

Introduced by: Mayor
Date: 04/19/11
Hearing: 05/17/11
Action: Enacted as Amended
Vote: 7 Yes, 1 No, 1 Absent

**KENAI PENINSULA BOROUGH
ORDINANCE 2011-09**

**AN ORDINANCE AMENDING KPB CHAPTER 21.18 REGARDING PRIOR
EXISTING USES AND STRUCTURES IN THE ANADROMOUS STREAM
HABITAT PROTECTION DISTRICT**

WHEREAS, KPB Chapter 21.18, Anadromous Streams Habitat Protection, was initially adopted in 1996 to protect salmon spawning and rearing habitat; and

WHEREAS, on April 6, 2010, May 4, 2010, and June 8, 2010, the assembly enacted amendments to KPB 21.18; and

WHEREAS, the planning commission and staff have continued to work on the issue of prior existing uses within the anadromous habitat protection district; and

WHEREAS, three planning commission work sessions were conducted in order to develop a fair and effective ordinance addressing prior existing uses; and

WHEREAS, at its regularly scheduled meeting of March 28, 2011, the planning commission recommended adoption of this ordinance by majority consent;

NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That KPB 21.18.090 is hereby amended as follows:

21.18.090. Prior existing [ACTIVITIES] uses and structures.

- A. Intent. There are [ACTIVITIES] uses which were conducted, and structures which were under construction, or exist and were in use before the enactment of this ordinance which would be prohibited or restricted under the terms of this ordinance or future amendments. It is the intent of this section to permit these prior existing uses [ACTIVITIES] or structures to continue but not be increased, expanded, or intensified. Any prior existing uses [SUCH ACTIVITIES] or structures must still comply with other applicable laws. [THE ACTIVITIES REFERENCED IN THIS SECTION SHALL BE ALLOWED IF THEY DO NOT RESULT IN SIGNIFICANT EROSION OR DAMAGE TO THE RIPARIAN HABITAT.]

B. The burden of proof is on the applicant to show that a prior existing use or structure existed, when the use or structure was established, and the size, location, and level of use.

[B]C. Structures. Structures which were under construction or in use before the effective date of any provision of this chapter, but that would be prohibited or restricted under the terms of this chapter, shall be allowed to continue, provided that a structure under construction must have been [BE] substantially completed by April 16, 1998 for the Kenai River and May 16, 2002, for the anadromous streams set forth in KPB 21.18.025(A)(1)(a) through (A)(15). [WITHIN TWO YEARS OF ENACTMENT OF THIS ORDINANCE. SUCH A STRUCTURE MAY BE MAINTAINED OR REPAIRED WITHOUT A PERMIT. SUCH A STRUCTURE MAY ALSO BE REPLACED OR RECONSTRUCTED WITHIN TWO YEARS AFTER ACCIDENTAL DAMAGE TO ACCIDENTAL DESTRUCTION BY FIRE, EXPLOSION, OR OTHER CASUALTY OR ACT OF GOD. RECONSTRUCTION OR REPLACEMENT NOT COMPLETED WITHIN TWO YEARS OF THE DATE OF THE DAMAGE IS PROHIBITED EXCEPT IN COMPLIANCE WITH CURRENT REQUIREMENTS. SUCH REPLACEMENT OR RECONSTRUCTION MAY ONLY BE UNDERTAKEN IN THE SAME SPACE THAT THE STRUCTURE OCCUPIED PRIOR TO DAMAGE OR DESTRUCTION.]

1. Upon application and approval of a prior-existing structure/use permit by river center staff principal structures may be replaced, repaired or reconstructed within two years after accidental damage or destruction by fire, explosion, natural disaster, flood, or other casualty, force of nature, or other force or act beyond the owner's control and not intentionally caused by the owner. If a principal structure is not substantially damaged and only a portion of the structure has been damaged or destroyed, only that portion may be repaired or replaced. The height of an original principal structure and area encompassed by the original footprint cannot be increased. The structure must be similar in size and use to the structure being repaired or replaced. Repair, replacement, or reconstruction may only encompass the same square footage that the structure occupied prior to damage or destruction, and the structure must be more compliant with this chapter which shall be determined by application of mitigation measures set forth in KPB 21.18.091 to the maximum extent practicable. Staff will determine the mitigation measures to be used consistent with the following conditions:

a. The structure will not cause significant erosion, sedimentation, damage within the habitat protection district, or an increase in ground or surface water pollution;

- b. Permitting repair, reconstruction, or replacement shall be consistent with the purposes of this chapter as set forth in KPB 21.18.020, the borough comprehensive plan, another applicable chapters of the borough code, and other applicable planning documents adopted by the borough;
 - c. The reconstruction, replacement, or repair will not physically damage the adjoining property;
 - d. Removal of materials or debris remaining from the damage or destruction; and
 - e. Owner's compliance with other borough permits and ordinance requirements.
2. The right to reconstruct in nonconformity with the chapter is forever lost if
- a. the application for reconstruction or repair is not made within six months of the date of damage, or
 - b. the application is approved but the structure is not substantially reconstructed within 24 months of the date of the approval of the application for reconstruction.
 - (i) For reasonable and sufficient cause shown for the delay, the river center director may authorize an extension not to exceed 12 months to complete reconstruction.
 - (ii) To obtain an extension of time an applicant shall submit a written request for an extension to the river center prior to the expiration of the 24 month reconstruction period. The applicant must show reasonable and sufficient cause for the extension.
3. Nothing in this section prohibits reconstruction at any time in compliance with this chapter.
4. The provisions applicable to principal prior existing structures set forth in KPB 21.18.090(C)(1)(2)(3) also apply to the replacement, repair or reconstruction of accessory structures within the habitat protection district. In addition to those provisions the following rules apply to accessory structures:

- a. Accessory structures may be replaced or reconstructed outside of the habitat protection district without a KPB 21.18 permit.
- b. Notwithstanding subsection a. above, accessory structures may not be replaced or reconstructed in KPB 21.06 mapped floodplains or floodways.
- c. The applicant must document the specific circumstances that would prevent the accessory structure from being located outside of the habitat protection district in order to be permitted to repair, replace, or reconstruct the accessory structure within the habitat protection district.

[C]D. Uses [ACTIVITIES]. This chapter shall not prohibit or restrict uses [ACTIVITIES] which were legally conducted before the effective date of this section [ANY PROVISION OF THIS CHAPTER], provided that, after the effective date, such uses [ACTIVITIES] are conducted in the same location and are not enlarged to include a greater number of participants or to occupy a greater area of land. Upon application and approval of a prior existing structure/use permit by river center staff a change to the prior existing use may be allowed. No change shall be granted unless the change reduces the noncompliance, by use of mitigation procedures set forth in KPB 21.18.091, to the maximum extent practicable. Staff will determine the mitigation measures to be used consistent with the following conditions:

- a. The use will not cause significant erosion, sedimentation, damage within the habitat protection district, or an increase in ground or surface water pollution;
- b. Permitting the use shall be consistent with the purposes of this chapter as set forth in KPB 21.18.020, the borough comprehensive plan, another applicable chapters of the borough code, and other applicable planning documents adopted by the borough;
- c. The use will not physically damage the adjoining property;
- d. Removal of materials or debris resulting from the prior-existing use; and
- e. Owner's compliance with other borough permits and ordinance requirements.

- [D. PERMITS. ANY ENLARGEMENT OR EXPANSION OF SUCH AN ACTIVITY OR STRUCTURE WITHIN THE HABITAT PROTECTION AREA SHALL REQUIRE A CONDITIONAL USE PERMIT. A CONDITIONAL USE PERMIT SHALL BE GRANTED TO AN APPLICANT IF THE ENLARGEMENT OR EXPANSION WILL BE CONDUCTED IN A MANNER THAT DOES NOT RESULT IN SIGNIFICANT EROSION, DESTRUCTION OF WETLANDS OR RIPARIAN HABITAT OR INCREASE IN GROUND OR WATER POLLUTION. THE PERMITTING AUTHORITY MAY ATTACH CONDITIONS TO THE PERMIT IT FEELS ARE REASONABLY NECESSARY TO ACHIEVE THE ABOVE OBJECTIVES.]
- E. Other provisions.
1. Any prior existing [ACTIVITY] use or structure which is abandoned for two years or more shall thereafter not be conducted, used or occupied except in conformity with the provisions of this chapter.
 2. The deliberate destruction of a prior existing structure by the owner terminates the prior existing status.
 3. The river center may require removal or cessation of abandoned uses or structures.
 - [2]4. Nothing in this chapter shall prevent any change of tenancy, ownership or management of any prior existing structure.
- F. Impervious materials placed in the habitat protection district which are not structures are not allowed as either prior existing uses or prior existing structures. The river center may require removal of these materials.
- G. River center determinations regarding prior existing structures and prior existing uses may be appealed to the planning commission.

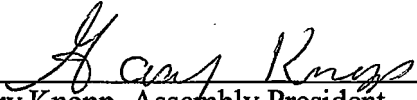
SECTION 2. That KPB 21.18.140 is hereby amended as follows:

- Y. “Abandoned” means to cease a use or use of a structure for a specified time period, whether the cessation of use is intentional or unintentional, and whether or not the use is seasonal. [“ABANDONED” MEANS TO STOP THE USE OF PROPERTY INTENTIONALLY. WHEN THE USE OF A PROPERTY HAS CEASED AND THE PROPERTY HAS BEEN VACANT FOR 24 MONTHS, ABANDONMENT OF USE WILL BE PRESUMED UNLESS THE OWNER CAN SHOW THAT A DILIGENT EFFORT HAS BEEN MADE TO SELL, RENT, OR CONTINUE THE PRIOR EXISTING USE OF THE PROPERTY.]
- Z. “Substantially damaged” shall mean that the cost to repair the damage equals or exceeds 50% of the structures’ assessed value prior to the damage.

AA. “Substantially reconstructed” shall mean completed to a point where the structure is available for the owner’s beneficial use or occupancy.

SECTION 3. That this ordinance takes effect immediately upon its enactment.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 17TH DAY OF MAY, 2011.

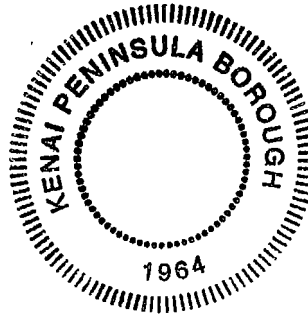


Gary Knopp, Assembly President

ATTEST:



Johni Blankenship, Borough Clerk



Yes: Haggerty, Johnson, McClure, Murphy, Pierce, Smith, Tauriainen
No: Knopp
Absent: Smalley