

HUGGINS REALTY  
4412 Spenard Road  
Anchorage, Alaska 99503

July 6, 1972

Chairman  
Kenai Peninsula Borough  
Planning and Zoning Commission

Dear Sir:

Pursuant to Section 20.15.085 of Kenai Peninsula Borough Ordinance number 26, relating to subdivision plats and platting, this letter is written to request that the Kenai River Keys Subdivision be granted an exemption from Section 20.15.075(29), which requires that each lot in a subdivision "shall abut on a dedicated street."

As you know, Section 20.15.085 authorizes the Commission to make exceptions to the requirements set forth in the subdivision ordinance if it is determined that special circumstances or conditions affect the property in question; that the exception is necessary for the preservation and enjoyment of a substantial property right of the petitioner; and that the granting of the exception will not be detrimental to the public welfare or injurious to other property. Accordingly, the first part of this correspondence will be addressed to the matters just mentioned.

With respect to the criteria of special circumstances, it is important to recognize that Kenai River Keys is to be developed as a recreational site. Accordingly, each deed will contain covenants restricting the use of any given lot to recreational purposes only, providing that only single family dwellings not exceeding two stories in height may be erected, insuring a minimum lot size, and protecting trees.

The explicit purpose of the subdivision to protect and promote recreational uses cannot be achieved if roads must be dedicated to the public. This is so because such uses are simply not compatible with the use of subdivision roads and other facilities by the large number of people who would be attracted to the site in the absence of access restrictions. The large amount of vehicular traffic resulting from this use would pose a serious danger to the children of lot owners, and in general, would create a condition which would impair the recreational value of the site. Such impairment is already all-too-familiar in our national parks and other areas set aside for recreational enjoyment. Within the subdivision itself, garbage and other

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debris ejected from passing cars and the large number of people attempting to use subdivision roads and lands are now posing a serious problem in our efforts to protect the pristine beauty of the site. These problems, along with the concomitant problems of noise and air pollution and loss of privacy resulting from excessive vehicular use, will become far more acute as time goes on if the exemption which we are requesting is not granted. Recognizing the need for the environmental protection of lands in and around the subdivision, many environmentalists, including the Isaak Walton Leagues have expressed support for the recreational subdivision concept and limited access roads which we envision. Given all of the factors referred to above, it is our strong belief that the subdivision site is indeed property affected by "special circumstances or conditions," as this phrase is used in the Ordinance.

The factors outlined above also indicate that an exception is necessary "for the preservation and enjoyment of a substantial property right of the petitioner." (Section 20.15.085)(2). Without the exception which we are requesting, the use of the site for recreational purposes would be limited. As a result, a serious diminution in property value can be expected. Thus, an exemption is necessary both to insure that each land owner will have the right to use his property for its highest and best use, that is, for recreational purposes, and to protect his economic investment.

It is our strong belief that the rights of the petitioner and subsequent lot owners can be fully protected with a suitable exemption without adversely affecting the public welfare or injuring adjacent property. In fact, it is our opinion that the public welfare will be enhanced if the exemption is granted. One reason for this contention is that an exception to the dedication requirement will help to insure the preservation and protection of one of the most beautiful scenic areas along the Kenai River. As stated earlier, construction of roads dedicated to the public will result in the utilization of the site by more people than the ecology of the area can reasonably be expected to bear. On the other hand, the subdivision plan which we have promulgated will insure the enjoyment of the site by the maximum number of people possible given the environmental concerns. In order for this subdivision to become a viable entity, roads must be built. The real question is whether such roads will be administered in a manner that will insure the protection of ecological and recreational values or whether they will not.

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It is important to recognize that the preservation of environmental values on the site in question for the enjoyment of the maximum number of people possible will not deprive the general public of access to or enjoyment of the Kenai River in the same vicinity. Along the east boundary of the subdivision, there is a substantial quantity of state owned land. The availability of this land will insure the enjoyment of recreational uses by the general public and access to a broad stretch of the Kenai River. In this connection, it is also important to realize that the dedication of subdivision roads to the general public would not provide access to the Kenai River nor promote recreational uses by the general public. This is so because land within the subdivision would still be retained in private ownership, thus, preventing its use by the public. In addition, the subdivision plan calls for the termination of roads at points short of the river. The land located between these termination points and the river will be subdivided into one owner lots. Therefore, it will not be possible for a member of the general public to reach the river without trespassing across privately owned land. In other words, the dedication of public roads would not provide access to the river by people who do not reside in the subdivision.

The public interest will also be served in other ways if the exemption which we have requested is granted. At the present time, we are planning to subdivide the site in question into approximately 110 individual lots. The assessed value of these lots and the improvements which are made on them will result in increased tax revenues to the Kenai Peninsula Borough. If the exemption which we are requesting is not granted, it is doubtful whether the subdivision concept that we envision could be successfully implemented at this time. Thus, increased tax revenues derived from the subdivision lots and improvements would not be realized.

It is also logical to assume that the monies spent by approximately 110 lot owners and their families will have a higher beneficial impact on businesses located in the general vicinity. This is so because every dollar spent by residents can be expected to have a multiplier effect on the economy of the Kenai Peninsula, as is the usual case when additional dollars are inculcated into the local Alaskan economy. Accordingly, it is reasonable to assume that additional income will accrue to businesses located near the subdivision and new jobs created, at least in the more temperate months.

With respect to the economic factors associated with the implementation of a recreational subdivision concept, it is also important to recognize that the establishment of private



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roads within the subdivision will not result in increased expense to the Borough. On the contrary, costs will be reduced since the subdivision, and not the Borough or a municipality, will assume the financial responsibility for road construction and maintenance. Moreover, as will be pointed out in subsequent paragraphs, the establishment of private roads will not jeopardize local fire-fighting or police enforcement activities.

Having discussed our subdivision plan in relation to each of the three findings of fact which the Commission must make under Section 20.15.085, we will now present a legal basis for our request for an acceptance from Section 20.15.075(29). As you know, Section 40.15.030 of the Alaska statutes provides that "all streets, alleys, thoroughfares, parks and other public areas shown on the plat (of a subdivision) are deemed to have been dedicated to public use." In order to prevent this statute from becoming applicable to the Kenai River Keys Subdivision, we propose to show the street and other access routes within the subdivision not as roads or public areas but as easements dedicated to the City and Borough of Kenai and to the City of Soldotna for certain specific purposes and to subdivision property owners for access purposes. We believe that if this approach is adopted, subdivisions roads need not be dedicated to the public since they would not come within the operation of Section 40.15.030.

Under this approach, easements would be dedicated on the plat to the cities of Kenai and Soldotna and to the Kenai Borough for fire-protection, police enforcement, and any other municipal functions which these governmental entities believe should be protected through a permanent right of access on subdivision property. In this connection, it has been held that a utility easement shown on a subdivision plat is not deemed to have been dedicated to the public and, consequently, does not come within the operation of Section 40.15.030. Chugach Electric Association, Inc. vs. Calais Company, Inc., 410 P.2d 508 (Alaska 1966). Thus, it was said in this case that:

"The utility easements shown on the Bancroft subdivision plat do not fit into such class (the public areas referred to in AS 40.15.030) because by their nature they are not subject to general or common use by the public at large, but only by a limited number of persons or corporations who are engaged in the business of providing public utility services for the residents of the Bancroft Subdivision. Such utility easements are public only in the sense that when used by a few, all of the residents of the subdivision, as a part of the public are entitled to derive benefits from such use."

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We believe that the same reasoning is also good authority for expanding the easement to insure street access by each lot owner.

In order to insure the future preservation of easements created in the subdivision plat under the authority of this case and other precedents referred to herein, we would also be willing to insert restrictive covenants in deeds to subdivision owners preserving the Soldotna, Kenai, and the Borough's right to use a portion of the lot as an easement for the provision of municipal services and to insure the right of access by other property owners. The effect of these covenants would be to create so-called "negative easements" in that a property owner's use of his land would be limited by the easement within the area covered by the covenant.

Although there are no private subdivisions in Alaska which we know of, it is our understanding that such subdivisions have been created in the Midwest by showing limited access easements on the subdivision plat. Thus, there seems to be ample precedent both in terms of Alaska law and the Midwestern experience for the dedication of easements as a mechanism for establishing limited access roads. These same precedents, in conjunction with the considerations referred to in the first part of this correspondence, are also persuasive evidence for the granting of an exception to Section 20.15.075(29) of Borough ordinance Number 26.

We are aware that the geographic isolation of certain parts of Alaska and other related factors have sometimes weakened restrictive covenants and even plat maps as a mechanism for implementing a particular plan of land use. Accordingly, we would like to take this opportunity to express our willingness to supplement these enforcement mechanisms with an agreement between the Borough and us or any other approach designed to insure that the road access plan ultimately arrived at will be satisfactorily carried out in future years. This willingness extends not only to the question of access but also to other matters which the Borough believes cannot be adequately handled within the context of the subdivision plat and restrictive covenants.

For the reasons outlined above, we respectfully ask that the Commission act favorably on the exception which we have requested. We also would appreciate the opportunity


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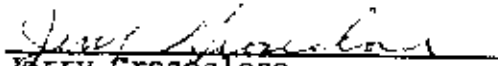
to appear personally at the Commission meeting at which our request will be considered.

Thank you for your consideration of this matter.

Very truly yours,

  
G. J. Huggins

  
Jack Linton

  
Jerry Groséclose

JK/am

cc: Mr. Ralph Darbyshire  
Planning Director

Mr. Nordale  
Borough Attorney