

Kenai Peninsula Borough Legal Department

MEMORANDUM

TO: Brent Hibbert, Assembly President
Members, Kenai Peninsula Borough Assembly

THRU: Charlie Pierce, Mayor *CP*
Melanie Aeschliman, Planning Director *MA*

FROM: Sean Kelley, Deputy Borough Attorney *SK*
Scott Huff, Platting Manager *SHA*

DATE: February 18, 2021

SUBJECT: UPDATED Amendment to Ordinance 2020-45, Amending KPB 2.40, Planning Commission, KPB Title 20, Subdivisions, and KPB 21.20, Hearing and Appeals, to Correct Grammatical Errors, and Clarify and Improve Certain Administrative Procedures (Mayor)

There are seven proposed amendments to Ordinance 2020-45.

At the assembly's meeting on December 1, 2020, the first four amendments below were moved, seconded, and then action on the amendments was postponed by the assembly to allow time for the planning commission to provide a recommendation on the four amendments. Thus, the first four amendments remain "on the floor".

Proposed Amendments #5 and #6 are recommended amendments passed by the planning commission.

Proposed amendment #7 adds a whereas clause to identify the procedural history where Ordinance 2020-45 (O2020-45) went back to the planning commission after its initial recommendation on this ordinance.

[Please note the bold underlined language is new with deletions crossed out.]

1. Proposed Amendment #1 to Section 37

- Amend 20.65.010 as follows:

20.65.010. – Authority; Legislative intent; Scope

This chapter is enacted under the authority of AS 29.40. A vacation decision is a discretionary legislative land use decision. The purpose of this chapter is to establish procedures for the vacation of a platted public right-of-way, public

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area, or other public easement ~~dedicated depicted~~ on a borough approved plat, and to provide procedures for the alteration, including removal, of platted utility easements. This chapter does not apply to easements or property owned or held by a city or the borough in their proprietary capacity which may only be extinguished through the terms of the controlling document or applicable law. This chapter does not apply to private easements.

Explanation: This amendment is proposed to clarify that the borough's vacation authority under this chapter is limited to platted dedicated public easements shown on a borough approved plat.

2. Proposed Amendment #2 to Section 37

- Amend 20.65.020 as follows:

20.65.020. – Planning commission recommendation on state-**managed** easements

The planning commission serving as the platting authority has no authority to vacate public easements under the jurisdiction of the state. The planning commission will provide a recommendation on proposed vacations of state-**managed** easements within the borough. Applications to vacate a section line easement or other ~~public state-managed easements of the state~~ must comply with KPB 20.65.040 and will be considered in accordance with KPB 20.65.050. The applicant is responsible for all submittals required by the state. Final authority for approval and platting of the vacation of any public easement under the jurisdiction of the state rests with the state.

Explanation: This addresses a concern that the term "state easements" is too broad and expansive. Under the proposed change the scope of planning commission recommendations on state easements would be limited to state-managed easements within the borough. Molloy Schmidt also requested that the language "must comply with KPB 20.65.040 and will be considered in accordance with KPB 20.65.050" be struck because a recommendation should not have to follow the same requirements as a final decision to approve or deny a vacation. Molloy Schmidt requested a new section be added providing a different procedure for consideration of state-managed easements. The planning commission chose not to move forward with recommending adding a new section or amending the requirement that recommendations be considered in accordance with KPB 20.65.050.

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3. Proposed Amendment #3 to Section 37

- Amend 20.65.050 as follows:

20.65.050. – Action on vacation application.

- A. Staff shall review the application and supporting materials for compliance. If the application is incomplete, staff will return it to the applicant with a written list of deficiencies to be satisfied for acceptance.
- B. After acceptance of the application, staff will:
1. Send notice of the proposed vacation and the public hearing in accordance with KPB 20.10.100.
 2. Prepare a staff report that evaluates the merits of the proposed vacation. Revisions to the application submitted subsequent to the preparation of the staff report and after notice is sent will not be considered at the scheduled public hearing. Any such revisions will be treated as a revised application under this chapter.
- C. An accepted application shall be placed on the agenda of a regularly scheduled planning commission meeting. The public hearing on the vacation may not be more than 60 days after acceptance of the application, unless the applicant requests postponement.
- D. The planning commission shall consider the merits of each vacation request. **A platted dedication to public use of land or interest in land may be vacated if the dedication is no longer necessary for present or future public use. and in all cases the planning commission shall deem the area being vacated to be of value to the public. It shall be incumbent upon the applicant to show that the area proposed for vacation is no longer practical for the uses or purposes authorized, or that other provisions have been made which are more beneficial to the public.** In evaluating the merits of the proposed vacation, the planning commission shall consider whether:
1. The right-of-way or public easement to be vacated is being used;
 2. A road is impossible or impractical to construct, and alternative access has been provided;
 3. The surrounding area is fully developed and all planned or needed rights-of-way and utilities are constructed;

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4. The vacation of a public right-of-way provides access to a lake, river, or other area with public interest or value, and if so, whether equal or superior access is provided;
5. The proposed vacation would limit opportunities for interconnectivity with adjacent parcels, whether developed or undeveloped;
6. Other public access, other than general road use, exist or are feasible for the right-of-way;
7. All existing and future utility requirements are met. Rights-of-way which are utilized by a utility, or which logically would be required by a utility, shall not be vacated, unless it can be demonstrated that equal or superior access is or will be available. Where an easement would satisfactorily serve the utility interests, and no other public need for the right-of-way exists, the commission may approve the vacation and require that a utility easement be granted in place of the right-of-way; and
- 8. Any other factors that are relevant to the vacation application or the area proposed to be vacated.**

...

The remaining subsections should be re-lettered accordingly.

Explanation: This proposed change addresses a concern that deeming the area being vacated to be "of value" could be problematic and hard to define. Upon further review, the public's interests in the area vacated are protected by language added regarding present or future use and the 1-8 criteria provided. The proposed change adds a new number 8 to the criteria to provide for a catch-all for other factors the planning commission deems relevant to the vacation application

4. Proposed Amendment #4 to Section 37

- Amend 20.65.060 as follows:

20.65.060. Title to vacated area

....

- C.** Other provisions of this subsection notwithstanding, the planning commission may determine that ~~all or~~ a portion of **the area proposed to be**

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~~vacated should be reserved a vacated area should be dedicated, for another public easement purpose,~~ and if so, title to the area **vacated reserved** and held for another public **easement** purpose remains in the borough or city, as applicable."

Explanation: A concern was raised that the language indicated the planning commission could re-dedicate the area vacated without the landowner's consent. While the current language tracks code language used by other second class boroughs and is comparable to state statutory language, this proposed change attempts to clarify the intent of this section. The intent is that the planning commission, in deciding whether or not to vacate an area, may determine that the best option is to vacate a portion of the easement while retaining or reserving a portion for other public easement purposes, such as a utility easement or pedestrian access easement. This section would provide for partial vacations to avoid the scenario of "all or nothing" vacations. A partial vacation and/or reserving a smaller public easement within the public easement being vacated is not a taking. For example, the planning commission, while evaluating the merits of vacating a 60-foot wide dedicated right-of-way, may determine it is appropriate to retain 10 feet of the 60-foot wide right-of-way for pedestrian or utility purposes and vacate the remaining 50 feet of the right-of-way. This would be a permissible partial vacation.

5. Proposed Amendment #5 to Section 47

- Amend Section 47 as follows:

Section 47. That this ordinance [~~is effective January 1, 2021~~] **shall take effect April 1, 2021.**

Explanation: The original effective date of January 1, 2021 has passed.

6. Proposed Amendment #6 to the title of the ordinance

- Amend the ordinance title as follows (added language shown in bold):

AN ORDINANCE AMENDING KPB 2.40, PLANNING COMMISSION, KPB TITLE 20, SUBDIVISIONS, **REPEALING KPB 20.70 VACATION REQUIREMENTS, ENACTING A NEW VACATIONS CHAPTER KPB 20.65,** AND **AMENDING** KPB 21.20, HEARINGS AND APPEALS, TO CORRECT GRAMMATICAL ERRORS, AND CLARIFY AND IMPROVE ADMINISTRATIVE PROCEDURES

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Explanation: Changing the title provides a more descriptive summary of the ordinance being considered.

7. Proposed Amendment #7 adding a whereas clause

Add a 16th Whereas clause that reads:

WHEREAS, the planning commission held a public work session on January 25, 2021 to consider the proposed amendments, and on February 8, 2021 the planning commission recommended approval of the six proposed amendments as described in an updated memo dated February 18, 2021.

Explanation: The addition of this whereas clause provides additional context and procedural history for the proposed amendments and O2020-45

Planning Commission Action

December 1, 2020 – At public hearing on O2020-45, the assembly postponed action on the ordinance to allow time for the planning commission to review the proposed amendments

January 11, 2021 – The planning commission considered the assembly's request at its regularly scheduled meeting on January 11 and requested the assembly postpone action on O2020-45 until the Assembly's first meeting in March so that the planning commission could hold a work session on the O2020-45 amendments. (at its meeting on January 19, 2021, the Assembly postponed action on O2020-45.)

January 25, 2021 – The planning commission held a work session and discussed the proposed amendments.

February 8, 2021 – At its regularly scheduled meeting, the planning commission voted to recommend approval of proposed amendments #1-6 by a vote of 8-1.

Your consideration of these proposed amendments is appreciated.