

Introduced by:	Mayor
Date:	09/04/12
Hearing:	10/09/12
Action:	Enacted as Amended
Vote:	9 Yes, 0 No, 0 Absent

**KENAI PENINSULA BOROUGH
ORDINANCE 2012-35**

**AN ORDINANCE AUTHORIZING A NEGOTIATED SALE AT FAIR MARKET
VALUE OF A 160 FOOT BY 200 FOOT PARCEL LOCATED ADJACENT TO
NIKISHKA BEACH ROAD IN NIKISKI TO THE LESSEE, EAST SHORE HOME
PROPERTIES**

WHEREAS, the Kenai Peninsula Borough was conveyed through municipal entitlement the 0.73-acre parcel known as ADL 36812 located within Section 36 T8N R12W, S.M. (KPB Tax Parcel No. 012-020-08) on May 16, 1980; and

WHEREAS, the property was subject to a long-term state lease (ADL 36812) to East Shore Home Properties; and

WHEREAS, pursuant to KPB 17.10.100(I) Jesse Wade on behalf of East Shore Home Properties filed an application for the negotiated purchase of the 0.73-acre parcel; and

WHEREAS, a building that was erected in 1967 and owned by East Shore Home Properties is located on the property; and

WHEREAS, the fair market value of subject land determined by the Kenai Peninsula Borough Assessor is \$20,700; and

WHEREAS, the KPB Planning Commission at its regularly scheduled meeting of September 10, 2012, recommended enactment by unanimous consent;

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

SECTION 1. That the assembly finds that selling the parcel described as 160 feet by 200 feet known as “Preferred Contractors Parcel,” ADL 36812, tax parcel 012-020-08, within Section 36, Township 8 North , Range 12 West, S.M., Kenai Recording District, Third Judicial District, State of Alaska, containing 0.73 +/- acre, subject to Nikishka Beach Road Right of Way ADL 32264, pursuant to KPB 17.10.100 (I) to East Shore Home Properties is in the best interest of the borough based on the following findings:

1. The parcel is less than an acre and was created by the state without a platting process and now straddles the boundary of two underlying government lots.
2. The parcel is largely occupied by a long-standing oil field shop owned by East Shore Home Properties which extends beyond the parcel boundary of ADL 36812.
3. The conveyance would merge title of the building and underlying land.
4. The borough has no need to retain the parcel.
5. The applicant has held a long-term lease for the parcel.
6. The conveyance would fulfill the assembly's intent set forth in ordinance 86-19(Substitute) to convey the parcel that is subject to a long-term lease to the lessee.

SECTION 2. The sale of subject land shall be at the fair market value of \$20,700. The property will be conveyed by quitclaim deed. Purchaser shall pay the purchase price and all closing costs including without limitation all escrow fees, title insurance charges, recording fees and bank charges in full at closing.

SECTION 3. That the assembly makes an exception to KPB 17.10.090 requiring classification prior to disposal. This exception is based on the following findings of facts pursuant to KPB 17.10.230:

1. Special circumstances or conditions exist.
 - A. KPB 17.10.080(A) states, classification of property is for review, plan implementation and management purposes. The classification system designates the most appropriate uses for land and thereby guides borough management of such lands and implementation actions to provide for the identified uses.

That the exception is necessary for the preservation and enjoyment of a substantial property right and is the most practical manner of complying with the intent of this chapter.

- A. The use of the property was established in 1967 under a long-term lease issued by the State of Alaska.

3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the area.

- A. The land use will remain unchanged.

SECTION 4. Pursuant to KPB 17.10.230 the assembly authorizes an exception to the requirements of KPB 17.10.110, Notice of disposition, based on the following facts:

1. That special circumstances or conditions exist:
 - A. KPB 17.10.110, Notice of disposition, requires publishing notice of the sale four times in the 30-day period immediately preceding the date of the sale. This notice requirement is intended to make the public aware of an opportunity to purchase borough land. Publishing notice of this conveyance will not serve a useful purpose as the sale is to a specific party.

That the exception is necessary for the preservation and enjoyment of a substantial property right and is the most practical manner of complying with the intent of this chapter:

- A. This exception to the notice requirement is not necessary to preserve a substantial property right, and the assembly hereby authorizes this exception to that finding requirement as it is impractical, and compliance is not in the best interests of the borough due to the delay and unnecessary expense it would cause.
 - B. Notice has been provided for the Planning Commission and Assembly hearings. Additional notice is not necessary to comply with the intent of KPB 17.10.
3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the area:
 - A. The public will receive notice of this conveyance through publication of the Planning Commission and Assembly meeting agendas.
 - B. The land use conforms to the surrounding light industrial land uses.

SECTION 5. East Shore Home Properties shall have 180 days from the date of enactment of this ordinance to execute the purchase agreement. This deadline may be extended by assembly resolution.

SECTION 6. The mayor is authorized to execute a purchase agreement substantially similar to the one attached, and any other documents necessary to effectuate the intent and purposes of this ordinance.

SECTION 7. This ordinance shall take effect immediately upon its enactment.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 9TH DAY OF OCTOBER, 2012.

Gary Knopp, Assembly President

ATTEST:

Johni Blankenship, MMC, Borough Clerk

Yes: Haggerty, Johnson, McClure, Murphy, Pierce, Smalley, Smith, Tauriainen, Knopp
No: None
Absent: None

PURCHASE AGREEMENT

This Agreement is made on this _____ of _____, 2012, by and between the KENAI PENINSULA BOROUGH, an Alaska municipal corporation, whose address is 144 North Binkley Street, Soldotna, Alaska 99669 (hereinafter referred to as "KPB") and EAST SHORE HOME PROPERTIES whose address is 103 Linwood Lane, Kenai, Alaska 99611; (hereinafter referred to as "BUYER").

WHEREAS, KPB is the owner of that real property located in the Kenai Recording District, Third Judicial District, State of Alaska, and more particularly described as follows:

160 feet by 200 feet known as "Preferred Contractors Parcel," ADL 36812, tax parcel 012-020-08, within Section 36, Township 8 North, Range 12 West, S.M., Kenai Recording District, Third Judicial District, State of Alaska, containing 0.73 +/- acres, subject to Nikishka Beach Road Right of Way ADL 32264

WHEREAS, BUYER has offered to buy, and KPB is willing to sell the above-described property as evidenced by KPB Ordinance 2012-____enacted _____, by the Assembly of the Kenai Peninsula Borough.

NOW THEREFORE, in consideration of the promises herein contained, KPB hereby agrees to sell to BUYER, and BUYER hereby agrees to buy from KPB, the property on the terms and conditions as set forth below:

1. PURCHASE PRICE

The purchase price of the property is \$20,700.00 dollars and NO cents and shall be paid in full at closing.

2. TITLE

Title shall be delivered at time of closing by **quitclaim deed** which shall be issued to BUYER. Seller sells only its interest in the property, if any, without warranty of any kind or nature whatsoever. Title shall also be subject to reservations, easements, rights-of-way, covenants, conditions and restrictions of record. BUYER warrants and covenants that at the time of closing there shall be no liens or judgments recorded against BUYER in the same recording district in which the property subject to this purchase agreement is situated.

3. ESCROW AND CLOSING COSTS

In addition to the purchase price, BUYER agrees to pay for all closing costs in connection with this Agreement, including without limitation all escrow fees, title insurance charges, recording fees and bank charges. All costs must be paid in full at the time of closing.

4. CLOSING

Closing will occur within 90 days of execution of this agreement. Both parties will execute all documents required to complete the Purchase Agreement.

5. POSSESSION

Possession shall be delivered to BUYER at time of recording.

6. BREACH BY BUYER; REMEDIES OF KPB

Prior to closing of the sale, in the event that BUYER fails to make any payment required, or fails to submit or execute any and all documents and papers necessary in examination of BUYER's financial background, or with closing and transfer of title within time periods specified in this Agreement, up to lesser of \$1,000.00 or 10% of the purchase price of BUYER's deposit shall be retained by KPB as liquidated damages. Additionally, other funds may be retained for out-of-pocket expenses incurred, and this Agreement shall be terminated.

In addition to the foregoing, in the event of a default in the performance or observance of any of the agreement terms, conditions, covenants and stipulations thereto, either prior to or after the closing of the sale, and such default continues thirty days after written notice of the default, KPB may cancel the agreement or take any legal action for damages or recovery of the property. No improvements may be removed during the time which the contract is in default. This provision shall survive the execution of sale documents and shall continue in full force and effect until either the purchase price is paid in full or the sale is otherwise terminated.

7. NOTICE OF DEFAULT. Notice of default will be in writing as provided hereinbelow. A copy of the notice will be forwarded to all lienholders or others who have properly recorded their interest in the purchase agreement with KPB.

8. REMOVAL OR REVERSION OF IMPROVEMENTS UPON CANCELLATION OF PURCHASE AGREEMENT OR LEASE.

- A. BUYER covenants that improvements owned by the BUYER on KPB lands shall, within thirty calendar days after termination of the agreement, be removed by BUYER; provided, such removal will not cause injury or damage to the land; and further provided, that the mayor or planning director when applicable may extend time for removing such improvements in cases where hardship is proven. The retiring BUYER may, with consent of the mayor or planning director when applicable, dispose of BUYER'S improvements to the succeeding BUYER.

- B. If any improvements and/or chattels having an appraised value in excess of ten thousand dollars, as determined by a qualified appraiser, are not removed within the time allowed, such improvements and/or chattels shall, upon due notice to the BUYER, under the terminated or canceled contract, be sold at public sale under the direction of the mayor and in accordance with provisions of KPB Title 5. Proceeds of the sale shall inure to the former BUYER, lessee, or permittee who placed such improvements and/or chattels on the lands, or his successors in interest, after paying to KPB all monies due and owing and expenses incurred in making such a sale. In case there are no other bidders at any such sale, the mayor is authorized to bid, in the name of KPB, on such improvements and/or chattels. Bid money shall be taken from the fund to which said lands belong, and the fund shall receive all moneys or other value subsequently derived from the sale or leasing of such improvements and/or chattels. KPB shall acquire all rights, both legal and equitable, that any other BUYER could acquire by reason of the purchase.
- C. If any improvements and/or chattels having an appraised value of ten thousand dollars or less, as determined by the mayor, are not removed within the time allowed, such improvements and/or chattels shall revert and absolute title shall vest in KPB. Upon request, BUYER, lessee, or permittee shall convey said improvements and/or chattels by appropriate instrument to KPB.
- D. Rental for Improvements or Chattels not Removed. Any improvements and/or chattels belonging to the BUYER and placed on the land during BUYER'S tenure with or without BUYER'S permission and remaining upon the premises after termination of the contract shall entitle KPB to charge a reasonable rent therefor.

9. RESALE.

In the event that a purchase agreement should be terminated, canceled, forfeited or abandoned, KPB may offer said lands for sale, lease or other appropriate disposal pursuant to provisions of KPB 17.10 or other applicable regulations. If said land is not immediately disposed of then said land shall return to the Land Bank.

10. DEFENSE AND INDEMNIFICATION

To the extent allowed by law and subject to appropriation The BUYER shall indemnify, defend, save and hold the borough, its elected and appointed officers, agents and employees, harmless from any and all claims, demands, suits, or liability of any nature, kind or character including costs, expenses, and attorneys fees resulting from BUYER'S performance or failure to perform in accord with the terms of this Agreement in any way whatsoever. The BUYER shall be responsible under this clause for any and all claims of any character resulting from BUYER or BUYER'S officers, agents, employees, partners, attorneys, suppliers, and

subcontractors performance or failure to perform this Agreement in any way whatsoever. This defense and indemnification responsibility includes claims alleging acts or omissions by the borough or its agents, which are said to have contributed to the losses, failure, violations, or damage. However, BUYER shall not be responsible for any damages or claims arising from the sole negligence or willful misconduct of the borough, its agents, or employees.

11. HAZARDOUS MATERIAL

- A. BUYER covenants and agrees that no hazardous substances or wastes shall be located on or stored on the property, or any adjacent property, nor shall any such substance be owned, stored, used, or disposed of on the property or any adjacent property by BUYER, its agents, employees, contractors, or invitees, prior to BUYER's ownership, possession, or control of the property.
- B. BUYER covenants and agrees that if the presence of hazardous material on the property is caused or permitted by BUYER, its agents, employees, contractors, or invitees, or if contamination of the property by hazardous material otherwise occurs on the property, BUYER shall defend, indemnify, and hold harmless KPB from any and all claims, judgements, damages, penalties, fines, costs, liabilities, or losses (including, but not limited to, sums paid in the settlement of claims, attorney's fees, consultant fees and expert fees) which may arise as a result of such contamination. This defense and indemnification includes, without limitation, costs incurred in connection with any investigation of site conditions or any clean-up, remedial, removal, or restoration work required by any federal, state or local government on or under the property. As used herein, the term "hazardous material" means a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under section 5103 of Federal hazardous materials transportation law (49 U.S.C. 5103). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (see 49 CFR 172.101), and materials that meet the defining criteria for hazard classes and divisions in part 173 of subchapter C of this chapter.

12. ASSIGNMENTS

BUYER may assign the lands upon which BUYER has an agreement only if approved by the mayor or planning director when applicable. Applications for assignment shall be made in writing on a form provided by the land management division. Assignment shall be approved if it is found that all interests of KPB are fully protected. Assignee shall be subject to and governed by provisions of KPB 17.10 applicable thereto.

13. ENTIRE AGREEMENT

This Agreement and the documents referred to herein contain the entire agreement of the parties with respect to the subject matter hereof. Any changes, additions or deletions hereto must be made in writing and signed by both KPB and BUYER or their respective successors in interest. Provisions of this agreement, unless inapplicable on their face, shall be covenants constituting terms and conditions of the sale and of the agreement to finance the sale, and shall continue in full force and effect until the purchase price is paid in full, or this agreement is earlier terminated.

14. MISCELLANEOUS

- A. Covenants. BUYER agrees to comply with any Declaration of Covenants, Conditions, and Restrictions of record, affecting the Property.
- B. No Warranty. BUYER acknowledges its responsibility to inspect the property and agrees KPB assumes no liability for matters that would have been disclosed to the BUYER by an inspection of the property. BUYER further acknowledges that KPB makes no warranties, either expressed or implied, nor assumes any liability whatsoever, regarding the social, economic or environmental aspects of the property, to include without limitation, soil conditions, water drainage, physical access, availability of personal use wood supplies now or in the future, or natural or artificial hazards which may or may not exist or merchantability, suitability, or profitability of the property for any use or purpose. The parties mutually agree that this transfer will not be covered by the Residential Real Property Transfers Act, AS 34.70.010 et. seq.
- C. Development. BUYER agrees the construction and maintenance of any improvements, roads, drainage systems and common areas shall be the responsibility of the BUYER. BUYER further agrees to comply with all federal, state, and borough regulations regarding use and development of the property, which includes but is not limited to; State of Alaska, Department of Environmental Conservation regulations regarding water and sewer installation; and if applicable, regulations of the U.S. Army Corps of Engineers regarding filling or draining any area within the property designated as wetlands by the appropriate authority.
- D. Time. Time is of the essence in performance of this Agreement.
- E. Cancellation. This agreement, while in good standing may be canceled in whole or in part, at any time, upon mutual written agreement by BUYER and the mayor or planning director when applicable. This purchase agreement is subject to cancellation in whole or in part if improperly issued through error in procedure or with respect to material facts.

- F. Entry or Re-entry. In the event that this agreement is terminated, canceled or forfeited, or in the event that the demised lands, or any part thereof, should be abandoned by the BUYER during the agreement term, or prior to payment in full of the purchase price, KPB or its agents, servants or representative, may immediately or any time thereafter, enter or re-enter and resume possession of said lands or such part thereof, and remove all persons and property therefrom either by summary proceedings or by a suitable action or proceeding at law or equity without being liable for any damages therefor. Entry or re-entry by KPB shall not be deemed an acceptance or surrender of the contract.
- G. Fire Protection. The BUYER shall take all reasonable precautions to prevent, and take all reasonable actions to suppress destructive and uncontrolled grass, brush, and forest fires on the land under agreement, and comply with all laws, regulations and rules promulgated and enforced by the protection agency responsible for forest protection within the area wherein the demised premises are located.
- H. Notice. Any notice or demand, which under the terms of this agreement or under any statute must be given or made by the parties thereto, shall be in writing, and be given or made by registered or certified mail, addressed to the other party at the address shown on the contract. However, either party may designate in writing such other address to which such notice of demand shall thereafter be so given, made or mailed. A notice given hereunder shall be deemed received when deposited in an U.S. general or branch post office by the addressor.
- I. Responsibility of Location. It shall be the responsibility of the BUYER to properly locate himself and his improvements on the purchased, leased, or permitted lands.
- J. Rights-of-way. All trails or roads in existence at the time the land is sold may be considered to be an easement for public use. Nothing herein contained shall prevent the mayor or planning director when applicable from specifically reserving such additional easements and rights-of-way across KPB lands as deemed reasonable and necessary prior to the sale thereof.
- K. Sanitation. The BUYER, lessee, or permittee shall comply with all regulations or ordinances which a proper public authority in its discretion shall promulgate for promotion of sanitation. Premises under purchase or lease agreement, or permit shall be kept in a clean and sanitary condition and every effort shall be made to prevent any pollution of waters and lands.

- L. Shore Land Public Access Easement. As established by AS 38.05, KPB lands sold or leased may be subject to a minimum 50 foot public access easement landward from the ordinary high water mark or mean high water mark.
- M. Violation. Violation of any provision of KPB Chapter 17.10, or of the terms of the agreement of sale may expose BUYER to appropriate legal action including forfeiture of purchase interest, termination, or cancellation of BUYER'S interest in accordance with state law.
- N. Written Waiver. Receipt of payment by KPB, regardless of knowledge of any breach of the purchase agreement by BUYER, or of any default on the part of BUYER, in observance or performance of any of the conditions or covenants of the agreement, shall not be deemed to be a waiver of any provision of the agreement. Failure of KPB to enforce any covenant or provision therein contained shall not discharge or invalidate such covenants or provision or affect the right of KPB to enforce the same in the event of any subsequent breach or default. Receipt by KPB of any payment of any other sum of money after notice of termination or after the termination of the agreement for any reason, shall not reinstate, continue or extend the agreement, nor shall it destroy or in any manner impair the efficacy of any such notice of termination unless the sole reason for the notice was nonpayment of money due and payment fully satisfies the breach.
- O. Construction. This Agreement shall be deemed to have been jointly drafted by both parties. It shall be constructed according to the fair intent of the language as a whole, not for or against any party. The interpretation and enforcement of this Agreement shall be governed by the laws of the State of Alaska. The titles of sections in this Agreement are not to be construed as limitations of definitions but are for identification purposes only.

This Agreement has been executed by the parties on the day and year first above written.

KENAI PENINSULA BOROUGH:

BUYERS:

Mike Navarre, Mayor

Jesse S. Wade, Trustee
East Shore Home Properties

Dated:_____

Dated:_____

Catherine A. Wade, Trustee
East Shore Home Properties
Dated:_____

ATTEST:

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY BY:

Johni Blankenship,
Borough Clerk

Holly B. Montague,
Deputy Borough Attorney

NOTARY ACKNOWLEDGMENT

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

The foregoing instrument was acknowledged before me this _____ day of _____, 2012, by **Mike Navarre**, Mayor of the Kenai Peninsula Borough, an Alaska municipal corporation, for and on behalf of the corporation.

Notary Public in and for Alaska
My commission expires: _____

NOTARY ACKNOWLEDGMENT

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

The foregoing instrument was acknowledged before me this _____ day of _____, 2012, by **Jesse S. Wade**, Trustee of East Shore Home Properties whose address is 103 Linwood Lane, Kenai, Alaska 99611, for and on behalf of the trust.

Notary Public in and for Alaska
My commission expires: _____

NOTARY ACKNOWLEDGMENT

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

The foregoing instrument was acknowledged before me this _____ day of _____, 2012, by **Catherine A. Wade**, Trustee of East Shore Home Properties whose address is 103 Linwood Lane, Kenai, Alaska 99611, for and on behalf of the trust.

Notary Public in and for Alaska
My commission expires: _____