

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

210 Fidalgo Avenue  
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL  
OF WAYNE JONES ET. AL.:  
APPEAL OF PLANNING AND  
ZONING COMMISSION ACTION  
GRANTING A CONDITIONAL USE  
PERMIT FOR EIGHT SINGLE  
FAMILY DWELLING UNITS AT  
1714 FOURTH AVENUE**

**Case No. BA-21-03**

**DECISION ON APPEAL**

**I. INTRODUCTION**

Wayne Jones, joined by thirty six other neighborhood residents appealed the DECISION of the City of Kenai Planning and Zoning Commission (Commission) granting a Conditional Use Permit for eight single family dwelling units, located at 1714 Fourth Avenue, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment UPHOLDS the DECISION of the Planning and Zoning Commission granting the Conditional Use Permit.

**II. PROCEDURAL HISTORY**

On April 30, 2021, the City of Kenai (City) received an application from TKC LLC requesting a Conditional Use Permit to build an eight single family dwelling units at 1714 Fourth Avenue. [R.21-22] The site is located in an area zoned Suburban Residential (RS). [R.8] Pursuant to KMC 14.22- Land Use Table, seven or more residential units on one lot require a Conditional Use Permit in the RS zone.

On May 26, 2021, the Commission held a public hearing on Resolution No. PZ2021-19, a resolution granting the Conditional Use Permit for eight single family residential units. [R 49- 50] At the public hearing the City Planner presented a staff report reviewing the criteria for granting Conditional Use Permits and recommended approval of the Conditional Use Permit with nine



additional requirements. [R. 49-50] At the public hearing, during the public comment time Wayne Jones expressed concerns about the proposed development, including the effect on neighboring property values, and increased traffic in the neighborhood. [ R.50] Mr. Jones also raised concerns about the loss of natural wooded spaces in the neighborhood. [R. 50] Mr. Jones noted that there were already numerous rentals in the area and questioned whether there would be adequate screening for the project. [R. 50] Fred Braun testified that the project would fill a need for rental housing in the City and bring tax dollars into the City. [R.50] He also explained that the project was not low-end housing, but instead was intended to target professionals as renters. [R.50] Star McCloud stated her opposition to the project because of the potential negative effect on neighboring property values, increased driveways and effect on local wildlife. [R.50] Sharon Shin also shared the same concerns as Ms. McCloud. [R.50] Rob Coreson, the project builder, explained the details of the proposed construction and layout of the project, and emphasized that numerous similar quality projects like this had been completed locally. [R.50]

After the close of the public hearing, Commissioner Springer explained that he was going to vote in favor of the Conditional Use Permit because the property owner was currently pursuing a subdivision of the parcel into two separate parcels, each to contain four dwelling units, and the subdivision would negate the need for a Conditional Use Permit. [R.50] Clarification was provided by the Planner that screening would be required of the project. [R.50] Commissioner Douthitt explained he would vote in favor of the project because he did not see a difference in effect on the neighborhood between this project and building one unit on eight separate lots. [R.50] He stated that the size of the buildings were adequate and the driveway plans conformed with City code. [R. 50] Commissioner Greenberg explained he would be voting in favor of the project as it was reasonable development of private property and the landscape site plan would require adequate screening. [R.50] Commission Halstead agreed with the rationale of the other commissioners and favored the project because it met the requirements for a Conditional Use Permit. [R.50] Chair Twait also explained that he believed the project met the requirements for granting a Conditional Use Permit and he did not expect neighboring property values to be negatively impacted. [R.50] The Commission then voted unanimously to approve Resolution PZ2021-19 approving the Conditional Use Permit as provided in the record. [R.50]



On June 10, 2021 the City received an appeal from Wayne Jones, with a list of 36 other names and signatures<sup>1</sup>, appealing the decision of the Commission. [R.54-56] The appeal explains that the project would damage the character, integrity and quality of the neighborhood threatening the safety and enjoyment of the neighborhood for residents. [R.54] The appeal also identifies increased traffic impairments in the neighborhood and long term negative impact on neighboring properties as reasons to overturn the Commission's decision. [R.54]

At the Hearing held before the Board on July 30, 2021 Mr. Jones was present to present his case, however, no official representative of TKC LLC was present to provide testimony or argument.

Numerous residents provided public comment in opposition of the Conditional Use Process before the presentation of the case. Concerns were expressed that the neighborhood was too small for the high-density project. Residents testified that crime was already an issue and were concerned this project would bring in more renters that would add to the existing neighborhood problems. Concern was raised about strangers living in the neighborhood. Residents argued that the lot was more suitable for development of four units instead of eight. They voiced concern that they did not like the aesthetics of the other projects the owner had developed nearby. It was also argued that renters wouldn't maintain their property in the same manner that resident owners nearby did. The neighbors stated they felt the project would bring down property values of adjoining property. One resident in particular who was a former realtor and lived adjacent to the proposed project testified that she already lived next to rentals in the area and that this particular project would be low income and impact surrounding property values. Others testified that there were already too many renters in the neighborhood and that more would not be a positive change. There was also concern that the project would result in a significant increase in traffic that the neighborhood was not designed to accommodate. The neighbors asserted that children that played in the streets would be endangered by the traffic from the development. It was also pointed out that there was only one fire hydrant on the street, and it was questioned whether this would be adequate for the new development.

Fred Braun provided public comment in favor of the project. He noted that he also owned property in the area. Mr. Braun, who is a realtor, argued that the project would increase the value of neighboring properties as it would be a nice development for the area. He explained that MLS

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<sup>1</sup> Not all the names on the list of 36 have standing to appeal. However, Mr. Jones does have standing and presented his arguments. There was no objection to the list of Appellants by TKC LLC.



searches for rentals in Kenai indicated little availability. He provided that the intent of the project was to rent to professionals and that the property owner would provide adequate screening and site plan development.

During his presentation to the Board, Mr. Jones provide that the neighborhood was against the project. He argued that the density of the development was too much for the area, and that the increase in traffic would have a negative impact and jeopardize safety. He acknowledged that the local real estate market was currently high and that the project might not have an immediate impact on values, but over the long run it would decrease the value of surrounding properties according to his testimony. He argued that the area was already saturated with rentals and that these rentals have had a negative impact on the area which was impacted by drug use and thefts.

### **1. 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."<sup>2</sup> The Board reviews the appeal *de novo*.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>6</sup> The Board must make specific findings supporting its conclusions.<sup>7</sup>

### **III. 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

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<sup>2</sup> KMC 14.20.290(f)(2).

<sup>3</sup> *Id.*

<sup>4</sup> *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

<sup>5</sup> *Id.* At 931-932.

<sup>6</sup> *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

<sup>7</sup> *Fields*, at 932. And KMC 14.20.180(c).



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
- (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.<sup>8</sup>

Preliminarily, the Board notes that the burden is on TKC LLC to show that the conditions for granting a Conditional Use Permit are met. Further, the majority of the neighborhood that testified expressed opposition to the granting of the conditional use, which is not determinative of the Board's decision but does hold evidentiary weight. In this case however, while many of the residents are against the project, their opposition is not necessarily supported in the narrow factors that the Board must base its decision on evaluating a Conditional Use Permit. Because TKC LLC must show that all six of the criteria for granting a conditional use are met, it was very close in this case given that TKC LLC did not present new evidence or argument to the Board. However, the evidence in the record before the Board along with public comment, shows that the proposed project does meet the criteria for granting a special use permit.

The evidence and testimony show that the neighborhood of the subject property is generally comprised of relatively small lots. There are already numerous multifamily structures in the area, and many rentals. The residents testified that there are already some problems with congestion and

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<sup>8</sup> KMC 14.20.150(d)(1-6).



even crime in the area. Much of the opposition from the neighborhood focused on the loss of green space that would result from development of the project. While this is a recognized concern by the Board, the Board can not prohibit a private property owner from developing private property in general. The property owner could build six units on the lot without a Conditional Use Permit as long as a landscape and site plan were approved by the City.

As the City planner noted, the development is not excessive given the relatively large size of the lot. The development is proposed to cover just over 12,000 square feet, while the maximum project footprint allowed given the size of the lot is well over 32,000 square feet. While the developer has chosen to pursue this project as one lot for this issue, the developer would be allowed to subdivide the property into additional lots and build the project without any Conditional Use Permits. The size of the lot would support subdivision without the lot sizes being out of character with adjacent properties in the neighborhood. The evidence indicates that the developer is actually pursuing a subdivision to divide the lot into two lots. If the subdivision is approved by the Kenai Peninsula Borough, which appears likely, this Conditional Use Permit will no longer be needed. While the Board recognizes that many of the neighbor's that testified feel the area is already congested and this project would only add to the congestion, the Board cannot prohibit development of private property, even if a Conditional Use Permit is currently required, when the criteria for evaluating the permit under City code are met.

**A. The Record and Evidence Before the Board show that the Proposed Development is Consistent with the Purpose of the Zoning Code and Purposes and Intent of the Zoning District.**

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

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

- (1) To separate residential structures to an extent which will allow for adequate light, air and privacy.
- (2) To prohibit uses which would:



- (A) Violate the residential character of the environment;
- (B) Generate heavy traffic in predominantly residential areas.<sup>9</sup>

In this case, the substantial evidence shows that the proposed use consistent with the purpose and intent of the Zoning District. The area is served by common utility systems and the density of the proposed development is consistent with surrounding properties given the large size of the lot and relatively small size of other lots in the neighborhood with single and multifamily dwelling improvements. The evidence and testimony show the character of the neighborhood is comprised of a mix of relatively small single family dwelling and multi family dwellings. Testimony indicates many, if not the majority of dwellings, are already utilized as rental properties. This proposed development would be consistent with the character of the neighborhood. While any new residential development on the street would increase traffic, this proposed development would not generate heavy traffic as compared to a businesses in the area and is consistent with other multifamily dwelling properties in the area. Given the lot size and project scope, any additional traffic does not appear unreasonable or heavy. Given the size of the lot proposed for the development, similarity of the use of the development to existing improvements and lot sizes in the neighborhood, the proposed project is consistent with the purpose of the Zoning Code and purpose and intent of the medium density residential zone.

**B. The Value of Adjoining Property or Neighborhood Would Not Be Significantly Impaired by the Proposed Development.**

The requirements for granting a Conditional Use Permit require the applicant to show the value of adjoining property and the neighborhood would not be significantly impaired by the use. While the Appellant and public testimony provided mixed analysis of the projects' effect on neighboring property values, the substantial evidence provided before the Board and in the record show that neighboring property values would not be significantly impaired by the project. The project as shown in the record would be new construction and suitable quality for the neighborhood. The size of the improvements and density of the improvements are consistent with much of what already exists in the neighborhood. Additionally the use of the property as rental units is similar to many of the other surrounding properties. While some testimony was that surrounding properties would

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<sup>9</sup> KMC 14.20.090



not be affected in the current real estate market but could affect prices in the long term, there was also testimony from a former realtor that neighboring property values would go down. On the other hand, another local practicing realtor testified that he believed the project would increase the value of adjoining lots. The Board finds that given the plans provided, this proposed new construction of suitable quality with a use and density consistent with other surrounding properties would not pose a significant impairment on adjoining property values or the neighborhood. This is especially true in light of the requirement that the City approve a landscape and site plan providing sufficient buffers between the subject property and neighboring properties.

**C. The Project is in Harmony with the Comprehensive Plan.**

The Comprehensive Plan (Plan) provides that “Suburban Residential land uses are typically single-family and multi-family residential uses that are urban or suburban in character. Typically, Suburban residential neighborhoods are developed at a higher density; lots are typically smaller; and, public water and sewer systems are required.” This medium density multifamily residential use is consistent with the Comprehensive Plan’s description of the zone.

Goal 1 of the Plan is “Quality of Life: promote and encourage quality of life in Kenai” with objectives including protecting and rejuvenating the livability of existing neighborhoods and promoting the siting and design of land uses that are in harmony and scale with surrounding uses. This new development is not inconsistent with the goal of rejuvenating and promoting the livability of this neighborhood. Newer development of a reasonable density attracting new renters to the area could improve the current neighborhood situation described by residents. Further, this land use is similar to and in scale with surrounding existing properties. Goal 3 of the Comprehensive Plan, implementing forward-looking approach to community growth and development with objectives of siting design standards in harmony and scale with surrounding uses and promoting the infill of existing improved subdivisions is also met by this proposed development. The project is in harmony and scale with surrounding uses and infills an existing improved subdivision.

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

The Board finds that public services and facilities are adequate to serve the proposed use. The property is adjacent to paved roads maintained by the City. There is adequate police and fire



response available, utilities are available and the property is served by public water and sewer. While there was argument that there was already congestion in the area, it appeared part of the problem was caused by large vehicles parked on the road which could be subject to City enforcement action. The Plan submitted by the developer includes adequate off street parking for the units and adequate private snow storage. Aside from traffic generated by the new residences which appears reasonable for the size of the parcel, the project does not appear to unreasonably add to any existing congestion problems in the neighborhood. There was also concern expressed about the availability of adequate fire hydrants in the area. As provided below, the City's Fire Marshall will review the adequacy of the hydrants and other fire protection in the area prior to approving occupancy for the proposed new buildings.

**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. While the Appellants have raised perceived safety concerns regarding increased vehicular traffic and the potential increase in the area to existing crime problems, these concerns are not sufficient to show the use would be harmful to the public safety, health or welfare. To the contrary, this newer construction of suitable quality could lead to decreased crime in the area. The evidence before the Board does not show that the proposed use which is consistent with other uses in the area, and would be of newer quality than existing rental units would be harmful to public health safety or welfare.

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

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. The Board finds that the imposition of the following requirements in addition to the requirements placed on the Conditional Use Permit by the Commission are needed:

1. Developer is required to install a stop sign on private property near intersection of private access driveway and Haller Street.



2. City Fire Marshall and Public Works Department will conduct inspection of available fire hydrants and other firefighting resources to ensure adequacy of available resources prior to issuance of certificate of occupancy for dwelling units.
3. City will evaluate need for any additional public street signage on Haller Street.
4. In evaluation of landscape and site plan City is encouraged to consider children playing on private property next to 4<sup>th</sup> Avenue.
5. Any approved landscaping plan must comply with 14.25.010 (b) Which reads: "*Landscaping Plans*. It is the intent of this chapter to provide for landscaping and/or the retention of natural vegetation in conjunction with commercial, industrial and multifamily development within the City of Kenai to enhance the community environment and visual character and to provide attractive and functional separation between residential, commercial, and industrial uses and reduce erosion and storm runoff."

### CONCLUSION

After reviewing the evidence and presentation of the Appellant, the Board of Adjustment Affirms the decision of the Planning and Zoning Commission based on the findings and conclusion of law stated above and those of the Commission in its decision to approve a Conditional Use Permit for an eight dwelling unit multifamily development at 1714 Fourth Avenue. The majority of the Board would prefer access to the property off of Fourth Avenue due to existing traffic patterns and the location of yards in the proposed development, but recognizes it does not have the authority to impose such a requirement. The Board also acknowledges that the property owner is pursuing a subdivision which will negate the need for this Conditional Use Permit.

Dated this 26<sup>th</sup> day of August, 2021

BY: B. Gabriel

Brian G. Gabriel, Board Chair

BY: [Signature]

Bob Molloy, Board Member



BY: Jim Glendening  
Jim Glendening, Board Member

BY: Henry Knackstedt  
Henry Knackstedt, Board Member

BY: Teea Winger  
Teea Winger, Board Member

BY: Victoria Askin  
Victoria Askin, Board Member

**ADDITIONAL STATEMENT BY BOARD MEMBER MOLLOY**

The applicant's representative, Rob Coreson, of Byler Contracting, was present and provided testimony supporting the application at the Planning Commission's public hearing on May 26, 2021, which is in the record. In this appeal, the applicant or representative did not provide testimony themselves supporting the application at the hearing before the Board of Adjustment. As I discussed during that public hearing, I was disappointed that neither an owner from TKC LLC, the applicant and property owner, nor from the applicant's representative, Byler Contracting, was present to provide testimony at the hearing before the Board.

As a result, the applicant or representative couldn't hear and consider the comments of the neighbors that were relevant to details for the applicant's landscape plan. Neighbors expressed concern over the lack of natural trees and shrubs that will result from clear-cutting the lot. Problems with the City's current code regarding landscape plans include that a plan with Code-required details may be submitted any time before a building permit is issued, and then there is a period of up to two years that is allowed for completion of the landscaping under the plan. The plan submitted for the hearing on the conditional use permit does not have to include all of the



Code-required detail, and there isn't a public hearing on the details of the landscaping plan that is submitted after the Commission's hearing on the conditional use permit where the neighbors (the public) can review and comment on the details of the landscape plan before its approval. The neighbors may be left uninformed for a long time period.

And as a result of the lack of applicant's supporting testimony, it was a close question whether the applicant met the applicant's burden of proof based on the record before the Planning Commission and the record made to the Board, which included that earlier record.

The City's Code should clearly require the applicant or representative to be present at the hearing held by the Planning Commission, and state that the applicant has the burden of proof. The Code also should require the applicant or representative to be present for the hearing held by the Board of Adjustment on an appeal, with the same burden of proof. And the Code should put the applicant on notice that the Planning Commission, or the Board, may dismiss the application if either the applicant or representative is not present to provide supporting testimony at the hearing.

But the City's Code does not give clear notice to the applicant of the applicant's burden of proof, or any notice that the applicant or representative must be present, or that dismissal of the application is a potential outcome if the applicant or representative is not present at the hearing to provide testimony in support of the application. If the City's Code included those notices to the applicant, then I would have voted to dismiss the TKC LLC application for applicant's or representative's failure to be present, which resulted in the lack of applicant's supporting testimony at the hearing before the Board of Adjustment. Public comment supporting the applicant should not be sufficient if the applicant or representative is not present to provide testimony supporting the application.

BY: \_\_\_\_\_

  
Bob Molloy, 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

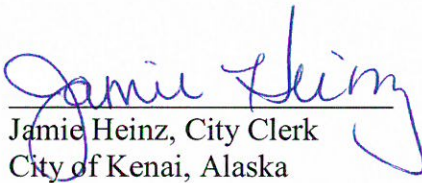


(30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

**CERTIFICATE OF DISTRIBUTION**

I certify that on the 27<sup>th</sup> 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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