BEFORE THE MUNICIPALITY OF ANCHORAGE
BOARD OF ADJUSTMENT

In Re:	)	
Appeal of Planning and Zoning Commission	)	
Resolution No. 2020-025	)	
	)	
Powder Run Multi-Family Residential Development	)	**Board of Adjustment Case No. 2020-4**
	)	
US Survey 3042, lot 3, T10N, R2E, Section 10	)	**Planning Case No. 2020-0097**
	)	

FINDINGS OF FACT AND CONCLUSIONS

On August 3, 2020, the Planning and Zoning Commission (PZC) approved the application for a Conditional Use Permit (CUP) submitted by 3MJ Development LLC (3MJ) on an 8-0 vote. PZC issued its written decision on September 14, 2020. Appellant Wedeking timely appealed.

The Board of Adjustment (BOA) deliberated and decided the appeal at a meeting open to the public held on March 25, 2021. The BOA's summary findings and motions from the meeting are attached hereto.

At issue is whether the PZC properly granted the CUP for the Powder Run Multi-Family Residential development, US Survey 3042, lot 3, T10N, R2E, Section 10. Pursuant to Anchorage Municipal Code ("AMC"), the Board of Adjustment (BOA) is to affirm, modify, or reverse the PZC's decision in a final disposition to this case, unless a remand is necessary because there is insufficient evidence on an issue material to the decision in the case, or there was a substantial procedural error or a legal error that warrants a remand. AMC section 21.03.050A.12.-13.

The Board of Adjustment remands this case for further hearing by the PZC.

Jurisdiction and Standard of Review

The Board of Adjustment has jurisdiction to decide appeals from decisions of the Planning and Zoning Commission regarding the approval or disapproval of a conditional use permit.[1] At the August 3, 2020 Planning and Zoning Commission meeting there were eight members participating of the nine seats of the full Commission. Anchorage Municipal Code 21.02.030D.1 provides that a majority of the full body constitutes a quorum and action requires a majority vote of the full body. The 8-0 vote approving the CUP was in excess of the required majority.

The BOA must consider an appeal solely on the basis of the record established before the PZC, the appeal notice, the briefs, and the law.[2] The Board of Adjustment may exercise its independent judgment on legal issues raised by the appellant. The term "legal issues" means those matters that relate to the interpretation or construction of ordinances or other provisions of

[1] AMC 21.03.050A.1.e.
[2] AMC 21.03.050A.11.a.

law.[3] The board of adjustment shall, unless it substitutes its independent judgment, defer to the judgment of the lower administrative body regarding factual issues. Findings of fact adopted expressly or by necessary implication by the lower administrative body may be considered as true if they are supported in the record by substantial evidence. The term "substantial evidence," for the purpose of this section, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the record affords a substantial basis of fact from which the fact in issue may be reasonably inferred, it shall be considered that the fact is supported by substantial evidence.[4]

Issues

I. Record on appeal before the Board of Adjustment.

As noted above, the BOA "consider an appeal solely on the basis of the record established before the lower administrative body, the notice of appeal, the briefs, and the law."[5]

The Municipal Clerk assembles the record on appeal which shall include "[c]opies from the department of all documentary evidence, memoranda, exhibits, correspondence, and other written material submitted to the administrative body prior to the decision from which the appeal is taken."[6] Any exhibits or other documents not before the Commission prior to its decision are not to be considered by the BOA as a matter of law. Briefs filed by the parties are to attach both full copies of code or regulation principally relied on and an excerpt of the record of the pages on which the briefing relies.[7]

Wedeking attached 4 pages of Exhibits to its brief filed on January 26, 2021. The first page ("Attachment A") is R-008 of the record. The second and third pages ("Attachment B" and "Attachment C", respectively) purport to be pages 48 and 49 from the Girdwood Area Plan ("Plan"). The fourth page ("Attachment D") is allegedly a photo of the subject property. Wedeking also filed exhibits with its Reply Brief, which appear to be records of the Girdwood Valley Service Area Board of Supervisors, the governing body for matters within their jurisdiction under AMC 27.30.020.[8] Also included are records of the Girdwood Land Use Committee.

A. Attachment A.

The BOA finds that Attachment A is already part of the record and is considered as part of this appeal.

B. Attachment B.

[3] AMC 21.03.050A.11.b.
[4] AMC 21.03.050A.11.c.
[5] AMC 21.03.050A.11.a.
[6] AMC 21.03.050A.6.b.iii.
[7] AMC 21.03.050A.7.d.i.
[8] AMC 27.20.110.

Planning Staff (Staff) and 3MJ mentioned and discussed the Girdwood Area Plan in advance of the PZC hearing. Staff did so in the Staff Report.[9] Appellee 3MJ did so in its Application for the CUP.[10] Staff discussed the Plan at the PZC hearing on August 3.[11] The Plan itself is not in the record. Appellee notes this in its brief, stating, "Although the Girdwood Area Plan is not included as part of the Record, 3MJ does not necessarily object to the specific language quoted by Appellants."[12] **The BOA finds** that Attachment B is pages 48 and 49 of the Girdwood Area Plan, adopted by the Municipality of Anchorage as part of its Comprehensive Plan.[13] **The BOA further finds** that the Plan, in its entirety, should be considered as part of this appeal as it is applicable law for the case, being an adopted element of the Comprehensive Plan. The CUP may not be approved by PZC unless the "proposed use is consistent with the comprehensive plan."[14]

C. Attachment C.

The photo is not part of the record on appeal, having not been any part of the PZC hearing or submittals given to PZC prior to the hearing. **BOA finds** that it cannot consider the photo as part of the appeal. In any event, the photo is not authenticated nor demonstrates any indication that it stands for the propositions Wedeking asserts that somehow 3MJ is "leaving no buffer" or that the photo is a "visual example of the adverse impacts (and incompatibility) to the surrounding area."[15] Further, the photo is not dated and no assertion is made by Wedeking that 3MJ violated the law relative to tree clearing or vegetation retention. No assertion is made by Wedeking that any clearing that has been done is in violation of the law as to timing, amount, location, or any other applicable Code provision. If the photo were new evidence, Wedeking would have needed to allege new evidence by written motion for rehearing before PZC, within 20 days after the date of initial service of the PZC decision.[16]

D. Exhibits submitted with Wedeking's Reply Brief.

The documents are not part of the Record on appeal. These records are not part of the Record on appeal and 3MJ has had no opportunity to respond to them or the argument(s) they purport to support.

The records are not new evidence, undiscoverable by Wedeking prior to either the PZC meeting or the start of this appeal. They are documents which appear to have been created prior to the PZC hearing. Wedeking includes these documents to support a new allegation not raised in its opening brief that 3MJ did not provide as much information as it should have or could have in the variance case; that 3MJ ignored the "traditional" process in Girdwood. Further, Wedeking alleges that 3MJ's statements that it made "considerable efforts to ensure that this project is compatible" and "has listened to the concerns of the community" are not true.[17]

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[9] R-009.
[10] R-030, R-037.
[11] T-020.
[12] Appellee's Brief, page 14.
[13] AMC 21.01.080, Table 21.01-1.
[14] AMC 21.03.080D.1
[15] Appellant's Brief, page 5.
[16] AMC 21.03.050A.5.a.
[17] Appellant's Reply Brief, page 2.

The BOA finds that it cannot consider the exhibits as part of this appeal.

II. The PZC did not rely on the error in the Staff Report regarding the zoning of surrounding property.

Wedeking alleges the staff report (R-007-R-133) at R-008 improperly designates adjacent property across Sproat Rd to the west of the subject property as GR-1, instead of GR-2, which leads the PZC to erroneous findings for CUP approval standards 2, 6 and 7.[18]

3MJ does not disagree that the Staff Report, at R-008, improperly identifies the adjacent property as GR-1, but notes that during the public hearing members of the public (Melissa LaRose, Leah Ellis, and Gerald Fox), and one of the Commissioners mentioned the correct zoning.[19] 3MJ asserts there is no reason to conclude the error was a factor in the PZC decision.

The BOA finds that the Staff Report is indeed incorrect at R-008.

However, the zoning map attached to the Staff Report correctly identifies the adjacent property to the west as GR-2.[20] The same is true for 3MJ's application.[21] There is no evidence in the Transcript that any statement by staff, 3MJ, any municipal agency commenting on the application, any public testimony given to PZC, or the PZC Commissioners themselves relied on the mistake at R-008. 3MJ correctly notes that members of the public and the Commissioners during the hearing noted the GR-2 zoning of the adjacent property.[22] **The BOA finds** that the error did not factor in the lower body's decision as there is no evidence the PZC relied on this error in its deliberations.

III. The PZC had the available public comments prior to the hearing.

Appellant argues that the Staff Report, at R-008, mistakenly asserts that no public comments were received and no comments from the Girdwood Board of Supervisors were received, which leads the PZC to "the disputed findings."[23] Wedeking also asserts that "several letters and faxed comments…were not included in the staff report and made available to the Anchorage Planning and Zoning Commission."[24]

3MJ argues that public comments, including a letter of objection from the Girdwood Board of Supervisors, appear to have been presented to the PZC prior to its hearing and deliberation.[25]

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[18] Appellant's Brief, page 1.
[19] Appellant's Brief, page 13.
[20] R-022.
[21] R-030. ("The lots on the West side of Sproat are zoned GR-2, Single Family/Two Family Residents.").
[22] See, e.g., T-031, T-035, T-039, T-044 ("Commissioner Looney: …Sure, the G2 properties that are located just west of this are a little less density."
[23] Appellant's Brief, page 1.
[24] Appellant's Brief, page 2.
[25] Appellee's Brief, pages 13-14.

3MJ notes that Commissioners mentioned the Girdwood Board of Supervisors' letter and appear to have been looking specifically at its contents.[26]

The Staff Report does note that public comments were not received "as of this writing."[27] During staff's presentation at the public hearing, staff stated that late comments were received and were included in the packet given to PZC on the Friday before the hearing, as a supplement to the agenda item for this matter.[28] There is no evidence in the Record that the staff report was inaccurate at the time it was written, as it appears to have been written and submitted prior to the public comments being received by the Planning Staff, who then created a supplemental packet for the PZC.

Appellant alleges "several letters and faxes" were not "made available to the Anchorage Planning and Zoning Commission."[29] Appellant does not identify whose submittals were not included. Appellant's Brief in this matter was filed with the BOA on January 26, 2021. Subsequently, Planning Staff recognized that it had failed to submit the aforementioned supplemental public comments to the Municipal Clerk's Office as part of the Record. Planning Staff submitted the material on February 1, 2021.[30] In light of this error, this Board issued an Order Extending Briefing Schedule on February 10 and gave the Appellant the opportunity to submit a revised brief by February 18. The Appellant did not submit a revised brief or ask for additional time to do so.

The supplemental comments are part of the Record submitted to this body.[31] **The BOA finds** that the Staff Report was accurate when written and that the public comments, including the Girdwood Board of Supervisor letter, were included in the PZC packet.

The BOA also finds the comments were considered by PZC during the hearing. The transcript contains discussion of the comments, including discussion of the issues raised in the Girdwood Board of Supervisors' letter.[32] **The Board finds** Wedeking has waived any remaining argument about what other public comments, if any, were not before the PZC, having chosen not to resubmit its brief after the record was supplemented and identify what it believes was not included.

IV. Does the application meet the 9 criteria for approval?

There are 9 criteria in AMC 21.03.080D that have to be met in order for a CUP to be approved:

> D. *Approval criteria*. The planning and zoning commission may approve a conditional use application if, in the judgment of the commission, all of the following criteria have been met in all material matters:

[26] Appellee's Brief, page 13.
[27] R-008.
[28] T-023.
[29] Appellant's Brief, page 2.
[30] R-137.
[31] R-138-157.
[32] E.g.T-026, T-028, T-029, T-034, T-045.

> 1. The proposed use is consistent with the comprehensive plan and all applicable provisions of this title and applicable state and federal regulations;
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> 2. The proposed use is consistent with the purpose and intent of the zoning district in which it is located, including any district-specific standards set forth in Chapter 21.04;
>
> 3. The proposed use is consistent with any applicable use-specific standards set forth in Chapter 21.05;
>
> 4. The site size, dimensions, shape, location, and topography are adequate for the needs of the proposed use and any mitigation needed to address potential impacts;
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> 5. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district;
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> 6. The proposed use is compatible with uses allowed on adjacent properties, in terms of its scale, site design, operating characteristics (hours of operation, traffic generation, lighting, noise, odor, dust, and other external impacts);
>
> 7. Any significant adverse impacts anticipated to result from the use will be mitigated or offset to the maximum extent feasible;
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> 8. The proposed use is appropriately located with respect to the transportation system, including but not limited to existing and/or planned street designations and improvements, street capacity, access to collectors or arterials, connectivity, off-site parking impacts, transit availability, impacts on pedestrian, bicycle, and transit circulation, and safety for all modes; and
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> 9. The proposed use is appropriately located with respect to existing and/or planned water supply, fire and police protection, wastewater disposal, storm water disposal, and similar facilities and services.

Of the 9 criteria, Appellant alleges three have not been met: Criteria no. 2, 6, and 7.[33] Wedeking also injects the applicability of certain aspects of the Plan into its argument regarding Criteria 6. While we do not agree that Wedeking's raising of the Plan's requirements is applicable to Criteria 6, we do recognize some leniency in latitude which we should afford a party not represented by counsel. With that in mind, we will address whether the CUP meets Criteria 1, consistency with the Comprehensive Plan. We note that 3MJ did devote part of their briefing to the issue of the Girdwood Area Plan.[34]

A. Criteria 1: The proposed use is consistent with the comprehensive plan.

[33] Appellant's Brief, page 1.
[34] Appellee's Brief, page 14.

According to AMC 21.01.080D.3, conditional uses "shall be consistent with the comprehensive plan" and, under AMC 21.01.080D.4., rezonings and conditional uses "shall conform to the land use plan map."

The Staff Report notes that the Land Use Plan Map in the Girdwood Area Plan, which is intended to guide development in the area, designates the property as single family residential.[35] However, the zoning map adopted by the PZC and Anchorage Assembly in 2005 adopted Chapter 21.09, the governing land use code for Girdwood, which included the creation and zoning of properties to the GR-1 and GR-2 districts, including designating the property at issue as GR-1, which allows 3 units per acre "by right" and more units per acre if done by CUP.[36]

Wedeking asserts that the CUP is not consistent with the Comprehensive Plan, as represented by the Plan (Girdwood Area Plan), because the Plan indicates housing in this area is intended to be affordable.[37] 3MJ asserts that the CUP is in conformance with current zoning.[38] If there were a conflict between the zoning, the zoning implemented by AO 205-81(S) takes priority over the Plan because it is newer in time, having been adopted 10 years after the Plan was adopted.[39]

Within the Girdwood Area Plan is a Land Use Plan, which is "intended to guide the physical development of the Girdwood area."[40] The Land Use Plan is a series of definitions and maps. For the parcel at issue, the Land Use Plan map identifies it as Single Family Residential.[41] Single Family Residential is classified as "areas substantially developed for single-family residential purposes and are expected to remain so for the duration of the Plan, and for vacant areas best suited for single-family residential use."[42]

Planning Staff addressed the issue of allowing multi-family housing in what is designated in the Plan as single family by noting that the difference "may appear to conflict."[43] Staff seems to concede that the zoning accomplished by AO 2005-81(S) is controlling, when it says "However, the underlying zoning designation (GR-1) is intended for a variety of housing types to allow for a diverse neighborhood aesthetic."[44]

We do not assume that the timing of the zoning adoption is controlling. As late as 2015, the Plan is still cited as controlling for Girdwood in subsequently adopted "subplans."[45] Further, AMC

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[35] R-009.
[36] AO 2005-81(S)
[37] Appellant's Brief, page 4.
[38] Appellee's Brief, page 14.
[39] Id.
[40] Girdwood Area Plan, page 45. All references to the Plan are from the MOA's online version. Page numbers are those of the original document and not the pagination of the online .pdf file. For example, the pagination of the .pdf file indicates page 45 of the Plan is page 66 of the electronic .pdf file.
[41] Girdwood Area Plan, Map 11.
[42] Girdwood Area Plan, page 46.
[43] R-009.
[44] R-009.
[45] See, e.g., Girdwood South Townsite Area Master Plan.

21.01.080D.3 states that "rezonings, conditional uses, subdivisions, and other related discretionary actions under this title shall be consistent with the comprehensive plan, including the goals, objectives, policies, and strategies of the elements identified in Table 21.01-1." AMC 21.01.080D4 states "Rezonings, conditional uses, and subdivisions shall conform to the land use plan map and other applicable comprehensive plan maps of the elements identified in Table 21.01-1."

Wedeking has not alleged that the 2005 rezoning is inconsistent with the Plan. BOA believes it has to presume the GR-1 zoning to be in compliance with the Girdwood Area Plan, but not for the reason stated by 3MJ. Instead, we think our confinement to the issues on appeal leaves us to presume the GR-1 zoning is in compliance. Further, we find that the Girdwood Area Plan specifically calls out Residential, Single Family as including a multi-family option, with density of 5-8 dwelling units per acre requiring a conditional use permit.[46] Therefore, we do not believe there is a direct conflict between the Plan and the GR-1 zoning. We now turn to the issue of affordable housing within both the Plan and, if present, the applicable Code.

The Plan says "[o]ne of the most critical land use issues for Girdwood is where and how new housing (in particular, multi-family) will be provided."[47] The Plan divides multi-family housing into two groups: resort based and community-based.[48] Resort-based "should be concentrated within the designated resort areas."[49] Community-based "should be dispersed and kept low scale in order to blend in with the small town atmosphere of the community, rather than resemble that of a more urban setting. This type of housing is intended to be affordable and to be available for both seasonal and full-time residents of the community."[50] Community-based housing could be up to as many as 20 units.[51] The ability of either housing type to "blend in with the community will be based upon where it is sited, and how well it is designed for continuity, scale, and compatibility with surrounding uses."[52]

As noted above, Wedeking asserts that the CUP results in 9 housing units that are not affordable and thus not in compliance with the Plan. The issue for us to consider is whether this CUP is required to offer affordable housing. In raising the issue of affordability, Wedeking presumes the CUP is for community-based housing, triggering the affordability requirement. Assuming this has to be community-based housing, we need to look further at whether affordability is a requirement for issuing the permit. Affordable Housing is defined in Title 21.[53] However, the term is not used in Chapter 21.09, applicable to Girdwood. And, elsewhere in Title 21 it is used only as an incentive (i.e., granting the right to build addition building stories if some of the housing is affordable - see, e.g., AMC 21.04.020), not as a requirement. We see nothing in the Code or the conditional use Criteria that implements some kind of definition or standards for affordability applicable to this case. In fact, the Plan itself says this type of housing is <u>intended</u> to

[46] Girdwood Area Plan, page 49, Table 9.
[47] Girdwood Area Plan, page 48.
[48] Id.
[49] Id.
[50] Id.
[51] Id.
[52] Id.
[53] AMC 21.15.040. *Definitions*.

be affordable.[54] An intention is not a mandatory requirement. Certainly, the Anchorage Assembly has not mandated affordable housing in any other aspect of Title 21, so we see no room to apply it here as a condition. Nothing in the law requires the CUP to be issued on a condition of affordability.

We find support for PZC's determination that the CUP is consistent with the Comprehensive Plan, as amended and implemented by AO 2005-81(S). We find the Girdwood Area Plan intends for community based multi-family housing to be affordable. While consideration of affordable housing is an important community concern, there are no implementing provisions in municipal code applicable to this specific application and therefore affordability is not a criterion upon which to grant or deny the permit.

Since the Plan describes Community-based housing as something that should blend in with the small-town atmosphere, if we were to assume this project needs to blend in, it would seem to us that design elements are critical, which are addressed by 3MJ in its application, and we address those below.

B. Criteria 2: The proposed use consistent with the purpose and intent of the zoning district in which it is located, including any district-specific standards set forth in Chapter 21.04.[55]

In its Staff Report and during the PZC hearing, Planning Staff asserted there is a housing shortage in Girdwood. Staff asserted "The Girdwood community is currently having trouble providing enough housing for both seasonal and permanent workers due to a lack of available long-term housing."[56]

Appellant argues that there is no evidence of a housing shortage in Girdwood in the Record to justify meeting this requirement and that, even if there were, the lack of a condition requiring owner occupancy undercuts this justification.[57] Appellant, without explicitly saying so, appears to be asserting that the purpose or intent of the zoning district includes alleviating a housing shortage.[58] In its Reply Brief, Appellant states "The appellees are correct in the statement that the appellants are aware that Girdwood has a 'housing shortage'. The appellant's argument is determining the type of housing required to meet this shortage."[59]

3MJ responds by noting the zoning district purpose and intent are codified at AMC 21.09.040B.2.a. and this CUP meets the purpose and intent. Further, 3MJ asserts the CUP also meets the district-specific standards in Chapter 21.09.[60] Therefore, Criteria 2 is satisfied.

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[54] Girdwood Area Plan, page 48
[55] AMC 21.04 contains descriptions and requirements for the Zoning Districts. AMC 21.04.010 Table 21.04-1 states that the Girdwood districts are set forth in 21.09. The District specific standard for GR-1 is in 21.09.040B.2.a.iii ("More than one principal structure may be allowed on any lot or tract by administrative site plan review.") No other district specific standards exist for GR-1.
[56] R-009, R-010.
[57] Appellant's Brief, page 2.
[58] Appellant's Brief, pages 2-3.
[59] Appellant's Reply Brief, page 7.
[60] Appellee's Brief, page 4.

If Planning Staff thought a housing shortage in Girdwood was a fact, no such evidence was presented by staff beyond staff's assertion. Staff used the assertion to both support its finding of compliance with Criteria 1 (compliance with the comprehensive plan) and Criteria 2. Staff repeated this assertion during the hearing.[61] The Applicant's representative made a similar assertion.[62] While the text of the Girdwood Area Plan does state "[t]he availability of housing in Girdwood is limited," and "[n]ew population growth in Girdwood will create a demand for additional housing," the text is over 25 years old and may or may not be currently accurate. As written, the Plan does not support staff's assertion that Girdwood is "currently" experiencing a lack of available housing.

Put differently, we could not find in the Record evidence of the nature of the shortage, the severity of the shortage, or the types of housing stock in short supply. Considering the appellant's own Reply Brief, it would seem the parties are at least in agreement that adding housing units may address a shortage. However, they do not agree on what kind of shortage this development would solve, if any. 3MJ has not confined their development to any particular housing model, between short-term rentals or long-term owner-occupied housing, or some mix in between.[63] We do not find substantial evidence in the Record supporting the PZC finding that the CUP's development of 9 housing units will "aid in reducing [Girdwood's] shortage of housing options" to the extent the finding is determinative that there is, in fact, a particular shortage which is satisfied by the development at issue. Given Staff's initial assertion that the shortage is in housing for "seasonal and permanent workers due to a lack of available long-term housing,"[64] there should be substantial evidence in the record that this shortage actually exists and is being addressed by this CUP development for one or both of those housing types. Neither is apparent in the Record.

Under AMC 21.03.050A.11.c, unless we substitute our independent judgment, we are to defer to PZC regarding factual issues. If the record affords a substantial basis of fact from which the fact in issue maybe reasonably inferred, it shall be considered that the fact is supported by substantial evidence.[65] We may, under AMC21.03.050A.11.d and by unanimous vote, substitute our independent judgment on any disputed findings of fact. During our hearing, the BOA voted unanimously to substitute our judgment **and find** that there is not support in the Record for PZC's finding A.3 and the BOA strikes that finding.

Nevertheless, we do find there is substantial evidence in the Record to support finding that Criteria 2 is met. As noted above, Criteria 2 is focused on whether the proposed use is consistent with the purpose and intent of the zoning district in which it is located.[66] The intent of this district is to continue the existing pattern of development as dwelling units are constructed on the

[61] T-020.
[62] T-026.
[63] T-026, T-040,T-041
[64] R-009.
[65] Id.
[66] AMC 21.03.080D.2.

remaining undeveloped lots, and to permit development of hostels, inns, and multiple-family housing.[67]

The application notes that GR-1 lots to the north and south of the subject project have 1 to 4 dwelling units per acre.[68] The CUP here allows up to 6 units per acre, for a total maximum of 9 on the 1.5-acre parcel. The purpose of allowing a conditional use is "intended for situations where a use may or may not be appropriate in a district, depending on the specific location, the use characteristics, and potential conditions to decrease the adverse impacts of the use on surrounding properties and/or the community-at-large." Given the intent is to allow multi-family housing, the CUP is "consistent" with Criteria 2. To the extent this development would generate adverse impacts, those are addressed in other Criteria and are to be ameliorated through conditions.

As to any district specific standards, the only standard applicable specifically to GR-1 is that more than one principal structure may be allowed with an administrative site plan review.[69] For all Girdwood residential zones, including GR-1, the additional standards are in 21.09.040B.3. Wedeking did not identify any district specific standards unmet by the applicant and as conditioned by PZC.

C. Criteria 6: the proposed use is compatible with uses allowed on adjacent properties, in terms of its scale, site design, and most of the operating characteristics (hours of operation, lighting, odor, and other external impacts).

However, the BOA finds there is insufficient evidence in the Record to support the conclusion that the proposed use is compatible with the allowed uses on adjacent properties in terms of compatibility with regards to traffic, noise, dust and related external impacts that may be related to traffic generation considering the range of anticipated uses under the conditional use.

Wedeking argues that this development does not meet the Plan's recommendation that multi-family housing should be dispersed and kept low scale.[70] Further, the housing will be expensive, contrary to the Plan's statement that this kind of housing is "intended" to be affordable.[71] If the units are not owner-occupied, there will be more traffic, noise, dust, and garbage.[72] And, the development's scale and site design are "not compatible" with the neighborhood.[73]

3MJ argues that it has made many design decisions to enhance the development's mesh with the surrounding uses, including changing and lowering site lines of the structures, providing more

[67] AMC 21.09.040B.2.a.ii. There is no separately stated "purpose."
[68] R-037
[69] See footnote 33. The CUP process is substituted for the administrative site plan review.
[70] Appellant's Brief, page 4.
[71] Id.
[72] Id.
[73] Id.

onsite parking, maintaining greater retention of trees, and diminishing the lighting.[74] 3MJ asserts traffic calculations do not show this development generating excessive trips.[75]

Criteria 6 focuses on compatibility with allowed uses, not existing uses. We note that the Girdwood Area Plan states: "community-based multi-family housing should be dispersed and kept low scale in order to blend in with the small town atmosphere of the community, rather than resemble that of a more urban setting."[76] The fact that some of the surrounding properties are not yet developed or are single family homes (when they could be redeveloped as multi-family homes) does not mean this development is out of scale. There is substantial evidence in the Record to support the PZC's decision that the proposed use is compatible, including the Application and its attachments and the staff report.[77] The applicant's representative provided detailed testimony on the proposed use's characteristics.[78]

Cost of the units is not a factor under Criteria 6. While Appellant raises the costs of the units as an issue, it just is not in the context of Criteria 6.

Wedeking, in their appeal, did not provide specific evidence that the traffic, noise, dust, or garbage generation would be out of character with allowed uses. It could be presumed that there would be more of each for each dwelling unit added to a property, but there is not evidence supporting any of it would be out of character that outweighs the evidence presented by the applicant. Especially lacking is any evidence that 9 units, instead of the allowed 5 - that is, adding 4 units above the "by right" limit, creates the incompatibility to such extent that we would be compelled to substitute our judgment for that of the PZC on all the elements of Criteria 6.

Wedeking does not contradict the traffic count calculations provided by applicant. There is not substantial evidence in the Record pointing to noise that would be out of character. More cars and kids do not necessarily mean louder noises, noise at different times, or noise out of character with a residential neighborhood. As to dust, part of the development requirements is that Sproat Road will be reconstructed with recycled asphalt, which would minimize dust from traffic. In addition, the interior driveway and parking will be paved. There is nothing in the record to suggest the property would not have adequate trash service or that the operation of the site would lend itself to producing trash off-property, as litter or otherwise. Lighting and other issues were adequately addressed by 3MJ.

However, we are concerned about the lack of evidence regarding the true range of traffic impacts. 3MJ, in its testimony, posited that in the worst-case scenario, the project would generate 13 trips in the peak hour.[79] 3MJ also said that the Municipality does not require a traffic impact analysis until 100 trips are estimated for the peak hour.[80] In 3MJ's application, there is a table

[74] Appellee's Brief, pages 6-8.
[75] Id.
[76] Girdwood Area Plan, page 48.
[77] R-011-R-017 (building features) and R-018.
[78] T-023-T-029.
[79] T-025.
[80] Id.

that demonstrates how it estimated the 13 trips at the peak hour. In the text of the application, 3MJ states that "[t]he developed lots along Sproat Road would generate approximately 20 trips in the peak hour. As seen in the [table], the added trips to Sproat Road depending on the use would be a total of 22 to 26 trips." It is not clear to us if 3MJ's calculations answer our concern. Do we assume that the 20 trips at the peak include the subject parcel, if developed without the CUP, and 26 trips at the peak if developed with the CUP? Do the 20 trips represent just the lots fronting Sproat and no other lots that might use Sproat if it is upgraded, as planned? Do the 20 trips represent the number of trips assuming the underdeveloped lots remain as is, or does it assume all lots are developed to currently approved maximum occupancy? If the 13 peak trips bring the total peak to 26 for the entire road, does that mean this project is doubling the expected amount of traffic?

Additionally, what seems to be missing is evidence about how the generation of trips over the course of any given day relates to typical or expected traffic for this area, beyond what might be present at the peak hour. An all-day constant stream of traffic, while under the 13/26 trips at the peak, might or might not be compatible in and of itself, and may or may not generate impacts, such as noise and dust, that are not compatible. The fact that the estimated number of trips is under the threshold for a traffic study does not negate the need for evidence regarding the comparative traffic generation. **The BOA finds** there is insufficient evidence by which to determine the impacts related to traffic and **therefore remand** this matter to PZC to look more closely at traffic generation and its impacts.[81]

D. Criteria 7: Most significant adverse impacts anticipated to result from the use will be mitigated or offset to the maximum extent feasible;

However, the BOA finds there is insufficient evidence by which to determine all significant adverse impacts anticipated to result from the use will be mitigated or offset to the maximum extent feasible.

Wedeking appears to argue that the applicant has not taken into account the community's concerns.[82] Wedeking further argues that tree clearing it attributes to the applicant is indicative of an adverse impact that is not mitigated or offset to the maximum extent feasible.[83]

3MJ argues, as it did in regard to Criteria 6, that it is asking for fewer units than it might have, and has incorporated vegetation retention and other low impact design elements to mitigate or offset any adverse impacts.[84]

Although we are unable to make the connection between the kind of cooperation an applicant has with the community and Criteria 7, as urged by Wedeking, we nevertheless find substantial evidence in the record that the applicant did engage with the community and therefore do not

[81] As indicated in AMC 21.03.050A.12.c, this matter shall take precedence over all other matters on the agenda of the PZC.
[82] Appellant's Brief, page 5. See, also, the Appellant's Reply Brief.
[83] Id.
[84] Appellee's Brief, pages 6-8.

find merit in Wedeking's argument.[85] Wedeking's own briefing acknowledges that the two sides have met; it is just a question of "perspective" on how to judge the outcome.[86] AMC 21.030.080C.3. requires a single community meeting as part of the CUP process. It does not require that all community desires need to be met as an outcome of that meeting. 3MJ satisfied the Code's requirement.[87]

While the evidence regarding vegetation does not support Wedeking's allegations, we do think the PZC should have included the applicant's voluntary compliance regarding vegetative requirements as part of the conditions of approval, as it is part of the mitigation efforts offered by applicant and an important part of why the application received the approvals. We could remand this matter to PZC under AMC 21.03.050A.13.iii, as the omission of this as a condition may be a legal error. However, we also have the power to modify the PZC decision. **The BOA chooses to do the latter and orders, if the CUP is ultimately approved, the following condition shall be included:**

> The property shall maintain minimum natural vegetation coverage of at least 25%. The remaining areas disturbed by construction will be surfaced with topsoil and revegetated per AMC 21.09.070.E.8. Total permeable surface, including natural vegetation, shall be 40% of the site (approximately 26,136 sf).

As to the remainder of the arguments regarding Criteria 7, the Board finds substantial evidence in the Record to conclude almost all significant adverse impacts will be mitigated or offset to the maximum extent feasible. The Application[88] and Testimony from the 3MJ representative[89] discuss these elements, including lighting, building height, exterior paint colors, siting of the buildings on the property, paving, addition onsite parking, and other examples that mitigate visual, sound, and other impacts. PZC could reasonably conclude that not all adverse impacts were significant and, for those that are, the mitigation is the maximum feasible.

However, there is one issue that we find we must remand for additional work. There was substantial testimony from Staff, 3MJ, and the public about access to the property from Gunnysack Mine Road or from the Alyeska Highway. In fact, neighborhood concerns about the project would seem to greatly diminish if access to the project was from Alyeska Highway or Gunnysack Mine Road, instead of from Sproat Rd.[90] While PZC did discuss with 3MJ the assumed legal inability to connect with Alyeska Highway and the fiscal infeasibility of developing Gunnysack, there does not appear to be in the Record sufficient evidence upon which to conclude that the State of Alaska Department of Transportation would, in fact, not approve direct access to Alyeska Highway or that developing Gunnysack Mine Road is infeasible under Criteria 7, which requires mitigation "to the maximum extent feasible."

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[85] T-024,T-026
[86] Appellant's Brief, page 5.
[87] T-024, T-025 ("We then also had a community meeting in April and went before the LUC and GBOS twice, really trying to, as much as we could, accommodate people's concerns and incorporate those into the design of this project.") See, also R-057,
[88] R-025-R-0121.
[89] T-023-T-029.
[90] E.g., T-031,T-032, T-036, R-147

We assume the State of Alaska seeks to minimize access points onto certain rights-of-way it owns or controls, for a variety of sound public policy reasons. However, we do not believe this assumption is one that we or PZC can simply also assume as a conclusive fact for the purposes of making a final, legal determination about access as it relates to any given project.

3MJ's representative testified that the State of Alaska "indicated that they will not allow access for this particular parcel."[91] At least one Commissioner echoed the assumed sentiment, by noting "Actually, that makes a lot of sense to me. I cannot imagine DOT letting another driveway from down here on the highway."[92] The GBOS noted in its letter of objection, "We understand that Alaska DOT, as the Right of Way owner, is unlikely to permit this access, in which case access should be from Gunnysack Mine Road."[93] We did not find in the Record any indication that the State had in fact made the determination.[94] Without this evidence, we must remand for a determination as to whether the State would allow access, as that may substantially affect a determination as to whether Criteria 7 has been fully met. We note that even if the State of Alaska allowed the connection, making the connection does not necessarily have to be required for this CUP, depending on all applicable factors. At least one person testified against allowing the connection, as a safety hazard.[95]

Similarly, we are concerned about the lack of evidence regarding Gunnysack Mine Road as an alternative. 3MJ's representative testified about looking at this road as the access point to the project, but "the cost of that relative to the development, it makes it cost-prohibitive."[96] What is missing, for purposes of Criteria 7, is at least some evidence of the cost, relative - for example - to the cost of improving Sproat Rd., such that PZC had substantial evidence in the Record to determine access to Gunnysack Mine Road was not a feasible alternative. It may very well be that the sewer line, slope, drainage, municipal improvement standards, and other issues mentioned by 3MJ all come at a substantial cost, but we cannot see how this can be assessed without some evidence in the Record beyond the cited testimony.

The BOA finds there is insufficient evidence in the record to determine that the project mitigates impacts to the maximum extent feasible with respect to access to the project. **The BOA remands** to PZC for further findings on the actual feasibility of connecting this project to either Alyeska Highway or Gunnysack Mine Road.

Conclusion

1. This appeal was heard in accordance with AMC 21.03.050.

[91] T-027.
[92] Id.
[93] R-141.
[94] The State has a permit process for requesting driveway or access road permits into State right of way. 17 AAC 10.020.
[95] R-145.
[96] T-027.

2. The Board of Adjustment orders the inclusion of the vegetation coverage as a condition of approval; strikes PZC Resolution No. 2020-025 finding A.3. regarding reducing a shortage of housing options, and remands this matter to PZC for further proceedings on traffic generation onto Sproat Road and the feasibility of access to the project from either Alyeska Highway or Gunnysack Mine Road. If either of the latter access points is feasible and added as a condition of approval by PZC, PZC should determine if the traffic generation onto Sproat Road is a moot issue.

3. Pursuant to AMC 21.03.050.A.13.d., this is not a final decision with respect to remanded issues involved in the appeal. The board of adjustment's decision remanding the case is the final decision with respect to all matters affirmed by this decision, when, following service of the lower administrative body's decision on remand, no appeal is perfected within the period specified in subsection 21.03.050A.4. The parties shall have 30 days from the expiration of said period to appeal to the superior court.

ADOPTED by the Board of Adjustment this 15th day of April 2021 at Anchorage, Alaska.

By:

Robert Stewart, Chair
On his own behalf and on behalf of Board of Adjustment Members
Tamas Deak and Nancy Pease
Municipality of Anchorage

Certificate of Service:

I hereby certify that on the 15 day of April, 2021 a true and correct copy of the foregoing document was served by electronic mail upon each of the following:

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