

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

210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF ROBERT MCINTOSH:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
APPROVING A CONDITIONAL USE
PERMIT FOR A MARIJUANA
RETAIL STORE LOCATED AT
10767 KENAI SPUR HIGHWAY,
UNIT D KENAI, ALASKA**

Case No. BA-18-01

DECISION ON APPEAL

I. INTRODUCTION

Robert McIntosh appealed the DECISION of the City of Kenai Planning and Zoning Commission ("Commission") approving a conditional use permit for Ryan Tunseth/Cook Inlet Cannibus Co., DBA East Rip, to operate a Marijuana Retail Store, located at 10767 Kenai Spur Highway, Unit D, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment AFFIRMS the Decision of the Planning and Zoning Commission granting the conditional use permit.

II. PROCEDURAL HISTORY

On September 27, 2017, the City of Kenai Planning Department received an application from Ryan Tunseth requesting a Conditional Use Permit to operate a Marijuana Retail Store. [R.19-48] Pursuant to KMC 14.20.330-Standards for Commercial Marijuana Establishments, a Conditional Use Permit is required for all Commercial Retail Marijuana Establishments in the City.

On November 8, 2017, the Commission held a public hearing on Resolution No. PZ2017-33 approving the Conditional Use Permit. [R. 54-56] At the public hearing, the City Planner presented a Staff Report recommending the Commission approve the application for a Conditional Use Permit. [R.3-9] Three business owners, two of which were located in the same building and one nearby, spoke in opposition to Mr. Tunseth's application. [R.55] The neighboring businesses shared concerns with impact on their businesses from odor and the federal legal status of marijuana sales. [R.55] Mr. Tunseth spoke in favor of his application noting he would meet all state and local requirements with minimal impact on neighbors. [R.55] Commissioners expressed concern with how the conditional use permit would affect other tenants in the building, Mr. Tunseth's ability to control odor and the proximity of City owned land that had been used in the past for youth recreational activities. [R.56] The Commission voted four to two against approving the conditional use permit. [R. 56]

At the following Commission meeting on December 8, 2017 Commissioner Halstead who had previously voted against approving the conditional use permit, moved to reconsider the November 8, 2017 vote on the matter. [R.115] The motion to reconsider was approved four to one. [R. 115] The Commission further discussed the use of adjacent City owned property and whether or not it should be defined as a "recreation or youth center" requiring a 500 foot buffer, odor control and the objections of neighboring businesses. [R. 115 and 116] On reconsideration, the Commission voted in favor of approving Resolution No. PZ2017-33 by a vote of three to two, with Chair Twait not participating and Commissioner Fikes absent. [R.116]

On December 27, 2017 Robert McIntosh submitted an appeal of the Commissions' approval of Resolution No. PZ2017-33. [R.119] The City Clerk initially rejected the appeal for failure to provide a description of harm, [R.127] however a revised complete appeal was timely submitted. [R.127, 129-137]

On February 20, 2018, Board Members Brian Gabriel, Robert Molloy, Henry Knackstedt, Mike Boyle, Glenese Pettey and Jim Glendenning were present for the hearing. Board Member Navarre did not participate. At the hearing, public comment was allowed and seven members of the public spoke in favor of approving the conditional use permit. The City Manager, Paul Ostrander presented a staff report and Robert McIntosh argued against the approval of the

conditional use permit, while Ryan Tunseth and his attorney, Jana Weltzin spoke in favor of the Board affirming the decision by the Planning and Zoning Commission.

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. The Motion and Vote on Reconsideration was proper.

Mr. McIntosh challenged whether the vote by the Commission on reconsideration was proper. [R.156] It is questionable whether this is a valid issue before the Board of Adjustment, but it is addressed as follows nonetheless. The City of Kenai follows Robert's Rules of Order Newly Revised, 11th Edition, except where superseded by City Charter, ordinance or any special rules of order adopted by the Council.⁷ City Code provides any member who voted on the prevailing side of an issue may move to reconsider the issue at the same or next meeting as long as the subject

¹ KMC 14.20.290(f)(2).

² *Id.*

³ *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n.11(Alaska 1993)

⁴ *Id.* At 931-932.

⁵ *Id.* Citing *Kiener v. City of Anchorage*, 378 P.2d 406, 411(Alaska 1963).

⁶ *Fields*, at 932. And KMC 14.20.180(c).

⁷ KMC 1.15.120 and Council Policy No. 2016-01 (Amended)

matter has not passed out of control of the body.⁸ The motion to reconsider was made by Commissioner Halstead who had voted on the prevailing side of the issue at the prior meeting. [R. 56, 115] No appeal on the issue had been heard at the time the motion to reconsider was made, so the matter had not passed out of control of the Commission. The vote approving the Resolution on reconsideration was three in favor to two against and was appropriate to carry the motion pursuant to Council Policy No. 2016-01 (Amended).

B. Robert McIntosh had Standing to Appeal.

Mr. Tunseth challenged Mr. McIntosh's standing to appeal. The City of Kenai confers a more expansive standard for who has standing to appeal a Planning and Zoning Commission decision than some other municipalities. Mr. Tunseth argued that based on *Griswold v. City of Homer*, 252 P.3d 1020 (Alaska 2011), Mr. McIntosh who did not show or even argue any harm from the approval of the conditional use permit different from that of the general public's, and therefore the appeal should not be allowed. However, a review of KMC 14.20.290 (a) which addresses standing, Ordinance 2142-2006 which amended KMC 14.20.290(a) and the minutes from the March 15, 2016, City Council Meeting that amended the standing requirements in KMC 14.20.290 to include a "resident of the City", indicate that it was intended that residents be conferred standing without any further necessary showing. Mr. Tunseth argued this interpretation is inconsistent with the requirement that Mr. McIntosh is required to provide a reason for the appeal, including a statement of harm, and why he meets the definition of an "aggrieved party. The applicable code section does not require that Mr. McIntosh to provide a description of harm different from that of the general public however. The Board finds Mr. McIntosh had standing to appeal under KMC 14.20.290.

C. The Board of Adjustments May Approve a Conditional Use Permit in This Matter.

Mr. McIntosh argued federal law prohibits the sale and possession of Marijuana and the Board of Adjustment members are judges similar to those described in the U.S. Constitution must follow federal law. The State of Alaska and City of Kenai, like many other jurisdictions across the

⁸ KMC 1.15.060

country have chosen to regulate the marijuana industry. The Board's decision complies with applicable state and local laws. The appropriateness of the policy decision by the State and City should be debated in a different forum.

D. Conditional Use Permit Requirements.

Kenai Municipal Code 14.20.330-Standards for Commercial Marijuana Establishments, provides in part that Commercial Retail Marijuana Establishments 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) 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.⁹

The Board adopts the findings addressing these six criteria contained in PZ2017-33 as approved by the Planning and Zoning Commission and attached hereto with the following additions:

- (1) First with regard to the second finding in PZ2017-33, the value of adjoining property and neighborhood will not be significantly impaired, Mr. Tunseth argued

⁹ KMC 14.20.150(d)(1-6).

during the hearing that his business would bring more customers to neighboring businesses and that his business would be filling a unoccupied space which also would benefit surrounding properties. He stated his security measures and odor control measures would minimize any negative impact on neighboring businesses. He provided that his exterior lighting would also be a benefit to neighbors. Mr. McIntosh seemed to argue that odor from marijuana product would detract from the value of adjoining property. The Board finds the value of adjoining property and the neighborhood, comprising of primarily businesses uses will not be significantly impaired based on the security and odor controls required and proposed, that increased security, lighting and a business in an otherwise unoccupied space may be beneficial to other surrounding businesses.

- (2) In addition to the Commissions' findings on the third criteria in PZ2017-33, harmony with the Comprehensive Plan, the Board notes that Mr. McIntosh argued the location of the Retail Marijuana Store was within 500 feet of City parcels pursuant to various general provisions of the Comprehensive Plan and KOOL Committee Report could at some point be used for recreation or event hosting. This argument is unpersuasive, primarily because the location of the retail marijuana store will not prohibit the creation of any future recreation or youth facilities, parks, or other event spaces. While a Commercial Marijuana Establishment cannot be located within certain distances of identified land uses, the inverse is not true, in that the City can locate a future recreation or youth center in proximity to a Commercial Marijuana Establishment.
- (3) With respect the fifth criteria, in PZ2017-33 the proposed use will not be harmful to the public safety, health or welfare, 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."¹⁰ This concern expressed by the City

¹⁰ Ordinance 2870-2016, 8th WHEREAS Clause.

Council was codified in KMC 14.20.330(f) which prohibits locating a commercial Marijuana Establishment within 500 feet of a recreation or youth center. A recreation or youth center is defined as “a building, structure, athletic playing field, or playground, run or created by a local government or the state to provide athletic, recreational, or 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.”¹¹ While evidence showed two City parcels previously were maintained by the City for youth recreation activities, after the City built the Kenai Soccer Complex to the North of town, these activities and associated maintenance stopped. Both the Administration and Mr. Tunseth agreed that these City parcels no longer met the definition of a “recreation or youth center” and did not need to be buffered from. Mr. McIntosh, also did not assert that these properties met the definition of a recreation or youth center. The Board of Adjustment finds the substantial evidence shows the parcels owned by the City within 500 feet of the proposed retail marijuana establishment do not constitute a recreation or youth center.

- (4) With Regard to the sixth criteria in PZ17-33 in special conditions, the Board makes the following amendments. The first condition stating “[f]urther development of the property shall conform to all federal, state and local regulations,” is amended to read “[f]urther development of the property shall conform to all federal regulations related to building codes and accessibility and all state and local regulations.”

CONCLUSION

After reviewing the evidence and presentation of the parties, the Board of Adjustment AFFIRMS the decision of the Planning and Zoning Commission and adopts Resolution No. PZ17-33 as its own decision and findings as amended above.

¹¹ KMC 14.20.320

DATED this 7th day of March, 2018.

BY: B. Gabriel 5
Brian G. Gabriel, Chair

BY: [Signature]
Robert J. Molloy, Board Member

BY: _____
Glenese Pettey, Board Member

BY: Jim Glendening
Jim Glendening, Board Member

BY: Henry Knackstedt
Henry Knackstedt, Board Member

BY: Mike Boyle
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).

DATED this 7th day of March, 2018.

BY: B. Gabriel
Brian G. Gabriel, Chair

BY: [Signature]
Robert J. Molloy, Board Member

BY: [Signature]
Glenese Pettey, Board Member

BY: [Signature]
Jim Glendening, Board Member

BY: [Signature]
Henry Knackstedt, Board Member

BY: [Signature]
Mike Boyle, Board Member

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CERTIFICATE OF DISTRIBUTION

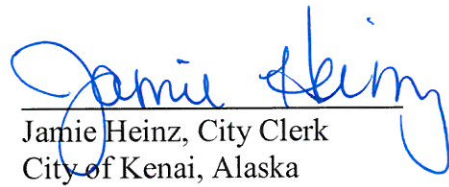
I certify that on the 8th day of March, 2018, a copy of this DECISION ON APPEAL was distributed by Certified and/or First Class Mail to each of the following:

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Jamie Heinz, City Clerk
City of Kenai, Alaska

