including the horse paddock and turn out area. All horse manure shall be bagged and stored in an air tight container to prevent odor accumulation. All horse manure shall be delivered to a person or entity legally authorized to receive such waste, on a weekly basis.

46. Although the Board considered whether it should impose an additional condition upon Ms. Garretson's conditional use permit requiring her to erect privacy or shade fencing around the horse enclosure, it concludes that no such condition is necessary under the circumstances. The Board's decision on this point is based upon the fact that the owner of an adjacent property testified to the Commission that the erection of shade fencing would not help to alleviate any negative aesthetic impacts of the proposed use upon the neighborhood. [R. 151] Although the adjacent property owner subsequently testified to the Board that he thought that it "might make a difference," [Tr. 40:13-41:5] no other individual submitted testimony or other evidence tending to show that shade fencing would be necessary to protect adjoining property values, or to otherwise mitigate any potential adverse impacts of the proposed use on other properties.

V. CONCLUSION

The Board finds that Ms. Garretson has met her burden of proof with respect to establishing that her proposed use of the Property satisfies the criteria mandated by KMC 14.20.150(d), but notes that the outcome might very well have been different, had the FHA not been implicated. Therefore, the Board GRANTS Ms. Garretson's appeal.

The conditional use permit is approved, subject to the conditions recommended by the City Planner and set forth in Substitute Planning and Zoning Commission Resolution PZ15-26, with a minor modification to Condition #5, as discussed above. Unless timely

appealed, the permit shall be issued in accordance with this decision after the expiration of the 30-day appeal period.

DATED this 10 th day of January, 2016.

BY: _____
Brian G. Gabriel, Acting Chair

Robert J. Molloy, Board Member
Tim Navarre, Board Member
Henry Knackstedt, Board Member
Mike Boyle, 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 7th day of January, 2016, a copy of this Decision was distributed by Certified and/or First Class Mail to each of the following:

Julie Kim Garretson
1107 4th Avenue
Kenai, Alaska 99611

Anne Applegate
Attorney for Julie Kim Garretson
3330 Arctic Boulevard
Suite 103
Anchorage, Alaska 99503

All "interested parties" and property owners as defined by KMC 14.20.290(f).

Sandra Modigh, Clerk
City of Kenai, Alaska