

MULLIKIN SURVEYS

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April 26, 2008

Planning Commission
Kenai Peninsula Borough
144 N. Binkley St.
Soldotna, AK 99669

Agenda Item N. 6.

Committee Lands

Page Number 155

Re: KPB Ordinance 2008-10, Legal Access to Subdivisions

Dear Commissioners:

Mullikin Surveys has been in business in the Kenai Peninsula Borough for 30 years. Most of our survey work is done statewide for DOT, DNR, U.S. Forest Service, BLM, and University of Alaska, but we continue to provide surveys within the Kenai Peninsula Borough.

This proposed ordinance would mandate that we complete more research and field work and, thus, charge more and make more money.

However, we are strongly opposed to this ordinance and believe it is another layer of unnecessary regulation. I RECOMMEND A VOTE OF NO ON THIS ORDINANCE.

- 1) The definition of legal access totally ignores prescriptive rights, RS2477 easements, and private easements.
- 2) What is the definition of "constructible"?
- 3) Section line easements can be expensive and difficult to research and define. Section line easements are not always well defined and many future court cases will be necessary to refine whether they continue through native allotments, wildlife refuges, etc.
- 4) The State of Alaska allows reasonable access through their lands. See the attached document, Alaska State Statute 11 AAC 96.020. Does the Kenai Peninsula Borough allow access through its land?
- 5) We recently provided a quote of less than \$5,000 to subdivide a 40 acre parcel near Homer. However, we informed the owner it would quite likely cost an additional \$1,000 should Ordinance 2008-10 be enacted.

- 6) Buyers of land should be informed of the conditions of the property. An alternate ordinance could simply state: "The physical and legal access to this property is not guaranteed by approval of this plat by the KPB."
- 7) Ordinance 2008-10 ignores private easements.
- 8) The constitution does not fully guarantee the right to subdivide. However, the government is required to pay when land is taken from a person. It appears to me that individual rights to use and develop land are being taken in exchange for the dubious determination of access.

Recommendation: VOTE NO ON THIS ORDINANCE.

Sincerely,

Donald E. Mullikin, P.L.S.

DEM:jvm

11 AAC 96.020. Generally allowed uses

(a) A permit or other written authorization is required for uses and activities not appearing on the list in this subsection. Unless otherwise provided in (b) of this section or in a special use land requirement in 11 AAC 96.014, the following land uses and activities, alone or in combination, are generally allowed uses on state-owned public domain land without any permit or other written authorization from the department, except that a land use or activity for a commercial recreation purpose requires prior registration under 11 AAC 96.018:

(1) travel or travel-related activities, as follows:

(A) hiking, backpacking, skiing, climbing, or other foot travel;

(B) bicycling;

(C) travel by horse or dogsled or with pack animals;

(D) using a highway vehicle with a curb weight of up to 10,000 pounds, including a pickup truck and four-wheel-drive vehicle, on or off an established road easement, if the use off the road easement does not cause or contribute to water quality degradation, alteration of drainage systems, significant rutting, ground disturbance, or thermal erosion;

(E) using a recreational-type off-road or all-terrain vehicle with a curb weight of up to 1,500 pounds, including a snowmobile and four-wheeler, on or off an established road easement if use off the road easement does not cause or contribute to water quality degradation, alteration of drainage systems, significant rutting, ground disturbance, or thermal erosion;

(F) landing an aircraft or using watercraft without damaging the land, including shoreland, tideland, and submerged land;

(G) driving livestock, including any number of reindeer or up to 100 horses, cattle, or other domesticated animals;

(2) access improvements, as follows:

(A) brushing or cutting a trail less than five feet wide using only hand-held tools such as a chainsaw; making a trail does not create a property right or interest in the trail;

(B) anchoring a mooring buoy in a lake, river, or marine waters, or placing a float, dock, boat haulout, floating breakwater, or boathouse in a lake, river, or marine waters, for the personal, noncommercial use of the upland owner, if the use does not interfere with public access or another public use, and if the improvement is placed within the projected sidelines of the contiguous upland owners parcel or otherwise has the consent of the affected upland owner; in this subparagraph,

(i) "float" or "dock" means an open structure without walls or roof that is designed and used for access to and from the water rather than for storage, residential use, or other purposes;

(ii) "boat haulout" means either a rail system, at ground level or elevated with pilings, or a line attached from the uplands to an anchor or mooring buoy;

(iii) "floating breakwater" means a structure, including a log bundle, designed to dissipate wave or swell action;

(iv) "boathouse" means a structure designed and used to protect a boat from the weather rather than for other storage, residential use, or other purposes;

(3) removing or using state resources, as follows:

(A) hunting, fishing, or trapping, or placement of a crab pot, shrimp pot, herring pound, or fish wheel; nothing in this subparagraph relieves a person from complying with applicable state and federal statutes and regulations on the taking of fish and game;

(B) harvesting wild plants, mushrooms, berries, and other plant material for personal, noncommercial use; however, the cutting of trees is not a generally allowed use under this subparagraph;

(C) using dead and down wood for a cooking or warming fire, unless the department has closed the area to fires during the fire season;

(D) grazing no more than five domesticated animals;

(E) recreational gold panning;

(F) hard-rock mineral prospecting or mining using light portable field equipment, including a hand-operated pick, shovel, pan, earth auger, or a backpack power drill or auger;

(G) suction dredging using a suction dredge with a nozzle intake of six inches or less, powered by an engine of 18 horsepower or less, and pumping no more than 30,000 gallons of water per day;

(4) other improvements and structures on state land, as follows:

(A) setting up and using a camp for personal, noncommercial recreational purposes, or for any non-recreational purpose, including as a support camp during mineral exploration, for no more than 14 days at one site, using a tent platform or other temporary structure that can readily be dismantled and removed, or a floathouse that can readily be moved; the entire camp must be moved at least two miles before the end of the 14-day period; a cabin or other permanent improvement is not allowed, even if on skids or another nonpermanent foundation; the camp must be removed immediately if the department determines that it interferes with public access or other public uses or interests;

(B) brushing or cutting a survey line less than five feet wide using only hand-held tools, including a chainsaw, or setting a survey marker; however, a survey monument may not be set without written survey instructions issued under 11 AAC 53;

(C) placing a residential sewer outfall into marine waters from a contiguous privately owned upland parcel, with the consent of the affected parcel owners, if the outfall is within the projected sidelines of the contiguous upland parcel and is buried to the extent possible or, where it crosses bedrock, secured

and covered with rocks to prevent damage; nothing in this subparagraph relieves a person from complying with state and federal statutes and regulations applicable to residential sewer outfalls;

(D) placing riprap or other suitable bank stabilization material to prevent erosion of a contiguous privately owned upland parcel if

(i) no more than one cubic yard of material per running foot is placed onto state shoreland; and

(ii) the project is otherwise within the scope of the United States Army Corps of Engineers Nationwide Permit 13 (Bank Stabilization), as set out in 67 Fed. Reg. 2,020 - 2,095, dated January 15, 2002 and adopted by reference;

(5) uses not listed in (1) - (4) of this subsection that

(A) are not conducted for a commercial recreational purpose;

(B) are not listed in 11 AAC 96.010;

(C) do not cause or contribute to significant disturbance of vegetation, drainage, or soil stability;

(D) do not interfere with public access or other public uses or interests; and

(E) do not continue for more than 14 consecutive days at any site; moving the use to another site at least two miles away starts a new 14-day period.

(b) The list of generally allowed uses in (a) of this section does not

(1) apply to land withdrawn from the public domain and no longer managed under AS 38, including a state park and land owned by the University of Alaska;

(2) exempt a user from complying with other applicable federal, state, or municipal statutes, ordinances, and regulations; or

(3) authorize a use if another person has already acquired an exclusive property right to undertake that use.

(c) In order to operate under a generally allowed use listed in this section, the user must comply with the conditions set out in 11 AAC 96.025.

(d) If the department determines that, under the circumstances of a particular case, an otherwise generally allowed use interferes with public access or other public uses or interests, the use must cease.

History: Eff. 1/1/70, Register 32; am 12/7/2002, Register 164

Biggs, Sherry

From: rogerimhoff@alaska.net
Sent: Sunday, May 04, 2008 12:52 PM
To: Biggs, Sherry
Subject: Ord 2008-10 Comments

Dear Ms Biggs, would you please forward this to all the Assembly members??

Thanks, Roger

Dear Assembly members,

Recently, I had a chance to review the proposed ordinance and discuss it with Gary Nelson, Tom Latimer, and Don Mullikin, all fellow Land Surveyors who have long resided and practiced in the Homer Area. I don't think any of us support the proposed Ordinance.

These are my own conclusions:

While well meaning, I believe that the Law of "Unintended Consequences" will certainly come into play if this ord is enacted.

There are 2 main problems.

The first and most obvious is the definition of "constructable." How far must this be carried in the way of "proof" and what is the consequence if the proposed route is later shown to be "UNconstructable"?? Certainly there is a liability to the Owner, the Surveyor, and the Borough (as Approving Authority).

The second problem is the proposal ignores the history of subdividing in the Borough. Many times well planned and platted subdivisions have been recorded with no ROW (Legal Access) connections. Practical Access is provided over private easements or perhaps a commonly used connecting road. Later plat actions through Infilling eventually connect the ROWs. We have seen this time and again in the Homer and Anchor Point areas.

The proposal would prevent private property owners from subdividing and this seems to be a huge contradiction in protecting property rights...Property rights are something the KPB has always supported in Code.

I would like to see 2008-10 voted down.

Sincerely,
 Roger Imhoff, RLS
 PO Box 2588
 Homer Ak 99603
 235-7279

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