

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

210 Fidalgo Avenue
Kenai, Alaska 99611

**IN THE MATTER OF THE APPEAL
OF DEAN SCHLEHOFER:
APPEAL OF PLANNING AND
ZONING COMMISSION ACTION
DENYING A CONDITIONAL USE
PERMIT FOR A LODGE AT
345 DOLCHOK LANE**

Case No. BA-21-02

DECISION ON APPEAL

I. INTRODUCTION

Dean Schlehofer appealed the DECISION of the City of Kenai Planning and Zoning Commission (“Commission”) denying a Conditional Use Permit to operate a lodge, located at 345 Dolchok Lane, Kenai, Alaska. For the reasons set forth below, the Board of Adjustment UPHOLDS the DECISION of the Planning and Zoning Commission denying the Conditional Use Permit.

II. PROCEDURAL HISTORY

On April 15, 2021, the City of Kenai (City) received an application from Dean Schlehofer requesting a Conditional Use Permit to operate a lodge and guiding service at 345 Dolchok Lane. [R.27-32] The site is located in an area zoned Rural Residential (RR). [R.23] Pursuant to KMC 14.22- Land Use Table, Guide Services and Lodging require a conditional use permit in the RR zone. The application was treated by the Planning Department as an application for two separate conditional uses, one for a guide service and one for lodging. [R. 97-100] This decision only addresses the lodge use. A lodge is defined by KMC 14.20.320(b) as “a building or group of buildings containing five (5) or fewer guest rooms used for the purpose of offering public lodging on a day-to-day basis with or without meals.” Mr. Schlehofer’s application indicates he has four rooms available for lodging, typically expects to have four or five guests spend the night with a

maximum capacity of eight. [R.29] He intends to serve guests a continental breakfast, otherwise his guests have access to a shared kitchen for meals. [R.32]

On May 12, 2021, the Commission held a public hearing on Resolution No. PZ2021-17, a resolution granting the Conditional Use Permit for a lodge. [R 99- 100] At the public hearing, during the public comment time Rick Baldwin testified that he was opposed to the granting of a conditional use permit for a lodge. [R.99] He argued that contrary to the City Planner's recommendations, the residential character of the neighborhood would be changed by the operation of a lodge due to the nature of its operations. [R. 99] Mr. Baldwin also argued that the goal of the Comprehensive Plan to support economic development should never override the other goal of the Plan of protecting quality of life. [R.99] Chuck Eubank also testified against the operation of a lodge in the neighborhood, questioning its impact on the neighborhood and the precedent for change it could bring. [R.99] Kelsey Daniel expressed concern for the safety of the neighborhood children, increased traffic, littering, increased noise and strangers in the neighborhood if the lodge was approved. [R.99] Amber Every testified that the operation of a lodge would be a violation of the neighborhood covenants, and that approval of this commercial operation would set a precedent to allow other businesses in the neighborhood. [R.100]. Written opposition was also provided by residents on Dolchok. [R. 41-44, 66-91]

Dean Schlehofer testified that he was aware of the neighbors concerns and he intended to operate the lodge in a safe manner. [R.100]

The City Planner presented a Staff Report recommending the Commission approve the application for a Conditional Use Permit. [R.44-65] After the close of the hearing the Commission made the following findings in denying the conditional use permit for a lodge:

1. Chair Twait was concerned that the character of the neighborhood would be altered by the operation of a lodge.
2. Commissioner Springer stated that this commercial activity was not appropriate in the residential Dolchok neighborhood.
3. Commissioner Halstead provided that the over-whelming feelings of the neighborhood were against the use, and the residents expressed valid concerns about traffic, a precedent to change the neighborhood, and the lodge not being compatible with the existing ambiance of the neighborhood.

4. Vice Chair Fikes stated that she was concerned about the health and safety of the neighborhood and increased traffic from the lodge. She also stated that the neighbors in the rural residential zone had a certain expectation of quality of life not compatible with a 24 hour a day business. She further noted that there were no other businesses in the neighborhood, and expressed her position that it shouldn't be changed.
5. Commissioner Woodward noted that every resident in the neighborhood was against the conditional use, and that approving the use could result in change to the neighborhood like what happened on Angler Drive.
6. Commissioner Greenberg explained that he was in favor of permitting the use, because it had been approved in other rural residential zones in the City and the code should be applied fairly. [R. 100]

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

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).

Kenai Municipal Code 14.20.150(a) states in relevant part that: “[t]he conditional use permit procedure is intended to allow flexibility in the consideration of the impact of the proposed use on surrounding property and the application of controls and safeguards to assure that the proposed use will be compatible with the surroundings.” The applicant for a conditional use permit has the burden of establishing that the conditional use meets the following six criteria:

- (1) The use is consistent with the purpose of this chapter and the purposes and intent of the zoning district;
- (2) The value of the adjoining property and neighborhood will not be significantly impaired;
- (3) The proposed use is in harmony with the Comprehensive Plan;
- (4) Public services and facilities are adequate to serve the proposed use;
- (5) The proposed use will not be harmful to the public safety, health or welfare; and
- (6) Any and all specific conditions deemed necessary by the Commission to fulfill the above-mentioned conditions should be met by the applicant. These may include, but are not limited to, measures relative to access, screening, site development, building design, operation of the use and other similar aspects related to the proposed use.⁷

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

He has proposed rules for his clients that include quiet hours after 10 p.m. and restrictions on roaming the property, asking his clients to respect the neighbors. He stated that he and his

⁷ KMC 14.20.150(d)(1-6).

family along with a helper will be staying at the property most of the time. The lodge will provide a continental breakfast, but otherwise clients are expected to do their own cooking in a common kitchen area. A house cleaner will also be coming to the location.

Mr. Schlehofer's appeal indicates that denial of a conditional use permit will cause him economic harm and that he has already spent significant funds to accommodate the property for guests. He argues that the opinion of neighbor's who testified against him has been unfairly biased because of their experience with lodges and guide services on nearby Angler Drive. Mr. Schlehofer argues that he will run a different type of operation than those complained about on Angler Drive and that he should not be penalized for what occurred there.

During the public comment period of the hearing before the Board, Deidre Cheek showed a video of the neighborhood which highlighted the homes and long term residents of the neighborhood. Charlotte Coots explained that she and her family relocated to the Dolchok neighborhood to get away from noise and industrial activity encroaching on her prior home. She and her husband relied on the covenants in the neighborhood prohibiting businesses in choosing its location according to her testimony. She also provided that she relied on the City's zoning code in protecting their residence from noncompatible land uses. She stated that she enjoyed walks in the neighborhood and the residential neighborhood life. Concern was expressed that the proposed lodge was not a 9-5 business, but instead one that had vacationing guests all hours of the day and night. A comparison was made to Angler Drive which had numerous commercial uses permitted through the conditional use process and had lost its residential character. She asserted that the residents of Dolchok Lane's quality of life was at jeopardy and questioned whether the Board was listening to the wishes of the community.

Rick Baldwin argued that it would be poor planning to allow this business use in the Dolchok Neighborhood which planning and zoning regulations were set up to protect. He argued that this business use was not compatible with the residential Dolchok Neighborhood, and it was not merely a matter of allowing some flexibility in use. He argued that the business would operate consistently on an early fishing schedule, and that clients would be coming and going, and checking in and out causing inevitable noise and disturbance. He argued that the business would bring transient strangers into the neighborhood that were on a vacation schedule and would behave like vacationers as opposed to residents. He agreed that not all guest would be loud and boisterous, but that some certainly would, even if rules were in place. He stated that the number

of guests and activity of a lodge were not compatible with the neighborhood. He argued that the Comprehensive Plan promoted quality of life and that the City should protect the neighborhood environment that had been nurtured. He asserted that Comprehensive Plan provided a common theme of protecting neighborhoods. He argued that Angler Drive showed how granting conditional uses for a lodge in residential neighborhoods changed the character of the neighborhoods and devalued surrounding residential property. He reminded the Board the Mr. Schlehofer had the burden of proof and that every neighbor was against the proposed use.

During Mr. Schlehofer's presentation of his case, after the Planners staff report, Mr. Schlehofer noted the opposition from his neighbors. He provided that he had been misled by his realtor and the prior homeowner that the home would be appropriate for a lodge. He noted that the downstairs of the house had previously been rented out. Mr. Schlehofer argued that he would not be fostering a loud environment but that he would have strict rules in place for his guests and that his impact on the neighborhood would be minimal because it was so close to the entrance of the subdivision. He stated that his guests came to fish and were not there to party. He also noted that the business would not be run year round, but only seasonally. Mr. Schlehofer clarified that his plan would involve only minimal fish processing at the residence to include vacuum sealing. He asserted that granting his use would not result in the neighborhood changing like Angler Drive had.

Much like his written appeal, Mr. Schlehofer emphasized before the Board his lengthy career in the guide industry and that he was a responsible and respected operator. He also clarified that there was a trailer on the property which was used to house a deckhand, and he had a house cleaner, otherwise he only worked with other independent contractors. He stated that he wanted to be given a chance by the neighborhood and that his business would not interfere or disrupt the neighborhood, explaining that he also had his family living on the property.

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

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

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

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

- (1) To separate residential structures to an extent which will:
 - (A) Preserve the rural, open quality of the environment;
 - (B) Prevent health hazards in areas not served by public water and sewer.
- (2) To prohibit uses which would:
 - (A) Violate the residential character of the environment;
 - (B) Generate heavy traffic in predominantly residential areas.⁸

In this case, the substantial evidence shows that the proposed lodge is not compatible with the stable and attractive residential environment and would violate the residential character of the neighborhood. Public testimony provided through a video of the neighborhood, clearly shows the neighborhood's unique residential character. The video showed that many of the residents had lived in the neighborhood for a long time, indicating a stable environment. The video along with other public testimony described a close knit neighborhood where children played in the street, residents walked along the street and the neighbors generally knew each other. The neighborhood appears relatively neat with single family homes. The activity of operating a lodge, with clients leaving early every morning, and returning in the evening to cook and enjoy their vacations would likely disrupt the character of the neighborhood. Other activities such as a deckhand living on sight, and a cleaner coming to clean on a commercial basis would add to this disruption. The residents testified during public comment and in the record before the Board about the closeness of the residents in the neighborhood and their enjoyment of its livability. Having paying clients

⁸ KMC 14.20.080

staying at the property proposed for the lodge, on a daily or weekly basis could certainly detract from this, even if they were asked to stay on the property by the owner and observe quiet hours. Public testimony is persuasive that even if Mr. Schlehofer had strict house rules for his clients, not all could reasonably be expected to follow them, and Mr. Schlehofer cannot control the activity of his clients in their comings and goings to the residence. Having eight guests, plus Mr. Schlehofer's family, a deckhand and cleaning lady coming and going from the property can reasonably be expected to increase noise and traffic beyond a typical family residence. This is especially true of the earlier morning activities typical of fishing clientele as explained to the Board.

Covenants for the neighborhood (found in the record at [R.94-97]) prohibit commercial businesses and neighbors indicated that they relied on these covenants in choosing to locate in the neighborhood. While the covenants are not ultimately determinative in the Board's decision as the City does not enforce private covenants, coupled with the testimony by residents of their reliance on the covenants, they are evidence that the neighbors expect the neighborhood to be residential in character and free of commercial activity. The evidence indicates that there are not any other current commercial uses on Dolchok Lane.

Mr. Schlehofer provided that his intention was to run a small operation that would not be disruptive to the other residents. He testified and provided evidence that guests staying over would be expected to follow strict rules. He only had a small number of guest rooms and expected vehicle traffic from his clients to be limited. He also indicated that fish processing activities would be minimal. His business plan was to provide a small breakfast, otherwise clients would be responsible for cooking their own food in a shared kitchen area. This testimony and his plan for guests does not meet his burden of showing that the lodge operation would not destabilize the attractive residential environment of the neighborhood, or jeopardize its residential character.

Mr. Schlehofer also argued that he had been in the guide business for a long time and was well respected in the industry. He stated that he had been told by his realtor and the previous home owner that the property was suitable for a lodge business. While this may be true, it is not persuasive to the findings of the Board.

The Board finds that the substantial evidence shows that even though Mr. Schlehofer intends to run a small operation, with a small number of guests staying overnight, close to the exit of the neighborhood, the commercial use would violate the residential character of the neighborhood and not maintain a stable and attractive residential environment. Having up to eight

guests coming and going, staying overnight, cooking, and spending evenings and nights at the residence would likely have an impact on the neighborhood. While other neighbors could certainly have guests stay over or visit, consistent use of this property during the summer by clients, and two workers, along with the Mr. Schlehofer's family would be more of an impact in relation to traffic and noise than a typical household in the neighborhood would have.

The neighbors who provided public testimony and written comments in the record showed the impacts of similar conditional uses in a nearby neighborhood that had lost its residential character. The purpose of the RR zone is to create a stable and attractive residential environment, and in this case, in this close knit neighborhood, with numerous long time residents, without any current commercial uses, the lodge use as presented by Mr. Schlehofer would likely violate the residential character of this particular neighborhood and cause destabilization. This would be the first permitted commercial use in the neighborhood, and while this decision is just based on this use, the Board does note that in other neighborhoods the intrusion of numerous commercial uses has been shown to have caused significant change.

B. Mr. Schlehofer Did Not Meet his Burden to Show that the Value of Adjoining Property or Neighborhood Would Not Be Significantly Impaired.

The requirements for granting a conditional use permit require the applicant to show the value of adjoining property and the neighborhood would not be significantly impaired by the use. In this case Mr. Schlehofer argued that the values of adjoining property would not be impaired. He argued that there were sufficient natural and fencing buffers surrounding his property to minimize impact. He also provided that he has invested in the house to improve it. The public testimony and neighbor's arguments in the record on the other hand argue that their property would be significantly impaired. The neighbors testified that new buyers would be concerned about living in a residential neighborhood next to a lodge with unknown clients coming and going, as compared to the current neighborhood without any commercial uses. The neighbors testified that the criteria was also not specifically limited to monetary value but that other aspects of the value of their property and the neighborhood would be significantly impaired, namely their use and enjoyment of their property and the neighborhood.

Neither Mr. Schlehofer nor his neighbors presented appraisal or assessment data, nor opinions from a realtor indicating one way or another how property values could be affected by commercial

uses in a residential neighborhood. While the staff report by the City Planner also indicates adjoining property values would not be affected, this conclusion is also not supported by substantial evidence. The Board finds that given the contradicting opinions by both Mr. Schlehofer and his neighbors, the Applicant has not shown by substantial evidence that adjoining property or the neighborhood would not be significantly impaired.

C. Mr. Schlehofer Did Not Show that a Lodge in the Neighborhood would be in Harmony with the Comprehensive Plan.

Mr. Schlehofer did not present evidence related to the proposed use being in harmony with the City's Comprehensive Plan related to a lodge. In response to this criteria in his application for a lodge, he only indicated that he would have lodge rules in each room to ensure the safety and harmony at all guests. The City Planner did note that one of the goals of the Comprehensive Plan is to promote economic development and support the fiscal health of the City. However, neighbors publicly testified and provided written comment in the record that one of the other goals of the Comprehensive Plan is to promote and encourage quality of life in the City, including an objective to protect and rejuvenate the livability of existing neighborhoods and promote the siting and design of land uses that are in harmony and scale with surrounding uses.

The Board finds that these goals are not mutually exclusive, however Goal 1 of the Plan, promoting and encouraging quality of life is more applicable, especially in light of the objectives of the goal in protecting livability of existing neighborhoods and siting land uses in harmony with each other. While Mr. Schlehofer has argued that his proposed lodge use would have little to no impact on the neighborhood, numerous residents testified about the benefits of living in the residential neighborhood without any commercial uses. There was testimony about residents' enjoyment of the neighborhood's private and public property attributes. The neighbor's testified about the current privacy in the neighborhood, quietness, and use of the residential street by children and how these attributes contributed to their quality of life. A commercial use in this environment does not necessarily meet, nor is it in harmony with the objective of protecting the livability of neighborhoods and siting harmonious uses. While economic development is a goal of the Comprehensive Plan, it is less specific to this residential neighborhood and the attributes that are important to its residents. Economic development can be fostered in other areas of the City more appropriate for commercial uses. Additionally, the Comprehensive Plan in Goal 3 discusses

land use strategy to implement a forward-looking approach to community growth and development. Siting a lodge in this quiet residential neighborhood is not necessarily consistent with this goal.

The Board is more persuaded, that the Comprehensive Plan is intended to promote and encourage quality of life and protect the livability of neighborhoods, sitting compatible uses next to each other as opposed to economic development in residential neighborhoods. Mr. Schlehofer has not met his burden of showing by substantial evidence that a lodge on Dolchok Lane would be in harmony with the Comprehensive Plan. Mr. Schlehofer's presentation and evidence is almost completely silent as to how the use is in harmony with the Comprehensive Plan.

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

The Board finds that public services and facilities are adequate to serve the lodge. The property is adjacent to a paved road maintained by the City. There is adequate police and fire response available, utilities are available and the property is large enough for onsite private water and sewer.

E. The Proposed Use Will not be Harmful to Public Safety, Health or Welfare.

The Board finds that the proposed use would not be harmful to public health safety or welfare. Mr. Schlehofer's description of his proposed operations do not give rise to concern for public safety, health or welfare. While the Appellants have raised safety concerns regarding risk to their children from increased vehicular traffic from overnight guests, as well as the suggestion of the influx of unknown clients of the business wandering off property, these concerns are not sufficient to show the use would be harmful to the public safety, health or welfare.

F. There are Not Additional Conditions that can be Imposed on the Conditional Use Permit that Would Allow the Use to Satisfy all of the Requirements for Granting a Conditional Use Permit for a Guide Service.

This final criteria allows for the imposition of additional limitations or safeguards to be required in the operation of the proposed conditional use to ensure it meets the other five criteria for granting a conditional use. Mr. Schlehofer testified and provided evidence that he would impose certain rules for his clients to restrict their impact on the neighborhood, such as quiet hours

and restrictions on leaving his property while staying there. He also described his operation being small and utilizing few independent contractors that would be coming to the neighborhood.

The Board considered additional criteria that could be imposed to limit the impact of the lodge use on the neighborhood. These included requiring additional screening and limiting hours of operation. However, ultimately the Board concludes that there are not reasonable limitations that can be placed on the operation that would allow the use without impacting the stable attractive and residential environment and character of the Dolchok Neighborhood. Further, considered limitations on the lodge use could not ensure there would not be significant affect on the values of adjacent property or the neighborhood given the evidence presented. Finally, these considered limitations would not bring the use into harmony with the City's Comprehensive Plan which strives to promote quality of life and livability and protect existing neighborhoods.

CONCLUSION

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

DATED this 19 day of August, 2021

BY: 

Brian G. Gabriel, Board Chair

BY: 

Bob Molloy, Board Member

BY: 

Glenese Pettey, 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

Notice of Right to Appeal

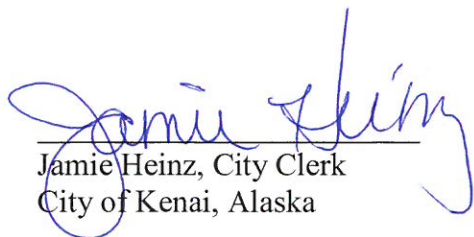
This decision constitutes the final decision of the City of Kenai Board of Adjustment in this matter. An appeal of this decision to the Alaska Superior Court must be filed within thirty (30) days of the date of this decision, in accordance with Kenai Municipal Code Section 14.20.300, Alaska Statute 22.10.020(d), and Alaska Rule of Appellate Procedure 602(a)(2).

CERTIFICATE OF DISTRIBUTION

I certify that on 14th 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:

Paul Ostrander, City Manager
City of Kenai

210 Fidalgo Ave
Kenai, AK 99611



Jamie Heinz, City Clerk
City of Kenai, Alaska

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