

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

**IN THE MATTER OF THE APPEAL OF )  
ROBERT E. FLANDERS )  
(PZ11-22) )**

\_\_\_\_\_)  
Case No. BA-11-01

**I. DECISION**

The appeal of Robert E. Flanders is granted in part, denied in part. The conditional use permit is amended to modify the conditions attached to the permit.

**II. PROCEDURAL HISTORY**

The Kenai Peninsula Racing Lions (the Racing Lions) is an organization operating a racetrack, known as the Twin City Raceway, at 490 Shotgun Drive in the City of Kenai (the Property). The Property is located in the City's Rural Residential (RR) zoning district. The Property is owned by the Kenai Peninsula Borough on portions of Borough Parcel Nos. 041-030-50 and 041-020-52. The Racing Lions occupies the Property under a Land Use Permit, LMD Project # 04-15, issued by the Borough. The Racing Lions conducts circle track (stock car) racing and motocross events on the Property.

Different persons and entities have operated a raceway at the Property since the early 1970s.<sup>1</sup> Historically, the raceway was used as a circle track for stock cars, motor cycles, and perhaps for other vehicles. Although commercial recreational activities in the RR zoning district are allowed only as conditional uses under a conditional use permit,

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<sup>1</sup> These persons and entities include the Kenai Peninsula Racing Association, Twin City Raceway, Inc., Freddie Pollard and Gary Frost, Alaska Circle Track Association, and the Kenai Peninsula Racing Lions.

because the use of the Property as a circle track predated the City's zoning of the Property under the RR zone, the use of the Property for a circle track is considered a legal non-conforming use under the City's Zoning Code and Land Use Table.<sup>2</sup> The motocross track, constructed in 2001, however, is not a grandfathered use.<sup>3</sup> As it represents an expansion of a legal non-conforming use, the Racing Lions are required to obtain a conditional use permit (CUP) to use the Property for motocross activities.<sup>4</sup>

On May 12, 2011, the Racing Lions filed an application with the City for a CUP to operate the motocross track. The City of Kenai's Planning and Zoning Commission (Commission) held a public hearing on the permit application on June 8, 2011. The City's Planning Department Staff Report recommended issuance of the CUP subject to certain conditions. After the hearing closed, the Commission voted to approve the CUP with six members voting in favor of a motion to approve Commission Resolution PZ11-22 to authorize the CUP subject to conditions, and one against.

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<sup>2</sup> KMC 14.20 and KMC 14.22. Because circle track racing is a legal nonconforming use, the Racing Lions did not need a CUP to continue its use of the Property for that activity.

<sup>3</sup> The history of the use of the Property is detailed in the Staff Report in the administrative record at R. 27-28. The history is complex; but, for purposes of this appeal the most significant fact is that the motocross track was developed in 2001 without the proper zoning permit. The Racing Lions filed its application for a CUP in 2011 after the City informed the Racing Lions that a permit was required to continue this use at the Property.

<sup>4</sup> KMC 14.20.050(a), (f) (non-conforming use may not be expanded if no longer permissible); KMC 14.20.050(h) (allowing Commission to grant a CUP to allow nonconforming use to expand under certain circumstances, including that the use was a permitted use in the prior zone at the time it became a nonconforming use); KMC 14.22.010, Land Use Table (allowing commercial recreation as a conditional use).

On June 23, 2011, Robert E. Flanders timely filed an appeal of the Commission's decision with the City's Board of Adjustment (Board). In his appeal, Mr. Flanders asked the Board to modify the CUP to impose additional conditions to protect the public safety, health, and welfare. He requested that the Board "put in writing" that no motorized vehicle be allowed to pass through the gate to the raceway unless it was "street legal" except where the vehicle is transported on a trailer; that the Racing Lions be required to have a gate attendant to turn away persons who do not comply with that condition as well as an on-site host during the summer racing season;<sup>5</sup> and that the City review the activities and construction work on the Property after one year of operation under the CUP instead of after the three years identified in the CUP.<sup>6</sup>

The Board held its appeal hearing on August 22, 2011. Mr. Flanders testified and provided argument. The Racing Lions also provided testimony and argument through its President, Sandra Emery, and in support of the CUP application. Eight other members of the general public<sup>7</sup> testified in support of the issuance of the permit and six others testified in opposition to the issuance of the permit or requested changes to the permit.

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<sup>5</sup> Mr. Flanders testified that he has observed numerous persons on "numbered bikes" leave the racetrack, spin brodies, and then return to the racetrack. The significance of a numbered bike was not fully addressed at the hearing. The Board understands the term to refer to riders (and their bikes) participating in races held by the Racing Lions on the Property.

<sup>6</sup> At the Board's hearing, Mr. Flanders made clear that he was not asking the City to shut down the racetrack. He emphasized, rather, that he believed that the CUP, and specifically the conditions attached to it, be modified and that the Board clarify whether the Racing Lions can expand the track.

<sup>7</sup> Several of these persons were members of the Racing Lions working actively within the organization.

Without objection by either party, at the conclusion of the hearing the Board accepted additional evidence submitted by both Mr. Flanders and the Racing Lions and added that evidence to the administrative record.

### III. STANDARD ON APPEAL

An appeal from the Commission is a *de novo* appeal. The Kenai Municipal Code states that “[t]he Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as ought to be made, and to that end the Board shall have all the powers of the body from whom the appeal is taken.”<sup>8</sup> The Board does not have to defer to the findings or decision of the Commission. While the Board may take the concerns of the neighborhood into consideration, it may not base its decision solely on neighborhood support for, or opposition to, the action requested.<sup>9</sup> Because appeals of a decision on a CUP to the Board of Adjustment are heard *de novo*, the Racing Lions carry the burden of demonstrating that it meets the standards for issuance of the permit.

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<sup>8</sup> KMC 14.20.290(f)(2).

<sup>9</sup> *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 172 n. 11 (Alaska 1993).

#### IV. ANALYSIS

##### A. Criteria for Evaluating the Racing Lions's Conditional Use Permit Application

Commercial recreation activities are allowed as conditional uses within the Rural Residential (RR) zoning district.<sup>10</sup> Kenai Municipal Code section 14.20.150(d) sets forth the review criteria for granting conditional use permits:

Prior to granting a use permit, it shall be established that the use satisfies the following conditions:

- (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;
- (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.

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<sup>10</sup> KMC 14.22.010, Land Use Table. No one disputes that the activities of the Racing Lions are commercial recreation activities as described by the applicants and as that term is used in the Kenai Zoning Code and Land Use Table.

B. Findings of Fact and Conclusions of Law

1. The first criterion is whether the proposed use is consistent with the purposes and intent of the zoning district.<sup>11</sup> The RR zone is established 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 of the district is to preserve the rural and open quality of the environment and to prevent health hazards in areas not served by public water and sewer.<sup>12</sup> Prohibited uses include those uses that violate the residential character of the environment and that generate heavy traffic in predominantly residential areas.<sup>13</sup>

The proposed use is for a motocross track run by an organized club that operates regular practice sessions and race days. According to the evidence before the Board, the Property is surrounded by wetlands and lowlands with little surrounding development of the immediately adjoining properties. A gun club is located to the east of the Property, although that property is outside of City limits. Thus, while the area is zoned RR, there is little residential character in the environment.<sup>14</sup>

There is conflicting evidence with respect to whether the expanded use will promote heavy traffic in the area. Undoubtedly, the expanded use will draw more

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<sup>11</sup> KMC 14.20.150(d) (1).

<sup>12</sup> KMC 14.20.080(a).

<sup>13</sup> *Id.*

<sup>14</sup> This case is distinguished from Case No. BZ 09-04, an appeal by Linda Campanella after she was denied a CUP for a daycare located in the RR zoning district. Ms. Campanella requested a CUP for a commercial day care operated from a house located in a developed residential neighborhood surrounded by other houses in the VIP subdivision.

persons to the area for motocross practice sessions and races. The Board heard evidence that this traffic has had some negative impact on surrounding areas in terms of increased noise and with respect to rogue drivers using local trails and streets, unsafely riding their motocross bikes to access the Property. Mr. Flanders and others presented evidence that at least some of these persons are driving “numbered bikes,” indicating that the riders are participating in Racing Lions events. The Racing Lions presented evidence that so-called “ditch riders” are not members of the Racing Lions or persons accessing the track. Persons on both sides of this issue presented evidence that while some of the increased off-road traffic may be created by motocross riders improperly using streets and trails to access the Property, motocross riders are not uniquely a problem.

The Board concludes that the expanded use of the Property for motocross activities is not the primary or even a significant cause of the negative impacts of traffic noise and unsafe driving observed in the area. The Board accepts as more persuasive evidence that traffic issues (and the noise generated by that traffic) are largely created by the rural character of the area and the prevalent use of motor-powered vehicles for off-road travel by persons on 4-wheelers, snowmachines, dirt bikes, and, occasionally motocross bikes (only some of whom may access the track).<sup>15</sup>

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<sup>15</sup> Implicit in the Commission’s decision is that the Commission placed at least some reliance on promises made by the Racing Lions to undertake efforts to mitigate noise generated by legitimate activities on the Property and to prevent trespassers who might attempt to access and use the Property improperly. The Board concludes that these promises by the Racing Lions are made in good faith. However, the community need not rely on these promises and finds that additional conditions should be attached to the permit to require some noise mitigation efforts as part of the CUP. *See*, section IV, ¶¶ 5 – 6, below.

Another function of evaluating the purposes of the zoning district is to determine if the use presents health hazards for areas not served by public water and sewer. The activities on the Property, whether for the grandfathered use of circle track racing or for the proposed expanded motocross use, require the use of fuels and oils that present certain hazards to the surrounding properties and their owners if not properly handled. There is a risk of contamination of the water supply in the event of spills, which risk is expanded by increased vehicle use of the Property. The Commission addressed this issue by requiring the Racing Lions to complete a spill prevention plan.

We find that this condition is not sufficient to protect the community's interests in a clean water supply. Accordingly, we impose new conditions to the permit as set out in section IV, ¶ 6, below. These conditions replace conditions 2 and 3 in the permit as approved by the Commission. With these additional conditions, we hold that the expanded use to allow motocross activities is consistent with the purposes and intent of the RR district and the first criterion is met.

2. The second of the criteria the Board must evaluate is whether the proposed use will significantly impair the value of the adjoining and neighboring properties.<sup>16</sup>

There is no evidence that the use of the Property, with the expanded motocross track, has or will impair the value of adjoining or neighboring properties. Adjoining properties are undeveloped, or used for commercial recreational purposes in the case of the gun club.

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<sup>16</sup> KMC 14.20.150(d) (2).



One member of the public testified that there have been impacts due to noise with respect to her bed and breakfast business located approximately 1,000 feet from the Property; but, that evidence was not conclusive or specific to motocross traffic. Noise is produced by the grandfathered circle track use as well as by other persons using local trails and paths for general off-road use. Accordingly, we hold that the proposed additional use of the Property for motocross activities will not significantly impair the value of adjoining or neighboring properties.

3. The third criterion is whether the proposed use is in harmony with the Comprehensive Plan.<sup>17</sup> With respect to the Rural Residential zoning district generally, the 2003 City of Kenai Comprehensive Plan (at page 29) states:

The Rural Residential district includes areas that due to location or site conditions, are best suited for large-lot single family residential development. Homes in this district typically rely on individual on-site water supply and wastewater disposal systems. Compatible institutional uses such as churches, schools, and daycare facilities may be intermixed if they comply with zoning design guidelines.

The proposed expanded use will maintain the quality of the existing pattern of development already in the area with respect to both surrounding uses and vacant lands. The Property has been operated as a raceway for over 30 years and evidence before the Board suggests that the immediate neighboring properties are not developable for residential uses. Considering the long-standing use of the Property for a raceway and the nature of the surrounding land, the permit for the expanded use furthers the goal of the Comprehensive Plan to “promote the siting and design of land uses that are in harmony

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<sup>17</sup> KMC 14.20.150(d) (3).

and scale with the surrounding uses.” The condition of the Commission imposing building and permitting requirements (to the extent not already required by Code) also furthers this goal of the Comprehensive Plan.<sup>18</sup>

Accordingly, the proposed expanded use of the Property is in harmony with the Comprehensive Plan and meets this third criterion of KMC 14.20.150(d).

4. The fourth criterion is whether the public facilities are adequate to support the proposed use(s) on the subject parcel.<sup>19</sup> There is no public water or sewer provided to the Property. The Racing Lions provided evidence that they have adequate facilities on site during the race season, including waste disposal units. No evidence was presented to the Board to indicate otherwise or to show that the public facilities were not sufficient to serve either the grandfathered use of the Property for circle track racing, or the expanded use of the Property for motocross activities.

With respect to the adequacy of the public roads, our review is limited to determining whether the physical conditions of the roadways can support the use. The evidence shows that the Property has good vehicular access. The Property is directly accessible to the Kenai Spur Highway from both the east and west. The Kenai Spur

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<sup>18</sup> Mr. Flanders requested that the City amend the permit to review the Racing Lions’s activities on the Property every year, not every three years. Because the Board has added additional conditions to the permit, a violation of those conditions could trigger a review earlier than the required review at three years. Also, the permit includes conditions that the Racing Lions complete any construction projects and occupy any structures in a manner consistent with the Code. Nothing in this Decision alleviates the Racing Lions from complying with building permitting, building occupancy, and other Code requirements. If the Racing Lions do not address structural issues at the Property, it will risk enforcement actions under the City’s Code and/or under this permit.

<sup>19</sup> KMC 14.20.150(d) (4).

highway is paved, already supports other commercial, industrial and residential uses, and is regularly maintained by the State of Alaska.

Police and fire protection are adequate to serve the Property. Although there is evidence to show that some persons tend to improperly drive their 4-wheelers, dirt bikes, and snowmachines in the area, this does not lead us to conclude that the existing infrastructure is inadequate. No condition that the Board could impose on the Racing Lions would end off-Property illegal driving of motor vehicles by persons not associated with the Racing Lions. We also conclude that only a very small portion of the traffic on the local trails is attributable to persons who are associated with the organized motocross activities at the track. These driving habits are not the result of inadequate road access to the Property.

We find the public facilities are adequate to support the proposed uses of each parcel and the Racing Lions has satisfied this fourth criterion.

5. Under the fifth criterion we must consider whether the proposed use will be harmful to the public safety, health, or welfare.<sup>20</sup> The evidence is conflicting on this criterion, as indicated in our discussion above, regarding traffic and noise. As discussed above, noise from rogue ditch-riders is not largely a function of the expanded use of the Property for a motocross track but to other use of off-road vehicles more generally. However, the evidence presented tends to support a conclusion that the expanded activities on the track, particularly practice sessions and increase race events, presents

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<sup>20</sup> KMC 14.20.150(d) (5).

some additional noise issues for residents in the area. The Racing Lions effectively concede this and have worked with the neighbors to institute plans to reduce noise.

The Board finds that the expanded use of the Property to include a motocross track and the activities that relate to the track are not harmful to the public safety, health or welfare provided that additional conditions are attached to the permit. Specifically, the Racing Lions have undertaken several steps to deter trespassers and reduce noise by limiting its hours of operation of motocross events at the Property. The evidence demonstrated that those actions have addressed at least some of the residents' concerns and are necessary to protect the public safety, health, and welfare. Those steps to reduce noise and deter trespassers shall now be required as a condition of the permit and by including those conditions in the permit, provide clear guidance to the Racing Lions and help set neighborhood expectations.

The Racing Lions has met its burden that the expanded use is not likely to harm the public's health, safety, or welfare. Accordingly, we find that this fifth criterion has been met when additional conditions are attached to the permit.

6. The sixth criterion asks the Board to consider other criteria or conditions deemed necessary by the Commission for the applicant to meet the requirements of the other criteria discussed above.

We concur that the conditions imposed by the Commission are appropriate. However, the conditions are not sufficient in order for the Racing Lions to meet the other criteria discussed above and specifically, to prevent health hazards for the area not served by the public water and sewer and to protect the public's health, safety, and welfare.

Accordingly, the CUP is amended to add the following additional requirements and conditions (unless otherwise noted, all conditions imposed by the Commission remain):

a. The Racing Lions shall comply with any and all conditions and requirements of the Land Use Permit issued by the Kenai Peninsula Borough (LMD Project # 04-15) the term of which is May 19, 2011, through May 18, 2012, and as the Land Use Permit it may be subsequently amended or renewed or replaced.

b. The Racing Lions must complete and shall comply with the Spill Response Control and Countermeasures Plan (Kenai Peninsula Racing Lions, dated December, 2010) implemented to ensure groundwater protection. The Racing Lions shall provide a completed copy of the Plan (including the location of the spill kit identified in section 1.2 of the Plan) to the City no later than December 31, 2011, unless the City otherwise agrees in writing. In addition, the Racing Lions shall report all reportable incidents under that Plan to the City of Kenai in the same manner as otherwise specified in section 1.4 of that Plan regarding reports to other agencies (this replaces condition 2 as set out in Commission Resolution PZ11-22).

c. The Racing Lions shall immediately inform the City of any oil and hazardous substance spill on the Property that it is otherwise required to report to the Borough or to any state or federal regulatory agency and such information shall be provided to the City within ten calendar days of its

distribution to those agencies (this replaces condition 3 as set out in Commission Resolution PZ11-22).

d. The Racing Lions shall provide the City with copies of all enforcement orders and notices of violation (or alleged violation) received by the Racing Lions from the Kenai Peninsula Borough or from any state or federal regulatory agency with respect to its operations on the Property and such information shall be provided to the City within ten calendar days of its receipt by the Racing Lions.

e. The Racing Lions shall post at least three new sets of signs on the Property. The signs shall be located at the fork in the road on Shotgun Drive leading to the entry gate, on the entry gate, and in another conspicuous location where bikes may enter the track. One set of signs shall display the practice schedule. The other set of signs shall say “No Trespassing.” The Racing Lions shall maintain these signs throughout the life of this permit so that the signs are easily readable and in good condition.

f. The hours of operation for motocross activities shall be limited as follows (nothing requires the Racing Lions to utilize all permitted hours and it may elect to open its motocross track for fewer hours):

Sunday: The track shall be closed.

Monday: The track shall be closed.

Tuesday: The track may be open from 12:00 p.m. through 8:00 p.m. only.

Wednesday: The track may be open from 3:00 p.m. through 8:00 p.m.

Thursday: The track may be open from 12:00 p.m. through 8:00 p.m. only.

Friday: The track may be open from 12:00 p.m. through 8:00 p.m. only.

Saturday: The track may be open from 12:00 p.m. through 8:00 p.m. only.

g. The schedule in subparagraph f, immediately above, does not apply to motocross race events (for example City Races and state race weekends) held on weekends and on State holidays, which events are permitted.

h. Because Radio Control (RC) and BMX racing will not add any significant additional noise or traffic to the area, and because no specific objection to those additional uses was made (only a request for clarification), the Board affirms the Commission's decision that the Racing Lions may further expand the facility to include a new track and activities with respect to RC and BMX racing. Any RC and BMX racing must occur during the same hours of operation as the motocross activities on the Property. Pit bikes are not permitted due to their potential to generate additional noise and traffic in the area. If the Racing Lions wants to have pit bike activities on the Property, it must apply for a separate conditional use permit for that expanded use. (This modifies condition 1 as set out in Commission Resolution PZ11-22.)

All information required by these conditions shall be directed the Kenai City Manager at Kenai City Hall, 210 Fidalgo Avenue, Kenai, AK 99611. Failure to comply with any of the conditions of the CUP is grounds for revocation of the CUP.

## V. SUMMARY

We find that the Kenai Peninsula Racing Lions met its burden of proof with respect to the criteria in KMC 14.20.150(d) (1)-(6) provided that it complies with the additional conditions set forth above and attached to the permit. Therefore, we affirm the decision of the Commission to grant the conditional use permit.

DATED this 21<sup>st</sup> day of September, 2011.

BY:   
Pat Porter, Chair

Robert J. Molloy, Board Member  
Ryan Marquis, Board Member  
Terry Bookey, Board Member  
Brian G. Gabriel, Sr., Board Member

### **Concurrence:**

I agree with the Decision in most respects except that I would not have imposed a requirement that the hours of operation be a component of the conditional use permit. The hours of operation as part of the conditional use permit were not requested by the Appellant.

Pat Porter, Chair

### **Dissent:**

While in concurrence with a greater part of the Board's decision, I dissent from the requirement that the hours of operation be a component of the conditional use permit. The hours of operation as part of the conditional use permit were not requested by the



Appellant. I believe the board has overstepped its duty by imposing un-necessary requirements within the conditional use permit. It's the opinion of this Board member that the majority decision of the Board to include hours of operation has gone beyond the relief that was asked for by the Appellant.

Joe Moore, Board Member

**Not Participating:**

Mike Boyle

**NOTE: This decision constitutes a final order under Alaska Appellate Rule 602. An appeal of this decision to the Alaska Superior Court must be filed within thirty days (30) days of the date of this decision.**

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BEFORE THE BOARD OF ADJUSTMENT FOR THE CITY OF KENAI

IN THE MATTER OF THE APPEAL OF )  
ROBERT E. FLANDERS )  
(PZ11-22) )

Case No. BA-11-01

AFFIDAVIT OF SERVICE

STATE OF ALASKA )  
) ss.  
THIRD JUDICIAL DISTRICT )

I, Jacqueline Van Hatten, having been first duly sworn on oath, state:

1. that I am the Legal Administrative Assistant for the City of Kenai;
2. that on this date a copy of the decision of the Kenai Board of Adjustment was mailed by U.S. Mail to both of the following and e-mailed to Ms. McGahan:

- Robert E. Flanders  
4769 Beaver Loop Road  
Kenai, Alaska 99611;  
(no e-mail on file)

- Kenai Peninsula Racing Lions  
ATTN: Jackie McGahan  
PO BOX 2755  
Soldotna, Alaska 99669; and,  
(mcgahan@ptialaska.net)

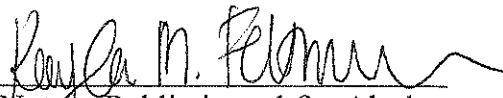
3. that a copy was given to the City Clerk for website publication; and
4. that courtesy copies were mailed to all members of the Board of Adjustment and the Planning and Zoning Commission.

DATED this 22<sup>nd</sup> day of September, 2011.



Jacqueline Van Hatten  
Legal Administrative Assistant  
City of Kenai

SUBSCRIBED AND SWORN to before me this 22 day of September, 2011.



Notary Public in and for Alaska.  
My Commission Expires: 7/16/2013

