



KENAI PENINSULA BOROUGH

PLANNING DEPARTMENT

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MIKE NAVARRE
BOROUGH MAYOR

MEMORANDUM

TO: Kelly Cooper, Assembly President
Kenai Peninsula Borough Assembly Members

THRU: Mike Navarre, Borough Mayor *MN*

FROM: Max Best, Planning Director *MB*

DATE: August 14, 2017

SUBJECT: Ordinance 2017-22; An ordinance amending KPB 20.25.120 – Review and Appeals, KPB 21.06.060(A)(3) – Exceptions Procedures, KPB 21.20 – Hearings and Appeals, and KPB 21.25.100 – Appeals.

The Kenai Peninsula Borough Planning Commission reviewed the subject Ordinance during their regularly scheduled August 14, 2017 meeting.

A motion passed by unanimous consent to recommend approval of Ordinance 2017-12, An ordinance amending KPB 20.25.120 – Review and Appeals, KPB 21.06.060(A)(3) – Exceptions Procedures, KPB 21.20 – Hearings and Appeals, and KPB 21.25.100 – Appeals.

In the Ordinance, please make the following amendments to the last WHEREAS statements:

WHEREAS, the Planning Commission heard this ordinance at its regularly scheduled meeting of August 14, 2017, and recommended approval by unanimous consent.

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

AGENDA ITEM F. PUBLIC HEARINGS

1. Ordinance 2017-22; An ordinance amending KPB 20.25.120 – Review and Appeals, KPB 21.06.060(A)(3) – Exceptions Procedures, KPB 21.20 – Hearings and Appeals, and KPB 21.25.100 – Appeals.

Staff Report given by Max Best

PC Meeting: 7/17/17

The borough has experienced success with the use of a hearing officer to hear cases regarding violations of the borough's land use regulations. It has provided for a fair and efficient process. Converting the tribunal for appeals of planning commission decisions to a hearing officer from a board of adjustment would also provide for a fair and more efficient process. Use of a hearing officer is authorized by AS 29.40.

There has been difficulty recruiting members for the board of adjustment. Meetings have been cancelled and postponed due to lack of a quorum. This works a hardship on members of the public who are in attendance at the cancelled meeting, the parties to the appeal, other board members several of who travel from the Seward and Homer areas, and results in unnecessary legal costs for the outside counsel advising the board of adjustment. Disposition of an appeal also takes longer than necessary because the schedules of the board members, multiple parties, counsel, and support staff all need to be considered when scheduling hearings.

In addition to changing the appeal process to a hearing officer format some housekeeping revisions are made to KPB 21.20 where language is obsolete, in conflict with other code provisions, or presented interpretation issues.

Consideration of this ordinance is appreciated.

END OF MEMORANDUM & 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: Commissioner Carluccio moved, seconded by Commissioner Ecklund to recommend approval of Ordinance 2017-22, amending KPB 20.25.120 – Review and Appeals, KPB 21.06.060(A)(3) – Exceptions Procedure, KPB 21.20 – Hearing and Appeals and KPB 21.25.100 – Appeals.

Commissioner Foster asked if the Assembly was the Board of Adjustment at one time and if it now went to an appointed board by the Assembly. Mr. Best replied that originally the Board of Adjustment was the Assembly that heard the appeals of the Planning Commission. The Assembly created a lay board to handle these appeals because they felt it would be better since they were a legislative body hearing quasi-judicial issues. He stated now they are having timing problems.

Commissioner Carluccio asked if the hearing officer was one person making the decision to overturn the decision or send it back to the commission. Mr. Best replied that was correct. Essentially, they hire an attorney to serve as a hearing officer to interpret the decisions of the planning commission through the lawful procedures in determining whether it should be remanded, overturned or upheld.

Commissioner Carluccio asked if the hearing officer was using the borough ordinances, rules and regulations that are on the books to determine whether the decision was just or whether it meets the criteria as directed by the law. Mr. Best replied that it would be a new hearing on the evidence that was presented to the planning commission. It would be somebody new reviewing and deciding whether the planning commission had adequate findings, follow the law, etc. and made a good or bad decision.

Commissioner Ecklund asked what the budget impact would be with this change. Mr. Best thought that it would be a substantial savings because the board of adjustment members are paid, then they hire counsel and then on top of that would be staff costs. It would be hiring one attorney rather than a whole board.

Commissioner Ruffner asked if court would be the next step after the hearing officer's decision if someone wants to go further with their appeal. Mr. Best replied that there was an appeal process of the hearing officer's decision which would be reconsideration before the hearing officer with the final step being court. Commissioner Ruffner asked if the hearing officer would be the same person doing a double check. Mr. Best replied yes, that was correct. He stated that there would be one person who hears the appeal. There was a process of being able to appeal or asking for a reconsideration of the decision of the hearing officer to the officer who made the decision based on new information presented.

Commissioner Carluccio understood that an appeal of the commission's decision would go before a hearing officer and the hearing officer could override the planning commission's decision. Mr. Best replied that may not necessarily be the case. Commissioner Carluccio asked what the next step would be if hypothetically they overruled the planning commission's decision.

Mr. Navarre stated that the borough already hires a hearing officer to advise the board of adjustment of what laws were applicable and make recommendation on the action. The only problem they are having has been obtaining a quorum which can end up delaying for weeks or months if they don't have a quorum. He stated there may be some savings but more importantly it helps effect a quicker decision for those that are impacted by the appeal process.

Mr. Best addressed what happens after the decision of the hearing officer. KPB 21.20.350 states, "Reconsideration by the hearing officer. Within 14 days of issuance of the written decision a party that participated in the hearing may request reconsideration of a hearing officer's decision based only on the following criteria: (1.) The hearing officer overlooked, misapplied, or failed to consider a code provision directly controlling; (2.) The hearing officer overlooked or misconceived a material fact; (3.) The hearing officer overlooked or misconceived a material question in the case; or (4.) Fraud or misrepresentation by a party." He stated that those are the things that are considered upon a hearing officer's reconsideration. Then after 30 days it could be taken to court.

Commissioner Carluccio asked if a reconsideration request goes back to the same hearing officer. Mr. Best replied yes.

Commissioner Foster asked if the hearing officer was only looking at the ordinance and state law or do they look at the spirit of the law away from the letter of the law. He asked if they look at the Comprehensive Plan, historical uses as well as listening to the testimony of the community and use that as evidence to uphold the decision of the planning commission. Mr. Best replied that the hearing officer was supposed to give due deference to the Planning Commission's decision. Commissioner Foster stated that there was a finding with the State Supreme Court that stated that the experts in a certain case were the planning commission.

Commissioner Ruffner supported this ordinance because he felt this could expedite the appeal process.

VOTE: The motion passed by unanimous consent.

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| BENTZ YES | CARLUCCIO YES | ECKLUND YES | ERNST YES | FIKES YES | FOSTER YES | ISHAM YES |
| LOCKWOOD YES | MARTIN YES | MORGAN YES | RUFFNER YES | VENUTI ABSENT | WHITNEY YES | 12 YES 1 ABSENT |

~~AGENDA ITEM F. PUBLIC HEARING~~

~~2a. State application for a marijuana establishment license renewal; Kasilof Area~~

~~Staff Report given by Bruce Wall~~

~~PC MEETING: August 14, 2017~~

~~**Applicant:** Alaska Bud Brothers Aerogardens LLC~~

~~**Landowner:** James R. Gossman~~