

Kenai Peninsula Borough
Planning Department

MEMORANDUM

TO: Kelly Cooper, Assembly President
Kenai Peninsula Borough Assembly Members

THRU: Charlie Pierce, Borough Mayor *CP*
Max J. Best, Planning Director *MB*

FROM: Scott Huff *SH*

DATE: November 20, 2019

RE: Ordinance 2019-24; An Ordinance Adopting KPB 20.80 Subdivision Private Streets and Gated Subdivisions.

The Kenai Peninsula Borough Planning Commission reviewed the subject Ordinance during their regularly scheduled November 12, 2019 meeting.

A motion passed by majority vote (6 Yes, 4 No, 2 Absent) to recommend approval of Substitute Ordinance 2019-24.

In addition, the Kenai Peninsula Borough Planning Commission passed a motion by unanimous consent to recommend that Section 3 of Substitute Ordinance 2019-24 be changed to "That this ordinance shall become effective 180 days after its enactment.

In the Substitute Ordinance, please make the following amendment to the last WHEREAS statement:

WHEREAS, the Kenai Peninsula Borough Planning Commission at its meeting held on November 12, 2019 recommended approval by majority vote.

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

AGENDA ITEM E. UNFINISHED BUSINESS

1. Ordinance 2019-24; An Ordinance Adopting KPB 20.80 Subdivision Private Streets and Gated Subdivisions. (*Postponed from the August 26, 2019 Planning Commission meeting. Motion on floor.*)

Staff Report given by Scott Huff

PC Meeting: November 12, 2019

Mr. Huff let everyone know that the laydown packet had an updated version of the Ordinance. At the August 26, 2019 Planning Commission meeting the motion was made to approve Ordinance 2019-24, an Ordinance for Private Streets and Gated Subdivisions. At the September 23, 2019 Planning Commission meeting the Planning Commission moved and approved the motion to postpone until brought back by staff. The Assembly will be reviewing and voting on this on December 3, 2019.

Since the September 23, 2019 Planning Commission meeting staff has worked with the various cities. Staff met with Kenai, Soldotna, and Homer. Staff also reached out to Seward and Seldovia to discuss with them the ordinance. More staff work sessions have been held which has led to some edits and revisions. A substitute ordinance has been prepared.

Mr. Huff highlighted some of the proposed changes. KPB 20.80.020 the provisions were changed to have the new gated subdivision follow all of KPB Chapter 20, excluding only 20.30.210, which is fronting on a dedicated right-of-way, and 20.50, which is exceptions. Any plat under 20.80 will not have to front a dedicated road but cannot have any exceptions to borough code requirements. All references to Home Owner Associations were removed from the ordinance. Staff felt it was not the borough's place to determine if a HOA was valid or who controlled the HOA. All the adjoining lot owners or the HOA could own the private tract but the borough will not be the deciding body of who has that ownership. A reference was added that any final plat located within a city must comply with borough code 20.60.080, which is installation agreements. That gives the city a final say on a private subdivision within the city. If they have something in their code that requires roads to be built or that water and sewer must be supplied then the subdivider must get the installation agreement from the city before the plat can be recorded. 20.80.040 is for converting to a gated subdivision from a regular subdivision. The references to the Home Owner Association were removed. Language was added that a public road could not be converted if a road improvement assessment district or central improvement project had been performed on the road within the last 10 years. This is to address any funds the borough may have put into major road improvements. Under 20.80.050, a section was added to clarify that any private streets that are to be dedicated to public right-of-way must comply with borough road design criteria. Any private street can become or revert to a public right-of-way if it complies with borough standards. Under Section 3, the effective date was changed to be 90 days after the Ordinance is enacted. That change gives the cities some time to review and make any changes to their code to address private streets and gated subdivisions.

END OF STAFF REPORT

Chairman Martin asked if anyone from the public wished to comment on this item.

1. Frank Turpin, PO Box 1113, Sterling, AK 99672-1113

Mr. Turpin lives in Kenai River Keys Subdivision. He is on the board of the Kenai River Keys Property Owners Association. They have a gate serving two subdivisions, Kenai River Keys and Stephenkie Subdivision No. 2. There are 130 residential lots behind the gate and the association maintains 2 miles of road. They also have neighboring property owners that use the gate and private road for their access. They have an issue that should be considered before the propose ordinance creates confusion for a new private subdivision. In written comments to the Planning Commission, he cited the challenge of having roads dedicated to public use behind their subdivision gate. Kenai River Keys Subdivision was established in 1972 after the developer requested and received approval for an exception to the subdivision ordinance. The plat depicted roads with private road easements. Lots adjacent to platted roads have side lot line extended to the road

centerlines. The plat designated road easements for use of subdivision lot owners only. The Association manages private road easements by enforcing covenants, which address utilities, encroachments, and allowed uses. Enforcement actions or permissions are directed to the owner of the land and all lot owners are required to be members of the Association. One year after the final subdivision plat was approved the developer had sold all lots available for sale. The developer then proposed resubdividing a tract that created additional lots within an area of the subdivision that remained undeveloped. For access to these new lots, the resubdivision included an extension of a stub street that had been platted as a private road easement. The extension was not encumbered with private easements. The developer requested approval of the resubdivision with dedications of roadways to the public, which the Planning Commission approved and the Mayor signed. This created a dilemma. The plat did not depict private ownerships within the road right-of-way and the Association's ability to enforce covenants was meaningless without a lot owner. Rather than address the issue the borough has maintained that the street extension was a private road easement even though notes and developer's intent show that it is a public right-of-way. The Property Owners Association has no authority to enforce covenants on land dedicated to the public. The Association is still searching for authority to regulate use of dedicated streets that are behind their gate. It is not hard to imagine the same problem in a new private subdivision.

Commissioner Ruffner asked if Mr. Turpin had anything specific in the Substitute Ordinance for them to review. Mr. Turpin noted that the subdivision was more successful than the developer anticipated. After the sale of all the lots, the developer wanted to subdivide a tract to create new lots. A mistake was made. A lot was sold that is adjacent to the extended stub street. It was dedicated as public so signatures by adjacent lot owners were not needed. This could happen again. He does not have specific words for the Ordinance. Commissioner Ruffner said he understood what they went through but wanted to make sure it was not something to address specifically in the Substitute Ordinance. Mr. Turpin said that they support the ordinance but hate to see it pass if it may breed confusion on the future authority to regulate the use of roadways within a private subdivision. He does not propose a correction but looks to the Planning Commission. He thinks there is a problem with the "to and through". In his letter, he talked about the subdivision and how the Association lets the property owners outside their subdivision use the gate and roads. Three property owners have property adjacent to the subdivision and are allowed to use the gate and private roads. He is not sure there is language that would work for a "to and through" subdivision because there are too many variations. He thought there should be some rule that a road cannot be dedicated in a private subdivision, and that would help. Commissioner Ruffner said that would lead to a point that lots cannot be subdivided anymore once a private subdivision is created. Mr. Turpin said nothing in the ordinance states that.

Commissioner Venuti was still trying to understand the concept of gated subdivisions. He wondered why Mr. Turpin chose to live in one and what some advantages are to living within a gated subdivision. Mr. Turpin said that there are two main advantages. One is that when the subdivision first started there were no year round residents. They were people from Anchorage or other places that would come down on weekends to enjoy the Kenai River. A gated subdivision was an ideal way to protect their property. Now about fifteen property owners live there year round. The subdivision works. Security is a big issue, they feel better with a gate, and it helps. The other advantage is that it gives a sense of community. Everybody takes care of their own streets, problems, and neighbors. It is a slightly different mentality. There is no intent to bar anyone with legitimate business reasons to be in the subdivision but they do not want to provide access to people to use private property for fishing. It protects the river habitat that they have as well as provide security and sense of community. He can see reasons that other subdivisions would want to be gated. An airport subdivision may want it for safety purposes. A subdivision around a lake to keep people from wandering through their yards. There are many examples that work for a private subdivision. Theirs has worked for 47 years but they just do not have authority to control uses on dedicated roads.

Mr. Best asked Mr. Turpin if emergency responders and utility company access have been a problem or issue. Mr. Turpin said that there has not been an issue. The emergency responders

come out every couple of years and check things. They have a Knox box on the gate and they check it to make sure all the keys still work. There are two gates, an electric gate and padlocked gate. The padlock or chain can be cut if needed. Usually emergency responders will call before they come out. The subdivision has gotten to know the people they need to know. Each utility is approached separately and the subdivision has to find out what each utility company needs. They have all worked with the Association. Mr. Nelson with the borough has a clicker, and Mr. Uhlin has a clicker or a key. The River Center usually calls before they come out. They had an assessor out a few weeks ago and he walked in. Mr. Turpin has been trying to find out who it was so they can call him next time to be let in. Borough employees come into the subdivision frequently. ENSTAR and Homer Electric drive the neighborhood to read the meters. They all know the rules and it works well. The tricky part is those that live next to the subdivision that have no other way to get access. There are three private properties that have no other access but through the Kenai River Keys subdivision. One of the properties is actually across the river; there is a portion of the fish camp on the subdivision's side of the canal. That owner has a key and can come in anytime he wants. The State of Alaska also comes in often. Usually DNR or Fish and Game to do fish work or look at trap lines. If they want a clicker, they contact the Association and they provide them one. It is very casual and they get to know those people very quickly. He will say that for a new subdivision it will take years to develop those kind of relationships with the utilities, borough and emergency responders. It is an ongoing effort. There are also contractors and realtors. It is something developed over time.

Seeing and hearing no one else wishing to comment, Chairman Martin closed public comment and opened discussion among the Commission. Chairman Martin noted that a motion is on the floor.

Motion from August 26, 2019 meeting: move to forward to the Assembly a recommendation to approve Ordinance 2019-___; an ordinance adopting KPB 20.80, Subdivision private streets and gated subdivisions.

AMENDMENT A MOTION: Commissioner Ruffner moved, seconded by Commissioner Whitney, to amend the motion on the floor, which is a recommendation for Ordinance 2019-___, by substituting the language found in the desk packet.

Commissioner Ruffner asked if staff had any additional notes on the changes. Mr. Huff said the main changes were discussed during the staff report. He asked if anyone had any specific changes to discuss Commissioner Ruffner said this was a substantial piece of code to address. When it is presented in a laydown it can be hard to review. Mr. Huff said the only thing that changed from the original packet was there were some comments from the roads department. Commissioner Ruffner said that only one person from the public came to speak. He is putting a lot of trust into staff because no one will not know the issues until it is implemented. He wanted to know if staff had enough time to work through it. Last time it was postponed was because the cities were concerned about it. What he understood from Soldotna was that they wanted to make sure they had more say in whether it goes through. He wanted to know if first class cities have the ability to say no or does the borough retain the platting authority to authorize or not. Mr. Huff said the borough is the platting authority. The cities could request to be but they would have to comply with borough code in terms of notification and appeal process. None of the cities currently has that in their code. They could implement that to have the platting authority within their city. The first submittal received will have to be worked through because there are so many scenarios. Mr. Best added that this ordinance has some high standards since no exceptions can be requested other than fronting on a dedicated right-of-way. The postponement gave staff time to go back and review past subdivision plats. From the ones they reviewed only two or three could work under this code and a few that could if minor adjustments were made. There will only be a few situations that this code will work. Commissioner Ruffner said that he is supportive of sending it through to the Assembly but it is at the discretion of staff. He does feel that it has been rushed but if staff feels comfortable having a recommendation go to the Assembly he supports that.

Commissioner Whitney said that the Soldotna City Council had it before them at a recent meeting. There was not much support from the Council. There were many questions and a lot of concern about how it would work inside the city limits. If this passes there will need to be changes to City Ordinances on how to accomplish a change if someone proposed a gated community. They did not see an issue with a new

subdivision going in and creating a gated community because many factors can be built in during the creation. It is an issue to take an existing neighborhood and change it to a gated subdivision and how it would be done.

Commissioner Venuti said he did not understand how a public road would be transferred to a gated subdivision and how the cost of that road would be reimbursed to the borough. Mr. Best said that was a major discussion with the Road Service Area Board. If there was a recent capital improvement project or local improvement district it was figured that after 10 years the borough's half of the road is used. After talking with Mr. Uhlin and the Road Service Area Board, 10 years was determined to be about the period to get half of the use out of the road. After 10 years, they do not care if the road is taken over. This does not apply to the cities and they will need to come up with a way to handle and determine what they will allow. Commissioner Venuti could see in an area like Homer, which has high valued land that is valued at the square foot, it could add up to be expensive property. He understands the recovering the cost of the road but the land also has value. He does not see it being to the advantage of the public to give it away. Mr. Best said that most of the roads are by expressed dedication on a plat. That is fee simple property that is given to the borough. There was no compensation. The borough did not go out and purchase the property it was given to them. Statutes says the land would be given back so there is no value being exchanged. There are situations where rights-of-way are purchased and that the money would then be asked back for the value of the property. Commissioner Whitney said the City of Soldotna had that concern also. There are quite a few paved roads with concrete sidewalks and there are would be more value to those roads than a gravel road that is not well maintained. The special assessment districts usually have a 10-year payback with the city financing about 75% and adjoining property owners financing the remaining 25%.

Commissioner Morgan wanted to know how a gated community would affect public easement access such as a section line easement. Mr. Huff said that if a right-of-way went to a section line easement, as long as there is public access at each end of the easement, there could be a private street. The public cannot be limited to getting through the section line easement. Commissioner Whitney said if a section line easement ran through the street people could still walk across it and the homeowners that have created the gated community could not stop them. Mr. Best wanted to clarify if he meant a dedication on top of the section line easement or a section line easement crossing through a dedication. Commissioner Whitney said it would be when there is a section line easement and a private gated road goes across it. If someone is walking on that section line easement they can still cross the road and not have any interference from the homeowners telling him that he is not allowed. Mr. Huff said that is correct. The section line easement's public access still exists across the private tract.

Mr. Huff noticed that under definitions on the substitute ordinance Home Owner's Association is still in there and he would like to change that. Under private street definition, instead of "by a homeowners' association" and change it to "by the private tract owner". That would be a minor change to the substitute ordinance. Chairman Martin asked if the maker of the motion and second agreed to that change. Commissioners Ruffner and Whitney agreed to that change.

Commissioner Bentz asked if the 90-day effective date was consistent with the city zoning departments to give them time to react to the changes and make necessary changes to their codes. Mr. Best said they have given the cities advanced notice. To have something drafted, a reading and have a hearing, 90 days should be sufficient.

Commissioner Whitney wanted to know if a gated community is authorized who gets ownership of the road if there is no homeowner association. Mr. Huff said if within an existing subdivision and a right-of-way is made private all lots bordering the road would be joint owners of the private tract. They can all share in the cost as common owners of the tract or form an HOA. Commissioner Whitney asked if they would pay property tax on their portion of the tract. Mr. Best said yes, it would be absorbed into each lot. There would be a \$100 value put on the parcel that is the right-of-way. This is similar to how condominiums and areas with common ownership are handled. The value is allocated to all of the property owners. If there is a paved road with sidewalks and lights, the assessment values will reflect that. Mr. Whitney asked if it would be valued at fair market value. Mr. Best said the value for the assets in the right-of-way would be allocated

to each lot. Commissioner Whitney asked if he meant the property the road is on. Mr. Best said yes. Chairman Martin stated that a parcel with a road on it could be foreclosed upon if the taxes are not paid. Mr. Best that is why they would allocate a \$100 value on the parcel itself.

Commissioner Bentz was considering the public testimony heard about the issues with public rights-of-way within in gated subdivisions. Looking at 20.80.050 is there anything to think about adding to prevent those issues from arising in the future. Mr. Huff said that any future subdivision within a private subdivision could only have private streets dedicated. No public streets will be dedicated. It is a good point that if a subdivision has a three acre lot on a private street that lot could be subdivided in half. Depending on who owned the tract there could be some access issues.

Commissioner Whitney thought the original version said that a hundred percent of the surrounding property owners had to agree to go to a gated community. The new ordinance says a majority. Mr. Huff said a right-of-way vacation can be started with a majority but a hundred percent of the landowners have to sign the final plat to agree to it. The code for vacations requires a majority of owners fronting on a right-of-way to start a petition. Commissioner Whitney gave an example of 50 lots along a street and 49 want to do it and one says no then they cannot do it. Mr. Huff said that was correct.

Commissioner Ruffner wanted to discuss a case as described in the Kenai River Keys. There is a gated subdivision and then someone is going to subdivide within the subdivision. He wanted to know how they ensure that everyone has access if the other landowners or the HOA controls it. Mr. Best said any future subdivision within the subdivision would require access. If they could not do flag lots or have enough frontage then it would require an extension of the private tract. In the Keys situation, there is dedicated access to those other subdivisions but they are not constructed because they go through wetlands. Commissioner Ruffner said that the platting authority would be retained even within a private subdivision. It would be required that lots have frontage or place a new private easement across the property for access. Mr. Huff said that under any new plat, even in a private subdivision, they would have to comply with all of Chapter 20. Under 20.30.050 is legal access. "The applicant shall provide an access plan to the planning department verifying the existence of legal access to the subdivision boundary." That may be a private tract inside the subdivision. "In this title, legal access exists where an unrestricted, public right-of-way connects the subdivision to the state highway system", etc. They have to show that there is public access to a private lot so it could not be further subdivided because exceptions cannot be granted.

Commissioner Bentz felt that she understood more, especially the part about converting private streets to public right-of-way after already being privatized. She felt that what Commissioner Ruffner said about public dedication that was not built, such as a riparian area, it would not meet the criteria of 20.80.050(B) so that would help address the issues about future dedications and make sure they do not cause problems in the future.

Commissioner Venuti saw that this would be a great idea if a developer bought a piece of land and turned it into a gated subdivision. It would be less complicated than converting existing roads. He is concerned that the concept, while attractive to some people, promotes divisiveness and he thinks there is enough of that in the world. It is hard for him to support this.

Commissioner Fikes shares some of the same concerns as Commissioner Venuti. The testifier talked about access as far as the basics such as emergency responders. There are many additional people that may need access that are not thought about. What if a relative wishes to stay there, there is a sublet or rental, how would they get the correct access and how would others in the subdivision know they are allowed to have access? She also wanted to know where the burden of responsibility falls if there is disaster. Many other agencies may need access. The gate can be cut right away but it is still someone's property that people have to try to get access to in an emergency.

Commissioner Bentz said she did not notice in the packet if there was anything from the conversations had with the first class cities about their concerns. The City of Homer had a discussion at a work session and some issues were brought up there. A sentiment was how the city could make its own choices about this. She asked how the cities regain platting authority if they want it and how does a city say no. She does not

think it is easy to get code revisions done within 90 days. She would think about a longer time to enactment to give the cities more time to understand how it affects their ordinance.

Commissioner Morgan said that very little public testimony has been heard. She is curious on the history of this ordinance and how it started. Mr. Best said that over the past twenty years he has been asked several times if there was a provision for gated subdivisions. Some people are only here seasonally that live on cul-de-sacs and wanted to have a gate. They cannot gate a public right-of-way. Administration also advised that they wanted to it come through and based on everyone's past experiences they drafted something to move forward.

Commissioner Whitney agreed with Commissioner Venuti that if it is a large parcel that someone wants to create a gated community he understands. It is trying to do it after the fact and there are too many problems and concerns from everyone involved.

Commissioner Ruffner asked staff if a bunch of neighbors get together and create a gated subdivision there would be somebody on the boundary or edge of the subdivision. That lot could be subdivided or replatted and give new access into the private subdivision that others in the subdivision do not agree with. He wanted to make sure there are protections for those within the subdivision. Mr. Huff said that if there was a three-acre lot abutted to a five-acre lot that fronted on a right of way they could be combined and someone could break out of the subdivision because it meets right-of-way frontage. It would still have to go through code. It could be broken out and no longer be part of the private subdivision. Chairman Martin wanted to know if Commissioner Ruffner wanted to know about breaking out or breaking into a gated subdivision. Commissioner Ruffner wanted to look at both sides. He said Mr. Huff's example would be breaking out but they could add more lots into the subdivision. Mr. Best said that it would be up to the HOA if one is formed and civil court. He would encourage a subdivision to form a HOA to collect dues to operate and maintain their right-of-way as they do in Kenai River Keys and to help regulate it. Commissioner Ruffner asked if staff looked at other municipality's codes with gated subdivisions and wanted to know if there are protections built in that we are lacking. Mr. Best said that most jurisdictions build the roads before subdivision and also build walls and confine access through the gated areas.

Commissioner Fikes asked if one of these gated communities had a land owner that wants to put in some type of mixed use and the HOA is upset, where would that leave the borough. Mr. Best said hopefully on the sideline.

Commissioner Venuti wanted to know if a gated community could have mixed residential and commercial usage. Mr. Huff said there is no regulations in the borough on mixed use or commercial being in the same private subdivision as residential unless within a local option zoning district.

Commissioner Ruffner felt they were done discussing if staff felt it was ready to send to the Assembly. The Assembly has the final word on it. He does not feel good about this but also is fine sending it to the Assembly to discuss.

AMENDMENT B MOTION: Commissioner Bentz moved, seconded by Commissioner Ruffner, to amend Section 3 that this ordinance shall become effective 180 days after its enactment.

Commissioner Bentz said she was thinking of the seasonality or capacity for the cities to respond to this. She thought there might be more public comment at the city levels than at the borough level. More time would be welcomed by the City of Homer to process and discuss the issues that are being raised about converting existing subdivisions to private subdivisions.

AMENDMENT B MOTION PASSED: Seeing and hearing no objection or discussion, the motion passed by unanimous consent.

Chairman Martin noted that they were back to the motion to amend the motion to staff recommendations found in the desk packet.

Commissioner Whitney asked if they were just substituting with this motion and then they would vote on the recommendation to approve. Chairman Martin said that was correct, this motion is just to substitute the ordinance.

AMENDMENT A MOTION PASSED: Seeing and hearing no objection or discussion, the motion passed by unanimous consent.

Chairman Martin stated they were now discussing the main motion as amended.

Commissioner Ruffner said that it would be to recommend to the Assembly to take up the substitute.

Commissioner Morgan said she felt that she was not ready to support passing this onto the Assembly. She did not feel comfortable giving the Assembly something that does not feel ready or complete.

MOTION PASSED BY MAJORITY VOTE: 6 Yes, 4 No, 2 Absent

Yes: Bentz, Brantley, Ernst, Foster, Martin, Ruffner

No: Fikes, Morgan, Venuti, Whitney

Absent: Carluccio, Ecklund