



# **KENAI PENINSULA BOROUGH**

PLANNING DEPARTMENT

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**MIKE NAVARRE**  
**BOROUGH MAYOR**

## **MEMORANDUM**

**TO:** Dale Bagley, Assembly President  
Kenai Peninsula Borough Assembly Members

**THRU:** Mike Navarre, Borough Mayor *MN*

**FROM:** Max Best, Planning Director *MB*

**DATE:** August 13, 2015

**SUBJECT:** Ordinance 2015-22, An Ordinance Amending KPB Chapter 14.40 Regarding the Use and Control of Borough Rights-of-Way and Enforcement of Right-of-Way Regulations

The Kenai Peninsula Borough Planning Commission reviewed the subject ordinance during their regularly scheduled August 10, 2015 meeting. A motion passed by unanimous consent to recommend approval of the ordinance amending KPB Chapter 14.40, Regarding the Use and Control of Borough Rights-of-Way and Enforcement of Right-of-Way Regulations.

In the Ordinance, please make the following amendment to the last WHEREAS statement:

*WHEREAS, the Planning Commission reviewed this ordinance at its August 10, 2015 and recommended approval by unanimous consent.*

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

AGENDA ITEM F. PUBLIC HEARINGS

2. Ordinance 2015-22, An Ordinance Amending KPB Chapter 14.40 Regarding the Use and Control of Borough Rights-of-Way and Enforcement of Right-of-Way Regulations

Staff Report given by Max Best

PC Meeting: July 13, 2015

Ordinance 2015-22 was postponed from the July 13, 2015 meeting so that the Advisory Planning Commissions and other interested parties could review the ordinance and so that the questions the Planning Commission had could be answered.

Mr. Best reviewed the following amendment memorandum that was submitted from Liz Leduc, Assistant Borough Attorney.

After the introduction of Ordinance 2015-22, amending KPB chapter 14.40, several needed changes came to light. We are requesting that the Planning Commission and the Road Service Area Board consider the amendments outlined below at your meetings on August 10 and August 11, respectively. New language is denoted by **bold** text.

➤ **Amend KPB 14.40.040(D).**

Encroachment permits. Encroachment permits **[MAY BE]** **are issued by the RSA director for objects existing or to be constructed, installed or placed within a borough right-of-way by a private party or other non-borough entity:**

Comment: The proposed amendment to 14.40.040 clarifies that encroachment permits are required for both existing and new encroachments.

➤ **Amend KPB 14.40.061(A)(2) and (5).**

...

[2. PROJECT-SPECIFIC PERMITS FOR CROSSING AN ANADROMOUS WATERBODY WITHIN A DEDICATED RIGHT-OF-WAY WILL ONLY BE ISSUED UPON RECEIPT BY THE RSA OF AN APPLICANT'S COMPLETED APPLICATIONS FOR PROJECT PERMITS TO THE UNITED STATES ARMY CORPS OF ENGINEERS AND ALASKA DEPARTMENT OF NATURAL RESOURCES OFFICE OF HABITAT MANAGEMENT AND PERMITTING, CHANGED AFTER JULY 1, 2008 TO THE ALASKA DEPARTMENT OF FISH AND GAME DIVISION OF HABITAT. IT SHALL BE THE SOLE RESPONSIBILITY OF ALL APPLICANTS FOR PROJECT-SPECIFIC PERMITS TO ENSURE COMPLIANCE WITH ALL APPLICABLE STATE AND FEDERAL LAW, INCLUDING PERMITTING REQUIREMENTS.]

**2. Project specific construction permits for crossing an anadromous waterbody within a dedicated right-of-way will only be issued upon receipt by the RSA director of applicant's written certification that s/he has obtained all other applicable permits for the project, including but not limited to permits issued by the Army Corps of Engineers, Kenai Peninsula Borough, Alaska Department of Fish & Game, Alaska State Parks, and the U.S. Fish & Wildlife Service. It shall be the sole responsibility of all applicants for project-specific construction permits to ensure compliance with all applicable state and federal law, including permitting requirements.**

...

[5. UPON RECEIPT OF A COMPLETE PROJECT-SPECIFIC CONSTRUCTION PERMIT APPLICATION, INCLUDING COPIES OF THE PERMITTEE'S PERMITS FROM THE ARMY CORPS OF ENGINEERS AND ALASKA DEPARTMENT OF

FISH AND GAME, THE RSA DIRECTOR WILL FORWARD A COPY OF THE MATERIALS TO THE KENAI RIVER CENTER FOR REVIEW AND RECOMMENDATIONS REGARDING MITIGATION MEASURES.]

Comment: These changes resulted from further discussion with the planning director. Under these proposed amendments, applicants for road construction permits that will cross an anadromous waterbody are required to obtain all other necessary permits before a road construction permit can be issued. Because the Gilman River Center currently coordinates such permitting, it is not necessary for the River Center to review the RSA application (it would be redundant), so paragraph 5 has been deleted. Because the RSA director does not have jurisdiction to enforce permits issued by any other agency, paragraph 2 has been amended to simply require the RSA applicant to certify that they have obtained all necessary permits, thereby leaving the responsibility of following all other municipal, state and federal law squarely within the applicant's hands.

➤ **Amend KPB 14.40.300(C)(3).**

The RSA director may post a cease and desist order within the affected right-of-way if the person violating [CHAPTER] KPB chapter 14.40 cannot be ascertained. Removal of a posted notice is subject to the fines set forth in KPB 14.40.380.

Comment: scrivener's error.

Mr. Best stated that the posting a violation on site is a method of contacting the person. It could also be placed on a piece of equipment, truck, etc. and not just posting it on a stick. When a notice is posted, it is usually posted on something noticeable so it is another avenue used to contact the people to cease and desist.

A couple of other items discussed by the Planning Commission were regarding utilities. The utilities are a whole separate process. KPB 14.08 separates activities in a right-of-way by a utility. The utility companies are the ones who have authorization from the public utility commission to operate as a utility. The Planning Department has a permit process in place already. In that process, there is an exception method. The utilities have the outer 10 feet of the right-of-way that they can operate in as well as their utility easement. If they are going to be outside that in the right-of-way then there is that exception process that puts it back on them. If something needs to be removed then they need to remove it. Anything they operate outside there, it is really up to them to move it at a later date.

What staff doesn't have is any kind of fine schedule for the utilities being responsible for not being where they are supposed to be. Mr. Best has it on his schedule to come up with a remedy in 14.08 to force the utility companies into getting where they are supposed to be or paying a fine. They have quite orchestrated how they are going to go after the utility companies when the utilities are put where they are supposed to be.

Another item discussed was timeframe of when penalties started and stopped. There is a hearing date and the person is given a cease and desist order or an enforcement notice stating when the fines start. The fines then go to the hearing date and they let the hearing officer decide how many of those days they want to fine the person. The hearing is supposed to be within 20-30 days so their fine could be anywhere in-between 20x or 30x depending on how many days there are which could be adjusted by the hearing officer.

The Cooper Landing Advisory Planning Commission did a really good job asking a lot of questions that are more Roads Service Area questions rather than the Planning questions.

Mr. Best brought this forward to the Planning Commission mainly for the encroachment permit process which is new. It gives the protections to the Borough and the property owners to work something out in an encroachment situation. There are situations and problems with people encroaching into the right-of-way with stuff. This was not for the people who had their flower gardens and small rock walls, things that are fairly useful or necessary next to a right-of-way. He said they are not out to move people's retaining walls and their rock gardens; they want to give them permission. Now the encroachment process gives the Roads Service

Area the ability to allow certain things in the right-of-way. Roads now has to either give a permit for something or that it be removed which gives them the ability to plat it.

**END OF MEMORANDUM AMENDMENT & STAFF REPORT**

Chairman Martin opened the meeting for public comment. Seeing and hearing no one wishing to speak Chairman Martin closed the public comment period and opened discussion among the Commission.

**MOTION ON FLOOR:** Commissioner Holsten moved, seconded by Commissioner Whitney to recommend approval of Ordinance 2015-22, ordinance amending KPB Chapter 14.40 Regarding the Use and Control of Borough Rights-of-Way and Enforcement of Right-of-Way Regulations.

Commissioner Holsten observed people using the right-of-way ditch to drain a wetland. She asked staff to address if someone receives a permit to work in the ditch but actually wants to drain a wetland. Mr. Best replied that any activity in a right-of-way requires some sort of authorization. Technically, a permit would be needed. Commissioner Holsten clarified that they get the permit to clean out the ditch but actually want to drain the wetlands into the ditch. Mr. Best replied that was why staff says that a permit was needed. He stated that more water in the roadway was not good and wasn't sure if that would be allowed. It may come down to making them install a culvert.

Commissioner Holsten asked if a longer term permit for mailboxes for people who want to manually clean out the culvert, business signs, etc. She suggested that the Roads Service Area director be given the ability to grant a permit for three years. Mr. Best thought that was good suggestion and would forward this onto the Roads Service Area.

Commissioner Holsten referred to the fine schedule and felt that the most expensive violation should be failure to respond to citation / complaint. Mr. Best replied that was the minimum amount. That was another good suggestion and will pass that onto Roads.

Commissioner Holsten felt the minimum fines were light. Mr. Best agreed that it wasn't much a deterrent. They are running into that right now in KPB 21.50. It is a business decision and quite frankly the businesses decisions say send them a bill.

Commissioner Ecklund referred to the tagging of violation which states, "... a tag placed on the property allowing 48 hours to remove the encroachment." She asked if there was a timeline when something is tagged. Mr. Best replied that was if they were not able to make contact. This was for something that was in the right-of-way such as parked cars and no one was around to move them. He thought the only time they would use this was if there was something blocking a driveway, blocking and impeding maintenance. Most of the time they are successful in contacting the people involved in the encroachment. Commissioner Ecklund thought the operative word was "unauthorized". Mr. Best agreed. Commissioner Ecklund asked if authorization could come through a phone call. Mr. Best replied yes. Commissioner Ecklund asked if there was a fee for a permit. Mr. Best replied no.

Commissioner Holsten asked if the Roads Service Area Board approved this ordinance. Mr. Best replied no, they have a meeting on Tuesday, August 11, 2015. Their recommendations will be forwarded to the Assembly.

Chairman Martin asked about Commissioners voting at this meeting and voting on at the Advisory or City Planning Commissions. Mr. Best replied that this is a Legislative issue so all commissioners at this meeting can vote.

**VOTE:** The motion passed by unanimous consent.

CARLUCCIO YES	COLLINS YES	ECKLUND YES	ERNST YES	FOSTER YES	GLENDENING ABSENT	HOLSTEN YES
ISHAM YES	LOCKWOOD ABSENT	MARTIN YES	RUFFNER ABSENT	VENUTI YES	WHITNEY YES	10 YES 3 ABSENT