

November 24<sup>th</sup>, 2023

To: Haines Borough Assembly and Mayor Morphet

From: Appellants Gershon Cohen, Ann Myren, Tim McDonough, Carol Tuynman, Kathleen Menke

Re: Consolidated appellant arguments on Conditional Use Permit 23-87

Dear Haines Borough Assembly Members and Mayor Morphet,

Thank you for accepting our request for a hearing on CUP 23-87 (CUP). Numerous deficiencies in the CUP application, as well as in the review by staff and adjudication by the Haines Borough Planning Commission (PC) should have resulted in a denial of this permit application. We have divided our contentions into two general categories: application deficiencies vis-à-vis HBC 18.60.010 General Use Criteria and other relevant provisions of Borough Code, and inadequate consideration by the PC of numerous Code provisions and approval criteria.

### Application Deficiencies

HBC 18.60.010 General Use Criteria establishes the burden of proof, the fundamental need to protect public health and safety, and states in part:

*...a conditional use permit...may be granted if all of the following general approval criteria and applicable specific approval criteria of HBC 18.60.020 are complied with...the burden of proof is on the developer to show that the proposed use meets these criteria...no use will be approved that will materially endanger the public health or safety or decrease the value of property in the neighboring area...*

The burden of proof with the “preponderance of the evidence” requirement of the applicant for all land use permits is codified at HBC 18.40.020:

*...In all applications for a land use permit, the burden shall be on the applicant to prove by a preponderance of the evidence that the development implements all policies of this title...*

The burden of proof with a “preponderance of the evidence” requirement of the applicant for all conditional use permits is further codified at HBC 18.50.020:

*All conditional uses must receive approval by the commission prior to commencement. In all applications for approval, the burden of proof shall be on the developer to prove, by a preponderance of the evidence, that the criteria set forth in this title are met.*

The lack of sufficient information and technical support in the application made it impossible for the staff and the PC to make a reasoned decision that a preponderance of the evidence ensured compliance with Borough Code. For example:

1. The area proposed for blasting and excavation (Site A) is defined at HBC 18.60.010 (T) as a “hazard” area because the slope is at or greater than 30% grade and is known to experience landslides and avalanches.

*...(T) Hazard Areas. Development which is not designed and engineered to mitigate the risk of loss of life or property is prohibited in the following hazard areas...4. Slopes greater than 30 percent...6. Rock and mudslide areas...*

The CUP application acknowledges the site contains steep slopes with a grade of greater than 30% and should have included a design/engineering study to address public safety and welfare issues. Removing trees and other vegetation, blasting with explosives, and excavating significant quantities of the exposed rock walls has the potential to trigger landslides and avalanches that could reach Lutak Road and endanger the health and safety of the community. The applicant's argument that blasting and excavation might make the area safer from landslides and avalanches was unsupported by any technical analysis specific to this site. Citing anecdotes from other locations in S.E Alaska that may have different geologic conditions and experience different weather patterns should have been insufficient "proof" to the PC. Upon questioning from one PC member, the applicant acknowledged the area immediately adjacent and above their planned excavation area was beyond their control.

There have been numerous significant landslides/rockslides in the immediate area in past years (see Chilkat Valley News article 3/10/2016.) Between October 27<sup>th</sup> and October 29<sup>th</sup> of this year there were 39 reported earthquakes centered less than 40 miles from Haines, with two measuring over 5.0 on the Richter scale - seismic events and blasting activities coupled to major rain or snow events in a steep slope area could lead to significantly increased risks to the public. It is worth noting that many municipalities, ski resorts, etc., routinely use explosives to *purposefully* trigger avalanches; allowing the use of explosives on a hillside adjacent to a high-traffic area known to have landslide potential presents an unnecessary risk to the general public.

2. There was insufficient background data presented by the applicant for the following additional subsections of Haines Borough Code General Use Criteria:

a. *Criteria E. Traffic. The proposed use shall not overload the existing street system with traffic or result in unsafe streets or dangers to pedestrians.*

The applicant did not provide even a rough estimate of truck traffic for transporting rock and gravel from Sites A and B, however, they acknowledged they currently fill 3-4 barges/year with aggregate for export and that level of activity could increase if they secure more contracts. The applicant stated at the hearing that permitting this site for gravel and riprap extraction could lessen the amount of truck traffic through town from their facility on the Chilkat River side of the peninsula, however, there is no guarantee that would occur. The amount of material they will transport is more likely dependent on contracts, than concerns regarding the impacts of truck traffic on residents.

Trucks at the proposed site would be crossing the highway to the inlet side of the road (as opposed to driving down the road, which is generally less dangerous) and would present a danger to other users of the highway, especially given the proximity to the ferry terminal and the use of Lutak Road by residents, visitors, and tour operators. While the PC added a condition that would prohibit blasting two hours before the ferry arrives and two hours after a ferry departs, no conditions were established regarding the blasting itself or the truck traffic that would be crossing the road as a result of the blasting and excavation.

The applicant is also proposing to create a gravel quarry and washing area at Site B. The application states that the wash water will be trucked in from off-site, however, no estimate was given for the amount of water required or the number of additional trucks that would be transiting the area to deliver the process water.

b. *Criteria I. Utilities. The proposed use shall be adequately served by public water, sewer, on-site water or sewer systems, electricity, and other utilities prior to being occupied...If property on which a use is proposed is within 200 feet of an existing, adequate public water and/or sewer system, the developer shall be required to connect to the public systems...*

According to the EPA: "a public water system provides water for human consumption through pipes or other constructed conveyances to at least 15 service connections or serves an average of at least 25 people for at least 60 days a year. A public water system may be publicly or privately owned." Based on this definition, and the proximity of Site B to the water source used by the ferry terminal and the Lutak Dock, it appears likely there is

a “public water system” within 200 feet of the applicant’s parcel. There was no discussion in the application regarding the potential need to hook into the existing system, or what impact the development might have on the system and its current users.

c. *Criteria M. Peak Use. The proposed use shall not result in significantly different peak use characteristics than surrounding uses or other uses allowed in the zone.*

Blasting/excavation activities could significantly change the peak use characteristics for other uses of the highway such as commuting traffic and the operation of bike and bus tours. The application failed to address those potential impacts.

d. *Criteria N. Off-Site Impacts. The proposed use shall not have significant negative impacts on the surrounding properties including excessive noise, fumes or odors, glare, smoke, light, vibration, dust, litter...or become a nuisance...*

The blasting and excavation on Site A and gravel extraction on Site B will create significant levels of noise, dust, fumes, odors, vibration, and easily meet the definition in Code for “nuisance.” Nuisance is defined in HBC 8.12.020 (B): *to annoy, injure or endanger the safety, health, comfort, or repose of the public; and (C) to interfere with, obstruct, or render dangerous any street, highway, sidewalk, right-of-way, navigable lake, or stream.* No explanations were put forward by the applicant as to why *Criteria (N)* would not be violated.

#### Inadequate Consideration by the PC

While the applicant has the burden of proving Code provisions are met, the PC has the burden of evaluating the information provided by the applicant to ensure that all Code provisions at HBC 18.50.040 are met. The PC failed to require adequate (or in some cases even minimal) information regarding the sections of Code noted above or consider relevant portions of the Haines Borough Comprehensive Plan.

1. Sites A and B in the CUP are immediately adjacent to areas designated as a “Natural Hazard” in the 2007 Haines Coastal Zone Management Plan [Pg. 5-9], with the same slope contours.

*“...The areas mapped on Figure 5 in the Haines coastal district are designated as Natural Hazard areas (in accordance with 11 AAC 112.210(a) and 11 AAC 114.250(b))...Lutak Highway Hazardous Slopes Area. This is the area of cliffs and very steep slopes greater than 30% along the east side of Mt. Ripinski, and immediately upland of the Lutak Highway from the coastal management program boundary to extend north of the AMHS terminal. This area shall be managed to prevent erosion and subsequent avalanching by protecting the natural trees and vegetation on the steep slopes...”*

Obviously, removing all trees and stripping all vegetation from Sites A and B would be inconsistent with the above recommendation.

2. The PC ignored suggestions from the public for delaying the decision while the State completes a new publication on slope stability for the Lutak area.
3. Required approval criteria specific to the issuance of a CUP [HBC 18.50.040 Subsections 1-8] were not only insufficiently supported they were almost uniformly contraindicated and in some cases, the PC was given incorrect information by staff. For example, the Manager’s recommendation stated the site is in a Heavy Industrial area. Sites A and B are within the Townsite Service Area and zoned Waterfront Industrial, which allows for natural resource *export* but not resource *extraction* as a use by right, unlike the use Heavy Industrial.

According to HBC 18.70.030 (A)(3):

*...Waterfront Industrial Zone. The intent of the waterfront industrial zone is to provide for and protect productive, marine-related heavy industries, including wharfage, natural resource export, milling and major seafood processing. Areas zoned as waterfront industrial should be located so that adjacent nonindustrial areas are buffered from the external effects common to heavy industry including noise, dust, vibration, glare, pollution, heavy traffic and unsightly uses or activities.*

A landslide or avalanche, or nuisance conditions resulting from these proposed activities would not “provide and protect” the use of the Lutak Dock and the ferry terminal regarding wharfage, natural resource export, etc. If there is contamination of Lutak Inlet from dust, debris, or contaminated wastewater runoff there could be a significant impact on marine-related uses of the zone such as seafood processing. The following examples demonstrate the inconsistency of the application with the PC’s required approval criteria:

*a. Criteria #1: The use is so located on the site as to avoid undue noise and other nuisances and dangers...*

The use cannot be located on this site such that undue noise, nuisances (described above) and other dangers are avoided. The PC failed to ask any questions related to these impacts, e.g., the control of dust at the site or from truck traffic, fumes from the operation of numerous diesel vehicles, noise from vehicles and blasting, etc.

*b. Criteria #2: The development of the use is such that the value of the adjoining property will not be significantly impaired*

There was little discussion of the impacts to the AMHS ferry terminal/traffic and no discussion of any potential impacts to the Rural Mixed Use zone uphill of Site B.

*c. Criteria #4: The specific development scheme of the use is consistent and in harmony with the comprehensive plan and surrounding land uses*

The Comprehensive Plan, in its section on Resource-based Development Opportunity Section 7.3.5 recognizes the need to consider other uses and benefits to the community.

*“...Development of these resources must be done in a manner that protects the recreational and scenic values and places in the Borough upon which tourism, as well as quality of life, is based. The Borough’s objective is to achieve responsible development, which is defined as complying with environmental regulations, ensuring fisheries resource and riparian zone protection, providing protection of salmon habitat and Bald Eagle Preserve resources, maintains scenic viewsheds, and buffers operations from adjacent land uses and activities...”*

Further support for prohibiting the proposed activity along Lutak Road can be found in the Comprehensive Plan at Section 6.4.1.

*“...The 40-mile Haines Highway, 7-mile Lutak Road and Alaska Marine Highway System are all designated Scenic Byways. The Haines Highway and Lutak Road are designated for the scenic, fish and wildlife viewing, historic and cultural values and opportunities they offer...”*

Surrounding land uses must include the ferry terminal, the use of the highway for commuting and tours, and the tremendous value of the viewshed since we promote ourselves to the world on the basis of the area’s pristine

beauty. The recent Comprehensive Plan survey presented to the Assembly fully supports the continued importance of protecting the natural characteristics of the Chilkat Valley to a majority of the residents.

*d. Criterion #5: The granting of the conditional use will not be harmful to the public safety, health or welfare...*

See discussion under General Use Criteria above re: endangering public health and safety. There was virtually no discussion of the impact of the development on public welfare through its impacts on bicycling and walking on Lutak road by locals, private tourists, or customers of local tour companies, which would significantly harm other economic enterprises throughout the community.

*e. Criteria #8: Comments received from property owners impacted by the proposed development have been considered and given their due weight...*

The Alaska Marine Highway ferry terminal could be directly impacted by the proposed activities (blasting, traffic, landslide impacts, etc.) and uses a water source on the slope immediately adjacent to Site B that could be compromised by the development. To our knowledge, the AMHS was not consulted as an adjacent property owner. The zoom link to the CUP hearing was nonfunctional and there were members of the public who did not have the opportunity to comment.

4. The PC failed to consider the Alaska Department of Environmental Conservation Best Management Practices (BMP) for gravel extraction and washing operations.

ADEC BMP Section 6.1 recommends identifying whether acid-forming minerals such as pyrite are present, because in the presence of oxygen and water, pyrite can generate sulfuric acid, which can lower the pH of groundwater and runoff water and liberate and mobilize heavy metals. Should this occur, the proximity of the wastewater that will eventually leave the site and enter Lutak Inlet could impact salmon and eulachon runs. To our knowledge there has been no testing of the material to be excavated or if testing has occurred, the results were not included in the application provided to the PC or the public.

Similarly, Section 7.2.3.4 of the ADEC BMP notes that developers should determine whether asbestos, a naturally occurring mineral present in some rocks and soils in Alaska is present, and recommends assessing the possible presence of asbestos *before* disturbing the site:

*...If asbestos becomes airborne in the form of dust from activities like excavation, blasting, or crushing, it is a very serious respiratory hazard. The possibility of encountering naturally occurring asbestos (NOA) at a mine site should be investigated before ground is broken... If NOA is present, the dust abatement BMPs listed above will not likely be sufficient to reduce airborne asbestos to an acceptable level...*

Given the proximity of the ongoing and proposed excavation of Site B and the proposed activity at Site A to a road heavily used by the public and the marine resources of Lutak Inlet, the Borough should have required an analysis to determine whether acid forming materials or asbestos are present in the CUP area.

Section 8.2.4 of ADEC BMP for gravel washing operations describes the likely need for processing or settling ponds to remove silt, clays and fines, and the testing of sludge that accumulates in those ponds for metal content and pH prior to evaluating disposal options. The applicant has a Multisector APDES General Permit to discharge wastewater/process water from their facility on the Chilkat River side of the peninsula that can be extended to cover their activities on the Lutak side. However, there are no settling ponds as yet constructed to control runoff water from ongoing operations at Site B, even after multiple rain events the past five months that may already be transporting liberated material into Lutak Inlet. ADEC Stormwater Permitting staff recently acknowledged that State inspection of this new facility *might occur only once every five years*. Given the value

of the Lutak Inlet area to the community, the PC should have required compliance with ADEC BMP recommendations before any activity at the Lutak sites had begun.

### Conclusion

Borough Code requires the applicant to demonstrate by a preponderance of the evidence why their application for a CUP should be granted. As we have demonstrated, this application falls far short of that requirement in multiple instances. Code also requires the PC to find that the CUP application meets *all* judging criteria listed in HBC 18.50.040; failing to meet *any one* of those eight criteria is sufficient to result in a permit denial.

More generally, this CUP application demonstrates the challenges that Borough staff and elected officials face in approaching land use decisions when there is a potential conflict between private gain and the common good. We urge the Borough to rethink its decades-old approach to such decisions, for example, at what point in the review process should the Borough have a full description of a developer's intent, so that permit decisions will be based on a clear understanding of the downstream impacts from the activity? The applicant requested a minimal Site Development Permit for Site B last spring to remove vegetation and grade the parcel. They didn't mention future use, and the Borough didn't ask. Notwithstanding their unpermitted activities and the Borough's acceptance of an absurdly low value assessment that limited the potential fines for violating Code, the developer must have already been planning the development of the gravel pit and had the Borough known, a tremendous number of staff hours, at no small cost to the Borough, could have been saved.

The fact that we have planning and zoning rules and can and do impose conditions on developments in the Borough demonstrates the right to make a profit does not automatically trump the needs and concerns of the greater community. Where the balance point is in any specific case is up to you. The applicant of CUP 23-87 wants to make a profit through resource extraction and claims there could be an additional benefit by reducing the risk from future landslides, which is not only unproven by their submission, the opposite may in fact be true. They asserted having a gravel-producing operation near the dock would reduce truck traffic through town from their Chilkat River facility, but we have no reason to assume they won't operate both facilities if it is in their best interest since both will be permitted. These benefits to the applicant need to be weighed in terms of the common good, and our Code provides the standards to do so.

Defining activities as minimally as possible at each step so that each individual step is hard to oppose is a common strategy used to generate momentum towards an internal goal, known as "permit creep." Congress passed a law to address this issue over fifty years ago whenever federal permits are required. The National Environmental Policy Act (NEPA) requires the cumulative social, economic, and environmental impacts of related activities of a project to all be considered up front. We would like to see the Borough incorporate the NEPA principle into its permit review processes so elected officials and the broader community can go into permitting decisions with eyes wide open. The absence of the identification (and therefore evaluation) of the downstream impacts to public safety and welfare from the proposed blasting and excavation in a landslide-prone area, along with the potential impacts to the welfare and economic interests of people throughout the Borough would have raised numerous red flags. With or without a catastrophic event, cumulative increases in traffic, noise, dust, and danger compromise other uses of the road and any injury, death, or financial impact that might result from such a Borough-approved development could lead to significant legal and financial liability.

The permitting of development activities can have significant consequences; it is your responsibility to adequately weigh all of the consequences in terms of the best interests of the community as a whole.

Thank you for considering our concerns.

Gershon Cohen  
Box 956  
Haines, AK 99827

Ann Myren and Tim McDonough  
Box 951  
Haines, AK 99827

Carol Tuynman  
Box 633  
Haines, AK 99827

Kathleen Menke  
Box 781  
Haines, AK 99827