

YES	ABSENT	YES	YES	YES	YES	2 ABSENT
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## AGENDA ITEM H. SPECIAL CONSIDERATIONS

3. Remand of appeal by KPB Board of Adjustment – 7 factors; Riverquest preliminary plat approval; KPB File 2003-028; [Integrity(previously Whitford)/Riverquest RV Resort LLC]; Location: On Porter Road and Kenai River

Staff report as read by Max Best.

PC Meeting: 12-8-03

### Timeline:

February 4, 2003 -- Plat reviewed by Plat Committee and granted conditional approval

April 14, 2003 -- Revised preliminary plat submitted addressing concerns of February 4, 2003 conditional preliminary approval

May 12, 2003 -- Planning Commission hears appeal of April 14, 2003 Plat Committee decision and upholds approval

June 4, 2003 -- Appeal of Planning Commission decision filed with KPB Clerk

September 17, 2003 -- Board of Adjustment hears appeal and goes into closed adjudicatory executive session

October 15, 2003 -- Written decision from Board of Adjustment remanding the matter back to the Planning Commission on seven points

On November 12, 2003 -- the developer submitted a revised preliminary plat and a submittal letter that addresses the Board of Adjustment's concerns on remand. Findings of fact and recommendations are included below

December 8, 2003 -- Planning Commission scheduled to consider remand

The Kenai Peninsula Borough Assembly sitting as the Board of Adjustment remanded the Planning Commission decision to uphold the Plat Committee approval of Riverquest Subdivision back to the Planning Commission. The BOA voted to remand the matter, directing the Commission to consider the following seven factors:

1. **The minimum 100-foot lot depth must be addressed.**

**STAFF FINDINGS:** The subdivider's surveyor has submitted a partially redesigned plat for preliminary/final approval. He has requested an exception to 20.20.180 100-foot minimum lot depth for Lots 8,9, 29, 31, 44, 47, 56, 61-64, 78 and 86.

Staff has been unable to determine the specific reason for the minimum 100-foot lot depth requirement.

### **STAFF FINDINGS:**

1. Per submittal, Lots 8 and 9 were approved (as Lots 6 and 7) with an exception to 3:1; the new configuration is better for lot development.
2. In its prior configuration, Lot 6 would have been subject to a 20-foot building setback.
3. In its prior configuration, Lot 6 would have had a developable outside the building setback of 25 feet by 133 feet.
4. Lots 8 and 9 have developable areas outside the building setback of 60 feet by 70 feet.
5. Per submittal, Lot 31 is restricted in configuration due to the location of the existing bridge located at the end of Shelby Court.
6. Lot 31 is pre-configured by being bounded on the west by the existing travel way, on the east by Castaway Cove Subdivision and on the south by the Kenai River.
7. Per submittal, Lot 44 has a mean depth of over 97 feet.
8. Per submittal, configuration of Lot 44 is restricted by location of existing travel way.
9. Lot 44 is bounded on the southwest by the Kenai River.

10. Per submittal, Lots 47 and 56 are restricted by location of existing travel way.
11. Per submittal, location of existing travel way has been designed to fit between the Kenai River and the slough.
12. Per submittal, Lots 61-64 are restricted by the location of the existing travel way and canal.
13. Lot 78 has a mean lot depth of approximately 98 feet.
14. Lot 78 is configured to accommodate the existing travel way, the slough and a structure.
15. Per submittal, Lot 86 (originally Tract D) will be reserved for boat launch only.
16. Large parts of the subdivision are designed to accommodate existing travel ways, to maximize the use of existing development.
17. All lots are served by ADEC approved community water/sewer.
18. Area has been in use with rented or leased RV spaces since the 1970's.
19. Proposed subdivision significantly reduces the density due to the lot sizes.

20.24.010 provides that the commission may authorize exceptions to any of the requirements set forth in Title 20. This section also states - The commission shall find the following facts before granting any exceptions:

1. That special circumstances or conditions affecting the property have been shown by application;  
**Findings 1-19 appear to satisfy this condition.**
  2. That the exception is necessary for the preservation and enjoyment of a substantial property right and is the most practical manner of complying with the intent of this title;  
**Findings 1-6, 8-12, 14, 16-19 appear to satisfy this condition.**
  3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the area in which said property is situated.  
**Findings 1, 3, 7, 13, 15, 16-19 appear to satisfy this condition.**
2. **The extent of the reliance on grand fathered rights, if any, and the nature of the reliance require further consideration. The Board finds that temporary structures as defined in the current leases are not the type of grand fathered structures resulting in footprints for grand fathered continued further permanent use as intended by KPB Code 21.18.090.B. If existing activity will be considered to allow a continued similar activity on the same area of land as provided by KPB Code 21.18.090.C, then further clarification is required. This additional clarification is required, in part, in light of testimony at the September 17, 2003 hearing that the Appellee is not relying on grand fathered uses in subdividing and developing the area but instead will be seeking a conditional use permit for activities and structures that would otherwise be prohibited.**

**STAFF FINDINGS:** The owner has indicated that he is working with the Kenai River Center on a conditional use permit application that would substantially decrease the grand fathered impacts within the Habitat Protection Area. This is a development issue regulated under KPB Code 21, and is separate from the plat approval requirements. The subdivision plat will divide the land into legally conveyable lots under KPB Code 20.

According to John Mohorcich, Kenai River Center Coordinator, the developer is working with the Kenai River Center ("KRC") to obtain one CUP for all lots within the subdivision. This will allow the KRC to consider the overall development and its impacts in granting any conditional uses. The KRC is supportive of the CUP approach as opposed to the grandfather approach. The grandfather approach would result in numerous permanent structures being grandfathered on the very edge of the bank in the area most sensitive to habitat damage under KPB 21.18.090(C). To the extent that uses are activities under KPB 21.18.090(C) and not structures it would also allow non-permanent moveable campers to continue to park each summer on the bank as they have done in the past. However, in consideration of the developer forgoing grand father rights, the KRC is recognizing that structures did exist and will allow that square footage to be utilized farther away from the bank and in a less dense arrangement thereby reducing the negative impacts on the habitat, which will provide an opportunity for sensitive areas formerly subject to structures to revegetate.

While the plat was drawn around existing structures, a number of these structures, which were subject to yearly renewable leases, will be removed in favor of allowing a permanent structure on the lot in a manner that will provide a lesser negative impact on the habitat; however, some will remain as well. The details of the overall CUP continue to be worked on between the developer and the KRC. Conditions as authorized by KPB Chapter 21.18 will be placed on any uses; however, this is a development issue, and the platting code itself does not contain the process or the conditions

for these uses. The platting code contains requirements for lot sizes, and all but one lot on the plat before the board of adjustment (Tract D, designated boat ramp, now lot 86) comply with this requirement.

3. **Turnaround areas identified in the testimony at the September 17, 2003 hearing as “bulbs” do not meet the minimum Borough size requirements for cul-de-sacs. The Board finds that further evidence is needed to show the “bulbs” would be sufficient for emergency vehicles to maneuver freely within the area.**

**STAFF FINDING:** The submittal letter states that the turnaround at the end of Meridith Circle has been increased to a 40-foot radius and the turnaround at the end of Davison Avenue has an additional 15-foot turnaround easement to make a total 40-foot radius.

Staff recommends the proposed turnaround areas meet the code to accommodate for adequate emergency vehicle turnaround. This can be achieved by utilizing an easement or expanding the portions of Tract C to provide the area needed. 503.2.5 of the International Fire Code provides for an alternate turnaround consisting of a Tee with a 40' radius and a minimum of 60' on each side.

4. **On remand, reconsideration is required regarding construction of the portion of Tract C that is intended to be relocated along the river on the island. The Board finds that the goal of riparian protection in this area indicates a preference for leaving the existing access road where it is, unless it can be shown why the alternative is preferred.**

**STAFF FINDINGS:** The revised submittal shows an easement within the “island” lots that encompasses the existing travel way. The original intention of moving the travel way closer to the north boundary of the island was to limit structural development to one side of this island, with maximum area outside the 50-foot Habitat Protection Area being made available to each lot. The easement will accomplish this same purpose. Staff recommends the easement be granted by document and the recording information be provided on the final signed mylar. The movement of the travel way was not intended to require any new construction of a travel way, just to move the actual driving location closer to, but not on, the northerly bank. Most of the island is already developed and graveled.

5. **For a private road not dedicated on the plat as a public right-of-way, there must be noted on any final plat that the roads are not designed or built to meet KPB standards and shall not be maintained by the Borough until such private access is brought up to Borough road standards and dedicated to, and accepted by, the Borough.**

**STAFF FINDING:** The final plat will contain the following note: Roads must be dedicated and meet the design and construction standards established by the borough in order to be certified for inclusion in the borough road maintenance program.

6. **Many of the exceptions to KPB ordinances were based on specific findings with regard to continued seasonal use of the area. However, testimony at the hearing as well as further evidence in the record indicates the intent to utilize the subdivided areas for year-round use in the future. On remand, clarification regarding seasonal use is requested. The proposed preliminary plat includes a note stating that the subdivision is intended for seasonal use. See Finding No. 1 under paragraph 16 of the proposed Findings and Conclusions submitted by the Borough Planning staff dated September 2, 2003. In contrast, Mary Toll, Platting Officer, testified on September 17, 2003 that the seasonal use would not be noted on the final plat. The Board is troubled by an apparent reliance on continued seasonal use in light of the evidence indicating year-round use following subdivision.**

**STAFF FINDING:** The BOA did not indicate what reliable evidence was given that the use of this subdivision would be year-round. The only reliable assertion borough staff is aware of in this regard is that *if* the water and sewer systems are upgraded in compliance with DEC regulations, then year-round occupancy would be possible.

For now the staff's information indicates that the use of this area has always been seasonal based on the fishing season, that individual well and septic can't be placed on 6,000 square foot lots so the system would have to be upgraded in order for there to be year-round water and sewer, that historically the Riverquest development has been gated in the winter and the land access has not been plowed. Staff does not recommend against the seasonal use plat note because staff believes the use will not be seasonal; rather, staff recommends against the seasonal use note

because it is a land use restriction unrelated to the plat. It is the same reason that staff recommends against developer-placed notes that declare "residential use only."

Eventually, people buying into the plat expect the borough to enforce such developer-placed plat notes even where the borough has adopted no authority to do so. The seasonal use can only be enforced by ADEC (if the water and sewer systems are not shut down at the required seasonal time) or by the property owner through covenants, restrictions, homeowners' association or other such civil means. The Borough has no means to enforce the seasonal use. Additionally, with system upgrades and changes to the covenants or restrictions, the seasonal use could be changed. A note on the plat would incorrectly indicate to the public that the Borough has some enforcement powers regarding the seasonal use. If systems were legally upgraded or private restrictions were legally changed, a limiting note on the plat could cause a conflict upon sale or transfer of lots.

7. **The Board further finds that based on the testimony presented on September 17, 2003, the Appellee and the Borough Platting staff are requested to continue to work on preliminary plat design and requirements and that further changes be made prior to approval of a preliminary plat. The Board encourages such further discussion and refinement to comply with both the policy as well as the technical requirements of the KPB Code.**

**STAFF FINDING:** A new submittal letter and revised preliminary plat have been submitted by the developer to help meet the BOA's concerns. Both platting and the KRC staff continue to work with the developer toward a plat that complies with the code (to the extent feasible, 50 percent of all plats require exceptions; however, because of topography, existing and surrounding development--that percentage is higher for plats adjacent to waterways) as well as a plat that will promote a reduction of the negative impacts on the riparian habitat consistent with the goals of the KRO.

**NOTE: An appeal of a decision of the Planning Commission may be filed to the Assembly sitting as a board of adjustment, in accordance with the requirements of the Kenai Peninsula Borough Code of Ordinances, Chapter 21.20.250. An appeal must be filed with the borough clerk within 15 days of date of the notice of the decision, using the proper forms, and be accompanied by the \$300 filing and records preparation fee.**

END OF STAFF REPORT

STAFF RECOMMENDATION: The Planning Commission discuss and vote on each item separately.

Chairman Bryson asked if the newest preliminary plat had been made available to the appellants. Mr. Best did not know.

Chairman Bryson opened the meeting for public comment. He noted that the public hearing rules would be in effect.

1. Don Deitz, 6133 Staedem Drive, Anchorage

Mr. Deitz, Riverquest lessee, has followed this project since it began last year and has testified before the Commission in the past.

Mr. Deitz distributed a packet of information to the Commission. (*Clerk's Note: No copy was provided to staff or the subject file.*) He commented that a document in the packet was sent to the Clerk's office for the Board's hearing in September; however, it arrived too late to be included in the proceedings. A significant amount of information from the appellants was in this document. He referred to Page 4, which contained findings of fact, etc. He asked the Commission to review this information before their final discussion. The packet contained areas of concern to the appellants and residents of Riverquest. Mr. Deitz pointed out the copy of the notice to quit, which was a sample of the notice given to all residents in June and July. This is a legal document. Mr. Deitz commented about the turmoil that occurred during the height of the season with the subdivision process moving forward. Many residents were out of state and would have had a very difficult time moving their possessions, etc.

The developer, acting in the capacity of a landlord, gave a second document to residents. This document was an option agreement. Mr. Deitz estimated that 60-70 agreements had been negotiated and signed. He referred to Paragraph 11 in the packet. One reason he was the only person [of the appellants] testifying at this

meeting was due to a gag order placed on appellants and residents of Riverquest. Mr. Deitz believed the gag order restrained the public process. He questioned if the gag order was a violation of the Open Meetings Act; he deferred to the Borough Attorney's office. It set a tone for the month of August and clouded the concept of developing a subdivision that is supposed to be a positive, worthwhile project for the community.

Mr. Deitz had not seen the latest revised preliminary plat. He understood it would be provided to the Commission tonight. He had seen a revised plat; he thought the plat was still inadequate. He was concerned about a number of issues. He thought it was important to note that the sewer system, which is the linchpin to the subdivision, is not addressed. He believed there was some direction that the system on Lot 5 had connectivity to the replat. Often this matter is deferred to DEC, but this system is very important to the replat.

Chairman Bryson asked Mr. Deitz to summarize his comments.

Mr. Deitz thought the replat still had many flaws. He urged the Commission to not approve it. The subdivision is within the flood zone. He did not think the replat met the basic criteria for good public policy.

## 2. Cliff Baker, Integrity Surveys

Mr. Baker said he was representing the developer. He requested extra time to speak; he had information for the Commission, and he wished to address individual items. He noted that his presentation would mostly center on the second item of the remand.

Mr. Baker commented that Item 2 of the remand was really not a platting issue. He wished to address portions of Item 2, such as grandfather rights of the temporary structures. He distributed a spreadsheet of Riverquest structures and KPB tax parcel information for the parcels. (*Clerk's Note: A copy was provided for the subject file.*) The spreadsheet contained property values, existing structures, age of the structures, etc. One structure had been in place since 1960. Many structures have been on the parcels since the 1970s and 1980s. Mr. Baker questioned if these structures were actually temporary.

Mr. Baker distributed three large aerial photos to the Commission, which showed the structures. (*Clerk's Note: John Mohorcich, Kenai River Center Coordinator, has the three aerial photos.*) Numerous existing structures were in place long before the Borough enacted the Kenai River Habitat Protection Ordinance. Mr. Baker did not believe the structures were temporary, and the use was definitely not temporary. The photos depicted the congestion of the property, which the developer is trying to alleviate through the platting process.

Regarding grandfather rights and development of the proposed subdivision versus the current existing use, Mr. Baker showed the Commission a plat that depicted all the lease parcels fronting the water. (*Clerk's Note: No copy was provided for the subject file.*) Some parcels on the proposed Tract C were not shown on this plat. Approximately 145 lots are shown on this plat. If the property is left as it currently exists with lease lots, or if a co-op is formed, the subdivision would have about 180 lots. The proposed subdivision has about 92 lots. For the most part the lease plat's lot numbers correspond to the KPB tax parcel numbers. The Borough has been assessing tax on the parcels based on the lot numbers for a long time.

Mr. Baker commented that the existing uses were in place well before the current Kenai River Habitat Protection Ordinance was enacted. The existing structures do not need a conditional use to continue their current activity. Prior existing uses were allowed to continue when the Kenai River Habitat Protection Ordinance was enacted. The subject plat is proposed to replace the lease plat, which will help clean up the area and reduce the density. The intent is to have more aesthetically pleasing structures on the property. The proposed subdivision was designed to accommodate the current uses and current development. Some lots will have two owners. Mr. Baker did not think the owner needed to apply for a conditional use permit. The proposed plat subdivides the property and will allow those who have been leasing on a year-to-year basis an option to purchase their lot(s).

Structures to be moved away from the water will need a conditional use permit. Conditional use permits are not required for the subdivision approval process. The current uses on the property can continue. Any new uses will require a conditional use permit.

Regarding the turnarounds, Mr. Baker spoke with Gary Hale, CES Fire Marshall. Mr. Baker received a copy of

the International Fire Code. He offered to provide the Commission copies of the Code. He made some changes on the plat to comply with Code requirements. The plat now has through easements, and all cul-de-sacs and turnarounds will meet the International Code, which has been adopted by the Borough.

Mr. Baker distributed a handout to the Commission that addressed the travel way. A 10-foot nonvehicular strip has been provided adjacent to the Kenai River slough. (*Clerk's Note: A copy was provided for the subject file.*) The aerial photos show that the entire island is graveled up to the shoreline. The 10-foot nonvehicular area will allow for a vegetative buffer, boardwalk, or something to help protect the river bank.

Regarding Item 5 of the remand, the revised plat has the following note (Plat Note 8): Roads must be dedicated and meet the design and construction standards established by the borough in order to be certified for inclusion in the borough road maintenance program.

Mr. Baker concurred with staff on the remaining items.

Commissioner Massion asked Mr. Baker if he had a copy of the Board of Adjustment document given to the Commission tonight. Mr. Baker replied he had a copy of the staff report. Commissioner Massion offered to give Mr. Baker his copy of the Board of Adjustment document and asked him to comment on Items 12 and 13 regarding square footage. For the record, Mr. Best said this information was provided by Mr. Deitz and was not given to staff. Mr. Baker asked if this information was part of the Board of Adjustment's findings or the remand. Commissioner Massion asked Mr. Baker to comment on Items 12 and 13. Commissioner Massion added that this document was given to the Commission tonight, and they had not had much time to review it.

Chairman Bryson pointed out that the document referenced by Commissioner Massion was unsigned. Chairman Bryson was unsure if it was official. Mr. Best advised the Commission that the document was submitted late and was not accepted by the Borough Clerk for the Board of Adjustment hearing. He did not have a copy of the document, but he believed it was from the appellant.

Mr. Baker understood the document was from the appellant and was submitted to the Clerk's office too late to be included in the appeal, but now an attempt was being made to get it into the record. He understood the plat was remanded to the Commission based on seven items, and these items are all that can be addressed at this time. The rest of the approvals of the subdivision remain unchanged. If any decision made by the Commission tonight is appealed, the appeal would be based on the seven items. The appeal could not be based on prior approved items. Mr. Baker indicated he would like to be corrected if he was mistaken. Chairman Bryson asked for staff comments. Mr. Best concurred with Mr. Baker.

Commissioner Hutchinson asked if the plat provided in the mailout packet was the latest plat. Mr. Baker deferred to Ms. Toll. The latest plat had a table showing the parcel sizes with the exceptions that he provided to the Commission a few minutes ago showing the increased turnarounds to meet the International Fire Code.

Commissioner Hutchinson commented that Detail A did not match the plat. He wondered if Detail A was transferred from another plat. Mr. Baker believed this was a drafting error. He noted that the lines matched.

3. Kristine A. Schmidt

Ms. Schmidt said she represented the applicant. The staff report mentioned that the reason for moving the right-of-way to the northern side of the island was to have development on one side, and the active travel way went through the middle of the lot. She referred to the aerial photo. The northern side of the island is also a travel way. Campers drive to the edge of the bank and park throughout the season.

Ms. Schmidt asked the Commission to not consider the document [provided by Mr. Deitz]. She also had not seen the information provided by the appellant tonight. She asked the Commission to not look at or consider the proposed findings and conclusions of law because the Borough Assembly rejected this document since it was untimely. This document is not part of the record. She did not think new findings and new evidence that have been previously rejected could be included at this time. Ms. Schmidt offered to answer questions. No questions were heard.

4. Robert Nash, P.O. Box 3457, Soldotna

Mr. Nash was pleased that more than 70 percent of the people at Riverquest decided to stay and will be able to purchase their lots. He offered to answer questions.

Commissioner Isham asked Mr. Nash to elaborate on the septic system. Mr. Nash said the septic system had always been seasonal, and it will continue to be seasonal. Concern was expressed about the drainage of the septic system, which was on the other side of the subdivision as far from the river as possible. The septic system is now part of the subdivision. The homeowners association will manage, regulate, and maintain the septic system. The septic system was installed in 2000 when he purchased the property so that a septic pumping truck would not have to be utilized. The system has worked very well. Mr. Tauriainen designed the septic system, and Foster Construction installed it. Mr. Nash believed the system has been a very successful community septic system.

Commissioner Johnson asked how many people the septic system had been designed for. Mr. Nash believed the system was designed for 130-135. Testing by Northern Test Labs (Mike Tauriainen) has indicated 0 percent nitrates. According to DEC it could be increased. However, the plat has fewer lots, which was one of the goals of the subdivision. The septic system will serve 92 lots.

Mr. Deitz asked if he could speak again. Chairman Bryson asked Mr. Deitz if he had new information. Chairman Bryson cautioned Mr. Deitz against rebutting previous testimony. Seeing and hearing no objection, Chairman Bryson recognized Mr. Deitz.

5. Don Deitz

Mr. Deitz commented that he was not able to comment about this because he ran out of time. He asked the Commission to refer to Paragraph 11 of the document that the residents had to sign. The document talked about Government Lot 5. It is the intention of the developer to add density to this subdivision. Although statements have been made that density is being reduced, the density is being increased.

Many lots still have questionable area for construction when the setbacks of 20 feet and 50 feet are considered. Most lots on the southern side of the canal area and the northern side of the slough have virtually no area for construction.

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

Chairman Bryson asked if staff had further comments. Staff indicated no.

Chairman Bryson asked if the plat was a final plat. Mr. Best replied yes. Chairman Bryson asked if the plat had a reference, e.g., Amendment No. 2. Mr. Best said it did not have a reference at this point.

**MOTION:** Vice Chairman Clark moved, seconded by Commissioner Hutchinson, to approve per staff recommendations.

Commissioner Troeger asked if the motion included all the remand items. Vice Chairman Clark replied yes.

Mr. Best noted that some Commissioners were not present for a previous remand addressed by the Commission. A single motion was made to cover all points on appeal, which the Assembly found unacceptable. Mr. Best recommended the Commission address each item in the remand individually and vote on each item separately.

Chairman Bryson noted that information was given to the Commission tonight, e.g., the revised plat, which might not have been provided to the appellants. He asked staff if it would be appropriate to continue the hearing to the next meeting. Ms. Toll advised the Commission that a copy of the plat was sent to all parties who received the Clerk's remand decision.

**MOTION WITHDRAWN:** Vice Chairman Clark withdrew his motion. Commissioner Hutchinson withdrew the second. No objection was heard.

Ms. Toll explained that the final plat would go through a very extensive in-house final review for items such as lot numbers, boundary closure, adherence with all the required notes, etc.

Commissioner Johnson said the Commission was presented with a document from Birch, Horton, Bittner & Cherot by Mr. Deitz. Commissioner Johnson asked if the Commission could look at this document. Mr. Best believed the Commission could look at information. He asked the Commission to address the points on remand.

**MOTION:** Vice Chairman Clark moved, seconded by Commissioner Hutchinson, to address Remand Item No. 1, minimum 100-foot lot depth, and adopt staff findings 1-19.

Chairman Bryson asked if staff had further comments. Mr. Best replied no.

**STAFF FINDINGS:** The subdivider's surveyor has submitted a partially redesigned plat for preliminary/final approval. He has requested an exception to 20.20.180 100-foot minimum lot depth for Lots 8,9, 29, 31, 44, 47, 56, 61-64, 78 and 86.

**STAFF FINDINGS:**

1. Per submittal, Lots 8 and 9 were approved (as Lots 6 and 7) with an exception to 3:1; the new configuration is better for lot development.
2. In its prior configuration, Lot 6 would have been subject to a 20-foot building setback.
3. In its prior configuration, Lot 6 would have had a developable outside the building setback of 25 feet by 133 feet.
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20.24.010 provides that the commission may authorize exceptions to any of the requirements set forth in Title 20. This section also states - The commission shall find the following facts before granting any exceptions:

1. That special circumstances or conditions affecting the property have been shown by application;  
**Findings 1-19 appear to satisfy this condition.**
2. That the exception is necessary for the preservation and enjoyment of a substantial property right and is the most practical manner of complying with the intent of this title;  
**Findings 1-6, 8-12, 14, 16-19 appear to satisfy this condition.**
3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the area in which said property is situated.  
**Findings 1, 3, 7, 13, 15, 16-19 appear to satisfy this condition.**

**MOTION:** Commissioner Johnson moved, seconded by Commissioner Isham, to postpone action to the January 12, 2004 meeting.

Commissioner Johnson commented about the significant amount of information the Commission needed to consider.

Commissioner Troeger said he would vote against the postponement motion. He believed the information the Commission needed to base their decisions on was in the mailout packet. The other documents received tonight were interesting, but they were not part of the remand received from the Borough Assembly. Commissioner Troeger was prepared to make decisions tonight based on the packet information only.

**VOTE:** The motion to postpone action failed by a majority vote.

BRYSON NO	CLARK NO	FOSTER NO	GROSS NO	HOHL ABSENT	HUTCHINSON NO	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION NO	PETERSEN NO	TAURIAINEN NO	TROEGER NO	9 NO 2 YES 2 ABSENT

**VOTE:** The motion to address No. 1, minimum 100-foot lot depth, and adopt staff findings 1-19 passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

**MOTION:** Commissioner Hutchinson moved, seconded by Commissioner Gross, to adopt staff findings for Remand Item No. 2 (*The extent of the reliance on grand fathered rights, if any, and the nature of the reliance require further consideration. The Board finds that temporary structures as defined in the current leases are not the type of grand fathered structures resulting in footprints for grand fathered continued further permanent use as intended by KPB Code 21.18.090.B. If existing activity will be considered to allow a continued similar activity on the same area of land as provided by KPB Code 21.18.090.C, then further clarification is required. This additional clarification is required, in part, in light of testimony at the September 17, 2003 hearing that the Appellee is not relying on grand fathered uses in subdividing and developing the area but instead will be seeking a conditional use permit for activities and structures that would otherwise be prohibited.*)

Vice Chairman Clark commented that the Assembly appeared to have placed a development issue, as opposed to platting issues, before the Commission. Some existing uses will continue, and some will not. Issues in Item 2 need to be dealt with by the Kenai River Center and other appropriate agencies. He supported staff's findings.

After the Commission addressed all remand items, Commissioner Troeger asked if the Commission would take action on the final plat. Chairman Bryson commented it would be appropriate. Mr. Best indicated affirmatively.

**STAFF FINDINGS:** The owner has indicated that he is working with the Kenai River Center on a conditional use permit application that would substantially decrease the grand fathered impacts within the Habitat Protection Area. This is a development issue regulated under KPB Code 21, and is separate from the plat approval requirements. The subdivision plat will divide the land into legally conveyable lots under KPB Code 20.

According to John Mohorcich, Kenai River Center Coordinator, the developer is working with the Kenai River Center ("KRC") to obtain one CUP for all lots within the subdivision. This will allow the KRC to consider the overall development and its impacts in granting any conditional uses. The KRC is supportive of the CUP approach as opposed to the grandfather approach. The grandfather approach would result in numerous permanent structures being grandfathered on the very edge of the bank in the area most sensitive to habitat damage under KPB 21.18.090(C). To the extent that uses are activities under KPB 21.18.090(C) and not structures it would also allow non-permanent moveable campers to continue to park each summer on the bank as they have done in the past. However, in consideration of the developer forgoing grand father rights, the KRC is recognizing that structures did exist and will allow that square footage to be utilized farther away from the bank and in a less dense arrangement thereby reducing the negative impacts on the habitat, which will provide an opportunity for sensitive areas formerly subject to structures to revegetate.

While the plat was drawn around existing structures, a number of these structures, which were subject to yearly renewable leases, will be removed in favor of allowing a permanent structure on the lot in a manner that will provide a

lesser negative impact on the habitat; however, some will remain as well. The details of the overall CUP continue to be worked on between the developer and the KRC. Conditions as authorized by KPB Chapter 21.18 will be placed on any uses; however, this is a development issue, and the platting code itself does not contain the process or the conditions for these uses. The platting code contains requirements for lot sizes, and all but one lot on the plat before the board of adjustment (Tract D, designated boat ramp, now lot 86) comply with this requirement.

**VOTE:** The motion passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

**MOTION:** Vice Chairman Clark moved, seconded by Commissioner Isham, to adopt staff findings for Remand Item No. 3 (*Turnaround areas identified in the testimony at the September 17, 2003 hearing as “bulbs” do not meet the minimum Borough size requirements for cul-de-sacs. The Board finds that further evidence is needed to show the “bulbs” would be sufficient for emergency vehicles to maneuver freely within the area.*)

**STAFF FINDING:** The submittal letter states that the turnaround at the end of Meridith Circle has been increased to a 40-foot radius and the turnaround at the end of Davison Avenue has an additional 15-foot turnaround easement to make a total 40-foot radius.

Staff recommends the proposed turnaround areas meet the code to accommodate for adequate emergency vehicle turnaround. This can be achieved by utilizing an easement or expanding the portions of Tract C to provide the area needed. 503.2.5 of the International Fire Code provides for an alternate turnaround consisting of a Tee with a 40' radius and a minimum of 60' on each side.

**VOTE:** The motion passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

**MOTION:** Commissioner Hutchinson moved, seconded by Commissioner Isham, to adopt staff findings and recommendations for Remand Item No. 4 (*On remand, reconsideration is required regarding construction of the portion of Tract C that is intended to be relocated along the river on the island. The Board finds that the goal of riparian protection in this area indicates a preference for leaving the existing access road where it is, unless it can be shown why the alternative is preferred.*)

Commissioner Tauriainen asked staff for clarification on the easement. Ms. Toll suggested the Commission consider the revised easement (sketch) provided tonight that showed a nonvehicular easement along the bank of the river and incorporate it into the findings. The intent of the easement was to prohibit vehicles from accessing the actual bank.

**AMENDMENT TO THE MOTION:** Commissioner Hutchinson moved, seconded by Commissioner Tauriainen, to amend the motion to include staff recommendations and references to the easement on the new plat for a nonvehicular easement.

Chairman Bryson noted a copy of the sketch was provided to the Commission tonight.

**VOTE:** The amendment passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

**STAFF FINDINGS:** The revised submittal shows an easement within the “island” lots that encompasses the existing travel way. The original intention of moving the travel way closer to the north boundary of the island was to limit structural development to one side of this island, with maximum area outside the 50-foot Habitat Protection Area being

made available to each lot. The easement will accomplish this same purpose. Staff recommends the easement be granted by document and the recording information be provided on the final signed mylar. The movement of the travel way was not intended to require any new construction of a travel way, just to move the actual driving location closer to, but not on, the northerly bank. Most of the island is already developed and graveled.

**VOTE:** The motion as amended passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

**MOTION:** Vice Chairman Clark moved, seconded by Commissioner Tauriainen, to adopt staff findings for Remand Item No. 5 (*For a private road not dedicated on the plat as a public right-of-way, there must be noted on any final plat that the roads are not designed or built to meet KPB standards and shall not be maintained by the Borough until such private access is brought up to Borough road standards and dedicated to, and accepted by, the Borough.*)

**STAFF FINDING:** The final plat will contain the following note: Roads must be dedicated and meet the design and construction standards established by the borough in order to be certified for inclusion in the borough road maintenance program.

**VOTE:** The motion passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

**MOTION:** Commissioner Hutchinson moved, seconded by Commissioner Gross, to adopt staff findings for Remand Item No. 6 (*Many of the exceptions to KPB ordinances were based on specific findings with regard to continued seasonal use of the area. However, testimony at the hearing as well as further evidence in the record indicates the intent to utilize the subdivided areas for year-round use in the future. On remand, clarification regarding seasonal use is requested. The proposed preliminary plat includes a note stating that the subdivision is intended for seasonal use. See Finding No. 1 under paragraph 16 of the proposed Findings and Conclusions submitted by the Borough Planning staff dated September 2, 2003. In contrast, Mary Toll, Platting Officer, testified on September 17, 2003 that the seasonal use would not be noted on the final plat. The Board is troubled by an apparent reliance on continued seasonal use in light of the evidence indicating year-round use following subdivision.*)

**STAFF FINDING:** The BOA did not indicate what reliable evidence was given that the use of this subdivision would be year-round. The only reliable assertion borough staff is aware of in this regard is that *if* the water and sewer systems are upgraded in compliance with DEC regulations, then year-round occupancy would be possible.

For now the staff's information indicates that the use of this area has always been seasonal based on the fishing season, that individual well and septic can't be placed on 6,000 square foot lots so the system would have to be upgraded in order for there to be year-round water and sewer, that historically the Riverquest development has been gated in the winter and the land access has not been plowed. Staff does not recommend against the seasonal use plat note because staff believes the use will not be seasonal; rather, staff recommends against the seasonal use note because it is a land use restriction unrelated to the plat. It is the same reason that staff recommends against developer-placed notes that declare "residential use only."

Eventually, people buying into the plat expect the borough to enforce such developer-placed plat notes even where the borough has adopted no authority to do so. The seasonal use can only be enforced by ADEC (if the water and sewer systems are not shut down at the required seasonal time) or by the property owner through covenants, restrictions, homeowners' association or other such civil means. The Borough has no means to enforce the seasonal use. Additionally, with system upgrades and changes to the covenants or restrictions, the seasonal use could be changed. A note on the plat would incorrectly indicate to the public that the Borough has some enforcement powers regarding the seasonal use. If systems were legally upgraded or private restrictions were legally changed, a limiting note on the plat could cause a conflict upon sale or transfer of lots.

**VOTE:** The motion passed by unanimous consent.

BRYSON YES	CLARK YES	FOSTER YES	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER YES	11 YES 2 ABSENT

Commissioner Massion asked for clarification for Remand Item No. 7. If No. 7 was approved, he asked if the plat would have to be approved at a later date. Ms. Toll replied the plat was submitted as a preliminary/final, which is not uncommon when staff has reviewed various designs of the preliminary plat. When the Commission takes action, it will be for the revised preliminary and the final plat subject to the final staff review.

Commissioner Massion asked if the Commission would review the plat again. Ms. Toll replied that if any final plat is submitted with major changes, staff brings it back to the Commission. For example, a major change would be a change in right-of-way pattern. It is staff's opinion that by reviewing the subject plat the Commission is complying with the remand requirement. The plat is a revised preliminary/final plat. Staff has been working with the developer for a long time. The Board of Adjustment was not allowed to see any revisions because the appeal precluded the Board from seeing any of the revised plats. The subject plat before the Commission at this time has been greatly refined compared to the original preliminary plat.

**MOTION:** Vice Chairman Clark moved, seconded by Commissioner Hutchinson, to adopt staff findings for Remand Item No. 7 (*The Board further finds that based on the testimony presented on September 17, 2003, the Appellee and the Borough Platting staff are requested to continue to work on preliminary plat design and requirements and that further changes be made prior to approval of a preliminary plat. The Board encourages such further discussion and refinement to comply with both the policy as well as the technical requirements of the KPB Code.*)

Commissioner Troeger commented that Item 7 was the major item. Items 1-6 addressed technical matters. Approval of Item 7 would grant revised/final approval to the plat. Commissioner Troeger did not support the motion. He previously voted against the plat when he served on the Plat Committee and during the reconsideration by the Planning Commission. He agreed the ordinance requirements had been met.

Commissioner Troeger recalled the aerial photos presented during this meeting. He could not vote to approve the plat because of the safety of the river. The original subdivision would not be approved today. Commissioner Troeger doubted that many long-time residents would ask for a conditional use permit because they would have too much respect for the river. He commended staff for a good job and noted that the developer had worked hard to comply with the ordinance. He remarked that sometimes the Commission had to take a position that was in the best interest of the public. Commissioner Troeger supported preserving private property rights if the public interest is not harmed. He believed in this case that the public interest would be harmed by continuing this development on the river. The river is an interest locally, Borough wide, and State wide. Commissioner Troeger objected to final approval of the plat.

Commissioner Massion did not wish to stop the development, but he still had some questions. He inquired about the result of a negative vote. Chairman Bryson deferred to the Planning Director. Mr. Best commented that the owner answered all the questions the Board of Adjustment asked the Commission to consider. He believed the plat before the Commission represented findings and evidence that staff has worked with the developer to bring the plat into compliance with the Code.

Commissioner Johnson recalled that the last time the plat was before the Commission, it was approved by a 6/5 vote. Now the subdivision has 92 lots. He inquired about the number of lots for the previous preliminary plat. Ms. Toll believed the first plat had 107 lots.

Commissioner Hutchinson commented that if the Commission voted affirmatively, the process would move forward under the watchful eye of the Kenai River Center and the Planning Department. This would probably be a better situation than it is now.

**STAFF FINDING:** A new submittal letter and revised preliminary plat have been submitted by the developer to help meet the BOA's concerns. Both platting and the KRC staff continue to work with the developer toward a plat that complies with the code (to the extent feasible, 50 percent of all plats require exceptions; however, because of topography, existing and surrounding development, that percentage is higher for plats adjacent to waterways) as well as a plat that will promote a reduction of the negative impacts on the riparian habitat consistent with the goals of the KRO.

**VOTE:** The motion passed by a majority vote.

BRYSON YES	CLARK YES	FOSTER NO	GROSS YES	HOHL ABSENT	HUTCHINSON YES	ISHAM YES
JOHNSON YES	MARTIN ABSENT	MASSION YES	PETERSEN YES	TAURIAINEN YES	TROEGER NO	9 YES 2 NO 2 ABSENT

Chairman Bryson read the appeal statement. He thanked everyone for their comments.

AGENDA ITEM I. SUBDIVISION PLAT PUBLIC HEARINGS

Plat Committee Chairman Johnson reported that the Committee reviewed and granted conditional approval to nine plats.

AGENDA ITEM J. ANADROMOUS STREAM HABITAT PROTECTION (KPB 21.18) - None

AGENDA ITEM K. COASTAL MANAGEMENT PROGRAM CONSIDERATIONS - None

AGENDA ITEM L. OTHER/NEW BUSINESS

1. Choose new Plat Committee. New members will serve January, February, and March 2004.

Vice Chairman Clark and Commissioners Massion, Tauriainen, and Petersen volunteered to serve as Plat Committee members. Chairman Bryson and Commissioner Gross volunteered to serve as Plat Committee alternates.

AGENDA ITEM M. ASSEMBLY COMMENTS

Chairman Bryson noticed that Assembly Member Chay was present. Chairman Bryson asked Assembly Member Chay if he would like to comment. Assembly Member Chay declined.

AGENDA ITEM N. DIRECTOR'S COMMENTS

A telephone survey for the Comprehensive Plan update has begun. As of last weekend, approximately 80 people have been polled. The survey will continue throughout the next week.

Tomorrow morning staff and Tom Brigham, consultant, will meet with the Assembly regarding the Transportation Plan. The Assembly is scheduled to take action on the Plan December 16.

Mr. Best offered to answer questions. No questions were heard. He advised the Commission that he would still like to receive questions for ground water and gravel pits.

AGENDA ITEM O. COMMISSIONER COMMENTS

The Commission exchanged holiday greetings.

Commissioner Troeger complimented staff for their energy and effort on all items brought to the Commission. He noted that often there was frustration with changes and the workload. Many changes have occurred throughout the year, especially at the State level. Commissioner Troeger thanked the entire staff of the Planning Department for their fine work throughout the year.

Commissioner Foster thanked Assembly Member Chay for attending. Commissioner Foster thanked staff for supporting Mr. Bevington's work with the Kachemak Bay Research Reserve on the Coastal Dynamics Workshop scheduled to be held in March 2004.

Commissioner Gross thanked Commissioner Troeger for his sincere conscientious consideration of the issues and supporting what he believed in. She also thanked staff.