



# Kenai Peninsula Borough

144 North Binkley Street  
Soldotna, AK 99669

## Meeting Agenda Planning Commission

*Jeremy Brantley, Chair – Ridgeway/Runny River/Sterling District*  
*Pamela Gillham – Kalifornsky/Kasilof District*  
*Virginia Morgan, Parliamentarian – Cooper Landing/Hope/East Peninsula District*  
*Dawson Slaughter – South Peninsula District*  
*Diane Fikes – City of Kenai*  
*Franco Venuti – City of Homer*  
*Charlene Tautfest – City of Soldotna*  
*VACANT – City of Seward*

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Monday, September 25, 2023

7:30 PM

Betty J. Glick Assembly Chambers

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**Zoom Meeting ID: 907 714 2200**

The hearing procedure for the Planning Commission public hearings are as follows:

- 1) Staff will present a report on the item.
- 2) The Chair will ask for petitioner's presentation given by Petitioner(s) / Applicant (s) or their representative – 10 minutes
- 3) Public testimony on the issue. – 5 minutes per person
- 4) After testimony is completed, the Planning Commission may follow with questions. A person may only testify once on an issue unless questioned by the Planning Commission.
- 5) Staff may respond to any testimony given and the Commission may ask staff questions.
- 6) Rebuttal by the Petitioner(s) / Applicant(s) to rebut evidence or provide clarification but should not present new testimony or evidence.
- 7) The Chair closes the hearing and no further public comment will be heard.
- 8) The Chair entertains a motion and the Commission deliberates and makes a decision.

All those wishing to testify must wait for recognition by the Chair. Each person that testifies must write his or her name and mailing address on the sign-in sheet located by the microphone provided for public comment. They must begin by stating their name and address for the record at the microphone. All questions will be directed to the Chair. Testimony must be kept to the subject at hand and shall not deal with personalities. Decorum must be maintained at all times and all testifiers shall be treated with respect.

### A. CALL TO ORDER

**B. ROLL CALL****C. APPROVAL OF CONSENT AND REGULAR AGENDA**

*All items marked with an asterisk (\*) are consent agenda items. Consent agenda items are considered routine and non-controversial by the Planning Commission and will be approved by one motion. There will be no separate discussion of consent agenda items unless a Planning Commissioner so requests in which case the item will be removed from the consent agenda and considered in its normal sequence on the regular agenda.*

*If you wish to comment on a consent agenda item or a regular agenda item other than a public hearing, please advise the recording secretary before the meeting begins, and she will inform the Chairman of your wish to comment.*

**1. Time Extension Request****2. Planning Commission Resolutions**

[KPB-5506](#) PC Resolution 2023-19  
Building Setback Encroachment Permit; KPB File 2023-063

Attachments: [C2. PC Resolution 2023-19](#)

**3. Plats Granted Administrative Approval**

[KPB-5507](#) a. Hank and Mattie Bartos Subdivision; KPB File 2022-180  
b. Kenai Meadows Addition No. 1; KPB File 2022-035  
c. Soldotna Junction Sub Creek Side Estates 2023 Addn  
KPB File 2023-027

Attachments: [C3. Admin Approvals](#)

**4. Plats Granted Final Approval (KPB 20.10.040)**

[KPB-5508](#) a. Binkley Subdivision Back Replat; KPB File 2023-074

Attachments: [C4. Final Approvals](#)

**5. Plat Amendment Request****6. Commissioner Excused Absences**

City of Seward, Vacant

**7. Minutes**

[KPB-5509](#) September 11, 2023 PC Meeting Minutes

Attachments: [C7. 091123 PC Meeting Minutes Packet](#)

**D. OLD BUSINESS****E. NEW BUSINESS**

1.     [KPB-5510](#)     Building Setback Encroachment Permit; KPB File 2023-094  
Petitioner/Landowner: Parker, Downs  
Request: 4.7' portion of a hangar & well to remain in the 20' building setback  
Location: Block 1, Lot 1 Lakewood Estates Amended Subdivision; Plat KN 2004-88  
Sterling Area  
  
      Attachments:     [E1. BSEP Lakewood Estates Amend Sub Packet](#)
2.     [KPB-5511](#)     Building Setback Encroachment Permit; KPB File 2023-097  
Petitioner/Landowner: Frison  
Request: 40' garage to be constructed in the 20' building setback  
Location: Block 1, Lot 1, Ashton Park Subdivision; Plat KN 1997-074  
Kalifornsky Area  
  
      Attachments:     [E2. BSEP Ashton Park Sub Packet](#)  
                              [E2. Desk Packet](#)
3.     [KPB-5512](#)     Conditional Use Permit; PC Resolution 2023-28  
Petitioner: Wilson  
Request: To construct a cabin in the 50' HPD of the Kenai River  
Location: 45646 Spruce Avenue West / PIN: 05749306  
Soldotna Area  
  
      Attachments:     [E3. CUP Wilson Packet.pdf](#)  
                              [E3. Desk Packet](#)
4.     [KPB-5513](#)     Ordinance 2023-23: Amending KPB 20.30.280 and KPB 21.06  
regarding floodplain management to adopt required changes to remain  
compliant with the National Flood Insurance program.  
  
      Attachments:     [E4. ORD 2023-23 Packet](#)  
                              [E4. Desk Packet](#)

**F. PLAT COMMITTEE REPORT****G. OTHER**

1.     [KPB-5522](#)     Remand Hearing  
                    Building Setback Encroachment; KPB File 2022-121  
                    Lot 10, Lake Estates Subdivision, Plat KN 1648  
                    Applicants: David & Nancy Whitmore  
                    General Location: GL Hollier Street  
                    Ridgeway Area

Attachments:     [G1. Remand Hearing Desk Packet](#)

## H. PUBLIC COMMENT/PRESENTATION

*(Items other than those appearing on the agenda or scheduled for public hearing. Limited to five minutes per speaker unless previous arrangements are made)*

## I. DIRECTOR'S COMMENTS

## J. COMMISSIONER COMMENTS

## K. ADJOURNMENT

### MISCELLANEOUS INFORMATIONAL ITEMS

#### NO ACTION REQUIRED

### NEXT REGULARLY SCHEDULED PLANNING COMMISSION MEETING

The next regularly scheduled Planning Commission meeting will be held Monday, October 9, 2023 in the Betty J. Glick Assembly Chambers of the Kenai Peninsula Borough George A. Navarre Administration Building, 144 North Binkley Street, Soldotna, Alaska at 7:30 p.m.

### CONTACT INFORMATION

#### KENAI PENINSULA BOROUGH PLANNING DEPARTMENT

Phone: 907-714-2215

Phone: toll free within the Borough 1-800-478-4441, extension 2215

Fax: 907-714-2378

e-mail address: [planning@kpb.us](mailto:planning@kpb.us)

website: <http://www.kpb.us/planning-dept/planning-home>



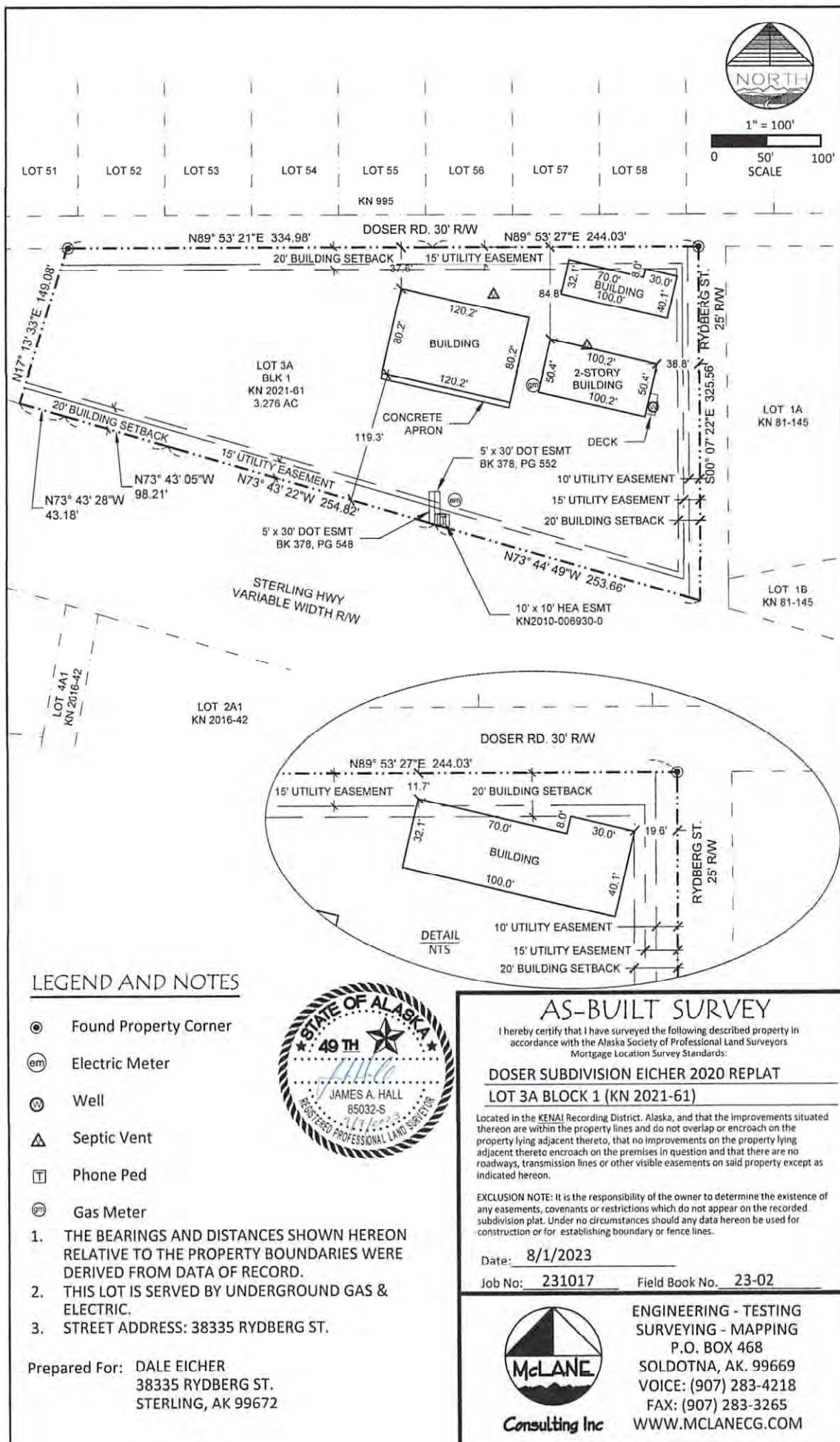
A party of record may file an appeal of a decision of the Planning Commission in accordance with the requirements of the Kenai Peninsula Borough Code of Ordinances. An appeal must be filed with the Borough Clerk within 15 days of the notice of decision, using the proper forms, and be accompanied by the filing and records preparation fees. Vacations of right-of-ways, public areas, or public easements outside city limits cannot be made without the consent of the borough assembly.

Vacations within city limits cannot be made without the consent of the city council. The assembly or city council shall have 30 calendar days from the date of approval in which to veto the planning commission decision. If no veto is received within the specified period, it shall be considered that consent was given.

A denial of a vacation is a final act for which the Kenai Peninsula Borough shall give no further consideration. Upon denial, no reapplication or petition concerning the same vacation may be filed within one calendar year of the date of the final denial action except in the case where new evidence or circumstances exist that were not available or present when the original petition was filed.

# **C. CONSENT AGENDA**

- \*2. Planning Commission Resolutions**
  - a. PC Resolution 2023-19**
    - Building Setback Encroachment Permit**
    - KPB File 2023-063**



AGENDA ITEM C2. PLANNING COMMISSION RESOLUTIONS

ITEM 1. – BUILDING SETBACK ENCROACHMENT PERMIT – DOSER SUBDIVISION EICHER 2020 REPLAT

<b>KPB File No.</b>	2023-063
<b>Planning Commission Meeting:</b>	September 25, 2023
<b>Applicant / Owner:</b>	Marlin Eicher of Sterling, Alaska
<b>Surveyor:</b>	James Hall / McLane Consulting Group
<b>General Location:</b>	Doser Road, Rydberg Street, Sterling

<b>Parent Parcel No.:</b>	065-520-20
<b>Legal Description:</b>	Lot 3A Block 1 Doser Subdivision Eicher 2020 Replat, Plat KN 2021-61 Township 5 North Range 8 West Section 7
<b>Assessing Use:</b>	General Commercial
<b>Zoning:</b>	Rural Unrestricted

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STAFF REPORT

This building setback encroachment permit is a follow-up to a building setback permit request that was heard and approved at the July 17, 2023 Planning Commission meeting. The applicants were given a conditional approval to resolve the encroachments into Doser Road and provide an updated as built to reflect the completion of the removal of the encroachment. The final as-built is has been submitted and staff is bringing Resolution 2023-19 before the Planning Commission for adoption.

**Specific Request / Purpose as stated in the petition:** We built the building in 2016 where it is today, per the as-built we received from Tauriainen Engineering (a copy is attached). Had we known they measured it incorrectly, we would have gladly had it moved, before building the permanent structure ... The second building, the small building behind the permanent structure is just on skids, and can be moved at any time

**Site Investigation:** Per the as-built and submittal there are two structures within the 20-foot building setbacks of Lot 3A Block 1, Doser Subdivision Eicher 2020 Replat, KN 2021-61. The Doser Road and Rydberg Street setbacks are the two rights-of-ways with encroachments. As of 07062023 staff has been notified that the shed has been moved, a photo is included in the packet showing the open spot where the shed was.

Doser Road is a 30-foot partially constructed right-of-way. The RSA currently maintains a portion of Doser Road with maintenance ending at the west end of the lot. Doser Road provides dedicated access to the subdivision to the north. Rydberg Street, originally dedicated as Cook Street, is a 25-foot right-of-way is currently unconstructed except for a portion connecting to the Sterling Highway that appears to be being used as a driveway for the subject lot and lot 1A, Doser Subdivision No 2, Plat KN 81-145 to the east. Doser Subdivision No 2, Plat KN 81-145 dedicated the 25-foot right-of-way and granted the 20-foot building setback.

According to KPB Imagery there does appear to be objects located within Rydberg Street, but staff is unable to determine if they are permanent or not.

The structure labeled as 'shop' encroaches by 8.2 feet into the setback along Doser Road.

Street views are available for the area, but are very dated, do not show an accurate representation of the area.

With the flat topography of the area and the current right-of-way configuration the Shop structure doesn't appear to hinder any line of sights, but the shed possibly does. **Staff recommends:** *the shed be removed before adopting the resolution and a new as-built be submitted for recording.*

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**Staff Analysis:** The subject parcel has been resubdivided several times and was originally created from an unsubdivided remainder lying between the Sterling Highway and Gatten Subdivision K-995. The first subdivision was Doser Subdivision No 2 KN 73-32. This subdivision created lots 1 through 4 and the 20-foot building setback along Doser Road. Lot 4 of Doser Subdivision No 2 KN 73-32 and an unsubdivided parcel to the west were later subdivided by Doser Subdivision 2016 Addition KN 2017-6 into lots 9 through 12. Doser Subdivision Eicher 2020 Replat KN 2021-61 combined Lot 3 Block 1, 10, 11, and 12 into the configuration it is today.

It does appear that both of the structures are within the 15' utility easement of Doser Road. Staff would advise the owners to investigate the utility easement encroachments. If it is determined that a utility provider needs to use the easement any damage or relocation of items or structures would be at the owner's expense.

This location is not within an Advisory Planning Commission boundary.

Due to the requirements to remove the shed, **staff recommends a one-year approval be granted and once all requirements have been met Resolution 2023-19 will be brought back to the planning commission for adoption. If the new as-built depicts additional encroachments not reviewed under this application a new application will be required and a new hearing will be scheduled.**

**Findings:**

1. A building setback along Doser Road was created by Doser Subdivision No 2, KN 73-32.
2. A building setback along Rydberg Street was created by Doser Subdivision No 2 Lots 1A, 2A, & 1B, KN 81-145.
3. The shed is not a permanent structure and is on skids and is moveable.
4. Doser Road is a 30-foot dedicated right-of-way.
5. Rydberg Street is a 25-foot dedicated right-of-way.
6. There is no steep terrain located near the encroaching improvements.
7. The 'shop' structure was set by a misinterpretation of the site plan layout.
8. Movement of the 'shop' structure would be a hardship on the owner.
9. This will close a KPB Code Compliance case.
10. Doser Road is not maintained at this portion of the road.

**20.10.110. – Building setback encroachment permits.**

- E. The following standards shall be considered for all building setback encroachment permit applications. Staff recommends the Commission select the findings they determine are applicable to the standards and vote on them:

1. The building setback encroachment may not interfere with road maintenance.

**Findings 3-6, 7, 8 & 10 appear to support this standard.**

2. The building setback encroachment may not interfere with sight lines or distances.

**Findings 3-6 & 10 appear to support this standard.**

3. The building setback encroachment may not create a safety hazard.

**Findings 3, 6 & 10 appear to support this standard.**

- F. The granting of a building setback encroachment permit will only be for the portion of the improvement or building that is located within the building setback and the permit will be valid for the life of the structure or for a period of time set by the Planning Commission. The granting of a building setback permit will not remove any portion of the 20-foot building setback from the parcel.

- G. The Planning Commission shall approve or deny a building setback encroachment permit. If approved, a resolution will be adopted by the planning commission and recorded by the planning department within the time frame set out in the resolution to complete the permit. The resolution will require an exhibit drawing showing, and dimensioning, the building setback encroachment permit area. The exhibit drawing shall be prepared, signed and sealed, by a licensed land surveyor.

**KPB department / agency review:**

KPB Roads Dept. comments	Out of Jurisdiction: No  Roads Director: Griebel, Scott Comments: No comments
SOA DOT comments	
KPB River Center review	A. Floodplain  Reviewer: Hindman, Julie Floodplain Status: Not within flood hazard area Comments: No comments  B. Habitat Protection  Reviewer: Aldridge, Morgan Habitat Protection District Status: Is NOT within HPD Comments: No comments  C. State Parks  Reviewer: VACANT Comments:
State of Alaska Fish and Game	
Addressing	Reviewer: Leavitt, Rhealyn Affected Addresses: 38335 RYDBERG ST  Existing Street Names are Correct: Yes  List of Correct Street Names: DOSER RD, STERLING HWY, RYDBERG ST  Existing Street Name Corrections Needed:  All New Street Names are Approved: No  List of Approved Street Names:  List of Street Names Denied:  Comments: NO COMMENT
Code Compliance	Reviewer: Ogren, Eric Comments: Current code compliance case for encroachment into the 20ft building set back.
Planner	Reviewer: Raidmae, Ryan There are not any Local Option Zoning District issues with this proposed plat.

	Material Site Comments: There are not any material site issues with this proposed plat.
Assessing	Reviewer: Windsor, Heather Comments: No comment

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**RECOMMENDATION:**

Based on the standards to grant a building setback encroachment permit, **staff recommends** to adopt Resolution 2023-19, subject to compliance with KPB 20.10.110 sections F and G.

**NOTE:**

**20.10.110.(H) A decision of the planning commission may be appealed to the hearing officer by a party of record, as defined by KPB 20.90, within 15 days of the date of notice of decision in accordance with KPB 21.20.250.**

**END OF STAFF REPORT**

**KENAI PENINSULA BOROUGH PLANNING COMMISSION  
RESOLUTION 2023-19  
KENAI RECORDING DISTRICT**

GRANT A BUILDING SETBACK ENCROACHMENT PERMIT TO A PORTION OF THE TWENTY FOOT BUILDING SETBACK FOR 3A, DOSER SUBDIVISION EICHER 2020 REPLAT (KN 2021061); IN NE 1/4 S07, T05N, R08W; SEWARD MERIDIAN, ALASKA, WITHIN THE KENAI PENINSULA BOROUGH; KPB FILE NO. 2023-063

WHEREAS, per KPB 20.30.240 – Building Setbacks, a minimum 20-foot building setback shall be required for fee simple non-arterial rights-of-way in subdivisions located outside incorporated cities; and

WHEREAS, Marlin Eicher of Sterling, AK requested a building setback encroachment permit to the 20-foot building setback granted by Doser Subdivision Eicher 2020 Replat (KN 2021061); and

WHEREAS, per the petition; a building encroaches 11.7 feet into the building setback along Doser Road; and

WHEREAS, the encroaching structure does not affect sight distance along the right-of-way; and

WHEREAS, on Monday, July 17, 2023, the Kenai Peninsula Borough Planning Commission considered the background information, all comments received, and recommendations from KPB Planning Department staff regarding the proposed exception; and

WHEREAS, the Planning Commission found that granting the building setback encroachment permit will not be detrimental to the public interest; and

WHEREAS, 20.10.110 of the Kenai Peninsula Borough Code of Ordinances authorizes the Planning Commission to accomplish building setback encroachment permits by Resolution.

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH:

Section 1. That the 20-foot building setback limit on KN 2021061 3A is hereby excepted to accommodate only the encroaching portion of the building.

Section 2. That any new, replacement, and/or additional construction will be subject to the 20-foot building setback limit.

Section 3. That the 20-foot building setback limit shall apply to the remainder of said lot.

Section 4. That a current as-built survey or sketch prepared, signed, and sealed by a licensed land surveyor showing the location of the encroachment within the building setback be attached to, and made a part of this resolution, becoming page 2 of 2.

Section 5. That this resolution is void if not recorded in the appropriate Recording District within 90 days of adoption.

Section 6. That this resolution becomes effective upon being properly recorded with petitioner being responsible for payment of recording fees.

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

\_\_\_\_\_  
Jeremy Brantley, Chairperson  
Planning Commission

ATTEST:

\_\_\_\_\_  
Ann Shimberg,  
Administrative Assistant

Return to:  
Planning Department  
Kenai Peninsula Borough  
144 North Binkley Street  
Soldotna, Alaska 99669



## ITEM 2. – BUILDING SETBACK ENCROACHMENT PERMIT DOSER SUBDIVISION EICHER 2020 REPLAT

<b>KPB File No.</b>	2023-063
<b>Planning Commission Meeting:</b>	July 17, 2023
<b>Applicant / Owner:</b>	Marlin Eicher of Sterling, Alaska
<b>Surveyor:</b>	Jason Schollenberg / Peninsula Surveying, LLC
<b>General Location:</b>	Doser Road, Rydberg Street, Sterling

<b>Parent Parcel No.:</b>	065-520-20
<b>Legal Description:</b>	Lot 3A Block 1 Doser Subdivision Eicher 2020 Replat, Plat KN 2021-61, Township 5 North Range 8 West Section 7
<b>Assessing Use:</b>	General Commercial
<b>Zoning:</b>	Rural Unrestricted

Staff report given by Platting Manager Vince Piagentini. He noted there are several conditions that must be met before the permit can be issued. When the conditions are met staff will bring back a resolution for the commission to review and adopt.

Chair Brantley opened the item for public comment.

Dale Eicher; 38335 Rydberg Street, Sterling, AK 99672: Mr. Eicher is the son of the petitioner and made himself available to answer any questions.

Seeing and hearing no one else wishing to comment, public comment was closed and discussion was opened among the commission.

**MOTION:** Commissioner Slaughter moved, seconded by Commissioner Fikes to grant a building setback encroachment permit to Block 1, Lot 3A, Doser Subdivision Eicher 2020 Replat, Plat KN 2021-6, based on staff recommendations and adopting and incorporating by reference findings 3-8 & 10 in support of standard one and findings 3, 6 & 10 in support of standards two and three, as set forth in the staff report.

Hearing no objection or further discussion, the motion was carried by the following vote:

**MOTION PASSED BY UNANIMOUS VOTE:**

Yes - 9	Brantley, Fikes, Gillham, Hooper, Morgan, Slaughter, Staggs, Tautfest, Venuti
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## ITEM 3. – BUILDING SETBACK ENCROACHMENT PERMIT HEAVEN'S VIEW SUBDIVISION 2019 ADDITION ROW VACATION PLAT

<b>KPB File No.</b>	2023-066
<b>Planning Commission Meeting:</b>	July 17, 2023
<b>Applicant / Owner:</b>	Dean Robinson
<b>Surveyor:</b>	Jason Schollenberg / Peninsula Surveying, LLC
<b>General Location:</b>	Lopez Avenue, Sterling

<b>Parent Parcel No.:</b>	058-351-28
<b>Legal Description:</b>	Tract A1, Heaven's View Subdivision 2019 Addition Right-of-Way Vacation Plat, KN 2019-22
<b>Assessing Use:</b>	Residential Dwelling
<b>Zoning:</b>	Rural Unrestricted

Staff report given by Platting Manager Vince Piagentini. He noted there are several conditions that must be met before the permit can be issued. When the conditions are met staff will bring back a resolution for the commission to review and adopt.

Chair Brantley passed the gavel to Vice Chair Gillham. Commissioner Brantley requested to be recused

## **C. CONSENT AGENDA**

- \*3. Plats Granted Administrative Approval**
  - a. Hank and Mattie Bartos Subdivision; KPB File 2022-180**
  - b. Kenai Meadows Addition No. 1; KPB File 2022-035**
  - c. Soldotna Junction Sub Creek Side Estates 2023 Addn.; KPB File 2023-027**



## Planning Department

144 N. Binkley Street, Soldotna, Alaska 99669 • (907) 714-2200 • (907) 714-2378 Fax

Peter A. Micciche  
Borough Mayor

### ADMINISTRATIVE APPROVAL

Subdivision: Hank and Mattie Bartos Subdivision  
KPB File 2022-180  
Kenai Recording District

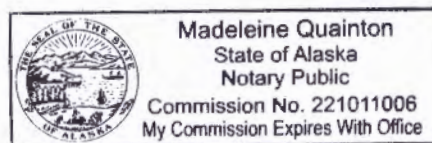
The Kenai Peninsula Borough Planning Commission conditionally approved the preliminary subdivision plat on January 9, 2023. Approval for the plat is valid for two years from the date of approval.

The final plat complied with conditions of preliminary approval and KPB Title 20 (Subdivisions); therefore, per KPB 20.60.220, administrative approval has been granted by the undersigned on Tuesday, September 12, 2023.

Vince Piagentini  
Platting Manager

State of Alaska  
Kenai Peninsula Borough

Signed and sworn (or affirmed) in my presence this 12 day of September 2023 by  
Vince Piagentini.

  
Notary Public for the State of Alaska

My commission expires: with office

The survey firm has been advised of additional requirements, if any, to be complied with prior to recording. After the original mylar has been signed by the KPB official, it must be filed with the appropriate district recorder within ten business days by the surveyor or the Planning Department.



## Planning Department

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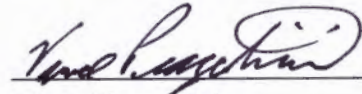
Peter A. Micciche  
Borough Mayor

### ADMINISTRATIVE APPROVAL

Subdivision: Kenai Meadows Addition No 1  
KPB File 2022-035  
Kenai Recording District


The Kenai Peninsula Borough Planning Commission conditionally approved the preliminary subdivision plat on May 23, 2022. Approval for the plat is valid for two years from the date of approval.

The final plat complied with conditions of preliminary approval and KPB Title 20 (Subdivisions); therefore, per KPB 20.60.220, administrative approval has been granted by the undersigned on Tuesday, September 12, 2023.

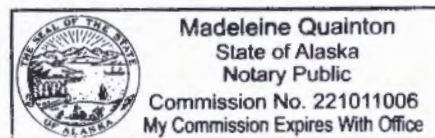
  
Vince Piagentini  
Platting Manager

State of Alaska  
Kenai Peninsula Borough

Signed and sworn (or affirmed) in my presence this 12 day of September 2023 by  
Vince Piagentini.

  
Notary Public for the State of Alaska

My commission expires: With office



The survey firm has been advised of additional requirements, if any, to be complied with prior to recording. After the original mylar has been signed by the KPB official, it must be filed with the appropriate district recorder within ten business days by the surveyor or the Planning Department.





## Planning Department

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Peter A. Micciche  
Borough Mayor

### ADMINISTRATIVE APPROVAL

Subdivision: Soldotna Junction Subdivision Creekside Estates 2023 Addition  
KPB File 2023-027  
Kenai Recording District

The Kenai Peninsula Borough Planning Commission conditionally approved the preliminary subdivision plat on April 10, 2023. Approval for the plat is valid for two years from the date of approval.

The final plat complied with conditions of preliminary approval and KPB Title 20 (Subdivisions); therefore, per KPB 20.60.220, administrative approval has been granted by the undersigned on Wednesday, September 6, 2023.

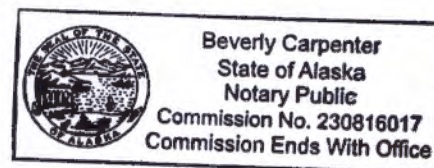
Vince Piagentini  
Platting Manager

State of Alaska  
Kenai Peninsula Borough

Signed and sworn (or affirmed) in my presence this 6<sup>th</sup> day of September 2023 by  
Vince Piagentini.

Notary Public for the State of Alaska

My commission expires: with office



The survey firm has been advised of additional requirements, if any, to be complied with prior to recording. After the original mylar has been signed by the KPB official, it must be filed with the appropriate district recorder within ten business days by the surveyor or the Planning Department.

## **C. CONSENT AGENDA**

- \*4. Plats Granted Final Approval**
  - a. Binkley subdivision Back Replat; KPB File 2023-074**



## Planning Department

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Peter A. Micciche  
Borough Mayor

### FINAL APPROVAL OF PLAT SUBMITTED UNDER 20.10.040


Subdivision: Binkley Subdivision Back Replat  
KPB File 2023-074  
Kenai Recording District

The Kenai Peninsula Borough Planning Department has reviewed the above referenced subdivision plat in accordance with 20.10.040 Borough Code of Ordinances. The final plat meets the conditions of the preliminary approval and complies with KPB Title 20; therefore, final approval has been granted by the undersigned on Tuesday, September 12, 2023.

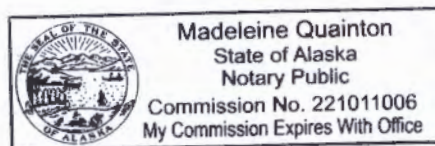
  
Vince Piagentini  
Platting Manager

State of Alaska  
Kenai Peninsula Borough

Signed and sworn (or affirmed) in my presence this 12 day of September 2023 by  
Vince Piagentini.

  
Notary Public for the State of Alaska

My commission expires: With office



The survey firm has been advised of additional requirements, if any, to be complied with prior to recording. After the original mylar has been signed by the KPB official, it must be filed with the appropriate district recorder within ten business days by the surveyor or the Planning Department.

## **C. CONSENT AGENDA**

### **\*7. Minutes**

**September 11, 2023 PC Meeting Minutes**



# Kenai Peninsula Borough Planning Commission

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Betty J. Glick Assembly Chambers, Kenai Peninsula Borough George A. Navarre Administration Building

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September 11, 2023  
7:30 P.M.  
UNAPPROVED MINUTES

**AGENDA ITEM A.      CALL TO ORDER**

Commissioner Brantley called the meeting to order at 7:30 p.m.

**AGENDA ITEM B.      ROLL CALL**

*Commissioners Present*

Jeffery Epperheimer, Nikiski District  
Jeremy Brantley, Ridgeway/Sterling District  
Dawson Slaughter, South Peninsula District  
Franco Venuti, City of Homer  
Diane Fikes, City of Kenai

With 5 members of an 8-member seated commission in attendance, a quorum was present.

*Staff Present*

Robert Ruffner, Planning Director  
Walker Steinhage, Borough Deputy Attorney  
Vince Piagentini, Platting Manager  
Madeleine Quainton, Platting Specialist  
Jenny Robertson, Land Management Administrative Assistant  
Ann Shirnberg, Planning Administrative Assistant

**AGENDA ITEM C.      CONSENT & REGULAR AGENDAS**

**\*2      Planning Commission Resolutions**

- a. PC Resolution 2023-22

**\*3.      Plats Granted Administrative Approval**

- a. Federal Addition to Seward Saltwater Safari Replat; KPB File 2022-184
- b. Salamatof Air Park Alcan 2022 Replat: KPB File 2022-117
- c. Trust Land Survey 2021-03 Lower Cohoe Subdivision; KPB File 2022-057

**\*6.      Commissioner Excused Absences**

- a. Pamela Gillham, Kalifornsky/Kasilof District
- b. Virginia Morgan, Cooper Landing/Hope District
- c. Charlene Tautfest, City of Soldotna (unexcused)
- d. City of Seward, Vacant

**\*7.      Minutes**

- a. August 28, 2023 Planning Commission meeting minutes.

Chair Brantley asked Ms. Shirnberg to read the consent agenda items into the record. Chair Brantley then asked if anyone wished to speak to any of the items on the consent agenda. Seeing and hearing no one wishing to comment, Chair Brantley brought it back to the commission for a motion.

**MOTION:** Commissioner Epperheimer moved, seconded by Commissioner Slaughter to approve the consent agenda and amend the regular agendas.

Hearing no objection or further discussion, the motion was carried by the following vote:

**MOTION PASSED BY UNANIMOUS VOTE:**

Yes - 5	Brantley, Epperheimer, Fikes, Slaughter, Venuti
Absent - 3	Gillham, Morgan, Tautfest

**AGENDA ITEM E. NEW BUSINESS**

Chair Brantley asked Ms. Shirnberg to read the public hearing procedures into the record.

**ITEM #1 – STREET NAMING RESOLUTION 2023-05  
NAMING CERTAIN PUBLIC RIGHTS-OF-WAY WITHIN ESN 751  
NAMING A CERTAIN PUBLIC EASEMENT WITHIN ESN 401  
NAMING CERTAIN PUBLIC RIGHTS-OF-WAY WITHIN ESN 302**

Staff report was given by Planning Director Robert Ruffner.

Chair Brantley opened the item for public comment.

Cody Gilmore; P.O. Box 854, Seward, AK 99664: Mr. Gilmore is the petitioner and the owner of Lots 75 & 76. He requested that western alley be named Gilmore Alley. He doesn't really want another street name with the name Bear in it.

Betty Gilmore; P.O. Box 854, Seward, AK 99664: Ms. Gilmore is the owner of Lot 74 and stated that she supports naming the western alley Gilmore Alley.

Lynn Hettick; 33508 Lincoln Ave., Seward, AK 99664: Ms. Hettick is the owner of Lots 43, 44, 69, 70, 71, 72, 73A & 73B. She does not support the name changes at this time. She feels that the other neighbors in the area did not have input on the name selection. Commissioner Fikes asked if she had a name suggestion for the alleys. Ms. Hettick replied no, but she still thinks that the other neighbors in the area should have opportunity to have input on the name. She then asked how she accesses her property. Ms. Hettick replied that they use Lincoln Ave. off Bear Lake Rd.

Christopher Hettick; 33508 Lincoln Ave., Seward, AK 99664. Mr. Hettick is Lynn Hettick's son and lives on one of their properties. He agrees with his mother and would like to see more neighbor input on these alley names. Commissioner Fikes asked if he had a name that he would like to be considered. Mr. Hettick replied no. Commissioner Fikes asked Mr. Hettick how he accesses his property. He stated that he uses Lincoln Ave. and goes across his parents' property.

Seeing and hearing no one else wishing to comment, public comment was closed and discussion was opened among the commission.

**MOTION:** Commissioner Slaughter moved, seconded by Commissioner Venuti to adopt Street Naming Resolution 2023-05 and to split the question and discuss the name changes separately.

Commissioner unanimously agreed.

**MOTION:** Commissioner Slaughter moved, seconded by Commissioner Venuti to adopt Street Naming Resolution 2023-05 naming certain public alleys within the Bear Creek community, ESN 751, Retreat Alley (eastern alley) & Gilmore Alley (western alley). Naming an unnamed public access easement within the Happy Valley community, ESN 401, to Wishbone Way and renaming a public right-of-way within the Coho community, ESN 302, to Old Weasel Trail Road.

Hearing no objection or further discussion, the motion was carried by the following vote:

**MOTION PASSED BY UNANIMOUS VOTE:**

Yes - 5	Brantley, Epperheimer, Fikes, Slaughter, Venuti
Absent - 3	Gillham, Morgan, Tautfest

**AGENDA ITEM F.      PLAT COMMITTEE REPORT**

Commissioner Slaughter reported the plat committee reviewed and granted preliminary approval to 3 plats,

**AGENDA ITEM H.      PUBLIC COMMENT/PRESENTATIONS**

Chair Brantley asked if there was anyone from the public who would like to comment on anything not appearing on the agenda. No one wished to comment

**AGENDA ITEM K.      ADJOURNMENT**

Commissioner Slaughter moved to adjourn the meeting at 8:41P.M.

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Ann E. Shirnberg  
Administrative Assistant

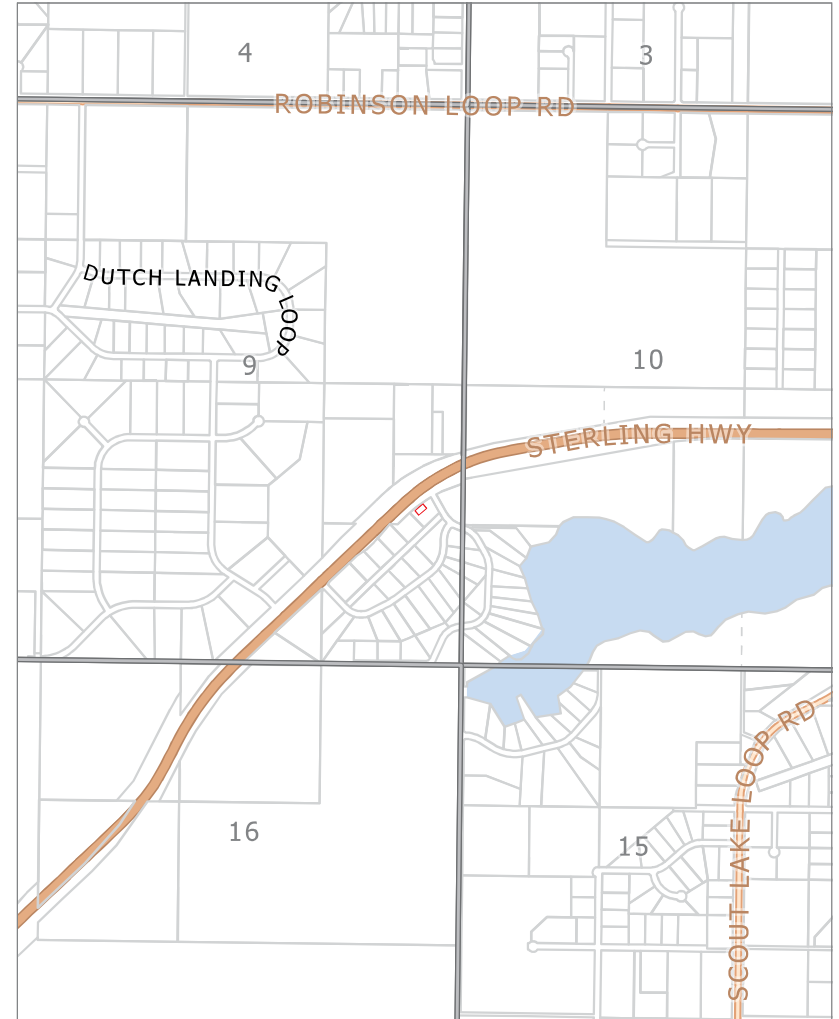
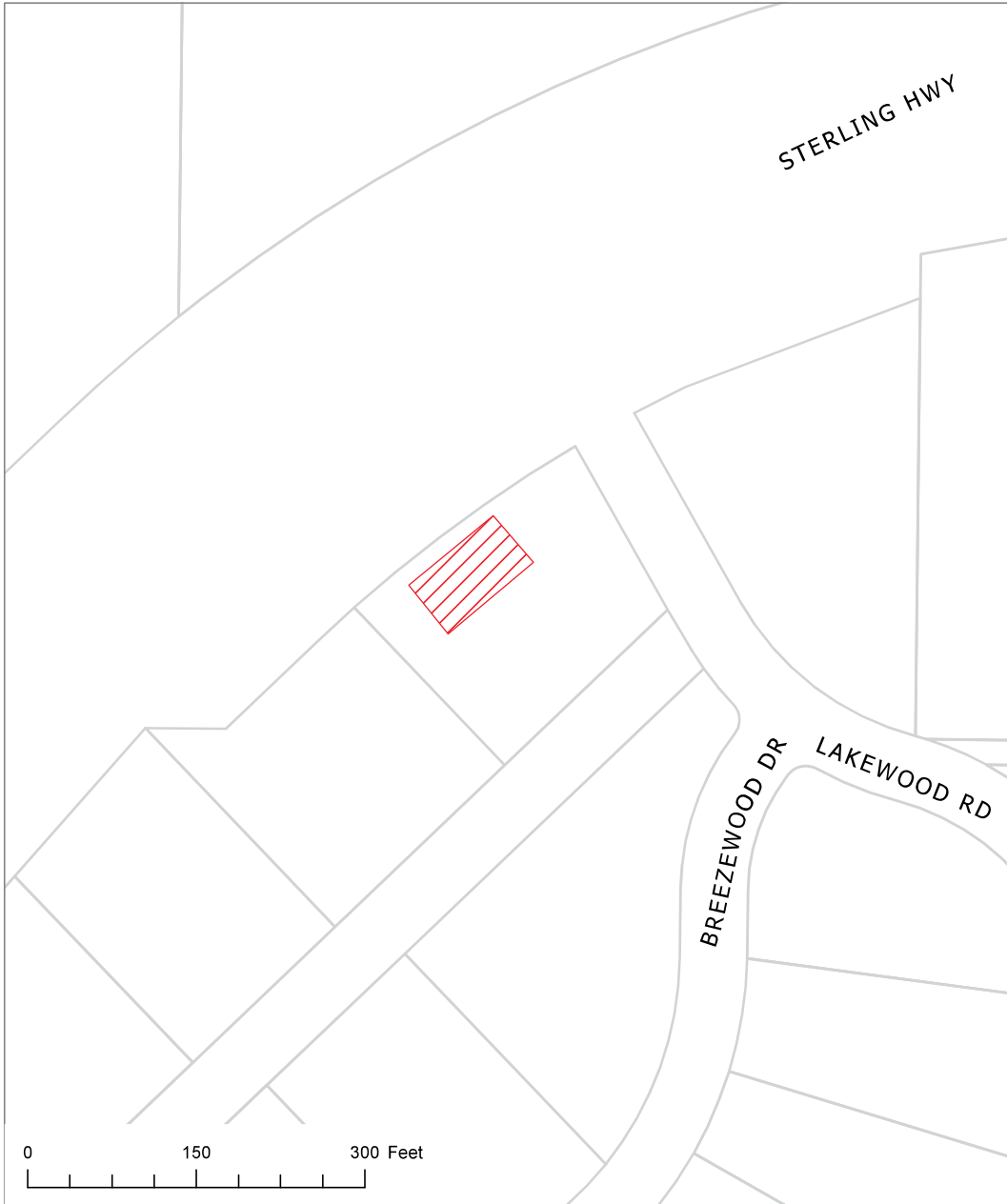
## **E. NEW BUSINESS**

**1. Building Setback Encroachment Permit; KPB File 2023-094**

**Petitioner/Landowner: Parker, Downs**

**Request: 4.7-foot portion of a hangar & well to remain in the  
20-foot building setback**

**Location: Block 1, Lot 1 Lakewood Estates Amended Subdivision;  
Plat KN 2004-88  
Sterling Area**



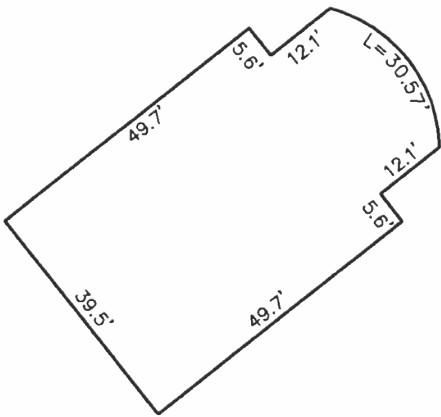
KPB File 2023-094  
T 05N R 09W SEC 09  
Sterling



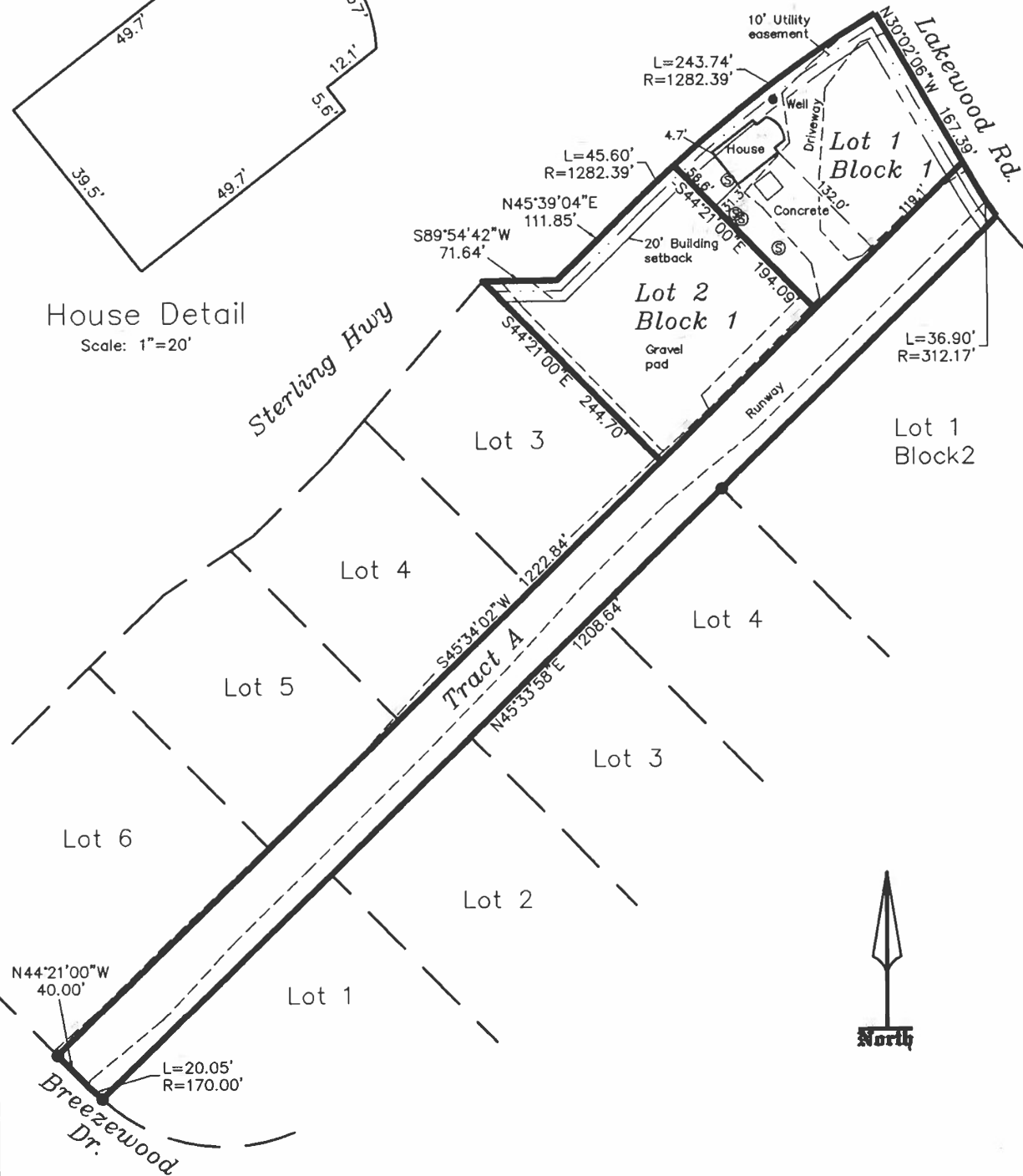


The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.





House Detail  
Scale: 1"=20'



ASBUILT CERTIFICATION

LEGEND

- Found Rebar
- ⊙ Sewer vent

KENAI RECORDING DISTRICT      Plat: 97.37

Date: 8-28-23      Scale: 1"=100'      Drawn: JFS

Job: 23198      Book: 23-3

**SEGESSER SURVEYS**  
30485 ROSLAND ST.  
SOLDOTNA, AK 99669  
(907) 262-3909

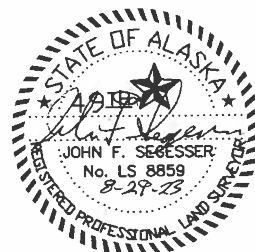
I hereby certify that I have surveyed the following described property:

Lots 1 and 2 Block 1, Tract A  
Lakewood Estates

and that no encroachments exist except as indicated.

Exclusion Note:

It is the responsibility of the Owner to determine the existence of any easements, covenants, or restrictions which do not appear on the recorded subdivision plat. Under no circumstances should any data hereon be used for construction or for establishing boundary or fence lines.



AGENDA ITEM E. NEW BUSINESS

ITEM 1. – BUILDING SETBACK ENCROACHMENT PERMIT - LAKEWOOD ESTATES AMENDED

<b>KPB File No.</b>	2023-094
<b>Planning Commission Meeting:</b>	September 25, 2023
<b>Applicant / Owner:</b>	Stephen Parker of Montgomery, Texas
<b>Surveyor:</b>	John Segesser / Segesser Surveys
<b>General Location:</b>	Sterling Highway and Lakewood Road, Sterling Area

<b>Parent Parcel No.:</b>	063-021-03
<b>Legal Description:</b>	T 5N R 9W SEC 9 Seward Meridian KN 2004088 Lakewood Estates Amended Lot 1 BLK 1
<b>Assessing Use:</b>	Commercial
<b>Zoning:</b>	Rural Unrestricted
<b>Resolution</b>	2023-29

---

STAFF REPORT

**Specific Request / Purpose as stated in the petition:** Stone hanger/house and well is in the building setback. Not known until as built was for sale and completed in 2023. We request to waive the public comment 15 day wait.

**Site Investigation:** Per the as built submitted there is a house / hangar constructed in the 20-foot building setback along the Sterling Highway. The subject parcel is located on the corner of Sterling Highway and Lakewood Road. Sterling Highway is maintained by the State of Alaska and Lakewood Road is maintained by the Kenai Peninsula Borough (KPB).

The building setbacks were granted along all dedicated rights-of-ways by Lakewood Estates Amended KN 2004-88 originally recorded under KN 97-37.

The structure labeled "House" on the as built encroaches 4.7 feet by 49.7 feet in the building setback. The as built also shows a well casing in the building setback. Per KPB code 20.90 - Definitions - Permanent structures wells casing is an allowable improvement and this permit will not include the well. The subject parcel is 40.586 square feet or 0.932 acres with the southern boundary fronting along what appears to be a runway. The runway parcel is shown as Tract A on the as built, but the correct designation is Tract B as shown on Lakewood Estates Amended, KN 2004-88. According to Assessing records the encroachment was constructed in 2008.

There are street views available from Google Earth and can be found in the packet. There is a treed buffer between the encroachment and the Sterling Highway and does not appear to impede line of sight.

---

**Staff Analysis:** The subdivision was created from an aliquot parcel and a government lot by Lakewood Estates KN 97-37. On October 26, 2004 an amended plat was recorded as KN 2004-88, revising the curve on the subject lot. The 20-foot building setback with the front 10 feet being a utility easement were granted on the parent plat. No other platting actions have happened for this parcel.

Terrain for the subject parcel is flat and there are no classified wetlands within the subject parcel.



**Findings:**

1. The parcel is 0.932 acres with room for additions further within the lot.
2. There is no steep terrain or wetlands within the parcel.
3. 15.3 feet of the setback will remain open.
4. There are no line-of-sight issues.
5. There is a runway to the south of the parcel.
6. There is a treed buffer between the Sterling Highway and the encroachment.
7. The building setback was granted on Lakewood Estates KN 97-37 amended by 2004-88.
8. The structure was built in this location by mistake.
9. The structure has been there for 15 years.

**20.10.110. – Building setback encroachment permits.**

- E. The following standards shall be considered for all building setback encroachment permit applications. Staff recommends the Commission select the findings they determine are applicable to the standards and vote on them:
1. The building setback encroachment may not interfere with road maintenance.  
**Findings 3, 4, 6 & 9 appear to support this standard.**
  2. The building setback encroachment may not interfere with sight lines or distances.  
**Findings 3, 6 & 9 appear to support this standard.**
  3. The building setback encroachment may not create a safety hazard.  
**Findings 2, 3, 4, 6 & 9 appear to support this standard.**
- F. The granting of a building setback encroachment permit will only be for the portion of the improvement or building that is located within the building setback and the permit will be valid for the life of the structure or for a period of time set by the Planning Commission. The granting of a building setback permit will not remove any portion of the 20 foot building setback from the parcel.
- G. The Planning Commission shall approve or deny a building setback encroachment permit. If approved, a resolution will be adopted by the planning commission and recorded by the planning department within the time frame set out in the resolution to complete the permit. The resolution will require an exhibit drawing showing, and dimensioning, the building setback encroachment permit area. The exhibit drawing shall be prepared, signed and sealed, by a licensed land surveyor.

**KPB department / agency review:**

KPB Roads Dept. comments	Out of Jurisdiction: No  Roads Director: Griebel, Scott Comments: The setback encroachment borders an AK DOT managed ROW. The Row does appear to widen substantially in this vicinity. No RSA protest or additional comments.
SOA DOT comments	DOT ROW Engineering has no comments on these setbacks. – Engineering
KPB River Center review	A. Floodplain Reviewer: Hindman, Julie Floodplain Status: Not within flood hazard area Comments: No comments  B. Habitat Protection Reviewer: Aldridge, Morgan Habitat Protection District Status: Is NOT within HPD Comments: No comments

	C. State Parks Reviewer: VACANT Comments:
State of Alaska Fish and Game	
Addressing	Reviewer: Leavitt, Rhealyn Affected Addresses: 38371 LAKEWOOD RD  Existing Street Names are Correct: Yes  List of Correct Street Names: LAKEWOOD RD  Existing Street Name Corrections Needed:  All New Street Names are Approved: No  List of Approved Street Names:  List of Street Names Denied:  Comments: No other comments
Code Compliance	Reviewer: Ogren, Eric Comments: encroachment into the 20 ft set back is a violation, this would need to be approved to be in compliance with KPB Code.
Planner	Reviewer: Raidmae, Ryan There are not any Local Option Zoning District issues with this proposed plat.  Material Site Comments: There are not any material site issues with this proposed plat.
Assessing	Reviewer: Windsor, Heather Comments: No comment

**RECOMMENDATION:**

Based on the standards to grant a building setback encroachment permit, **staff recommends** to adopt Resolution 2023-29, subject to compliance with KPB 20.10.110 sections F and G.

**NOTE:**

**20.10.110.(H) A decision of the planning commission may be appealed to the hearing officer by a party of record, as defined by KPB 20.90, within 15 days of the date of notice of decision in accordance with KPB 21.20.250.**

**END OF STAFF REPORT**

**KENAI PENINSULA BOROUGH PLANNING COMMISSION  
RESOLUTION 2023-29  
KENAI RECORDING DISTRICT**

GRANT A BUILDING SETBACK ENCROACHMENT PERMIT TO A PORTION OF THE TWENTY FOOT BUILDING SETBACK ADJOINING THE NORTH BOUNDARY ALONG THE STERLING HIGHWAY FOR LOT 1 BLOCK 1, LAKEWOOD ESTATES AMENDED (KN 0970037); IN NE 1/4 S09, T05N, R09W; SEWARD MERIDIAN, ALASKA, WITHIN THE KENAI PENINSULA BOROUGH; KPB FILE NO. 2023-094

WHEREAS, per KPB 20.30.240 – Building Setbacks, a minimum 20-foot building setback shall be required for fee simple non-arterial rights-of-way in subdivisions located outside incorporated cities; and

WHEREAS, Stephen Parker of Montgomery, TX requested a building setback encroachment permit to the 20-foot building setback granted by Lakewood Estates Amended (KN 0970037); and

WHEREAS, per the petition; and the as built submitted showing a house encroaching 4.7 feet by 49.7 feet into the 20-foot building setback; and

WHEREAS, the encroaching structure does not affect sight distance along the right-of-way; and

WHEREAS, on Monday, September 25, 2023, the Kenai Peninsula Borough Planning Commission considered the background information, all comments received, and recommendations from KPB Planning Department staff regarding the proposed exception; and

WHEREAS, the Planning Commission found that granting the building setback encroachment permit will not be detrimental to the public interest; and

WHEREAS, 20.10.110 of the Kenai Peninsula Borough Code of Ordinances authorizes the Planning Commission to accomplish building setback encroachment permits by Resolution.

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH:

Section 1. Approved a permit to allow only the encroaching portion of the house that extends 4.7 feet into the 20-foot building setback adjoining the Sterling Highway right-of-way on the north boundary of Lot 1 Block 1 Lakewood Estates Amended (KN 0970037).

Section 2. That any new, replacement, and/or additional construction will be subject to the 20-foot building setback limit.

Section 3. That the 20-foot building setback limit shall apply to the remainder of said lot.

Section 4. That a current as-built survey or sketch prepared, signed, and sealed by a licensed land surveyor showing the location of the encroachment within the building setback be attached to, and made a part of this resolution, becoming page 2 of 2.

Section 5. That this resolution is void if not recorded in the appropriate Recording District within 90 days of adoption.

Section 6. That this resolution becomes effective upon being properly recorded with petitioner being responsible for payment of recording fees.

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

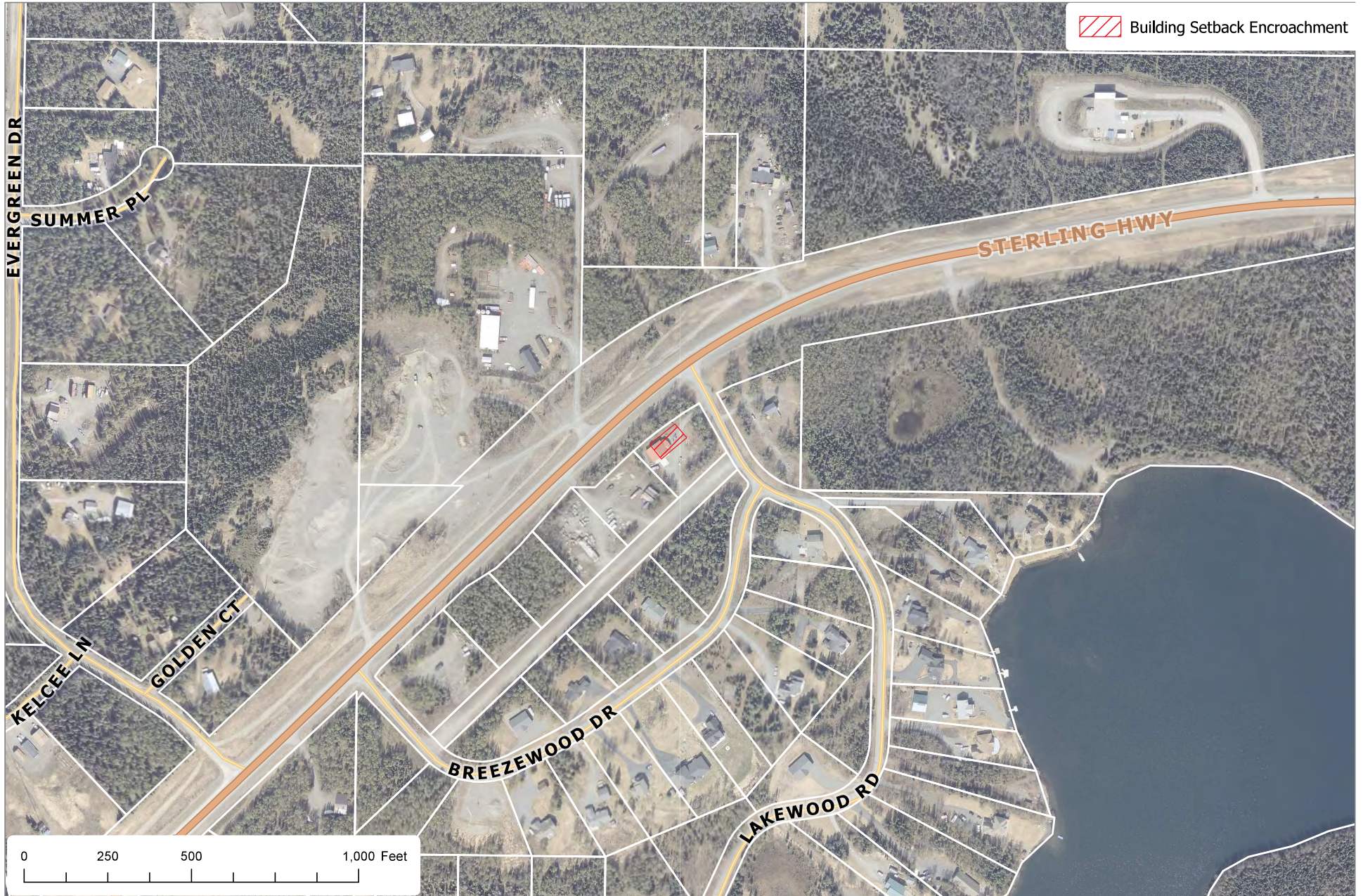
\_\_\_\_\_  
Jeremy Brantley, Chairperson  
Planning Commission

ATTEST:

\_\_\_\_\_  
Ann Shirmberg,  
Administrative Assistant

Return to:  
Planning Department  
Kenai Peninsula Borough  
144 North Binkley Street  
Soldotna, Alaska 99669





The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.



Images taken from Google Earth by staff on 9/6/2023 MQ

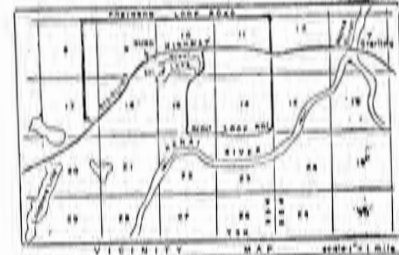




## ESTATES

located in the SE  $\frac{1}{4}$  of Section 9 and south of the Starling Highway Right of Way  
and in the SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  of Section 10; AND HAVE LOT'S IN THE NE  $\frac{1}{4}$  SE  $\frac{1}{4}$  Sec 8, T 8 N R 10 W  
Hennepin Recording District, A L A S K A,  
M R R File no. 97 - 048

This plan was approved by the Keweenaw Peninsula Borough Planning Commission at the meeting of May 13, 1977  
Keweenaw Peninsula Borough by [Signature]  
Authorized Official



We hereby certify that we are the owners of the property shown and described herein, and that we hereby adopt this plan of subdivision, and by our free consent dedicate all right-of ways in public use and grant all easements to the use shown.

James R. Davis  
 JAMES R DAVIS  
 PO Box 833, Siler City, NC 27580

James R. Davis  
 JAMES R DAVIS  
 PO Box 833, Siler City, NC 27580

NOTARY'S ACKNOWLEDGEMENT  
 Subscribed and sworn to before me on 10/10/19  
 (19th) day of October 2019  
 at  
 For:  
 James R Davis  
 JAMES R DAVIS

(NOTARY SEAL)  
 JAMES R DAVIS  
 Notary Public  
 State of North Carolina

FOR ALABAMA Alabama  
MY COMMISSION EXPIRES 2/1/80  
James H. Smith

NOTARY'S ACKNOWLEDGMENT  
Subscribed and sworn before me  
this 11th day of March 1964  
at \_\_\_\_\_

Raymond A. Mennitt  
Nicola J. Mennitt

NOTARY  
PUBLIC

NOTARY PUBLIC  
FOR ALASKA  
MY COMMISSION EXPIRES

LAKE

**WASTEWATER DISPOSAL:** Soil conditions, water table levels, and soil slopes in this subdivision have been found suitable for conventional on-site wastewater treatment and disposal systems serving single family duplex residences and meeting the regulatory requirements of the Miami Peninsula Borough. Any other type of on-site wastewater treatment and disposal system must be designed by a professional engineer, registered to practice in Miami, and the design must be approved by the Miami Department of Environmental Conservation.

[illegible]

SUBMITTED: Terry T. Sullivan, No. 72824  
 On Dec 28/1, Receiving A-00  
 INDEXED BY: J.E. JONES, 1987  
 RELEASED: 11-1-2001



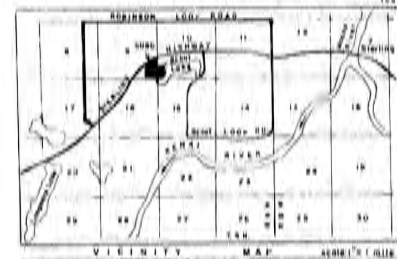
LAKEWOOD

## ESTATES

1. A building setback of 20' is required from all street right-of-way unless a lesser setback is approved by resolution of the appropriate Planning Commission.
2. No structures shall be placed in parkland portion of lots and 2' setback.
3. No structures shall be permitted or constructed in an easement which would interfere with the ability of a utility to use the easement.
4. No direct access to state maintained right-of-way permits unless approved by the State of Alaska Department of Transportation.
5. Sterling Highway right-of-way and curve cuts from State of Alaska right-of-way map in DSR-510 (rotated to subdivision base bearing).
6. The front 10' feet of the building setback and the entire setback within 10' feet of the side lot lines is also a utility easement.
7. The natural meanders of the ordinary shore line of Beaul Lake forms the true limits of lot lines.

No other changes were made to this plot. By

This plan was approved by the Kona Peninsula Borough Planning Commission  
at the meeting of 03 September 1974  
Kona Peninsula Borough by [Signature]  
Authorized Official



We hereby certify that we are the owners of the property shown and described hereon, and that we hereby adopt this plan of subdivision, and by our free consent dedicate all right of way in public use and grant all easements to the use shown.

000000 0 000000  
P.0. 000 000 00000000. 00 000000

NOTARY'S ACKNOWLEDGEMENT  
Subscribed and sworn before me  
this \_\_\_\_\_ day of \_\_\_\_\_ 1997.  
For:  
Cynthia D. Downs  
Marilyn R. Ditz

NOTARY PUBLIC  
FOR ALASKA  
MY COMMISSION

00001022 10 0000 01 1000

RAYMOND A. MURPHY  
P.O. Box 222416 AUSTIN, TX 78722

NOTARY'S ACKNOWLEDGEMENT  
Subscribed and sworn before me  
this 10 day of August 1997  
for:  
Raymon A McNeill  
Stacia J McNeill

P. O. Box 88475 Anaheim, CA 92788

2004-08  
Kenai 20  
10-26 04  
11-08 0

NOTARY PUBLIC  
FOR ALASKA  
MY COMMISSION EXPIRES \_\_\_\_\_

SCOUT  
LAKE

**WASTEWATER DISPOSAL:** Soil conditions, water table levels, and soil slopes in this jurisdiction have been found suitable for conventional onsite wastewater treatment and disposal systems serving single family or duplex residences and meeting the regulatory requirements of the New Mexico Building Code. Any other type of on site wastewater treatment and disposal system must be designed by a professional engineer, registered in the state of New Mexico, and the design must be approved by the Alaska Department of Environmental Conservation.

Registered engineer: Ted J. Ford P.E. License No.

CURVE DATA, Reported ONLY

	A			B			C			D			E		
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95	15	18	15	1,000	100	10	10	10	10	10	10	10	10	10	10
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97	15	18	15	1,000	100	10	10	10	10	10	10	10	10	10	10
98	15	18	15	1,000	100	10	10	10	10	10	10	10	10	10	10
99	15	18	15	1,000	100	10	10	10	10	10	10	10	10	10	10
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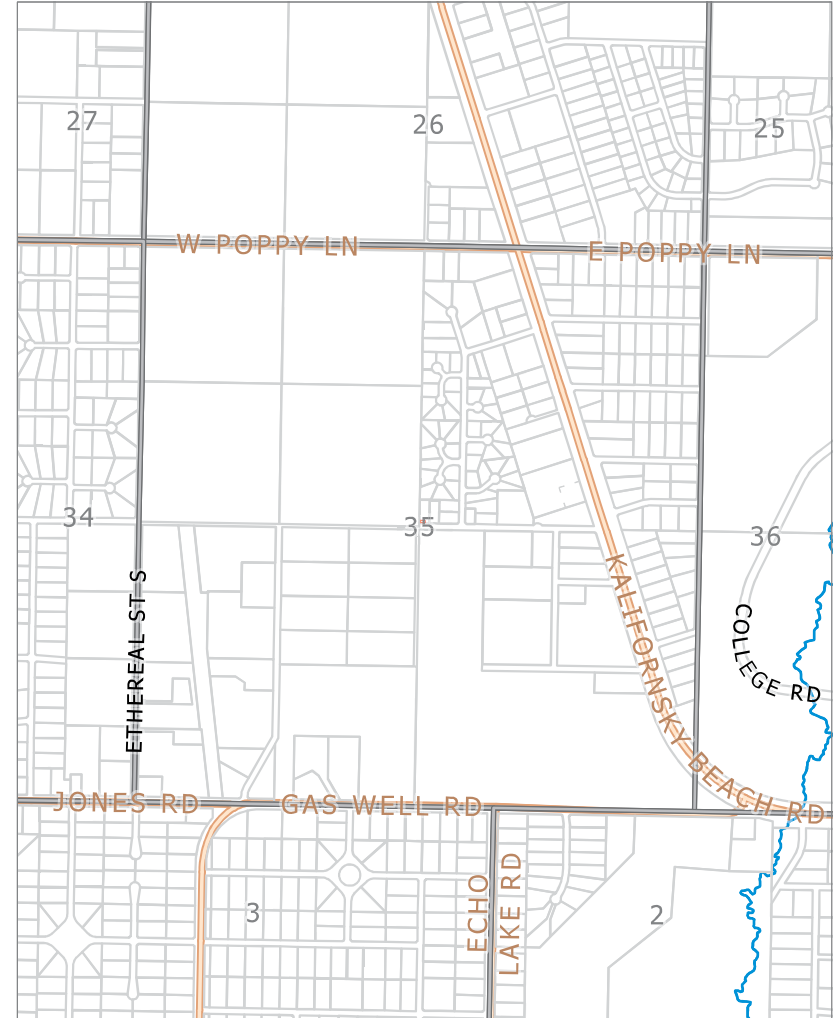
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## **E. NEW BUSINESS**

- 2. Building Setback Encroachment Permit; KPB File 2023-097**  
**Petitioner/Landowner Frison**  
**Request: 40-foot garage to be constructed in the 20-foot**  
**building setback**  
**Location: Block 1, Lot 1, Ashton Park Subdivision**  
**Plat KN 1997-074**  
**Kalifornsky Area**





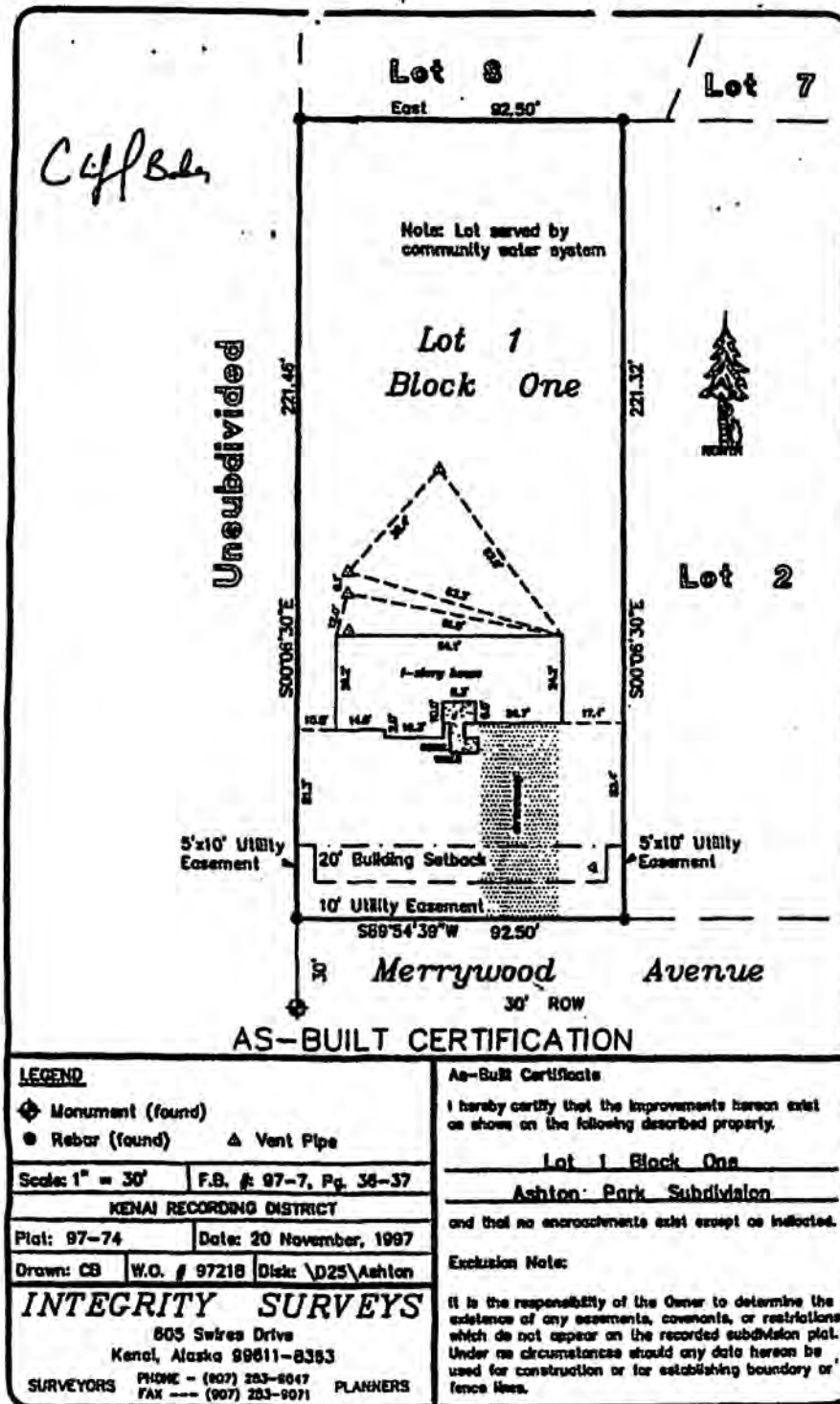
KPB File 2023-097  
T 05N R 11W SEC 35  
Kalifornsky





The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.





**KPB 2023-097**

HOUSE

small  
window

utilities  
on Right  
side of  
driveway

Proposed  
Garage

Driveway

utility  
easement

Lot Line



40' Garage

Kitchen

Dining

Bedroom

Bedroom

Den

Bedroom

Living

Bath w/ tub

French Doors

French Doors

Glass Door

Covered Porch E2-5

30'

## Quainton, Madeleine

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**From:** Laurel Frison <laurelfrison@gmail.com>  
**Sent:** Wednesday, September 6, 2023 10:20 AM  
**To:** Quainton, Madeleine  
**Subject:** <EXTERNAL-SENDER>Re: Ashton Park Subdivision Building Setback Permit KPB 2023-097

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**CAUTION:** This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

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I meant to add a letter of explanation to the permit request, but it was so last minute and so much going on... and we already had a good contractor set up to work on it this month. So glad we looked at the As-Built.

The garage will be 20 feet wide by 24 foot long. We didn't realize when we planned this project that we had a 20 foot building setback and we misjudged the property line. A little pushed for space.

We're not able to put the garage in the back just because we'll have very limited access in the winter.

So while I don't really want a garage in our front yard it's our only choice.

Thank you so much for following up.

Laurel Frison

598-2011

Sent from my iPad

On Sep 6, 2023, at 10:06 AM, Quainton, Madeleine <mquainton@kpb.us> wrote:

Hello Laurel,

Staff has begun to work on your request to construct a garage within the 20-foot building setback of lot one block one of the above referenced subdivision. The application did not include a justification or dimensions for the garage you are looking to construct. Please respond to this email with those details, so that we can prepare a staff report for the Planning Commission.

Thank you,

**Madeleine Quainton**

Platting Specialist

Planning Department

Ph: (907) 714-2200

Fx: (907) 714-2378

<image001.png>

ITEM 2. – BUILDING SETBACK ENCROACHMENT PERMIT – ASHTON PARK SUBDIVISION

CPB File No.	2023-097
Planning Commission Meeting:	September 25, 2023
Applicant / Owner:	Laurel Frison of Soldotna, Alaska
Surveyor:	None
General Location:	Merrywood Avenue, Kalifornsky Area

Parent Parcel No.:	055-081-45
Assessor Description:	T 5N R 11W SEC 35 Seward Meridian KN 0970074 Ashton Park Sub Lot 1 Blk 1
Assessing Use:	Residential
Zoning:	Rural Unrestricted
Resolution	2023-30

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STAFF REPORT

**Specific Request / Purpose as stated in the petition:** The garage will be 20 feet wide by 24 foot long. We didn't realize when we planned this project that we had a 20 foot building setback and we misjudged the property line. A little pushed for space. We're not able to put the garage in the back just because we'll have very limited access in the winter. So, while I don't really want a garage in our front yard it's our only choice.

**Site Investigation:** The owners are requesting permission to construct a garage that would encroach approximately 9 feet by 24 feet into the building setback along borough maintained Merrywood Avenue. Merrywood Avenue is a 60-foot-wide right-of-way that reduced to 30 feet to the west. Road maintenance ends at the Merrywood Avenue and Herr Street intersection. When the unsubdivided parcel along the west boundary of the subject parcel is subdivided a matching dedication will be given to Merrywood Avenue to bring the dedication to the borough required 60 feet width.

There are several improvements located on the property. According to borough imagery taken May 12, 2023 there are several structures towards the north boundary of the lot behind the house. Per the justification letter the owner is requesting to build the garage in front of the house due to lack of space in the backyard. Along Merrywood Avenue there is a chain link fence shown on some aerial photos that is not shown on the as built that was submitted dated November 20, 1997. Per CPB Code 20.90 – Definitions – Permanent structures – transparent fencing is an allowable improvement. However, along the west boundary the fence is cedar and not transparent according to a more recent aerial photo. Staff is unable to determine if the cedar fence or the chain link fencing encroaches into the right-of-way or just within the setback. If the cedar portion of the fence is within the setback that portion will need to be removed or changed to chain link to comply with CPB code. If the permit is approved and both fences are removed from the parcel for construction **staff recommends the owner verify boundary lines and non-allowable fencing not be placed in the building setback or rights-of-ways.**

There are several vacant lots and unsubdivided parcels located to the west of the subject parcel. Traffic turning left on to Herr Street would have limited impact to line of sight as there is only one driveway currently to the northwest and this garage would be behind the vehicle. Traffic turning right on to Merrywood Avenue would not have line of sight issues. There are Google Earth Street Views in the area and are available in the packet.

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**Staff Analysis:** This subdivision was created from an aliquot parcel within Section 35, Township 5N, Range 11W SM, KRD, Kenai Peninsula Borough, Alaska. The plat granted all utility easements and the building setback on Ashton Park Subdivision KN 97-74.



There is no steep terrain or classified wetlands within the boundary of the subject parcel.

This parcel is located within the Kalifornsky Advisory Planning Commission which is not currently active.

Merrywood Avenue is maintained by the Borough and maintenance ends at the west side of the subject property.

**Findings:**

1. There are several large parcels located west of the subject lot.
2. There is no steep terrain within the boundary of the lot.
3. There are no classified wetlands within the boundary of the lot.
4. A cedar fence is not an allowable improvement as defined by KPB 20.90 within setbacks.
5. There is limited space on the property to build a garage.
6. The lot is 20,479 sq. ft in size which is less than a half an acre (0.47 ac).
7. The septic field is located behind the house.
8. There will be no site issues.
9. Ashton Park Subdivision KN97-74 created the setbacks.
10. 11 feet of the building setback will remain.
11. Merrywood Avenue is currently not fully developed.
12. Merrywood Avenue is 60 feet in width.

**20.10.110. – Building setback encroachment permits.**

- E. The following standards shall be considered for all building setback encroachment permit applications. Staff recommends the Commission select the findings they determine are applicable to the standards and vote on them:

1. The building setback encroachment may not interfere with road maintenance.

**Findings 5 - 8, 10 & 12 appear to support this standard.**

2. The building setback encroachment may not interfere with sight lines or distances.

**Findings 5 – 7, & 10 – 12 appear to support this standard.**

3. The building setback encroachment may not create a safety hazard.

**Findings 5 – 8, & 10 – 12 appear to support this standard.**

- F. The granting of a building setback encroachment permit will only be for the portion of the improvement or building that is located within the building setback and the permit will be valid for the life of the structure or for a period of time set by the Planning Commission. The granting of a building setback permit will not remove any portion of the 20 foot building setback from the parcel.

- G. The Planning Commission shall approve or deny a building setback encroachment permit. If approved, a resolution will be adopted by the planning commission and recorded by the planning department within the time frame set out in the resolution to complete the permit. The resolution will require an exhibit drawing showing, and dimensioning, the building setback encroachment permit area. The exhibit drawing shall be prepared, signed and sealed, by a licensed land surveyor.

**KPB department / agency review:**

KPB Roads Dept. comments	Out of Jurisdiction: No  Roads Director: Griebel, Scott Comments:
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	No comments
SOA DOT comments	DOT ROW Engineering has no comments on these setbacks.
KPB River Center review	<p>A. Floodplain Reviewer: Hindman, Julie Floodplain Status: Not within flood hazard area Comments: No comments</p> <p>B. Habitat Protection Reviewer: Aldridge, Morgan Habitat Protection District Status: Is NOT within HPD Comments: No comments</p> <p>C. State Parks Reviewer: VACANT Comments:</p>
State of Alaska Fish and Game	
Addressing	<p>Reviewer: Leavitt, Rhealyn Affected Addresses: 47490 MERRYWOOD AVE</p> <p>Existing Street Names are Correct: Yes</p> <p>List of Correct Street Names: MERRYWOOD AVE</p> <p>Existing Street Name Corrections Needed:</p> <p>All New Street Names are Approved: No</p> <p>List of Approved Street Names:</p> <p>List of Street Names Denied:</p> <p>Comments: No other comments</p>
Code Compliance	<p>Reviewer: Ogren, Eric Comments: Construction of the structure would be a violation of the 20 ft set back if, it is not approved.</p>
Planner	<p>Reviewer: Raidmae, Ryan There are not any Local Option Zoning District issues with this proposed plat.</p> <p>Material Site Comments: There are not any material site issues with this proposed plat. Review Not Required</p>
Assessing	<p>Reviewer: Windsor, Heather Comments: No comment</p>

### **RECOMMENDATION:**

Based on the standards to grant a building setback encroachment permit, **staff recommends** to grant approval for the portion of the structures within the 20 foot building setback as shown on the sketch, subject to:

1. Compliance with KPB 20.10.110 sections F and G.
2. Providing a current as-built to be used as an exhibit drawing prepared, signed, and sealed by a licensed land surveyor after construction is complete.
3. The recording fees be submitted to the Kenai Peninsula Borough Planning Department for the recording of the resolution.
4. Failure to provide an as-built so that it may be recorded within one year approval will result in a new application, hearing, and approval.
5. Additional encroachments found on the new as-built will require a new hearing.

**NOTE:**

**20.10.110.(H) A decision of the planning commission may be appealed to the hearing officer by a party of record, as defined by KPB 20.90, within 15 days of the date of notice of decision in accordance with KPB 21.20.250.**

**END OF STAFF REPORT**

**KENAI PENINSULA BOROUGH PLANNING COMMISSION  
RESOLUTION 2023-30  
KENAI RECORDING DISTRICT**

GRANT A BUILDING SETBACK ENCROACHMENT PERMIT TO A PORTION OF THE TWENTY FOOT BUILDING SETBACK FOR LOT 1 BLOCK 1, ASHTON PARK SUBDIVISION (KN 097074); IN NE 1/4 S35, T05N, R11W; SEWARD MERIDIAN, ALASKA, WITHIN THE KENAI PENINSULA BOROUGH; KPB FILE NO. 2023-097

WHEREAS, per KPB 20.30.240 – Building Setbacks, a minimum 20-foot building setback shall be required for fee simple non-arterial rights-of-way in subdivisions located outside incorporated cities; and

WHEREAS, Laurel A Frison of Soldotna, AK requested a building setback encroachment permit to the 20-foot building setback granted by Ashton Park Subdivision (KN 097074); and

WHEREAS, per the petition;

WHEREAS, the encroaching structure does not affect sight distance along the right-of-way; and

WHEREAS, on Monday, September 25, 2023, the Kenai Peninsula Borough Planning Commission considered the background information, all comments received, and recommendations from KPB Planning Department staff regarding the proposed exception; and

WHEREAS, the Planning Commission found that granting the building setback encroachment permit will not be detrimental to the public interest; and

WHEREAS, 20.10.110 of the Kenai Peninsula Borough Code of Ordinances authorizes the Planning Commission to accomplish building setback encroachment permits by Resolution.

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH:

Section 1. That the 20-foot building setback limit on KN 097074 Lot 1 Block 1 is hereby excepted to accommodate only the encroaching portion of the Structure.

Section 2. That any new, replacement, and/or additional construction will be subject to the 20-foot building setback limit.

Section 3. That the 20-foot building setback limit shall apply to the remainder of said lot.

Section 4. That a current as-built survey or sketch prepared, signed, and sealed by a licensed land surveyor showing the location of the encroachment within the building setback be attached to, and made a part of this resolution, becoming page 2 of 2.

Section 5. That this resolution is void if not recorded in the appropriate Recording District within 90 days of adoption.

Section 6. That this resolution becomes effective upon being properly recorded with petitioner being responsible for payment of recording fees.

ADOPTED BY THE PLANNING COMMISSION OF THE KENAI PENINSULA BOROUGH ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

\_\_\_\_\_  
Blair J. Martin, Chairperson  
Planning Commission

ATTEST:

\_\_\_\_\_  
Ann Shirmberg,  
Administrative Assistant

Return to:  
Planning Department  
Kenai Peninsula Borough  
144 North Binkley Street  
Soldotna, Alaska 99669

Images taken from Google Earth by staff on 9/6/2023 MQ







The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.

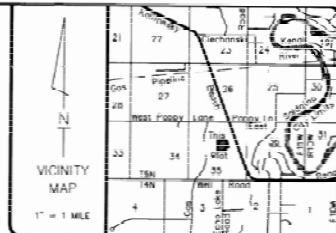


KN 97-74

KPB NOTE: See PC Resolution 98-34

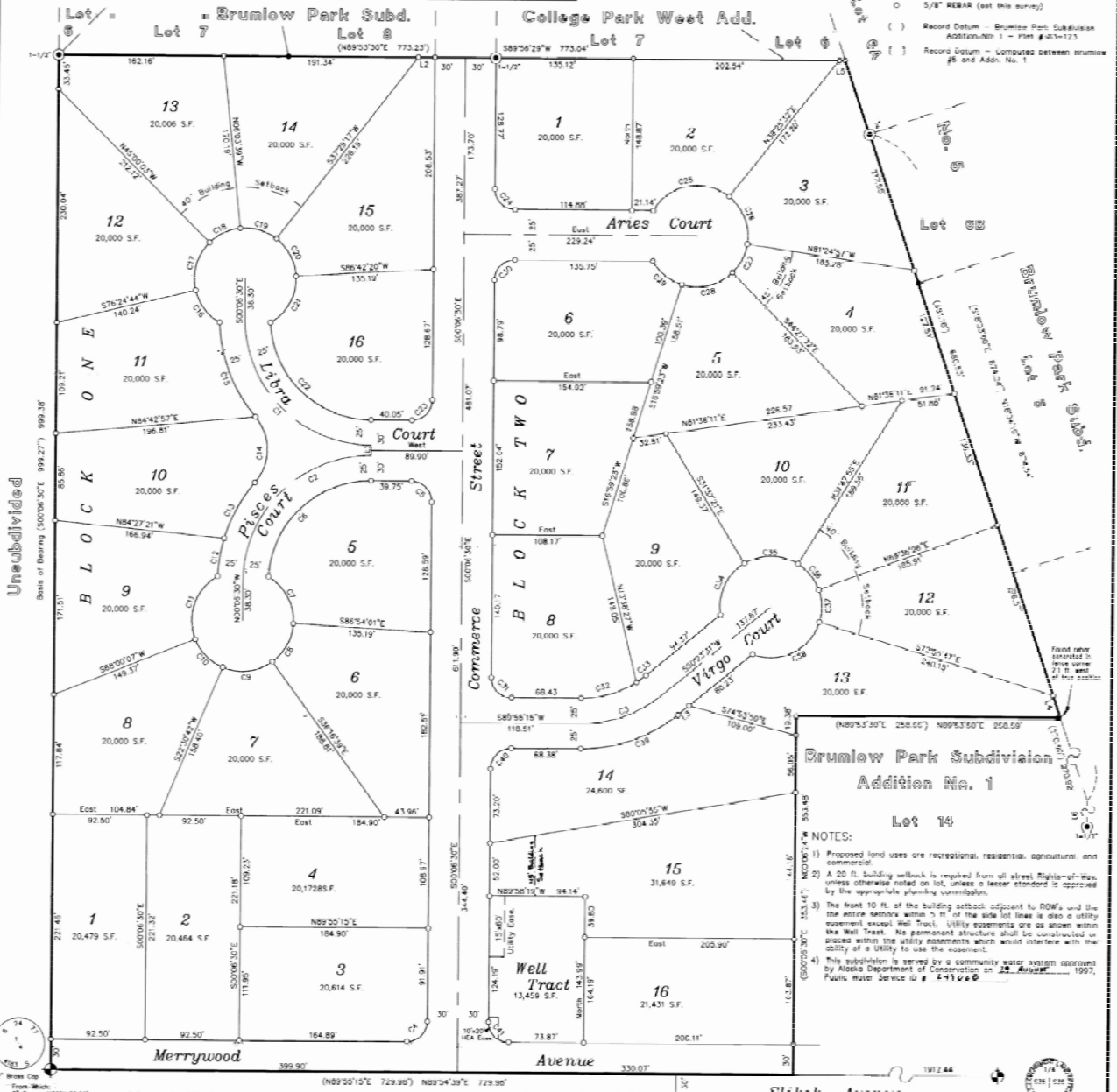
No.	Bearing	Radius	Area Length	Chord Length	Chord Bearing	No.	Bearing	Radius	Area Length	Chord Length	Chord Bearing
C1	89°58'08"	125.00	196.32	176.75	N45°05'04"W	C27	56°57'25"	50.00	32.25	31.69	N27°03'45"E
C2	90°00'51"	125.00	196.32	176.75	N44°53'56"E	C28	61°06'56"	50.00	32.25	31.69	N26°40'55"E
C3	38°31'44"	125.00	86.24	84.54	N70°09'23"E	C29	43°00'37"	50.00	31.63	31.63	N61°00'18"W
C4	90°01'09"	20.00	31.42	28.29	S44°54'05"W	C30	90°06'30"	20.00	31.45	28.31	S44°56'45"W
C5	89°53'30"	20.00	31.38	28.26	S45°03'15"E	C31	89°58'15"	20.00	31.41	28.28	S45°05'37"E
C6	87°16'58"	100.00	152.34	138.03	N46°01'11"E	C32	57°46'50"	100.00	52.51	56.72	N72°58'48"E
C7	63°02'50"	50.00	55.02	52.28	N28°25'26"W	C33	06°34'43"	100.00	11.48	11.48	N57°40'53"E
C8	56°37'22"	50.00	44.18	42.75	N28°24'40"E	C34	67°29'08"	50.00	28.37	28.37	N64°23'00"E
C9	58°41'24"	50.00	51.30	49.08	N65°07'02"E	C35	63°23'18"	50.00	29.55	22.56	S89°54'43"E
C10	45°29'25"	50.00	39.70	36.69	S44°44'44"W	C36	37°48'31"	50.00	32.89	32.40	S38°17'20"E
C11	82°00'08"	50.00	71.58	65.61	S19°00'11"W	C37	37°27'47"	50.00	32.69	32.11	S01°39'40"E
C12	44°30'23"	150.00	37.88	37.88	S09°04'26"W	C38	93°10'18"	50.00	41.44	72.73	S63°43'52"W
C13	24°06'23"	150.00	53.17	53.17	S28°22'49"W	C39	39°33'44"	150.00	103.49	101.45	S70°09'23"W
C14	81°05'00"	50.00	70.76	65.00	S02°08'30"E	C40	90°01'48"	20.00	31.43	28.20	N44°54'23"E
C15	38°36'45"	150.00	101.09	99.19	S21°20'37"E	C41	68°58'51"	20.00	31.41	28.28	N45°05'56"W
C16	46°37'59"	50.00	40.10	38.28	S36°54'15"E						
C17	58°30'13"	50.00	51.13	48.33	S19°42'11"W						
C18	38°56'24"	50.00	33.89	33.33	S64°28'09"W						
C19	4°32'55"	50.00	38.00	37.10	N74°17'11"W						
C20	49°15'03"	50.00	42.85	41.84	N22°54'12"W						
C21	63°01'30"	50.00	55.00	52.27	N20°13'05"E						
C22	87°03'57"	100.00	151.96	137.75	N46°28'02"W						
C23	50°06'30"	20.00	31.45	28.31	S44°56'45"W						
C24	89°53'30"	20.00	31.38	28.26	N45°03'15"E						
C25	88°25'32"	50.00	85.89	75.71	S79°12'42"E						
C26	50°02'31"	50.00	52.50	50.12	N21°29'43"E						

No.	Bearing	Distance
1	S00°28'10"E	10.00'
2	S02°26'20"E	18.40'
3	S50°22'51"W	14.14'
4	N18°34'18"W	22.58'
5	S89°54'43"E	5.40'
6	N00°54'23"E	55.60'
11	S00°54'45"E	55.60'



LEGEND

- MONUMENT (found this survey)
- Alum. Cap Property Cor. (found this survey)
- 1/2" REBAR (found this survey)
- 5/8" REBAR (not this survey)
- Record Datum - Brumley Park Subdivision Addition No. 1 - FST # 401-123
- Record Datum - Computed between Brumley Park Subd. and Addn. No. 1



Brumley Park Subdivision Addition No. 1

- NOTES:
- Proposed land uses are recreational, residential, agricultural and commercial.
  - A 20 ft. building setback is required from all street Right-of-Way, unless otherwise noted on lot, unless a lesser standard is approved by the appropriate planning commission.
  - The least 10 ft. of the building setback adjacent to ROW's and the entire setback within 5 ft. of the side lot lines is also a utility easement except Well Tract. Utility easements are as shown within the Well Tract. No permanent structures shall be constructed or placed within the utility easements which would interfere with the ability of a utility to use the easement.
  - This subdivision is served by a community water system approved by Alaska Department of Conservation on 12 August 1997. Public water service is # 4-11-66-0.

CERTIFICATE of OWNERSHIP and DEDICATION

I HEREBY CERTIFY THAT I AM THE OWNER(S) OF THE REAL PROPERTY SHOWN AND DESCRIBED HEREON AND THAT I HEREBY ADOPIT THIS PLAN OF SUBDIVISION AND BY MY FREE CONSENT DEDICATE ALL RIGHTS-OF-WAY AND PUBLIC AREAS TO PUBLIC USE AND GRANT ALL EASEMENTS TO THE USE SHOWN.

I FURTHER CERTIFY THAT DEED(S) OF TRUST AFFECTING THIS PROPERTY DO NOT CONTAIN RESTRICTIONS WHICH WOULD PROHIBIT THIS REPLAT, OR REQUIRE SIGNATURE AND APPROVAL OF BENEFICIARY(IES).

*Christ D. Hall*  
Christ D. Hall  
P.O. Box 2829  
Kenai, Alaska 99611

NOTARY'S ACKNOWLEDGEMENT

SUBSCRIBED AND SWORN before me this 29th DAY of Oct 1997 for *Christ D. Hall*

*Anna M. Johnson*  
NOTARY PUBLIC FOR ALASKA  
MY COMMISSION EXPIRES 6-23-2001

PLAT APPROVAL

THIS PLAT WAS APPROVED BY THE KENAI PENINSULA BOROUGH PLANNING COMMISSION AT THE MEETING OF 18 October 1997

KENAI PENINSULA BOROUGH  
APPROVED OFFICIAL

**WASTEWATER DISPOSAL** No wastewater will be generated or disposed of on Well Tract. Sanitation, water table levels, and soil slopes in this subdivision have been found suitable for conventional onsite wastewater treatment and disposal systems serving single-family or duplex residences and meeting the regulatory requirements of the Kenai Peninsula Borough. Any other type of onsite wastewater treatment and disposal system must be designed by a professional engineer, registered in practice in Alaska, and the design must be approved by the Alaska Department of Environmental Conservation.

*St. Petersburg*  
Mike Thompson, PE  
3300-E  
License # 290497  
Date

CERTIFICATE OF SURVEYOR

I hereby certify that I am properly registered and licensed to practice land surveying in the State of Alaska; this plat represents a survey made by me or under my direct supervision; the monuments shown herein actually exist as described, and all dimensions and other details are correct to the normal standards of practice of land surveyors in the State of Alaska.

47-74  
RECORDED 80-  
Kenai REC. DIST.  
DATE 11-12-97  
TIME 1:19 PM  
REGISTERED HY-  
INTEGRITY SURVEYS  
805 SWANSON DRIVE  
KENAI, ALASKA 99611



KPD FILE No. 97-034

Ashton Park Subd.

Located within the CW/4 NE1/4 of Section 35, T24N, R11W, S14, Kenai Recording District, Kenai Peninsula Borough, Alaska.

Containing 18,970 Acres

INTEGRITY SURVEYS

OWNER	DAVID SUTHER	KENAI, ALASKA 99611-8563
SURVEYORS	PROF. (907) 241-9847 (907) 281-2811	FLANNERY
JOB NO.	97009	DRAWN: 14 October, 1997 CB
SURVEYED:	April - October 1997	SCALE: 1" = 80'
FIELD BK:	97-3, Pg. 24-	DISK: 1/0701/Ashton

# **DESK PACKET**

**(MATERIALS SUBMITTED AFTER MEETING PACKET PUBLICATION)**

## **E. NEW BUSINESS**

- 2. Building Setback Encroachment Permit  
KPB File 2023-097**



**From:** [Planning Dept.](#)  
**To:** [Quainton, Madeleine](#); [Carpenter, Beverly](#)  
**Subject:** FW: <EXTERNAL-SENDER>KPB planning commission Att. Beverly Carpenter  
**Date:** Wednesday, September 20, 2023 9:34:56 AM

---

**From:** Jeremy Herr <jsrherr@alaska.net>  
**Sent:** Tuesday, September 19, 2023 9:13 PM  
**To:** Planning Dept, <planning@kpb.us>  
**Subject:** <EXTERNAL-SENDER>KPB planning commission Att. Beverly Carpenter

---

**CAUTION:** This email originated from outside of the KPB system. Please use caution when responding or providing information. Do not click on links or open attachments unless you recognize the sender, know the content is safe and were expecting the communication.

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Building setback encroachment permit

KPB File No. 2023-097

Petitioner/Land owner; Laurel A Frison of Soldotna, AK

My name is Stacey Herr. I'm writing the KPB planning commission department about the setback encroachment for lot 1, block 1 in Ashton Park subdivision on Merrywood Ave, owner Laurel Frison.

My main concern is safety. Road maintenance ends at the Merrywood Ave and Herr St intersection. This garage may limit their line of sight for on coming traffic from Herr St and the private drive directly after them. When they exit their garage or driveway will they see the traffic with this garage in the 20ft set back? If Merrywood was already paved would this be allowed?

Snow removal is our biggest concern. Where are they going to put their snow? In the past they have pushed snow from their driveway into the road across the street. Last winter the snow was excessive. So much snow was pushed across the street and left in the road. It choked the road to one lane and the grader was unable to push it back. It created a safety hazard for home owners past their drive. The grader has a tight area to work with in the summer, let alone the winter.

Thank you,  
Stacey Herr

Sent from [Mail](#) for Windows

## **E. NEW BUSINESS**

### **3. Conditional Use Permit; PC Resolution 2023-28**

**Petitioner: Wilson**

**Request: To construct a cabin in the 50' HPD of the Kenai River**

**Location: 45646 Spruce Avenue West / PIN: 05749306**

**Soldotna Area**

# Multi Agency Permit Application



514 Funny River Road, Soldotna, AK 99669 • (907) 714-2460 • KenaiRivCenter@kpb.us

## Applicant Information:

Name: Trevor Wilson  
Owner? ☒ Yes ☐ No  
Mailing: 1406 276<sup>th</sup> ST NW  
STANWOOD WA 98292  
Phone: 360 661-3828  
Email: CWilsonconcrete@AOL.com

## Agent Information: (if applicable)

Name: \_\_\_\_\_  
Mailing: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Email: \_\_\_\_\_

## Project Location: PIN# 05748938

KPB Parcel ID: \_\_\_\_\_ Subdivision: Poachers Cove  
Physical Address: 45646 SPRUCE AVEW Lot: 4 Block: \_\_\_\_\_ Addn/No.: \_\_\_\_\_  
Lot 4 Poachers Cove, Soldotna Directions to site: \_\_\_\_\_  
Waterbody Name: Kenai  
River Mile: \_\_\_\_\_ Riverbank: ☒ Right ☐ Left  
looking downstream

## Permit Fees: (please select the applicable permit fees)

- ☐ \$100 - ADNR State Parks Permit ☒ \$300 - KPB Conditional Use Permit  
☒ \$50 - KPB Habitat/Floodplain Permit ☐ \$300 - KPB Floodway Development Permit

## Project Description: ☒ New Project **OR** ☐ Extension ☐ Amendment to RC# \_\_\_\_\_

Provide a detailed description of your project and all related activities, use additional pages if needed. Include the following information for all existing and proposed structures:

- |                                     |                                  |                                      |
|-------------------------------------|----------------------------------|--------------------------------------|
| ▪ Project location & dimensions     | ▪ Construction methods/equipment | ▪ Fuel Storage: location, quantities |
| ▪ Waterbody description & proximity | ▪ Filling/dredging/excavation:   | ▪ Vegetation Removal: location,      |
| ▪ Proximity to OHW and/or HTL       | ○ type, volume, area, location   | amount, type                         |

Remove 640 # Cabin + Rebuild 744 # Cabin  
Site Plan + Drawings Attached

## KPB Tax Credit: (skip this section if your project is prior existing, only applicable to NEW projects)

Please provide your estimated project cost(s) below. Do not include grants or other funding assistance:

Elevated Light Penetrating Structure(s) \$ 40,000  
Bank or Habitat Restoration & Protection \$ \_\_\_\_\_  
Other Activities \$ \_\_\_\_\_

**Project Questions:**

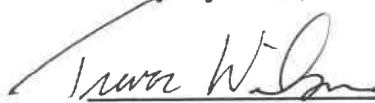
**Note:** Use Ordinary High Water (OHW) for non-tidal waters, and Mean High Tide (MHT) for tidal waters.

1. Start date: 5/15/24 End date: 9/15/25 Estimated Days of Construction: \_\_\_\_\_
2. Is the project located within 50 feet of OHW or HTL a waterbody? ☒ Yes ☐ No
3. Does any portion of the project extend **below** the OHW or HTL of the stream or waterbody? ☐ Yes ☒ No
4. Does any portion of the project cantilever or extend **over** the OHW of the waterbody? ☐ Yes ☒ No
5. Will anything be placed below OHW or HTL of the waterbody? ☐ Yes ☒ No
6. Will material be extracted or dredged from the site? ☐ Yes ☒ No
7. Including areas below OHW or HTL, what is the total area (in acres) that will be excavated or dredged?  
Total Area: \_\_\_\_\_ Type of Material: \_\_\_\_\_  
Location you will depositing fill: \_\_\_\_\_
8. Will any material (including soils, debris, and/or overburden) be used as fill? ☐ Yes ☒ No  
Type of material: \_\_\_\_\_ Amount: \_\_\_\_\_ Permanent ☐ or Temporary ☐  
Will fill be placed below OHW or HTL: ☐ Yes ☐ No
9. List all motorized equipment to be used in this project, including access route to site, any stream or waterbody crossings, and (if applicable) how long equipment will be used below OHW or HTL: \_\_\_\_\_  
\_\_\_\_\_
10. Is any portion of the work already complete? ☐ Yes ☒ No  
If yes, describe: \_\_\_\_\_

**Signature & Certification:**

This application is hereby made requesting permit(s) to authorize the work described in this application form. I certify the information in this application is complete and accurate to the best of my knowledge.

**If applying for a tax credit:** I certify that I have not begun construction of the project on this the property and that the proposed project will be constructed in a manner consistent with KPB 5.12 Real Property and Personal Property Taxes, KPB 5.14 Habitat Protection Tax Credit, and other applicable ordinances.

  
Applicant Signature (required)

8/15/23  
Date

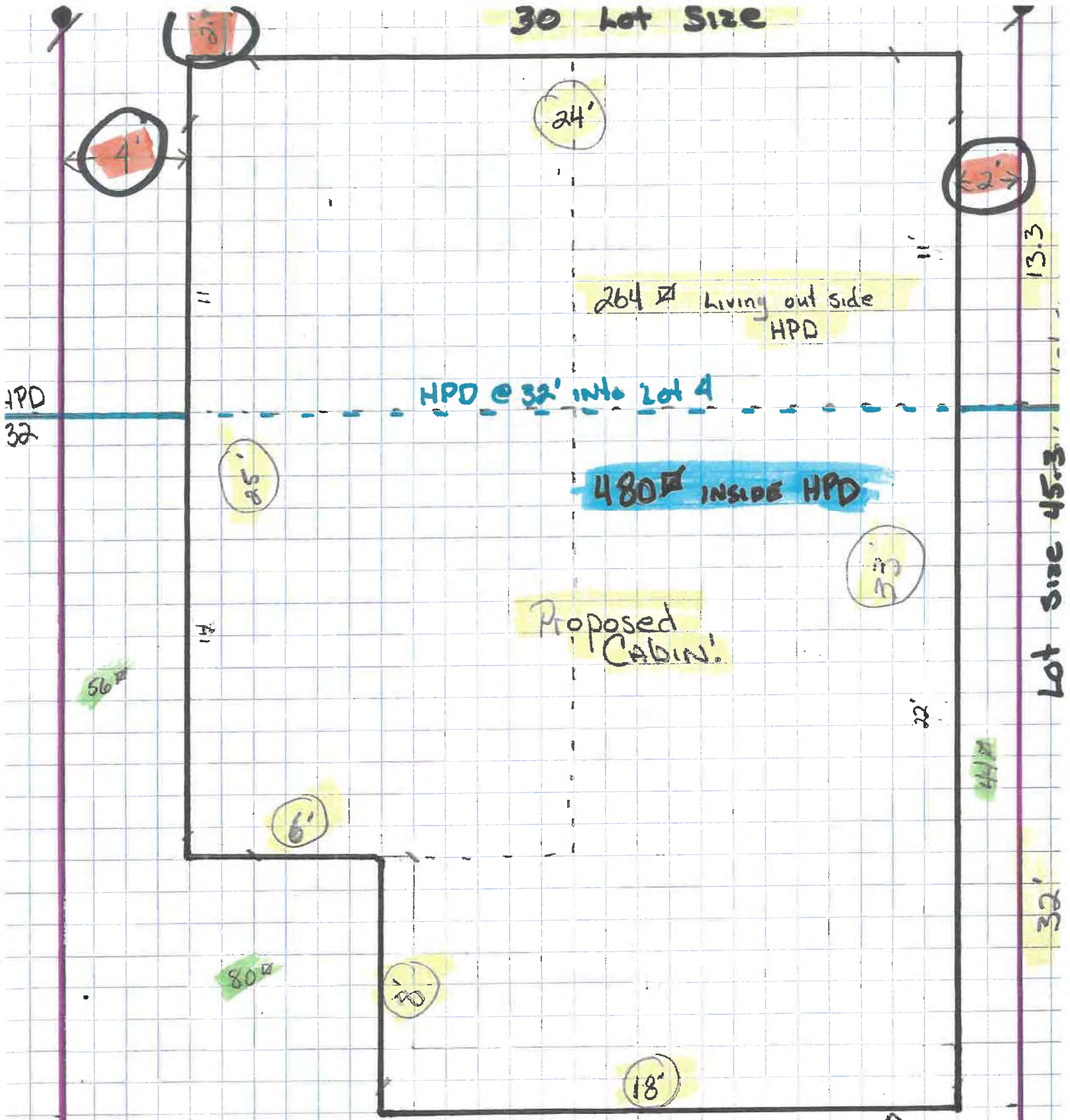
\_\_\_\_\_  
Agent Signature (if applicable)

\_\_\_\_\_  
Date





30 Lot Size



Site Plan.

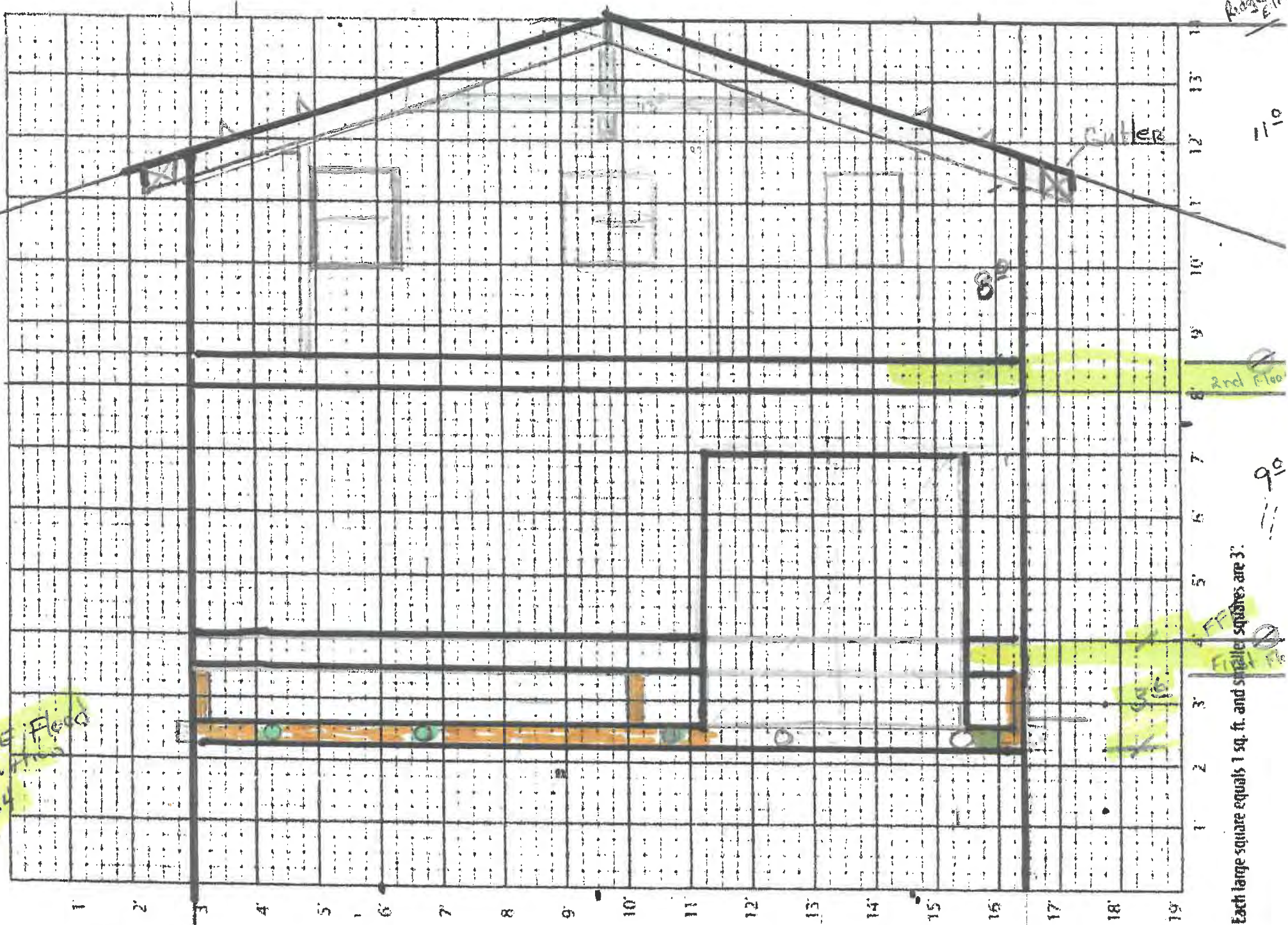
300'

480' Greenery

River E3-4 side



SIDE Floor  
Elevation  
32.4

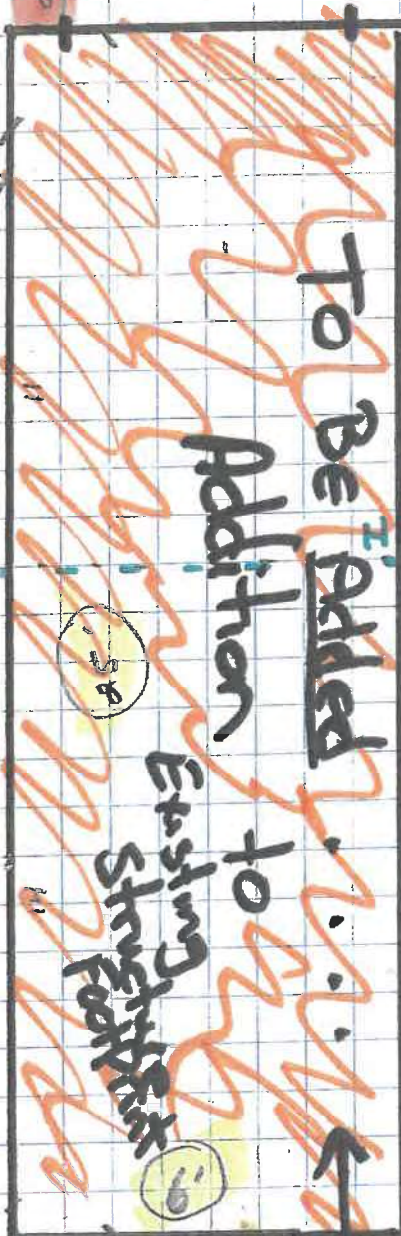




30' lot size

HPD  
32

Porchers Cove lot 4



24'

264' Living out side HPD

HPD @ 32' into lot 4

480' INSIDE HPD

Remodel  
Existing Cabin Footprint.

Finish Floor Elevation

32.6

2' Above Flood Plane

80'

8'

16'

Remove  
8x16  
Existing

300'

480'

Greenery



Ponchar's Cove lot 4

30' Lot Size

Lower Floor:

264' Living out side HPD

HPD @ 32' into lot 4

480' INSIDE HPD

Garage Non Parking Space

Proposed Cabin Remodel

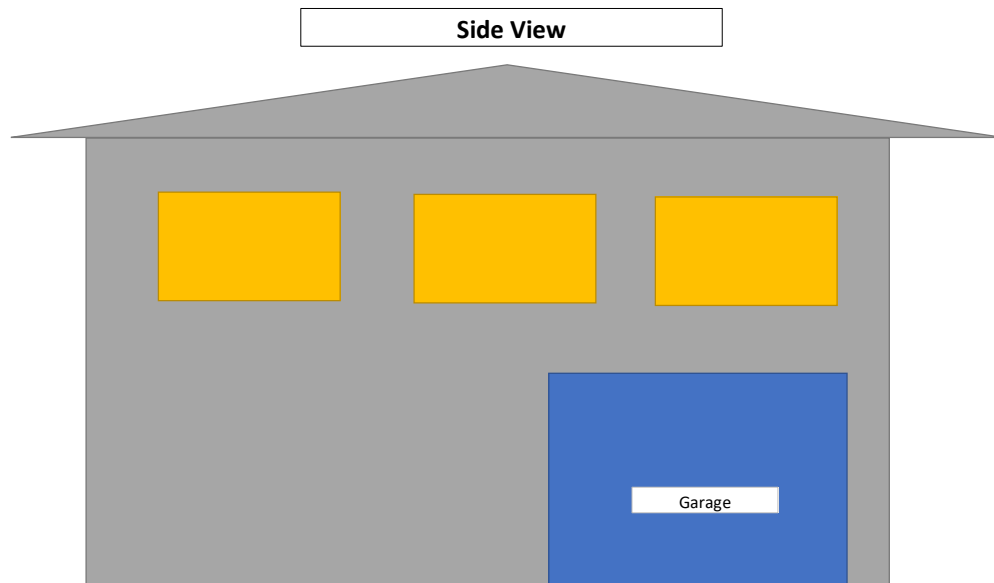
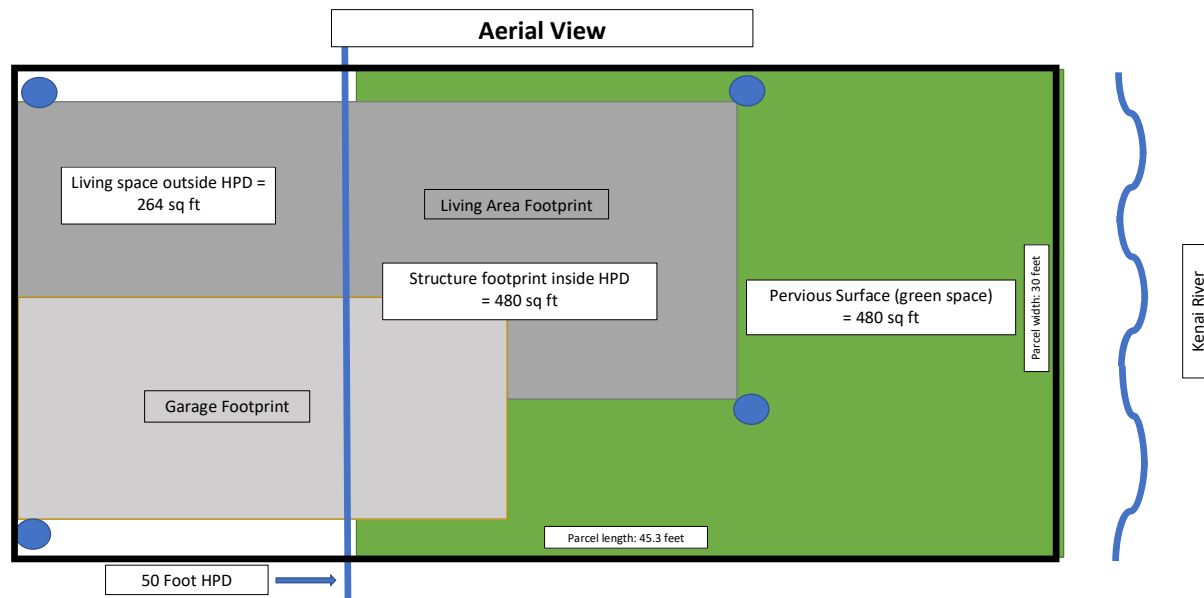
Base F.F. Elev  
= B.F.E. 32.0

Gravel Drive to be removed

13' x 12' Area Brick Pavers to be removed

All Greenery Areas will be left Graded w/ natural Soils from under the 10' Gravel + Paver Areas

No Fill in or Out!





**Conditional Use Permit  
Anadromous Waters Habitat Protection District  
Staff Report**

---

<b>KPB File No.</b>	<b>2023-38</b>
<b>Planning Commission Meeting:</b>	<b>September 25, 2023</b>
<b>Applicant</b>	<b>Trevor Wilson</b>
<b>Mailing Address</b>	<b>1406 276<sup>th</sup> St NW</b> <b>Stanwood, WA 98292</b>
<b>Legal Description</b>	<b>T 5N R 10W SEC 19 SM KN 0870069 POACHER'S COVE PLANNED UNIT DEVELOPMENT AMENDED LOT 4</b>
<b>Physical Address</b>	<b>45646 SPRUCE AVE W</b>
<b>KPB Parcel Number</b>	<b>05748938</b>

**Project Description**

A Conditional Use Permit is sought pursuant to KPB 21.18 for the construction of a residential structure within the 50-foot Habitat Protection District of the Kenai River, as established in KPB 21.18.040.

**Background Information**

The current structure was built in 1997 and is essentially an RV trailer with a pole barn structure surrounding it. The remaining ground on the parcel is either gravel or brick. Applicant would like to remove existing structure and rebuild, partially on the same footprint but it would also come into compliance with current KPB Habitat and Floodplain standards. The new proposed structure will have a smaller footprint, footprint will be reduced within the HPD to 480 square feet down from the current 780 square feet. Because the structure will not be in the exact same footprint and would have a second story, this will not be allowable under a Prior Existing Structures permit but meets the general standards for a Conditional Use Permit. The applicant will remove gravel and brick from the existing ground and will create 480 square feet of green space within the HPD.

**Project Details within the 50-foot Habitat Protection District (HPD)**

1. Removal of existing trailer and surrounding enclosure.
2. Shrinking the building footprint inside the HPD from 780 square feet to 480 square feet.
3. Removing approximately 300 square feet of gravel and 144 square feet of bricks from the HPD.
4. Increasing the pervious (green space) in the HPD from approximately 36 square feet to 480 square feet.
5. Construction of a new residential building, with a second story of living space on top, and attached garage.
6. Structure will be built to KPB Floodplain Management standards, elevated above the Flood Protection Elevation, with sufficient flood vents for any enclosed spaces below.
7. Rain barrels will be placed at the corners of the building to collect and filter runoff water.
8. Place five cubic yards of topsoil 2-4 inches deep, allowing grass and shrub plantings to establish root systems.



### **Findings of fact pursuant to KPB 21.18.081 Conditional Use Permit**

1. Portions of this proposed project are within the 50-foot habitat protection district as defined by KPB 21.18.040.
2. Pursuant to KPB 21.18.081(B)(10), construction of principal structure may be approved as a conditional structure/use within the habitat protection district.
3. Pursuant to 21.18.081(D) General Standards, staff finds that the proposed project meets the five general standards.
4. Pursuant to KPB 21.18.020(A), this chapter was established to protect and preserve the stability of anadromous fish through controlling shoreline alterations and disturbances along anadromous waters and to preserve nearshore habitat.
5. Pursuant to KPB 21.18.20(B)(5), one purpose of this chapter was established to separate conflicting land uses.
6. The portions of the parcel covered by impervious surfaces will be decreased by the new structure.
7. The structure will become compliant with KPB Floodplain requirements.
8. Pursuant to KPB 21.06.081(D)(3), the proposed work will occur on the applicant's property and shall not have an adverse effect on adjoining properties.
9. Kenai Peninsula Borough Planning Commission Resolution 2015-35 defines water-dependent as:  
*"...a use or structure located on, in or adjacent to water areas because the use requires access to the waterbody. The definition is applicable to facilities or activities that must be located at or near the shoreline and within the 50-foot buffer. An activity is considered water dependent if it is dependent on the water as part of the intrinsic nature of its operation. Examples of water dependent facilities may include, but are not limited to, piers, boat ramps, and elevated walkways."*
10. The River Center found the application complete and scheduled a public hearing for September 25, 2023.
11. Agency review was distributed on September 15, 2023. No comments or objections have been received from resource agencies to date.
12. Pursuant to KPB 21.11.030, public notice was mailed to all property owners within a radius of 300 feet of the project on September 11, 2023. A total of 56 mailings were sent.
13. Pursuant to KPB 21.11.020, public notice was published in the Peninsula Clarion on September 14, 2023 and September 20, 2023.
14. The applicant is currently in compliance with Borough permits and ordinances.

### **Permit Conditions**

1. Construction techniques and best management practices shall be utilized to ensure that land disturbing activities do not result in runoff or sedimentation to the Kenai River.
2. The structure must be designed and installed to meet KPB floodplain requirements.
3. The permittee shall minimize damage to all vegetation and shall revegetate all disturbed areas with native vegetation.
4. For each tree removed, two seedlings less than 5.5-feet tall of a species native to the region will be planted within the 50-foot HPD.
5. Storage or use of fuel is prohibited within 50-feet of any open water.
6. The River Center shall be notified at least 3 days prior to the start of the project.
7. If changes to the approved project described above are proposed prior to or during its siting, construction, or operation, the permittee is required to notify the River Center to determine if additional approval is required.
8. The permittee shall be held responsible for the actions of the contractors, agents, or others who perform work to accomplish the approved plan.

9. The construction or installation phase of this Conditional Use Permit must be completed within one calendar year from the date of the permit's issuance, or the Conditional Use Permit shall expire unless the Planning Commission finds that more time is necessary to effectuate the purposes of this chapter, in which case the commission may extend the deadline for a maximum of six years from the date of issuance. Prior to its expiration date and upon written request, the Planning Director may grant a Conditional Use Permit extension for 12 months (KPB 21.18.081 (H)).
10. In addition to the penalties provided by KPB 21.18.110, and pursuant to KPB 21.50, the permit may be revoked if the permittee fails to comply with the provisions of this chapter or the terms and conditions of a permit issued under this chapter. The Borough Clerk shall provide at least 15 day's written notice to the permittee of a revocation hearing before the hearing officer (KPB 21.18.082).
11. The permittee shall comply with the terms, conditions and requirements of the Kenai Peninsula Borough Code of Ordinances Chapter 21.18, and any regulations adopted pursuant to this chapter.
12. The permittee is responsible for abiding by all other federal, state, and local laws, regulations, and permitting requirements applicable to the project (KPB 21.18.081 (G)).

### **General Standards**

**Pursuant to 21.18.081(D) General Standards, the following standards shall be met before conditional use approval may be granted:**

1. The use or structure will not cause significant erosion, sedimentation, damage within the habitat protection district, an increase in ground or surface water pollution, and damage to riparian wetlands and riparian ecosystems;
2. Granting of the conditional use shall be consistent with the purposes of this chapter, the borough comprehensive plan, other applicable chapters of the borough Code, and other applicable planning documents adopted by the borough;
3. The development of the use or structure shall not physically damage the adjoining property;
4. The proposed use or structure is water-dependent;
5. Applicant's or owner's compliance with other borough permits and ordinance requirements.

### **Attachments**

Multi-Agency Application  
Draft Resolution 2023-38

### **Recommendation**

Based on the findings, staff finds that the proposed project meets the five general standards of KPB 21.18.081. The Planning Commission could consider additional permit conditions to mitigate for any habitat loss if it chooses.

Staff recommends the Planning Commission grant a Conditional Use Permit for the proposed project details subject to adopted conditions as set forth in 2023-38.

**Note: An appeal of a decision of the Planning Commission may be filed to the Hearing Officer, 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 filing and records preparation fee.**

**END OF STAFF REPORT**



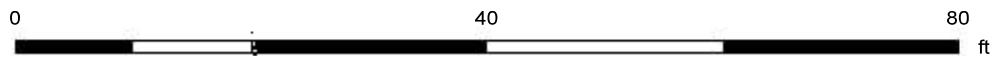
Project Overview and Vicinity Map

**Poacher's Cove Cabin**



**Project Area**

cabin re-build



**Vicinity**



Map created by Aldridge, Morgan

The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.

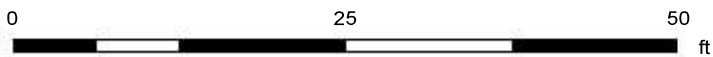


 **Project Area**

Tax Parcels



Map created by Aldridge, Morga  
Thursday, August 31, 2023





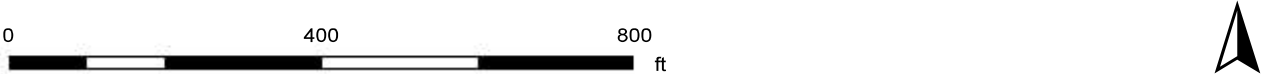


 **Project Area**

 River Miles

 Tax Parcels

Map created by Aldridge, Morga  
Thursday, August 31, 2023





# Donald E. Gilman River Center

514 Funny River Road, Soldotna, Alaska 99669 • (907) 714-2460 • (907) 260-5992 Fax

*A Division of the Planning Department*

Peter A. Micciche  
Borough Mayor

## KENAI PENINSULA BOROUGH PLANNING COMMISSION NOTICE OF PUBLIC HEARING

Public notice is hereby given that an application for a Conditional Use Permit has been received to construct a cabin in Poacher's Cove within the 50-foot Habitat Protection District of the Kenai River near Soldotna, Alaska. ***You have been sent this notice because you are a property owner within 300 feet of the described property.***

Pursuant to KPB 21.18.081(B)(10) Principal Structures and KPB 21.18.091 Mitigation measures, projects within the 50-foot Habitat Protection District must be approved by the Planning Commission under a Conditional Use Permit (CUP). This project is located at 45646 Spruce Ave W, in Soldotna, Alaska.

**Petitioner:**     **Trevor Wilson**  
                              **1406 276<sup>th</sup> St N W**  
                              **Stanwood, WA 98292**

**Public Hearing:** The Kenai Peninsula Borough Planning Commission meeting will hold a public hearing on September 25, 2023 commencing at 7:30 p.m., or as soon thereafter as business permits. The meeting is to be held in the Borough Administrative Building, 144 N. Binkley St., Soldotna, Alaska. The public may also attend the meeting electronically/telephonically via Zoom. To join the meeting from a computer visit <https://us06web.zoom.us/j/9077142200>. To attend the Zoom meeting by telephone call toll free **1-888-788-0099** or **1-877-853-5247**. When calling in you will need the Meeting ID **907 714 2200**.

**Public Comment:** Anyone wishing to testify may attend the above meeting to give testimony, or may submit written comment via the methods below. **Written comments must be submitted by 1:00 pm Friday, September 22, 2023.**

**Mail comments to:**

Donald E. Gilman River Center  
514 Funny River Road  
Soldotna, Alaska 99669

**Fax comments to:**

(907) 260-5992

**Email comments to:**

[planning@kpb.us](mailto:planning@kpb.us)  
[KenaiRivCenter@kpb.us](mailto:KenaiRivCenter@kpb.us)

For additional information contact Morgan Aldridge, [maldridge@kpb.us](mailto:maldridge@kpb.us), Donald E. Gilman River Center, (907) 714-2465.





 **Project Area**

River Miles

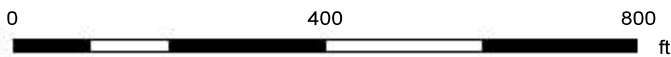


Tax Parcels



Map created by Aldridge, Morga

Thursday, August 31, 2023





**KENAI PENINSULA BOROUGH PLANNING COMMISSION**

**RESOLUTION 2023-28**

**A RESOLUTION GRANTING A CONDITIONAL USE PERMIT PURSUANT TO KPB 21.18 FOR THE  
CONSTRUCTION OF A RESIDENTIAL STRUCTURE WITHIN THE 50-FOOT HABITAT PROTECTION  
DISTRICT OF THE KENAI RIVER.**

- WHEREAS,** Chapter 21.18 provides for the approval of Conditional Use Permits for certain activities within the habitat protection district; and
- WHEREAS,** KPB 21.18.081 provides that a conditional use permit is required for construction not meeting the standards of KPB 21.18.071; and
- WHEREAS,** KPB 21.18.091 provides for mitigation measures by the planning department staff to address impacts to the Habitat Protection District from a proposed, ongoing, or completed project; and
- WHEREAS,** public notice was sent to all property owners within a 300-foot radius of the proposed activity as provided in Section 21.11.030; and
- WHEREAS,** public notice was published in the Peninsula Clarion on September 14, 2023 and September 14, 2023 as provided in Section 21.11.020; and
- WHEREAS,** public testimony was received at the September 25, 2023 meeting of the Kenai Peninsula Borough Planning Commission;

**NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI  
PENINSULA BOROUGH:**

That the Planning Commission makes the following findings of fact pursuant to KPB 21.18:

**Section 1. Project Details Within the 50-foot Habitat Protection District**

1. Removal of existing trailer and surrounding enclosure.
2. Shrinking the building footprint inside the HPD from 780 square feet to 480 square feet.
3. Removing approximately 300 square feet of gravel and 144 square feet of bricks from the HPD.
4. Increasing the pervious (green space) in the HPD from approximately 36 square feet to 480 square feet.
5. Construction of a new residential building, with a second story of living space on top, and attached garage.
6. Structure will be built to KPB Floodplain Management standards, elevated above the Flood Protection Elevation, with sufficient flood vents for any enclosed spaces below.
7. Rain barrels will be placed at the corners of the building to collect and filter runoff water.
8. Place five cubic yards of topsoil 2-4 inches deep, allowing grass and shrub plantings to establish root systems.

## **Section 2. Findings of fact pursuant to KPB 21.18.081**

1. Portions of this proposed project are within the 50-foot habitat protection district as defined by KPB 21.18.040.
2. Pursuant to KPB 21.18.081(B)(10), construction of principal structure may be approved as a conditional structure/use within the habitat protection district.
3. Pursuant to 21.18.081(D) General Standards, staff finds that the proposed project meets the five general standards.
4. Pursuant to KPB 21.18.020(A), this chapter was established to protect and preserve the stability of anadromous fish through controlling shoreline alterations and disturbances along anadromous waters and to preserve nearshore habitat.
5. Pursuant to KPB 21.18.20(B)(5), one purpose of this chapter was established to separate conflicting land uses.
6. The portions of the parcel covered by impervious surfaces within the HPD will be decreased by the new structure.
7. The structure will become compliant with KPB Floodplain requirements.
8. Pursuant to KPB 21.06.081(D)(3), the proposed work will occur on the applicant's property and shall not have an adverse effect on adjoining properties.
9. Kenai Peninsula Borough Planning Commission Resolution 2015-35 defines water-dependent as:  
*"...a use or structure located on, in or adjacent to water areas because the use requires access to the waterbody. The definition is applicable to facilities or activities that must be located at or near the shoreline and within the 50-foot buffer. An activity is considered water dependent if it is dependent on the water as part of the intrinsic nature of its operation. Examples of water dependent facilities may include, but are not limited to, piers, boat ramps, and elevated walkways."*
10. The River Center found the application complete and scheduled a public hearing for September 25, 2023.
11. Agency review was distributed on September 15, 2023 No comments or objections have been received from resource agencies to date.
12. Pursuant to KPB 21.11.030, public notice was mailed to all property owners within a radius of 300 feet of the project on September 11, 2023. A total of 56 mailings were sent.
13. Pursuant to KPB 21.11.020, public notice was published in the Peninsula Clarion on September 14, 2023 and September 20, 2023.
14. The applicant is currently in compliance with Borough permits and ordinances.

## **Section 3. Permit Conditions**

1. Construction techniques and best management practices shall be utilized to ensure that land disturbing activities do not result in runoff or sedimentation to the Kenai River.
2. The structure must be designed and installed to meet KPB floodplain requirements.
3. The permittee shall minimize damage to all vegetation and shall revegetate all disturbed areas with native vegetation.
4. For each tree removed, two seedlings less than 5.5-feet tall of a species native to the region will be planted within the 50-foot HPD.
5. Storage or use of fuel is prohibited within 50-feet of any open water.
6. The River Center shall be notified at least 3 days prior to the start of the project.

7. If changes to the approved project described above are proposed prior to or during its siting, construction, or operation, the permittee is required to notify the River Center to determine if additional approval is required.
8. The permittee shall be held responsible for the actions of the contractors, agents, or others who perform work to accomplish the approved plan.
9. The construction or installation phase of this Conditional Use Permit must be completed within one calendar year from the date of the permit's issuance, or the Conditional Use Permit shall expire unless the Planning Commission finds that more time is necessary to effectuate the purposes of this chapter, in which case the commission may extend the deadline for a maximum of six years from the date of issuance. Prior to its expiration date and upon written request, the Planning Director may grant a Conditional Use Permit extension for 12 months (KPB 21.18.081 (H)).
10. In addition to the penalties provided by KPB 21.18.110, and pursuant to KPB 21.50, the permit may be revoked if the permittee fails to comply with the provisions of this chapter or the terms and conditions of a permit issued under this chapter. The Borough Clerk shall provide at least 15 day's written notice to the permittee of a revocation hearing before the hearing officer (KPB 21.18.082).
11. The permittee shall comply with the terms, conditions and requirements of the Kenai Peninsula Borough Code of Ordinances Chapter 21.18, and any regulations adopted pursuant to this chapter.
12. The permittee is responsible for abiding by all other federal, state, and local laws, regulations, and permitting requirements applicable to the project (KPB 21.18.081 (G)).

**Section 4. Pursuant to 21.18.081(D) General Standards, the following standards shall be met before conditional use approval may be granted:**

1. The use or structure will not cause significant erosion, sedimentation, damage within the habitat protection district, an increase in ground or surface water pollution, and damage to riparian wetlands and riparian ecosystems; **Conditions 1-3 and Findings 6-7 appear to support this standard.**
2. Granting of the conditional use shall be consistent with the purposes of this chapter, the borough comprehensive plan, other applicable chapters of the borough Code, and other applicable planning documents adopted by the borough; **Findings 9-14 appear to support this standard.**
3. The development of the use or structure shall not physically damage the adjoining property; **Finding 8 appears to support this standard.**
4. The proposed use or structure is water-dependent; **Findings 1-3, 9 appear to support this standard.**
5. Applicant's or owner's compliance with other borough permits and ordinance requirements. **Finding 14 appears to support this standard.**



THIS CONDITIONAL USE PERMIT EFFECTIVE ON \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

\_\_\_\_\_  
Jeremy Brantley, Chairperson  
Planning Commission

ATTEST:

\_\_\_\_\_  
Ann Shirnberg  
Administrative Assistant

**Note: An appeal of a decision of the Planning Commission may be filed to the hearing officer, in accordance with the requirements of the KPB 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 filing and records preparation fee.**

# **DESK PACKET**

**(MATERIALS SUBMITTED AFTER MEETING PACKET PUBLICATION)**

## **E. NEW BUSINESS**

- 3. Conditional Use Permit; PC Resolution 2023-28**

**KENAI PENINSULA BOROUGH PLANNING COMMISSION**

**RESOLUTION 2023-28**

**A RESOLUTION GRANTING A CONDITIONAL USE PERMIT PURSUANT TO KPB 21.18 FOR THE  
CONSTRUCTION OF A RESIDENTIAL STRUCTURE WITHIN THE 50-FOOT HABITAT PROTECTION  
DISTRICT OF THE KENAI RIVER.**

- WHEREAS,** Chapter 21.18 provides for the approval of Conditional Use Permits for certain activities within the habitat protection district; and
- WHEREAS,** KPB 21.18.081 provides that a conditional use permit is required for construction not meeting the standards of KPB 21.18.071; and
- WHEREAS,** KPB 21.18.091 provides for mitigation measures by the planning department staff to address impacts to the Habitat Protection District from a proposed, ongoing, or completed project; and
- WHEREAS,** public notice was sent to all property owners within a 300-foot radius of the proposed activity as provided in Section 21.11.030; and
- WHEREAS,** public notice was published in the Peninsula Clarion on September 14, 2023 and September 14, 2023 as provided in Section 21.11.020; and
- WHEREAS,** public testimony was received at the September 25, 2023 meeting of the Kenai Peninsula Borough Planning Commission;

**NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE KENAI  
PENINSULA BOROUGH:**

That the Planning Commission makes the following findings of fact pursuant to KPB 21.18:

**Section 1. Project Details Within the 50-foot Habitat Protection District**

1. Removal of existing trailer and surrounding enclosure.
2. Shrinking the building footprint inside the HPD from 780 square feet to 480 square feet.
3. Removing approximately 300 square feet of gravel and 144 square feet of bricks from the HPD.
4. Increasing the pervious (green space) in the HPD from approximately 36 square feet to 480 square feet.
5. Construction of a new residential building, with a second story of living space on top, and attached garage.
6. Structure will be built to KPB Floodplain Management standards, elevated above the Flood Protection Elevation, with sufficient flood vents for any enclosed spaces below.
7. Rain barrels will be placed at the corners of the building to collect and filter runoff water.
8. Place five cubic yards of topsoil 2-4 inches deep, allowing grass and shrub plantings to establish root systems.



## **Section 2. Findings of fact pursuant to KPB 21.18.081**

1. Portions of this proposed project are within the 50-foot habitat protection district as defined by KPB 21.18.040.
2. Pursuant to KPB 21.18.081(B)(10), construction of principal structure may be approved as a conditional structure/use within the habitat protection district.
3. Pursuant to 21.18.081(D) General Standards, staff finds that the proposed project meets the five general standards.
4. Pursuant to KPB 21.18.020(A), this chapter was established to protect and preserve the stability of anadromous fish through controlling shoreline alterations and disturbances along anadromous waters and to preserve nearshore habitat.
5. Pursuant to KPB 21.18.20(B)(5), one purpose of this chapter was established to separate conflicting land uses.
6. The portions of the parcel covered by impervious surfaces within the HPD will be decreased by the new structure.
7. The structure will become compliant with KPB Floodplain requirements.
8. Pursuant to KPB 21.06.081(D)(3), the proposed work will occur on the applicant's property and shall not have an adverse effect on adjoining properties.
9. Kenai Peninsula Borough Planning Commission Resolution 2015-35 defines water-dependent as:  
*"...a use or structure located on, in or adjacent to water areas because the use requires access to the waterbody. The definition is applicable to facilities or activities that must be located at or near the shoreline and within the 50-foot buffer. An activity is considered water dependent if it is dependent on the water as part of the intrinsic nature of its operation. Examples of water dependent facilities may include, but are not limited to, piers, boat ramps, and elevated walkways."*
10. The River Center found the application complete and scheduled a public hearing for September 25, 2023.
11. Agency review was distributed on September 15, 2023 No comments or objections have been received from resource agencies to date.
12. Pursuant to KPB 21.11.030, public notice was mailed to all property owners within a radius of 300 feet of the project on September 11, 2023. A total of 56 mailings were sent.
13. Pursuant to KPB 21.11.020, public notice was published in the Peninsula Clarion on September 14, 2023 and September 20, 2023.
14. The applicant is currently in compliance with Borough permits and ordinances.

## **Section 3. Permit Conditions**

1. Construction techniques and best management practices shall be utilized to ensure that land disturbing activities do not result in runoff or sedimentation to the Kenai River.
2. The structure must be designed and installed to meet KPB floodplain requirements.
3. The permittee shall minimize damage to all vegetation and shall revegetate all disturbed areas with native vegetation.
4. For each tree removed, two seedlings less than 5.5-feet tall of a species native to the region will be planted within the 50-foot HPD.
5. Storage or use of fuel is prohibited within 50-feet of any open water.
6. The River Center shall be notified at least 3 days prior to the start of the project.

7. If changes to the approved project described above are proposed prior to or during its siting, construction, or operation, the permittee is required to notify the River Center to determine if additional approval is required.
8. The permittee shall be held responsible for the actions of the contractors, agents, or others who perform work to accomplish the approved plan.
9. The construction or installation phase of this Conditional Use Permit must be completed within one calendar year from the date of the permit's issuance, or the Conditional Use Permit shall expire unless the Planning Commission finds that more time is necessary to effectuate the purposes of this chapter, in which case the commission may extend the deadline for a maximum of six years from the date of issuance. Prior to its expiration date and upon written request, the Planning Director may grant a Conditional Use Permit extension for 12 months (KPB 21.18.081 (H)).
10. In addition to the penalties provided by KPB 21.18.110, and pursuant to KPB 21.50, the permit may be revoked if the permittee fails to comply with the provisions of this chapter or the terms and conditions of a permit issued under this chapter. The Borough Clerk shall provide at least 15 day's written notice to the permittee of a revocation hearing before the hearing officer (KPB 21.18.082).
11. The permittee shall comply with the terms, conditions and requirements of the Kenai Peninsula Borough Code of Ordinances Chapter 21.18, and any regulations adopted pursuant to this chapter.
12. The permittee is responsible for abiding by all other federal, state, and local laws, regulations, and permitting requirements applicable to the project (KPB 21.18.081 (G)).

**Section 4. Pursuant to 21.18.081(D) General Standards, the following standards shall be met before conditional use approval may be granted:**

1. The use or structure will not cause significant erosion, sedimentation, damage within the habitat protection district, an increase in ground or surface water pollution, and damage to riparian wetlands and riparian ecosystems; **Conditions 1-3 and Findings 6-7 appear to support this standard.**
2. Granting of the conditional use shall be consistent with the purposes of this chapter, the borough comprehensive plan, other applicable chapters of the borough Code, and other applicable planning documents adopted by the borough; **Findings 9-14 appear to support this standard.**
3. The development of the use or structure shall not physically damage the adjoining property; **Finding 8 appears to support this standard.**
4. The proposed use or structure is water-dependent; **Findings 1-3, 9 appear to support this standard.**
5. Applicant's or owner's compliance with other borough permits and ordinance requirements. **Finding 14 appears to support this standard.**

THIS CONDITIONAL USE PERMIT EFFECTIVE ON \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

\_\_\_\_\_  
Jeremy Brantley, Chairperson  
Planning Commission

ATTEST:

\_\_\_\_\_  
Ann Shirnberg  
Administrative Assistant

**Note: An appeal of a decision of the Planning Commission may be filed to the hearing officer, in accordance with the requirements of the KPB 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 filing and records preparation fee.**



## **E. NEW BUSINESS**

4. Ordinance 2023-23: Amending KPB 20.30.280 and KPB 21.06 regarding floodplain management to adopt required changes to remain compliant with the National Flood Insurance program.

# Kenai Peninsula Borough

## Planning Department – River Center

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### MEMORANDUM

**TO:** Brent Johnson, Assembly President  
Members, Kenai Peninsula Borough Assembly

**THRU:** Peter A. Micciche, Mayor *PM*  
Robert Ruffner, Planning Director *RR*  
Samantha Lopez, River Center Manager *SL*

**FROM:** Julie Hindman, Floodplain Administrator *JH*

**DATE:** September 7, 2023

**RE:** Ordinance 2023-\_\_\_\_, Amending KPB 20.30.280 and KPB 21.06 Regarding Floodplain Management to Adopt Required Changes to Remain Compliant with the National Flood Insurance Program (Mayor)

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Since 1988, the Borough has participated in the National Flood Insurance Program (“NFIP”), making federal disaster assistance, federal hazard mitigation grants, federal subsidized mortgages, and affordable individual homeowner flood insurance available within the Borough. The Federal Emergency Management Agency (“FEMA”) oversees the NFIP and provides participating communities with the minimum regulations and regulatory flood maps for each community to enforce.

Every five to eight years, FEMA visits the Borough to perform a Community Assistance Visit. This is a visit by FEMA staff that serves the dual purpose of providing technical assistance to the community and assuring that the community is adequately enforcing its floodplain management regulations. This visit includes: meeting with community staff and officials; reviewing current code; touring and inspecting structures in the floodplain; reviewing floodplain development permits; and documenting any unpermitted structures.

The proposed amendments to Borough Code reflected in this ordinance are a combination of FEMA-required changes and housekeeping amendments to ensure the Borough’s floodplain management code meets federal standards. The proposed amendments also address other portions of Borough Code for clerical purposes. These amendments are necessary to keep the Borough in good standing with the NFIP. Failure to adopt the required changes could result in sanctions, which could impact the Borough’s ability to participate in the NFIP.

Your consideration is appreciated.

Introduced by:	Mayor
Date:	09/19/2023
Hearing:	10/24/2023
Action:	
Vote:	

**KENAI PENINSULA BOROUGH  
ORDINANCE 2023-XX**

**AN ORDINANCE AMENDING KPB 20.30.280 AND KPB 21.06 REGARDING  
FLOODPLAIN MANAGEMENT TO ADOPT REQUIRED CHANGES TO REMAIN  
COMPLIANT WITH THE NATIONAL FLOOD INSURANCE PROGRAM**

**WHEREAS,** the Kenai Peninsula Borough has had an accredited floodplain management program under the National Flood Insurance Program (“NFIP”) since 1988, which makes federal disaster insurance, federal hazard mitigation grants, federally subsidized mortgages, and affordable individual homeowner flood insurance available within the Borough; and

**WHEREAS,** continued participation in the NFIP is predicated upon continued good standing in the NFIP; and

**WHEREAS,** as part of the 2022 Federal Emergency Management Agency (“FEMA”) Community Assistance Visit, FEMA officials reviewed KPB Chapter 21.06 to assess compliance with federal requirements and to provide required and recommended changes to the Chapter; and

**WHEREAS,** the proposed amendments increase flood safety, bring code pertaining to FEMA minimum regulations into compliance with federal standards and provide clarifications; and

**WHEREAS,** the proposed amendments address other portions of Borough Code for clerical purposes; and

**WHEREAS,** at the meeting of \_\_\_\_\_, the Seward-Bear Creek Flood Service Area Board recommended \_\_\_\_\_; and

**WHEREAS,** at the meeting of \_\_\_\_\_, the Kenai Peninsula Borough Planning Commission recommended \_\_\_\_\_; and

**WHEREAS,** the Borough’s best interest will be served by maintaining its good standing in the NFIP by amending its floodplain management ordinance.

**NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:**



**SECTION 1.** That KPB 20.30.280 is hereby amended as follows:

**20.30.280. – Floodplain requirements.**

- A. All subdivision plats which are within areas where the floodplain has been identified by the Federal Emergency Management Agency (FEMA), and which involve 50 lots or five acres whichever is lesser, shall include the base flood elevation source. If the base flood elevation is not provided from another authoritative source, it must be generated at the responsibility of the developer and noted on the final plat.
- B. Any area of the subdivision within the regulatory floodplain, floodway or Seward Mapped Flood Data Area (SMFDA) is to be shown and labeled on the plat.
- ...
- D. All subdivisions or replats within the Flood Insurance Rate Map (FIRM) area or SMFDA, as amended, as defined by KPB [21.06.020] 21.06.070, shall contain the following note:  
...
- E. All subdivisions or replats that include any portion of the mapped floodway shall contain the following note:

**FLOODWAY NOTICE:**

Portions of this subdivision are within the floodway. Pursuant to KPB Chapter 21.06, all development (including fill) in the floodway is prohibited unless certification by an engineer [OR ARCHITECT] is provided demonstrating that encroachments shall not result in any increases in flood levels during the occurrence of the base flood discharge.

- [F. EACH PLAT WITHIN A CITY WHICH HAS MET THE REQUIREMENTS OF THIS SECTION SHALL CONTAIN THE FOLLOWING STATEMENT: "THE FIRST FINISHED AND HABITABLE FLOOR OF A BUILDING CONSTRUCTED WITHIN A FLOODPLAIN SHALL BE BUILT AT OR ABOVE THE 100-YEAR FLOOD LEVEL."]

- [G]F. This section applies to all cities which adopt a resolution requesting participation in the FEMA floodplain program and which are subsequently recognized by the state as participants.

- [H]G. A city may adopt an ordinance as part of its building code with greater restrictions than those set forth in KPB 20.30.280(A). A note shall be placed on the plat to indicate that the developer is responsible for contacting the city to determine the restrictions prior to any development.

**SECTION 2.** That KPB 21.06.010 is hereby amended as follows:

**21.06.010. – [FINDINGS AND STATEMENT] Statutory authorization, findings, and statement.**

The assembly adopts the following findings and statements establishing a floodplain management chapter:

A. Statutory Authorization. The State of Alaska has delegated the responsibility to local governmental units to adopt floodplain management regulations designed to promote the public health, safety, and general welfare of its citizenry.

[A.]B. Findings. The flood hazard areas of Kenai Peninsula Borough are subject to periodic inundation which results in loss of life and property, health, and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.

C. These flood losses may be caused by the cumulative effect of obstructions in flood hazard areas, which increase flood heights and velocities and, when inadequately anchored, cause damage in other areas. Uses that are inadequately flood proofed, elevated, or otherwise protected from flood damage, also contribute to flood loss.

[B.]D. Statement of Purpose. It is the purpose of this chapter to promote the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions in specific areas by provisions designed:

...

7. To ensure that potential buyers are notified that property is in an area of special flood hazard; [AND]
8. To ensure that those who occupy the areas of special flood hazard assume responsibility for their actions[.]; and
9. To allow participation in and, to maintain eligibility for, flood insurance and disaster relief.

[C.]E. Objectives. In order to accomplish its purposes, this chapter includes methods and provisions for:

...

**SECTION 3.** That KPB 21.06.030 is hereby amended as follows:

**21.06.030. – General provisions.**

...

C. Basis for Establishing Flood Protection Elevation. The Flood Protection Elevation (FPE) shall be the applicable elevation as determined by the planning department using the criteria below and will be the elevation to which structures

and utilities must be raised as required in the building standards in KPB 21.06.050.

...

E. *Noncompliance—Enforcement and Penalties.* Structures and activities which are not permitted or allowed by this chapter are prohibited. No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this chapter and other applicable regulations. Violation of the provisions of this chapter by failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with conditions) shall be enforced by the remedies set forth in KPB 21.50. Each day a violation continues is a separate violation. Nothing herein contained shall prevent the Kenai Peninsula Borough from taking such other lawful action as is necessary to prevent or remedy any violation.

F. *Conflicts.* Unless otherwise preempted by applicable law, where this chapter and another rule, ordinance, statute, regulation, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restriction will prevail. Notwithstanding, nothing in this chapter may be construed to require the borough to enforce a private covenant or deed restriction.

G. *Interpretation.* In the interpretation and application of this chapter, all provisions must be:

1. Considered as minimum requirements;
2. Liberally construed in favor of the governing body; and,
3. Deemed neither to limit nor repeal any other powers granted under state statutes.

**SECTION 4.** That KPB 21.06.040 is hereby amended as follows:

**21.06.040. – Administration.**

...

- [1. ELEVATION IN RELATION TO MEAN SEA LEVEL OF THE LOWEST FLOOR (INCLUDING BASEMENT) OF ALL STRUCTURES;
2. ELEVATION IN RELATION TO MEAN SEA LEVEL TO WHICH ANY STRUCTURE HAS BEEN FLOODPROOFED;
3. CERTIFICATION BY A REGISTERED PROFESSIONAL ENGINEER OR ARCHITECT THAT THE FLOODPROOFING METHODS FOR ANY NONRESIDENTIAL STRUCTURE MEET THE FLOODPROOFING CRITERIA IN KPB 21.06.050(B)(2);

4. DESCRIPTION OF THE EXTENT TO WHICH A WATERCOURSE WILL BE ALTERED OR RELOCATED AS A RESULT OF PROPOSED DEVELOPMENT.]

1. For A Zones (A, AI-30, AE, AH, AO).

- a. Proposed elevation in relation to mean sea level of the lowest floor (including basement) of all structures. In Zone AO, elevation of existing highest adjacent grade and proposed elevation of lowest floor of all structures;
- b. Proposed elevation in relation to mean sea level to which any non-residential structure will be floodproofed;
- c. Certification by a registered professional engineer or architect that the floodproofing methods for any non-residential structure meet the floodproofing criteria in KPB 21.06.050(B)(2); and
- d. Description of the extent to which any watercourse will be altered or relocated as a result of proposed development.

2. For V Zones (VE, VI-30 and V).

- a. Proposed elevation in relation to mean sea level of the bottom of the lowest structural member of the lowest floor (excluding pilings and columns) of all structures, and whether such structures contain a basement;
- b. Base Flood Elevation data for subdivision proposals or other development, including manufactured home parks or subdivisions, greater than 50 lots or 5 acres, whichever is the lesser.

...

4. *Information to be Obtained and Maintained.*

Obtain and maintain the following for public inspection and make available as needed:

[A. WHERE BASE FLOOD ELEVATION DATA IS PROVIDED THROUGH THE FLOOD INSURANCE STUDY OR REQUIRED IN SUBSECTION (C)(2) OF THIS SECTION, RECORD THE ACTUAL ELEVATION AS SUBMITTED (IN RELATION TO MEAN SEA LEVEL) OF THE LOWEST FLOOR (INCLUDING BASEMENT) OF ALL NEW OR SUBSTANTIALLY IMPROVED STRUCTURES, AND WHETHER OR NOT THE STRUCTURE CONTAINS A BASEMENT;

B. FOR ALL NEW OR SUBSTANTIALLY IMPROVED FLOODPROOFED STRUCTURES:



- I. RECORD THE ACTUAL ELEVATION AS SUBMITTED (IN RELATION TO MEAN SEA LEVEL), AND
- II. MAINTAIN THE FLOODPROOFING CERTIFICATIONS REQUIRED IN KPB 21.06.040(A)(3);
- C. MAINTAIN FOR PUBLIC INSPECTION ALL RECORDS PERTAINING TO THE PROVISIONS OF THIS CHAPTER IN PERPETUITY.]
  - a. Certification required by KPB 21.06.050(B)(1) and KPB 21.06.050(A)(2) (lowest floor elevations for all structures, bottom of the lowest horizontal structural member (if applicable), and service facilities/mechanical equipment);
  - b. Certification required by KPB 21.06.050(B)(2) (lowest floor elevations or floodproofing of non-residential structures and service facilities/mechanical equipment);
  - c. Certification required by KPB 21.06.050(B)(1)(b) (engineered flood openings);
  - d. Certification required by KPB 21.06.050(C) (floodway encroachments);
  - e. Records of all variance actions, including justification for their issuance; and
  - f. Improvement and damage calculations.

[5. *ALTERATION OF WATERCOURSES.*

- A. NOTIFY ADJACENT COMMUNITIES AND THE DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS PRIOR TO ANY ALTERATION OR RELOCATION OF A WATERCOURSE, AND SUBMIT EVIDENCE OF SUCH NOTIFICATION TO THE FEDERAL INSURANCE ADMINISTRATION.
- B. REQUIRE THAT MAINTENANCE IS PROVIDED WITHIN THE ALTERED OR RELOCATED PORTION OF SAID WATERCOURSE SO THAT THE FLOOD-CARRYING CAPACITY IS NOT DIMINISHED.]

5. *Notification to Other Entities.*

- a. Whenever a watercourse is to be altered or relocated, notify adjacent communities and the State Coordinating Office prior to such alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administrator through appropriate notification

means, and assure that the flood carrying capacity of the altered or relocated portion of said watercourse is maintained.

- b. Base Flood Elevations may increase or decrease resulting from physical changes affecting flooding conditions. As soon as practicable, but not later than six months after the date such information becomes available, the Floodplain Administrator must notify the Federal Insurance Administrator of the changes by submitting technical or scientific data in accordance with Volume 44 Code of Federal Regulations Section 65.3, to ensure that, upon confirmation of those physical changes affecting flooding conditions, risk premium rates and floodplain management requirements will be based upon current data.
- c. Notify the Federal Insurance Administrator in writing of acquisition by means of annexation, incorporation or otherwise, of additional areas of jurisdiction.

6. Remedial Actions. The Kenai Peninsula Borough must take actions on violations of this chapter pursuant to KPB 21.06.030(E) herein.

[6.][7. Fee Required. The planning department shall charge fees for permits and [EXCEPTIONS] variances. Fees shall be the amount listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees to be paid by the applicant at the time that the floodplain development permit application is submitted.

**SECTION 5.** That KPB 21.06.050 is hereby amended as follows:

**21.06.050. – Standards.**

A. *General Standards.* In all flood hazard areas, the following standards are required:

1. Alteration of Water Courses.

- a. The flood-carrying capacity within the altered or relocated portion of said watercourse must be maintained. Maintenance must be provided within the altered or relocated portion of said watercourse to ensure that the flood-carrying capacity is not diminished.

[1.][2. Anchoring.

- a. All new construction and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy.

...

### 3. Storage of Materials and Equipment

- a. The storage or processing of materials that could be injurious to human, animal, or plant life if released due to damage from flooding is prohibited in special flood hazard areas.
- b. Storage of other material or equipment may be allowed if not subject to damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

### [2.]4. Construction Materials and Methods.

...

### [3.]5. Utilities.

...

### [4.]6. Subdivision Proposals.

...

### [5.]7. Review of Development Permits.

...

B. *Specific Standards.* In all flood hazard areas, as set forth in KPB 21.06.030(B), the following provisions are required:

#### *1. Residential Construction.*

- a. New construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated to or above the Flood Protection Elevation.
- b. Fully enclosed areas below the lowest floor, including crawlspaces, basements, and skirting, that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect or must meet or exceed the following minimum criteria:
  - i. A minimum of two openings located on separate walls and having a total net area of not less than 1 square inch for every square foot of enclosed space subject to flooding shall be provided.
  - ii. The bottom of all openings shall be no higher than 1 foot above grade.
  - iii. Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.

- iv. Enclosed areas below the Flood Protection Elevation must be unfinished and usable only for parking, access or storage of materials easily moved during a flood event.
- v. Before a final floodplain development permit is issued by the planning department for a residential structure with enclosed areas below the [BASE FLOOD ELEVATION] Flood Protection Elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall remain in compliance with KPB 21.06.050(B)(1)(b)(iv). The non-conversion agreement shall be recorded, [BY THE KENAI PENINSULA BOROUGH] placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

...

2. *Nonresidential Construction.* [NEW CONSTRUCTION AND SUBSTANTIAL IMPROVEMENT OF ANY COMMERCIAL, INDUSTRIAL OR OTHER NONRESIDENTIAL STRUCTURE SHALL EITHER HAVE THE LOWEST FLOOR, INCLUDING BASEMENT, ELEVATED TO THE LEVEL OF THE FLOOD PROTECTION ELEVATION; OR, TOGETHER WITH ATTENDANT UTILITY AND SANITARY FACILITIES, SHALL]:

a. New construction and substantial improvement of any commercial, industrial or other nonresidential structure, together with attendant utility and sanitary facilities, must have its lowest floor elevated to the Flood Protection Elevation to meet the standards in KPB 21.060.050(B)(1)(b); or

b. Nonresidential structures that are not elevated must:

[A.] i. Be floodproofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water; and

[B.] ii. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and

[C.] iii. Be certified by a registered professional engineer or architect that the standards of this subsection are satisfied. Such certifications shall be provided to the official as set forth in KPB 21.06.040(C)(4)(b); and

iv. Before a final floodplain development permit is issued by the planning department for a nonresidential structure with enclosed areas below the flood protection elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall not be converted to a residential space. The non-conversion agreement shall be



recorded, placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

[D. NONRESIDENTIAL STRUCTURES THAT ARE ELEVATED, NOT FLOODPROOFED, MUST MEET THE SAME STANDARD FOR SPACE BELOW THE LOWEST FLOOR AS DESCRIBED IN KPB 21.06.050(B)(1)(B).]

[E]c. Applicants floodproofing nonresidential buildings shall be notified that flood insurance premiums will be based on rates that are 1 foot below the floodproofed level (e.g. a building constructed to the base flood level will be rated as 1 foot below that level).

[F. FOR ZONES AH, AO, AND AREAS OF THE SMFDA, DRAINAGE PATHS ARE REQUIRED AROUND STRUCTURES ON SLOPES TO DRAIN FLOODWATERS AWAY FROM PROPOSED STRUCTURES.]

3. Appurtenant Structures (Detached Garages and Storage Structures). Appurtenant structures located in A Zones (A, AE, A1-30, AH, AO) used solely for parking of vehicles or storage may be constructed such that the floor is below the Flood Protection Elevation, provided the structure is designed and constructed in accordance with the following requirements:

- a. Use of the appurtenant structure must be limited to parking of vehicles or storage;
- b. The portions of the appurtenant structure located below the Flood Protection Elevation must be built using flood resistant materials;
- c. The appurtenant structure must be adequately anchored to prevent flotation, collapse and lateral movement;
- d. Any machinery or equipment servicing the appurtenant structure must be elevated or floodproofed to or above the Flood Protection Elevation;
- e. The appurtenant structure must comply with floodway encroachment provisions in KPB 21.06.050(C); and
- f. The appurtenant structure must be designed to allow for the automatic entry and exit of flood waters in accordance with KPB 21.06.050(B)(1)(b). Detached garages, storage structures and other appurtenant structures not meeting the above standards must be constructed in accordance with all applicable standards in KPB 21.06.050(B)(2). Upon completion of the structure, certification that the requirements of this section have been satisfied shall be provided to the Floodplain Administrator for verification.

g. Before a final floodplain development permit is issued by the planning department for an appurtenant structure with enclosed areas below the flood protection elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall not be converted to a residential space. The non-conversion agreement shall be recorded, placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

[3.]4. *Manufactured Homes.* All manufactured homes to be placed or substantially improved within Zones A1-30, AH, and AE shall be elevated on a permanent foundation such that the lowest floor of the manufactured home is at or above the base flood elevation and be securely anchored to an adequately anchored foundation system in accordance with the provisions of subsection (A)[(1)](2) of this section.

[4.]5. *Recreational vehicles.*

...

[5.]6. *Before regulatory floodway.*

...

[6.]7. *Fuel storage tanks.*

...

[7.]8. *Logging or clearing.*

...

9. *AH, AO, and SMFDA. Drainage paths are required around structures on slopes to drain floodwaters away from proposed structures.*

C. *Floodways.*

...

1. All encroachments, including fill, new construction, substantial improvements, and other development are prohibited unless certification by a registered professional engineer [OR ARCHITECT] is provided demonstrating that encroachments shall not result in any increase in flood levels during the occurrence of the base flood discharge.

...

3. Encroachments within the adopted regulatory floodway that would result in an increase in base flood elevations may be permitted, provided that the Kenai Peninsula Borough first applies for and fulfills the requirements for a Conditional Letter of Map Revision (CLOMR), and receives approval

from the Federal Insurance Administrator to revise the FIRM and FIS in accordance with KPB 21.06.040(C)(5)(b).

...

**SECTION 6.** That KPB 21.06.060 is hereby amended as follows:

**21.06.060. – [EXCEPTIONS] Variance procedure.**

The variance criteria set forth in this section are based on the general principle of zoning law that variances pertain to a piece of property and are not personal in nature. A variance may be granted for a parcel of property with physical characteristics so unusual that complying with the requirements of this chapter would create an exceptional hardship to the applicant or the surrounding property owners. The characteristics must be unique to the property and not be shared by adjacent parcels. The unique characteristic must pertain to the land itself, not to the structure, its inhabitants or the property owners.

It is the duty of the Kenai Peninsula Borough to help protect its citizens from flooding through regulating development in the Special Flood Hazard Area. This need is so compelling and the implications of the cost of insuring a structure built below the Base Flood Elevation are so serious that variances from the flood elevation or from other requirements in the flood ordinance are quite rare. The long-term goal of preventing and reducing flood loss and damage can only be met if variances are strictly limited. Therefore, the variance guidelines provided in this ordinance are more detailed and contain multiple provisions that must be met before a variance can be properly granted. The criteria are designed to screen out those situations in which alternatives other than a variance are more appropriate.

*A. Appeal Board.*

1. The Kenai Peninsula Borough Planning Commission shall hear and decide appeals and requests for [EXCEPTIONS] variances from the requirements of this chapter.

...

5. Upon consideration of the factors of subsection (A)(4) of this section and the purposes of this chapter, the planning commission may attach such conditions to the granting of [EXCEPTIONS] variances as it deems necessary to further the purposes of this chapter,
6. The planning department shall maintain the records of all appeal actions and report any [EXCEPTIONS] variances to the Federal Insurance Administration upon request.

*B. Conditions for [EXCEPTIONS] Variances.*

1. Generally, the only condition under which a[N EXCEPTION] variance from the elevation standard may be issued is for new construction and substantial improvements to be erected on a lot of ½ acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, providing subparagraphs (a) through (k) of subsection (A)(4) of this section have been fully considered. As the lot size increases the technical justification required for issuing the [EXCEPTION] variance increases.
2. [EXCEPTIONS] Variances may be issued for the reconstruction, rehabilitation, or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places, without regard to the procedures set forth in this section.
3. [EXCEPTIONS] Variances shall not be issued within a designated floodway if any increase in flood levels during the base flood discharge would result.
4. [EXCEPTIONS] Variances shall only be issued upon a determination that the [EXCEPTION] variance is the minimum necessary, considering the flood hazard, to afford relief.
5. [EXCEPTIONS] Variances shall only be issued upon:
  - ...
  - b. A determination that failure to grant the [exception] variance would result in exceptional hardship to the applicant;
  - c. A determination that the granting of a [exception] variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public or conflict with existing local laws or ordinances.
6. [EXCEPTIONS] Variances, or variances as interpreted in the National Flood Insurance Program are based on the general zoning law principle that they pertain to a physical piece of property; they are not personal in nature and do not pertain to the structure, its inhabitants, or to economic or financial circumstances. They primarily address small lots in densely populated residential neighborhoods. As such, [EXCEPTIONS] variances from the flood elevations should be quite rare.
7. [EXCEPTIONS] Variances may be issued for nonresidential buildings in very limited circumstances to allow a lesser degree of floodproofing than watertight or dry-flood proofing where it can be determined that such action will have low damage potential, complies with all other [EXCEPTION]



variance criteria except subsection (B)(1) of this section, and otherwise complies with KPB 21.06.060(A) and (B).

8. Any applicant to whom a[N EXCEPTION] variance is granted shall be given written notice that the structure will be permitted to be built with a lowest floor elevation below the base flood elevation and that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation.

**SECTION 7.** That KPB 21.06.070 is hereby amended as follows:

**21.06.070. – Definitions.**

...

“Anchored” or “anchoring” means a system of ties, anchors and anchoring equipment that will withstand flood and wind forces. The system must work in saturated soil conditions.

“Alteration of watercourse” means any action that will change the location of the channel occupied by water within the banks of any portion of a riverine waterbody.

...

“Coastal high hazard area” means [THE AREA SUBJECT TO HIGH VELOCITY WATERS DUE TO WIND, TIDAL ACTION, STORM, TSUNAMI OR ANY SIMILAR FORCE, ACTING SINGLY OR IN ANY COMBINATION RESULTING IN A WAVE OR SERIES OF WAVES OF SUFFICIENT MAGNITUDE, VELOCITY OR FREQUENCY TO ENDANGER PROPERTY AND LIVES] an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources. The area is designated on the FIRM as Zone V1-30, VE, or V.

...

[“EXCEPTION” MEANS A GRANT OF RELIEF FROM THE REQUIREMENTS OF THIS CHAPTER, WHICH PERMITS CONSTRUCTION IN A MANNER THAT WOULD OTHERWISE BE PROHIBITED BY THIS CHAPTER.]

[“FEDERAL EMERGENCY MANAGEMENT AGENCY” IS THE AGENCY RESPONSIBLE FOR ADMINISTRATION OF THE NATIONAL FLOOD INSURANCE PROGRAM.

“FLOOD HAZARD AREA” MEANS THE LAND AREA COVERED BY THE FLOOD, HAVING A 1 PERCENT CHANCE OF OCCURRING IN ANY GIVEN YEAR. SEE ALSO “100-YEAR OR 1-PERCENT ANNUAL EXCEEDANCE PROBABILITY FLOOD.”]

“Flood elevation study” means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards. Also known as a Flood Insurance Study (FIS).

...

“Functionally dependent use” means a use which cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities, port facilities that are necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities, and does not include long term storage or related manufacturing facilities.

“Historic structure” means any structure that is:

1. Listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;
2. Certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;
3. Individually listed on a state inventory of historic places in states with historic preservation programs which have been approved by the Secretary of Interior;  
or
4. Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:
  - a. By an approved state program as determined by the Secretary of the Interior  
or
  - b. Directly by the Secretary of the Interior in states without approved programs.

...

“Recreational vehicle” means a vehicle that is:

1. Built on a single chassis;
2. 400 square feet or less when measured at the largest horizontal projection;
3. Designed to be self-propelled or permanently towable by a light duty truck; and

4. Designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use.

...

"Special Flood Hazard Area (SFHA)" means Flood hazard areas identified on the Flood Insurance Rate Map [AREAS OF HIGH RISK AS DEFINED IN THE CURRENT EFFECTIVE FIRM AND DFIRM] panels for the Kenai Peninsula Borough. These are the areas that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year. See also "100-year or 1-percent annual exceedance probability flood.

...

"Variance" means a grant of relief from the requirements of this chapter, which permits construction in a manner that would otherwise be prohibited by this chapter.

**SECTION 8.** That KP.B 21.50.055 is hereby amended as follows:

**21.50.055. – Fines.**

...

Code Chapter & Section	Violation Description	Daily Fine
...		
KPB 21.06.030([D]) <u>E</u>	Structure or activity prohibited by KP.B 21.06	\$300.00
[KP.B 21.06.045]	[FAILURE TO OBTAIN A DEVELOPMENT PERMIT/VIOLATION OF SMFDA PERMIT CONDITIONS/FLOODPLAIN MANAGEMENT]	[\$300.00]

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS \* DAY OF \* 2023.**

\_\_\_\_\_  
Brent Johnson, Assembly President

ATTEST:

\_\_\_\_\_  
Michele Turner, CMC, Borough Clerk

# **DESK PACKET**

**(MATERIALS SUBMITTED AFTER MEETING PACKET PUBLICATION)**

## **E. NEW BUSINESS**

### **4. Ordinance 2023-23**



Introduced by:	Mayor
Date:	09/19/23
Hearing:	10/24/23
Action:	
Vote:	

**KENAI PENINSULA BOROUGH  
ORDINANCE 2023-23**

**AN ORDINANCE AMENDING KPB 20.30.280 AND KPB 21.06 REGARDING  
FLOODPLAIN MANAGEMENT TO ADOPT REQUIRED CHANGES TO REMAIN  
COMPLIANT WITH THE NATIONAL FLOOD INSURANCE PROGRAM**

**WHEREAS,** the Kenai Peninsula Borough has had an accredited floodplain management program under the National Flood Insurance Program (“NFIP”) since 1988, which makes federal disaster insurance, federal hazard mitigation grants, federally subsidized mortgages, and affordable individual homeowner flood insurance available within the Borough; and

**WHEREAS,** continued participation in the NFIP is predicated upon continued good standing in the NFIP; and

**WHEREAS,** as part of the 2022 Federal Emergency Management Agency (“FEMA”) Community Assistance Visit, FEMA officials reviewed KPB Chapter 21.06 to assess compliance with federal requirements and to provide required and recommended changes to the Chapter; and

**WHEREAS,** the proposed amendments increase flood safety, bring code pertaining to FEMA minimum regulations into compliance with federal standards and provide clarifications; and

**WHEREAS,** the proposed amendments address other portions of Borough Code for clerical purposes; and

**WHEREAS,** at the meeting of \_\_\_\_\_, the Seward-Bear Creek Flood Service Area Board recommended \_\_\_\_\_; and

**WHEREAS,** at the meeting of \_\_\_\_\_, the Kenai Peninsula Borough Planning Commission recommended \_\_\_\_\_; and

**WHEREAS,** the Borough’s best interest will be served by maintaining its good standing in the NFIP by amending its floodplain management ordinance.

**NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:**

**SECTION 1.** That KPB 20.30.280 is hereby amended as follows:

**20.30.280. – Floodplain requirements.**

- A. All subdivision plats which are within areas where the floodplain has been identified by the Federal Emergency Management Agency (FEMA), and which involve 50 lots or five acres whichever is lesser, shall include the base flood elevation source. If the base flood elevation is not provided from another authoritative source, it must be generated at the responsibility of the developer and noted on the final plat.
- B. Any area of the subdivision within the regulatory floodplain, floodway or Seward Mapped Flood Data Area (SMFDA) is to be shown and labeled on the plat.

...

- D. All subdivisions or replats within the Flood Insurance Rate Map (FIRM) area or SMFDA, as amended, as defined by KPB [21.06.020] 21.06.070, shall contain the following note:

...

- E. All subdivisions or replats that include any portion of the mapped floodway shall contain the following note:

**FLOODWAY NOTICE:**

Portions of this subdivision are within the floodway. Pursuant to KPB Chapter 21.06, all development (including fill) in the floodway is prohibited unless certification by an engineer [OR ARCHITECT] is provided demonstrating that encroachments shall not result in any increases in flood levels during the occurrence of the base flood discharge.

- [F] EACH PLAT WITHIN A CITY WHICH HAS MET THE REQUIREMENTS OF THIS SECTION SHALL CONTAIN THE FOLLOWING STATEMENT: "THE FIRST FINISHED AND HABITABLE FLOOR OF A BUILDING CONSTRUCTED WITHIN A FLOODPLAIN SHALL BE BUILT AT OR ABOVE THE 100-YEAR FLOOD LEVEL."

- [G]E. This section applies to all cities which adopt a resolution requesting participation in the FEMA floodplain program and which are subsequently recognized by the state as participants.

[H]G. A city may adopt an ordinance as part of its building code with greater restrictions than those set forth in KPB 20.30.280(A). A note shall be placed on the plat to indicate that the developer is responsible for contacting the city to determine the restrictions prior to any development.

**SECTION 2.** That KPB 21.06.010 is hereby amended as follows:

**21.06.010. – [FINDINGS AND STATEMENT] Statutory authorization, findings, and statement.**

The assembly adopts the following findings and statements establishing a floodplain management chapter:

A. Statutory Authorization. The State of Alaska has delegated the responsibility to local governmental units to adopt floodplain management regulations designed to promote the public health, safety, and general welfare of its citizenry.

[A.]B. Findings. The flood hazard areas of Kenai Peninsula Borough are subject to periodic inundation which results in loss of life and property, health, and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.

C. These flood losses may be caused by the cumulative effect of obstructions in flood hazard areas, which increase flood heights and velocities and, when inadequately anchored, cause damage in other areas. Uses that are inadequately flood proofed, elevated, or otherwise protected from flood damage, also contribute to flood loss.

[B.]D. Statement of Purpose. It is the purpose of this chapter to promote the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions in specific areas by provisions designed:

...

7. To ensure that potential buyers are notified that property is in an area of special flood hazard; [AND]

8. To ensure that those who occupy the areas of special flood hazard assume responsibility for their actions[.]; and

9. To allow participation in and, to maintain eligibility for, flood insurance and disaster relief.

[C.]E. Objectives. In order to accomplish its purposes, this chapter includes methods and provisions for:

...

**SECTION 3.** That KPB 21.06.030 is hereby amended as follows:

**21.06.030. – General provisions.**

...

C. *Basis for Establishing Flood Protection Elevation.* The Flood Protection Elevation (FPE) shall be the applicable elevation as determined by the planning department using the criteria below and will be the elevation to which structures and utilities must be raised as required in the building standards in KPB 21.06.050.

...

E. *Noncompliance—Enforcement and Penalties.* Structures and activities which are not permitted or allowed by this chapter are prohibited. No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this chapter and other applicable regulations. Violation of the provisions of this chapter by failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with conditions) shall be enforced by the remedies set forth in KPB 21.50. Each day a violation continues is a separate violation. Nothing herein contained shall prevent the Kenai Peninsula Borough from taking such other lawful action as is necessary to prevent or remedy any violation.

F. *Conflicts.* Unless otherwise preempted by applicable law, where this chapter and another rule, ordinance, statute, regulation, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restriction will prevail. Notwithstanding, nothing in this chapter may be construed to require the borough to enforce a private covenant or deed restriction.

G. *Interpretation.* In the interpretation and application of this chapter, all provisions must be:

1. Considered as minimum requirements;
2. Liberally construed in favor of the governing body; and,
3. Deemed neither to limit nor repeal any other powers granted under state statutes.



SECTION 4. That KPB 21.06.040 is hereby amended as follows:

**21.06.040. – Administration.**

...

- [1. ELEVATION IN RELATION TO MEAN SEA LEVEL OF THE LOWEST FLOOR (INCLUDING BASEMENT) OF ALL STRUCTURES;
2. ELEVATION IN RELATION TO MEAN SEA LEVEL TO WHICH ANY STRUCTURE HAS BEEN FLOODPROOFED;
3. CERTIFICATION BY A REGISTERED PROFESSIONAL ENGINEER OR ARCHITECT THAT THE FLOODPROOFING METHODS FOR ANY NONRESIDENTIAL STRUCTURE MEET THE FLOODPROOFING CRITERIA IN KPB 21.06.050(B)(2);
4. DESCRIPTION OF THE EXTENT TO WHICH A WATERCOURSE WILL BE ALTERED OR RELOCATED AS A RESULT OF PROPOSED DEVELOPMENT.]

1. For A Zones (A, A1-30, AE, AH, AO).

- a. Proposed elevation in relation to mean sea level of the lowest floor (including basement) of all structures. In Zone AO, elevation of existing highest adjacent grade and proposed elevation of lowest floor of all structures;
- b. Proposed elevation in relation to mean sea level to which any non-residential structure will be floodproofed;
- c. Certification by a registered professional engineer or architect that the floodproofing methods for any non-residential structure meet the floodproofing criteria in KPB 21.06.050(B)(2); and
- d. Description of the extent to which any watercourse will be altered or relocated as a result of proposed development.

2. For V Zones (VE, V1-30 and V).

- a. Proposed elevation in relation to mean sea level of the bottom of the lowest structural member of the lowest floor (excluding pilings and columns) of all structures, and whether such structures contain a basement;
- b. Base Flood Elevation data for subdivision proposals or other development, including manufactured home parks or subdivisions, greater than 50 lots or 5 acres, whichever is the lesser.

...

4. *Information to be Obtained and Maintained.*

Obtain and maintain the following for public inspection and make available as needed:

- [A. WHERE BASE FLOOD ELEVATION DATA IS PROVIDED THROUGH THE FLOOD INSURANCE STUDY OR REQUIRED IN SUBSECTION (C)(2) OF THIS SECTION, RECORD THE ACTUAL ELEVATION AS SUBMITTED (IN RELATION TO MEAN SEA LEVEL) OF THE LOWEST FLOOR (INCLUDING BASEMENT) OF ALL NEW OR SUBSTANTIALLY IMPROVED STRUCTURES, AND WHETHER OR NOT THE STRUCTURE CONTAINS A BASEMENT;
- B. FOR ALL NEW OR SUBSTANTIALLY IMPROVED FLOODPROOFED STRUCTURES:
  - I. RECORD THE ACTUAL ELEVATION AS SUBMITTED (IN RELATION TO MEAN SEA LEVEL), AND
  - II. MAINTAIN THE FLOODPROOFING CERTIFICATIONS REQUIRED IN KPB 21.06.040(A)(3);
- C. MAINTAIN FOR PUBLIC INSPECTION ALL RECORDS PERTAINING TO THE PROVISIONS OF THIS CHAPTER IN PERPETUITY.]
- a. Certification required by KPB 21.06.050(B)(1) and KPB 21.06.050(A)(2) (lowest floor elevations for all structures, bottom of the lowest horizontal structural member (if applicable), and service facilities/mechanical equipment);
- b. Certification required by KPB 21.06.050(B)(2) (lowest floor elevations or floodproofing of non-residential structures and service facilities/mechanical equipment);
- c. Certification required by KPB 21.06.050(B)(1)(b) (engineered flood openings);
- d. Certification required by KPB 21.06.050(C) (floodway encroachments);
- e. Records of all variance actions, including justification for their issuance; and
- f. Improvement and damage calculations.

[5. *ALTERATION OF WATERCOURSES.*

- A. NOTIFY ADJACENT COMMUNITIES AND THE DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS PRIOR TO ANY ALTERATION OR RELOCATION OF A WATERCOURSE, AND SUBMIT EVIDENCE OF SUCH NOTIFICATION TO THE FEDERAL INSURANCE ADMINISTRATION.
- B. REQUIRE THAT MAINTENANCE IS PROVIDED WITHIN THE ALTERED OR RELOCATED PORTION OF SAID WATERCOURSE SO THAT THE FLOOD-CARRYING CAPACITY IS NOT DIMINISHED.]

5. Notification to Other Entities.

- a. Whenever a watercourse is to be altered or relocated, notify adjacent communities and the State Coordinating Office prior to such alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administrator through appropriate notification means, and assure that the flood carrying capacity of the altered or relocated portion of said watercourse is maintained.
- b. Base Flood Elevations may increase or decrease resulting from physical changes affecting flooding conditions. As soon as practicable, but not later than six months after the date such information becomes available, the Floodplain Administrator must notify the Federal Insurance Administrator of the changes by submitting technical or scientific data in accordance with Volume 44 Code of Federal Regulations Section 65.3, to ensure that, upon confirmation of those physical changes affecting flooding conditions, risk premium rates and floodplain management requirements will be based upon current data.
- c. Notify the Federal Insurance Administrator in writing of acquisition by means of annexation, incorporation or otherwise, of additional areas of jurisdiction.

6. Remedial Actions. The Kenai Peninsula Borough must take actions on violations of this chapter pursuant to KPB 21.06.030(E) herein.

[6.]7. Fee Required. The planning department shall charge fees for permits and [EXCEPTIONS] variances. Fees shall be the amount listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees to be paid by the applicant at the time that the floodplain development permit application is submitted.

**SECTION 5.** That KPB 21.06.050 is hereby amended as follows:

**21.06.050. – Standards.**

- A. *General Standards.* In all flood hazard areas, the following standards are required:

1. Alteration of Water Courses.

- a. The flood-carrying capacity within the altered or relocated portion of said watercourse must be maintained. Maintenance must be provided within the altered or relocated portion of said watercourse to ensure that the flood-carrying capacity is not diminished.

[1.]2. Anchoring.

- a. All new construction and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy.

...

3. Storage of Materials and Equipment

- a. The storage or processing of materials that could be injurious to human, animal, or plant life if released due to damage from flooding is prohibited in special flood hazard areas.
- b. Storage of other material or equipment may be allowed if not subject to damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

[2.]4. Construction Materials and Methods.

...

[3.]5. Utilities.

...

[4.]6. Subdivision Proposals.

...

[5.]7. Review of Development Permits.

...

- B. *Specific Standards.* In all flood hazard areas, as set forth in KPB 21.06.030(B), the following provisions are required:

1. *Residential Construction.*

- a. New construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated to or above the Flood Protection Elevation.



- b. Fully enclosed areas below the lowest floor, including crawlspaces, basements, and skirting, that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect or must meet or exceed the following minimum criteria:
- i. A minimum of two openings located on separate walls and having a total net area of not less than 1 square inch for every square foot of enclosed space subject to flooding shall be provided.
  - ii. The bottom of all openings shall be no higher than 1 foot above grade.
  - iii. Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.
  - iv. Enclosed areas below the Flood Protection Elevation must be unfinished and usable only for parking, access or storage of materials easily moved during a flood event.
  - v. Before a final floodplain development permit is issued by the planning department for a residential structure with enclosed areas below the [BASE FLOOD ELEVATION] Flood Protection Elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall remain in compliance with KPB 21.06.050(B)(1)(b)(iv). The non-conversion agreement shall be recorded, [BY THE KENAI PENINSULA BOROUGH] placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

...

2. *Nonresidential Construction.* [NEW CONSTRUCTION AND SUBSTANTIAL IMPROVEMENT OF ANY COMMERCIAL, INDUSTRIAL OR OTHER NONRESIDENTIAL STRUCTURE SHALL EITHER HAVE THE LOWEST FLOOR, INCLUDING BASEMENT, ELEVATED TO THE LEVEL OF THE FLOOD PROTECTION ELEVATION; OR, TOGETHER WITH ATTENDANT UTILITY AND SANITARY FACILITIES, SHALL]:

- a. New construction and substantial improvement of any commercial, industrial or other nonresidential structure, together with attendant utility and sanitary facilities, must have its lowest floor elevated to the Flood Protection Elevation to meet the standards in KPB 21.060.050(B)(1)(b); or
- b. Nonresidential structures that are not elevated must:
- [A.] i. Be floodproofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water; and
- [B.] ii. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and
- [C.] iii. Be certified by a registered professional engineer or architect that the standards of this subsection are satisfied. Such certifications shall be provided to the official as set forth in KPB 21.06.040(C)(4)(b); and
- iv. Before a final floodplain development permit is issued by the planning department for a nonresidential structure with enclosed areas below the flood protection elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall not be converted to a residential space. The non-conversion agreement shall be recorded, placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.
- [D. NONRESIDENTIAL STRUCTURES THAT ARE ELEVATED, NOT FLOODPROOFED, MUST MEET THE SAME STANDARD FOR SPACE BELOW THE LOWEST FLOOR AS DESCRIBED IN KPB 21.06.050(B)(1)(B).]
- [E]c. Applicants floodproofing nonresidential buildings shall be notified that flood insurance premiums will be based on rates that are 1 foot below the floodproofed level (e.g. a building constructed to the base flood level will be rated as 1 foot below that level).
- [F. FOR ZONES AH, AO, AND AREAS OF THE SMFDA, DRAINAGE PATHS ARE REQUIRED AROUND STRUCTURES ON SLOPES TO DRAIN FLOODWATERS AWAY FROM PROPOSED STRUCTURES.]

3. Appurtenant Structures (Detached Garages and Storage Structures). Appurtenant structures located in A Zones (A, AE, A1-30, AH, AO) used solely for parking of vehicles or storage may be constructed such that the floor is below the Flood Protection Elevation, provided the structure is designed and constructed in accordance with the following requirements:

- a. Use of the appurtenant structure must be limited to parking of vehicles or storage;
- b. The portions of the appurtenant structure located below the Flood Protection Elevation must be built using flood resistant materials;
- c. The appurtenant structure must be adequately anchored to prevent flotation, collapse and lateral movement;
- d. Any machinery or equipment servicing the appurtenant structure must be elevated or floodproofed to or above the Flood Protection Elevation;
- e. The appurtenant structure must comply with floodway encroachment provisions in KPB 21.06.050(C); and
- f. The appurtenant structure must be designed to allow for the automatic entry and exit of flood waters in accordance with KPB 21.06.050(B)(1)(b). Detached garages, storage structures and other appurtenant structures not meeting the above standards must be constructed in accordance with all applicable standards in KPB 21.06.050(B)(2). Upon completion of the structure, certification that the requirements of this section have been satisfied shall be provided to the Floodplain Administrator for verification.
- g. Before a final floodplain development permit is issued by the planning department for an appurtenant structure with enclosed areas below the flood protection elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall not be converted to a residential space. The non-conversion agreement shall be recorded, placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

[3.]4. *Manufactured Homes.* All manufactured homes to be placed or substantially improved within Zones A1-30, AH, and AE shall be elevated on a permanent foundation such that the lowest floor of the manufactured home is at or above the base flood elevation and be securely anchored to an adequately anchored foundation system in accordance with the provisions of subsection (A)[(1)](2) of this section.

[4.]5. *Recreational vehicles.*

...

[5.]6. *Before regulatory floodway.*

...

[6.]7. *Fuel storage tanks.*

...

[7.]8. *Logging or clearing.*

...

9. AH, AO, and SMFDA. Drainage paths are required around structures on slopes to drain floodwaters away from proposed structures.

C. *Floodways.*

...

1. All encroachments, including fill, new construction, substantial improvements, and other development are prohibited unless certification by a registered professional engineer [OR ARCHITECT] is provided demonstrating that encroachments shall not result in any increase in flood levels during the occurrence of the base flood discharge.

...

3. Encroachments within the adopted regulatory floodway that would result in an increase in base flood elevations may be permitted, provided that the Kenai Peninsula Borough first applies for and fulfills the requirements for a Conditional Letter of Map Revision (CLOMR), and receives approval from the Federal Insurance Administrator to revise the FIRM and FIS in accordance with KPB 21.06.040(C)(5)(b).

...

**SECTION 6.** That KPB 21.06.060 is hereby amended as follows:

**21.06.060. – [EXCEPTIONS] Variance procedure.**



The variance criteria set forth in this section are based on the general principle of zoning law that variances pertain to a piece of property and are not personal in nature. A variance may be granted for a parcel of property with physical characteristics so unusual that complying with the requirements of this chapter would create an exceptional hardship to the applicant or the surrounding property owners. The characteristics must be unique to the property and not be shared by adjacent parcels. The unique characteristic must pertain to the land itself, not to the structure, its inhabitants or the property owners.

It is the duty of the Kenai Peninsula Borough to help protect its citizens from flooding through regulating development in the Special Flood Hazard Area. This need is so compelling and the implications of the cost of insuring a structure built below the Base Flood Elevation are so serious that variances from the flood elevation or from other requirements in the flood ordinance are quite rare. The long-term goal of preventing and reducing flood loss and damage can only be met if variances are strictly limited. Therefore, the variance guidelines provided in this ordinance are more detailed and contain multiple provisions that must be met before a variance can be properly granted. The criteria are designed to screen out those situations in which alternatives other than a variance are more appropriate.

*A. Appeal Board.*

1. The Kenai Peninsula Borough Planning Commission shall hear and decide appeals and requests for [EXCEPTIONS] variances from the requirements of this chapter.

...

5. Upon consideration of the factors of subsection (A)(4) of this section and the purposes of this chapter, the planning commission may attach such conditions to the granting of [EXCEPTIONS] variances as it deems necessary to further the purposes of this chapter,
6. The planning department shall maintain the records of all appeal actions and report any [EXCEPTIONS] variances to the Federal Insurance Administration upon request.

*B. Conditions for [EXCEPTIONS] Variances.*

1. Generally, the only condition under which a[N EXCEPTION] variance from the elevation standard may be issued is for new construction and substantial improvements to be erected on a lot of ½ acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, providing subparagraphs (a) through (k) of subsection (A)(4) of this section have been fully considered. As the lot size increases the technical justification required for issuing the [EXCEPTION] variance increases.
2. [EXCEPTIONS] Variances may be issued for the reconstruction, rehabilitation, or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places, without regard to the procedures set forth in this section.
3. [EXCEPTIONS] Variances shall not be issued within a designated floodway if any increase in flood levels during the base flood discharge would result.
4. [EXCEPTIONS] Variances shall only be issued upon a determination that the [EXCEPTION] variance is the minimum necessary, considering the flood hazard, to afford relief.
5. [EXCEPTIONS] Variances shall only be issued upon:  
...
  - b. A determination that failure to grant the [exception] variance would result in exceptional hardship to the applicant;
  - c. A determination that the granting of a [exception] variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public or conflict with existing local laws or ordinances.
6. [EXCEPTIONS] Variances, or variances as interpreted in the National Flood Insurance Program are based on the general zoning law principle that they pertain to a physical piece of property; they are not personal in nature and do not pertain to the structure, its inhabitants, or to economic or financial circumstances. They primarily address small lots in densely populated residential neighborhoods. As such, [EXCEPTIONS] variances from the flood elevations should be quite rare.

7. [EXCEPTIONS] Variances may be issued for nonresidential buildings in very limited circumstances to allow a lesser degree of floodproofing than watertight or dry-flood proofing where it can be determined that such action will have low damage potential, complies with all other [EXCEPTION] variance criteria except subsection (B)(1) of this section, and otherwise complies with KPB 21.06.060(A) and (B).
8. Any applicant to whom a[N EXCEPTION] variance is granted shall be given written notice that the structure will be permitted to be built with a lowest floor elevation below the base flood elevation and that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation.

**SECTION 7.** That KPB 21.06.070 is hereby amended as follows:

**21.06.070. – Definitions.**

...

“Anchored” or “anchoring” means a system of ties, anchors and anchoring equipment that will withstand flood and wind forces. The system must work in saturated soil conditions.

“Alteration of watercourse” means any action that will change the location of the channel occupied by water within the banks of any portion of a riverine waterbody.

...

“Coastal high hazard area” means [THE AREA SUBJECT TO HIGH VELOCITY WATERS DUE TO WIND, TIDAL ACTION, STORM, TSUNAMI OR ANY SIMILAR FORCE, ACTING SINGLY OR IN ANY COMBINATION RESULTING IN A WAVE OR SERIES OF WAVES OF SUFFICIENT MAGNITUDE, VELOCITY OR FREQUENCY TO ENDANGER PROPERTY AND LIVES] an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources. The area is designated on the FIRM as Zone V1-30, VE, or V.

...

[“EXCEPTION” MEANS A GRANT OF RELIEF FROM THE REQUIREMENTS OF THIS CHAPTER, WHICH PERMITS CONSTRUCTION IN A MANNER THAT WOULD OTHERWISE BE PROHIBITED BY THIS CHAPTER.]

[“FEDERAL EMERGENCY MANAGEMENT AGENCY” IS THE AGENCY RESPONSIBLE FOR ADMINISTRATION OF THE NATIONAL FLOOD INSURANCE PROGRAM.

“FLOOD HAZARD AREA” MEANS THE LAND AREA COVERED BY THE FLOOD, HAVING A 1 PERCENT CHANCE OF OCCURRING IN ANY GIVEN YEAR. SEE ALSO “100-YEAR OR 1-PERCENT ANNUAL EXCEEDANCE PROBABILITY FLOOD.”]

“Flood elevation study” means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards. Also known as a Flood Insurance Study (FIS).

...

“Functionally dependent use” means a use which cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities, port facilities that are necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities, and does not include long term storage or related manufacturing facilities.

“Historic structure” means any structure that is:

1. Listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;
2. Certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;
3. Individually listed on a state inventory of historic places in states with historic preservation programs which have been approved by the Secretary of Interior; or
4. Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:
  - a. By an approved state program as determined by the Secretary of the Interior or
  - b. Directly by the Secretary of the Interior in states without approved programs.

...

“Recreational vehicle” means a vehicle that is:



1. Built on a single chassis;
2. 400 square feet or less when measured at the largest horizontal projection;
3. Designed to be self-propelled or permanently towable by a light duty truck; and
4. Designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use.

...

"Special Flood Hazard Area (SFHA)" means Flood hazard areas identified on the Flood Insurance Rate Map [AREAS OF HIGH RISK AS DEFINED IN THE CURRENT EFFECTIVE FIRM AND DFIRM] panels for the Kenai Peninsula Borough. These are the areas that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year. See also "100-year or 1-percent annual exceedance probability flood.

...

"Variance" means a grant of relief from the requirements of this chapter, which permits construction in a manner that would otherwise be prohibited by this chapter.

**SECTION 8.** That KPB 21.50.055 is hereby amended as follows:

**21.50.055. – Fines.**

...

Code Chapter & Section	Violation Description	Daily Fine
...		
KPB 21.06.030([D]) <u>E</u>	Structure or activity prohibited by KPB 21.06	\$300.00
[KPB 21.06.045]	[FAILURE TO OBTAIN A DEVELOPMENT PERMIT/VIOLATION OF SMFDA PERMIT CONDITIONS/FLOODPLAIN MANAGEMENT]	[\$300.00]

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS \* DAY  
OF \* 2023.**

---

Brent Johnson, Assembly President

ATTEST:

---

Michele Turner, CMC, Borough Clerk

Yes:

No:

Absent:

**KENAI PENINSULA BOROUGH**  
**ORDINANCE 2023-23**  
**AN ORDINANCE AMENDING KPB 20.30.280 AND KPB 21.06 REGARDING**  
**FLOODPLAIN MANAGEMENT TO ADOPT REQUIRED CHANGES TO REMAIN**  
**COMPLIANT WITH THE NATIONAL FLOOD INSURANCE PROGRAM**  
**AMENDMENT GUIDE**

**SECTION 1.** That KPB 20.30.280 is hereby amended as follows:

**20.30.280. – Floodplain requirements.**

- A. All subdivision plats which are within areas where the floodplain has been identified by the Federal Emergency Management Agency (FEMA), and which involve 50 lots or five acres whichever is lesser, shall include the base flood elevation source. If the base flood elevation is not provided from another authoritative source, it must be generated at the responsibility of the developer and noted on the final plat.
- B. Any area of the subdivision within the regulatory floodplain, floodway or Seward Mapped Flood Data Area (SMFDA) is to be shown and labeled on the plat.
- ...
- D. All subdivisions or replats within the Flood Insurance Rate Map (FIRM) area or SMFDA, as amended, as defined by KPB [21.06.020] 21.06.070, shall contain the following note:  
...
- E. All subdivisions or replats that include any portion of the mapped floodway shall contain the following note:

**FLOODWAY NOTICE:**

Portions of this subdivision are within the floodway. Pursuant to KPB Chapter 21.06, all development (including fill) in the floodway is prohibited unless certification by an engineer [OR ARCHITECT] is provided demonstrating that encroachments shall not result in any increases in flood levels during the occurrence of the base flood discharge.

[F. EACH PLAT WITHIN A CITY WHICH HAS MET THE REQUIREMENTS OF THIS SECTION SHALL CONTAIN THE FOLLOWING STATEMENT: "THE FIRST FINISHED AND HABITABLE FLOOR OF A BUILDING CONSTRUCTED WITHIN A FLOODPLAIN SHALL BE BUILT AT OR ABOVE THE 100-YEAR FLOOD LEVEL."]

[G]E. This section applies to all cities which adopt a resolution requesting participation in the FEMA floodplain program and which are subsequently recognized by the state as participants.

[H]G. A city may adopt an ordinance as part of its building code with greater restrictions than those set forth in KPB 20.30.280(A). A note shall be placed on the plat to indicate that the developer is responsible for contacting the city to determine the restrictions prior to any development.

**SECTION 2.** That KPB 21.06.010 is hereby amended as follows:



**21.06.010. – [FINDINGS AND STATEMENT] Statutory authorization, findings, and statement.**

The assembly adopts the following findings and statements establishing a floodplain management chapter:

A. Statutory Authorization. The State of Alaska has delegated the responsibility to local governmental units to adopt floodplain management regulations designed to promote the public health, safety, and general welfare of its citizenry.

[A.]B. Findings. The flood hazard areas of Kenai Peninsula Borough are subject to periodic inundation which results in loss of life and property, health, and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.

C. These flood losses may be caused by the cumulative effect of obstructions in flood hazard areas, which increase flood heights and velocities and, when inadequately anchored, cause damage in other areas. Uses that are inadequately flood proofed, elevated, or otherwise protected from flood damage, also contribute to flood loss.

[B.]D. Statement of Purpose. It is the purpose of this chapter to promote the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions in specific areas by provisions designed:

...

7. To ensure that potential buyers are notified that property is in an area of special flood hazard; [AND]

8. To ensure that those who occupy the areas of special flood hazard assume responsibility for their actions[.]; and

9. To allow participation in and, to maintain eligibility for, flood insurance and disaster relief.

[C.]E. Objectives. In order to accomplish its purposes, this chapter includes methods and provisions for:

...

**SECTION 3.** That KPB 21.06.030 is hereby amended as follows:

**21.06.030. – General provisions.**

...

*C. Basis for Establishing Flood Protection Elevation.* The Flood Protection Elevation (FPE) shall be the applicable elevation as determined by the planning department using the criteria below and will be the elevation to which structures

and utilities must be raised as required in the building standards in KP  
21.06.050.

...

- E. *Noncompliance—Enforcement and Penalties*. Structures and activities which are not permitted or allowed by this chapter are prohibited. No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this chapter and other applicable regulations. Violation of the provisions of this chapter by failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with conditions) shall be enforced by the remedies set forth in KP 21.50. Each day a violation continues is a separate violation. Nothing herein contained shall prevent the Kenai Peninsula Borough from taking such other lawful action as is necessary to prevent or remedy any violation.
- F. *Conflicts*. Unless otherwise preempted by applicable law, where this chapter and another rule, ordinance, statute, regulation, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restriction will prevail. Notwithstanding, nothing in this chapter may be construed to require the borough to enforce a private covenant or deed restriction.
- G. *Interpretation*. In the interpretation and application of this chapter, all provisions must be:
  - 1. Considered as minimum requirements;
  - 2. Liberal construed in favor of the governing body; and,
  - 3. Deemed neither to limit nor repeal any other powers granted under state statutes.

**SECTION 4.** That KP 21.06.040 is hereby amended as follows:

**21.06.040. – Administration.**

...

- [1. ELEVATION IN RELATION TO MEAN SEA LEVEL OF THE LOWEST FLOOR (INCLUDING BASEMENT) OF ALL STRUCTURES;
- 2. ELEVATION IN RELATION TO MEAN SEA LEVEL TO WHICH ANY STRUCTURE HAS BEEN FLOODPROOFED;
- 3. CERTIFICATION BY A REGISTERED PROFESSIONAL ENGINEER OR ARCHITECT THAT THE FLOODPROOFING METHODS FOR ANY NONRESIDENTIAL STRUCTURE MEET THE FLOODPROOFING CRITERIA IN KP 21.06.050(B)(2);

4. DESCRIPTION OF THE EXTENT TO WHICH A WATERCOURSE WILL BE ALTERED OR RELOCATED AS A RESULT OF PROPOSED DEVELOPMENT.]

1. For A Zones (A, AI-30, AE, AH, AO).

- a. Proposed elevation in relation to mean sea level of the lowest floor (including basement) of all structures. In Zone AO, elevation of existing highest adjacent grade and proposed elevation of lowest floor of all structures;
- b. Proposed elevation in relation to mean sea level to which any non-residential structure will be floodproofed;
- c. Certification by a registered professional engineer or architect that the floodproofing methods for any non-residential structure meet the floodproofing criteria in KPB 21.06.050(B)(2); and
- d. Description of the extent to which any watercourse will be altered or relocated as a result of proposed development.

2. For V Zones (VE, VI-30 and V).

- a. Proposed elevation in relation to mean sea level of the bottom of the lowest structural member of the lowest floor (excluding pilings and columns) of all structures, and whether such structures contain a basement;
- b. Base Flood Elevation data for subdivision proposals or other development, including manufactured home parks or subdivisions, greater than 50 lots or 5 acres, whichever is the lesser.

...

4. *Information to be Obtained and Maintained.*

Obtain and maintain the following for public inspection and make available as needed:

[A. WHERE BASE FLOOD ELEVATION DATA IS PROVIDED THROUGH THE FLOOD INSURANCE STUDY OR REQUIRED IN SUBSECTION (C)(2) OF THIS SECTION, RECORD THE ACTUAL ELEVATION AS SUBMITTED (IN RELATION TO MEAN SEA LEVEL) OF THE LOWEST FLOOR (INCLUDING BASEMENT) OF ALL NEW OR SUBSTANTIALLY IMPROVED STRUCTURES, AND WHETHER OR NOT THE STRUCTURE CONTAINS A BASEMENT;

B. FOR ALL NEW OR SUBSTANTIALLY IMPROVED FLOODPROOFED STRUCTURES:

- I. RECORD THE ACTUAL ELEVATION AS SUBMITTED (IN RELATION TO MEAN SEA LEVEL), AND
- II. MAINTAIN THE FLOODPROOFING CERTIFICATIONS REQUIRED IN KPB 21.06.040(A)(3);
- C. MAINTAIN FOR PUBLIC INSPECTION ALL RECORDS PERTAINING TO THE PROVISIONS OF THIS CHAPTER IN PERPETUITY.]
- a. Certification required by KPB 21.06.050(B)(1) and KPB 21.06.050(A)(2) (lowest floor elevations for all structures, bottom of the lowest horizontal structural member (if applicable), and service facilities/mechanical equipment);
- b. Certification required by KPB 21.06.050(B)(2) (lowest floor elevations or floodproofing of non-residential structures and service facilities/mechanical equipment);
- c. Certification required by KPB 21.06.050(B)(1)(b) (engineered flood openings);
- d. Certification required by KPB 21.06.050(C) (floodway encroachments);
- e. Records of all variance actions, including justification for their issuance; and
- f. Improvement and damage calculations.

[5. *ALTERATION OF WATERCOURSES.*

- A. NOTIFY ADJACENT COMMUNITIES AND THE DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS PRIOR TO ANY ALTERATION OR RELOCATION OF A WATERCOURSE, AND SUBMIT EVIDENCE OF SUCH NOTIFICATION TO THE FEDERAL INSURANCE ADMINISTRATION.
- B. REQUIRE THAT MAINTENANCE IS PROVIDED WITHIN THE ALTERED OR RELOCATED PORTION OF SAID WATERCOURSE SO THAT THE FLOOD-CARRYING CAPACITY IS NOT DIMINISHED.]

5. *Notification to Other Entities.*

- a. Whenever a watercourse is to be altered or relocated, notify adjacent communities and the State Coordinating Office prior to such alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administrator through appropriate notification



means, and assure that the flood carrying capacity of the altered or relocated portion of said watercourse is maintained.

- b. Base Flood Elevations may increase or decrease resulting from physical changes affecting flooding conditions. As soon as practicable, but not later than six months after the date such information becomes available, the Floodplain Administrator must notify the Federal Insurance Administrator of the changes by submitting technical or scientific data in accordance with Volume 44 Code of Federal Regulations Section 65.3, to ensure that, upon confirmation of those physical changes affecting flooding conditions, risk premium rates and floodplain management requirements will be based upon current data.
- c. Notify the Federal Insurance Administrator in writing of acquisition by means of annexation, incorporation or otherwise, of additional areas of jurisdiction.

6. Remedial Actions. The Kenai Peninsula Borough must take actions on violations of this chapter pursuant to KPB 21.06.030(E) herein.

[6.]7. Fee Required. The planning department shall charge fees for permits and [EXCEPTIONS] variances. Fees shall be the amount listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees to be paid by the applicant at the time that the floodplain development permit application is submitted.

**SECTION 5.** That KPB 21.06.050 is hereby amended as follows:

**21.06.050. – Standards.**

A. *General Standards.* In all flood hazard areas, the following standards are required:

1. Alteration of Water Courses.

- a. The flood-carrying capacity within the altered or relocated portion of said watercourse must be maintained. Maintenance must be provided within the altered or relocated portion of said watercourse to ensure that the flood-carrying capacity is not diminished.

[1.]2. Anchoring.

- a. All new construction and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of

buoyancy.

...

3. Storage of Materials and Equipment

- a. The storage or processing of materials that could be injurious to human, animal, or plant life if released due to damage from flooding is prohibited in special flood hazard areas.
- b. Storage of other material or equipment may be allowed if not subject to damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

[2.]4. Construction Materials and Methods.

...

[3.]5. Utilities.

...

[4.]6. Subdivision Proposals.

...

[5.]7. Review of Development Permits.

...

B. *Specific Standards.* In all flood hazard areas, as set forth in KPB 21.06.030(B), the following provisions are required:

1. *Residential Construction.*

- a. New construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated to or above the Flood Protection Elevation.
- b. Fully enclosed areas below the lowest floor, including crawlspaces, basements, and skirting, that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect or must meet or exceed the following minimum criteria:
  - i. A minimum of two openings located on separate walls and having a total net area of not less than 1 square inch for every square foot of enclosed space subject to flooding shall be provided.
  - ii. The bottom of all openings shall be no higher than 1 foot above grade.

- iii. Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.
- iv. Enclosed areas below the Flood Protection Elevation must be unfinished and usable only for parking, access or storage of materials easily moved during a flood event.
- v. Before a final floodplain development permit is issued by the planning department for a residential structure with enclosed areas below the [BASE FLOOD ELEVATION] Flood Protection Elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall remain in compliance with KPB 21.06.050(B)(1)(b)(iv). The non-conversion agreement shall be recorded, [BY THE KENAI PENINSULA BOROUGH] placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

...

2. *Nonresidential Construction.* [NEW CONSTRUCTION AND SUBSTANTIAL IMPROVEMENT OF ANY COMMERCIAL, INDUSTRIAL OR OTHER NONRESIDENTIAL STRUCTURE SHALL EITHER HAVE THE LOWEST FLOOR, INCLUDING BASEMENT, ELEVATED TO THE LEVEL OF THE FLOOD PROTECTION ELEVATION; OR, TOGETHER WITH ATTENDANT UTILITY AND SANITARY FACILITIES, SHALL]:

- a. New construction and substantial improvement of any commercial, industrial or other nonresidential structure, together with attendant utility and sanitary facilities, must have its lowest floor elevated to the Flood Protection Elevation to meet the standards in KPB 21.060.050(B)(1)(b); or

- b. Nonresidential structures that are not elevated must:

[A.] i. Be floodproofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water; and

[B.] ii. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and

[C.] iii. Be certified by a registered professional engineer or architect that the standards of this subsection are satisfied. Such certifications shall be provided to the official as set forth in KPB 21.06.040(C)(4)(b); and

iv. Before a final floodplain development permit is issued by the planning department for a nonresidential structure with enclosed areas below the flood protection elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall not be converted to a residential space. The non-conversion agreement shall be recorded, placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

[D. NONRESIDENTIAL STRUCTURES THAT ARE ELEVATED, NOT FLOODPROOFED, MUST MEET THE SAME STANDARD FOR SPACE BELOW THE LOWEST FLOOR AS DESCRIBED IN KPB 21.06.050(B)(1)(B).]

[E]c. Applicants floodproofing nonresidential buildings shall be notified that flood insurance premiums will be based on rates that are 1 foot below the floodproofed level (e.g. a building constructed to the base flood level will be rated as 1 foot below that level).

[F. FOR ZONES AH, AO, AND AREAS OF THE SMFDA, DRAINAGE PATHS ARE REQUIRED AROUND STRUCTURES ON SLOPES TO DRAIN FLOODWATERS AWAY FROM PROPOSED STRUCTURES.]

3. Appurtenant Structures (Detached Garages and Storage Structures). Appurtenant structures located in A Zones (A, AE, A1-30, AH, AO) used solely for parking of vehicles or storage may be constructed such that the floor is below the Flood Protection Elevation, provided the structure is designed and constructed in accordance with the following requirements:

- a. Use of the appurtenant structure must be limited to parking of vehicles or storage;
- b. The portions of the appurtenant structure located below the Flood Protection Elevation must be built using flood resistant materials;
- c. The appurtenant structure must be adequately anchored to prevent flotation, collapse and lateral movement;
- d. Any machinery or equipment servicing the appurtenant structure must be elevated or floodproofed to or above the Flood Protection Elevation;
- e. The appurtenant structure must comply with floodway encroachment provisions in KPB 21.06.050(C); and
- f. The appurtenant structure must be designed to allow for the automatic entry

and exit of flood waters in accordance with KPB 21.06.050(B)(1)(b). Detached garages, storage structures and other appurtenant structures not meeting the above standards must be constructed in accordance with all applicable standards in KPB 21.06.050(B)(2). Upon completion of the structure, certification that the requirements of this section have been satisfied shall be provided to the Floodplain Administrator for verification.

- g. Before a final floodplain development permit is issued by the planning department for an appurtenant structure with enclosed areas below the flood protection elevation, the owners shall sign a non-conversion agreement stating that the enclosed space shall not be converted to a residential space. The non-conversion agreement shall be recorded, placing future buyers of properties on notice of the hazards of enclosed spaces below the Flood Protection Elevation and the requirements to keep the permitted structure compliant with KPB floodplain regulations.

[3.]4. *Manufactured Homes.* All manufactured homes to be placed or substantially improved within Zones A1-30, AH, and AE shall be elevated on a permanent foundation such that the lowest floor of the manufactured home is at or above the base flood elevation and be securely anchored to an adequately anchored foundation system in accordance with the provisions of subsection (A)[(1)](2) of this section.

[4.]5. *Recreational vehicles.*

...

[5.]6. *Before regulatory floodway.*

...

[6.]7. *Fuel storage tanks.*

...

[7.]8. *Logging or clearing.*

...

9. *AH, AO, and SMFDA.* Drainage paths are required around structures on slopes to drain floodwaters away from proposed structures.

C. *Floodways.*

...

1. All encroachments, including fill, new construction, substantial improvements, and other development are prohibited unless certification by a registered professional engineer [OR ARCHITECT] is provided demonstrating that encroachments shall not result in any increase in flood levels during the occurrence of the base flood discharge.



...

3. Encroachments within the adopted regulatory floodway that would result in an increase in base flood elevations may be permitted, provided that the Kenai Peninsula Borough first applies for and fulfills the requirements for a Conditional Letter of Map Revision (CLOMR), and receives approval from the Federal Insurance Administrator to revise the FIRM and FIS in accordance with KPB 21.06.040(C)(5)(b).

...

**SECTION 6.** That KPB 21.06.060 is hereby amended as follows:

**21.06.060. – [EXCEPTIONS] Variance procedure.**

The variance criteria set forth in this section are based on the general principle of zoning law that variances pertain to a piece of property and are not personal in nature. A variance may be granted for a parcel of property with physical characteristics so unusual that complying with the requirements of this chapter would create an exceptional hardship to the applicant or the surrounding property owners. The characteristics must be unique to the property and not be shared by adjacent parcels. The unique characteristic must pertain to the land itself, not to the structure, its inhabitants or the property owners.

It is the duty of the Kenai Peninsula Borough to help protect its citizens from flooding through regulating development in the Special Flood Hazard Area. This need is so compelling and the implications of the cost of insuring a structure built below the Base Flood Elevation are so serious that variances from the flood elevation or from other requirements in the flood ordinance are quite rare. The long-term goal of preventing and reducing flood loss and damage can only be met if variances are strictly limited. Therefore, the variance guidelines provided in this ordinance are more detailed and contain multiple provisions that must be met before a variance can be properly granted. The criteria are designed to screen out those situations in which alternatives other than a variance are more appropriate.

*A. Appeal Board.*

1. The Kenai Peninsula Borough Planning Commission shall hear and decide appeals and requests for [EXCEPTIONS] variances from the requirements of this chapter.

...

5. Upon consideration of the factors of subsection (A)(4) of this section and the purposes of this chapter, the planning commission may attach such conditions to the granting of [EXCEPTIONS] variances as it deems necessary

to further the purposes of this chapter,

6. The planning department shall maintain the records of all appeal actions and report any [EXCEPTIONS] variances to the Federal Insurance Administration upon request.

B. *Conditions for [EXCEPTIONS] Variances.*

1. Generally, the only condition under which a [EXCEPTION] variance from the elevation standard may be issued is for new construction and substantial improvements to be erected on a lot of ½ acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, providing subparagraphs (a) through (k) of subsection (A)(4) of this section have been fully considered. As the lot size increases the technical justification required for issuing the [EXCEPTION] variance increases.
2. [EXCEPTIONS] Variances may be issued for the reconstruction, rehabilitation, or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places, without regard to the procedures set forth in this section.
3. [EXCEPTIONS] Variances shall not be issued within a designated floodway if any increase in flood levels during the base flood discharge would result.
4. [EXCEPTIONS] Variances shall only be issued upon a determination that the [EXCEPTION] variance is the minimum necessary, considering the flood hazard, to afford relief.
5. [EXCEPTIONS] Variances shall only be issued upon:  
...
  - b. A determination that failure to grant the [exception] variance would result in exceptional hardship to the applicant;
  - c. A determination that the granting of a [exception] variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public or conflict with existing local laws or ordinances.
6. [EXCEPTIONS] Variances, or variances as interpreted in the National Flood Insurance Program are based on the general zoning law principle that they pertain to a physical piece of property; they are not personal in nature and do not pertain to the structure, its inhabitants, or to economic or financial circumstances. They primarily address small lots in densely populated

residential neighborhoods. As such, [EXCEPTIONS] variances from the flood elevations should be quite rare.

7. [EXCEPTIONS] Variances may be issued for nonresidential buildings in very limited circumstances to allow a lesser degree of floodproofing than watertight or dry-flood proofing where it can be determined that such action will have low damage potential, complies with all other [EXCEPTION] variance criteria except subsection (B)(1) of this section, and otherwise complies with KPB 21.06.060(A) and (B).
8. Any applicant to whom a [N EXCEPTION] variance is granted shall be given written notice that the structure will be permitted to be built with a lowest floor elevation below the base flood elevation and that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation.

**SECTION 7.** That KPB 21.06.070 is hereby amended as follows:

**21.06.070. – Definitions.**

...

“Anchored” or “anchoring” means a system of ties, anchors and anchoring equipment that will withstand flood and wind forces. The system must work in saturated soil conditions.

“Alteration of watercourse” means any action that will change the location of the channel occupied by water within the banks of any portion of a riverine waterbody.

...

“Coastal high hazard area” means [THE AREA SUBJECT TO HIGH VELOCITY WATERS DUE TO WIND, TIDAL ACTION, STORM, TSUNAMI OR ANY SIMILAR FORCE, ACTING SINGLY OR IN ANY COMBINATION RESULTING IN A WAVE OR SERIES OF WAVES OF SUFFICIENT MAGNITUDE, VELOCITY OR FREQUENCY TO ENDANGER PROPERTY AND LIVES] an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources. The area is designated on the FIRM as Zone V1-30, VE, or V.

...

["EXCEPTION" MEANS A GRANT OF RELIEF FROM THE REQUIREMENTS OF THIS CHAPTER, WHICH PERMITS CONSTRUCTION IN A MANNER THAT WOULD OTHERWISE BE PROHIBITED BY THIS CHAPTER.]

["FEDERAL EMERGENCY MANAGEMENT AGENCY" IS THE AGENCY RESPONSIBLE FOR ADMINISTRATION OF THE NATIONAL FLOOD INSURANCE PROGRAM.

"FLOOD HAZARD AREA" MEANS THE LAND AREA COVERED BY THE FLOOD, HAVING A 1 PERCENT CHANCE OF OCCURRING IN ANY GIVEN YEAR. SEE ALSO "100-YEAR OR 1-PERCENT ANNUAL EXCEEDANCE PROBABILITY FLOOD.]

"Flood elevation study" means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards. Also known as a Flood Insurance Study (FIS).

...

"Functionally dependent use" means a use which cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities, port facilities that are necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities, and does not include long term storage or related manufacturing facilities.

"Historic structure" means any structure that is:

1. Listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;
2. Certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;
3. Individually listed on a state inventory of historic places in states with historic preservation programs which have been approved by the Secretary of Interior; or
4. Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:
  - a. By an approved state program as determined by the Secretary of the Interior or
  - b. Directly by the Secretary of the Interior in states without approved programs.

...

“Recreational vehicle” means a vehicle that is:

1. Built on a single chassis;
2. 400 square feet or less when measured at the largest horizontal projection;
3. Designed to be self-propelled or permanently towable by a light duty truck; and
4. Designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use.

...

“Special Flood Hazard Area (SFHA)” means Flood hazard areas identified on the Flood Insurance Rate Map [AREAS OF HIGH RISK AS DEFINED IN THE CURRENT EFFECTIVE FIRM AND DFIRM] panels for the Kenai Peninsula Borough. These are the areas that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year. See also "100-year or 1-percent annual exceedance probability flood.

...

"Variance" means a grant of relief from the requirements of this chapter, which permits construction in a manner that would otherwise be prohibited by this chapter.

**SECTION 8.** That KPB 21.50.055 is hereby amended as follows:

**21.50.055. – Fines.**

...

Code Chapter & Section	Violation Description	Daily Fine
...		
KPB 21.06.030([D]) <u>E</u>	Structure or activity prohibited by KPB 21.06	\$300.00
<u>[KPB 21.06.045]</u>	<u>[FAILURE TO OBTAIN A DEVELOPMENT PERMIT/VIOLATION OF SMFDA PERMIT CONDITIONS/FLOODPLAIN MANAGEMENT]</u>	<u>[\$300.00]</u>



# **DESK PACKET**

**(MATERIALS SUBMITTED AFTER MEETING PACKET PUBLICATION)**

## **G. OTHER**

### **1. Remand Hearing**

**Building Setback Encroachment; KPB File 2022-121**

**Lot 10, Lake Estates Subdivision, Plat KN 1648**

**Applicants: David & Nancy Whitmore**

**General Location: GL Hollier Street**

**Ridgeway Area**

**(First Heard At October 24, 2022 PC Meeting)**

**MEMORANDUM**

**TO:** Jeremy Brantley, Chair  
Members, Kenai Peninsula Borough Planning Commission

**FROM:** A. Walker Steinhage, Deputy Borough Attorney

**CC:** Robert Ruffner, Director of Planning

**DATE:** September 25, 2023

**SUBJECT:** Setting the Remand Hearing Date in ITMO: Setback Encroachment Permit Along GL Hollier Street

---

**The purpose of this scheduling discussion is for the Planning Commission to set a date to consider this matter consistent with the Office of Administrative Hearings’s (“OAH”) *Decision*. The Commission should not discuss the merits during the scheduling discussion.**

On May 22, 2023, OAH Administrative Law Judge Lisa M. Toussaint issued her *Decision After Reconsideration* in the matter of the Commission’s decision through Commission Resolution 2022-46 to approve Lot 10, Lake Estates Subdivision building setback encroachment permit located on GL Hollier Street, OAH No. 22-0925-MUN (the “OAH *Decision*”). The OAH *Decision* is attached. An excerpt from pages 17 through 20 of the OAH *Decision* is provided to highlight direction and guidance from OAH:

In deciding how to proceed on remand, the Borough is advised that the record developed before the Planning Commission to date is exceedingly sparse as to information relevant to *each* of the three criteria in KPB 20.10.110(E). The Commission should be mindful that issuing a building setback encroachment permit is an exception to the rule prohibiting such encroachments. The Commission may only approve such an encroachment permit if there is substantial evidence showing that each of the three criteria is met – i.e., that the encroaching shop will not interfere with road maintenance, it will not interfere with sight lines or distances, and it will not create a safety hazard. If this threshold is not met as to any of the three criteria, the permit may not be issued. These are affirmative findings, and the applicant has the burden to demonstrate with substantial evidence that they are true. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard. I caution the Commission against trying to do the required analysis under KPB 20.10.110(E) with an extremely thin record.

Further, the Commission should be cognizant that it must apply each of the three criteria in KPB 20.10.110(E). There is evidence that at least some Commissioners may have applied a different standard, rather than

those in KPB 20.10.110(E), in voting to approve the permit. Comments by Commissioner Morgan and Commissioner Gillham during the October 24, 2022 public hearing suggest they may have felt compelled to approve the permit because they believed the Whitmores' contractor was to blame for the shop encroaching into the setback.

...

But whether the contractor or the homeowner failed to determine that the shop would be an encroachment into the building setback is not relevant to the analysis under KPB 20.10.110(E). Thus, it cannot be used as an independent basis for the Commissioners to approve the permit.

I also am concerned that some Commissioners may have misunderstood how to evaluate whether road maintenance will be impacted by the present of the shop on Lot 10. A comment by Commissioner Stutzer suggests that the fact that the road is privately, rather than publicly, maintained may have influenced his vote on the permit[.]

...

But as Judge Sullivan correctly pointed out in the April 18, 2023 decision, it is immaterial for the analysis whether the road is privately or publicly maintained. The Planning Commissioner was required to determine whether the shop will interfere with road maintenance, irrespective of whether the road is publicly or privately maintained.

Finally, a comment by Commissioner Brantley suggests that he voted in favor of the permit because the encroachment was into the building setback, which is the Whitmores' private property, rather than into the public right-of-way.... But as explained previously, whether the encroachment is into the right-of-way is not the end of the analysis. Said another way, just because the property within the setback is the Whitmores' private property, it is not a foregone conclusion that the encroachment will interfere [*sic*] with road maintenance. The shop could interfere with snow removal, for example, if it is necessary for some snow to be placed in the setback to clear GL Hollier Street, and there is insufficient space within the setback to place the snow due to the presence of the shop. In any event, it is the Commissioners' responsibility to evaluate whether the presence of the shop on the setback will interfere with road maintenance, no matter the nature of the encroachment. It may well be the case that Commission [*sic*] will decide it needs more evidence to make an adequate finding in that regard.

....

There is not substantial evidence to support the Commission's conclusions that each of the mandatory standards in KPB 20.10.110(E) has been met. The matter is remanded to the Commission to (1) make additional findings and conclusions supported by substantial evidence in the existing record as to each of the three criteria in KPB 20.10.110(E), or, alternatively,

(2) KPB 20.10.110(E), take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

There are no items on the agenda for the Commission's regularly-scheduled meeting of October 9, 2023. As such, it is recommended the Commission first consider the viability of that date for the remand hearing. The other alternatives are to schedule the remand hearing for another regular meeting or to set a special meeting. The other matter for the Commission to decide is whether to reopen the record for additional evidence and, if so, the deadline for submittal. If the Commission elects to reopen the record, it should also consider and decide whether it desires a new staff report after additional information and investigation in light of OAH's guidance. Deputy Borough Attorney Todd Sherwood will attend to advise and assist the Planning Commission as needed.

Finally, this is a quasi-judicial matter. The Commission is reminded to be aware of and refrain from ex parte communication.

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
BEHALF OF THE KENAI PENINSULA BOROUGH PLANNING COMMISSION**

In the matter of the Kenai Peninsula Borough )  
Planning Commission's decision to conditionally )  
approve Lot 10, Lake Estates Subdivision Building )  
Setback Encroachment Permit, KPB File )  
2022-121; KPB Resolution 2022-46 located )  
on GL Hollier Street, )  
)  
TROY & AUTUMN TAYLOR, )  
)  
Appellants. )  
\_\_\_\_\_)

OAH No. 22-0925-MUN  
Agency No. 2022-06-PCA

**DECISION AFTER RECONSIDERATION**

**I. Introduction**

Applicants David and Nancy Whitmore were granted a building setback permit by the Kenai Peninsula Borough Planning Commission on October 24, 2022. A garage the Whitmores built on their property encroaches into the building setback for the lot. Troy and Autumn Taylor own the residential lot across the street from the encroachment. They appealed the Planning Commission's decision, asserting among other things that KPB's setback requirements were disregarded. The case was fully briefed, and oral argument occurred. Based on that briefing, argument and record, the Planning Commission's decision approving the setback permit is remanded.

**II. Facts and Proceedings**

**A. *The Property at Issue***

The Whitmores own Lot 10, Lake Estates Subdivision, per Plat Number K-1648, Records of the Kenai Recording District, Third Judicial District (KPB Parcel ID 05724008).<sup>1</sup> The appellants, the Taylors, own Lot 9, Lake Estates Subdivision (KPB Parcel ID 05724001).<sup>2</sup> Below is an aerial image of the parties' respective parcels, showing the approximate location of the Whitmore encroachment with red hash marks<sup>3</sup>

<sup>1</sup> Record (R.) 12, 26.

<sup>2</sup> T. 4, R. 26.

<sup>3</sup> R. 16. The image was taken before the Whitmores constructed their encroaching building, and therefore does not depict it. *See also* R. 13.





The information depicted hereon is for a graphical representation only of best available sources. The Kenai Peninsula Borough assumes no responsibility for any errors on this map.

R-16

The parties' respective parcels were created by the Lake Estates Subdivision Plat in 1969. Per that Plat, all lots within the subdivision, including Lots 9 and 10, were required to have 20-foot building setback limits from all interior sides and 25-foot building setback limits from all sides with street frontage. The owners also explicitly "dedicate[d] to public use and to the use of the public utilities the streets shown hereon."<sup>4</sup> The strip of land referred to in this decision as the "GL Hollier Access," situated between the parties' lots, was dedicated as a 30-foot public use street and Ross Drive, the main roadway leading through the subdivision to the parties' parcels, was dedicated as a 60-foot public use street. The Lake Estates Subdivision Plat was ultimately approved by the KPB Planning Commission on September 8, 1969.<sup>5</sup>

<sup>4</sup> R. 19.

<sup>5</sup> R. 19, 20.

The 1969 KPB Planning Commission minutes approving the Plat acknowledged that the 30-foot road dedication to the Holliers' property did not meet the minimum width required for roads within the subdivision. The minutes approving the Plat state that "[t]he 30 foot road dedication to the Holliers [sic] property would be an exception to the minimum width required by the subdivision; however, *since only one parcel of land is to be served*, 30 feet of right-of-way should suffice and the exception granted."<sup>6</sup> Moreover, the KPB staff report in this matter notes that the width is substandard and contends that a 20-foot setback is justified:

[t]he dedication for GL Hollier Street is only 30 feet wide. **The right-of-way does not meet KPB width standards** and while constructed is not maintained by the Borough. The right-of-way only **provides access to three lots**.

...

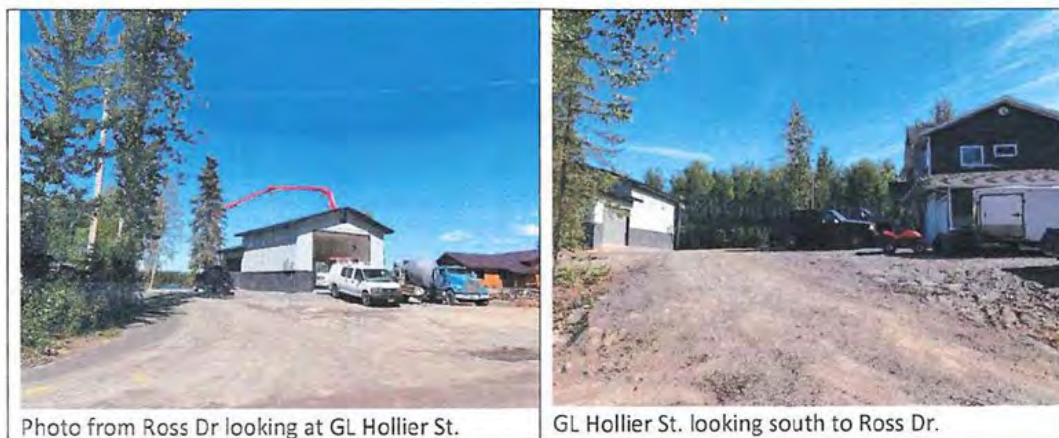
The width that was granted did not fit the width of any of the types of roads defined in the code. Per the staff report it appears an exception to width was granted. This right-of-way fits the definition of Marginal Access Streets in the 1968 KPB code. The definition states 'minor streets which are parallel with and adjacent to arterial streets and highways, and which provide access to abutting properties and protection from through traffic.' **While this width does not comply with the code**, the approval of a substandard width would mean that this is a marginal access street and all streets were subject to a 20 foot building setback at the time. The decision was made that the plat did note setbacks were present, code required a minimal 20 foot setback, the plat did not depict a 25 foot setback, the plat note also included 20 foot setbacks on interior lines, and thus we are enforcing a 20 foot setback along GL Hollier Street.<sup>7</sup>

During the fall of 2021, the Whitmores began prepping for construction of a 24-foot wide by 49-foot-long garage. They began pouring concrete on May 4, 2022. The Taylors saw the garage foundation being poured and realized that it was well within the subdivision's setback requirements per the Plat, and they immediately contacted a compliance officer in the KPB Planning Department. That person said it would take some time for the Borough to look into the issue. By the time the Borough sent staff out to investigate several weeks later, the walls on the garage were already constructed. Below are photos of what the construction project looked like by the time Planning Department staff came out to investigate.<sup>8</sup>

<sup>6</sup> R. 20 (emphasis added).

<sup>7</sup> R. 13 (emphasis added).

<sup>8</sup> T. 2, 4-5; R. 12.



Page 1 of 4

**R-12**

On May 20, 2022, Mrs. Taylor again contacted the KPB Planning Department and spoke with the Department Director, Robert Ruffner. She asked why work was not being stopped on the Whitmores' garage. She also said that before construction got too far along, it seemed that the Whitmores should be told to stop construction so that the building could be moved to comply with the setback requirements. According to Mrs. Taylor, she was informed that the issue was with the KPB legal department, and they were investigating the setback requirements. She was also instructed that if there were further concerns, she and her husband would be notified by mail about a public hearing.<sup>9</sup>

By July 22, 2022, the Whitmores were actively preparing an application for a building setback encroachment permit. KPB also confirmed that a surveyor performing work for the Borough in the subdivision would prepare an as-built survey so that it could be used for their permit.<sup>10</sup>

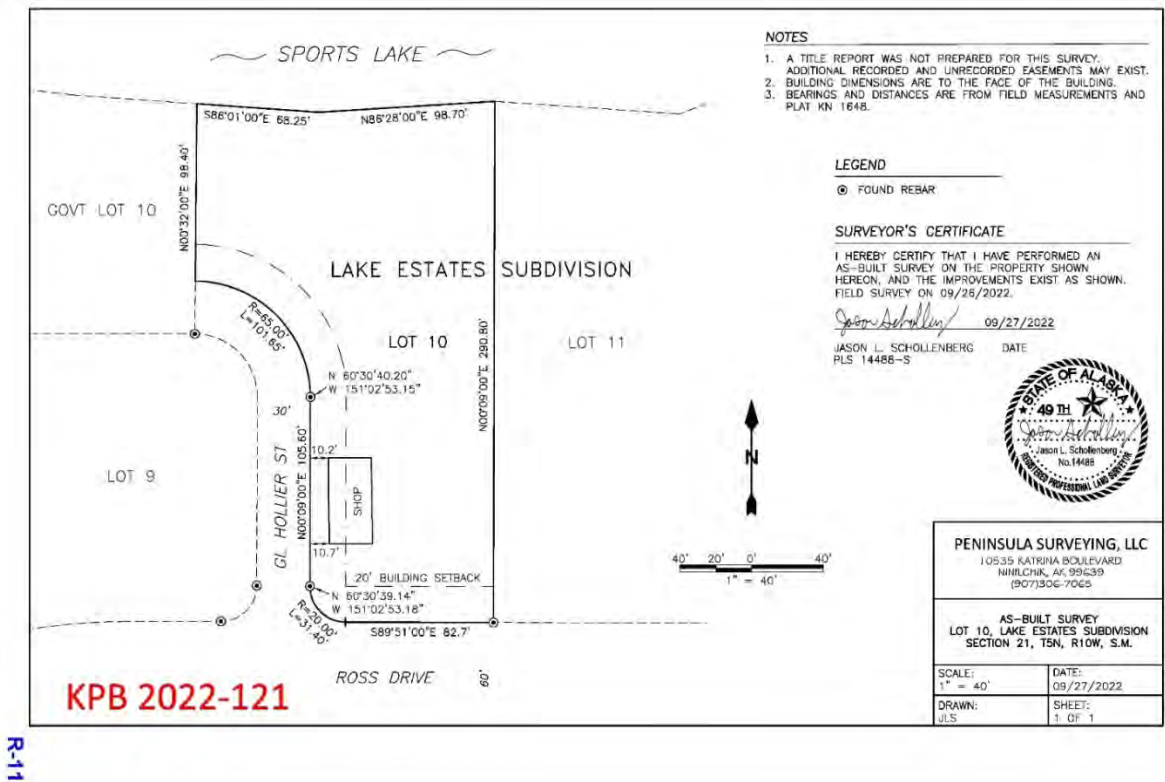
The as-built survey for Lot 10, which was prepared on September 27, 2022, shows that the Whitmores' garage is located between 10.2 feet and 10.7 feet from their property line and the edge of the 30-foot-wide GL Hollier Access. The survey also shows the setback as 20 feet along the two sides of the Whitmores' property.<sup>11</sup>

<sup>9</sup> *Id.*

<sup>10</sup> R. 12.

<sup>11</sup> The Lake Estates Subdivision Plat indicated that all lots would have 20-foot building setback limits from all interior sides and 25-foot setback limits from all sides with street frontage. R. 19. Contrary to the Plat, KPB has taken the position that the setback requirement applicable to Lot 10 is a 20-foot setback along its sides at issue here. R. 11, 13.

A copy of the as-built survey is shown below:



The image below is an aerial image depicting the Taylors' Lot 9, the Whitmores' Lot 10, the parties' respective homes, the Whitmores' garage, and GL Hollier Street, located between the parties' respective properties.





As the record and argument at the hearing confirmed, the specific details of the Whitmores' garage are not disputed. The garage is 49 feet long by 24 feet wide and approximately 1,176 square feet. It has approximately 14-foot-high walls. It also has in-floor heating and a half bath. It has two garage doors for vehicles. One garage door opens onto Ross Drive and the second garage door opens onto GL Hollier Street across from the Whitmores' home. Mrs. Whitmore has indicated that she intends to use the garage entrance opening onto GL Hollier Street to house her personal vehicle.<sup>12</sup>



On October 4, 2022, the KPB Planning Department published notice that it had received an encroachment permit application from the Whitmores for their garage. Nearby property owners were also informed that the Planning Commission would hold a public hearing regarding the Whitmores' application for an encroachment permit on October 24, 2022.<sup>13</sup>

***B. The Proceedings Before the Commission***

The Whitmores' application for an encroachment permit was heard before the KPB Planning Commission on October 24, 2022. Eleven of the twelve Commission members participated, as did Nancy Whitmore, Troy Taylor and KPB Planning Department staff.<sup>14</sup> Prior to the meeting, the KPB staff report regarding the permit was circulated and provided to the

<sup>12</sup> R. 12 – 15; T. 4; Taylors' Opposition to Motion to Dismiss at 18. In addition to the concrete foundation for the garage itself, there is also a concrete generator pad along the wall bordering GL Hollier Street. T. 5 - 6.

<sup>13</sup> R. 22 - 28. As the notice indicated, the Whitmores' application was received by the Planning Department on September 27, 2022. R. 22.

<sup>14</sup> R. 29 – 33.



Commission members.<sup>15</sup> Although the KPB staff report describes the encroaching structure as a “shed,”<sup>16</sup> the building is in fact a detached “garage/shop,” as Mrs. Whitmore herself confirmed in testimony before the Commission.<sup>17</sup> The staff report recommended adopting the encroachment permit application, as Resolution 2022-46, subject to compliance with KPB 20.10.110, Sections F and G.<sup>18</sup>

Per KPB 20.10.110(E), the Commission was required to apply the three standards in considering the permit application: 1) the building setback encroachment may not interfere with road maintenance; 2) the building setback encroachment may not interfere with sight lines or distances; and 3) the building setback encroachment may not create a safety hazard.

After some discussion and questioning by the Commission members, a vote was taken and the Whitmores’ application for the permit was unanimously approved.<sup>19</sup> In doing so, the Commission adopted each of the findings proposed by the Planning Department staff in its staff report and placed the following conditions on the permit’s approval:

Standard 1. The building setback encroachment may not interfere with road maintenance.

*Findings:*

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
12. The road is constructed by privately maintained [sic].<sup>20</sup>
13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
14. The encroachment is along a straight portion of the right-of-way.
15. There are no terrain issues within the dedication.

Standard 2. The building setback encroachment may not interfere with sight lines or distances.

*Findings:*

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
11. There does not appear to be any line of sight issues.
12. The road is constructed by privately maintained [sic].

<sup>15</sup> R. 12 – 20.

<sup>16</sup> R. 13.

<sup>17</sup> R. 31; T. 3.

<sup>18</sup> R. 15.

<sup>19</sup> R. 1 (Planning Commission Resolution 2022-46).

<sup>20</sup> It is inferred that this finding was intended to state that “the road is privately maintained.”

13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
  14. The encroachment is along a straight portion of the right-of-way.
  15. There are no terrain issues within the dedication.
- Standard 3. The building setback encroachment may not create a safety hazard.

*Findings:*

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
11. There does not appear to be any line of sight issues.
12. The road is constructed by privately maintained [sic].
13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
14. The encroachment is along a straight portion of the right-of-way.
15. There are no terrain issues within the dedication.

The approval is subject to:

1. Approved a permit to allow only the encroaching portion of the shop that extends 9.8 feet into the 20 foot building setback adjoining GL Hollier Street right-of-way on the west boundary of Lot 10, Lake Estates Subdivision, granted by Lake Estates Subdivision (K-1648).
2. That any new, replacement and/or additional construction will be subject to the twenty-foot building setback limit.
3. That the twenty-foot building setback shall apply to the remainder of said lot.
4. That an exhibit drawing or as-built survey prepared by a licensed land surveyor, showing the location of the portion of the building setback exception to be granted be attached to and made a part of this Resolution, becoming page 2 of 2.
5. That this resolution is eligible for recording upon being signed by the Planning Commission chairperson and will be deemed void if not recorded within 90 days of adoption.
6. That this Resolution becomes effective upon being properly recorded with petitioner being responsible for payment of recording fee.<sup>21</sup>

**C. The Proceedings During This Appeal**

The Taylors, acting *pro se*, timely appealed the Commission's approval of the Whitmores' encroachment permit. They alleged several errors regarding the Commission's

<sup>21</sup>

R. 2 – 3.

findings, and claimed that “all parties involved in the building of this shop disregarded the requirements after it was brought to their attention. . .”<sup>22</sup> The matter was then referred to the Office of Administrative Hearings (OAH).<sup>23</sup> Entries of appearance were subsequently filed by Deputy KPB attorney, A. Walker Steinhage, and by Craig and Nancy Whitmore.<sup>24</sup>

The day after the case was referred to OAH, and before the record was produced, KPB filed a motion to dismiss the Taylors’ appeal and to stay of production of the record.<sup>25</sup> The Taylors submitted an opposition to the motion and provided supporting documentation.<sup>26</sup> The Administrative Law Judge denied KPB’s motion to dismiss.<sup>27</sup>

KPB then produced an initial 33-page record, and a 14-page transcript from the public hearing in the matter before the Planning Commission.<sup>28</sup> Next, KPB filed a motion to strike what it alleged was improperly submitted new evidence from the Taylors and, a motion for reconsideration of the earlier order denying its motion to dismiss.<sup>29</sup> Both motions were denied.<sup>30</sup>

A telephonic hearing was held on February 23, 2023. Following the hearing, an order was issued expanding the record with additional specific items, including items required by KPB 21.20.270(A), such as the Whitmores’ original encroachment permit application and supporting information, and portions of the 1968 KPB Code referenced in the briefing and at the hearing.<sup>31</sup>

### **III. Discussion**

#### ***A. Procedural and Substantive Requirements***

KPB procedures for addressing encroachment issues along lot lines are contained in KPB Title 20, Chapter 10. KPB 20.10.010 specifies that “[t]he purpose of this title is to promote an adequate and efficient street and road system, to provide necessary easements, to provide

<sup>22</sup> Appeal of Planning Commission Decision (November 8, 2022).

<sup>23</sup> Case Referral Notice (December 1, 2022).

<sup>24</sup> Notice and Copies of Entries of Appearance (November 30, 2022). At the hearing, Mr. Whitmore confirmed that his middle name is Craig, his first name is David, and that he generally uses his middle name.

<sup>25</sup> Motion to Dismiss and Request to Stay Record Preparation (December 2, 2022). The primary contention of the motion to dismiss was lack of standing.

<sup>26</sup> Taylors’ Opposition to Motion to Dismiss (December 12, 2022).

<sup>27</sup> Order Denying KPB’s Motion to Dismiss. As the order noted, the Taylors, as the Whitmores’ neighbors closest to the encroachment, plainly have standing.

<sup>28</sup> Appeal Record (December 21, 2022), R. 1 – 56.

<sup>29</sup> Motion to Strike Improperly-Submitted New Evidence and Motion for Reconsideration (December 28, 2022).

<sup>30</sup> Order Denying Motions.

<sup>31</sup> Order for Supplementation of the Record and Opportunity to Object (February 23, 2023).

minimum standards of survey accuracy and proper preparation of plats, and to protect and improve the health, safety and general welfare of the people.”<sup>32</sup>

Encroachment permits under Title 20, Chapter 10, are required any time a person seeks to construct, or cause an encroachment within a building setback. When that occurs, a person must apply for an encroachment permit from the KPB Planning Department.<sup>33</sup> After the application is filed, it is then scheduled to be heard at the next available meeting of the KPB Planning Commission.<sup>34</sup>

The Planning Commission is required to either approve or deny the permit application, considering at the three criteria set out in Part II-B above.<sup>35</sup> Its decision is appealable to a hearing officer.<sup>36</sup>

### ***B. Standard of Review***

The applicable standards of review for the approval of the encroachment permit are set by the KPB Code. On purely legal issues, the standard of review is one of independent judgment. However, “due consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.”<sup>37</sup>

As to findings of fact, the hearing officer shall defer to the Planning Commission if they are supported in the record by substantial evidence.<sup>38</sup> “Substantial evidence” is “relevant evidence a reasonable mind might accept as adequate to support a conclusion.”<sup>39</sup> Thus, the substantial evidence standard requires the reviewer to uphold the original factual findings if they are supported by substantial evidence, even if the reviewer may have a different view of the evidence.

In a case reviewed on the substantial evidence standard, “[i]t is not the function of the [hearing officer] to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists.”<sup>40</sup> This said, if substantial evidence in the

<sup>32</sup> KPB 20.10.010.

<sup>33</sup> KPB 20.10.110(A).

<sup>34</sup> KPB 20.10.110(D).

<sup>35</sup> KPB 20.10.110(E).

<sup>36</sup> KPB 20.10.110(H).

<sup>37</sup> KPB 21.20.320(1).

<sup>38</sup> KPB 21.20.320(2).

<sup>39</sup> KPB 21.20.210(7).

<sup>40</sup> *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

record does not support the Commission's findings the hearing officer may make a different finding on the factual issues based on substantial evidence in the record.<sup>41</sup> Alternatively, the hearing officer has discretion to remand the matter to the Commission for new findings.<sup>42</sup>

When evaluating whether evidence for a finding is substantial, it is proper to "take into account whatever in the record fairly detracts from its weight."<sup>43</sup> The Alaska Supreme Court has adopted the requirement of substantial evidence in light of the whole record,<sup>44</sup> citing approvingly to the U.S. Supreme Court's discussion of this issue:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record....

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not ... mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.<sup>45</sup>

### **C. Analysis**

#### **1. The depth of the setback**

There is a question as to whether the depth of the building setback on Lot 10 is 20 feet or 25 feet. The plat establishing the Lake Estates subdivision in 1969 does not depict a setback on GL Hollier Street, but it does show a 25-foot setback on Ross Drive.<sup>46</sup> The plat also contains a plat note

<sup>41</sup> KPB 21.20.320(3).

<sup>42</sup> *Id.*

<sup>43</sup> *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568, 571 (Alaska 2001).

<sup>44</sup> *Keiner v. City of Anchorage*, 378 P.2d. 406 (Alaska 1963).

<sup>45</sup> *Delaney v. Alaska Airlines*, 693 P.2d 859, 863, n.2 (Alaska 1985) *overruled on other grounds* 741 P.2d 634, 639 (Alaska 1987) (quoting approvingly, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-90, 71 S.Ct. 456, 464-66, 95 L.Ed. 456, 467-68 (1950)).

<sup>46</sup> R-19.



stating that “[s]urface building limits from property lines shall be: Interior sides 20’ and *street Frontage 25’*.” KPB staff concluded that the setback is 20 feet, however. This determination was based on language in the Borough Code in place at the time, which allowed for a less restrictive setback, and the staff’s determination that GL Hollier Street is a Marginal Access Street -i.e., a minor street rather than a more substantial arterial street.<sup>47</sup>

Whether a 20 or 25-foot setback applies in this case may be debatable, but it is not a matter that needs to be resolved in the context of this administrative appeal.<sup>48</sup> It is clear that the Whitmores’ shop encroaches into the setback on Lot 10, irrespective of whether a 20 or 25-foot setback applies. No matter the depth of the setback, the encroaching shop is located approximately 10 feet from the property line abutting GL Hollier Street. It is this encroachment – the presence of a shop 10 feet from the property line – that the Planning Commission was required to evaluate against each of the three criteria in KPB 20.10.110(E).

**2. Does substantial evidence support the Planning Commission’s decision to approve the encroachment permit?**

The Commission concluded that the Whitmores met each of the three standards in KPB 21.10.110(E), and made findings that are essentially the same for each. For the first standard, the Commission concluded that the encroachment will not interfere with road maintenance, based on the following findings:

10. The shop is slightly angled with the northeast corner being the furthest encroachment into the setback at 9.8 feet into the setback.
12. The road is constructed by privately maintained [sic].
13. Due to the width of the street, improvements, the location of Sports Lake, it does not appear that this right-of-way will ever serve additional lots.
14. The encroachment is along a straight portion of the right-of-way.
15. There are no terrain issues within the dedication.<sup>49</sup>

The Commission made the same findings for its conclusions that the second and third standards (concerning interference with sight lines or distances, and the creation of a safety hazard, respectively) will be met, but added one more finding, Finding 11, which states:

<sup>47</sup> R. 13 (emphasis added).

<sup>48</sup> It is possible that a 25-foot setback exists on Lot 10, and that it is enforceable by a private landowner against another.

<sup>49</sup> R. 2.

11. There does not appear to be any line of sight issues.<sup>50</sup>

**a. Whether the encroachment interferes with road maintenance.**

The first standard in KPB 21.10.110(E) requires that the encroachment will not interfere with road maintenance.<sup>51</sup> Although the Commission concluded that the first standard will be met, its conclusion is not supported by substantial evidence.

The Commission's conclusion is based on findings that contain largely factually correct information, but they nevertheless do not show how the standard will be met. Finding 12, for example, correctly states that GL Hollier Street is privately maintained.<sup>52</sup> But the standard in KPB 21.10.110(E)(1) is not limited to whether the encroachment may interfere with the Borough's maintenance of a roadway. The standard requires that the encroachment not interfere with road maintenance at all, irrespective of whether the road is publicly or privately maintained. Thus, the Commission's finding that the road is privately maintained is immaterial to and does not advance the required analysis under the standard.

Similarly, findings 13 (the road is unlikely to serve additional lots), 14 (the encroachment is along a straight portion of the right-of-way), and 15 (there are no terrain issues within the roadway) do not show whether or how the encroachment will not interfere with road maintenance. While these findings may contain accurate statements, without further explanation, it is unclear how these findings support the Commission's conclusion that the shop will not interfere with road maintenance.

The truth of the matter is that the record is extremely sparse. The evidence includes the testimony of Ms. Whitmore and Mr. Taylor at the October 24, 2023 public meeting. The testimony was in response to a concern posed by Commissioner Fikes about the potential impact of the shop on road maintenance. The Commissioner asked:

[My] concern is that's really tight, and its not to code, and so its also not maintained, so I would be concerned about snow removal if that setback is already going to be encroached by 10 feet. Is that loss of road maintenance area, is that going to be impacting the person's access to the back land lock[ed parcel]?<sup>53</sup>

<sup>50</sup> R. 2-3.

<sup>51</sup> R. 2-3; KPB 20.10.110(E)(1).

<sup>52</sup> R. 2, 5.

<sup>53</sup> T. 3.

In response to the Commissioner's question, Ms. Whitmore acknowledged that she had not over-wintered on the property but answered that she thought GL Hollier could be cleared by pushing snow towards and across Ross Drive. She stated:

I would think the snow being pushed would probably be pushed from the farthest point of the road out toward Ross and maybe even across Ross. I don't – I mean, I don't know. We haven't been there for a winter, but it seems pretty wide with their 20-foot setback and our 10-foot setback and the 30 feet of road.<sup>54</sup>

But Mr. Taylor, who does the vast majority of the snow clearing himself, later testified that he does not believe pushing snow across Ross Drive is a viable option, and the encroaching shop will in fact impact the removal of snow from GL Hollier Street:

Clearing the snow down through there – like, it is not – yes, it's not a borough-maintained road, which 75 percent of the snow clearing on this road I do myself, and we are not going to – it was stated of possibly pushing snow across Ross Drive. Well, as we know, we're not supposed to push snow across a borough-maintained road and fill up the road and leave it up to the borough maintenance to take care of. The snow is supposed to be cleared off to the sides and not pushing snow across traffic and impeding traffic as well. So this does limit room for snow removal as well with them being 10 feet – approximately 10 to 12 feet with that pad.

It is unclear whether and how the Commission took Mr. Taylor's testimony about road maintenance into account in reaching its conclusions, and how it reconciled Ms. Whitmore's testimony suggesting that snow may be pushed across Ross Drive, with Mr. Taylor's testimony suggesting it cannot be. Nor was there any evidence documenting the Borough's actual requirements as to whether snow may be cleared from a privately maintained road across a publicly maintained one like Ross Drive. Given these deficiencies and the inadequacies in the Commission's findings, I cannot conclude there is substantial evidence to support the Commission's determination that the shop will not interfere with road maintenance. The matter will be remanded under KPB 21.20.33(B) for the Commission to either make new findings and conclusions supported by substantial evidence in the existing record as to the first standard in 21.10.110(E)(1), or to take additional evidence and issue new findings and conclusions.

<sup>54</sup>

T.3.

**b. Whether the encroachment interferes with sight lines and distances.**

The second standard that must be satisfied for an encroachment permit to be issued is that it must not interfere with sight lines or distances. The Planning Commission concluded that the shop meets this standard.<sup>55</sup>

Before standard two is addressed in detail, however, it is important to understand what is meant by the reference in KPB 20.10.110(E) to the terms “sight lines or distances.” These terms are not defined by the KPB Code. As such, we need to look elsewhere to determine their intended meaning.

The purpose of the setback requirement is to promote safe public access, areas for emergency response, and ‘traffic sight distance.’ Permanent structures are prohibited in a setback without a permit, and minor improvements are only allowed in a setback without a permit if they “do not interfere with the sight distance *from the right-of-way*.”<sup>56</sup>

The language of a former KPB design standard further sheds light on the meaning of sight lines and distances.<sup>57</sup> Specifically, the former KPB design standard required that “[c]lear visibility, measured along the center line shall be provided for” within specified distances of different types of streets.<sup>58</sup>

A standard legal treatise specifies that a key purpose of setbacks in planning and zoning law is to “protect[] sight lines for automobiles.”<sup>59</sup> As all the above references demonstrate, the requirement that the encroachment not interfere with sight lines or distances means that for persons travelling on roads near the encroachment, the encroachment itself cannot cause a traveler’s clear line of sight, for things such as vehicles, hazards, obstructions, etc., to be obscured.

Turning to the Commission’s findings, the only difference between the findings relied upon for the Commission’s conclusion regarding road maintenance and the findings relied upon

<sup>55</sup> R. 2-3; KPB 20.10.110(E).

<sup>56</sup> KPB 20.90.010 (definition of “Permanent structures”) (emphasis added).

<sup>57</sup> This standard is not being referenced to suggest that it applies here. Instead, it is merely referenced to demonstrate what is likely intended by the Code’s existing requirement that an encroachment not interfere with “sight lines or distances.”

<sup>58</sup> R. 78.

<sup>59</sup> 83 Am. Jur. 2d Zoning and Planning § 116 (2023).

for its conclusion that there will be no interference with sight lines and distances is Finding 11, which states “[t]here does not appear to be any line of sight issues.”<sup>60</sup>

Although a number of the findings under standard two are factually correct, they do not show how the shop satisfies the standard. For example, Finding 12 (the road is privately maintained) and Finding 13 (the road is unlikely to serve additional lots) appear to have no bearing on whether sight lines and distances are impacted. And Finding 11 is a conclusory statement that is legally insufficient to create a factual basis or support findings of fact for appellate review.<sup>61</sup>

Only Finding 14 - that the road section is straight - and potentially Finding 15 – that there are no terrain issues within the dedication - appear at all relevant to the criteria concerning sight lines and distances. But even so, there is no analysis as to how these findings lead to the conclusion that sight lines will not be impacted. Moreover, the record as to the application of this standard is exceptionally thin. Absent from the record, for example, are any comments from a traffic engineer or other person experienced in evaluating roadway sight lines. Given that the matter must be remanded in any event regarding the other required showings, the Commission will be given the opportunity to better explain its reasoning on the second criterion and to revisit whether there is substantial evidence to support a determination that the shop will not interfere with sight lines or distances under the second standard in 21.10.110(E).

**c. Whether the encroachment creates a safety hazard.**

The third standard that must be satisfied for an encroachment permit to be issued is that the encroachment will not create a safety hazard.<sup>62</sup> Although the Planning Commission determined that this standard has been met, some of the Commission’s underlying findings contain deficiencies similar to those in the findings under the other two standards, and the record is sparse in any event.<sup>63</sup> Because it has already been determined that the matter will be remanded back to the Planning Commission, the Commission may endeavor to make new findings and conclusions, supported by substantial evidence in the existing record, under the third standard in

<sup>60</sup> R. 5.

<sup>61</sup> *Stephens v. ITT/Felec Services*, 915 P.2d 620, 626-27 (Alaska 1996); *Schug v. Moore*, 233 P.3d 1114, 1117 (Alaska 2010).

<sup>62</sup> R. 2-3; KPB 20.10.110(E).

<sup>63</sup> As with the standard concerning sight lines, comments from a person with expertise on road safety issues would have been useful for the Commission’s analysis under this standard.



KPB 20.10.110(E). Alternatively, it may take additional evidence and issue new findings under this standard.<sup>64</sup>

#### **IV. Concluding Guidance**

In deciding how to proceed on remand, the Borough is advised that the record developed before the Planning Commission to date is exceedingly sparse as to information relevant to *each* of the three criteria in KPB 20.10.110(E). The Commission should be mindful that issuing a building setback encroachment permit is an exception to the rule prohibiting such encroachments. The Commission may only approve an encroachment permit if there is substantial evidence showing that each of the three criteria is met – i.e., that the encroaching shop will not interfere with road maintenance, it will not interfere with sight lines or distances, and it will not create a safety hazard. If this threshold is not met as to any of the three criteria, the permit may not be issued. These are affirmative findings, and the applicant has the burden to demonstrate with substantial evidence that they are true. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard. I caution the Commission against trying to do the required analysis under KPB 20.10.110(E) with an extremely thin record.

Further, the Commission should be cognizant that it must apply each of three criteria in KPB 20.10.110(E).<sup>65</sup> There is evidence that at least some Commissioners may have applied a different standard, rather than those in KPB 20.10.110(E), in voting to approve the permit. Comments by Commissioner Morgan and Commission Gillham during the October 24, 2022 public hearing suggest they may have felt compelled to approve the permit because they believed the Whitmores' contractor was to blame for the shop encroaching into the setback. Commissioner Morgan stated:

I am also included to support this. I think I have a bigger frustration with two contractors in the area who should know all of this. It is the homeowner's job to do research, but we also depend on our contractors to know their business. And so I'm kind of disappointed in their lack of researching before they started the work and not getting good information to the homeowners.<sup>66</sup>

<sup>64</sup> R. 5-6, 13-14.

<sup>65</sup> The language of the KPB Code does not affirmatively state that a building setback encroachment permit must be issued if each of the three standards in KPB 20.10.110(E) is met. It merely states that a person seeking to construct within a building setback must apply for a permit, and the three standards must be considered by the Planning Commission. KPB 20.10.110(A) and (E).

<sup>66</sup> T-7.

Commissioner Gillham commented similarly:

I would have to concur with Commissioner Morgan in that I would put most of the blame on the contractor who should have a little bit more knowledge on this than the homeowner. . . . I am inclined to vote in favor of this, mostly because I feel that this is more due to the contractor's fault rather than the property owner's fault.<sup>67</sup>

But whether the contractor or the homeowner failed to determine that the shop would be an encroachment into the building setback is not relevant to the analysis under KPB 20.10.110(E). Thus, it cannot be used as an independent basis for the Commissioners to approve the permit.

I also am concerned that some Commissioners may have misunderstood how to evaluate whether road maintenance will be impacted by the presence of the shop on Lot 10. A comment by Commissioner Stutzer suggests that the fact that the road is privately, rather than publicly, maintained may have influenced his vote on the permit:

So – and yeah, you've got a neighbor now and a building there and snow removal is a problem, but, you know, the road is always going to be – was designed not – that the borough is not going to take it over. So it's going to be a neighborhood snowplow operation, and you'll just have to figure out where you're going to push the snow.

But as Judge Sullivan correctly pointed out in the April 18, 2023 decision, it is immaterial for the analysis whether the road is privately or publicly maintained. The Planning Commissioner was required to determine whether the shop will interfere with road maintenance, irrespective of whether the road is publicly or privately maintained.

Finally, a comment by Commissioner Brantley suggests that he voted in favor of the permit because the encroachment was into the building setback, which is the Whitmores' private property, rather than into the public right-of-way. He stated, "They are not out in the right-if-way at all, so I don't see how snow removal would be affected anyway since they're not encroaching in the right-of-way at all, just in the setback."<sup>68</sup> But as explained previously, whether the encroachment is into the right-of-way is not the end of the analysis. Said another way, just because the property within the setback is the Whitmores' private property, it is not a foregone conclusion that the encroachment will

<sup>67</sup> T-7.

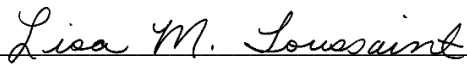
<sup>68</sup> T-7.

not interference with road maintenance. The shop could interfere with snow removal, for example, if it is necessary for some snow to be placed in the setback to clear GL Hollier Street, and there is insufficient space within the setback to place the snow due to the presence of the shop. In any event, it is the Commissioners' responsibility to evaluate whether the presence of the shop on the setback will interfere with road maintenance, no matter the nature of the encroachment. It may well be the case that Commission will decide it needs more evidence to make an adequate finding in that regard.

## **V. Conclusion**

There is not substantial evidence to support the Commission's conclusions that each of the mandatory standards in KPB 21.20.110(E) has been met. The matter is remanded to the Commission to (1) make additional findings and conclusions supported by substantial evidence in the existing record as to each of the three criteria in KPB 21.20.110(E), or, alternatively, (2) KPB 21.20.110(E), take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

DATED this 22<sup>nd</sup> day of May, 2023.

  
\_\_\_\_\_  
Lisa M. Toussaint  
Administrative Law Judge

**Certificate of Service:** I hereby certify that on May 22, 2023, a true and correct copy of this document was served on the following by email, or mail if email is unavailable, to the following listed below:

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By: *Haley Canfield*  
Office of Administrative Hearings

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL BY THE KENAI BOROUGH PLANNING COMMISSION**

In the matter of the Kenai Peninsula Borough )  
Planning Commission's decision to conditionally )  
approve Lot 10, Lake Estates Subdivision Building )  
Setback Encroachment Permit, KPB File )  
2022-121; KPB Resolution 2022-46 located )  
on GL Hollier Street, )  
)  
TROY & AUTUMN TAYLOR, )  
)  
Appellants. )  
\_\_\_\_\_ )

OAH No. 22-0925-MUN  
Agency No. 2022-06-PCA

**ORDER GRANTING RECONSIDERATION**

**I. Background**

David and Nancy Whitmore built a 49-foot by 24-foot shop on Lot 10 in the Lake Estates Subdivision in the Kenai Peninsula Borough. Because the shop encroaches into the building setback for the lot, the Whitmores applied for a building setback encroachment permit under KPB 21.10.110. After the Borough Planning Commission unanimously approved the permit on October 24, 2022, Troy and Autumn Taylor, the owners of a lot directly across the street from Whitmores, appealed the decision.

The Borough moved to dismiss the appeal, arguing that the Taylors lacked standing. The Taylors filed an opposition, including photos of the shop and its location on the lot and the surrounding area. The photos were eventually added to the record, against the Borough's objection, pursuant to an order explaining that the photos "do not change the facts, nor do they add additional facts," but rather clarified the evidence that had already been presented to the Commission.

Following briefing and oral argument, Administrative Law Judge Kent Sullivan issued a decision on April 18, 2023, reversing the approval of the permit on the grounds that substantial evidence did not support the Commission's conclusion that the encroaching shop will not interfere with road maintenance under the first of the three criteria set forth in KPB 20.10.110(E). Instead, the judge found that substantial evidence supported the opposite conclusion – that the encroachment will interfere with road maintenance – and adopted sixteen new factual findings.



On May 1, 2023, the Borough moved for reconsideration of the decision on several grounds, including that it contained findings based on information outside the record developed before the Planning Commission; misconstrued the depth of the building setback; misconceived the nature of the setback and the encroachment, and road maintenance on GL Hollier Street; and misapplied the relevant sections of KPB 21.20.330 in reversing, rather than remanding, the Planning Commission’s decision.

The Taylors and the Whitmores were given until May 11, 2023 to respond to the motion for reconsideration. The Taylors responded on May 8, 2023, arguing that reconsideration is unnecessary because the Commission’s findings under the first criterion in KPB 21.20.110(E) were not supported by substantial evidence. The Whitmores responded on May 11, 2023, reiterating many of the same points raised by the Borough but disagreeing that a remand is appropriate. Instead, they argued that the Planning Commission’s approval of the permit should be approved because it is supported by substantial evidence as to each of the three criteria.

In accordance with KPB 21.20.350(C), this order responds to the motion for reconsideration and addresses the arguments in the motion. The arguments have led to clarification or correction of language in the original decision, which will be accomplished through a “Decision After Reconsideration” issued later today. The outcome of the case will change, as the matter will be remanded to the Commission to (1) make additional findings and conclusions supported by substantial evidence in the existing record as to each of the three criteria in KPB 21.20.110(E), or, alternatively, (2) open the record to take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

## **II. Commentary on the Borough’s and Applicant’s Arguments<sup>1</sup>**

### ***A. Arguments about findings based on evidence not before the Planning Commission***

#### **1. Argument about Finding 14 (drainage)**

Citing to KPB 21.20.030(3), which allows a hearing officer to “make a different finding on a factual issue, based on the evidence in the record before the planning commission,” the Borough asserts that Judge Sullivan improperly adopted findings predicated upon information

<sup>1</sup> Because many of the Borough’s and the Whitmores’ arguments are largely the same, the Whitmore’s arguments will be discussed separately only where they raised new points not presented by the Borough.

outside the record before the Planning Commission. The Borough points to one finding - Finding 14 - which states that “[t]he encroachment has caused drainage issues.” The judge explained that “snow sloughing from the roof could be an issue with this encroachment.” His conclusion was based on “a detailed explanation and photographic evidence” (namely, Photo 3) provided by the Taylors in their opposition to the Borough’s motion to dismiss, which shows “how water from the roof” of the encroaching shop “has drained into GL Hollier Street, apparently causing erosion and impacting maintenance.”<sup>2</sup> The judge eventually expanded the record after oral argument to include the photo, as well as others in the Taylor’s opposition to the motion to dismiss, explaining that the photos did not “change . . . or add additional facts” but rather clarified the evidence that had already been presented to the Commission.<sup>3</sup>

The Taylors may have legitimate concerns about drainage from the shop roof impacting the GL Hollier Street, but they did not articulate those concerns in writing to the Planning Commission (indeed, there were no written comments submitted on the proposed permit at all), or in their testimony at the October 24, 2022 public meeting. They raised those concerns for the first time in their opposition to the Borough’s motion to dismiss. Although that information could have been provided to the Planning Commission earlier, it was not before the Commission when the Commission approved the permit on October 24, 2022. Thus, the information about drainage, while appropriate to consider in the context of a motion to dismiss based on standing, should not have been considered as to concerns not previously raised to the Commission. Finding 14 was based on information not before the Planning Commission when it approved the permit, and was used as an additional factual basis for Judge Sullivan’s conclusion that the shop will impact road maintenance, rather than to merely clarifying existing evidence. The Decision After Reconsideration will remove that finding and make other related adjustments as necessary.

## 2. Argument about fire safety

The Whitmores argue that Judge Sullivan misapplied KPB 21.20.270(c). That section requires that an appeal “shall be on the record,” and that the record may not be supplemented absent a showing that “even with due diligence the new evidence could not have been provided before the planning commission and a reasonable opportunity is provided” for the other parties to respond to it. The Whitmores claim that Judge Sullivan erred in relying on photos and testimonial evidence offered by the Taylors in their opposition to the motion to dismiss because

<sup>2</sup> Decision at 20.

<sup>3</sup> Order Expanding the Record at 3.

that information could have been submitted to the Commission previously, but it was not. They point to the judge's statements in the decision about fire safety. He described the "close proximity of the Whitmore's [sic] garage to the Taylors' home" as creating a "safety hazard in the event the structure is ever fully engulfed in a fire," and noted that "radiant heat from the fire may well cause the Taylors' home to catch fire."

As with the Taylors' concerns about drainage, they may have valid fire safety concerns related to the shop. But those concerns were not before the Planning Commission when it approved the permit on October 24, 2022, because the Taylors did not raise those concerns until they filed their opposition to the Borough's motion to dismiss. They could have provided that information in writing or orally at the public hearing, but they did not do so. Thus, the information should not have been considered in Judge Sullivan's April 18, 2023 decision as to concerns not previously raised to the Commission. Adjustments will be made in the Decision After Reconsideration accordingly.

### 3. Argument about information in opposition to motion to dismiss

The Whitmores broadly assert that the new information in the Taylors' opposition to the motion to dismiss, including the photos, were "highly prejudicial" to them. No examples were provided other than those concerning drainage (Finding 14) and fire safety, which have already been discussed above. Nonetheless, new information in the opposition to the motion to dismiss will not be used as a factual basis for any of the conclusions in the Decision After Reconsideration. The photos will only be used to the extent they help clarify the location of the shop on the lot and in the surrounding area.

#### ***B. Arguments about the depth of the setback***

The Borough alleges that Judge Sullivan erred in finding the building setback on the lot to be 25 feet from the property line, rather than 20 feet, and that this error impacted three of his findings (Findings 3, 4, and 5). The judge's conclusion was based on a 25-foot setback specified in a plat note on the 1969 subdivision plat establishing the Lake Estates subdivision. Citing language in a footnote in *Yankee v. City of Borough of Juneau*, 407 P.13d 460 (Alaska 2017), Judge Sullivan determined that the plat note specifying the setback constituted a covenant that runs with the land and binds all subsequent landowners, including the Whitmores, despite

language in the Borough Code in place at the time, which *allowed* developers to specify a less restrictive setback.<sup>4</sup>

The Borough claims Judge Sullivan’s reliance on *Yankee* was misplaced, arguing that provision at issue in that case, a section of the City and Borough of Juneau Code, is distinguishable from the KPB Code. While the Juneau code expressly describes a plat note as a restrictive covenant that runs with the land in favor of the municipality and the public, enforceable against future owners, the KPB Code contained no such language in 1968. Moreover, the *Yankee* court held that the City and Borough of Juneau had discretion, but not the obligation, to enforce the restrictive covenant at issue. Thus, even if were the case that a plat note is a covenant running with the land under the KPB code, the Borough would not be required to enforce it. Thus, the Borough argues that Judge Sullivan lacked the authority to compel the Borough to apply the 25-foot setback in the plat note.

Whether a 20 or 25-foot setback applies in this case may be debatable, but it is not a matter that needs to be resolved in the context of this administrative appeal.<sup>5</sup> It is clear that the Whitmores’ shop encroaches into the setback on Lot 10, irrespective of whether a 20 or 25-foot setback applies. No matter the depth of the setback, the encroaching shop is located approximately 10 feet from the property line abutting GL Hollier Street. It is this encroachment – the presence of a shop 10 feet from the property line – that the Planning Commission was required to evaluate against each of the three criteria in KPB 20.10.110(E).

The Decision After Reconsideration will remove the findings concerning the depth of the setback and otherwise correct the manner in which this subject was handled in the original decision. Because this matter is being remanded back to the Planning Commission to take additional evidence and make new findings, if the Borough believes the depth of the setback is relevant to its analysis under KPB 20.10.110(E), it is free to explore that subject further on remand.

***C. Arguments about the nature of the setback and the encroachment, and road maintenance***

**1. Argument about the nature of the setback and the encroachment**

<sup>4</sup> The 1969 Borough Code allowed for a “minimum 20-foot building setback for dedicated rights-of-way in subdivisions.

<sup>5</sup> It is possible that a 25-foot setback exists on Lot 10, and that it is enforceable by a private landowner against another through a civil action.

Relying on Mr. Taylor’s testimony at the October 24, 2022 public meeting, Judge Sullivan concluded that the encroaching shop will impact road maintenance by making snow removal, the vast majority of which is done by Mr. Taylor, more difficult by limiting the space available for snow cleared from GL Hollier Street. The Borough challenges the judge’s findings (Findings 13, 15, and 16) supporting this conclusion, claiming he misconstrued the setback as an easement rather than private property, and he conflated the building setback encroachment here with an encroachment into the right-of-way. The Borough focuses on the judge’s statement that “KPB was anxious to avoid any conclusion that the encroachment was an encroachment into a public right-of-way,” and statements suggesting the setback may be used for snow cleared from the road. According to the Borough, no portion of the setback was ever available for that purpose because the setback is private property, and pushing snow onto it would be a trespass. The Borough appears to suggest that the shop could not possibly impact road maintenance because any snow removal or other maintenance occurring in the setback, the Whitmores’ private property, would be illegal.

The Borough is correct that the setback on Lot 10 is private property, and the encroachment is into the building setback – not into the right-of-way (GL Hollier Street). But the contention that Judge Sullivan determined otherwise is incorrect. Nevertheless, in the Decision After Reconsideration, adjustments will be made to statements in the original decision that could potentially be misconstrued as suggesting that the encroachment here was into the right-of-way.

## 2. Argument about trespass

Regarding the assertion that Mr. Taylor would be committing a trespass if he were to place any snow cleared from the street onto the setback, this argument strains logic. Snow removed from a 30-foot-wide road needs to go somewhere. Logic dictates that when snow is pushed from a road, some amount may need to be placed (or may incidentally spill) onto property abutting the road. This would occur whether the road is publicly maintained by an entity like the Borough, or privately maintained by a person like Mr. Taylor. But no one could legitimately contend that the Borough would be committing a trespass in those circumstances. Nor can a legitimate argument be made that Mr. Taylor would be committing a trespass in those circumstances either.<sup>6</sup> The suggestion that the shop will not interfere with road maintenance,

<sup>6</sup> There could be a trespass if Mr. Taylor were to remove snow from his own property and place it on the Whitmores’ setback. But there is no evidence of this occurring. Nor is there any evidence that Mr.



including snow removal, simply because the setback is on private property (i.e., the encroachment is not into the right-of-way) where no snow can be placed, is incorrect. Indeed, such an interpretation would effectively render the requirement of KPB 21.20.110(E) meaningless—a result inconsistent with the rules of statutory construction requiring that a statute be interpreted “to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”<sup>7</sup>

### 3. Argument about snow clearing across public roads

The Borough also challenges Finding 13 in the April 18, 2023 decision, which reads, “Because the Borough mandates that snow cannot be pushed across public roadways, snow removal is now restricted on three of four sides. . . .” The authority cited for the finding is Mr. Taylor’s testimony before the Planning Commission, summarized on page 18 of the decision, and a footnote referencing a Borough website containing information about illegal snow clearing activities. The website states that “[i]t is illegal to plow snow into the roads, ditches, and rights of way *from private property*,” but, as the Borough points out, it is silent as to snow plowed from a public right-of-way. Thus, the Borough contends that Finding 13 is misconceived.

The Borough’s point is well-taken. Finding 13 will be removed, and other adjustments will be made in the Decision After Reconsideration, accordingly.

### ***D. Arguments about the application of KPB 21.20.320 and 21.20.330***

Claiming that the judge made findings “based upon a mix of misconceived facts” and evidence outside the record before the Planning Commission, the Borough contends the judge misapplied KPB 21.20.330 and 21.20.330, and should have remanded rather than reversed the Commission’s decision. The Borough points to language in KPB 21.20.330(3), which states:

The hearing officer may revise and supplement the planning commission’s findings of fact. Where the hearing officer decides that a finding of fact made by the planning commission is not supported by substantial evidence, the hearing officer may make a different finding on the factual issues, ***based on the evidence in the record developed before the planning commission*** if it concludes a different finding was supported by substantial evidence, or may remand the matter to the planning commission as provided in KPB 21.20.330(B). (Emphasis supplied.)

Taylor places a disproportionate amount of snow removed from the roadway onto the Whitmores’ setback when he plows the road.

<sup>7</sup> *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1139 (Alaska 2012) (quoting 2A Norman J. Singer & Shambie Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007)).

KPB 21.20.330(A) and (B), in turn, provide:

A. *Changed circumstances.* An appeal alleging changed circumstances or new relevant evidence, which with due diligence could not have been presented to the planning commission, shall be remanded to the planning commission.

B. *Lack of findings.* Appeals from the planning commission decisions which lack findings of fact and conclusions by the planning commission ***or contain findings of fact and conclusions which are not supported by substantial evidence*** shall be remanded to the planning commission with an order to make adequate findings of fact and conclusions. (Emphasis supplied.)

As explained previously, the Decision After Reconsideration will reflect adjustments to the original decision to account for problems with some of the factual findings, including that one finding was based on information outside the record before the Planning Commission (Finding 14), and that others were predicated on various misconceptions. I agree that remand is the appropriate remedy here. The matter will be remanded back to the Planning Commission to (1) make findings of fact and conclusion supported by substantial evidence in the existing record as to each of the three criteria in KPB 21.20.110(E), or, alternatively, (2) take additional evidence from the parties and the public and make new findings and conclusions under each of the three criteria, based on the augmented record.

**E. Argument that the Planning Commission's findings should be affirmed**

The Whitmores argue that substantial evidence supports the Commission's conclusions that each of the three standards in KPB 21.20.110(E). I disagree. The record in this case is extremely thin as to evidence relevant to each of the three standards. The matter will be remanded back to the Commission, where there will be an opportunity to take additional evidence and make new findings and conclusions. Because the Whitmores have the burden on each of the three criteria, they may wish to participate in the remand proceeding.

**III. Concluding Guidance**

In deciding how to proceed on remand, the Borough is cautioned that the record developed before the Planning Commission to date is exceedingly sparse as to information relevant to *each* of the three criteria in KPB 20.10.110(E). The Commission should be mindful that issuing a building setback encroachment permit is an exception to the rule prohibiting such encroachments. The Commission may only approve an encroachment permit if there is substantial evidence showing that each of the three criteria is met – i.e., that the encroaching

shop will not interfere with road maintenance, it will not interfere with sight lines or distances, and it will not create a safety hazard.<sup>8</sup> If this threshold is not met as to any of the three criteria, the permit may not be issued. These are affirmative findings, and the applicant has the burden to demonstrate with substantial evidence that they are true. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard. I caution the Commission against trying to do the required analysis under KPB 20.10.110(E) with an extremely thin record.

Further, the Commission should be cognizant that it must apply each of three criteria in KPB 20.10.110(E).<sup>9</sup> There is evidence that at least some Commissioners may have applied a different standard, rather than those in KPB 20.10.110(E), in voting to approve the permit. Comments by Commissioner Morgan and Commission Gillham during the October 24, 2022 public hearing suggest they may have felt compelled to approve the permit because they believed the Whitmores' contractor was to blame for the shop encroaching into the setback.

Commissioner Morgan stated:

I am also included to support this. I think I have a bigger frustration with two contractors in the area who should know all of this. It is the homeowner's job to do research, but we also depend on our contractors to know their business. And so I'm kind of disappointed in their lack of researching before they started the work and not getting good information to the homeowners.<sup>10</sup>

Commissioner Gillham commented similarly:

I would have to concur with Commissioner Morgan in that I would put most of the blame on the contractor who should have a little bit more knowledge on this than the homeowner. . . . I am inclined to vote in favor of this, mostly because I feel that this is more due to the contractor's fault rather than the property owner's fault.<sup>11</sup>

<sup>8</sup> To approve the permit, there must be substantial evidence to show that each the three criteria will be met. It is immaterial whether there is substantial evidence showing the opposite conclusion (that the shop will interfere with road maintenance, will interfere with sight lines or distances, and will create a safety hazard), because that is not the applicable standard.)

<sup>9</sup> The language of the KPB Code does not affirmatively state that a building setback encroachment permit must be issued if each of the three standards in KPB 20.10.110(E) is met. It merely states that a person seeking to construct within a building setback must apply for a permit, and the three standards must be considered by the Planning Commission. KPB 20.10.110(A) and (E).

<sup>10</sup> T-7.

<sup>11</sup> T-7.

But whether the contractor or the homeowner failed to determine that the shop would be an encroachment into the building setback is not relevant to the analysis under KPB 20.10.110(E). Thus, it cannot be used as an independent basis for the Commissioners to approve the permit.

I also am concerned that some Commissioners may have misunderstood how to evaluate whether road maintenance will be impacted by the presence of the shop on Lot 10. A comment by Commissioner Stutzer suggests that the fact that the road is privately, rather than publicly, maintained may have influenced his vote on the permit:

So – and yeah, you’ve got a neighbor now and a building there and snow removal is a problem, but, you know, the road is always going to be – was designed not – that the borough is not going to take it over. So it’s going to be a neighborhood snowplow operation, and you’ll just have to figure out where you’re going to push the snow.

But as Judge Sullivan correctly pointed out in the April 18, 2023 decision, it is immaterial for the analysis whether the road is privately or publicly maintained. The Planning Commissioner was required to determine whether the shop will interfere with road maintenance, irrespective of whether the road is publicly or privately maintained.

Finally, a comment by Commissioner Brantley suggests that he voted in favor of the permit because the encroachment was into the building setback, which is the Whitmores’ private property, rather than into the public right-of-way. He stated, “They are not out in the right-if-way at all, so I don’t see how snow removal would be affected anyway since they’re not encroaching in the right-of-way at all, just in the setback.”<sup>12</sup> But as explained previously, whether the encroachment is into the right-of-way is not the end of the analysis. Said another way, just because the property within the setback is the Whitmores’ private property, it is not a foregone conclusion that the encroachment will not interference with road maintenance. The shop could interfere with snow removal, for example, if it is necessary for some snow to be placed in the setback to clear GL Hollier Street, and there is insufficient space within the setback to place the snow due to the presence of the shop. In any event, it is the Commissioners’ responsibility to evaluate whether the presence of the shop on the setback will interfere with road maintenance, no matter the nature of the encroachment. It may well be the case that Commission will decide it needs more evidence to make an adequate finding in that regard.

<sup>12</sup> T-7.

#### IV. Order

The motion for reconsideration is granted. A revised decision will be issued later today.

DATED: May 22, 2023.

By: Lisa M. Toussaint  
Lisa M. Toussaint  
Administrative Law Judge

**Certificate of Service:** I hereby certify that on May 22, 2023, a true and correct copy of this document was served on the following by email, or mail if email is unavailable, to the following listed below:

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