

Introduced by:	Johnson, Chesley
Substitute Introduced:	09/05/23
O2022-36 (Johnson, Chesley)	See Original Ordinance for Prior History
Hearing:	09/09/23
Action:	Postponed to 09/19/23 and Added Additional Hearing on 10/10/23
Vote:	9 Yes, 0 No, 0 Absent
Date:	
Action:	
Vote:	

**KENAI PENINSULA BOROUGH
ORDINANCE 2022-36
(JOHNSON, CHESLEY) SUBSTITUTE**

**AN ORDINANCE AMENDING KPB CHAPTER 21.25 AND KPB CHAPTER 21.29
REGARDING CONDITIONAL LAND USE PERMITS AND MATERIAL SITE
PERMITS, UPDATING NOTICE, APPLICABILITY, PERMIT TYPES, APPLICATION
REQUIREMENTS, STANDARDS AND PERMITS CONDITIONS**

WHEREAS, there are goals and objectives within the 2019 Kenai Peninsula Borough Comprehensive Plan to establish policies that better guide land use to minimize land use conflicts, maintain property values, protect natural systems and support individual land use freedoms, as well as strategy objectives to update the Borough’s existing conditional use regulations for gravel extraction and other uses to better address reoccurring land use conflicts; and

WHEREAS, under current state law a first or second class borough must provide for planning, platting, and land use regulation on an areawide basis, except where such powers have been delegated to a city within the Borough; and

WHEREAS, land use regulation includes zoning powers; and

WHEREAS, the Borough has enacted KPB Chapter 21.04, Zoning Districts, and has established two zoning districts: the municipal district and the rural district; and

WHEREAS, within the rural district, KPB 21.25.040 requires a permit for the commencement of certain land uses within the rural district of the Kenai Peninsula Borough; and

WHEREAS, approximately 243 registered prior existing use material sites and approximately 68 conditional land use permits for material sites have been granted since 1996; and

WHEREAS, the assembly established a material site work group by adoption of Resolution 2018-004 (Substitute) to engage in a collaborative discussion involving the public and industry to make recommendations regarding the material site code; and

- WHEREAS,** the ordinance, Ordinance 2019-30, incorporating the final report and work group recommendations, failed enactment following public hearing and a vote during the assembly's October 24, 2019 meeting; and
- WHEREAS,** in late 2021, due to continued conflict including costly administrative and court appeals, the administration brought this land use issue back to the assembly and requested assembly action regarding the permitting process related to earth materials extraction and processing; and
- WHEREAS,** throughout this process the planning department, the material site work group, the planning commission, and the assembly have received many verbal and written public comments from Borough residents, professionals, and site operators; and
- WHEREAS,** the assembly first considered this issue by looking at the same ordinance that failed in 2019, relabeled Ordinance 2021-41; and
- WHEREAS,** Ordinance 2021-41 and a related substitute ordinance were tabled by the assembly at its February 1, 2022 to allow for consideration by the assembly as a committee of the whole, and
- WHEREAS,** the availability of three different types of conditional land use permits for material sites are designed to separate impacts of such uses and tailor applicable conditions and requirements to the associated impacts; and
- WHEREAS,** the Kenai Peninsula Borough recognizes the importance of implementing bonding, as applicable, to ensure neighboring properties and water sources are insured; and
- WHEREAS,** implementing a systematic process to determine a prior-existing use will allow the planning department to better identify the number of and types of pre-existing use sites in existence on the Kenai Peninsula and address complaints regarding nonconforming prior existing material sites; and
- WHEREAS,** requiring all prior-existing use operations to comply with reclamation plan and hours of operation requirements protects public health, safety, and general welfare; and
- WHEREAS,** requiring all prior-existing use operations which extract material below or within two feet of the seasonal highwater table to conduct operations in accordance with the requirements outlined in the relevant sections of code protects public health, safety, and general welfare; and

WHEREAS, buffer zones, dust control, hours of operation, and setbacks as mandatory conditions applicable to all permits, along with the discretionary conditions and conditions specific to processing or extraction with the water table, will reduce dust, noise, and attractive nuisances, thereby promoting public health, safety, and general welfare; and

WHEREAS, providing the planning director or planning commission the ability to add certain discretionary conditions recognizes the unique challenges material sites on the Kenai Peninsula present and that all conditions appropriate for one material site on one part of the Kenai Peninsula may not be appropriate for another site located on another part of the Kenai Peninsula; and

WHEREAS, Ordinance 2022-36 was postponed multiple times in 2022 and 2023 after the Assembly formed a Committee of the Whole to work through the ordinance section by section, amendment by amendment; and

WHEREAS, the Committee of the Whole first met on August 23, 2022 and subsequently 20 additional meetings; and

WHEREAS, the Committee of the Whole considered and deliberated 63 amendment documents to Ordinance 2022-36, made 107 motions, and voted on 89 separate items; and

WHEREAS, Ordinance 2022-36 and this substitute ordinance went before the Planning Commission for review; and

WHEREAS, after years of work, public input, and public deliberative process, this substitute ordinance enacts a new notice section to align with notice requirements of Title 20 of Borough code and enacts a new chapter of code related to material sites wherein it establishes a CLUP permit system containing three different endorsement types with standards and conditions applicable to each endorsement, which are intended to encourage responsible development while also protecting and promoting the public health, safety, and general welfare of all residents and visitors of the Kenai Peninsula Borough;

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

SECTION 1. That KPB 21.25.050 is hereby amended as follows.

21.25.050. Permit considerations—Public hearing required.

- A. Within 30 days of receiving an application, the planning director or designee shall review the submitted application for completeness and compliance with this chapter. If it is incomplete or does not meet the requirements of this chapter, the planning director shall notify the applicant in writing. The planning director shall thereafter either return the application to the applicant or schedule the application to be considered by the planning commission at the next appropriate scheduled meeting. Upon receiving an application, the planning director or designee will forward a copy of the application to the Kachemak Bay National Estuarine Research Reserve (“KBNERR”) for review and comment. KBNERR will have thirty days to provide its review and comment prior to submission of the application to the planning commission if the application is otherwise complete.

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SECTION 2. That the Kenai Peninsula Borough Code of Ordinances is hereby amended by repealing and reenacting KPB Chapter 21.25.060, Notice, which shall read as follows:

21.25.060. Notice.

- A. Except for counter permits for material sites issued under KPB 21.29.020(A) or expressly excepted elsewhere in this title, notice of any pending application required under this title will be given in accordance with this section.
- B. Required forms of notice are as follows:
1. Notice of the pending application will be published on the borough website.
 2. When available, the notice will also be posted on a public bulletin of the impacted community.
 3. At the beginning of the notice period a copy of the notice will be sent by First Class U.S. Mail to all owners and leaseholders of record of property located with a radius of one-half mile of the subject property, except for permit applications under KPB 21.29 the notice area is the parcels within a radius of 1000 feet of the subject property.
- C. The notice must contain a description of the proposed location, the type of proposed land use or a description of the action requested, as applicable, the applicant's name, where written comments may be submitted, the last deadline for submitting written comments to the planning commission, and the date, time and location of the public hearing.

- D. The failure of any person to receive any notice required under this section, where the records of the borough indicate the notice was provided in a timely and proper manner, will not affect the validity of any proceeding under this title or be basis for appeal.

SECTION 3. That the Kenai Peninsula Borough Code of Ordinances is hereby amended by repealing and reenacting KPB Chapter 21.29, Material Site Permits, which shall read as follows:

21.29.005. Intent and Purpose.

The purpose of this chapter is to provide a land use permitting process to regulate the operation, scope, and duration of earth materials extraction and processing within the borough while promoting the public health, safety, and general welfare of the Kenai Peninsula Borough, including the health of aquatic systems that support salmon. It is the further purpose of this chapter to promote compatible, orderly development.

21.29.010. Applicability—Prohibitions.

- A. This chapter applies to all private and public lands in the borough except where the use is prohibited by ordinance within a local option zoning district or exempt under KPB 21.29.015.
- B. This chapter does not apply within the incorporated cities of the Kenai Peninsula Borough.
- C. Earth material extraction within 300 linear feet from riparian wetlands and the seasonal high-water level of naturally-occurring open water bodies, such as a lake, pond, river, perennial stream, or ocean, is prohibited. This prohibition does not apply to man-made water bodies or isolated ponds of less than one acre on private property or the construction of waterbodies within the permitted area.
- D. All operations must be conducted in accordance with the current publication of the State of Alaska, Alaska DEC User’s Manual Best Management Practices for Gravel/Rock Aggregate Extraction Projects. In the event a provision of this chapter conflicts with the State of Alaska’s manual, this chapter controls.
- E. Up to 5,000 gallons of water per day may be withdrawn from a well. Proof of ADNR use authorization is required for a withdrawal of water in excess of 5,000 gallons per day from a well, as long as there is no open pond with active excavation. Open water is allowed only with an approved settling pond per KPB 21.29.055 or in conjunction with a CLUP approved pursuant to KPB 21.29.057 (Type III CLUP).

21.29.015. Material extraction exempt from obtaining a permit.

- A. Material extraction limited to one acre per parcel, that is not in a mapped flood plain or subject to 21.29.015(B), does not require a permit. There will be no excavation within 20 feet of a public right-of-way or within 10 feet of a lot line. An owner or operator exempt under this subsection must register with the borough on a form provided by the planning department and must comply with KPB 21.29.010(C). Material extraction within two feet of seasonal high-water table and all material crushing or screening activities are prohibited under this exemption.
- B. Material extraction taking place on dewatered bars within the confines of the Snow River and the streams within the Seward-Bear Creek Flood Service Area do not require a permit, however, operators subject to this exemption must provide the planning department with the information required by KPB 21.29.030(A)(1) and (6), and a current flood plain development permit prior to beginning operations.
- C. A prior existing use that is in full compliance with all provisions of KPB 21.29.120 does not require a material extraction permit.
- D. Material extraction from public or private property which is necessary for the construction of a public or private development on the same property does not require a material site extraction permit.

21.29.020. Types of permits available.

- A. Counter permit. A counter permit is required for earth material extraction which disturbs more than one acre and less than 5 cumulative un-reclaimed acres and is limited to one counter permit per parcel. Material conditioning or processing, and material extraction within two feet of the seasonal high-water table is prohibited under a counter permit except, upon request from the applicant, the planning director or designee may issue a one-time processing waiver for screening of materials only. The one-time processing waiver may not exceed sixty consecutive days. The hours of operation under the one-time processing waiver are the same as provided for a Type II Earth Materials Conditioning or Processing Endorsement under 21.29.055. Buffer conditions for a one-time processing waiver must be established consistent with the permit application prior to commencement of processing operations. A counter permit is valid for a period of two years. Upon request from the applicant, the planning director, or designee, may grant one 12-month extension on a counter permit. Counter permits are approved by the planning director, or designees, and are not subject to notice requirements under KPB 21.25.060. The planning director's decision to approve or deny a counter

permit may be appealed to the planning commission, which must act as the hearing officer, in accordance with KPB 21.20.

B. Conditional land use permit. A conditional land use permit (CLUP) is required for earth materials excavation, extraction, and earth materials conditioning or processing, that exceed the limitations for a counter permit in KPB 21.29.020(A) or for activities within two feet of the seasonal high-water table. A CLUP applicant may request the following CLUP endorsements as part of a single application and fee:

1. Type I Endorsement – Earth Materials Extraction. A Type I Endorsement is required for any earth materials excavation or extraction which disturbs 5 or more cumulative acres. Earth materials conditioning or processing activities and excavation or extraction within two feet of the seasonal high-water table is prohibited under this permit. The requirements and conditions in KPB 21.29.050 apply to a Type I Endorsement.
2. Type II Endorsement – Earth Materials Conditioning or Processing. A Type II Endorsement is required for any operation that includes earth materials conditioning or processing activities. The conditions in KPB 21.29.050 and KPB 21.29.055 apply to a Type II Endorsement.
3. Type III Endorsement – Earth Materials Extraction Within Water Table. A Type III Endorsement is required for operations of any size that excavate or extract earth materials within two feet of the seasonal high-water table. The requirements and conditions in KPB 21.29.050 and KPB 21.29.057 apply to a Type III Endorsement. If the application includes earth materials conditioning or processing activities, then the requirements and conditions in KPB 21.29.055 apply.

An applicant may request a CLUP that includes one, two or all three of the above endorsements. A CLUP is valid for a period of five years. A CLUP may be renewed in accordance with KPB 21.29.070. The provisions of KPB Chapter 21.25 are applicable to material site CLUPs and the provisions of KPB 21.25 and 21.29 are to be read in harmony. If there is a conflict between the provisions of KPB 21.25 and 21.29, the provisions of KPB 21.29 are controlling.

21.29.030. Application procedure.

A. In order to obtain a counter permit or CLUP under this chapter, an applicant must first complete and submit to the borough planning department a permit application, along with the fee listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees. The planning director may determine that certain contiguous parcels are eligible for a single permit. The application must include the following items, without which the application will be deemed incomplete:

1. Legal description of the parcel, KPB tax parcel ID number, and identification of whether the permit is for the entire parcel, or a specific location within a parcel;
2. Expected life span of the material site;
3. A buffer plan consistent with KPB 21.29.050(A)(1);
4. Reclamation plan consistent with KPB 21.29.060;
5. The depth of excavation;
6. Type of material to be extracted;
7. A site map provided by a professional surveyor licensed in the State of Alaska to include the following:
 - a. Location and elevation of test holes, and depth of groundwater, based on the seasonal high-water table. At least one test hole per ten acres of excavated area is required. The test holes must be at least two feet below the proposed lowest elevation of excavation depth. Depth of groundwater may also be established by a civil engineer licensed in the State of Alaska using professionally-accepted methods and data.
 - b. Location of all private wells of adjacent property owners within 300 feet of the proposed parcel boundary;
 - c. Identification of all encumbrances, including but not limited to, easements;
 - d. Points of ingress and egress. Driveway permits must be acquired from either the state or borough as appropriate prior to submitting the application;
 - e. Identify and label all drainage features entering and exiting the property;
 - f. Location of any water body on the parcel, including the location of any riparian wetland as determined by best available data;
 - g. North arrow;
 - h. The scale to which the site plan is drawn;

- i. Preparer's name and date; and
- j. Field verification must include staking the boundary of the parcel at sequentially visible intervals. The planning director may grant an exemption in writing to the staking requirements if the parcel boundaries are obvious or staking is unnecessary.

8. A site plan is required by a civil engineer licensed in the State of Alaska. The site plan must include the following:

- a. Surface water protection measures, if any, for adjacent properties, including the use of diversion channels, interception ditches, on-site collection ditches, sediment ponds and traps, and silt fence;
- b. Location of excavation, and, if the site is to be developed in phases, the life span and expected reclamation date for each phase;
- c. Proposed buffers consistent with KPB 21.29.050(A)(1), or alternate buffer plan;
- d. Anticipated haul routes;
- e. Location of any processing areas on the parcel, if applicable; and
- f. Ground water protection measures for anadromous waters, especially with regard to juvenile salmon, as identified by shallow groundwater flow paths and critical areas of aquifer connectivity, such as recharge, where this information is available.

9. A statement by the operator of the site that the requirements of KPB 21.29.045 have been satisfied.

B. In order to aid the planning commission or planning director's decision-making process, the planning director may provide vicinity, aerial, land use, and ownership maps for each application and may include additional information.

21.29.040. Standards for sand, gravel or material sites.

A. These material site regulations are intended to protect against aquifer disturbance, road damage, physical damage to adjacent properties, dust, noise, visual and other impacts of earth materials extraction sites through setbacks, buffer zones, street-level visual screening, and protection of salmon-rearing waters. Prior to granting a counter permit or conditional land use permit under this chapter, the planning director or planning commission, as applicable, must make the following findings:

1. That the use is not inconsistent with the applicable comprehensive plan;
2. That the use will not be harmful to the public's health, safety, and general welfare, or the health of anadromous waters particularly with regard to juvenile salmon;
3. That sufficient setbacks, buffer zones, and other safeguards, including measures to mitigate impacts to groundwater flow paths important for juvenile salmon, are being provided consistent with this chapter;
4. That the use provides for a reclamation plan consistent with this chapter; and
5. That the use will preserve the value and character of the surrounding area.

21.29.045. Required compliance with State and Federal laws

- A. All applicants for permits for earth materials extraction are required to demonstrate compliance with state and federal law. Prior to final approval of the permit, the applicant or agent must provide written documentation from the permitting agency of compliance with the following:
1. An Alaska Department of Natural Resources (ADNR) temporary use authorization if the applicant intends for water to leave the site. If water leaves the side, the applicant must adhere to the provisions of the ADNR temporary water use authorization;
 2. Mining permit as required by ADNR if extraction activities are to take place on state land;
 3. Reclamation plan as required by ADNR, pursuant to A.S. 27.19;
 4. Notice of intent for construction general permit or multi-sector general permit and storm water pollution prevention plan, and other associated permits or plans required by the Department of Environmental Conservation (DEC) pursuant to the Alaska Pollutant Discharge Elimination System (APDES) requirements;
 5. United States Army Corps of Engineers (USACE) permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344, if material extraction activity requires USACE approval; and
 6. Any other applicable state or federal agency with regulatory authority of mining activities or earth materials extraction.

B. In addition to the requirements in subsection (A) of this section, all activity must be conducted in compliance with state or federal regulations governing the items listed below. Written documentation of compliance with these regulations is not required. Complaints received by the borough of violations of requirements within this section will be forwarded to the appropriate agency for enforcement, this includes but is not limited to:

1. Air quality.

a. EPA air quality control permit is required for asphalt plants and crushers;

b. ADNR burn permit is required for brush or stump burning. Combustibles must be stockpiled separate from noncombustibles, and burn permit requirements must be followed; and

c. ADEC dust control and air quality regulations pertaining to burning activities must be followed.

2. Water quality. EPA or ADEC regulations controlling spills, spill reporting, storage and disposal of oil, anti-freeze and hydrocarbons.

3. Hazardous Materials. Use and storage of hazardous materials, waste and explosives.

a. EPA regulations controlling use of hazardous materials must be followed; and

b. U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives regulations must be followed when storing or using explosives.

C. Failure to comply with any of the requirements in subsections (A) and (B) of this section is a violation of the permit, and is subject to enforcement pursuant to KPB Chapter 21.50.

21.29.050. Permit conditions applicable to all permits.

A. The planning commission or planning director, as applicable, must impose the following mandatory conditions prior to approval of a permit under this chapter:

1. Buffer Zone.

- a. A minimum 30-foot buffer zone must be established between the area of excavation and the parcel boundaries. The buffer zone must provide visual, dust, and noise screening. The buffer zone may include one of the following: a six-foot earthen berm with a 2:1 slope; a minimum six-foot foot sight-obscured fence; or an alternative buffer proposal that the planning commission or planning director, as applicable, deems appropriate. There is no requirement to buffer the material site from uses which commence after the approval of the permit. Berms may not alter natural drainage features;
- b. Where an easement exists, a buffer must not overlap the easement, unless otherwise conditioned by the planning commission or planning director, as applicable; and
- c. This requirement may be waived upon a finding by the planning director or planning commission, as applicable, that a lot line where the waiver is requested is directly adjoining another material site or industrial use.
- d. Geographic Information System (GIS), Photogrammetry, LIDAR, and other technologies may be utilized in the design of the buffer zone. Using this technology, line-of-site profile drawings may be utilized in the determination of sufficiency of the buffer zone.
- e. At its discretion the planning director or planning commission (as applicable) may waive or reduce buffer requirements when screening proves to be not necessary or not feasible.

2. Water source separation.

- a. Material extraction below or within two feet of the seasonal high-water table is prohibited unless the applicant is issued a Type III Endorsement and the requirements and conditions in KPB 21.29.057 are satisfied;
- b. Offsite excavation dewatering is prohibited;
- c. All permits will be issued with a condition which prohibits any material extraction within 100 linear feet of any water source as

defined in KPB 21.29.130 existing prior to original permit issuance;
and

- d. On site movement of water may be permitted pursuant to KPB 21.29.057 if: (i) the operator provides a statement under seal and supporting data from a qualified independent civil engineer licensed and active in the State of Alaska that the dewatering will not lower any known water systems; and (ii) the applicant posts a bond for liability for potential accrued damages in an amount equivalent to the cost to replace each water wells within a 300-foot radius of the site. The rebuttable presumption is that the cost per well is a minimum of \$10,000.
- e. All permits must include a condition prohibiting material extraction inside the boundaries of a mapped tsunami hazard zone within 500 linear feet of any existing private or public drinking water source except for material sites where the floor is higher than the surrounding ground in at least one direction.
- 3. Roads. Operations that impact borough roads must be conducted in accordance with the requirements and remedies of KPB Chapter 14.40.
- 4. Dust control. Dust suppression is required on haul roads within the boundaries of the material site by application of water or calcium chloride.
- 5. Hours of operation. Material extraction activities, including equipment operation, may only occur between the hours of 6:00 a.m. and 9:00 p.m. Alaska Standard Time (AKST), or as determined by the planning commission or planning director, as applicable, to be appropriate based on information presented.

 - a. Project-based waiver. An applicant may request a seasonal, project-based waiver of the hours of operation requirements under this subsection. A waiver granted under this subsection is valid for up to six consecutive calendar months. To grant a waiver under this subsection, the commission must find that the waiver is necessary for a specific project, and that the waiver is not harmful to the public health, safety, and general welfare of borough residents.
- 6. Groundwater elevation. All material sites must maintain one monitoring well two feet below the proposed excavation per ten acres of excavated area.
- 7. Setback. Material site excavation areas must be 250 feet from the property boundaries of any existing public school ground, private school ground,

college campus, licensed childcare facility, multi-purpose senior center, assisted living home, and licensed health care facility.

8. Permit boundaries. The buffers and any easements or rights-of-way abutting the proposed permit area must be staked at sequentially visible intervals. Field verification and staking will require the services of a professional land surveyor. Stakes must be in place prior to issuance of the permit.

9. Processing. Material extraction of any size that includes processing, screening, or crushing activities is prohibited unless the applicant is issued a Type II CLUP and the conditions in KPB 21.29.055 are imposed on the permit.

B. Discretionary Conditions. The planning commission or planning director, as applicable, may set conditions of approval for issuance of a counter permit or CLUP, as appropriate for the area in which the development is sited, for the following:

1. Setbacks/Buffer Area.

a. The mandatory buffer area condition in subsection (A) above may be increased, up to a maximum of 100 feet between the area of excavation and the parcel boundaries, and include a combination of appropriate buffers, if the planning commission finds, based on substantial evidence presented, that increasing the buffer area is necessary for the public health, welfare and safety of the vicinity;

i. An earthen berm with a minimum 2:1 slope may be required. The berm height will be determined by the planning commission or planning director, as applicable, and constructed above preexisting elevation around the excavation area. As the excavation area expands, the berm will move toward negatively-impacted properties in the vicinity until such limits of the permitted area are exhausted. The berm must be maintained at the predetermined height while permitted activity is occurring. This earthen berm may be in addition to other buffer zone conditions imposed upon the permit.

b. All other requirements of KPB 21.29.050(A)(1) apply; and

- c. When a buffer area has been denuded less than a year prior to review of the application by the planning commission or planning director revegetation may be required.
- 2. Road repair. In consultation with the Road Service Area Director, repair of public right-of-way haul routes may be required of the permittee.
- 3. Ingress and egress. The planning commission or planning director may suggest the points of ingress and egress for the material site. The permittee is not required to construct haul routes outside the parcel boundaries of the material site. Driveway authorization must be acquired, from either the state through an “Approval to Construct” or the borough road service area, as appropriate, prior to issuance of a material site permit when accessing a public right-of-way.
- 4. Surface and ground water protection. Use of surface and ground water protection measures as specified in KPB 21.29.030(A)(8)(a).
- 5. Street-level screening. Street-level visual screening, noise mitigation, and lighting restrictions as appropriate for the surrounding area and in accordance with the standards set forth in KPB 21.29.040.
- 6. Noise suppression. At the discretion of the planning commission or planning director, as applicable, multi-frequency (white noise) back-up alarms may be required on all equipment and vehicles that have existing state or federal back-up alarm requirements as a condition to help meet the noise impact standard in accordance with and in consideration of existing uses in the vicinity.
- 7. Special Impacts Zone (SIZ)
 - a. The screening of adverse visual, noise, and dust impacts protects public health, safety, and general welfare. General welfare is further served through imposition of this zone. The distance restrictions balance the right to quiet enjoyment of one’s property against development rights. Residents within this zone may request screening methods that are objective, measurable, and within the overall regulatory limits set by this chapter by providing substantial evidence to support the request.

b. For counter permits, visual, noise, and dust impacts that cannot be screened as set forth in Subsection 8(a) within 500 horizontal feet of an existing principle residential structure may be grounds for denial. For Type 1, 2, and 3 Endorsements, visual, noise, and dust impacts that cannot be screened as set forth in Subsection 8(a) within 750 horizontal feet of an existing principle residential structure may be grounds for denial. The distances specified in this subsection will be measured from any outer wall of a principle residential structure to the nearest boundary of the proposed material site permitted parcel.

8. Public campgrounds. From the last Monday of May through the first Monday of September each year, for operations within 1,000 feet of a campsite within a public campground, the following limitations to operations may be applied:

(a) hours of operation limited to 9:00 am to 6:00 pm;

(b) no excavation, processing, or hauling activity allowed over the Memorial Day and preceding weekend, Independence Day, or Labor Day and preceding weekend; or

(c) if a proposed haul route conflicts with a public campground entrance road, then the planning commission or planning director, as applicable, may designate the haul route to be used, with exceptions allowed for local delivery.

The 1,000-foot distance will be measured from any campsite of the public campground to the outer boundary of the permitted area for which an applicant has requested a counter permit or conditional land use permit under this chapter.

21.29.055. Type II Endorsement – Earth Materials processing

In accordance with KPB 21.29.020(B)(2), a Type II Endorsement is required for earth materials conditioning or processing activities. Prior to issuing a permit under this subsection, the planning commission must impose the mandatory conditions in KPB 21.29.050(A) and discretionary conditions as the planning commission deems appropriate. In addition, the following requirements and permit conditions specific to Type II CLUP apply:

A. Setback. Equipment which conditions or crushes material must be operated at least 300 feet from the parcel boundaries. At its discretion, the planning commission may waive the 300-foot processing distance requirement, or allow a lesser distance in consideration of and in accordance with existing uses of the properties in the vicinity at the time of approval of the permit.

B. Hours of operation.

1. Earth materials crushing equipment and blasting may only be operated between 8:00 a.m. and 7:00 p.m. AKST, or as determined by the planning commission.
2. The planning commission may grant exceptions to increase the hours of operation and processing in the event of an emergency or a good-cause finding that the increased hours of operation serve a public purpose and are not harmful to the public health, safety, and general welfare of borough residents. Such an exception may not exceed 120 days.
3. Seasonal, project-based waiver. An applicant may request a seasonal, project-based waiver of the hours of operation requirements under this section. A waiver granted under this subsection is valid for six consecutive calendar months. To grant a waiver under this subsection, the commission must find that the waiver is necessary for a specific project, and that the waiver is not harmful to the public health, safety, and general welfare of borough residents.

- C. Onsite retention of settling pond water is allowed, including for the washing of materials, provided that the settling pond is not created by channeling or redirecting natural water bodies or natural drainage. Notwithstanding, if a settling pond is within two feet of the seasonal high water table, then a Type III Endorsement is required.

21.29.057. Type III Endorsement - Material extraction below or within two feet of the seasonal high-water table.

In accordance with KPB 21.29.020(B)(3), a Type III Endorsement is required for material extraction of material below or within two feet of the seasonal high water table. Prior to a permit being issued the planning commission must impose the mandatory conditions set forth in KPB 21.29.050(A) and discretionary conditions as deemed appropriate. In accordance with KPB 21.29.050(A)(2)(b) dewatering is prohibited. The following additional application requirements and permit conditions specific to a Type III Endorsement apply:

- A. Prior to application for a Type III Endorsement, the following requirements must be met:

1. Installation of a sufficient number of monitoring wells and test pits, as recommended by a qualified professional, to adequately determine groundwater flow direction, hydraulic gradient, water table and seasonal high-water table elevation. Monitoring well and test pit locations must provide the qualified professional with adequate information to characterize the entire property that will be permitted for material extraction. Well casing elevations must be surveyed to a vertical accuracy of 0.01 feet by a registered land surveyor and tied to NAVD 1988.
2. Determination of seasonal high-water table elevation, groundwater flow direction, hydraulic gradient, and water table elevation for the site must be measured under the supervision of a qualified professional.
3. A written report must be completed by a qualified professional that makes a determination about the potential adverse effects to groundwater and surface water body elevation, groundwater and surface water quality, surrounding water users and adjacent properties. The determination must be based on available data, interpretations of the data and knowledge of groundwater processes.
4. The report must be submitted with the CLUP application and must:
 - a. Identify existing public water system sources, as identified by the state, that are located within one-half mile of the boundary of the property on which the activity will take place;
 - b. Identify actual or presumed private drinking water wells located within one-half mile of the boundary of the property on which the activity will take place and include a copy of the available well logs;
 - c. Identify existing regulated potential sources of contamination within at least one-half mile of the boundary of the property on which the activity will take place;
 - d. Contain maps at appropriate scales presenting the results of the well search, the setbacks required by subsection (C)(7) of this section, and illustrating wetlands and water bodies; at least one map must show identified potential sources of contamination;
 - e. Include the water table elevation monitoring data, monitoring well logs and records of any test pits, and a discussion of the seasonal high-water table determination; and

- f. Evaluate subsurface hydrologic conditions and identify potential adverse effects that may occur as a result of material extraction. The evaluation of the hydrologic conditions must include identifying confining layers and ground water flow paths.

- B. In addition to the application requirements for a Type I Endorsement, the application for a Type III Endorsement must include:
 - 1. A description of the proposed extent and depth of material extraction beneath the seasonal high-water table.
 - 2. A written report that meets the requirements of subsection (A)(4) of this section, a monitoring plan, and a spill prevention, control, and countermeasures plan as required by this section.

- C. Conditions. In addition to the requirements of KPB 21.29.050, operating conditions for extraction within or below two feet of the seasonal high-water table are as follows:
 - 1. Implement a monitoring plan that meets the requirements of this chapter. If existing wells will provide sufficient data, no additional wells are required.
 - 2. Implement the spill prevention, control and countermeasures plan in accordance with Environmental Protection Agency's requirements for above ground storage tank operations regardless of the quantity of petroleum products on site.
 - 3. Groundwater flow direction, hydraulic gradient, and groundwater table elevation for the subject parcel must be measured at least monthly during active extraction. Monitoring wells must be maintained or replaced with equivalent monitoring wells.
 - 4. Water elevation monitoring data must be retained for two years following completion of reclamation activities and must be provided to the planning director upon request.
 - 5. A qualified professional must annually submit a report to the department that includes water table elevation monitoring data.
 - 6. Operations must not breach or extract material from a confined aquifer or a confining layer beneath a perched aquifer.

- a. If evidence suggests a confined aquifer or confining layer has been breached, or if groundwater or surface water elevation changes rapidly or beyond natural variation, the director must be notified within 24 hours.
 - i. A hydrologic assessment, conducted by a qualified professional, to determine the affected area and the nature and degree of effects and a description of potential repair or mitigation options must be submitted to the director within 14 calendar days of notification; and
 - ii. Repair or mitigation sufficient to address identified effects must be initiated as soon as practical, not to exceed 45 calendar days from the date the assessment is received by the director.
7. Operations must maintain the following setbacks:
- a. 500 feet from the nearest down-gradient drinking water source;
 - b. 350 feet from the nearest cross-gradient drinking water source;
 - c. 200 feet from the nearest up-gradient drinking water source; and
 - d. Minimum separation distances do not apply to drinking water sources constructed after a permit to extract material below the water table has been issued.

21.29.060. – Reclamation plan.

- A. All material site permit applications require an overall reclamation plan. A site plan for reclamation must be required including a scaled drawing with finished contours. A five-year reclamation plan must be submitted with a permit renewal request.
- B. The applicant may revegetate and must reclaim all disturbed land within the time period approved with the reclamation plan so as to leave the land in a stable condition wherein a 2:1 slope is maintained. Any revegetation must be done with a non-invasive plant species. Bonding must be required at \$750.00 per acre for all acreage included in the current five-year reclamation plan. In the alternative, the planning director may accept a qualified professional's estimate for determining the amount of bonding. If the applicant is bonded with the state, the borough's bonding requirement is waived. Compliance with reclamation plans will be enforced under KPB 21.50.

- C. The following measures must be considered in the preparation, approval and implementation of the reclamation plan, although not all will be applicable to every reclamation plan:
1. The area will be backfilled, graded and re-contoured using strippings, overburden, and topsoil so that it will be stabilized to a condition that will allow for revegetation under KPB 21.29.060(B).
 2. The topsoil used for reclamation must be reasonably free from roots, clods, sticks, and branches greater than 3 inches in diameter. Areas having slopes greater than 2:1 require special consideration and design for stabilization by an independent, professional civil engineer licensed and active in the State of Alaska.
 3. Exploration trenches or pits will be backfilled. Brush piles and unwanted vegetation must be removed from the site, buried or burned. Topsoil and other organics will be spread on the backfilled surface to inhibit erosion and promote natural revegetation.
 4. Topsoil mine operations must ensure a minimum of four inches of suitable growing medium is left or replaced on the site upon completion of the reclamation activity (unless otherwise authorized).
 5. Ponding may be used as a reclamation method as approved by the planning commission.
 6. The area will be reclaimed in a manner that is not harmful to public health, safety, and general welfare.
- D. The five-year reclamation plan must describe the total acreage to be reclaimed relative to the total excavation plan. The five-year reclamation plan must also identify any drainage features which enter or exit the property.
- E. Close-out. Reclamation plans and requirements survive expiration, termination, or revocation of a permit granted under this chapter. In order to close-out a permit, the planning director must be provided adequate proof that reclamation has been conducted in accordance with the reclamation plan. If a permit expires, terminates, or is revoked prior to permit close-out, the remedies under KPB 21.50 apply and the planning director may hold applicable fines and remedies in abeyance upon a finding that reclamation is actively ongoing.

21.29.063. Decision.

The planning commission or planning director, as applicable, will approve permit applications whereby standards under KPB 21.29.040 have been met through implementation of conditions set forth in KPB 21.29.050, KPB 21.29.055, and KPB 21.29.057 or will deny applications when the application does not meet the standards in KPB 21.29.040. The decision will include written findings detailing how the conditions under KPB 21.29.050, KPB 21.29.055, and KPB 21.29.057 meet, or do not meet the standards set forth in KPB 21.29.040 and evidence to support those findings. The decision must be distributed to the parties of record before the planning commission, with notice of right to appeal.

21.29.065. Effect of permit denial.

- A. Absent new evidence or a material change in circumstances that even with due diligence the applicant could not have presented with the original application, no reapplication concerning the same counter permit application may be filed within one calendar year of the date of the planning director's final denial action.
- B. Absent new evidence or a material change in circumstances that even with due diligence the applicant could not have presented with the original application, no reapplication concerning the same CLUP may be filed within five calendar years of the date of the final denial action.
- C. For the purposes of this section, the applicant bears the burden of proof of demonstrating that new evidence or a material change of circumstances exist and that even with due diligence the applicant could not have presented the information with the original application.

21.29.070. Permit renewal, modification and revocation.

- A. Conditional land use permittees must submit a renewal application every five years after the permit is issued. A renewal application must be submitted at least 90 days prior to expiration of the CLUP.
- B. The planning director may administratively approve a renewal application that meets the following requirements: (i) the permittee is in compliance with all permit conditions and no modification to operations or conditions are proposed; and (ii) the borough did not issue a notice of violation under the permit during the two calendar years preceding the renewal application. If the renewal application does not satisfy the foregoing requirements or if the planning director determines a review by the planning commission is warranted, then the planning commission will hear the renewal application.

- C. In the event the renewal application is heard by the planning commission, the planning commission must hold a public hearing on the renewal application. If the applicant is complying with all permit conditions and requirements and is not in violation of borough code, then the renewal must be granted by the planning commission. Notwithstanding the foregoing, if the commission determines, after public hearing, that discretionary conditions are appropriate on renewal then the commission may modify the CLUP by imposing conditions as deemed appropriate under the circumstances. Permit renewal applications will be denied if the permittee is in violation of the original permit requirements and conditions or borough code. The permittee will be given ninety days to correct any violations. If the violations are corrected, the permit will be renewed. A renewal application heard by the planning commission must be processed in accordance with the notice requirements of KPB 21.25.060.
- D. A permittee may request a modification of a CLUP or counter permit, as needed. A modification application will be processed pursuant to KPB 21.29.030 through KPB 21.29.050 with public notice given as provided by KPB 21.25.060. A permit modification is required if the permittee's operations are no longer consistent with the original permit application.
- E. The fee for a permit renewal or modification is the same as an original permit application in the amount listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees.
- F. Failure to submit a permit renewal will result in the expiration of the permit. The borough may issue a permit termination document upon expiration pursuant to KPB 21.29.080. Once a permit has expired, a new permit application approval process is required in order to operate the material site.
- G. Permits may be revoked pursuant to KPB 21.50.

21.29.080. Permit Close-out.

When a permit expires, is revoked, or a permittee requests close-out of their permit, a review of permit conditions and site inspections will be conducted by the planning department to ensure code compliance and verify site reclamation prior to close-out. When the planning director determines that a site qualifies for close-out, a permit close-out document will be issued to the permittee to terminate the permit and associated requirements. Reclamation plans and requirements survive permit expiration and revocation. The planning director is only authorized to close-out a permit following reclamation. A permit close-out determination shall release any bonding associated with the permit.

21.29.100. Recordation.

All permits, permit extensions, modified permits, prior existing uses, and terminations will be recorded. Failure to record a material site document does not affect the validity of the documents. The operator or owner of the material site is responsible for all associated permit recording fees.

21.29.110. Violations.

Violations of this chapter are governed by KPB 21.50 and this chapter.

21.29.115. Permit transfers.

A permit issued under this chapter is transferrable. The planning director will issue a conditional letter of approval upon receipt of a written permit transfer request containing the legal description of the parcel, former owner name, new owner name, and a copy of the approved permit or the legal PEU status and after a site visit. A conditional approval will not be issued if a permittee is in violation of the original permit requirements, conditions, or borough code. A transferring permittee will be given ninety days to correct violations. If the permittee fails to correct the violations within ninety days, the planning director will issue a denial letter. If a permittee is not in violation or if violations are cured within 90 days' notice, the planning director will issue a final letter of approval upon receipt of a recorded conveyance instrument listing the new owner. The requesting party may appeal a denial letter to the planning commission. Permit transfer approvals are not subject to administrative appeal.

21.29.120. Prior-existing uses.

A. *Determination.* Prior-existing uses (PEU) in effect on October 1, 2023 are allowed to continue operation subject to the requirements of this section. The burden of proof that the prior-existing use existed before October 1, 2023 and after May 21, 1996, is on the applicant. All other PEUs prior to May 21, 1996, are already recorded with the Borough and are recognized. If the planning director denies prior-existing use status, the applicant must comply with the permit requirements of this chapter. Failure to apply for a prior-existing use determination by January 1, 2025 will result in suspension of all rights to continued operation as a nonconforming use until 1) the operator applies for a prior-existing use determination; 2) the application is approved; and 3) the operator demonstrates full compliance with all provisions of this chapter relating to PEUs. The operator will have one year from the date of the notice of the planning director's review of an operator's five year renewal to come into full compliance with the provisions of this chapter, otherwise the suspended PEU permit will be terminated.

- B. *Decision.* The planning director will give notice of the application for a prior-existing use determination to property owners within 100 feet of the subject parcel boundaries. The notice will include a summary of the application, a vicinity map, and a deadline for submitting evidence regarding the existence of the use prior to the planning director issuing a decision. The planning director will issue a decision regarding the prior-existing use status based on the written application or evidence regarding the existence of the use. Based on that information, the planning director will classify the PEU based upon the use types set forth in KPB 21.29.020 and will provide a written description of the existing operations. The planning director's decision will also set forth the reclamation plan as required by subsection (F) below. The planning director's decision may be appealed by the applicant or affected property owners to the planning commission within 15 days of distribution of the decision.
- C. *Discontinuance.* Any prior-existing use which has ceased by discontinuance for an uninterrupted period of five years must thereafter conform to the permit requirements of this chapter. Lack of intent to cease use or abandon the use does not suspend the five-year time period. If a prior-existing use is discontinued or abandoned, it may not be recommenced. Any activity such as extraction, excavation, processing, or reclamation is considered valid and a continuance of site use.
- D. *Expansion Prohibited.* A prior-existing use may not be increased, intensified, or expanded or moved after October 1, 2023, nor may the prior-existing use be moved to a parcel which is subject to this chapter. If a parcel is subdivided, the pre-existing use may not be expanded to any lot, tract, or parcel where material extraction or processing had not previously occurred or was not lawfully established in accordance with this section. If a PEU material site has been exhausted as determined by the planning director, it cannot be used for earth materials processing without a Type II Endorsement.
- E. *Standards.* In order to qualify as a legal prior-existing use, the use must meet the following standards, on or before October 1, 2023:
1. A use must have been legally established under prior law.
 2. A use must be operational in accordance with the type of use.
- F. In accordance with 21.29.015, on or before January 1, 2026, all legal prior-existing-use extraction operations must comply with KPB 21.29.060 (reclamation plan) and applicable hours of operation requirements under this chapter. The planning director may waive or modify any or all of the reclamation plan requirements set forth in KPB 21.29.060 as appropriate.

- G. Materials extraction operations with legal prior-existing use status which extract material below or within two feet of the seasonal highwater table must conduct operations in accordance with the requirements outlined in KPB 21.29.057, except that KPB 21.29.057(C)(7) will not apply.
- H. For the purposes of this section, “increased, intensified, or expanded” means: (1) enlarging the area of excavation beyond the classification set forth in the planning directors decision or beyond the written description of existing operations as set forth by the planning direct under subsection (B) above; (2) increasing the depth of excavation to go within two feet of the seasonal high-water table; or (3) adding a use that was not in existence as of the date of the PEU status determination, to include adding earth materials processing to a use that did not previously include processing.

21.29.130. Definitions.

- A. Unless the context requires otherwise, the following definitions apply to material site permits and activities:
1. *Abandon* means to cease or discontinue a use without intent to resume, but excluding short-term interruptions to use or activity during periods of remodeling, maintaining, or otherwise improving or rearranging a facility or during normal periods of vacation or seasonal closure. An "intent to resume" can be shown through continuous operation of a portion of the facility, maintenance of utilities, or outside proof of continuance, e.g., bills of lading or delivery records. Abandonment also means the cessation of use, regardless of voluntariness, for a specified period of time.
 2. *Aggrieved Party* means a party of record adversely impacted by the decision of the hearing officer who participated before the hearing officer either by written or oral presentation.
 3. *Aquifer* means a subsurface formation that contains sufficient water-saturated permeable material to yield economical quantities of water to wells and springs.
 4. *Aquifer-confining layer* means that layer of relatively impermeable soil below an aquifer, typically clay, which confines water.
 5. *Assisted-living home* means a residential facility to which AS 47.33 applies, as described in AS 47.33.010.
 6. *Camp or camping* means to use a vehicle, tent, or shelter, or to arrange bedding, or both, with the intent to stay overnight.

7. Campsite means any space designated for camping within a public campground.
8. Commercial means any provision of services, sale of goods, or use operated for production of income whether or not income is derived, including sales, barter, rental, or trade of goods and services.
9. Conditioning or processing material means a value-added process including batch plants, asphalt plants, screening, blasting, washing, the use of mechanical hammers, and crushing by use of machinery. It does not include stripping and segregation with excavation equipment.
10. Earthen berm means a berm constructed of aggregate or soil not to contain slash or brush that maintains a 2:1 slop. The berm is to be constructed above the preexisting elevation.
11. Exhausted means that all material of a commercial quality in a sand, gravel, or material site has been removed.
12. Groundwater means, in the broadest sense, all subsurface water, more commonly that part of the subsurface water in the saturated zone.
13. Inactive site walls mean a wall with a slope steeper than 1.5:1 where there has been no exaction activity for 180 consecutive days.
14. Isolated pond means no surface water inlet or outlet is present at any time of the year.
15. Person includes any individual, firm, partnership, association, corporation, cooperative, or state or local government.
16. Public campground means an area, developed and maintained by a public entity, that is open to the public and contains one or more campsites.
17. Qualified professional means a licensed professional engineer, hydrologist, hydrogeologist, or other similarly-licensed professional.
18. Quarter or Quarterly means January through March, April through June, July through September, or October through December;
19. Reclamation means the process of restoring land that has been mined to a natural or economically-usable state in order to meet a variety of goals ranging from the restoration of productive ecosystems to the creation of industrial and municipal resources.

20. Sand, gravel or material site means an area used for extracting, quarrying, or conditioning gravel or substances from the ground that are not subject to permits through the state location (mining claim) system (e.g., gold, silver, and other metals), nor energy minerals including but not limited to coal, oil, and gas.
21. Seasonal high groundwater table means the highest level to which the groundwater rises on an annual basis.
22. Stable condition means the rehabilitation, where feasible, of the physical environment of the site to a condition that allows for the reestablishment of renewable resources on the site within a reasonable period of time by natural processes.
23. Surface water means water on the earth's surface exposed to the atmosphere such as rivers, lakes, and creeks.
24. Topsoil means material suitable for vegetative growth.
25. Vicinity means 1,000 linear feet from permitted boundary.
26. Waterbody means any lake, pond, stream, riparian wetland, or groundwater into which stormwater runoff is directed.
27. Water source means a well, spring or other similar source that provides water for human consumptive use.

SECTION 4. That this ordinance is effective immediately upon enactment.

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

Brent Johnson, Assembly President

ATTEST:

Michele Turner, CMC, Borough Clerk

09/05/23 Vote on motion to postpone to 09/19/23and add additional hearing on 10/10/23:

Yes: Chesley, Cox, Derkevorkian, Ecklund, Elam, Hibbert, Ribbens, Tupper, Johnson

No: None

Absent: None

Yes:

No:

Absent: