

I. CALL TO ORDER; ROLL CALL

A meeting of the Matanuska-Susitna Borough Board of Adjustment and Appeals was called to order at 10 a.m. by Vice Chair Claudia Roberts for the purpose of conducting an appeal hearing.

Board members present and establishing a quorum were:

Ms. Claudia Roberts
Ms. Tina Crawford
Mr. Larry Schmidt

Staff in attendance were:

Ms. Brenda J. Henry, Assistant Borough Clerk
Mr. Mark Whisenhunt, Development Services Manager
Mr. Joe Metzger, Planner II
Ms. Shannon Bodolay, Assistant Borough Attorney

II. APPROVAL OF AGENDA

Vice Chair Roberts queried if there were any changes to the agenda.

GENERAL CONSENT: There was no objection to the agenda as presented.

III. APPROVAL OF MINUTES

A. September 9, 2020

Vice Chair Roberts queried if there were any changes to the minutes.

GENERAL CONSENT: There were no changes to the minutes as presented.

IV. ITEMS OF BUSINESS

A. BOAA Case No. 20-03 - Appeal Hearing – Appeal the Denial of a Request for Variance, Janice Ellsworth, Appellant.

1. Borough Staff (*10 Minutes To Present The Decision Below And To Set Forth The Evidence And Rationale Of The Decision Maker.*)

a. Joe Metzger, Planner II

Mr. Metzger presented the decision and rationale of the Platting Board.

2. Appellant (*15 minutes*)

a. J. Taylor Rounds, Attorney on behalf of Janice Ellsworth, Appellant

Mr. Rounds provided his opening statement.

Mr. Schmidt asked questions of Mr. Rounds.

Ms. Crawford asked questions of Mr. Rounds.

Ms. Roberts asked questions of Mr. Rounds

3. Borough Attorney (*15 Minutes*)
 - a. Shannon Bodolay, Assistant Borough Attorney

Ms. Bodolay provided her opening statement.

Mr. Schmidt asked questions of Ms. Bodolay.

4. Interested Parties (*5 Minutes Each*)

There were no interested parties.

5. Appellant For Rebuttal (*5 minutes*)
 - a. J. Taylor Rounds, attorney on behalf of Janice Ellsworth

Mr. Rounds provided his rebuttal.

Mr. Schmidt asked questions of Mr. Rounds.

V. ADJUDICATORY SESSION

MOTION: Ms. Crawford moved to enter into adjudicatory session.

VOTE: There was no objection noted and the Board entered into adjudicatory session at 10:51 a.m.

MOTION: Ms. Crawford moved to exit adjudicatory session.

VOTE: There was no objection noted and the Board exited adjudicatory session at 2:23 p.m.

Vice Chair Roberts requested that Ms. Henry read the draft of the final decision into the record.

Ms. Henry read the draft final decision into the record.

MOTION: Ms. Schmidt moved to approve the final decision as read into the record by the Clerk.

VOTE: The motion passed without objection.

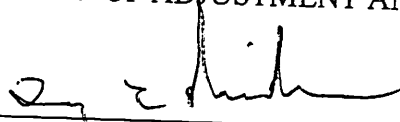
VI. BOARD COMMENTS

There were no comments provided.

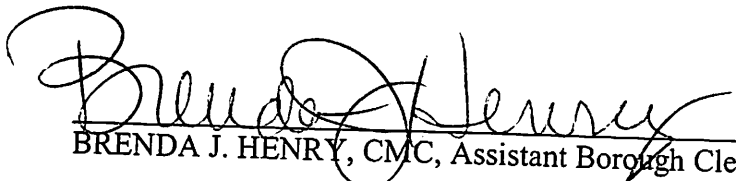
VII. ADJOURNMENT

The meeting adjourned at 2:25 p.m.

MATANUSKA-SUSITNA BOROUGH
BOARD OF ADJUSTMENT AND APPEALS


TERRY NICODEMUS, BOAA Chairperson

ATTEST:


BRENDA J. HENRY, CMC, Assistant Borough Clerk

Minutes Approved: 12/28/20

MATANUSKA-SUSITNA BOROUGH

BOARD OF ADJUSTMENT AND APPEALS

IN RE:

Denial of a conditional use permit
Located at 7430 West Sunrise Drive
Tax Id. No. 6405000L006

Dewayne Creech
Appellant

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)
)
)
)
) BOAA Case No. 20-04
)
)

NOTICE OF RIGHT TO APPEAL AND FINAL DECISION

NOTICE IS HEREBY GIVEN, that on December 28, 2020, the Matanuska-Susitna Borough Board of Adjustment and Appeals rendered the following final decision regarding the appeal filed in the above captioned matter. This final decision is appealable within 30 days of the date of this decision, pursuant to MSB 15.39.250 and the Alaska Rules of Appellate Procedure, Part VI.

FINDINGS

1. This appeal was filed in a timely manner.
2. The Sunrise Drive Property is located in a mixed-use area. Topographical information for the area shows that the property slopes down from the northeast to the southeast and that there are wetlands and a creek that abut the property on its southeast corner.

3. The Borough received a complaint about the Sunrise Drive Property and its now proposed use on September 12, 2016.
4. Code Compliance Officers conducted nine site visits of the Sunrise Drive property between November 2016 and September 2018. Eight of those visits revealed the applicant was storing junk vehicles within the public right-of-way of West Sunrise Drive.
5. On June 20, 2018, a Code Compliance Officer took a photograph that shows at least six vehicles and the appellant's two tow trucks in the public right-of-way on West Sunrise Drive.
6. During a site visit on November 16, 2018, staff found that there was still one vehicle stored in the right-of-way by the appellant.
7. During that same site visit, staff found that there was no space for customers to park onsite, as all three driveways and the area on the site plan labeled customer parking were completely occupied by junk vehicles, as well as personal vehicles utilized by the appellant and his employees.
8. At the time of appellant's application for a conditional use permit, there were no applications for driveway permits on file with the Borough for any of the driveways on the Sunrise Drive Property.

9. At the public hearing before the Planning Commission, the Appellant stated that he secured the required driveway permits for the driveways on the Sunrise Drive property. There were no copies of driveway permits supplied in the record.
10. On December 18, 2020, the appellant moved to supplement the record with copies of driveway permits and rebuttal to the written arguments. Borough code does not provide for rebuttal to written arguments. The BOAA allowed copies of the driveway permits to be admitted to the record and denied the rebuttal to the written arguments.
11. During the site visit on November 16, 2018, staff found all driveways to the Sunrise Drive Property littered with oil and grease spills. The driveway nearest the shop was the most contaminated and emitting an odor of oil detectable as staff was walking down the driveway.
12. During that same site visit, staff discovered two 55-gallon drums the applicant advised are for the collection of used oil. The drums were situated on the gravel driveway approximately 20-feet from the shop facility. The appellant testified that the drums now sit on concrete pads inside the shop. Photos in the record support the appellant's testimony.
13. On November 9, 2016, the appellant received a written warning for operating a junkyard without a permit, causing a public

nuisance regarding junk and trash, and unauthorized encroachment by storing junk vehicles within the public right-of-way.

14. On July 12, 2017, the appellant received citation no. P00444057 for operating a junkyard without a permit, to which he entered a "no contest" plea to on October 4, 2017.
15. According to the appellant's application material, there were two conex structures located within the center driveway and they were approximately 10-feet from the public right-of-way, which is not consistent with the Borough's requirement for a 25-foot setback. The appellant testified that the conexes are no longer in the 25-foot setback area.
16. In the application that was submitted on September 20, 2017, for a conditional use permit at the West Sunrise Drive location, the appellant stated that he has a conditional use permit for a separate property that is located on Machen Road.
17. In the application materials, the appellant states that there have been no incidents at the Machen Road location, except being required to construct a fence and the need to move vehicles out of the right-of-way.
18. During a March 2017 inspection of the Machen Road property, a Code Compliance Officer discovered that junk vehicles were

viewable from and within the public right-of-way. This issue was resolved two months later by May 2017.

19. During the July 2017 inspection of the Machen Road property, a Code Compliance Officer discovered that junk vehicles were viewable from and within the public right-of-way.
20. During the August 2017 inspection of the Machen Road property, a Code Compliance Officer discovered 14 vehicles in the public right-of-way, all of which were tagged with impound notices; this issue was resolved within two days.
21. During the October 2017 inspection of the Machen Road property, a Code Compliance Officer again found the appellant to be storing junk vehicles within the public right-of-way; this issue was not resolved until November 2017.
22. The Machen Road property received six site visits between March and November of 2017, four of which revealed violations of the conditional use permit issued for that location.
23. The Machen Road property and associated conditional use permit are not the subject of this appeal; however, the history of violations at this location, do provide a factual history of the appellant's inability to comply with the conditions of a CUP.

24. The appellant has demonstrated his inability to comply with Borough code by operating the Sunrise Drive property without a conditional use permit.
25. The record reflects that the appellant has been contacted by Borough Staff several times within the relevant five-year range and notified of noncompliance in written notices and issued citations. In his statements before the Planning Commission, the appellant stated that he had not been aware of the importance of compliance, saying "I had no idea that the - it was critical of an aspect, you know, that might risk me getting a permit."
26. The BOAA finds that any reasonable person that already had a CUP for a junkyard would have knowledge of the requirements of Borough code to operate lawfully under a conditional use permit.
27. On December 17, 2018, the Planning Commission denied the appellant's request for a conditional use permit, which he then appealed to the BOAA.
28. The BOAA then heard the appeal of the denial of a conditional use permit (CUP) for the Sunrise Drive property on March 14, 2019.
29. The appellant appealed the BOAA's decision to the Superior Court on April 10, 2019.

30. The Superior Court remanded the issue back to the Planning Commission because of comments they made at the first public hearing regarding the appellant's suitability to operate a CUP that were beyond the five-year look-back period.
31. For the hearing upon remand, the Planning Commission was limited to consideration of MSB 17.60.100, General Standards; MSB 17.60.110, Junkyards and Refuse Area Standards; and Alaska Statute 08.60.070.
32. The October 16, 2019, site visit by a Code Compliance Officer revealed that some vehicles and the appellant's dumpster were being stored in the right-of-way, in violation of Borough Code.
33. The follow-up site visit on April 2, 2020, revealed that the vehicles had been moved but that the dumpster was still in the right-of-way, in violation of Borough Code. At the public hearing before the Planning Commission, the appellant testified that the dumpster had been moved out of the right-of-way.
34. On September 8, 2020, a site visit by staff found the appellant had installed a narrow drivable loop along the exterior of the operation.
35. Prior to the Planning Commission considering the application at the September 21, 2020, public hearing, staff requested

updated information from the Appellant. Instead of updating his application, which includes the site plan, so that the Planning Commission had an accurate description of the proposed use, the appellant testified to the differences in his application and the current use of his property.

36. At the September 21, 2020, public hearing, the appellant testified that he had built an 8-foot metal panel fence, removed the conexas that were in violation of setback requirements, moved the oil barrels to be located inside the shop, unblocked driveways, and got permits for the driveways on the property. There were no photographs or other evidence provided to support that testimony other than what was included in the record by Borough Staff. The appellant's attorney provided one photograph of a side of the fence. The record inadvertently excluded this photo. The Borough moved to supplement the record with this photo. The BOAA Chairperson granted that request on December 9, 2020.
37. Appellant's statement of grounds for an appeal No. 1: alleges that the Planning Commission erred by applying and using the incorrect legal standards for conducting the hearing. The BOAA finds that the Planning Commission applied the legal standards as dictated by the Superior Court's remand order.

38. Appellant's statement of grounds for appeal No. 2: alleges that the Planning Commission erred in adopting PC Resolution No. 20-30 without discussion. The BOAA finds that there is no code requirement that there must be discussion or debate prior to voting on items that are before a board, committee, or commission of the Borough.
39. Appellant's statement of grounds for appeal No. 3: alleges that the Planning Commission erred by not giving weight to the efforts and expenses that the appellant made to bring his business into compliance. Other than the site visit photos taken by Borough staff, there is little to no documentation of efforts or expenses included in the record before the BOAA other than the appellant's testimony at the public hearing. The BOAA finds that testimony alone is not substantial evidence. The BOAA also finds that expenditures of funds are not a code requirement that has to be considered in order to approve a CUP.
40. Appellant's statement of grounds for appeal No. 4: alleges that the findings of fact adopted, which supported denial were in contrary to the evidence presented to the Planning Commission. There was no new evidence provided by the appellant, other than his testimony.

41. The issue on Appeal to the Superior Court No. (2) is based on whether the Borough erred in evaluating Mr. Creech's suitability for the conditional use permit by considering evidence that was more than five years old. At the September 21, 2020, Planning Commission public hearing, no comments were made that were outside the five-year look-back period.

CONCLUSIONS

1. Per MSB 15.39.030, the BOAA has jurisdiction over this appeal.
2. MSB 15.39.180(B), states, "Any evidence not already part of the record that an interested party wants the BOAA to consider must be submitted to the clerk's office before or on the day written arguments are due. Evidence or written arguments shall not be accepted after the deadline and before the hearing date unless the party requests and is granted leave by the BOAA chairperson to make a late filing. New evidence may be submitted at the time of hearing if the BOAA determines that the evidence was not discovered or could not have been obtained prior to the deadline for evidence submittal, or if the evidence is relevant and it is in the interest of justice that it be considered."
3. Alaska Statute 8.60.070 requires that municipalities regulate junkyards and refuse areas, correctional community

residential centers, and marijuana retail and cultivation facilities.

4. This statute provides requirements used to determine an applicant's suitability to establish, maintain, or operate a proposed use under that chapter. MSB 17.60.110(C) was adopted to incorporate this language into Borough code. The Court ruled that the Planning Commission applying the newly adopted code was a harmless error, as the requirements were already applicable to the appellant at the time of his application for a CUP, through binding state law.
5. Alaska Statute 08.60.070, states the commissioner of public safety, the city council, and organized borough assembly, in considering applications and regulations, shall take into account:
 - (1) the nature and development of surrounding property;
 - (2) the need to protect the local economy, adjacent land owners, and the motoring public from economically depressing and unsightly roadside locations;
 - (3) the proximity of churches, schools, hospitals, public buildings, recreation areas, or other places of public gathering;
 - (4) the sufficiency in number of other similar business establishments in the vicinity;

(5) the adequacy of fences and other types of enclosures to prevent the unsightly display of a junk yard;

(6) the health, safety, and general welfare of the public;

(7) the suitability of the applicant to establish, maintain, or operate the business under A.S. 08.60.050 - 08.60.100.

6. MSB 17.60.030(A)(1), states, "The following land uses are declared to be potentially damaging to the property values and usefulness of adjacent properties, or potentially harmful to the public health, safety, and welfare: 1) junkyards and refuse areas. . . .
7. MSB 17.60.030(B), states, "Such uses are permitted only upon the issuance of a conditional use permit, as provided in this chapter. Unless such uses are maintained under and in accordance with a lawfully issued permit, such uses are declared to be public nuisances. Maintenance of such a land use without a permit is prohibited."
8. The BOAA concludes that the Planning Commission appropriately determined that the appellant operated the Sunrise Drive business without a CUP for at least five years prior to applying for a CUP, which by Borough code is a public nuisance.

9. MSB 11.10.020(A), states, "Any person desiring to construct or cause an encroachment shall apply for an encroachment permit to the public works director." The record on appeal did not reflect that the appellant had applied for any encroachment permits.
10. MSB 11.10.030(C), states, "Unauthorized encroachments shall be deemed a public nuisance and are subject to all legal proceedings authorized by law." The record reflects that the appellant had vehicles parked in the right-of-way as recently as April 2020.
11. MSB 17.55.010(A) requires that no structures or building shall be placed within 25-feet from the public right-of-way. The appellant testified that the conexes had been, moved but provided no evidence to support that testimony.
12. MSB 17.60.100(A) states "a conditional use may be approved only if it meets the requirements of this section in addition to any other standards required by this chapter."
13. MSB 17.60.100(B), states, "In granting a conditional use permit, the Planning Commission must make the following findings:

(1) that the proposed use will preserve and not detract from the value, character, and integrity of the surrounding area;

(2) that granting the conditional use permit will be

harmful to the public health, safety, convenience, and welfare;

(3) that sufficient setback, lot area, buffers, or other safeguards are being provided to meet the conditions listed in subsections (B)(1) through (3) of this section; and (4) the conditional use fulfills all other requirements."

14. The BOAA concludes that the Planning Commission properly applied MSB 17.60.100 in denying the CUP, as they were unable to make each of the findings required by code in order to grant the CUP.
15. After a review of Alaska State Statute and applicable Borough code, the BOAA concludes that Alaska Statute 08.60.070 does not speak to limiting the suitability of an applicant to a look-back period of five years.
16. The BOAA concludes that the limiting of the look-back period occurred when the Assembly adopted MSB 17.60.110(C)(2). The appellant argued to the Court that MSB 17.60.110(C)(2) should not apply as it was adopted while his application was in process. MSB 17.60.110 prior to 2018, did not limit the look-back period of the suitability of the applicant to five years.
17. MSB 17.60.110(C)(2) being adopted is what limited the look-back period to five years. The appellant argues in his appeal to the Superior Court, that MSB 17.60.110(C)(2) should not have been applied as it was adopted after his application

was submitted. Then the appellant argues that it should apply so that his suitability is only impacted by a five-year look-back period.

18. The BOAA concludes that the Planning Commission's decision was not significantly colored by Mr. Creech's activity beyond the five year look-back period, as the limit on the five year look-back did not exist was the time of the application.
19. The BOAA concludes that with or without the five-year look-back at the appellant's history of noncompliance with local, state, and federal laws, the Planning Commission properly determined that the applicant is not suitable to establish, maintain, or operate the proposed use under the requirements outlined in State Statute and Borough Code. Since March of 2016, Borough Staff has observed the appellant violating Borough Code 15 times, 11 of which were at the proposed use on West Sunrise Drive; the other four were at the appellant's junkyard on Machen Road.
20. The BOAA concludes that the Sunrise Drive Property meets the definition of junkyard in MSB 17.125, which reads: "Junkyard/refuse area" means a location which is commercially used for the purpose of the outdoor storage, handling, dismantling, wrecking, keeping or sale of used, discarded, wrecked or abandoned airplanes, appliances, vehicles, boats,

building and building materials, machinery, equipment, or parts thereof, including, but not limited to, scrap metals, wood, lumber, plastic, fiber, or other tangible materials."

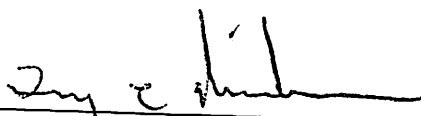
21. MSB 15.39.210(B), states, "The BOAA shall defer to the judgment of the decision maker regarding findings of fact if they are supported by substantial evidence."

FINAL DECISION

Based upon the above Findings and Conclusions, the Matanuska-Susitna Borough Board of Adjustment and Appeals affirms the Planning Commission decision denying the CUP through Resolution No. 20-30.

Dated this 28 day of December, 2020.

MATANUSKA-SUSITNA BOROUGH
BOARD OF ADJUSTMENT AND APPEALS



TERRY NICODEMUS, Chair

Attest:

BRENDA J. HENRY, CMC,
Assistant Borough Clerk

YES: Nicodemus, Crawford, Schmidt

O: Roberts