



KENAI PENINSULA BOROUGH

PLANNING DEPARTMENT

144 North Binkley Street • Soldotna, Alaska 99669-7520

PHONE: (907) 714-2200 • **FAX:** (907) 714-2378

Toll-free within the Borough: 1-800-478-4441, Ext. 2200

www.borough.kenai.ak.us

MIKE NAVARRE
BOROUGH MAYOR

M E M O R A N D U M

TO: Gary Knopp, Assembly President
Kenai Peninsula Borough Assembly Members

THRU: Mike Navarre, Borough Mayor *MN*

FROM: Max J. Best, Planning Director *PBV FOR MJB*

DATE: March 15, 2012

SUBJECT: Ordinance 2012-06; Amending KPB 21.18 - Anadromous Streams Habitat Protection to permit certain structures in tidally inundated areas, conditionally permit certain structures within the Habitat Protection District, and add definitions

The Planning Commission reviewed the subject Ordinance during their regularly scheduled March 12, 2012 meeting. A motion failed by majority consent to recommend approval of the ordinance. (Bryson, Yes; Carluccio, No; Collins, Absent; Ecklund, No; Foster, Yes; Gross, No; Holsten, Yes; Isham, No; Lockwood, No; Martin, Yes; Ruffner, Absent; Tauriainen, No)

In the ordinance, please make the following amendment to the last WHEREAS:

WHEREAS, at its regularly scheduled meeting of March 12, 2012, the Planning Commission denied approval by majority consent.

Attached are the unapproved minutes of the subject portion of the meeting.

AGENDA ITEM F. PUBLIC HEARINGS

3. Ordinance 2012-___, Amending KPB 21.18 - Anadromous Streams Habitat Protection to permit certain structures in tidally inundated areas, conditionally permit certain structures within the Habitat Protection District, and add definitions

Staff Report given by John Mohorcich

PC Meeting: 3/12/12

The ordinance was drafted and presented by Assembly member Bill Smith and co-sponsored with Assembly member Mako Haggerty.

The borough is in the process of a phased implementation of the addition of numerous streams which were added to the Anadromous Streams Habitat Protection district. Implementation Phase 2 encompassing most of the Kenai Peninsula is scheduled to take effect on May 1, 2012.

These added areas have brought to light issues with small pre-existing parcels that have seen their development rights unduly restricted due to the greater part of the parcel being in the Habitat Protection District and consequently have a limited area that could be developed. This condition has existed along the Kenai River and a few other areas for some time.

This ordinance allows, through the conditional use process, some development to occur within the Habitat Protection District when certain standards are met. By defining a conditional use for use by property owners, staff and the Planning Commission, I believe we will add a fair process allowing additional development which will relieve some of the burden for small lot property owners.

A standard of development is proposed that the parcels be served by a public sewer system to insure that waste water is properly disposed and streamside water quality is protected. A further condition brings into play city permitting processes in order to provide a more local influence on the development.

It is important that borough regulations do not unreasonably restrict development rights and more particularly, do not eliminate development rights.

Consideration of this ordinance will be appreciated.

END OF STAFF REPORT

Chairman Bryson opened the meeting for public comment. Seeing and hearing no one wishing to speak, Chairman Bryson closed the public comment period and opened discussion among the Commission.

MAIN MOTION: Commissioner Holsten moved, seconded by Commissioner Lockwood to approve Ordinance 2012-___; an ordinance amending KPB 21.18.081, 21.18.100 and 21.18.140 to permit certain structures in tidally inundated areas and conditionally permit certain structures within the habitat protection district and adding definitions.

Commissioner Holsten asked why the .3 acres was picked. Mr. Mohorcich replied that they talked about sizes. He didn't specifically speak to Mr. Smith about what size that was identified so he wasn't sure how Mr. Smith came up with that.

Commissioner Foster asked if a city could have the authority to have their planning commission approve the conditional use permit and that it either comes to the Borough Planning Commission for final approval or that it be given final approval administratively. Mr. Mohorcich replied that KPB 21.18.100 allows the cities to administer the code with the Borough delegating this code to them if the cities wanted to oversee it. The entire code of KPB 21.18 could be given to the cities to administer if they chose to. He stated they have had discussion with the City manager regarding if the City wanted to change their building codes to incorporate more of KPB 21.18.

Chairman Bryson asked if he spoke with city managers. Mr. Mohorcich replied yes, with Tim Dillon, City manager for the City of Seldovia

Commissioner Ecklund referred to the following statement in the ordinance, Section 1.10(b) which states, *"The parcel is subject to a city building code and is served by a public sewer system."* She asked if the parcels that this ordinance would affect would be located in the city. Mr. Mohorcich replied that is correct. Commissioner Ecklund asked if the cities would have to adopt this ordinance. Mr. Mohorcich understood that the way this ordinance was written is that it just changes to the borough code KPB 21.18. This allows additional provisions if a parcel meet the four criteria. One of the criteria is that it must be in the city because it must be subject to a city building permit and also served by a public sewer system. He stated that Mr. Smith was limiting these provisions to properties of this size within city limits.

Commissioner Tauriainen asked why this was only limited to the cities. Mr. Mohorcich replied that he has struggled with these situations when the administration is not the maker of the ordinance. He wasn't sure why Mr. Smith made that final decision to just limit it to the cities. There was discussion between them that there were small lot issues outside the cities.

Commissioner Foster asked how high the tide goes back into the lagoon in Seldovia. Mr. Mohorcich understood that all of Seldovia slough that is mapped in the anadromous stream catalog by Fish & Game is tidal influence. He asked if he was speaking about Fish Creek. Commissioner Foster replied yes. Mr. Mohorcich replied that the tidal influence goes above or upstream of Fish Creek in the Seldovia slough. Commissioner Foster asked if it only went to the city limits. Mr. Mohorcich replied that the city limits extends further up Seldovia slough than just Fish Creek. There is a portion of Seldovia slough outside city limits. Commissioner Foster asked if they could extra territorial powers like the City of Homer has. Mr. Mohorcich believed they could if that was appropriate.

Commissioner Holsten referred to Section 2.40 which states, *"Building permits issued by a city for areas subject to tidal inundation, between mean high water and mean higher high water, will constitute a determination that the requirements of KPB 21.18 are satisfied and the project is exempt from KPB 21.18 application."* She read it that a city affected could decide that a building permit met the requirements of KPB 21.18 and that it would be exempt. She asked why the word *"requirements"* rather than the word *"intent"*. Mr. Mohorcich stated that Section E was in the ordinance because Mr. Smith identified that in most tidal situations between the mean high and the higher high is that there usually is no vegetation. It will fluctuate with the topography and what type of soils substrate is there. Commissioner Holsten asked for clarification regarding what it means that a percentage of a lot or property can be developed. Mr. Mohorcich interpreted that it means that it is within the habitat protection district and the district is defined by the mean high, 50 feet back.

Commissioner Tauriainen asked if he believed it would help in other situations as well if the city part was taken out. Mr. Mohorcich replied that the small lots situations have been a major issue. It takes up to approximately 80-90% of their staff time working in most of those small lot subdivisions in trying to apply this code.

Commissioner Tauriainen asked if recommendations for change could be made on this ordinance. Chairman Bryson replied yes, making recommendations to the proposed ordinance can be forwarded to the Assembly. Commissioner Tauriainen asked if he could make a recommendation to remove all parts of this ordinance that refer to just cities. Chairman Bryson replied yes.

AMENDMENT MOTION: Commissioner Tauriainen moved, seconded by Commissioner Isham to amend the ordinance to remove the requirements that it only pertains to cities but that this ordinance be applied to the entire Borough.

Commissioner Ecklund asked if that motion included Section 2.E. Commissioner Tauriainen replied that it would pertain to everything in the ordinance. Commissioner Ecklund asked if he proposed to take out Section 10b and Section 2E. Commissioner Tauriainen replied yes. Chairman Bryson asked if that was the intent of his motion. Commissioner Tauriainen replied yes.

Commissioner Gross asked for staff's comments because this looked like it could create lots of problems if

they have small lots without proper sewage outside the city. Mr. Mohorcich felt that it is appropriate to look at small lots but not sure striking the city building code and public sewer system is the appropriate way to go borough wide without studying this more closely. It would give a little more scrutiny to be able to look at the lots by having the building code within the cities. There are no building codes or any requirements outside city limits unless it falls under the 50 foot habitat protection or within the floodplain. Commissioner Gross asked if there are a lot of small building lots of that size outside the cities. Mr. Mohorcich replied that they are managing their 24 streams. There are definitely small lots located throughout the borough that are less than the 40,000 sq foot such as on the Anchor River, Poachers Cove, Kenai Keys and Castaway Cove.

Commissioner Isham stated that this is only a recommendation. He asked if staff would have time to make recommendations between this meeting and the time the Assembly would be looking at the ordinance. Mr. Mohorcich replied that they could make recommendations at any time if it was the wishes of the Mayor.

Commissioner Carluccio stated that this amendment was written to try and resolve some of the issues that have come up in Seldovia and along the Seldovia slough. She stated they were happy that Mr. Smith and Mr. Haggerty have taken the time to try to accommodate them but Seldovia does not feel that this is what they were looking for at this time. Seldovia is actually looking for a complete exclusion from the requirements of this ordinance. The City of Seldovia passed Resolution 12-15 which is a resolution from the city council opposing Kenai Peninsula Borough Ordinance 2011-12. It was her understanding that Mr. Smith only wanted this ordinance to pertain to areas that were actually within city limits that had building codes.

Commissioner Foster stated that he would be voting against the amendment because he felt that they need to protect areas that have sewer systems. Commissioner Tauriainen asked if he supported the entire ordinance or just the amendment. Commissioner Foster replied that he opposed just the amendment.

Commissioner Tauriainen asked if he could withdraw his amendment motion. Chairman Bryson ruled that the amendment motion should be voted on.

There being no further discussion or questions, Chairman Bryson called for a roll call vote.

AMENDMENT VOTE: The motion failed by unanimous consent.

BRYSON NO	CARLUCCIO NO	COLLINS ABSENT	ECKLUND NO	FOSTER NO	GROSS NO	HOLSTEN NO
ISHAM NO	LOCKWOOD NO	MARTIN NO	RUFFNER ABSENT	TAURIAINEN NO		0 YES 10 NO 2 ABSENT

Commissioner Carluccio stated that she was not going to support the ordinance because she doesn't want a yes vote to be misconstrued as Seldovia being satisfied with this ordinance. They feel that this ordinance will not help Seldovia. Tim Dillon, City Manager continues to work with the Assembly and Administration towards excluding Seldovia from this and KPB Ordinance 2011-12.

Commissioner Tauriainen also was not going to recommend this ordinance based on comments that were made from Commissioner Carluccio and comments from staff that other issues need to be addressed.

Commissioner Ecklund believes this ordinance need additional work so she also will not be supporting the main motion.

Commissioner Foster stated he would be voting in favor of the motion because right now it doesn't leave any wiggle room for anybody. This ordinance allows a landowner to obtain a conditional use permit to develop property which will come before this body. He felt this was a logical first step at making KPB 21.18 workable.

Commissioner Holsten expressed concerns about the costs for Seldovia and other communities to enacting this ordinance but using Commissioner Foster's logic she was going to support this ordinance even though Seldovia has some good arguments. She hoped the Assembly would spend some time working this out.

Commissioner Isham stated that he would not support the motion because at best a conditional use permit is temporary and felt Seldovia needs something permanent.

There being no further questions or comments, Chairman Bryson called for a roll call vote.

MAIN MOTION VOTE: The motion failed by majority consent.

BRYSON YES	CARLUCCIO NO	COLLINS ABSENT	ECKLUND NO	FOSTER YES	GROSS NO	HOLSTEN YES
ISHAM NO	LOCKWOOD NO	MARTIN YES	RUFFNER ABSENT	TAURIAINEN NO		4 YES 6 NO 2 ABSENT

AGENDA ITEM G. ANADROMOUS STREAM HABITAT PROTECTION (KPB 21.18)

- Resolution 2012-08; A Conditional Use Permit pursuant to KPB 21.18 for the replacement of an existing damaged culvert along with fill and grade work within the 50-foot Habitat Protection District of Bishop Creek an anadromous stream. This project is located within the SOA Holt-Lamplight Road right-of-way on the right and left banks of Bishop Creek, located in S21 T7N R11W, SM, AK, (adjacent to KPB Parcels 013-570-01 & 013-570-03.

Memorandum and Staff Report given by Tom Dearlove

PC Meeting: 3/12/12

Additional information was provided for Resolution 2012-08 on the replacement of a damaged culvert within the 50 foot habitat protection district on Bishop Creek. Several concerns and questions were expressed during the February 27, 2012 Planning Commission meeting as shown below:

- Show view of the new stream alignment
- Show transitions of stream in-flow and out-flow of the culvert
- Slope of the new culvert
- Details on the low flow channel

The additional information submitted by the applicant is the response to the above concerns.

Discussions with the ADF&G biologists at the River Center who wrote on this project and visited the site in 2011, directed me to the diagram from DOT submitted earlier, stating the low flow channel will measure 5'feet wide and .5' feet deep. They also stated that Gary Walkin from DOT was on site in 2011 and there was an agreement of a 1% or lower slope on the culvert to maximize the aquatic life passage within the culvert.

In the ADF&G permit it states the following stipulation:

- The structures shall be designed, installed, and maintained to accommodate the efficient passage and movement of fish, both upstream and downstream, at all flows up to and including a mean annual seasonal flood design with a two-day duration for the specific time of the year that the weakest swimming fish (design fish) present in the waterbody must be assured passage.*

The biologist writing the permit mentioned to the River Center staff that in this case the weakest swimming fish would be the Coho salmon.

Staff still recommends approval of

END OF MEMORANDUM AND STAFF REPORT