

KENAI PENINSULA BOROUGH

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**MIKE NAVARRE
BOROUGH MAYOR**

MEMORANDUM

TO: Dale Bagley, Assembly President
Members, Kenai Peninsula Borough Assembly
Mike Navarre, Mayor

FROM:  Colette Thompson, Borough Attorney

DATE: June 2, 2015

SUBJECT: Ordinance 2015-19, Annual Budget: Authority of Borough to Spend Funds for Proposed K-Beach Area High-Water Relief and Prevention Feasibility Study

The question was raised at the May 19, 2015 assembly meeting whether the borough has the legal power to fund the Kalifornsky Beach ("K-Beach") Area High-Water Relief and Prevention Feasibility Study. This memorandum responds to that request.

I. Scope of Proposed Feasibility Study.

According to information posted on the internet by the KBeach Flood Mitigation Project at www.floodmitigationproject.org/feasibility_study, the purpose of the proposed study is to:

1. Gain a better understanding of the causes and extent of persistent high water-table flooding and intermittent surface water flooding conditions between 2012 and 2015 in the Kalifornsky Beach (K-Beach) Road area of the Kenai Peninsula.
2. Identify, evaluate, and rank potential remedies to the high water and flooding, evaluate costs of the most feasible alternatives; and
3. Provide recommendations for further actions.

To determine whether the borough has the power to fund this, the available borough powers are discussed next.

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II. Kenai Peninsula Borough Powers.

The Kenai Peninsula Borough is a second-class borough and may only exercise powers set out in Alaska Statutes for second-class boroughs, transferred to it from cities in the borough and accepted by the borough assembly, or authorized by the voters.¹

Borough powers may be exercised on three different geographic levels: (1) areawide, which means throughout the entire borough including the areas inside and outside cities; (2) nonareawide, which means all areas of the borough outside of the cities in the borough; and (3) service areas, which are geographic areas of the borough created by the assembly to provide services approved by the voters.

Three powers warrant further examination to determine whether they would support funding the proposed feasibility study: emergency management, planning, and road service area powers.^{2,3}

A. Emergency Management Powers.

This flooding was declared a local, state, and federal disaster in October and November 2013. Disasters have several phases including planning, preparation, response, recovery, and mitigation. This proposed feasibility study is intended to mitigate damages from future high water or flooding incidents rather than responding to the immediate effects of the 2013 incident. Accordingly, it is not a disaster “response,” instead it is mitigation. The only area the borough clearly has flood mitigation powers is in the Seward-Bear Creek Flood Service Area.⁴

KPB Chapter 2.45 provides the Office of Emergency Management is responsible for development of borough and interjurisdictional disaster response and recovery plans and coordinating disaster management between the borough, the State of Alaska, and other municipalities and response and recovery organizations. *See* KPB 2.45.010. It does not expressly provide for disaster mitigation services.

¹ AS 29.04.020 and AS 29.35.300(b).

² Questions have been raised as to why the borough has the ability to construct and develop property located in the Widgeon Woods Subdivision if it cannot do the same for the K-Beach area properties. AS 29.35.010(8) grants the borough the authority to acquire, manage, control, use and dispose of real and personal property. As the property developed by the borough in Widgeon Woods Subdivision was all borough-owned property when it was subdivided and developed, AS 29.35.010(8) is the source of the borough’s power to develop it. As the developed property in the K-Beach area is private property, the borough cannot use this power to spend funds to develop those subdivisions. It exercises Road Service Area powers to maintain and improve borough –maintained roads in that area.

³ Article X, Section 1, of the Alaska Constitution states, “[a] liberal construction shall be given to the powers of local government units.” Two provisions of Title 29 reflect this general rule of construction. Alaska Statute 29.35.400 provides that “[a] liberal construction shall be given to all powers and functions of a municipality conferred in this title”, and AS 29.35.410 states that “[u]nless otherwise limited by law, a municipality has and may exercise all powers and functions necessarily or fairly implied in or incident to the purpose of all powers and functions conferred in this title.” This rule of liberal interpretation, however, is of no use to KPB unless it can identify a specific statutory grant of authority to construe.

⁴ The Seward-Bear Creek Flood Service Area was established to provide flood protection, planning, and mitigation services. *See e.g.* KPB 16.50.090.

AS 29.35.040 is the only statute in Title 29 granting emergency disaster powers to municipalities. It provides that a borough may exercise housing, urban renewal, and redevelopment powers on a nonarea-wide basis where an area within the borough has been declared a disaster area by the governor or president. The powers granted by this section must be initiated within five years after the date of the disaster declaration.

While Title 29 does not define “housing, urban renewal, and redevelopment,” some guidance may be found in Alaska’s Slum Clearance and Redevelopment Act at AS 18.55.480 - .960. That chapter defines the term “redevelopment project” as including preparation of a redevelopment plan, the work incident to a redevelopment project and the preparation and arrangements for carrying out a redevelopment project. The work can include:

1. acquiring a slum area or a blighted area, including lands, or improvements for clearance or redevelopment of the area, or to prevent the spread or recurrence of slum or blight conditions;
2. clearing a slum or blight area by removing improvements and installing site improvements necessary to prepare sites for use in accordance with a redevelopment plan;
3. selling, leasing, or otherwise making available land in a slum or blight area for residential, commercial, or other uses in accordance with a redevelopment plan.

“Blighted area” is defined as an area that for certain reasons such as predominantly defective street or lot layout, unsanitary or unsafe conditions, deterioration of site or improvements, the existence of conditions that endanger life or property by fire and other causes, “substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its condition and use.”

The power granted by AS 29.35.040 enables a municipality to develop and implement a plan to acquire, cleanup, and potentially reconstruct a blighted area. Funding the proposed feasibility study designed to identify ways to mitigate damage from a high water event does not appear to constitute a redevelopment plan as described above.

Further, although a number of properties in this area were damaged as a result of the 2013 flood, based on the evidence made available to the borough to date, the current conditions in the K-Beach area do not appear to constitute a “blighted area.” Despite numerous inspections the borough has been unable to document septic systems that are failing now because of persistent flooding, or any wells contaminated due to the flooding. Instead, evidence obtained shows the ground water level is falling.

AS 26.23.060 provides for local and interjurisdictional disaster services. Each political subdivision in the state is responsible for disaster preparedness and coordination of response. However, this statute does not grant power to the borough to provide funding to mitigate

damages from future flooding.

AS 26.23.150 addresses disaster prevention, recognizing that disaster prevention measures may be included in state, local, and interjurisdictional disaster plans. However it does not grant powers to local governments to fund efforts to prevent or reduce harmful consequences of future disasters. Instead, it indicates that if state agencies believe, upon investigation, that additional building standards and land use controls are essential to help prevent disasters, they are to specify those essential changes to the governor.

Historically the borough has conducted some preventative projects such as removing gravel from streams in the Seward area when flooding appears imminent. However, the bulk of preventative projects have been funded with state and federal grants.

In sum, based on the information available it appears funding this project, as proposed, is beyond the scope of current borough emergency management powers.

B. Planning, Platting and Land Use Regulation Powers.

AS 29.35.180 requires the borough to provide for planning, platting, and land use regulation in accordance with AS 29.40 on an areawide basis. The planning commission is required to prepare a comprehensive plan and submit it to the assembly, and review, recommend, and administer measures necessary to implement the comprehensive plan, including measures provided in AS 29.40.040 (Land Use Regulation).

A comprehensive plan is “a compilation of policy statements, goals, standards, and maps for guiding the physical, social, and economic development, both private and public, of the first or second class borough.”

AS 29.40.040 and .070 authorize the borough to provide for land use and platting regulations. All of these statutes focus on the borough’s regulatory role in the development and use of property in the borough. For example, the borough has enacted Chapter 21.06 of the borough code, which regulates construction in certain identified flood hazard areas of the borough.

The current comprehensive plan, approved in 2005, contains several references to flood-related issues. These include the goal of developing criteria for the evaluation, selection and scheduling of road improvement projects. One implementation action is to design upgrades to streets, culverts and bridges to accommodate the 1 percent flood event to minimize adverse impacts of flooding to neighboring properties or resources, and to develop and repair flood-damaged streets, culverts and bridges to a level that can accommodate 1 percent flood events.⁵ These are goals and objectives that are listed as falling within the purview of the Road Service Area to implement, not that of planning. The Road Service Area powers are discussed below.

Other actions recommended in the comprehensive plan include improving regulation of

⁵ Transportation, Goal 5.1, Objective 1, Implementation Action E; Objective 2, Action D.

land uses and types of land to protect or minimize adverse impacts of flooding to neighboring properties,⁶ consider development suitability of land during subdivision review,⁷ and improve the borough's floodplain ordinance.⁸ Except for the provisions falling within the purview of the Road Service Area, these are regulatory, not participatory actions such as funding the feasibility study. Implementation actions listed in the comprehensive plan are also not required to take place. They are actions that people believed would help to achieve a stated goal.

In all, it does not appear that the borough's planning, platting and land use regulation powers include funding the feasibility study as it is proposed.

C. Road Service Area Powers.

The Road Service Area ("RSA") is a geographical area of the borough in which the voters have authorized the borough to provide for the construction, improvement and maintenance of roads within the service area. Borough powers exercised through a service area are limited to those approved by the voters.

In exercising these powers, the borough has adopted standards for road construction and issues contracts for road construction, improvement, and maintenance projects. These include establishing construction and maintenance standards for the road materials, alignment, drainage and culvert material, and structures and bridges.

The proposed feasibility study is intended to ultimately identify and implement remedies to the high water and flooding experienced in recent years. As drafted, this study appears to encompass a much broader scope than the authority granted by the voters to the RSA. While the RSA would have the power to consider the results of such a study in future road service area construction, maintenance and improvement projects, in my opinion it would not have the power to fund or conduct this study as proposed.

III. Conclusion.

As discussed above, in my opinion the borough does not currently have clear authority to fund this proposed feasibility study.

The only emergency management power that specifically includes efforts to mitigate damages for future events using borough funds is the power to provide for housing, urban renewal and redevelopment. However, the scope of current damages does not seem to rise to the level of damage that would trigger this power. Further, the proposed plan itself does not appear to constitute providing for urban renewal or redevelopment.

Planning powers tend to be implemented through regulations. Therefore, they would not alone authorize the borough to participate actively by funding this study.

⁶ Land Ownership, Management and Use, Goal 6.6, Implementation Action D.

⁷ *Id.* at G.

⁸ *Id.* at Goal 6.7, Objective 3.

Road Service Area powers are limited to the provision of road construction, maintenance and improvement. While design work is necessary to implement these powers, it does not extend to the broad scope of the proposed feasibility study. However, based on the provisions in the comprehensive plan and the RSA powers, if the study were limited to include only subject matters that are within borough RSA powers, the borough would have the authority to fund such a study. Any effort to exert authority to do more than that is legally questionable.