

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

**IN THE MATTER OF THE APPEAL
OF RONALD AND DENIECE ISAACS:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
DENYING A CONDITIONAL USE
PERMIT FOR A MARIJUANA
RETAIL STORE AND LIMITED
CULTIVATION LOCATED AT
1188 KENAI SPUR HIGHWAY
SWANSON SQUARE #3
KENAI, ALASKA**

Case No. BA-16-03

DECISION ON APPEAL

I. INTRODUCTION

Ronald and Deniece Isaacs (the “Isaacs”) appealed the DECISION of the City of Kenai Planning and Zoning Commission (“Commission”) denying a Conditional Use Permit for the Isaacs to operate a Marijuana Retail Store and Limited Cultivation, located at 1188 Kenai Spur Highway, Swanson Square #3, Kenai, Alaska. For the reasons set forth below, the Isaacs’ Appeal for a Conditional Use Permit is DENIED by the Board of Adjustment.

II. PROCEDURAL HISTORY

On May 24, 2016, the City of Kenai Planning Department received an application from the Isaacs requesting a Conditional Use Permit to operate a Marijuana Retail Store and Limited Cultivation. [R. 116-128] 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 June, 22 2016, the Commission held a public hearing on the Conditional Use Permit. [R. 138-142] At that public hearing, the City Planner presented a Staff Report recommending the Commission deny the application for a Conditional Use Permit due to the proposed locations proximity to two parcels containing baseball and softball fields. [R. 74-76 and R. 139-140] At the public hearing three members of the public spoke in opposition to the Isaacs' application stating: the proposed business was located close to the Episcopal Dioceses of Alaska that was against the proposed marijuana establishment; that business would hurt surrounding property values; and that the business would negatively impact a neighboring restaurant. [R. 140] The Isaacs spoke in favor of their application at the hearing, noting that they were complying with all State requirements and questioned the City's method of measuring the buffer distances and definition of "outer boundary" as used in KMC 14.20.330(f)(2). [R. 140] Commission Members acknowledged the unique parcel conditions and configurations, but noted their obligation to follow the City Code in relation to buffer distances which the Commission found required buffer measurements to property lines of the parcels containing the ball fields. [R. 141] After the public hearing, the Commission unanimously voted against Resolution PZ16-17, because the proposed business location was too close to the two parcels with the ball fields. [R. 141]

The Isaacs timely appealed the Decision of the Commission to the Board of Adjustment (the "Board"). [R. 60] The Board scheduled a hearing for the Appeal on August 23, 2016. [R. 61] The record before the Commission was submitted for the Board's consideration. [R. 71-167]

On August 23, 2016, Board Members Brian Gabriel, Robert Molloy, Henry Knackstedt, Tim Navarre and Mike Boyle were present for the hearing. At the hearing, public comment was allowed and three members of the public spoke against the Conditional Use Permit due to the proposed locations proximity to a church of which they were members, noting that their church held Twelve Step meetings twice a week. One member of the public spoke in favor of the Conditional Use Permit stating that the business would be good for the local economy and create jobs. The City Planner reviewed his Staff Report and the Isaacs testified in support of their application for a Conditional Use Permit.

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

A. Conditional Use Permit Requirements.

Kenai Municipal Code 14.20.330-Standards for Commercial Marijuana Establishments, provides in subpart (a) that Commercial Marijuana Establishments such as the retail and cultivation businesses applied for by the Isaacs are only allowed pursuant to a Conditional Use Permit under KMC 14.20.150-Conditional Use Permits. 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.” Conditional Use Permits must meet the following six criteria:

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).

- (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
- (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

B. A Conditional Use Permit Can Not Be Approved due to the Proximity of the Proposed Business Location to Two Parcel Containing Recreation Centers.

While it is the intent of the Conditional Use Permit process to allow flexibility in uses, this flexibility must be considered in light of the impact of the proposed use on surrounding properties.⁸ In reviewing the six criteria required for the issuance of a Conditional Use Permit as provided in KMC 14.20.150(d), the Board finds that the first four are met. First, the use is consistent with the purpose of Conditional Use Permits and the intent of the zoning district in which the business is proposed. The proposed business is located within the General Commercial Zone. [R. 72] The City's Land Use Table provides that Limited Marijuana Cultivation Facilities and Marijuana Retail operations are allowed in the General Commercial Zone with a Conditional Use Permit.⁹ Second, the Board did not receive any convincing evidence that value of the surrounding properties or neighborhoods would be significantly impaired. However, the Board does note that there was testimony before the Planning and Zoning Commission in the record that raised this concern. Third, the proposed use is in harmony with the City's Comprehensive Plan. [R. 74] Fourth, the public services and facilities are adequate to serve the proposed use, as City water and sewer are available, along with City police and fire protection. [R. 74]

⁷ KMC 14.20.150(d)(1-6).

⁸ KMC 14.20.150(a).

⁹ KMC 14.22.010.

The fifth condition requires that the proposed use is not harmful to the public safety, health and welfare.¹⁰ In enacting Ordinance 2870-2016, which created the City's regulations on Commercial Marijuana Establishments, the City Council found that "some uses are especially susceptible to the potential negative impacts of marijuana-related activities and land-uses, requiring buffering in addition to the standard Zoning Regulations."¹¹ This concern expressed by the City Council was codified in KMC 14.20.330(f) which provides:

- (f) No portion of a parcel upon which any Commercial Marijuana Establishment is located shall be permitted within the following buffer distances:
- (1) 1,000 feet of any primary and secondary schools (K-12) and 500 feet of any vocational programs, post-secondary schools including but not limited to trade, technical, or vocational schools, colleges and universities, recreation or youth centers, correctional facilities, churches, and state licensed substance abuse treatment facilities providing substance abuse treatment; and,
 - (2) Buffer distances shall be measured as the closest distance from the perimeter of a stand-alone commercial marijuana establishment structure to the outer boundaries of the school, recreation or youth center, or the main public entrance of a church, correctional facility, or a substance abuse treatment facility providing substance abuse treatment. If the commercial marijuana establishment occupies only a portion of a structure, buffer distances are measured as the closest distance from the perimeter of the closest interior wall segregating the commercial marijuana establishment from other uses, or available uses in the structure, or an exterior wall if closer, to the outer boundaries of the school, recreation or youth center, or the main public entrance of a church or correctional facility, a substance abuse treatment facility providing substance abuse treatment.

There are two parcels of concern in this matter with regard to buffer distances.¹² Both parcels contain ball fields. [R. 75] Kenai Municipal Code 14.20.320-Definitions, defines "Recreation or Youth Center" to include "a building, structure, athletic playing field, or playground, run or created by a local government or the State to provide athletic, recreational, or

¹⁰ KMC 14.20.050(d)(5)

¹¹ Ordinance 2870-2016, 8th WHEREAS Clause.

¹² While there was public testimony at the hearing from several members of a church opposed to the location of the proposed business, there is no evidence in the record that the Church falls within the prohibited buffer distance of 500 feet. The Isaacs submitted evidence that the Church is 547 feet from their proposed business. [R.152]

leisure activities for minors, or operated by a public or private organization, licensed to provide shelter, training, or guidance for persons under 21 years of age.” Based on the testimony and evidence before it, the Board finds that the ball fields are athletic playing fields run or created by the City (local government), and thus fall under the definition of “Recreation or Youth Center.” Therefore the ball fields must be buffered from as required in KMC 14.20.330(f). There was no testimony by the Isaacs that disputed this. Instead the focus of the Isaacs’ testimony and evidence presented at the hearing was on the method of measuring the buffer distances and the appropriateness of such methods. [R. 143-144] In order to comply with the buffer requirements for Commercial Marijuana Establishments in KMC 14.20.330(f) the location of the business be 500 feet or greater from the outer boundaries of the ball fields.

On South Forest Drive the City maintains baseball fields that are located on 12 separate parcels with one Kenai Peninsula Borough Parcel Number. [R. 75] Government Lot 86, is the closest parcel to the proposed business that contains part of the ball fields. [R. 75]. Also, on Main Street Loop, bounded by First Avenue and Birch Street, the City maintains ball fields. This parcel is identified by the Kenai Peninsula Borough as Parcel No. 04327036.

As to the ball fields on South Forest, testimony was presented by the Isaacs that they retained a surveyor who measured the distance from the proposed business to the actual parking area for the ball fields or edge of grass of the playing fields and this distance was over 500 feet. This distance itself is not disputed. However, for buffer purposes the City Planner measured the distance from the proposed business to the closest edge of the parcel containing the ball fields (Government Lot 86) using a Geographic Information System (“GIS”) and found this distance to be less than 500 feet. [R. 75-76] With regard to the ball fields adjacent to Main Street, the Isaacs testified and the City Planner agrees that the actual ball fields are over 1,000 feet from the proposed business, however, due to the large size of the parcel on which the ball fields are on, the closest edge of the parcel containing the ball fields is approximately 438 feet from the proposed business. [R. 76] The Isaacs did not dispute that the closest edge of the parcel is within 500 feet, but instead argued that the measurement should not be to the closest edge of the parcel, but instead to the edge of the ball fields themselves.

During the hearing and in the evidence presented by the Isaacs, the Isaacs argued that the City Planner's measurement to the ball fields on South Forest did not account for topographical features, the curvature of the earth, an easement for South Forest Drive which is in between the ball fields from the edge of Government Lot 86 closest to their proposed business, and that the Planners' measurement should be to the closest part of the ball fields, and not the outer perimeter of the parcel itself. [R. 143-167] As to the ball fields on Main Street, the Isaacs argued that the ball fields themselves were over a thousand feet from their proposed business location, the lot containing the ball fields was very large and oddly shaped in such a manner to make application of a measurement to the edge of the parcel and not the ball fields themselves unfair. The Isaacs further provided testimony and evidence that the City should adopt a method of measuring buffers based on pedestrian routes, like the State of Alaska, instead of a lineal measurement. [R. 143-167] The Isaacs contend that with current technology, pedestrian routes are simple to measure and would not lead to disputes.

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 12.20.330(f). If "outer boundary" means to the edge of the ball fields themselves then the Isaacs' 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 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.

While not directly relevant to the outcome of this decision at this time, the Board notes that the unusual and particular size, shapes and roadway easements on the lots at issue in this case may lead to unforeseen consequences and encourages a review of the method of measurement of the City's buffer distances that might provide for future changes to the City's Code.

V. CONCLUSION

City Code requires that Commercial Marijuana Establishments be located at a distance of 500 feet or greater from the outer boundary of Recreation or Youth Centers. The Board finds that based on the City Council's intent, this requires a measurement from the closest edge of the parcel on which the Recreation or Youth Center is located to the Commercial Marijuana Establishment. The Board finds that the location of the Isaacs' proposed Marijuana Retail Store and Limited Cultivation facility is within 500 feet of two City parcels that contain ball fields, or athletic playing fields, which by definition are Recreation or Youth Centers. Because the Board finds that the proposed location of the Isaacs' business does not meet the buffer requirements of City Code, the Conditional Use Permit applied for is DENIED and the decision of the Commission is UPHOLD.

DATED this 22 day of September, 2016.

BY: 
Brian G. Gabriel, 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 22 day of September, 2016, 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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