

# Kenai Peninsula Borough Planning Department

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## MEMORANDUM

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

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

**FROM:** Scott Huff, Planning Manager SA  
Sean Kelley, Deputy Borough Attorney SK

**DATE:** November 19, 2020

**SUBJECT:** Second 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)

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In response to comments received from the law firm Molloy Schmidt, the administration, planning, and legal staff met with Mr. Molloy and Ms. Schmidt to discuss and fully consider their concerns. Following that discussion, some wording changes to this amendment are proposed herein. All of the proposed changes are contained within Section 37 of Ordinance 2020-45.

[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 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.

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*2. Proposed Amendment #2 to Section 37*

- Amend 20.65.020 as follows:

**20.65.020. – Planning commission recommendation on state 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. The proposed change limits the planning commission’s recommendation oversight to state-managed easements within the borough. The commenters 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. This amendment however does not propose striking that language at this time because the public may have some interest in retaining the state-managed public easement and to reach a well-informed recommendation it is prudent for the platting authority’s review to follow a standardized process.

*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.

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- 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;
  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.**

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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**

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

Your consideration of these proposed amendments is appreciated.