



HAINES BOROUGH, ALASKA
P.O. BOX 1209
HAINES, AK 99827
(907) 766-6400 FAX (907) 766-2716

Memorandum

Date: April 8, 2019

To: Debra Schnabel, Borough Manager
CC: Alekka Fullerton, Borough Clerk

From: Holly Smith, Borough Planner

Re: Resource Extraction

For your consideration, please see attached draft ordinance for resource extraction (VERSION 2). The draft ordinance is my recommendation for a replacement to draft ordinance 19-01-515. I am recommending the change because of the numerous concerns I've heard about the 'cumulative amounts matrix'. This new version does not have a matrix.

Correspondence from our attorney is also attached and provides insight into the proposed changes. I am also attaching his February correspondence regarding public comments received by the Mental Health Trust Lands Office.

The following is a list of topics that should be addressed with the new draft:

Elimination of RE Minor

Many members of the Assembly and public have expressed concerns about the definition of 'resource extraction, minor' and, in particular, about the allowable cumulative amounts matrix. Many believe that the matrix allows too much or too little cumulative amounts or that it is simply too confusing.

The new ordinance removes the allowable amounts designated by the planning commission, but maintains the intent of 'resource extraction, minor' by noting that activities are not considered resource extraction if they are incidental to the construction, alteration or repair of (1) a building or the grading and landscaping incidental thereto; or (2) a platted public or private access road and associated utilities or public facility providing essential services.

The elimination of the matrix does not make the ordinance any better or worse – just different. There are advantages and disadvantages to each type of definition. The correspondence from our attorney explains this in better detail. Ultimately, this is a policy decision for the Assembly.

Site Development

The planning commission recently recommended new regulations for site development (draft Ord. 19-03-527), which should work in conjunction with any definition for resource extraction. Basically, anything that isn't resource extraction would be site development if it exceeds 100 cubic yards of material or 5,000 board feet of timber. The regulations provide a way for staff to monitor and assess activities that might have an

impact on drainage patterns, erosion, anadromous streams, or other externalities to a property owner, neighboring properties, or on public facilities such as roads or storm drains. The draft ordinance does not provide for regulation outside of the townsite. I would recommend that the Assembly consider implementing the regulation in the Lutak and Mud Bay zones if residents in those zones are concerned about impacts to their properties from neighbors or if they wish greater monitoring of extractive activities by its government.

RE is a Heavy Industrial Use

The new ordinance links the definition of RE to a definition we already have in land use code – “Industrial, heavy”. The connection helps clarify the intent.

Subsurface Extractive Activities

I had previously commented that the regulation of mining, petroleum, and natural gas should not be part of the RE definition because the state has ultimate authority over all subsurface activities. However, according to Chandler, we can regulate these activities to an extent, so the new ordinance does not remove them from the definition of RE.

Enforcement of RE

We have received many comments regarding the nature of enforcement of RE and whether or not we should increase the penalty fees for violating after-the-fact occurrences or conditions of a permit. My research indicates that most other Alaskan communities do in fact have higher penalty fees than Haines. However, our attorney suggests that it is the level of commitment that a government has in enforcing code that makes the difference in reducing violations – not fine amounts (see correspondence). No change has been recommended to penalty fees at this time.

Definition of “Commercial Enterprise”

In the Mud Bay Planning/Zoning District, a commercial enterprise is a conditional use encompassing all commercial uses as long as they be done by a member or members of a family residing on the property of the proposed use. It is not a good idea to regulate land uses in terms of familial relations. The new ordinance removes this characterization while still maintaining the intent for commercial uses to be incidental to a property’s primary use as a residence.

Allowing or Prohibiting RE in the Mud Bay Rural Residential Zone

Again, this is a policy decision for the Assembly. The new ordinance leaves RE as prohibited in the MBRR zone – there is no change from Ord. 19-01-515 except that RE Minor has been removed from allowable accessory uses.

Version 2 Draft

HAINES BOROUGH, ALASKA
ORDINANCE No. 19-VERSION 2

An Ordinance of the Haines Borough amending Haines Borough Code Title 18 to amend the definition for “resource extraction”; to amend regulations of the use in 18.60.020; and to designate allowed uses in 18.70.30 for Lutak and Mud Bay zones.

Comment [hs1]: Removed “minor resource extraction” and “major resource extraction” and any changes associated with them in HBC 18.70.040 Land Use Chart. Added a new fine for violating regulations pertaining to resource extraction. This draft assumes that the draft site development ordinance will be adopted.

BE IT ENACTED BY THE HAINES BOROUGH ASSEMBLY:

Section 1. Classification. This ordinance is of a general and permanent nature and the adopted amendment shall become a part of the Haines Borough Code.

Section 2. Severability. If any provision of this ordinance or any application thereof to any person or circumstance is held to be invalid, the remainder of this ordinance and the application to other persons or circumstances shall not be affected thereby.

Section 3. Effective Date. This ordinance is effective upon adoption.

Section 4. Amendment of Section 18.20.020 of the Haines Borough Code is hereby amended to revise the definition of “resource extraction”, and to add new definitions for “minor resource extraction” and “major resource extraction” to read as follows:

NOTE: **Bolded/UNDERLINED** ITEMS ARE TO BE ADDED
~~STRIKETHROUGH~~ ITEMS ARE DELETED

18.20.020: Definitions – Regulatory.

“Industrial, heavy” means a use that has potential for significant negative impact on adjoining uses. This category includes uses that incorporate buildings that are large, tall, or unsightly; uses that generate offensive odors, noise, dust, smoke, fumes, vibration or glare; uses that involve large amounts of exterior storage; and uses that, because of their scale or characteristics, create nuisances or hazards such as heavy truck or other vehicle traffic, or other intense activity.

Comment [hs2]: This is included only for reference (there are no proposed changes to the definition of “industrial, heavy”) and would not be included in final draft ordinance. It shows that resource extraction is already defined as a heavy industrial use in Haines Borough Code and points to the types of characteristics to be considered in our zoning regulations.

These uses include airports, landing strips, and heliports; truck or ship terminals and docks; concrete batching plants; asphalt or concrete mixing plants; resource extraction; bulk material or machinery storage; petroleum refineries and trans-shipment facilities; grain elevators; meat packing plants or fish processing facilities; mills; resource recycling facilities; commercial flammable or hazardous material storage; sanitary landfills and solid waste storage/transshipment facilities; large scale sewage treatment facilities and manufacturing plants.

“Plat” means ~~the map prepared for the purpose of recording subdivisions of land or other changes to the dimensions of properties as provided herein.~~ **a two-dimensional representation of a tract or parcel of land proposed for subdivision, resubdivision, dedication, or vacation, which portrays all necessary data for**

Comment [hs3]: Added by staff 3/19/19 definition from Fairbanks North Star Borough code 17.04.010. If we are to regulate based on “approved plat” as intended in current ordinance, we should be more specific about what a plat is.

locating and retracing property lines and all easements and dedications of record, created, or to be abandoned in the course of subdivision. The plat contains information required by this title under preliminary and final plat specifications and is intended for recordation in the local recording district.

“Resource extraction” means a heavy industrial use involving the removal of rock, gravel, sand, clay, topsoil, peat, timber, ~~clearing or grading of land or the removal, for commercial purposes, of native vegetation, topsoil, fill, sand, gravel, rock, petroleum, natural gas, coal, metal ore, or any other mineral,~~ and other operations having similar characteristics. Resource extraction does not include the removal of material incidental to the construction, alteration or repair of (1) a building or the grading and landscaping incidental thereto; or (2) a platted public or private access road and associated utilities or public facility providing essential services.

Comment [hs4]: Relates to the existing definition in code for “industrial, heavy”

Comment [hs5]: Local governments can in fact regulate subsurface activities to an extent. The regulations cannot be more stringent than state standards and the borough cannot “veto” subsurface activities. Recommend we leave this in for now – **See correspondence from Brooks and attached 2015 decision of the Alaska Supreme Court invalidating an ordinance aimed at the Pebble Mine project adopted by the voters of the Lake and Peninsula Borough by initiative.**

Section 5. Amendment of Subsection 18.60.020(A). Subsection 18.60.020(A) of the Haines Borough Code is hereby amended to read as follows:

NOTE: **Bolded/UNDERLINED** ITEMS ARE TO BE ADDED
STRIKETHROUGH ITEMS ARE DELETED

Comment [hs6]: From Wrangell code 20.52.160 and Haines planning commission intent for exemption of rights-of-way and utilities

Comment [hs7]: Removed “resource extraction, minor”. Again, **see Brooks correspondence relating to this change.**

18.60.020: Specific Approval Criteria.

Comment [hs8]: No change from current draft ordinance before assembly.

The following uses are subject to the preceding general criteria and these additional specific approval criteria:

A. Resource Extraction.

1. **Permitting.** ~~A permit for the commercial extraction of a natural major resource~~ **extraction** may be issued with such reasonable conditions as necessary **to limit or minimize the adverse impact of the permitted extraction.** The **permitted** use must meet all other pertinent requirements of this title and ~~include an acceptable operation and reclamation plan that~~ addresses the following concerns ~~and assures that the adverse impact of the operation is minimized and the site will be left in a safe, stable and environmentally and aesthetically acceptable condition:~~

- ~~a. Methods and process of reclamation including stockpiling of topsoil for reuse;~~
- ~~b. Initial site conditions including existing land use, vegetation, soils, geology and hydrology;~~
- a. Limits of operational areas;
- b. Days and hours of operation;

- c. Traffic patterns;
- d. Fencing and screening;
- e. Control of dust and noise;
- f. Phasing of operations and reclamation steps;
- g. Final condition of site including:
 - (1) Relation to adjoining land forms and drainage features,
 - (2) Relation of reclaimed site to planned or established uses of the surrounding area,
 - (3) Demonstration that the final land form will have a viable land use compatible with land use trends in the surrounding area;
 - (4) Relation of reclaimed site to initial site conditions including land use, vegetation, soils, geology and hydrology.**
- h. Methods to minimize potential conflict with **other** existing uses **within the neighborhoods adjacent to the development and traffic corridors used by the development** ~~that are significantly impacted by the development.~~

Section 6. Amendment of Subsection 18.70.030(B). Subsection 18.70.030(B) of the Haines Borough Code is hereby amended to read as follows:

NOTE: **Bolded/UNDERLINED** ITEMS ARE TO BE ADDED
~~STRIKETHROUGH~~ ITEMS ARE DELETED

18.70.030: Zoning Districs - Zones.

The borough is hereby divided into the following zoning districts and zones. These districts and zones are depicted on the official borough zoning map.

B. Mud Bay Planning/Zoning District.

1. Intent. The intent of this district is to preserve the existing zoning provisions of the former land use service area No. 1 (Mud Bay) and for the people of the Mud Bay community to preserve their lifestyle, community scale, self-sufficiency, self-determination, and the basic rights of health, safety and welfare. This is in accordance with the goals and objectives of the former Mud Bay land use service area board which were developed from the Haines Borough comprehensive plan.

2. Applicability. This district shall be defined as:

Beginning at the NW corner of Section 14, T31S, R59E, CRM; thence due south to SW corner of Section 26, T31S, R59E CRM; thence southeast to SW

corner of Section 21, T32S, R60E CRM; thence due east to SE corner of Section 21, T32S, R60E CRM; thence northeast to NE corner of Section 22, T32S, R60E CRM; thence north-northwest to NE corner of Section 17, T31S, R60E CRM; thence due west to the point of beginning. This describes an area of the Chilkat Peninsula from the southern edge of the Carr's Cove Subdivision to Seduction Point, and including Kochu Island.

3. Rural Residential Zone (MBRR).

- a. Purpose. This zone is intended to provide for the establishment of a rural residential area allowing for single-family dwellings and cottage industries.
- b. Applicability. This zone shall encompass all lands within the Mud Bay planning/zoning district with the exception of the cannery zone.
- c. c. Uses-by-Right.
 - (1) One single-family dwelling shall be allowed on a lot no less than three acres in area, or on any smaller lot which existed prior to the implementation of any land use ordinances.
 - (2) Any development which existed prior to the implementation of any land use ordinances.
- d. **Accessory Uses.** Accessory uses in the rural residential zone are:
 - (1) Accessory buildings;
 - (2) Cottage industries;
 - (3) Guest house;
 - (4) Marijuana testing facilities.
- e. Conditional Uses. Conditional uses in the rural residential zone are:
 - (1) Public parks, public recreation sites, and nonprofit camps;
 - (2) Schools;
 - (3) Fire stations;
 - (4) Lodges;
 - (5) Commercial or public radio and television transmitters and towers;
 - (6) Public utility facilities;
 - (7) Commercial Enterprise. "Commercial enterprise" means any commercial, manufacturing, sale or service that occurs on a person's private property. A commercial enterprise shall be ~~conducted only by a member or members of a family residing in a residence on the property~~ **secondary to the property's primary use as a residence** and **shall have no more than with up to six additional** employees at any one time. Terms of a conditional use permit for commercial enterprise shall eliminate or mitigate adverse effects to air quality, noise, traffic, parking, waste and sewage, signs, lighting and burdens

Comment [hs9]: Removed "Resource extraction, minor" since it is not applicable in this definition.

Comment [hs10]: See correspondence from Brooks: "Limiting commercial activity to secondary uses of residential property without regard to whether those residing on the property are a "family" is a much better way to achieve the goal of limiting commercial uses in this particular zoning district."

on any community utilities and resources that may result from such commercial enterprise;

- (8) Cemetery;
 - (9) Vacation rentals;
 - (10) Marijuana cultivation (indoor/outdoor, small, large, limited, unlimited) and marijuana manufacturing (small), provided the establishments conform to the requirements of a "commercial enterprise."
- f. Lot Standards. The minimum lot size in the rural residential zone for newly developed lots shall be three acres;
- g. Setback Standards.
- (1) Structures shall be located no less than 25 feet from the nearest lot line, and right-of-way line, with Chilkat State Park Road being exempt from the right-of-way setbacks.
 - (2) Structures shall be located no less than 25 feet, measured from the top of the nearest stream bank, from any stream or watercourse used to provide domestic water, and from all anadromous fish streams.
- h. Prohibited Uses.
- (1) Heliports.
 - (2) Resource extraction.**

Comment [hs11]: Removed the word "major"

4. Cannery Zone (CA).

- a. Purpose. This zone is intended to create a commercial area for the provision of support functions for the Haines fishing fleet.
- b. Applicability. This zoning shall apply to the area as described: Lot 2, SEC 24, T31S, R59E, CRM, lot 3, SEC 19, T31S, R59E, CRM; ATS 192, Tracts A and B; TL-1902, SEC 19, T31S, R59E, CRM.
- c. Permitted Uses. Permitted uses in the cannery zone (commercial) are:
 - (1) Moorage;
 - (2) Boat and gear storage and maintenance;
 - (3) Retail sale of petroleum products and miscellaneous fishing supplies;
 - (4) All residential uses which must be consistent with the provisions permitted within the rural residential zone;
 - (5) Any use existing prior to the implementation of any land use ordinances.
- d. Accessory Uses. Accessory uses and buildings shall be consistent with the rural residential zone standards previously stated in this code.
- e. Conditional Uses. There are no conditional uses in the cannery zone.

f. Prohibited Uses.

(1) Heliports.

(2) Resource Extraction.

Comment [hs12]: Removed the word "major"

Section 7. Amendment of Subsection 18.70.030(C). Subsection 18.70.030(C) of the Haines Borough Code is hereby amended to read as follows:

NOTE: **Bolded/UNDERLINED** ITEMS ARE TO BE ADDED
~~STRIKETHROUGH~~ ITEMS ARE DELETED

18.70.030: Zoning Districs - Zones.

The borough is hereby divided into the following zoning districts and zones. These districts and zones are depicted on the official borough zoning map.

C. Lutak Inlet Planning/Zoning District.

1. Intent. The intent of this district is to protect and maintain the water quality, waterfront and watershed of Lutak Inlet and the Chilkoot River system while encouraging a rural lifestyle that includes cottage industry. In addition, there is a desire to maintain the natural environment and its associated fisheries and wildlife by ensuring orderly growth and sensible land use.
2. District Defined. This district is defined as follows:

Beginning at the N.E. Corner of Section 16, Township 30 South, Range 59 East, C.R.M.; thence southwesterly to the summit of Tukagahgo Mt.; thence northwesterly to the summit of Mt. Kashagnak; thence northwesterly to the summit of Klutshah Mt.; thence due East on a straight line to the highest point on the ridge line between the Chilkoot River drainage and the area drained by the Ferebee River; thence in a southeasterly direction from high point to high point along said ridge line to Sanka Point on the West side of Taiyasanka Harbor; thence southwesterly to the N.E. Corner of Borough-owned tidelands off the Lutak Dock; thence in a southwesterly direction along the Townsite Service Area limits to the true point of beginning.

3. Rural Residential Zone.
 - a. Purpose. This zone is intended to provide for the establishment of a rural residential area allowing for one single-family dwelling per lot and cottage industries.
 - b. Applicability. This zone applies to all lands within Lutak Inlet land use planning and zoning district excluding those within the riparian zone.
 - c. Uses-by-Right. Permitted uses are those uses which are allowed outright within a particular zone. In the residential zone those uses are:
 - (1) One single-family dwelling per lot;
 - (2) Guest houses;

- (3) Cottage industry;
 - (4) Domestic log milling (milling for personal use);
 - (5) Marijuana testing facilities.
- d. **Accessory Uses.** Accessory uses are those uses which are incidental to the permitted use. In the residential zone, accessory uses include but are not limited to:
- (1) Wood sheds, greenhouses, smokehouses, tool sheds, steam baths, saunas, workshops and garages, provided they are within the required setbacks;
 - (2) Chicken coops, rabbit hutches, barns, and other structures and enclosures for housing animals and fowl, provided they are within the required setbacks;
- e. **Conditional Uses.** Conditional uses in the rural residential zone are:
- (1) Churches;
 - (2) Schools;
 - (3) Lodging houses;
 - (4) Public parks and recreation sites;
 - (5) Public utility facilities;
 - (6) Fire stations;
 - (7) Community halls;
 - (8) Governmental buildings;
 - (9) Rentals, sales, and professional services;
 - (10) Fish hatchery;
 - (11) Commercial agriculture;
 - (12) ~~Commercial logging~~ **Resource extraction**;
 - (13) Campgrounds; provided, that:
 - (a) A 50-foot greenbelt separates the campsites from any public road right-of-way and a 20-foot greenbelt separates the campsites from any perimeter property lines; and
 - (b) The campground is at least one-half mile from existing houses or land subdivided for residential purposes at the time of the application for a conditional use permit; and
 - (c) The campground provides facilities for solid waste disposal (e.g., bear-proof dumpsters); and
 - (d) Complies with all Department of Environmental Conservation sanitation requirements contained in 18 AAC 30; and

Comment [hs13]: Removed "Resource extraction, minor" since it is not applicable in this definition.

Comment [hs14]: Removed the word "major"

- (e) The campground has a maximum average density of six individual campsites per commercially developed acre, a minimum distance from center to center of adjacent sites of 75 feet and a maximum of 60 sites overall;
- (14) Cemetery;
- (15) Vacation rentals;
- (16) Marijuana cultivation (indoor/outdoor, small, large, limited, unlimited) and marijuana manufacturing (small).
- f. Prohibited Uses Designated. All uses not expressly provided under permitted, accessory or conditional uses are prohibited.
- g. Lot Standards. The minimum lot size in the rural residential zone shall be three acres. The minimum lot width shall be 200 feet.
- h. Building Setback Standards. Structures shall be located no closer than 10 feet from all property lines except for properties located along the Lutak Spur road (from the Chilkoot River Bridge to the end of the road) where there will be no minimum setback along the road front right-of-way. Setbacks will apply for all other property lines along the Lutak Spur road.
- i. Building Height Standards. The building height standard is 35 feet maximum height from the plane of the mean building grade.
- j. Sign Standards.
 - (1) Signs permanently affixed to structures shall not exceed 32 square feet.
 - (2) Permanent signs not affixed to a structure shall not exceed 16 square feet.
 - (3) Only nonelectrified signs will be permitted.
 - (4) Temporary signs shall be removed within 10 days after the date of sale or the event or condition advertised. Temporary signs shall not exceed 16 square feet per side.
- k. Recreational Vehicle (RV) Parking. Recreational vehicles are not to be used as permanent dwellings, such as a single-family dwelling, and may not be inhabited on the lot more than four months annually. Parking will be limited to three RVs per lot. Commercial RV parks are prohibited.
- l. Noise Standards.
 - (1) Heavy equipment operation, other than for house maintenance, building construction, or emergencies, is limited to the hours of 8:00 a.m. to 5:00 p.m., seven days a week with a maximum of seven consecutive days of operation.
 - (2) All generators used for permanent power must be muffled,

enclosed and owners must employ noise reduction measures (a pamphlet describing such measures will be available from the manager). Generators used for construction purposes or emergencies are exempt. It is not the intent of this chapter to place an onerous burden on any property owner but to try to control noise pollution from power generators for the benefit of all within the zone.

4. Riparian Zone (RI).

- a. Purpose. This zone is intended to provide for the protection of waterfront property.
- b. Applicability. The riparian zone applies to all land from mean high tide to the 21-foot high tide level and 15 feet landward therefrom and/or 15 feet from the vegetated banks of streams or lakes.
- c. Permitted Uses. The only permitted use will be water intake structures for domestic water use.
- d. Accessory Uses. Accessory uses in the riparian zone are:
 - (1) Saunas;
 - (2) Cisterns;
 - (3) Hot tubs;
 - (4) Spring houses.
- e. Conditional Uses. Conditional uses in the riparian zone are:
 - (1) Hydropower units;
 - (2) Parks;
 - (3) Fish hatcheries;
 - (4) Docks;
 - (5) Boat launching facilities;
 - (6) Bridges;
 - (7) Roads and trails;
 - (8) Cottage industries;
 - (9) Commercial water intakes.
- f. Prohibited Uses Designated. All uses not expressly provided under permitted, accessory or conditional uses are prohibited.

ADOPTED BY A DULY CONSTITUTED QUORUM OF THE HAINES BOROUGH ASSEMBLY THIS ____
DAY OF _____, 2019.

Comment [hs15]: Removed the section of this ordinance pertaining to 18.70.040 Zoning Use Chart since "resource extraction, minor" was removed and was the only change to the chart.

ATTEST:

Janice Hill, Mayor

Alekka Fullerton, Borough Clerk

Date Introduced:

Date of First Public Hearing:

Date of Second Public Hearing:

To: Brooks Chandler
Subject: RE: Your Help is Requested: Resource Extraction Draft Ordinance

From: Brooks Chandler
Sent: Friday, April 5, 2019 1:26 PM
To: Holly Smith
Cc: Debra Schnabel
Subject: RE: Your Help is Requested: Resource Extraction Draft Ordinance

Greetings Holly:

Responses are in red below.

Brooks Chandler
Boyd, Chandler & Falconer LLP
911 W. 8th Ave.
Suite 302
Anchorage, AK
907-272-8401

From: Holly Smith <hsmith@haines.ak.us>
Sent: Wednesday, April 3, 2019 4:31 PM
To: Brooks Chandler
Cc: Debra Schnabel <dschnabel@haines.ak.us>
Subject: Your Help is Requested: Resource Extraction Draft Ordinance
Importance: High

Brooks:

Debra has given me permission to request your assistance on a resource extraction ordinance currently before the assembly. You had previously provided comments on this issue in 2017 and again on February 13th of this year.

The assembly's committee on Government Affairs and Services (GAS) is discussing this issue during their April 9th meeting and, if possible, I would like provide assembly members and the public with my recommendations by this Monday, April 8th. I would also be including any correspondence we receive from you regarding my recommendations.

Please let me know when you might be able to provide answers to questions I have about this issue. If you think you need longer than 4 days, staff may need to request that the GAS committee postpone this agenda item until the May meeting.

Please see attached:

1. **Ord 19-01-515.** This is the current draft ordinance before the assembly regarding resource extraction.
2. **ORD 19-03-257.** This is the current draft ordinance before the assembly regarding site development, which is somewhat related to resource extraction.
3. **Version 2 Draft Ord.** This is a draft ordinance I am recommending the assembly adopt for resource extraction instead of ordinance 19-01-515.

My questions (4) relate to the assumptions I make in the **Version 2** ordinance. These assumptions are also noted throughout the document in comment form. They are as follows:

1. Am I correct that the borough should not regulate subsurface extractive activities such as mining or gas exploration because the State has the ultimate authority? I have not seen much municipal land use code in Alaska that includes subsurface activities in resource extraction.

This is an interesting question in part because the answer is the classic lawyer response “it depends”. The Borough cannot adopt an ordinance which grants the Borough the authority to “veto” a mining project located within the Borough that has been or could be authorized by federal or state regulators. Nor can the Borough adopt a permitting standard for mining more stringent than the State or federal government. But it is possible the Borough could regulate aspects of subsurface extraction activity not directly addressed by state or federal regulation (noise is one example if a state-permitted project did not address noise levels).

This is emphasized by the 2015 decision of the Alaska Supreme Court invalidating an ordinance aimed at the Pebble Mine project adopted by the voters of the Lake and Peninsula Borough by initiative. I have attached the opinion. The “meat” of the decision on this point is at pages 12-20.

The question as to any particular borough ordinance would be whether it is “so substantially irreconcilable” with state statutes and regulations that state law “cannot be given its substantive effect” if the borough ordinance is implemented.

2. Do you agree that our penalty for violating code pertaining to resource extraction is weak / that it lacks a deterrent? (i.e. It appears one may commercially log a 40-acre property without a conditional use permit as long as he/she pays a \$250.00 after-the-fact fine and possibly \$100 fee for other violations.) Note that most land use violations are discovered long after they happen. I have suggested a \$300/acre fine for beginning work without obtaining a permit related to site development or resource extraction or violating the conditions thereof. Do you have any alternative suggestions?

The most effective enforcement mechanism available is an injunction shutting down the activity. This is a generally available enforcement tool for any violation of a borough ordinance. HBC 1.24.010(B). Temporary injunctions can be obtained literally a few days after a lawsuit seeking an injunction is filed. They can last up to 10 days during which a preliminary injunction which can remain in place while the lawsuit is pending can be obtained. Generally speaking a clear violation of a permit requirement will always lead a court to grant an injunction if requested.

The practical issue regarding this enforcement tool is cost and the need for prompt action. For violations discovered after the fact- an injunction can still be obtained but it will only apply to future similar activity conducted by the same property owner on the same property.

In considering the fine amount remember that each day a violation of a permit requirement continues is a separate violation. HBC 1.24.010(C). So after the fact discoveries can potentially lead to very large penalties. The issue here is one of resolve- does the Borough have the level of commitment to code permitting requirements that will support seeking large fines based on issuing multiple notices of violation covering long periods of non-compliance in the face of the inevitable complaints made by a property owner tour operator etc. about an overbearing government. In my opinion it is not the amount of the penalty but this level of commitment to code enforcement in light of strong criticism that is the issue. Using the logging example- if the illegal logging was discovered three months after it started the Borough could literally issue 90 citations each of which could be for the \$250 amount. There is a past example of this involving a tour permit but I am not recalling the name of the business owner. This was also an issue in the Nelson lawsuit where the Borough tried to combine fines in one NOV rather than issuing a separate NOV for each day of the violation. So there is an administrative paperwork burden on staff (which can be reduced by using form letters and making sure to send out a new one each day).

Another alternative is a civil forfeiture remedy but these have been the subject of abuse across the United States and I do not recommend the Borough pursue forfeiture as an alternative remedy. The way forfeiture works is that all personal property involved in the unpermitted activity could be seized by the Borough. Again using the logging example, chain saws, trucks, Cats etc.. could be made subject to forfeiture.

Here is an assessment of zoning penalty fees from other communities:

Community	Source	Name	Fee	Specific to Resource Extraction?
Kenai	21.50.055	Failure to obtain a Development Permit/Floodplain Management; Failure to Obtain a counter permit/Material Site Permits	\$300	Yes
Anchorage	14.60.030	Use in violation of conditions; Use without Permit	\$50-300	No
Ketchikan	18.55.080	Violation of the provisions of title	\$500	No
Sitka	22.30.300	Violation of the provisions of title; Failure to comply	\$500 +	No

Juneau	49.10.630	A person who violates or causes or permits to be violated a provision of this title or a regulation, a lawful order of the department, or a permit, approval, or term or condition of a permit or approval issued under this title is liable, in a civil action, to the municipality for a sum to be assessed by the court of not less than \$25.00 nor more than \$1,000.00 for the initial violation, nor more than \$500.00 for each day thereafter on which the violation continues; or, in the case of operating without an appropriate notice, permit or for violations which are related to public health, safety and welfare, or cause substantial adverse effects on the environment, not less than \$500.00 nor more than \$5,000.00 for the initial violation nor more than \$2,000.00 for each day thereafter on which the violation continues and which, in either case, shall reflect, when applicable	\$500 - 5,000 + \$2,000 per day	Somewhat
Fairbanks	18.112.020	Violation of the provisions of title	\$300	No
Wrangell	20.92.020	Violation of the provisions of title	\$100	No
Petersburg	19.96.040	Violation of the provisions of title	\$500	No
Kodiak	17.210.030	Violation of the provisions of title	\$300	No

3. Is it illegal for the borough to allow land uses based on residency or based on familial relations? (See the definition of "commercial enterprise" in 18.70.030[B]). Would it not be better to change this definition to say that a commercial enterprise "is a secondary use to the property's primary use of a single family residential dwelling" ?

Limiting commercial activity in a particular zoning district is a perfectly legitimate goal of a zoning ordinance but this particular provision is a poor way to accomplish that goal and the ability of the borough to enforce this provision as written is limited IMO. HBC 18.20.020 defines "family" as "one person, or two or more persons related by blood, marriage, or adoption." So whether the exact same activity can be conducted by a couple living on a property depends on whether the couple has become legally married. Marital status is not specifically identified as a civil right in the Alaska Constitution (Art. I, Sec. 3) but the concept of "equal protection" contained in Art. I, Sec. 1 and described as an "inherent" right is implicated by creation of categories in land use ordinances based on marital status. The ideal of "equal protection" is that all people will be treated equally under the law. In general, any legal restriction on property use to a "family" must have a "fair and substantial relation" to a "legitimate public purpose". The purpose of zoning regulation is control of the impacts of commercial activity in a particular zoning district not the promotion of marriage or "family". Limiting commercial activity to secondary uses of residential property without regard to whether those residing on the property are a "family" is a much better way to achieve the goal of limiting commercial uses in this particular zoning district. I recommend this code provision be replaced by one based on allowable secondary use of residential property.

Do you see any problems with eliminating the 'allowable cumulative amounts' matrix contained under "resource extraction, minor" of Ord 19-01-515? Overall, do you think my ordinance is better? Why or why not?

This is a policy decision. Elimination of subsection (b) in Ord. 19-01-515 reduces the number of uses considered “minor” resource extraction and expands the activities for which a permit is required. This will increase the work load for the PC and staff but allow for greater control of such uses of property.

The other draft is intended to accomplish the same policy goal via defining “resource extraction” in a more limited fashion and eliminating the distinction between “minor” and “major” resource extraction. The reference to “heavy industrial use” means staff will need to make a determination as to whether a particular removal of timber, rock etc. “has potential for significant negative impact on adjoining uses”. This is not a bright line standard.

So the policy question between the two approaches is whether one prefers establishing an objective standard for when a permit is required (which will result in more instances where permits are required) vs. allowing some judgment regarding the “potential for significant negative impact” of a particular activity. The more subjective approach will result in less certainty for property owners and their neighbors as to whether a permit is required but most likely will result in fewer permits being required. Those who favor greater governmental control over resource extraction will favor Ord. 19-01-515. Those who favor less government control over resource extraction will prefer the alternate version.