



MEMORANDUM

Ordinance 23-21(S)(A) Planning Commission Recommendations

Item Type: Action Memorandum
Prepared For: Mayor Castner and Homer City Council
Date: September 15, 2023
From: Ryan Foster, AICP, City Planner
Through: Rob Dumouchel, City Manager

Ordinance 23-21(S)(A) was introduced at the June 26, 2023 regular Council meeting and was sent to the Homer Planning Commission for comment and input. Since the text amendments in Ordinance 23-21(S)(A) is relevant to Public Works, the City Planner forwarded the Ordinance to Jan Keiser, City Engineer and Public Works Director, for review and comment. At the August 16, 2023 regular meeting, Jan Keiser took the Planning Commission through the subdivision process and highlighted weaknesses and recent changes in code, and in the current process, and noted how they could be improved. A work session was held on September 6, 2023 to discuss further and consider draft comments, with the final comments approved at the regular meeting that evening.

Key Findings of the Planning Commission

- The intent of the ordinance is that there is a concern that there were improvements being missed in the subdivision process and the text change is intended to rectify it.
- A flow chart has been created to visually represent the entire subdivision process based on Jan Keiser' memos and explanation of the process in detail at the August 16, 2023 regular meeting.
- Public Works Director Keiser provided information on the following topics:
 - Was under the belief that a developer could not sell lots within the subdivision until construction of improvements, but can be done with a final plat and subdivision agreement.
 - Kenai Peninsula Borough in accordance with State laws can release a preliminary plat if an agreement is made between the Developer and the City and recorded even when no improvements have been constructed and the Developer can then sell the lots – this is uncommon, but currently City Code as written allows it.
 - The Borough will not issue a final plat for recording until receipt of acceptance by the City of Homer stating everything has been completed as required by the subdivision agreement.

- Public Works strongly recommends not deviating from this current process
 - City Council recently adopted an ordinance requiring a performance guarantee of 150% of the estimated costs of improvements outlined in the Subdivision Agreement.
 - The use of Construction Agreements in the past 10 years over Subdivision Agreements
 - Language in the Subdivision Agreement is more defined
 - Includes performance guarantee requirements and provided options for the developer to choose from to provide a requirement
 - Includes specific remedies if the developer defaults
 - Council is requiring commitments that are not codified or captured in the Subdivision Agreement
 - It is believed that the City does not have the legal ability to hold developers to requirements that are not in city code or the signed agreement
 - Preliminary, Construction and Asbuilts Drawings
 - In the beginning of the process construction drawings are developed by an Engineer, included in the Subdivision Agreement. Inspections are done pursuant to those drawings. Substantial Completion is based on completion of the work contained in those drawings.
 - Final Acceptance and the Warranty Bond is based on the completion of work in the drawings
 - Final Acceptance results in the delivery of the Asbuilts
 - Asbuilts depict all the work that was done, where construction drawings show what is planned to be built. There are always deviations of some kind in the construction process. Waiting until the project is done until recording a plat is contrary to State and City Code.
- Subdivision Agreements are not submitted to the Kenai Borough for review or approval
 - The Borough is supportive of the City of Homer requirements of adding the comments related to requiring a subdivision agreement, drainage, improvements, etc., on the preliminary plat.
 - This presents a good relationship in as much as the Borough will tell the applicant that they will not issue a final plat until the City notifies them that all the requirements have been met.
- Preliminary Plats now have a time limit of two years to be finalized.
 - The Borough does allow two extensions allowing up to an additional four years, for a total of six years to finalize a plat.
 - If not completed in that timeframe, the entire process must begin again.
- City Attorney has reviewed the Public Works Director's analysis of the process and concurred

The Planning Commission would like to thank the City Council for bringing forth the issue, as it has been beneficial to review the subdivision process, and would like to present the following recommendations for Ordinance 23-21:

1. Recommend an effort to reconcile the Homer City Code for development processes including cross references or consolidation of subdivisions and platting which takes place in Title 22 and construction of subdivisions which takes place in Title 11 and clean-up work and reconciliation of language in the city code.
2. Recommend utilizing the following agreements for their intended purpose and define in Homer City Code:
 - a. Subdivision Agreement: requirements for subdivision improvements
 - b. Construction Agreement: constructing infrastructure such as roads and utilities, where the lot lines are not changing
 - c. Installation Agreement: connecting to city water and sewer
3. Recommendation to ensure preliminary plat considerations by the Homer Planning Commission include comments referencing when subdivision, construction or installation agreements are required and sent to the Kenai Peninsula Borough.
4. Recommendation to provide information and training on the subdivision development process to City Council and other relevant city commissions.
5. Create and implement a preliminary plat application form.
6. Request City Council withdraw Ordinance 23-21(S)(A).

RECOMMENDATION:

Staff recommends City Council approve the recommended comments of the Planning Commission on Ordinance 23-21 Title 22 Subdivision text amendment.

ATTACHMENTS:

Memorandum dated August 7, 2023 (updated September 6, 2023) from Jan Keiser, City Engineer and Public Works Director

Memorandum dated August 9, 2023 from Jan Keiser, City Engineer and Public Works Director
City of Homer Subdivision Development Process Flow Chart



City of Homer

www.cityofhomer-ak.gov

Public Works

3575 Heath Street
Homer, AK 99603

publicworks@cityofhomer-ak.gov

(p) 907- 235-3170

(f) 907-235-3145

DATE: August 7, 2023 (updated September 6, 2023)

TO: Ryan Foster, City Planner

FROM: Janette Keiser, PE, City Engineer and Public Works Director

RE: Proposed Ordinance 23-21(S) regarding preliminary plats

Here are my updated comments regarding the proposed ordinance:

- Reference:** WHEREAS #2 (Line 17) states that “[d]evelopers often make development commitments... which may not be required by code but may arise in consultation with city staff or in response to public testimony...”

Comment: Commitments, which arise “in consultation with city staff” are either grounded in City Code or the City’s technical specifications, and are memorialized in the City’s Standard Specifications, Design Criteria, and the Construction Drawings, which are prepared for the subdivision. Such commitments are then, identified with specificity in the Subdivision Development Agreement, the satisfaction of which is already a pre-requisite to the City’s approval of a Final Plat. Commitments made “in response to public testimony”, which have a basis in the HCC, are also made part of the Subdivision Development Agreement. We do not need a new tool for these kinds of commitments. We should not be requiring, or expecting, developers to make commitments that are not grounded in City Code or the City’s technical specifications.
- Reference:** WHEREAS #3 (Line 25) refers to “additional development commitments”.

Comment: These kinds of commitments, if grounded in City Code, should be captured in the Subdivision Development Agreement. There should not be any “additional development commitments” that are not either grounded in City Code or captured in the Subdivision Development Agreement.
- Reference:** WHEREAS #4 (Line 30) says “there have been instances where development commitments... were not implemented as promised...”

Comment: As mentioned above, any development commitments must be grounded in City Code and set forth in the Subdivision Development Agreement to be enforceable.
- Reference:** WHEREAS #5 (Line 33) says a final plat is issued by the Borough on the basis of a commitment, not the realization of those commitments.

Comment: This is ~~less not~~ true **than it was. Homer City Code allows plats to be recorded either (a) once a Subdivision Agreement has been executed or (b) when the improvements are complete. HCC 22.10.050(a), adopted in 2011 by Ord 10-57. HCC 11.20.070 did not previously require a performance guaranty for Subdivision Agreements creating the possibility that the improvements may never be realized. However, with the amendment of HCC 11.20.070(f), adopted by Ord 23-15, a 150% performance guaranty is now required, making the risk of a “paper plat” less likely. Current practice is that** The Borough ~~does will~~ not issue a Final Plat until the City signs off on the

completion of the improvements set forth in the Subdivision Development Agreement, **but this is not required by HCC.**

5. **Reference:** WHEREAS #6 (Line 37) seems to desire that final plats be issued only when a subdivision agreement has been signed.
Comment: **Public Works agrees with this policy and currently, Homer City Code requires it. HCC 22.10.050(a), adopted in 2011 by Ord 10-57.** Current practice is that final plats are issued only when the City notifies the Borough that a Subdivision Development Agreement has been, not just signed, but completed, **but this is not required by the HCC.** ~~We do not recommend deviating from this practice.~~
6. **Reference:** Lines 49 – 64. This is current practice.
Comment: Now, the City has the requirement that a developer must post a bond worth 150% of the estimated cost of the improvements, at the time the Subdivision Development Agreement is executed.
7. **Reference:** Lines 91-93. This would require the developer to provide improvements that *“may not be required by code but may arise in consultations with city staff or in response to public testimony...”*
Comment: City staff should not be requiring improvements that are not grounded in City Code. Requiring the developer to provide improvements that are requested in public testimony, but which aren’t set forth in City Code, opens the door to arbitrary and capricious requests for playgrounds, dog parks, street art, sidewalks paved in gold and other spurious ideas. This exposes the City to risks from legal challenges. One of the few things the City, as a municipal body, cannot do is make arbitrary and capricious decisions.
8. **Reference:** Ordinance title states *“a final plat for the City...shall be an as-built survey.”*
Comment: The term *“as-built survey”* is a technical term of art, which refers to the actual configuration, dimensions, materials, elevations, and distances used in the construction of a particular utility or facility. We require the developer to provide as-built drawings as a condition precedent to receiving a Certificate of Final Completion, which is required before the City will notify the Borough that a final plat may be issued. The *“final plat”* is not the *“as-built”* and calling it such is not an appropriate application of this term. Requiring the *“final plat”* to contain the same level of detail as an *“as-built”* is contradictory to best engineering practice.



City of Homer

www.cityofhomer-ak.gov

Public Works

3575 Heath Street
Homer, AK 99603

publicworks@cityofhomer-ak.gov

(p) 907- 235-3170

(f) 907-235-3145

Memorandum

TO: Ryan Foster, City Planner
FROM: Janette Keiser, PE, City Engineer and Public Works Director
DATE: August 9, 2023
RE: Legislative History of Regarding Subdivision Development in Homer

Purpose: I have reviewed the legislative history relating to connections between subdivision developments, performance guarantees and platting in Homer, with the goal of clarifying these connections. This memorandum summarizes my findings and conclusions.

Executive Summary: Current regulations allow developers to record a plat if (a) there is a subdivision agreement addressing the development of improvements in City rights-of-way or easements and (2) the developer provides a performance guaranty valued at 150% of the estimated cost of said improvements. The current language of our Subdivision Agreements, which memorializes development permits, supports the premise that developers providing the required performance bond, are able to finalize their Subdivision Agreements, record their plats and thus, sell lots.

Excerpts and citations of applicable legislation supporting the premise:

1. State law clearly puts the City and the Borough, as “authorities having jurisdiction”, in the driver’s seat regarding when plats can be recorded and lots can be sold.
“Before the lots...of any subdivision...may be sold or offered for sale, the subdivision... shall be approved by the authority having jurisdiction...and shall be filed and recorded in the office of the recorder.” AS 40.15.010.
2. Also:
“The owner of land located in a subdivision may not transfer, sell, or enter into a contract to sell land in a subdivision before a plat of the subdivision has been prepared, approved, filed and recorded...A person may not file or record a plat or other document depicting subdivided land in a public recorder’s office unless the plat... has been approved by the platting authority.” AS 29.40.180.
3. The City’s original regulation, adopted in 1987, required that improvements be constructed before a plat would be released, unless there was an agreement stipulating the improvements would be constructed. The original code about subdivisions and platting said:
“No subdivision plat shall be released by the Kenai Peninsula Borough for filing...until the subdivider or developer...constructs streets...and all other utilities...to be constructed in said rights of way...”

“This provision [HCC 22.10.050(a)] may be waived if the developer signs an agreement with the City of Homer that no building permit may/or request for utility connection will be submitted...for any lot...until such time as the improvements are completed and accepted...” HCC 22.10.050(a)

HCC 22.10.050(a) was adopted by Ord 87-8(s) and revised in 2011 by Ord 10-57.

4. The City’s 2011 revisions replaced the 1987 language about the “agreement”, with the following new language:

“The Kenai Peninsula Borough shall not release any final plat for a subdivision in the City for filing at the State Recorder’s office until the subdivider or developer...either enters into a subdivision agreement for, or constructs and obtains written City approval of, the following improvements... HCC 22.10.050(a), adopted in 2011, by Ord 10-57.

The current code contains this same language, which clearly allows a plat to be released upon execution of a subdivision agreement. For example, the Canyon Trails Phase II Subdivision Agreement, executed in 2012, states:

“The intent of this Subdivision Agreement is to allow recording of the subdivision plat and marketing...before the punchlist items are completed...”

Further, later Subdivision (or Construction Agreements) issued by Public Works stated, the

“[The] final plat...shall not be recorded until Developers met all conditions of this agreement or provide a performance guaranty...[in the amount equal to the Engineers Estimate plus 10%]”

5. The City’s original 1987 regulations required a performance guaranty, but there was a provision for a waiver in the case of new subdivisions:

“A performance bond or other acceptable guarantee in the amount of 100% of the project cost, which bond shall be waived in the case of new subdivisions, in which ROW dedication via plat filing or recordation, cannot occur until improvement are installed and accepted.” HCC 11.20.070 as amended by Ord 87-6(s) and later amended in 2023.

6. Even though the HCC allowed performance bonds to be waived in the case of new subdivisions, subdivision agreements issued by Public Works, as far back as 2003 required a performance bond, in the amount of 110% of the estimated costs of improvements. I didn’t see where this practice was codified.

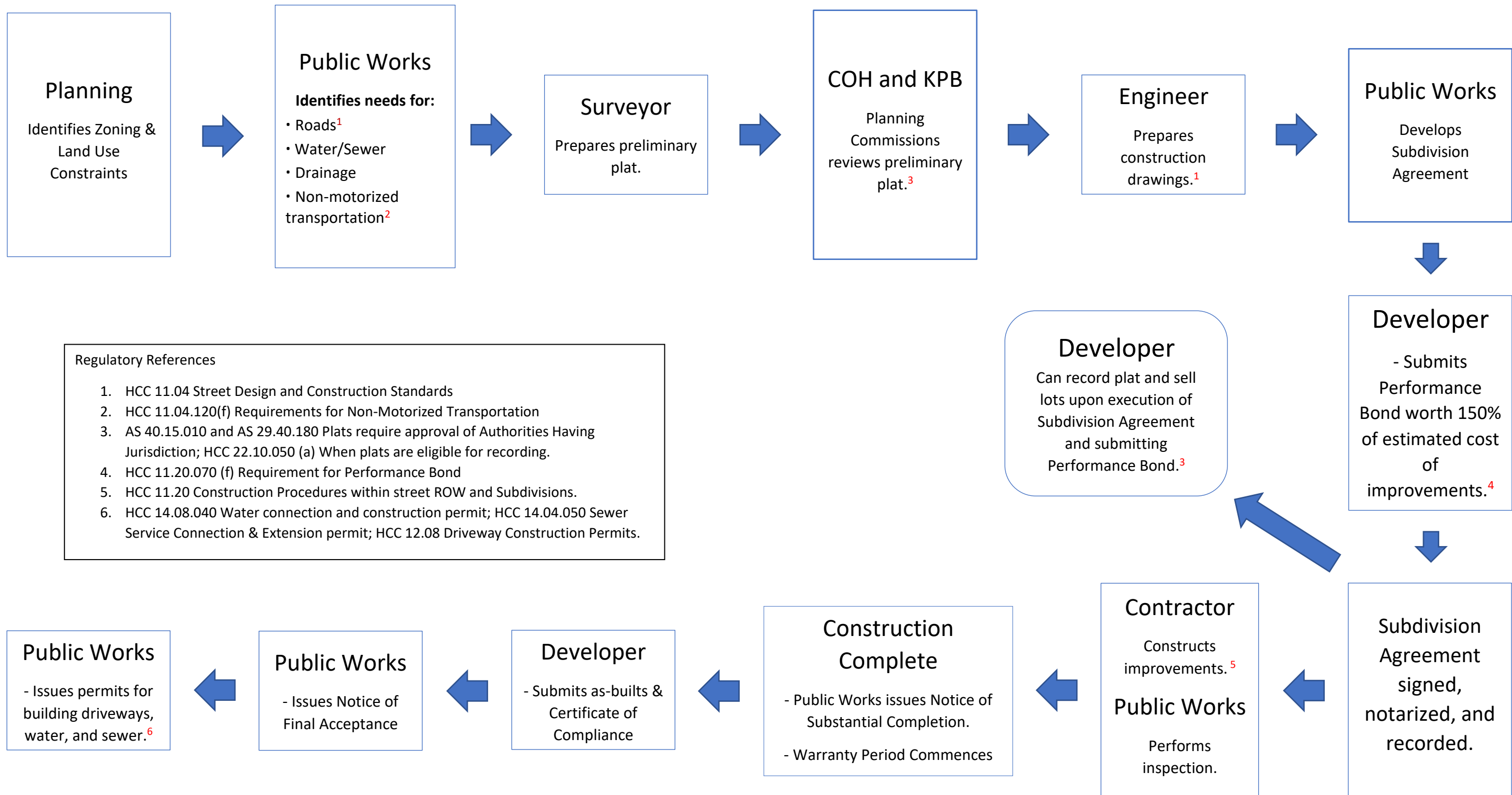
7. Our current Subdivision Development Agreement template says,

“The final plat for the subdivision or any portion thereof shall not be recorded until Developer has met all conditions of this agreement (or provides a performance guaranty for work not completed in a form approved by the City).”

8. In 2023, HCC 11.20.070 was amended to require a larger performance bond.

“A performance bond or other acceptable guaranty in the amount of 150 percent of the design engineer’s construction cost estimate is required.” HCC 11.20.070(f) adopted in 2023 by Ord 23-15.

City of Homer Subdivision Development Process



- Regulatory References
1. HCC 11.04 Street Design and Construction Standards
 2. HCC 11.04.120(f) Requirements for Non-Motorized Transportation
 3. AS 40.15.010 and AS 29.40.180 Plats require approval of Authorities Having Jurisdiction; HCC 22.10.050 (a) When plats are eligible for recording.
 4. HCC 11.20.070 (f) Requirement for Performance Bond
 5. HCC 11.20 Construction Procedures within street ROW and Subdivisions.
 6. HCC 14.08.040 Water connection and construction permit; HCC 14.04.050 Sewer Service Connection & Extension permit; HCC 12.08 Driveway Construction Permits.