November 24, 2013

SENT VIA FIRST CLASS MAIL & EMAIL TRANSMISSION

City and Borough of Juneau
Parks & Recreation Advisory Committee
155 S. Seward Street
Juneau, Alaska 99801
parks_rec@ci.juneau.ak.us

Re: Proposed Off-Highway Vehicle Park at Fish Creek Quarry

Dear Parks and Recreation Advisory Committee Members:

I am writing to express my strong opposition to the renewed proposal to create an off-highway vehicle (“OHV”) park at the Fish Creek Quarry. I, like many of my neighbors in North Douglas, am dismayed, frustrated and angry that the City and Borough of Juneau (“CBJ”) would resurrect a proposal that was so resoundingly defeated by the Planning Commission in 2008.

I. CBJ’s Previous Proposal

In its previous attempt to create a Fish Creek Quarry OHV park, CBJ pitted the North Douglas neighborhood against OHV users in an intense and controversial debate that occurred during numerous meetings and hearings over the course of approximately 14 months. Needless to say, that process was an emotional roller coaster for the neighborhood and not something that it ever expected to experience again. This is because the CBJ Community Development Department’s (“CDD”) proposal was resoundingly denied by the Planning Commission in a 6-1 vote on June 24, 2008.1 Among other things, the CBJ Planning Commission concluded that OHV use within the quarry and vicinity would: 1) pose “undeniable conflicts between uses;” 2) increase ambient noise to unacceptable levels and 3) “have a negative impact on residences; thus, affecting property values and neighborhood harmony.”2

2 Id. (emphasis added).
II. The NOHVCC 35-Mile OHV Park Site Assessment & CBJ’s Current Proposal

Notwithstanding the above conclusions and the Planning Commission’s resounding defeat of OHV use in the Fish Creek Quarry, the CBJ Assembly has apparently decided that fostering OHV use within this community is a top priority. This is despite the small percentage of OHV users within the community and the fact that the Borough’s lack of available and developable land makes our community relatively non-conducive to OHV use. The Assembly’s declaration that accommodating OHV use in the Borough is a top priority is also disconcerting in light of the other much higher priority issues the Borough faces such as affordable housing, finding long-term solutions concerning disposal of our community’s waste, and promoting economic development. Despite these facts, this past summer, CBJ elected to retain an OHV advocacy group, the National Off-Highway Vehicle Conservation Counsel (“NOHVCC”), to perform a site assessment of the area that the CBJ had already determined was best suited for accommodating OHV use. This area is located on over 1,500 acres of CBJ property out-the-road at 35-mile.3

Apparently many CBJ Assembly members have expressed frustration with NOHVCC’s site assessment. Nobody should be surprised, however, given NOHVCC’s subjective involvement and advocacy. Rather than focus on the property that NOHVCC was retained to evaluate (CBJ’s parcel at 35-mile), NOHVCC boldly declared that this 1,500 acre parcel is insufficient to satisfy the wants, needs and desires of the OHV users it represents.4 Instead, NOHVCC argues that not only should CBJ’s 1,500 acre parcel at 35-mile be developed for OHV use, but further, CBJ also needs to develop OHV use at two other locations. These additional sites are allegedly necessary to accommodate a youth training area and “kiddie track” as well as an OHV park and motocross track. NOHVCC asserts that somehow, the 1,500 acres that CBJ has already identified for OHV use out-the-road is insufficient to accommodate these supposedly much needed activities.5 Rather than recognize the NOHVCC assessment for what it is (a subjective wish list prepared by a single-interest group with a strong personal stake in the assessment’s outcome), the CDD has apparently wholeheartedly embraced it.6

The CDD has suggested that due to a minor change made in the present proposal for OHV use at the Fish Creek Quarry,7 this proposal is somehow distinguishable and

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4 Id.
5 Id.
6 Supra at 1, n.1.
7 The present proposal suggests OHV riders will attempt to be restricted to the quarry itself as opposed to using trails outside of the quarry as previously suggested. See Options Being Considered for OHV Development, Option C, at http://www.juneau.org/parkrec/facilities/documents/EngineeringpresentationofOHRVAIternativesforPRACmtg11.5.13-2013.pdf.
should be more palatable to the neighborhood than the proposal in 2007-08. This is not the case. The superficial changes made to the most recent proposal for OHV use of the Fish Creek Quarry are distinctions without a difference. In fact, the concerned citizens of North Douglas are now far more resolute, steadfast and determined to defeat this reincarnated plan than they were with CBJ’s previous ill-advised attempt. This is because many within the neighborhood are appalled and incensed that they are being forced to wage this battle yet again: 1) after having been required to do so just a few years previous; 2) after the earlier proposal was so resoundingly defeated by the CBJ Planning Commission; and 3) in light of the obvious factual and legal flaws which exist concerning OHV use of the quarry in such close proximity to a long-standing residential neighborhood.8

Needless to say, should the CBJ's latest proposal for OHV use at the Fish Creek Quarry proceed beyond the CBJ Parks and Recreation Advisory Committee (“PRAC”), the CBJ can expect that litigation will quickly follow. Further, this will occur even before any substantive decision is made by the CBJ Planning Commission or Assembly. This litigation will be based on the fact that this issue was already raised and resoundingly defeated by the Planning Commission. Even if this legal challenge proves unsuccessful, CBJ can also expect a legal challenge regarding the substantive merits of any final decision to allow OHV use within the Fish Creek Quarry. This is because, as was demonstrated in 2007-08, the concerned citizens of North Douglas have already established through expert witness and public testimony that OHV use in the vicinity of the quarry will have a significant negative impact on neighborhood harmony and property values.9

III. The Unique Characteristics of This Community Must be Taken Into Consideration in Contemplating and Attempting to Provide for OHV use in Juneau

At the PRAC meeting on November 6th, CDD staff suggested that NOHVCC has previously wrestled with the same issues and challenges Juneau faces in attempting to accommodate OHV use. Further, staff indicated that the challenges faced by Juneau with regard to OHV use are not unique and that because NOHVCC so frequently deals with these same issues, it is well poised to analyze the challenges and needs associated with OHV use within this community. To the contrary, it is firmly believed that in preparing its report and in quickly deciding that Juneau OHV users need not one, but three locations to enjoy their sport, NOHVCC blatantly overlooked the very unique issues that this

8 The quarry is a mere 1,400 feet from private property lines. See, Fish Creek Off-Highway Vehicle Park – Noise Study, at 5, http://www.juneau.lib.ak.us/plancomm/documents/Noise_Study_5_30_08.pdf.
9 The same conclusion which was also already adopted and made by the CBJ Planning Commission. See, Planning Commission Notice of Decision, dated July 9, 2008. See, http://www.juneau.org/plancom/documents/NOD_USE07-38.PDF.
community faces in accommodating OHV use. Further, had these unique issues and challenges been taken into consideration by NOHVCC and CDD staff, they would not have been so quick to suggest that three OHV sites are needed instead of one and that other sites should be considered in addition to the 35-mile site that the CBJ has already worked so hard to provide.

As many of the residents of this community appreciate, Juneau is incredibly unique. Where else in the Country do you have a community of over 30,000 residents and yet the furthest you can drive in any one direction is a mere 40 miles? Where else in the Country do you have a community of this size that can only be reached by plane or boat? Where else in the Country does the ocean, topography and landlocked nature of the community conspire to make available, developable land as rare as it is here in Juneau? Where else in the Country is a community of this size surrounded in virtually every direction by non-developable lands owned, managed and controlled by the federal government? Where else in the Country do the combination of these factors result in private property values being as high and deserving of protection as they are in this community?

Therefore, I strongly disagree with any suggestion that the challenges Juneau faces in providing for OHV use are not unique to this community. Juneau’s peculiar combination of characteristics are unlikely to exist anywhere else in the Country with perhaps the exception of a few other smaller Southeast Alaska communities such as Ketchikan and Sitka. These very unique characteristics make it extremely difficult and challenging to provide for OHV use. They also make it virtually impossible to provide for OHV use in this community in a way that OHV advocacy groups and users might desire or that may be considered the norm elsewhere.

Insisting that the residents of Juneau be provided OHV opportunities is a bit like the residents of Fairbanks insisting that the Fairbanks North Star Borough provide them suitable opportunities to halibut fish. While clearly it may be scientifically and biologically possible to create a salinity induced and controlled lake or reservoir and a hatchery capable of producing and sustaining halibut, why would the Borough ever consider such an idea? Doing so, even if physically and technologically possible, is simply too costly and unreasonable given Fairbanks’ location and characteristics. Instead, most within Fairbanks recognize that the community it is not conducive to halibut fishing. If halibut fishing is a big priority for you or your family, then you probably need to look at living somewhere other than Fairbanks – for instance, perhaps Juneau. Similarly, if you live in Juneau and a big priority for you or your family is recreational OHV use, you must recognize that Juneau is not well suited for those activities and its abilities to provide them are extremely limited.

Some may question the use of this analogy and suggest that it is not a perfect fit for this situation. It is certainly acknowledged that the challenges confronted in providing OHV opportunities in Juneau are likely far less than providing for halibut fishing.
opportunities in Fairbanks. The point, however, is that the unique characteristics of this community must be taken into consideration. We must be mindful that the wants, wishes and desires of the OHV proponents should be considered in light of this community’s unique limitations. Had this been done, the CBJ would not be revisiting OHV use at the Fish Creek Quarry yet again, and instead, would still be hard focused on the 35-mile site. In continuing to analyze the 35-mile site, CBJ would do so with the understanding that while it may be far from ideal in satisfying all the wishes of OHV users, it is more than reasonable given Juneau’s unique limitations. It must be recognized how difficult it is under the circumstances for Juneau to accommodate any location for OHV use and how unreasonable it is to suggest that Juneau must provide not one, but three separate locations.

IV. OHV Use at the Fish Creek Quarry Would Significantly and Negatively Impact Neighborhood Harmony and Property Values

When CBJ previously proposed OHV use of the Fish Creek Quarry in 2007-08, the residents of North Douglas retained real estate appraiser, Mr. Charlie Elliott. Specifically, Mr. Elliott was asked to assess how neighborhood property values would be impacted by OHV use in the vicinity of Fish Creek Quarry. A copy of Mr. Elliott’s report and findings were previously submitted to the CBJ Planning Commission. Mr. Elliott concluded that property values in the North Douglas neighborhood will be substantially reduced if an OHV park is located there. Among other things, Mr. Elliott noted that:

In my professional opinion, many of the homes around the track, if it is built, will suffer from what we in the appraisal profession refer to as ‘proximity damage.’

. . . we may be assured with certainty that there will be damage, and that it will adversely affect property values of homes near the track.

. . . Further, property values could suffer significantly given the damage estimate in the Hedonic Property case of 0.75% diminution in value per excess decibel level beyond the standard. Given this information and considering that the 45 decibel cap in the evening is a reasonable maximum decibel standard, surrounding properties on or near a OHV, such as the subject, could decrease in value as much as 22% rounded (74 decibels – 45 decibels x 75% damage), due to the addition of OHV use.

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11 Id.
of the track.

. . . In order to insure that property values are not negatively affected by an OHV track, a relatively safe distance from residences, in my opinion, would be one mile.

**In final conclusion from my experience and the information in the cases above, there remains no question in my mind that noise and other negative effects of the proposed track will cause significant concern among neighbors. Their peace and quiet will be materially affected in a negative way and the creation of the proposed track will result in significant property value diminution.**

The CDD is likely to suggest that the current proposal to allow OHV use at Fish Creek Quarry is somehow distinguishable because the proposed use will be limited to the quarry floor as opposed to trails in the vicinity of the quarry. However, as referenced above, Mr. Elliott specifically noted that “[i]n order to insure that property values are not negatively affected by an OHV track, a relatively safe distance from residences, in my opinion, would be one mile.”

Even if OHV use were somehow limited to the quarry floor, however unrealistic that expectation might be, such use would be within 1,400 feet of neighborhood property lines. This is far less than the 5,280 feet that Mr. Elliott indicates is necessary to preserve property values. In fact, there appear to be approximately 100 separate North Douglas residences located less than one mile from the Fish Creek Quarry. Therefore, the potential impact to North Douglas property values from the present proposal is extreme.

V. The CBJ and OHV Users Have Already Demonstrated an Inability to Regulate OHV use Generally & North Douglas Residents Have Already Experienced the Negative Impacts of Uncontrolled OHV use in and Around the Quarry

The CDD has suggested that this proposal is different than the last proposal because OHV use will be limited to the quarry floor and also because noise from the use will not be allowed to exceed a certain decibel level. However, the CBJ and OHV users have already repeatedly demonstrated a complete inability to regulate such use and it is merely wishful thinking to suggest that this would suddenly change at the Fish Creek Quarry.

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12 Id. at 7-8 (emphasis added).
13 Id. at 8 (emphasis added).
15 Options Being Considered for OHV Development, Option C.
In this most recent proposal, the CDD has suggested that noise limits will be placed on vehicles using the quarry.\textsuperscript{16} However, this is no different than was suggested in 2008.\textsuperscript{17} And, as was asserted last time, it is unrealistic to expect that this user group will be able to self-monitor its members regarding the decibel level of sound their machines will emit. Is it realistic to assume that the OHV user group is going to pre-test every single OHV that arrives at the quarry before use occurs? Is it realistic to assume that they are going to be able to police and prevent their own members from using the quarry when they arrive with a machine that exceeds the maximum allowable decibel level? Given the history of OHV use in this community, such expectations are completely implausible.

Further, in suggesting that noise from OHV use at Fish Creek Quarry can be controlled by having users self-monitor and test their vehicles on-site, the CDD has committed a very elementary error. The CDD has indicated that a designated person from the OHV user group will be on-site at all times and will test new machines arriving at the park with a hand-held sound meter. The operator will be asked to rev their machine to a certain pre-determined RPM level and machines which produce sound above some pre-determined limit will be prohibited from using the park. Not only is it unrealistic to suggest that this will actually occur, but further, even if it did, the CDD is overlooking the effects of the actual testing itself. Has it not occurred that the testing of machines will, in and of itself, create unacceptable levels of noise? This would be similar to CBJ deciding that it will allow low-level nuclear waste to be buried within the community as long as it does not emit radioactivity beyond a certain level. In doing so, it will allow the waste owner to bring it into the community, leave it set for a week and then test it. Then, if the waste is below the allowable limit of radioactivity, it can be disposed of here. However, if it exceeds the allowable level, the waste must be removed. Even the most daft among us can realize that by performing the testing in this manner, the very harm you sought to avoid (exposing the community to unacceptable levels of radiation) will have already occurred. This is no different than CDD’s current proposal to reduce the amount of noise coming from the quarry.

It is also unrealistic to suggest that OHV use can effectively be restricted to the quarry floor. As has been seen at Dredge Lakes, Montana Creek and Echo Cove, once OHV use begins in an area, it becomes almost impossible to restrict, control or effectively regulate. One of the challenges that CDD staff has already acknowledged concerning the 35-mile site is the reluctance of users to reload their vehicles on trailers after arriving at the site should they wish to ride at nearby Echo Cove or the Goldbelt Quarry. It was suggested that OHV users will simply travel on their OHVs between these sites.

\textsuperscript{16} Id.
potentially impacting sensitive habitat areas between the two locations, as well as causing traffic concerns on the highway and at the bridge crossing on Cowee Creek. However, this same reluctance to place vehicles back on trailers after riding in an allowed area also applies to the Fish Creek Quarry. Once OHV enthusiasts have ridden repeatedly within the relatively small quarry area, it should be expected that a certain percentage of users will continue to ride in neighboring areas. This includes the sensitive wetland areas adjacent to the quarry, the entrance road leading to the quarry, all up and down Fish Creek Road and potentially on much of the nearby lands, including Forest Service lands and at the Eaglecrest Ski Area. Again, this is because as has occurred elsewhere at Dredge Lakes, Montana Creek and Echo Cove, once OHV use begins, it is almost impossible to control. Consequently, any suggestion by the CDD that OHV use will effectively be limited to the quarry floor is illusory.

Further, this inability to restrict OHV use to the quarry floor also significantly influences the analysis of the noise impact to neighboring properties. That analysis and the suggestion that OHV use will only be 1,400’ from nearby private property lines assumes that CBJ will be 100% successful in restricting use to the quarry floor. However, if it is assumed, as has been demonstrated in the past, that CBJ will be largely unable to control the use once it begins, the impact to neighboring properties becomes much greater. For instance, OHV use in and along Fish Creek Road will result in a distance of 0’ between the use and adjacent private properties, not 1,400’ as CDD suggests. Based on the history of OHV use in this community, the inability of both OHV users and the CBJ to effectively regulate and control such use must be considered.

It was also suggested at the PRAC meeting on November 6th that CBJ and the neighborhood must wait to see what OHV use of the Fish Creek Quarry would be like if planned appropriately. However, as a North Douglas residents living near the quarry, my wife and I have already experienced the negative impacts of OHV use at the quarry. This is because the last time the CBJ made this proposal, some members of the Juneau OHV community did not wait to see whether the proposal would be approved by the Planning Commission. Instead, riders immediately began to flock to the quarry and ride their OHVs there. As such, we know first-hand how loud and obnoxious sounding OHVs are at our property, when being ridden from within the quarry itself. Needless to say, even the sound of one or two OHVs being ridden from within the quarry is intolerable. It is difficult to comprehend what it would be like to experience a dozen or two OHVs being ridden within the quarry at the same time in addition to the proposed testing of OHVs that may exceed allowable noise limits.

Further, our experience with illegal OHV use at the quarry also demonstrates the futility and short-sightedness of any suggestion that riders can be limited to the quarry floor or that it may be possible to effectively regulate noise levels. When illegal OHV use of the quarry began to occur back in 2007-08, CBJ attempted to lock the gate to the entrance road leading to the quarry. However, the locks on the gate were repeatedly cut. For the year or two following CBJ’s initial proposal in 2007, I was forced to contact the
CBJ Lands Department, the CDD and the Juneau Police Department (“JPD”) on numerous occasions due to persons illegally racing OHVs up and down Fish Creek Road, on the entrance road leading to the quarry and within the quarry itself.\textsuperscript{18} Almost without exception, JPD was either unable to respond due to other priorities, or by the time they did respond, the offending riders had long since left. Needless to say from this experience, both CBJ and JPD have already demonstrated a complete inability to appropriately regulate, monitor and control OHV use in the Fish Creek area. Therefore, once again, it is simply wishful thinking to suggest that OHV riders will effectively be restricted to the quarry floor or that CBJ can regulate and limit noise from OHV use in the area.

Finally, some have suggested that perhaps the North Douglas neighborhood is not as bucolic or tranquil as its residents indicate and that therefore, OHV use at the quarry is not as objectionable as claimed. Some claim that North Douglas residents already experience noise from 1) blasting and rock crushing within the quarry, 2) highway traffic on North Douglas Highway, 3) duck hunters on the Mendenhall wetlands, 4) avalanche control at Eaglecrest Ski Area, and 5) the Juneau airport. While it is true that North Douglas residents already experience noise pollution from these and other sources, it is precisely because of the exposure to noise from these sources that any additional noise pollution in the neighborhood is so objectionable.

VI. Just as With the Last Proposal for OHV Use of Fish Creek Quarry, This Proposal Would be Unprecedented and Legally Unsupportable

Another reason why this proposal is so objectionable is because OHV parks are rarely, if ever, planned, constructed or designed so close to existing residential neighborhoods. CBJ overlooked this fact in its 2007-08 proposal and it has overlooked it again in this latest iteration.

Last time, CDD staff suggested that “[t]o gain a better understanding of how other community’s with similar [sic] regulate noise and buffer adjacent properties, staff evaluated [OHV tracks in] the following communities: Horn Rapids (City of Richland, WA). . ., Spokane ORV Park (Spokane Cty, WA). . ., [and] Grays Harbor ORV Park (Grays Harbor Cty, WA).”\textsuperscript{19} However, the shortcoming of the staff report on the Fish Creek Quarry proposal was that it contained no analysis of the proximity of the OHV parks at these sites with residential neighborhoods.\textsuperscript{20}

Set forth below is just such a comparison and much of which I previously presented to the Planning Commission in 2008:

\begin{itemize}
\item \textsuperscript{18} Email from Z. Kent Sullivan to Daniel Sexton, \url{http://www.juneau.org/plancom/documents/STF_USE07-38_AttJ.PDF}, at p. 14.
\item \textsuperscript{19} CBJ Community Development Staff Report, dated February 21, 2008, at 8-9.
\item \textsuperscript{20} Id.
\end{itemize}
Proposed Fish Creek Quarry OHV Park
Juneau, Alaska

1,400’\textsuperscript{21} \hspace{1cm} 1,400’\textsuperscript{22}

Polar Roller Raceway, Fairbanks, Alaska
(closest adjacent home is that of the raceway developer, neighborhood homes constructed after raceway was built, \textit{dissimilar zoning} \& adjacent to Air Force base)\textsuperscript{23}

360’ \hspace{1cm} 563’

Bunny Meadows, Oregon ORV Trailhead/Staging Area
Jackson County, Oregon (\textit{now closed} by BLM due to neighborhood incompatibility)\textsuperscript{24}

897’ \hspace{1cm} 1,081’

Franklin Township, Wayne County Ohio OHV Park
\textit{Angerman, et al., v. Burick, et al.} (\textit{now closed} due to court order)\textsuperscript{25}

1,000’ \hspace{1cm} \sim3,000’

\textsuperscript{21} As set forth \textit{supra}, this assumes that CBJ will be able to effectively regulate, monitor, control and restrict OHV use to the quarry floor. Given the inability of the CBJ and OHV users to regulate their use in the past at locations such as Dredge Lakes, Montana Creek and Echo Cove, it is unrealistic to expect that OHV use will be limited to the quarry floor. As such, OHV use will likely occur directly adjacent to private property lines within the neighborhood not the 1,400’ as suggested above.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} Polar Roller Raceway Park is in a general use zoning district, which includes such conditional uses such as adult entertainment facilities, nuclear power plants, petrochemical plants, petroleum refineries and storage, sanitary landfills, storage of hazardous substances, etc. \textit{See} Fairbanks North Star Borough Code, Chapter 18.44.20.

\textsuperscript{24} \textit{See} \url{http://www.gpo.gov/fdsys/pkg/FR-2007-11-13/html/E7-22170.htm}.

\textsuperscript{25} In \textit{Angerman, et al., v. Burick, et al.}, over 100 residents of a nearby motocross track filed a case asserting that noise from the track created an actionable nuisance impacting them and their properties. The neighbors described the noise as "high pitched", "nerve wracking", "annoying", "not pleasing", "intolerable", "irritating", "noisy", "sharp", "unrelenting and high pitched", "obnoxious", "earpiercing", "aggravating", "angering", "same high-pitched noise 20 minutes at a time with few gaps". The court agreed with the neighbors and permanently enjoined operation of the track. It is noteworthy that some of the neighbors the court deemed to be affected were located over 4,000 feet away from the track. \textit{See} \textit{Angerman v. Burick}, Case No. 01-CV-0117, in the Court of Common Pleas, Wayne Country, Ohio, \url{http://www.nonoise.org/resource/racetrack/waynecounty.htm}, Affirmed on appeal to the
Jodhpur Motocross Track, a/k/a Kincaid Park, Anchorage, Alaska (nearest homes and neighborhood constructed after the track was built and dissimilar zoning) 1,161’ 1,354’

Spokane County, Washington ORV Park (located in dissimilar industrially zoned area) 1,546’ 2,054’

Twin Cities Raceway, Kenai, Alaska (nearest homes and neighborhood constructed after the original track was built in 1971 and noise from the raceway has become very controversial) 26 1,280’ 2,963’

Cadillac Ranch Motocross Park, Thurston County Washington (now closed due to, among other things, finding of neighborhood incompatibility by administrative hearing officer) 27 2,950’ 2,950’

Richland, Washington Horn Rapids ORV Park 4,880’ 6,318’

Prairie City, California State Veh. Recreation Area 8,218’ 10,530’

Gray’s Harbor, Washington Straddleline ORV Park 2,319’ 14,652’

As indicated above, there do exist a few instances where OHV parks are located nearer in proximity to residential neighborhoods than what is proposed in this instance. However, this is not the case with the three parks that CDD staff chose to evaluate for its comparison. Further, in all known instances where OHV parks are located nearer in

26 It should be noted that operation of the Twin Cities Raceway has become very controversial and troublesome for both the Kenai Peninsula Borough as well as the raceway’s neighbors. See Kenai Peninsula Borough Planning Commission Meeting Minutes, December 13, 2010, at 9-11 (some residents living as far as one mile away from the track testified that while the track is in use, they cannot even be heard when speaking on their cell phones while outside), http://www2.borough.kenai.ak.us/planningdept/PlannComm/Minutes/2010/121310/121310.pdf.

proximity to neighborhoods than is presently proposed, either the neighborhood was created after construction of the park,\(^{28}\) and/or it occurred in an area with drastically different zoning than exists in North Douglas.

To the extent noise and buffering issues are not major factors at the parks CDD previously reviewed, it is because they were proposed, planned, developed and operated at a far greater distance from existing residential areas than the present proposal. To the extent that OHV parks are not located sufficiently far enough away, as occurred in Wayne County, Ohio, and Thurston County, Washington, those parks inevitably create problems for their neighbors and are legally prohibited from operating. As evidenced in Washington and Ohio, even neighbors as far away as 2,950' to 4,000' can be deemed to be illegally and inappropriately impacted by the resulting noise.\(^{29}\) Therefore, if CBJ seeks to follow through with this proposal, it will be unprecedented and legally unsupportable.

**VII. This Proposal is Currently Impacting Neighborhood Property Owners and Property Values**

CBJ must also understand the many ways in which the current proposal is already affecting many of the residents of North Douglas. First, there is the emotional turmoil of having to yet again relive this assault on our private property and the unique character of our neighborhood. Second, there is also the tremendous amount of time, effort and energy that is required to effectively challenge CBJ’s ill-advised course of action. Third, there is also a present financial impact to residents in the vicinity of this proposal who are or may soon seek to sell their property.

In Alaska, persons selling residential real property are required to provide interested buyers a residential real property disclosure statement developed by the State to meet the requirements of Alaska statutes.\(^{30}\) The form is designed to place potential buyers on fair notice of any issues or conditions which exist on or near the property that may impact its habitability or value. In filling out the form, a seller must make a good faith effort to ascertain and disclose the information required.\(^{31}\) A person who negligently violates the obligation to do so is liable to the buyer for actual damages suffered and in the event of a willful violation, may be liable for three times the actual damages suffered, together with costs and attorney’s fees.\(^{32}\)

Question 33 of the form asks the seller to disclose “any noise sources that may

\(^{28}\) Which makes it much more difficult to assert a legal nuisance claim.

\(^{29}\) *Infra*, nn.27 and 25.

\(^{30}\) *See*, [http://www.bsrha.org/files/pdf/State%20Disclosure%20Form.pdf](http://www.bsrha.org/files/pdf/State%20Disclosure%20Form.pdf); AS 34.70.010 and 34.70.200.

\(^{31}\) AS 34.70.040(b).

\(^{32}\) AS 34.70.090.
affect the property, including airplanes, trains, dogs, traffic, race tracks, neighbors, etc."\(^{33}\)

Because the disclosure form specifically requires a seller to disclose noise from sources that \textit{may} affect the property, the form does not purport to limit the disclosure to the present, but instead, can reasonably be interpreted to include known sources of future noise to the extent that those potential sources of future noise are ascertainable.\(^{34}\) Therefore, a strong argument can be made that persons selling properties in the vicinity of the quarry and certainly those within a mile of the quarry, are presently required to disclose that the CBJ is considering placing an OHV park and raceway at the quarry.

Obviously, if a seller were to do so, it will likely have a chilling effect on many potential property transactions. Alternatively, if the seller fails to make this disclosure and if the OHV Park in the Fish Creek Quarry comes to fruition, the seller could face liability and significant damages. It is hoped that CBJ does not take lightly the effect that its decision to revisit this ill-advised proposal is having on many of the residents of North Douglas.

\section*{VIII. OHV use Within the Fish Creek Quarry Will Create Traffic and Safety Issues Along North Douglas Highway and Fish Creek Road}

In addition to the added noise from OHV use within the quarry itself, there is also the noise and safety issues posed by the significant increase in traffic levels that would occur on North Douglas Highway and Fish Creek Road. Previously in 2007-08, the CDD staff report suggested that “the measures the applicant has taken to modify the proposal to limit the affects on existing traffic, as proposed above, indicates that the project will not have unacceptable traffic impacts.”\(^{35}\) Such a conclusion was and is unsupported. Instead, as set forth below, OHV use at the Fish Creek Quarry will substantially increase traffic along North Douglas Highway and Fish Creek Road. This substantial change is not planned, anticipated or warranted.

As noted in the above-referenced staff report, “[t]he applicant estimates that during a full day of operation, the park will not attract more than 50 riders. Thus, with an anticipated 50 users, the maximum daily generated traffic trips will be approximately 100 trips.”\(^{36}\) To begin with, the conclusion that 50 riders equates to 100 trips per day (presumably 50 persons travelling to and 50 persons travelling from the sight) is illogical. It assumes that non-riders are not travelling to and from the site, it assumes that riders will only come and go once per day, and it assumes an absence of attendant third-parties

\(^{33}\) \url{http://www.bsrha.org/files/pdf/State%20Disclosure%20Form.pdf}, at 6 (emphasis added).

\(^{34}\) \textit{Id.}


\(^{36}\) \textit{Id.} at 5.
including spectators, an alleged caretaker and his or her visitors, emergency personnel that will likely be called to and from the site, police calls to the site, etc.

As a matter of comparison, the American Society of Highway Traffic Officials ("AASHTO") recommends that roadways accommodate 9.5 vehicles per day per single family detached dwelling.\(^37\) This is despite the fact that U.S. residences have, on average, only 2.38 persons per household according to the 2000 United State Census.\(^38\) By the analysis set forth in the staff report, such a number of persons per household would only result in 4.76 trips per day as opposed to 9.5 vehicles per day as suggested by AASHTO.\(^39\) However, as can be seen, AASHTO recommends accommodating far in excess of that (an average of 3.99 trips per day per person).\(^40\) This is likely due to the fact that because of guests, service vehicles, and repeated trips by occupants, there is not a direct 1:2 correlation between persons at a site and average daily trips to and from a site. Therefore, based on the information above, CBJ should anticipate an increase of upwards of 199.5 additional vehicle trips per day along North Douglas Highway and Fish Creek Roads as a result of proposed OHV use at the Fish Creek Quarry (50 x 3.99 trips per day).

CBJ staff previously noted that the Alaska Department of Transportation and Public Facilities has only observed an average daily traffic count of 135 vehicle trips per day between the intersection of North Douglas Highway and the Fish Creek Bridge. Further, during the wintertime, this average daily traffic count increases to 580 trips.\(^41\) As should be obvious to nearly anyone, an increase in this daily traffic volume by an average of 199.5 additional vehicle trips per day is significant and substantial. While it is recognized that such an increase is unlikely in the winter months when traffic volumes along the roadway are already high,\(^42\) such an increase is likely during the summer months when traffic volumes are normally low. During the summer, when people are accustomed to the peace and tranquility along Fish Creek Road, allowing this proposed use will result in traffic levels increasing along North Douglas Highway alone by nearly 200%. The percentage increase of summertime traffic along Fish Creek Road is currently unknown based on the lack of figures for present Fish Creek Road traffic volume. Nevertheless, in the summer, there is normally very little traffic along that roadway. As such, an increase of nearly 200 vehicle trips per day will be extreme. Such an increase in traffic along North Douglas Highway and Fish Creek Roads is unplanned and

\(^{37}\) American Association of State Highway Transportation Officials, Minimum Private Road Standards.

\(^{38}\) U.S. Census Bureau, 2000 U.S. Census.

\(^{39}\) CBJ Community Development Staff Report, dated February 21, 2008, at 6.

\(^{40}\) Compare, American Association of State Highway Transportation Officials, Minimum Private Road Standards, with U.S. Census Bureau, 2000 U.S. Census.

\(^{41}\) CBJ Community Development Staff Report, dated February 21, 2008, at 5-6.

\(^{42}\) And correspondingly, OHV use will likely be low, even if snowmachines are allowed.
inappropriate. It will create a safety hazard for all persons accustomed to using these roadways in the summer months.\textsuperscript{43}

IX. OHV Use at The Fish Creek Quarry Would Not Conform With the Land Use Plan

The current applicable plan is CBJ’s 2008 Comprehensive Plan.\textsuperscript{44} The proposal for OHV use at Fish Creek Quarry is not in conformity with this plan.

Among other things, the Comprehensive Plan indicates that it seeks to encourage policies that provide “adequate housing for all CBJ residents and to protect the character and livability of its neighborhoods.”\textsuperscript{45} Another specific section of the Comprehensive Plan deals with avoiding residential land use conflicts. It provides:

\textbf{Avoiding Residential Land Use Conflicts}

A major concern expressed by residents of the CBJ is the need to protect the character of existing neighborhoods from incompatible uses. Their primary concern is to minimize the intrusion of heavy traffic on neighborhood streets and avoid conflicts related to parking congestion, noise, glare, loss of privacy and other factors associated with higher intensity uses.

\textbf{POLICY 10.4 IT IS THE POLICY OF THE CBJ TO MINIMIZE CONFLICTS BETWEEN RESIDENTIAL AREAS AND NEARBY RECREATIONAL, COMMERCIAL, OR INDUSTRIAL USES THAT WOULD GENERATE ADVERSE IMPACTS TO EXISTING RESIDENTIAL AREAS THROUGH APPROPRIATE LAND USE LOCATIONAL DECISIONS AND REGULATORY MEASURES.}\textsuperscript{46}

There is little doubt that this proposal operates in direct contravention to Policy 10.4 of the Comprehensive Plan. As should be evident from the materials submitted to the Planning Commission in 2007-08 and to PRAC now, there is virtually no support for this proposal in the North Douglas neighborhood. Pursuant to the Comprehensive Plan, it cannot be claimed that this proposal minimizes conflicts between residential areas and competing uses through appropriate land use locational decisions and regulatory measures. The proposed use simply fails to conform to the Comprehensive Plan.

\textsuperscript{43} Including the many bikers, walkers, joggers and others who use the shoulders of these roadways.
\textsuperscript{44} \textit{See generally}, CBJ 2008 Comprehensive Plan, at \url{http://www.juneau.org/cddftp/CompPlan2008.php}.
\textsuperscript{45} \textit{Id.} at 35.
\textsuperscript{46} \textit{Id.} at 144.
CONCLUSION

Even more than before, it is difficult to rationalize this proposal. It is so ill-conceived and legally deficient, it is almost incomprehensible that it being considered, yet again. This is particularly true given how resoundingly this proposal was defeated the last time around.

CDD staff attempted to suggest at the last PRAC meeting that perhaps the residents of North Douglas shouldn’t be as offended by this proposal as they likely would be. It was indicated that, among other things, the Fish Creek Quarry is being considered for OHV use again because the Army Corps of Engineers require that, in order to develop the 35-mile site, CBJ must first demonstrate that it has exhausted all other reasonable alternatives. Any such suggestion is disingenuous at best.

The concerned residents of North Douglas already established over the course of over 14 long months, numerous hearings, public comment, and expert testimony that use of the Fish Creek Quarry by OHVs is unreasonable and inconsistent with neighborhood values. The Planning Commission already agreed with this as evidenced by its previous 6-1 decision. There is no justifiable reason that this needs to be done yet again. Suggesting that this is being done in order to satisfy Army Corps of Engineer’s regulatory requirements is simply an attempt to pacify the concerned residents of North Douglas while simultaneously concealing the seriousness with which this proposal is being pushed.

It is also imprudent from the perspective of both OHV users as well as CBJ to try and bind together an idea that holds promise (development of the 35-mile site for OHV developments) with a proposal that is so factually and legally defective (development of the Fish Creek Quarry for OHV use). In doing so, CBJ runs the risk of tainting the good with the bad. In doing so, CBJ jeopardizes everything it and the OHV users seek to achieve. For the best interests of everyone involved, including the OHV proponents, the CBJ should quickly and publicly confirm that the Fish Creek Quarry will no longer be considered, under any circumstances, for OHV use or development.

Finally, it is certainly understood that few members of PRAC may live in North Douglas. It is also understood that many residents of North Douglas tend to value the tranquil characteristics of the neighborhood more so than perhaps some other members of the community. However, this being said, how many members of PRAC would be satisfied to have a motocross track located within approximately a quarter mile of their property? Unless the question can unequivocally be answered yes, I would respectfully ask that you immediately and conclusively recommend against further consideration of the Fish Creek Quarry for OHV use.
I greatly appreciate the time you have taken to read and review my comments and concerns.

Sincerely,

Z. Kent Sullivan

Cc: Amy Mead, City Attorney (via email only)
    Brent Fischer, CBJ Parks & Recreation Director (via email only)
    Merrill Sanford, CBJ Mayor (via email only)
    Kim Kiefer, City Manager (via email only)
    Randy Wanamaker, PRAC Liaison to the Assembly (via email only)
    Jeremy Hsieh, KTOO (via email only)
    Merry Ellefson (via email only)
    Vance Sanders (via email only)
    Fred Hiltner (via email only)
    Jim Sheehan (via email only)
    Joan Wilkerson (via email only)