



MEMORANDUM

Kenai Peninsula Borough, AK: Anadromous Stream Habitat Protection Ordinance

October 8, 2012

EXECUTIVE SUMMARY

In the **Background** section of this memorandum, we provide a brief overview of the Ordinance, including the recent amendments (in 2011 and 2012). In the **Analysis** section, we identify several issues presented by the Ordinance. First we note that the language of the recent amendments could be interpreted to bring within the scope of the Ordinance waterbodies of all types, not just streams, and we point out where that result is inconsistent with other Ordinance provisions. We then discuss shortcomings of using a uniform 50-foot stream setback for habitat protection and suggest other approaches that might provide equal or greater habitat protection with better results for affected property owners. We comment that the Ordinance is overly restrictive in how it addresses existing structures within the anadromous stream habitat protection district by limiting modifications to existing structures and potentially requiring the removal of impervious surfaces. We then note that the Ordinance appears to have a disproportionate impact on private property owners. Last, we point out two obvious drafting and editing errors in the Ordinance.

BACKGROUND

ANADROMOUS STREAM HABITAT PROTECTION ORDINANCE

The Kenai Peninsula Borough's Anadromous Stream Habitat Protection Ordinance was initially adopted in 1996 to protect salmon spawning and rearing habitat. Originally entitled the "Kenai River Habitat Protection" ordinance, it established a "habitat protection district" generally consisting of a 50 foot wide strip of upland adjacent to and on both sides of, portions of the Kenai River.¹ The Ordinance sought to "establish measures for the protection of Kenai River Salmon spawning and rearing habitat."² It imposed restrictions on the type of activities that could occur within the district and it established a permit process for certain activities that were not prohibited outright.

¹ Kenai Peninsula Borough Ordinance 96-06. Although generally extending 50 feet horizontally from the high water line, the district can be wider where there is very steep bank that extends more than 25 feet back from the high water line.

² *Id.*, codified as KPB 21.18.010.



In 2000, the Ordinance was amended and the district was extended to encompass upland adjacent to 10 tributaries of the Kenai River and 14 additional streams within the east side of Cook Inlet.³ Each of these tributaries and streams were identified by reference to their stream identification numbers in the "Atlas and Catalogue of Waters Important for Spawning, Rearing, or Migration of Anadromous Fish" published by the Alaska Department of Fish and Game (hereafter called the "State Atlas and Catalogue").

In 2010, the Borough further revised the Ordinance by passing four amendments that significantly modified the permit process for activities within the "anadromous stream habitat protection district."⁴ The geographic boundaries of the protection district, however, remained the same.

2011 AND 2012 AMENDMENTS

In 2011, the Borough passed **Ordinance 2011-12**, which significantly expanded the geographic extent of the anadromous stream habitat protection district by extending the district to "all anadromous waterbodies within the municipal boundaries of the Kenai Peninsula Borough which are listed in the [State Atlas and Catalogue] as periodically updated . . . excluding all portions of waterways found within the Seward-Bear Creek Flood Service area."⁵ It provided that uses or structures in existence as of January 1, 2012 in lands added to the district would be eligible for the protection offered by the "prior existing uses and structures" provisions of the Ordinance. It also established that, for waterbodies added to the State Atlas and Catalogue in the future, the "prior existing uses and structures" provisions of the Ordinance would apply to structures and uses existing as of the date that an anadromous stream was added to the State Atlas and Catalogue.

Based on information provided by the Task Force, the number of river miles subject to the Ordinance increased from 602.45 to 2,317.25 as a result of the 2011 amendment. This is nearly a four-fold increase. Acknowledging the scope of that increase in jurisdiction, Ordinance 2011-12 granted discretion to the Borough to implement the expanded jurisdiction in phases, which could occur over a period of up to three years.⁶

In response to concerns regarding the expanded jurisdiction of the Ordinance, the Borough passed **Ordinance 2012-06**, which specifically excluded from the habitat district lands adjacent to "Braided Channels, Tide Dominated Deltas, Estuaries and Lagoons which are primarily seawater."⁷ It also added a provision allowing, by conditional use permit, new construction or additions within the habitat district on previously created parcels that contain 0.3 acres and that meet certain other qualifying criteria.⁸

³ Kenai Peninsula Borough Ordinance 2000-08.

⁴ Kenai Peninsula Borough Ordinance 2010-12, Ordinance 2010-14, 2010-16, and 2010-21.

⁵ Kenai Peninsula Borough Ordinance 2011-12, codified as KPB 21.18.025.B.

⁶ Kenai Peninsula Borough Ordinance 2011-12, s.3.

⁷ Kenai Peninsula Borough Ordinance 2012-06, codified as KPB 21.18.025.B.2.

⁸ Kenai Peninsula Borough Ordinance 2012-06, codified as KPB 21.18.081.B.10.

ANALYSIS

Issue: The 2011 Amendments could create an argument for applying the Ordinance to areas that border lakes and ponds, not just streams and rivers, which would be inconsistent with other Ordinance provisions.

The 2011 amendments to the Ordinance added two provisions to the “Applicability” section that have the effect of extending the habitat protection district to “all anadromous waterbodies within the municipal boundaries of the Kenai Peninsula Borough” which are found in the State Atlas and Catalogue, with very limited exceptions. Although the term “waterbodies” is not defined in the Ordinance, its use in the provisions added by the 2011 amendments could give rise to an interpretation that the habitat protection district encompasses lakes and ponds that are the headwaters of the anadromous streams listed in the Ordinance. This potentially expansive interpretation could be based on the fact that the list of “waterbodies” in the “State Atlas and Catalogue,” includes lakes as well as rivers and streams. Also, the term “waterbody,” or “body of water,” is generally applied to lakes and ponds, whereas streams and rivers are sometimes called “watercourses.”

However, other provisions in the Ordinance appear to indicate that the habitat protection district is confined to areas adjacent to streams and does not encompass the lakes and ponds that feed those streams. Section 21.18.040 of the Ordinance states that the district includes “all lands within 50 horizontal feet of the streams set forth in KPB 21.18.025.”⁹ The Ordinance’s title itself – “Chapter 21.18. – Anadromous Streams Habitat Protection” – gives an additional indication that only lands adjacent to streams should be subject to the restrictions of the Ordinance, and not areas around lakes or other waterbodies.

Recommendation: The Alaska Association of Realtors[®] (the “Association”) requests the Borough to confirm that the “anadromous stream habitat protection district” applies only adjacent to streams and not to other waterbodies used by anadromous fish that may now or in the future be included in the State Atlas and Catalogue.

Issue: The Ordinance’s use of a uniform 50-foot wide habitat protection district for all covered streams and rivers, may be less effective in protecting important habitat than a more context-sensitive and flexible approach.

The Ordinance establishes an “anadromous stream habitat protection district,” which, in general includes “all lands within 50 horizontal feet of the streams set forth in [the Ordinance].” The size of this zone is the same for the original streams subject to the Ordinance, such as the Kenai River itself and its major tributaries, as well as all of the additional streams to which the Ordinance currently applies following the 2011 and 2012 amendments. This means that the setback is the same on streams of all types and characteristics, and is the same for pristine riparian (riverfront) areas as it is for already degraded or altered riparian areas. This suggests that there may not be a clear relationship between the extent of the “habitat protection” district and the actual habitat characteristics of various rivers and streams. Put another way, on what

⁹ Section 21.18.040 of the Ordinance (emphasis added).

non-arbitrary basis has the Borough determined that a uniform 50 foot width on either side of the watercourse strikes the best balance between habitat protection and property rights in all cases?

Alternative Approaches to Achieve Objectives: The Borough should consider other ways to establish a relationship between the *size* of the habitat protection district and the *qualitative factors* of the streams and the riparian habitats, and then refine its regulation accordingly to reduce the burdens on affected property owners while maintaining an appropriate level of protection where most needed.

(1) One approach would be to undertake a more formal habitat assessment by evaluating the existing quality of the streams listed in the "State Atlas and Catalogue" as well as the nature and quality of the associated riparian areas as they relate to (a) the particular species of anadromous fish present in the streams and (b) the associated uses of the stream (spawning, rearing or migration) by the particular species. The Borough could then define the habitat protection district in a way that more adequately protects the higher quality riparian areas and more threatened or sensitive species, while reducing the regulatory burden on land that is less suitable for riparian habitat and less essential for species protection.

(2) Another possible approach would be for the Borough to use a tiered treatment for the habitat protection district. For example, the streams that were initially subject to the Ordinance and are presumably most in need of protection, could retain the 50-foot wide setback, whereas a smaller setback (for example, 25 feet) could be applied to the land adjacent to the streams recently added to the habitat protection district.

(3) A third approach would be to allow property owners some flexibility in establishing the exact location of the protected area on their property by allowing an owner to reduce the setback along part of a particular owner's riverfront in exchange for an enhanced setback along another part of the same parcel. The average undisturbed riverfront, calculated for the parcel as a whole, would have to exceed a particular width. For example, if the existing 50-foot setback were in effect, a property owner could reduce the setback along a portion of the parcel to a minimal distance, as long as a setback greater than 50 feet was maintained along another part of the property so that the average setback was equal to or greater than 50 feet.

Whatever approach is taken, the Borough should give landowners the right to petition for a reduction in the otherwise applicable setback at locations where the riparian land has previously been disturbed or is otherwise situated so that a reduced setback is justified.

Recommendation: The Association requests that the Borough undertake a more ecologically-based process to identify lands suitable for anadromous stream habitat protection, which could consist of an actual evaluation of riparian habitat or, at the least, a tiered approach to the size of the protection district that affords greater protection to more significant streams. It also urges the Borough to allow some flexibility in how the district is applied to particular parcels in order to acknowledge practical considerations and reduce the Ordinance's impact on property owners.

Issue: The automatic inclusion of all streams within the local habitat protection district when they are added to the State Atlas and Catalogue is a questionable practice.

The recent amendments to the Ordinance provide that as the state adds "waterbodies" to the State Atlas and Catalogue, the lands adjacent to those waterbodies are automatically added to the habitat protection district. It appears that this would occur without providing an opportunity for the local public to comment on whether that particular stream is appropriately subject to the Ordinance, and without local regulators making a determination themselves as to whether local regulation should be extended to the particular stream in question. Providing automatic protection to land adjacent to every waterbody that is added to the State Atlas and Catalogue has the potential to result in a huge increase in the area covered by the habitat protection district, without the opportunity for public input or review. In effect, the Borough Assembly that passed the recent amendments created a mechanism by which the State controls a significant aspect of local policy concerning habitat protection adjacent to streams – namely, what additional streams require local regulatory protection under the Ordinance – and can effectively amend the Ordinance in that regard, without any new legislative action by the Borough.

Furthermore, the criteria used by the Alaska Department of Fish and Game to decide whether to add waterbodies to the State Atlas and Catalogue do not appear to include the quality of the riparian zone as habitat. The criteria are limited to observations of spawning, rearing or migration of the anadromous fish. From a scientific perspective, a more legitimate approach would be for the Borough to review the updated State Atlas and Catalogue on a periodic basis, in order to evaluate the actual characteristics of the waterbodies added. It should then consider, on a stream-by-stream basis, whether the extension of the habitat protection district to the lands adjacent to any of these particular streams will in fact further the protection goals of the Ordinance.

Recommendation: The Association requests that the Borough reconsider the 2011 amendments to the Ordinance that greatly expanded the size of the habitat protection district by reference to the State Atlas and Catalogue. The Association also requests that the Borough amend the Ordinance so that lands adjacent to waterbodies newly added to the "State Atlas and Catalogue" are not automatically included in the habitat protection district. Before any stream or other waterbody is added to the habitat protection district, the Borough should evaluate the particular stream and the extent to which regulation of the adjacent lands is advisable in light of habitat protection goals and with consideration of private property rights, and it should provide a process for deliberation and public input before making a decision.

Issue: The Ordinance is overly restrictive in how it addresses existing structures within the habitat protection district.

Section 21.18.090.C.1. of the Ordinance addresses existing structures within the anadromous stream habitat protection district. It states:

Upon application and approval of a prior-existing structure/use permit by river center staff principal structures may be replaced, repaired or reconstructed within two years after accidental damage or destruction by fire, explosion, natural disaster, flood, or other casualty, force of nature, or other force or act beyond the owner's control and not

intentionally caused by the owner. If a principal structure is not substantially damaged and only a portion of the structure has been damaged or destroyed, only that portion may be repaired or replaced. The height of an original principal structure and area encompassed by the original footprint cannot be increased. The structure must be similar in size and use to the structure being repaired or replaced. Repair, replacement, or reconstruction may only encompass the same square footage that the structure occupied prior to damage or destruction, and the structure must be more compliant with this chapter which shall be determined by application of mitigation measures set forth in KPB 21.18.091 to the maximum extent practicable.

This section significantly limits a property owner's ability to reconstruct a structure that is damaged or destroyed. It provides no opportunity for a property owner to modify a structure absent damage or destruction. The Ordinance only allows for an addition to an existing structure within the habitat protection district in the very limited circumstances identified in Section 21.018.081.B.10, and even then only pursuant to a conditional use permit by which the Borough can impose other conditions and requirements on the property owner.

These restrictions will discourage owners from upgrading or redeveloping property that already contains a structure, even if the upgrade would otherwise result in greater compliance with the standards of the Ordinance. For example, a structure that is within the habitat protection district, but which is on a property that is greater than 0.3 acres (meaning it would not qualify for the conditional use permit under Section 21.018.081.B.10) cannot be modified within the district, except pursuant to a variance.¹⁰ There is no consideration of, or exception for, even those modifications that have the net result of improving the condition of the property for riparian habitat purposes. This result undercuts the purposes of the Ordinance.¹¹

It is a common practice throughout the country, for local zoning ordinances to allow the expansion or reconstruction of pre-existing structures in ways that do not increase the degree of a nonconformity or change its nature.¹² They permit such changes in appropriate cases, either without any discretionary review, or with a form of review that does not involve proving hardship and the other stringent criteria for variance relief. If the Borough adopted such an approach, it would provide more flexibility for owners to use and enjoy their property and adapt it to modern needs. At the same time, it could promote development that would advance the goals of the Ordinance.

Section 21.18.090.F. of the Ordinance also potentially requires the removal of existing impervious materials, at the discretion of the River Center.¹³ It states:

Impervious materials placed in the habitat protection district which are not structures are not allowed as either prior existing uses or prior existing structures. The river center may require removal of these materials.

¹⁰ KPB 21.18.145.

¹¹ KPB 21.18.020, which includes minimizing the impacts of structures within the habitat protection district.

¹² Salkin, AMERICAN LAW OF ZONING § 12:56 (2012).

¹³ Formally, the Donald E. Gilman River Center, which is a multi-agency permitting, information, and education center comprised of staff from Borough, state, and federal agencies.

This section could be interpreted as giving the River Center authority to require a property owner to remove pre-existing pavement and other impervious surface from the habitat protection district, even when the owner is not seeking development approval.

Further, the Ordinance does not define "impervious materials" but it does define "Impervious Coverage" as follows:

"Impervious Coverage" means an area of ground that, by reason of its physical characteristics or the characteristics of materials covering it, does not absorb rain or surface water. All parking areas, driveways, roads, sidewalks and walkways, whether paved or not, and any areas covered by buildings, structures, or water shedding material such as, but not limited to, concrete, asphalt, brick, stone, wood, ceramic tile, plastic sheeting or metal shall be considered to be or have impervious coverage. Elevated light penetrating structures meeting the requirements of KPB 21.18.071 A.2 shall not be counted as impervious coverage.¹⁴

This definition seems overly restrictive, as there are numerous "pervious" products that are sold for use as hardscape materials for driveways, walkways or parking areas that are well documented as promoting infiltration of rain or surface water.¹⁵ Automatically identifying these materials as impervious without any consideration as to their actual ability to promote infiltration is bad policy. More importantly, however, if the River Center relies on this definition of "impervious coverage" to determine what "impervious materials" it can order removed under KPB 21.18.090.F, it could have significant and expensive consequences for property owners. Anyone who has used any part of a habitat protection district as an area for parking or as a driveway ("whether paved or not"), or for any other use involving the placement of "water shedding" materials on the ground, could be forced to cease the use and remove the offending materials. This would mean that the River Center would have the ability to force property owners to remove unpaved walkways within the habitat protection district

Recommendation: The Association urges the Borough to adopt a less severe approach to the subject of prior existing structures. Individuals and businesses that have made substantial investments in their property should be permitted to upgrade and expand and adapt those properties and their uses in reasonable ways that do not substantially impact the Borough's habitat protection goals. They should be able to do so subject to reasonable conditions and in most cases without having to present a variance application and satisfy the highly stringent standards for that form of discretionary relief.

Specifically, the Association encourages the Borough to accommodate reasonable expansion and modification of prior existing structures, even if subject to discretionary review, so that businesses and other property owners can continue to make suitable use of specialized properties.

¹⁴ KPB 21.18.140.AC.

¹⁵ Current research demonstrates that permeable pavements can be an effective way in which to provide infiltration as a means for stormwater treatment. For example, a four-year research effort by the University of New Hampshire's Stormwater Center examined the effectiveness of permeable pavement in a cold weather climate and found that a permeable parking lot resulted in reduction in stormwater volume of 25% from existing site conditions. See "Pervious Pavements - New Findings about their Functionality and Performance in Cold Climates." *Stormwater*, September 2008.

The Association also requests that the Borough remove the section of the Ordinance that would appear to grant the River Center authority to order the removal of impervious materials from the habitat protection district. Requiring the removal of lawfully placed materials that may have been in place for years and that may be an important component of a property's utility and arguably is contrary to the Ordinance's goal to "protect and enhance real property values."¹⁶ On a related point, the Association also notes that the definition of "impervious coverage" excludes materials that demonstrably are permeable to water, and requests that this definition be revised.

Issue: The Ordinance appears to have a disproportionate impact on private property owners.

The Ordinance applies to any lands adjacent to the identified anadromous waterbodies, but as a practical matter, it appears to affect privately owned property the most. According to information made available by the Task Force at the August, 2012 meeting, the Ordinance, prior to 2011, affected 3,499 parcels, of which 2,797 are privately owned (80%). The 2011 amendments extended the Ordinance's jurisdiction to an additional 1,906 parcels, of which 871 are privately owned (46%). The result is that the large majority (68%) of the parcels subject to the Ordinance are privately owned. Moreover, the vast majority of improved parcels affected by the Ordinance are privately owned. 2,354 out of 2,473 (95%) of improved parcels within the district are privately owned.

In addition the Ordinance explicitly favors public uses within the habitat protection district even on private property. The conditional uses that may be permitted under the Ordinance include: "public owned facilities, parks, campgrounds," and private boat launches established to serve the public, open to the public, and without "exclusive membership." The distinction is made between public and private use in these categories even though there is not necessarily any difference between the two in terms of impact on the habitat protection district. For example, there is unlikely to be any difference in the impact to the habitat protection district associated with a boat launch open to the public and a private boat launch open to a members only recreational club. Yet the Ordinance would allow the public use of private property, but not the private use of the private property in an identical way. Likewise, whether a campground is public or private does not have any bearing on the extent of impact on riparian habitat.

Recommendation: The Association requests that the Borough address the disproportionate impact the Ordinance has on private property owners and ask the Borough to expand the scope of uses that may be permitted on private property located in the District. The Association notes that doing so would help to advance the Ordinance's goal of "protect[ing] and enhance[ing] real property values."¹⁷ The Association also requests the Borough to confirm that all the public parcels within the Borough's control that are adjacent to anadromous streams are being managed by the Borough for habitat protection purposes. We note that a focus on ensuring the protection of anadromous stream bank habitat on public lands by strictly managing those lands for the benefit of the anadromous species of concern, would be a particularly appropriate way to advance the objectives of the Ordinance. Notably, the management of public land, unlike the

¹⁶ KPB 21.18.020.D.

¹⁷ KPB 21.18.

private property regulation that is the focus of the Ordinance, does not implicate the countervailing interest of protecting and enhancing property values.

Issue: The Ordinance contains mistakes that should be corrected.

Inconsistent Conditional Use Definitions

Section 21.18.090.C.1. of the Ordinance contains the following definitions:

- B. "Conditional use" shall mean a use that would not be appropriate without restrictions throughout the habitat protection area but which, if controlled as to number, area, location, relation to the habitat or method of operation, would not cause or lead to significant erosion, destruction of wetlands or riparian habitat, or result in or increase ground or water pollution.
- U. "Conditional use" means a use or associated structure which, owing to some special characteristics attendant to its operation or installation, is permitted in a district subject to special standards and conditions in addition to the usual requirements for the district in which the conditional use may be located.

These definitions are clearly different. The definition under subsection B appears to be specifically drafted for the Ordinance, whereas the definition under subsection U appears to be a general zoning definition for a conditional use.

Reference to a Repealed Provision

Section 21.18.072 providing for limited commercial activity within a habitat protection agency references 21.18.070.B. The annotation in the Ordinance indicates that 21.18.070 was repealed in its entirety in 2010.

The presence of such obvious errors suggests that the Ordinance may have received insufficient attention by its drafters during the adoption of the recent amendments. Drafting and editing that is not careful can signal an absence of careful substantive review as well.

Recommendation: The Association suggests that the Borough address these discrepancies as part of an overall reconsideration of the Ordinance in light of the Association's other comments.