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March 20, 2009

Ms. Milli Martin
President,
Kenai Peninsula Borough Assembly
144 N. Binkley St.
Soldotna, Alaska 99669

via facsimile to 907-714-2388

Re: KPB Ordinance 2009-09
Our File No.: 10406.002

Dear President Martin and Members of the Assembly:

On behalf of Cook Inlet Region, Inc. (CIRI), I write to you to express CIRI's concern over proposed Kenai Peninsula Borough Ordinance 2009-09 *as presently drafted*. CIRI applauds the Borough for taking the lead in trying to address the flooding problems faced by many landowners in the area, and supports the goal of adopting an ordinance to address those problems. However, in its current form, the ordinance misses opportunities to build on the federal flood plain insurance program, and contains drafting errors and ambiguities that do not serve the ordinance's important goals.

We respectfully suggest that the Borough consider amending the ordinance in the following ways: (1) adopt special rules for development on large lots; (2) impose restrictions only on development activities that truly increase the risk of flood damage; (3) clarify the exemption provision; (4) clarify the waiver process; and (5) limit the coverage of the ordinance to flood hazard areas which have been identified through reliable mapping data. Finally, in light of anticipated amendments to the FIRM maps, the Assembly should consider postponing adoption of the ordinance as drafted, and refer it to the Borough Attorney for preparation of a more effective law. Our analysis follows.

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1. Different rules should apply to large lots.

The draft ordinance applies to any development on any portion of any lot in the covered area.¹ The permitting requirements and restrictions apply to the full lot regardless of whether the portion of the lot being developed actually is in the flood zone. In many cases, development on larger lots may occur on high topography well outside the flood hazard area. We suggest that, for lots above one acre, the ordinance's requirements should only apply if development is proposed in an area within twenty five feet from a mapped flood hazard area. This is even more stringent than standards imposed for work adjacent to wetlands.

2. The ordinance should only apply to activities that present a material likelihood of increasing the risk of flood damage.

The ordinance as drafted applies to any "development" on a covered property. The term "development" is defined in existing code and encompasses "any manmade change to improved or unimproved real estate."² This broad definition of "development" may unintentionally restrict forms of activity that carry little likelihood of increasing the risk of flood hazard. For example, the replacement of railroad ties or work in utility easements presumably would be covered even though neither poses a flood risk. CIRI respectfully suggests that the application of the ordinance be limited to primary structures, grading activities and substantial improvements to primary structures. To the extent there is other activity that the Assembly believes should be covered, it would be appropriate to develop a more detailed standard for covered activities in the SMFDA district to avoid unnecessary regulation of activity that bears no risk of increasing flood hazard. This is a good example where taking some time now to tailor the scope of coverage will save many hours of potential disputes that may arise in implementation.

¹ Proposed KPB Code Section 21.06.030(b)(2).

² KPB Code Section 21.06.020(c).

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3. The language of the exemption provision should be clarified.

The provisions defining the exemption from coverage are unclear. Proposed KPB Code Section 21.06.045(b) allows an exemption for application of SMFDA under specified scenarios, separated by "and/or." The use of "and/or" in this section is confusing and makes unclear whether all, or just one, of the grounds for exemption must be met. Assuming that the intent is the latter, the Borough Attorney should agree that the ordinance must be amended. Additionally, this section would condition the exemption on the opinion of adjacent property owners. We respectfully suggest that the Assembly obtain a legal opinion from the Borough Attorney on delegating governmental decision-making authority to private individuals if the success of the exemption turned on obtaining such consent.

4. The language of the waiver provision should be clarified.

Proposed KPB Code Section 21.06.045(E) provides for the right to submit a plan to the planning commission for consideration of a waiver, but does not specify what facts a petitioner must demonstrate to the commission to obtain the waiver. The language provides that the planning commission may place conditions on the permit to avoid increasing the risk of flood damage, but the absence of any standard for the commission to consider would grant the commission almost unfettered discretion to grant or deny a waiver. CIRI suggests that the provision be rewritten to state that the waiver is available to the petitioner upon a showing that the proposed development will not increase the risk of flood damage.

5. The coverage of the ordinance should be based upon reliable mapping data.

While the 1986 Seward flood boundaries were determined by the USGS, the two subsequent maps were developed through significantly less formal processes. We understand that the 1995 map was based on a combination of aerial photos and survey locates prepared by a private surveying and engineering firm in Soldotna. The 2006 data was apparently generated by Northern Hydraulics based upon anecdotal information and observation. CIRI requests that the Assembly carefully scrutinize the data-gathering methods that were utilized to generate each of the proposed maps.

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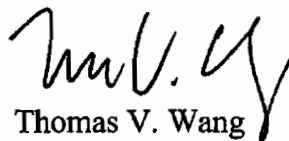
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Finally, the Assembly should consider the ramifications of an ordinance hastily passed based upon one set of maps, when the FIRM maps are in the process of being updated and are anticipated to be completed later this year. Given the significant likelihood that the FIRM map ultimately produced will not be contiguous with the flood hazard maps to be developed pursuant to 2009-09, CIRI would like the Assembly to consider the effect of parallel and conflicting schemes with overlapping maps applying different standards in different areas. CIRI strenuously recommends that the Borough await the revision to the FIRM regulatory scheme, and then add further requirements if necessary. Because the flood insurance program adds flood plain insurance depending on the effectiveness of regulation by the local community, tying this ordinance to the FIRM maps can increase the likelihood of obtaining a favorable score under FEMA's community rating scheme. The beneficial result of potential flood insurance rate decreases for all covered property in the community would then be a suitable off set to the increased cost of development engendered by this ordinance, certainly a laudable result.

We look forward to assisting the Borough Attorney in this redrafting process to provide for effective regulations that address a serious problem.

Very truly yours,

ASHBURN & MASON, P.C.



Thomas V. Wang

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