

MEMORANDUM

TO: Grace Merkes, Assembly President
Members, Kenai Peninsula Borough Assembly

FROM: Colette Thompson, Borough Attorney
Holly Montague, Deputy Borough Attorney

DATE: December 20, 2007

SUBJECT: Ordinance 2008-02, requiring that roads constructed prior to final plat approval meet borough maintenance standards

As mentioned in Mr. Knopp's memorandum supporting this ordinance, the Legal Department recommends that some proposed amendments be developed to address potential legal concerns after the assembly has had an opportunity to consider the basic proposal. Preliminarily it seems these concerns can be overcome. However, input is needed from the assembly and staff to determine how best to address them.

A primary concern is that, as written, this ordinance would require partially built roads in a proposed plat to be built to borough maintenance standards even if the subdivision is some distance from the road maintenance system. Roads that are not contiguous to the road maintenance system are not accepted for maintenance. Therefore, the developer would be required to install a potentially expensive improvement for which he or she would receive no concomitant benefit unless he or she builds an access road. This would likely be considered a regulatory "taking" without some modifications.

Another concern exists if the developer is required to build an access road across neighboring parcels to reach his or her subdivision. As written, the ordinance requires this if there are partially constructed roads because it requires partially built roads to meet borough maintenance standards as a condition of plat approval. Those maintenance standards include a requirement that the roads be contiguous to other publicly maintained roads. The subdivider would therefore have to build an access road to the nearest maintained road. This would become a legal problem if it results in the requirement that the access road be built to a greater standard than what the developer's subdivision alone would require. Also, constructing an access road to borough standards that would pass numerous other properties would likely improve those properties without compensating the subdivider.

Additionally, the term “constructed” needs to be defined to eliminate any question as to whether the roads in the proposed plat must be constructed to borough maintenance standards as a condition of final plat approval.

Also, clearer guidelines should be included for the RSA director to exercise the discretion to waive the road construction requirements. Otherwise the borough could be exposed to claims that the director acted arbitrarily or capriciously in waiving or not waiving the requirements.

Additional time, and direction from the assembly, is necessary to give the proposal a more thorough legal review.