



Kenai Peninsula Borough  
Planning Department

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**MEMORANDUM**

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

THRU: Charlie Pierce, Borough Mayor 

FROM: Melanie Aeschliman, Planning Director 

DATE: January 13, 2021

**RE:** Second Amendment to Ordinance 2020-45: An ordinance amending Kenai Peninsula Borough Code of Ordinances including Chapter 2.40-Planning Commission, Title 20-Subdivisions, Chapter 21.20-Hearing & Appeals to correct grammatical errors, clarify and improve certain administrative procedures.

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The Kenai Peninsula Borough Planning Commission reviewed the amendments to subject ordinance during their regularly scheduled January 11, 2021 meeting.

A motion passed by majority vote (8 Yes, 2 No) to request postponement of Ordinance 2020-45 by the Assembly so that the Planning commission has time to hold a work session.

Attached are the unapproved minutes of the subject portion of the meeting.

defined channel.

- 14. The proposed plat has a plat note that addresses the city code and the setback requirements.
- 15. There is not a drainage easement that connects drainage C and drainage E to drainage D.
- 16. A drainage easement to provide a connection from drainage C and E to drainage D can be granted on the Lillian Walli Estate 2020 Replat.

**STAFF RECOMMENDATION:**

Based on the means of evaluating public necessity established by KPB 20.70, the merits of the proposed vacations, and findings 1, 2, 3, 7, 10, 13, 16, **Staff recommends** approval of the drainage easements labeled A, B and F on the Water Resources Map KPB, and the denial of the drainage easements labeled C, D and E on the Water Resources Map KPB, subject to:

- 1. The granting of a 15 foot drainage easement to provide a connection from drainages C and E to drainage D with the location of the easement being defined on the Lillian Walli Estate 2020 Replat.
- 2. Finalize the approved vacations by submitting a final plat within a timeframe such that the plat can be recorded within one year of vacation consent (KPB 20.70.130).
- 3. Any drainage easements that are retained may require additional drainage easement dedications within the vacated portion of Cheryl Lane that are approved by the City of Homer Public Works Department.

**NOTE: Action after denial of vacation (KPB 20.70.120)**

- A. Denial of a vacation petition is a final act for which no further consideration shall be given by the Kenai Peninsula Borough.
- B. Upon denial by the planning commission, no reapplication or petition concerning the same vacation may be filed within one calendar year of the date of the final denial action except in the case where new evidence or circumstances exist that were not available or present when the original petition was filed.

**END OF STAFF REPORT**

Chair Martin open the item for public comment. Seeing and hearing no one from the public wishing to comment, Chair Martin closed public comment and opened discussion among the Commission.

**MOTION:** Commissioner Venuti moved, seconded by Commissioner Bentz to approve the vacation of drainage easements labeled A, B & F as shown on the Water Resources Map KPB in the meeting packet, based on the means of evaluating public necessity established by KPB 20.70, and findings 1, 2, 3, 7, 10, 13 & 16.

Seeing and hearing no objection or discussion, the motion was carried by the following vote:

**MOTION PASSED BY UNANIMOUS VOTE:**

Yes	10	No	0	Absent	1
Yes	Bentz, Brantley, Carluccio, Chesser, Ecklund, Fikes, Gillham, Martin, Ruffner Venuti				
No	None				
Absent	Morgan				

**AGENDA ITEM E. NEW BUSINESS**

- 3. Second Amendment to Ordinance 2020-45: An ordinance amending Kenai Peninsula Borough Code of Ordinances including Chapter 2.40-Planning Commission, Title 20-Subdivisions, Chapter 21.20-Hearing & Appeals to correct grammatical errors, clarify and improve certain administrative procedures.

Staff report given by Scott Huff (from the December 16, 2020 memo to the Planning Commission)

The following is a timeline of events regarding Ordinance 2020-45

September 14 – Ordinance 2020-45 was introduced to the Planning Commission so that they had time to review the ordinance before the next meeting. Public comment was not available as this item was only up for introduction.

September 28 - Ordinance 2020-45 was presented to the Planning Commission. The commission opened up the item for public comment and no public comment was given. Staff provided a sectional analysis of the ordinance. The commissioners discussed the ordinance and had several questions for staff. The ordinance was postponed to allow staff time to edit the ordinance and provide answers to the commissioner's questions.

October 12 – Staff presented the ordinance with several edits that were brought about from the previous meeting. The commission opened up the item for public comment and no public comment was given. The Planning Commission unanimously approved to recommend the adoption of Ordinance 2020-45, including a revision to Section 37, to the Kenai Peninsula Borough Assembly.

October 13 – Ordinance 2020-45 was introduced to the Kenai Peninsula Borough Assembly and set for public hearing.

November 10 - The Assembly reviewed Ordinance 2020-45, listened to public testimony from Mr. Bob Molloy and Ms. Kristine Schmidt, and reviewed public comments that were submitted. The Assembly postponed the item to December 1 to allow time for additional review and time to meet with testifiers.

November 18 – A meeting was held with Mr. Molloy and Ms. Schmidt. Attending the meeting was the Planning Director, Platting Manager, Deputy Borough Attorney, Borough Chief of Staff, and Mayor Pierce.

Legal Staff and Platting Staff reviewed the comments and testimony provided by Mr. Molloy and Ms. Schmidt. Four amendments were proposed to clarify items within Section 37 of Ordinance 2020-45. The November 19, 2020 memo was sent to the KPB assembly.

December 1 – The Assembly met and discussed Ordinance 2020-45, listened to public testimony from Mr. Molloy and Ms. Schmidt, and reviewed public comments that were submitted. The Assembly approved an amendment to update the 'Where As' statement and also approved an amendment to correct Section 37 where a clerical error accidently removed a sentence that was approved by the Planning Commission.

By a 5 to 4 vote, the Assembly postponed action on Ordinance 2020-45 to the January 19, 2021 meeting to allow time for the Planning Commission to review the memo dated November 19, 2020, and provide a recommendation to the Assembly.

**Staff recommends** the Planning Commission review the four proposed amendments from the memo dated November 19, 2020 and provide a separate recommendation to the Assembly for each Proposed Amendment outlined in the memo.

**Staff recommends** the Planning Commission also review Proposed Amendment #5 as outlined below and provide a recommendation to the Assembly.

*Proposed Amendment #5 to Section 47*

➤ *Amend Section 47 as follows:*

**Section 47.** That this ordinance [is effective January 1, 2021] shall take effect immediately upon its enactment.

Explanation: This amendment is proposed to clarify when the effective date will be. As Ordinance 2020-45 has been postponed by the Assembly it will not be approved before January 1, 2021 as Staff had originally planned. This amendment will allow the ordinance to become effective as soon as the ordinance is approved by the Assembly.



Mr. Huff then referred to the commission to the comparison table, prepared by Mr. Kelly, in the desk packet, which laid out the comparisons between the proposed ordinance approved by the commission at the October 12, 2020 meeting and proposed amendments from the November 1, 2020 meeting with Molloy and Schmidt. He believed the comparison table laid out clearly the changes in language of the proposed amendments. He then referred to comments from several APCs that were also located in the desk packet. He noted the Cooper Landing APC (CLAPC) did not provide a recommendation because four of their members felt they had insufficient time to fully consider the ordinance. The CLAPC wanted it noted they received information on this ordinance eight day before their scheduled meeting. The Kachemak Bay APC unanimously approved the recommend amendments to Ordinance 2020-45.

#### END OF STAFF REPORT

Chair Martin open the item for public comment.

Bob Molloy; Molloy, Schmidt LLC, 110 S. Willow St., #101, Kenai, AK 99611: Mr. Molloy wanted the commission to know that he is not receiving any compensation for the work he has put into this ordinance. He would request the commission recommend to the Assembly that action on this ordinance to be postponed to allow more time to work on this complex rewrite of code. He does not believe this ordinance is time sensitive and would like to see more time to allow for public input. He noted the time he is allowed for public comment at meetings is short and does not allow for any in depth discussion. With his allotted time, he would like to speak to two of the amendments. First, he would speak to the proposed amendment to 20.65.020 on page 57 of the meeting packet. He would ask the commission to consider his amendment language on this section of code, which can be found on page 109 of the packet. He believes the borough should have the option of declining to provide a recommendation on a state managed easements, especially those that are not section line easements or those that are not platted such as RS2477 right-of-ways. This is allowed by state regulation. There should be an easier process allowed. The second item is the amendment to 20.65.050 point D, which is on page 58 of the packet. The amendment lists eight factors the commission shall consider when considering the merits of a vacation. He believe this limits the commission discretion and he believes the commission should have a lot of discretion when considering vacations. He believed that mandating that these eight factors be to be taken into consideration in every case would place a heavy burden on the applicant. Especially with the public hearing practice of only allowing the applicant, ten minutes to present his/her case. He also believes other items not included in this rewrite need to be consider such as 20.60.160 –easements, which states that private easements may not be granted on a plat, however there is no language stating that private easement should not be shown on a plat either. He believes since the Planning Commission and Assembly are considering significant revisions to the subdivision code more time would be warranted to consider some of these issues.

Kristine Schmidt; Molloy, Schmidt LLC, 110 S. Willow St., #101, Kenai, AK 99611: Ms. Schmidt stated she agreed with Mr. Molloy's request for postponement to allowing additional time to work on the ordinance. She and Mr. Molloy appreciated the meeting they had with borough staff which allowed them to address some of their issues. She feels the amendments are a good start but she believes this is a much more complex issue than what is being billed. She then addressed concerns she had regarding the vacation factors listed on page 87 of the meeting packet. These factors address the most complicated ones that they have seen of any second-class boroughs. They believe they are unnecessarily complicated and there are easier factors from other municipalities that should be taken into consideration. These factors are too strict and do not allow for flexibility. For example, factor #2 – *A road is impossible or impractical to construct, and alternative access has been provided* – this language does not take into consideration that alternative access may not be required as there are existing accesses already in place. The petitioner should not always have to be the one to provide an alternative access when one is already in existence. This is just one of the problems they see with these factors as they are written. Since this rewrite is not time sensitive she believes a recommendation to postpone would be appropriate. Especially since the borough has a new Planning Director, Planner and Commissioners who have had little chance to review this rewrite and weigh-in on it, she believes postponement would be better in the long run.

Seeing and hearing no one else from the public wishing to comment, Chair Martin closed public comment and opened discussion among the Commission.

**MOTION:** Commissioner Chesser moved, seconded by Commissioner Carluccio to recommend to the Assembly postponing action on this ordinance until after the April 12, 2021 Planning Commission meeting.



Commissioner Chesser stated he believes Mr. Molloy and Ms. Schmidt have brought up some very good points. He also noted this is a lot of information to digest, he would like more time to review the information, and have his concerns answered. He believes the commission should take the time to get this rewrite done right. He then asked staff what was the urgency in getting this ordinance passed. Mr. Huff replied there was no urgency but this ordinance has already gone through the review process. Work sessions have been done with surveyors and engineers over a year ago. He had also reviewed the ordinance with all the advisory planning commissions. They have met with all the cities. They have also brought this to the commission for review, it was introduced at one meeting and had two other meetings where the ordinance was discussed. Additional work sessions were offered to the commission at that time and none were requested. The commission reviewed the ordinance and made a recommendation to the assembly to approve it. The Assembly has reviewed it, and now is asking the Commission to review and make a recommendation on the five amendments before you tonight. Commissioner Chesser replied it seemed to him the rewrite is taking a simple process and making it more complex. As a new commissioner, he was not here for the beginning of this process. After reviewing Molloy and Schmidt's memo and listening to their testimony tonight, he has more questions and does not feel comfortable recommending approval of this ordinance yet.

Commissioner Ecklund stated she knows the commission has looked at this a couple of times and she thinks this is a very detailed ordinance and does not believe that is reflected in the title of the ordinance. She believes this ordinance is doing more than correcting grammatical errors and clarifying and improving certain administrative procedures. For example, the section on vacations is more complex than what is stated in the ordinance title. She also expressed concerns should the Assembly approve the ordinance it will go into effect immediately. She usually likes to see a little lag time between approval and the effective date. Since there is no rush to approve this ordinance, she too has noticed other small things she would like to see addressed. She would be happy to sit on a working group with Commissioner Chesser. She knows staff has put a lot of work into this rewrite but there is no rush to approve the ordinance and she would be happy to see a little more work go into it.

Commissioner Ruffner stated he was leaning toward recommending postponement but had a question for staff. His question was regarding Amendment #3 where it speaks to KPB 20.65.050(d). There is a changed language, which at first glance, appears to remove the mandate to consider the value of an easement. It also appears to remove from the applicant the burden of having to prove the easement should be vacated. He did not recall this being discussed in their previous reviews and this appears to be a significant shift. This new amendment language appears to be going in a new direction and he was curious how this fits into what they have already approved. Mr. Huff replied they removed the language "of value" to that section of code. He stated it is still on the applicant to show what is being petitioned to be vacated, why they do not want it, believe it is not necessary, and where other access is available. The burden is still on the applicant to provide a complete submittal. There was concern the term "of value" might be confusing, inferring the borough might be paying for it or reimbursing someone for it. Mr. Huff also noted what was before the commission tonight were these five amendments, and that the rest of Ordinance 2020-45 had already been approved by them and is currently before the Assembly. Commissioner Ruffner then replied he understood the counter testimony from the public on this amendment. While amendment might shift the burden from the applicant a bit making it a little easier to get through the vacation process, it becomes more prescriptive with the eight criteria that have to be met. He wanted clarification on whether this amendment made the vacation process less or more burdensome. Mr. Huff replied he believed the process would be similar to what it currently is. The eight guidelines would give the commission something to use to judge a vacation request. Currently code does not have any standards or criteria to judge a vacation. Mr. Huff believes that passing this ordinance will be good, as it will give the commission standards by which to judge vacation requests.

Commissioner Ecklund had a question for borough attorney Mr. Kelly. Can the commission request the Assembly postpone action on this ordinance or can they only make a recommendation on the amendments before them tonight? Mr. Kelly replied the commission could make a recommendation to the Assembly to postpone action on the ordinance, he cannot guarantee the Assembly will table or postpone it to a date certain. Commissioner Ecklund followed up with another question and asked if this ordinance was already scheduled for an Assembly meeting. Mr. Kelly replied he believed it was postpone to a date certain of January 19, to give the commission a chance to review the proposed five amendments. Commissioner Ecklund then stated that this had not gone before the Seward Planning & Zoning Commission. She did not



know if it had been sent to the city and the Community Development Director chose not to bring it forward. She then asked if the commission had ever had a work session on the ordinance that had not a part of a public meeting. Mr. Huff replied this was sent to the City of Seward and does not know what happen to it after that. He also stated there was not a separate work session for the commission; the ordinance was just discussed during regular meetings.

Commissioner Carluccio stated she does not recall this ordinance being addressed by the Seldovia Planning & Zoning Commission. Again, staff may have sent it to the city but it did not make it to the Commission. It might have gotten lost during the city's process of hiring a new city manager.

Commissioner Bentz asked staff if they voted to recommend postponement would they lose the opportunity to have any discussion on the amendments before them tonight. Would postponement halt their discussion tonight and allow it to be taken up at later date? Mr. Huff said it was up to the commission to decide. They could recommend postponement. The commission could also motion to set up a work group as was discussed tonight. Commissioner Bentz then asked if they postponed making any recommendations on the amendments, could the Assembly decide to move forward to approve the ordinance without the Commission's recommendations. Thus, forfeiting the opportunity to make recommendation on the five amendment before them tonight? Mr. Huff replied that yes that could happen.

Commissioner Carluccio stated while she is in favor of postponement she does not believe it needs to be postponed until April. She does not support a postponement until April.

Commissioner Chesser stated that he would be fine postponing to a sooner date. He would just like to have more time to form a work group.

**AMENDMENT MOTION:** Commissioner Ecklund motion, seconded by Commissioner Carluccio to recommend the Assembly postpone action on this item until after the Planning Commission's first meeting in March to allow the Planning Commission to form a workgroup with staff to go over the ordinance in more detail.

Mr. Kelly suggested the term work group can have a more technical or formal meaning. If the commission wishes to recommend the establishment of a workgroup to the Assembly, the commission might want to consider how the workgroup will be formed. Will it have members appointed from the Planning Commission as well as members from the public? Perhaps the commission might want to have something less formal.

Commissioner Ecklund stated her vision was the workgroup would be made up of Planning Commission member and staff. Mr. Kelly then recommend that perhaps the motion should be to recommend postponement until the first meeting in March, leaving the workgroup part of it out of the motion. The commission could then just schedule a work session for the commission outside of a regular meeting. Commissioner Ecklund then asked Mr. Kelly for additional clarification on what the motion should be. Mr. Kelly replied the motion could to request postponement by the Assembly so the Planning Commission has time to hold a work session. Commissioner Ecklund agreed with this language.

Chair Martin then asked Commissioner Ecklund as the maker of motion and Commissioner Carluccio who was the second, did they agreed to change the motion language to "to request postponement by the Assembly so that the Planning Commission has time to hold a work session." Both Commissioner Ecklund as the maker of the motion and Commissioner Carluccio as the second consent to the change in language.

**REVISED AMENDMENT MOTION:** Commissioner Ecklund moved, seconded by Commissioner Carluccio to request postponement by the Assembly so that the Planning Commission has time to hold a work session.

Seeing and hearing no objection or further discussion, the revised amendment motion was carried by the following vote:



**REVISED AMENDMENT MOTION PASSED BY MAJORITY VOTE:**

Yes	8	No	2	Absent	1
Yes	Bentz, Carluccio, Chesser, Ecklund, Gillham, Martin, Ruffner Venuti				
No	Brantley, Fikes				
Absent	Morgan				

Seeing and hearing no objection or further discussion, the amended main motion was carried by the following vote:

**MAIN MOTION AS AMENDED PASSED BY MAJORITY VOTE:**

Yes	8	No	2	Absent	1
Yes	Bentz, Carluccio, Chesser, Ecklund, Gillham, Martin, Ruffner Venuti				
No	Brantley, Fikes				
Absent	Morgan				

AGENDA ITEM E.      NEW BUSINESS

4. Consideration of Kachemak Bay Advisory Planning Commission Recommendation

Staff report given by Bryan Taylor.

Mr. Taylor stated that he is forwarding the recommendation below on behalf of the Kachemak Bay Advisory Planning Commission. At their December 10, 2020 meeting a proposal was passed unanimously to amend the platting code at KPB 20.25.070, Forms and Contents Required. The amendment would require that provisions for wastewater disposal review would be applicable at the preliminary platting phase of approval, rather than only during the final plat review period.

Recommendation:

We propose changing the timing of the submittal of wastewater disposal reports so that they are submitted with the proposed rather than the final plat. Specifically, we'd like to add the following to the KPB planning code.

**20.25.070. - Form and contents required.**

P. An accompanying submittal of a wastewater review which complies with KPB 20.40 - wastewater review.

Mr. Taylor stated that the APC felt that having the information wastewater review information would be helpful when reviewing preliminary plats and would result in a more informed recommendation. The APC wondered if this request could be considered under the Ordinance 2020-45 code rewrite.

Mr. Taylor then asked the commission for direction on how they would like to see recommendations like these to come before them. Would they like them as an item under New Business on the agenda or submitted as informational items.

END OF STAFF REPORT

Chair Martin asked Mr. Huff for his input on the recommendation. Mr. Huff replied he had attended a meeting with the Kachemak Bay APC back in August where a preliminary plat with lots that were less than 40,000 square feet, was reviewed. He noted borough codes does allow for this if a soils analysis report shows that it can have onsite well and septic. The question posed by the APC was how can they recommend approval of the preliminary plat without the soils report showing this is possible. Mr. Huff informed the APC the soils report is not due until the final plat review and it is not a requirement for the preliminary plat. The APC wanted to see a change to code that would make the soils report a requirement for the preliminary plat application. Mr. Huff stated if the commission would like to move forward with the recommendation; it would follow the same path as Ordinance 2020-45 that was before them tonight. A factor to consider would be the cost of wastewater review. You have to pay an engineer to complete a wastewater review. Making that a requirement for a preliminary plat that may, may not be approved, or