

Introduced by: Mayor
Date: 08/04/20
Hearing: 09/01/20
Action: Withdrawn by Sponsor

**KENAI PENINSULA BOROUGH
ORDINANCE 2020-36**

**AN ORDINANCE AMENDING KPB 20.70 VACATION REQUIREMENTS AND KPB 21.20
HEARINGS AND APPEALS TO IMPROVE VACATION AND HEARING OFFICER
APPEAL PROCEDURES**

WHEREAS, amendments to KPB 20.70, Vacation Requirements, and KPB 21.20, Hearings and Appeals, are needed to clarify vacation and appeal procedures; and

WHEREAS, the amendments to KPB 20.70 will improve practice and procedure for processing vacation petitions by providing standards to evaluate vacation petitions and clarifying the process following a vacation decision by the planning commission; and

WHEREAS, KPB 21.20 currently indicates that the assembly will sit as hearing officer to hear appeals of vacation petitions approved by the planning commission; and

WHEREAS, a party that disagrees with the legislative action of the governing body's veto or consent action may appeal that action to the superior court; and

WHEREAS, other amendments to KPB 21.20 clarify who is a party of record to a hearing officer appeal, the record on appeal, statements that may be submitted to the hearing officer, and improves the process for appeals where borough administration chooses not to participate as a party to an appeal filed before the hearing officer; and

WHEREAS, at its meeting of August 10, 2020, the Planning Commission reviewed this ordinance and recommended _____;

NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That a new section KPB 20.70.035 is hereby enacted:

20.70.035. Approval of Vacations.

The planning commission shall consider the merits of each request to vacate a street, public right-of-way, public area, public access easement, and utility easement, and in all cases the planning commission will deem the area being vacated to be of value to the borough unless proven otherwise. The burden of proof shall lie entirely with the petitioner. In considering any vacation of a street, public right-of-way, public area, or public easement the borough shall consider the following standards:

- A. The current and future needs of the right-of-way, public access easement, or public areas.
- B. The vacation of the right-of-way, public access easement, or public areas will not limit access to surrounding property and all neighboring parcels are served by dedicated right of way or public access easements.
- C. The vacation of the right-of-way or public access easement will not be detrimental to the public welfare.
- D. The borough will consider realignment of a right-of-way by vacation and rededication where the planning commission finds that the right-of-way realignment will enhance access and the realigned right-of-way is located to provide reasonable means of ingress and egress.

SECTION 2. That KPB 20.70.040 is hereby amended as follows:

20.70.040. Application—Petition required.

- A. A platted right-of-way or platted public area may not be vacated, except upon petition by resolution of the governing body from a municipality in which the property is located or by the owners of the majority of land fronting or abutting the right-of-way or public area to be vacated. The petition shall be filed with the planning commission.
- B. A petition to vacate a utility easement [ONLY MUST] may only be submitted by the state, the borough, a public utility, or the owners of the land subject to the easement.

SECTION 3. That KPB 20.70.050 (B) is hereby amended as follows:

20.70.050. Petition—Information required.

- A. A recorded plat may not be altered or replatted except by the platting authority on petition of the state, the borough, a public utility, or the owners of the majority of the land affected by the alteration or replat. A platted street may not be vacated, except on petition of the state, the borough, a public utility, or the owners of a majority of the land fronting the part of the street sought to be vacated. The petition shall be filed with the platting authority and shall be accompanied by a copy of the existing plat showing the proposed alteration or replat.

- B. Persons listed on the borough assessor's tax roll shall be deemed the legal owners for purposes of the vacation petition. The petition shall include a statement containing the reasons in support of the vacation and be accompanied by a minimum of three copies of a sketch clearly indicating the proposed vacation, submitted to the planning department at least 30 calendar days in advance of the meeting at which it will be considered. [ADDITIONAL COPIES MAY BE REQUIRED AS NEEDED.] The format and number of copies shall be determined by the planning director. In cases where encroachments on public rights-of-way are in question, an as-built survey, sealed by a surveyor, is required showing the improvements, existing travelways, amount of encroachment, and any other submittal as requested by the planning commission. The burden of proof shall lie with the petitioner to support the vacation.

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SECTION 4. That KPB 20.70.080 is hereby amended as follows:

20.70.080. Utility easement vacations.

- A. Where a vacation petition is for a utility easement only, the petitioner has the responsibility to obtain comments from the KPB Road Service Area, all appropriate utility providers, and the jurisdictional authority of the adjoining right-of-way, if applicable, and submit those comments with the petition. The petition must be signed by the owners of the land subject to the easement as shown on the most current Kenai Peninsula Borough tax rolls. A sketch showing the location of the requested vacation must accompany the petition. A public hearing is not required in the case of vacation of a utility easement that is not associated with the vacation of a right-of-way.
- B. Publication of a notice in the newspaper is not required for utility easement vacations.
- C. A notice shall be sent by regular mail to each property owner as shown on the Kenai Peninsula Borough tax rolls within a 300-foot radius from the utility easement proposed for vacation at least 14 days prior to the scheduled public hearing.
- D. When the application is complete, within ten working days the planning director will schedule the petition to be heard by the planning commission. [TAKE ACTION ON THE REQUESTED VACATION WITHIN TEN WORKING DAYS, EITHER APPROVING OR DENYING THE REQUESTED VACATION. IF THE DIRECTOR APPROVES THE VACATION,] The vacation may be finalized by a vacation resolution that will be prepared and taken to the planning commission for adoption, in accordance with KPB 20.70.140, or[.]the owner may finalize the vacation in conjunction with a preliminary plat depicting the requested vacation, that shall be submitted in accordance with KPB Title 20. [IF THE DIRECTOR DENIES THE

VACATION, A LETTER CONTAINING THE REASONS SUPPORTING THE DENIAL WILL BE SENT TO THE PETITIONER. THE DIRECTOR MAY CHOOSE TO FORWARD ANY UTILITY EASEMENT VACATION REQUEST TO THE PLANNING COMMISSION FOR ACTION. IF THE REASONS FOR DENIAL ARE RESOLVED, THE PETITIONER MAY SUBMIT A NEW PETITION FOR VACATION WITH DOCUMENTATION THAT THE ISSUES HAVE BEEN RESOLVED, ACCOMPANIED BY A NEW FEE.]

- E. If the utility easement will be finalized in conjunction with the recording of a subdivision plat in accordance with KPB Title 20, the final plat must be recorded within one year of the planning commission's approval or the municipal vacation consent in KPB 20.70.110
- F. For the purposes of vacations, a utility easement is defined under KPB 20.90.010 "Easement" (B) – Utility Easement.

SECTION 5. That KPB 20.70.090 is hereby amended as follows:

20.70.090. Notice required.

[THE PLANNING DIRECTOR SHALL PUBLISH A NOTICE STATING WHEN AND BY WHOM THE PETITION WAS FILED, ITS PURPOSE, AND THE TIME AND PLACE OF THE PUBLIC HEARING. THE NOTICE SHALL DESCRIBE, THROUGH BOTH LEGAL AND GENERAL DESCRIPTION, THE LOCATION, NATURE, AND EXTENT OF THE VACATION. THE NOTICE SHALL BE PUBLISHED ONCE A WEEK FOR TWO CONSECUTIVE WEEKS IN A NEWSPAPER OF GENERAL CIRCULATION IN THE AREA OF THE VACATION.] Except for utility easement vacations under KPB 20.70.080, [C]certified mail notice shall [ALSO] be mailed to each property owner as shown on borough tax rolls within a 300-foot radius and regular mail notice sent to owners within the next 300-foot radius to equal a 600-foot total notice radius from the boundaries of the area proposed to be vacated. If the 600-foot radius does not include owners other than the petitioner(s), notice must be sent to owners of parcels adjoining the boundaries of the parcel(s) that contain the area of the proposed vacation. Notice by email or by regular mail shall be sent to all public utilities operating within the general area of the vacation and to the municipality in which the property is located.

Notice of public hearing shall be posted in a public area such as a post office, community center, or library. Public hearings will be advertised twice, once on the agenda published in a local newspaper of general circulation and either on the KPB website or KPB social media. The notice shall include:

- a. Name of applicant and/or surveyor;
- b. General location;
- c. Legal description;

- d. Summarized purpose;
- e. Time and location of public hearing; and
- f. KPB File number.

SECTION 6. That KPB 20.70.110 is hereby amended as follows:

20.70.110. Vacation [CONSENT] decision - City council or assembly.

A vacation approval or denial of a [CITY] street, public right-of-way, public area, utility easement, or public easement located within an incorporated city [MAY NOT BE APPROVED WITHOUT THE CONSENT OF THE CITY COUNCIL] must be sent to the city for consent or veto of the vacation decision. A vacation of a street, right-of-way, public area, utility easement, or public easement within the borough outside of the boundaries [LIMITS]of a city [IES MAY NOT BE MADE WITHOUT THE CONSENT OF THE BOROUGH ASSEMBLY] must be sent to the assembly for consent or veto of the vacation decision. The assembly or council shall have 30 calendar days from the date of [APPROVAL]the planning commission decision in which to veto the planning commission decision. If no veto is received by the planning director within [THE SPECIFIED PERIOD] 30 calendar days of the date of the planning commission decision, the city or borough shall be considered to have given consent to the vacation. An appeal of a city council or borough assembly action under this provision must be filed in the superior court in accordance with the Alaska Rules of Appellate Procedure.

SECTION 7. That KPB 20.70.130 is hereby amended as follows:

20.70.130. Vacation plat—Preparation, approval and recording.

Upon approval of the vacation request by the planning commission and no veto by the city council or assembly, the applicant shall have a surveyor prepare and submit a plat including the entire area approved for vacation in conformance with KPB 20.10.080, or KPB 20.25. Only the area approved for vacation by the assembly or council may be included on the plat. The final plat must be recorded within one year of the vacation consent in KPB 20.70.110. No extensions of time may be granted for the right-of-way vacation. To allow time for State of Alaska Department of Natural Resources (DNR) review and approval, section line easement vacation plats must be recorded within four years of the vacation consent in KPB 20.70.110.

SECTION 8. That KPB 20.70.140 is hereby amended as follows:

20.70.140. Vacation resolution—Easement.

Upon approval of an easement vacation not associated with the vacation of a right-of-way or not requiring transfer of title or platting action, a vacation resolution may be adopted by the planning commission and recorded by the planning department within the time frame set out in the resolution to finalize the vacation. The petitioner is responsible for the recording fees as well as a legal description of the area to be vacated. The legal description shall be a written description and/or a drawing prepared, stamped, and signed by a land surveyor.

SECTION 9. That KPB 20.70.130 is hereby amended as follows:

20.70.220. Section line easement vacations.

Section line easement vacation petitions must comply with the requirements of KPB 20.70.040, 20.70.050 and 20.70.060 [A FEE IS REQUIRED IN COMPLIANCE WITH KPB 20.70.060]. Public hearing and notice must comply with the requirements of KPB 20.70.070, [20.70.080]20.70.090, 20.70.100, 20.70.110, [AND] 20.70.120, and 20.70.130. [THE MAIL NOTICE REQUIRED IN KPB 20.70.090 MAY BE BY REGULAR MAIL. PUBLICATION ON THE PLANNING COMMISSION AGENDA, ADVERTISED ONCE IN LOCAL PAPERS, POSTED IN PUBLIC AREAS, AND ON THE BOROUGH WEBSITE PRIOR TO THE MEETING WILL SATISFY THE PUBLISHING REQUIREMENT.] The petitioner is responsible for all submittals required by the State of Alaska Department of Natural Resources (DNR) in compliance with their procedures. The petition must be reviewed and approved by the planning commission but final authority for approval and platting of the vacation rests with DNR. The petitioner is responsible for coordination with DNR and submittals to DNR.

SECTION 10. That KPB Chapter 21.20.210 is hereby amended as follows:

21.20.210 Definitions

- A. For the purposes of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning:
1. "Aggrieved party or person" means a party of record adversely impacted by the decision of the hearing officer who participated before the hearing officer either by written or oral presentation.
 2. The "appellant" is the party who pays the filing fee and initially files the notice of appeal.
 3. The "applicant" is the party that made application with the planning department for a permit, plat, variance or other entitlement subject to a quasi-judicial process under KPB Title 20 or 21.
 4. "Ex parte" means by or for one party; done for, on behalf of, or on the application of, one party only.
 5. "Party of record" means:
 - a. The applicant before the planning commission,

- b. Any party or person aggrieved by the decision where the decision has or could have an adverse effect on value, use or enjoyment of real property owned by them who appeared before the planning commission with either an oral or written presentation, and who owns lands within the notification radii. A signature on a petition does not qualify the signatory as a party of record.

[(1) A SIGNATURE ON A PETITION DOES NOT QUALIFY THE SIGNATORY AS A PARTY OF RECORD. WITHOUT A SEPARATE ORAL OR WRITTEN PRESENTATION TO THE PLANNING COMMISSION.]

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SECTION 11. That KPB Chapter 21.20.230 is hereby amended as follows:

21.20.230. Jurisdiction.

- A. Unless a different appellate procedure is provided by this Code, the hearing officer is authorized to hear and decide appeals from quasi-judicial planning commission decisions.
- [B. THE ASSEMBLY SHALL CONSIDER VACATION PETITIONS APPROVED BY THE PLANNING COMMISSION IN ACCORDANCE WITH THE PROCEDURES IN KPB CHAPTER 20.70.]

SECTION 12. That KPB Chapter 21.20.250 is hereby amended as follows:

21.20.250. Appeal of planning commission decision to hearing officer.

- A. *Time; fees.* Any party of record may file an appeal of a decision of the planning commission within 15 days of the date of the notice of the decision with the borough clerk on the forms provided, and by paying the filing and records preparation fee in the amount listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees. An appeal may be filed by personal delivery or mail as long as it is complete and received in the clerk's office by 5:00 p.m. on the day the notice of appeal is due.
- B. An application to proceed with an appeal as an indigent may be filed with the borough clerk's office on a form provided by the borough clerk in lieu of the filing fee. The hearing officer may allow an applicant who qualifies as an indigent a reduced filing fee, a payment plan, or a waiver of the filing fee where the hearing officer is able to make a written finding, based on information provided by the applicant, that payment of the appeal fee would be a financial hardship for the appellant. Based upon the information provided, the fee may be reduced or waived in accordance with the following schedule:

Annual income as a Percent of current Health and Human Services (HHS) Poverty Guidelines for Alaska	Percent of fee reduced
1—100%	100% Waiver
101—149%	75% Waiver
150—174%	50% Waiver
175—199%	25% Waiver
200% plus	No Waiver

Any appellants with income equal to or less than 200 percent of the HHS poverty guidelines for Alaska for the year in which the appeal is filed may apply for a payment plan in which the filing fee shall be paid in full within in six months of the date of filing.

- C. All appeals shall be to the hearing officer, and shall be conducted in accordance with the provisions of this chapter, unless otherwise provided by the Kenai Peninsula Borough Code.
- D. *Notice of appeal.* The notice of appeal must 1) state the decision from which the appeal is taken; 2) state with specificity the errors asserted in the findings of fact or conclusions of law; and 3) state the relief sought on appeal, including a statement of whether the decision should be reversed, modified, or remanded for further proceedings.
- E. *Entry of appearance.* The borough clerk shall mail or otherwise deliver copies of the notice of appeal to all parties of record in the proceeding appealed within 15 days of the date of filing the notice of appeal. Proof of service upon each party shall accompany the notice of appeal. Any party desiring to participate in the appeal process must file an entry of appearance containing that party's name and address and signature, or the name and address of the party and the name and address and signature of the party's representative, within 15 days of the date of mailing of the notice of appeal by the borough clerk. If borough staff is not participating in the appeal beyond providing the required staff overview and answering questions of the hearing officer, a notice of non-participation shall be filed with the borough clerk. Proof of service of the entry of appearance upon each party shall be made in the manner prescribed in KPB 21.20.280(D). Any party filing an entry of appearance may file additional designations of error or other alternative requests for modification or reversal of the decision.

SECTION 13. That KPB Chapter 21.20.270 is hereby amended as follows:

21.20.270. Record on appeal.

- A. *Record; contents.* For the purposes of appeal, the record shall include:
 - 1. The filed application or complaint which initiated the proceedings before the planning commission;

2. All informational materials supplied to the commission or relied upon by the planning director or staff in making its report or recommendations to the planning commission;
 3. All informational materials which were entered into the record or minutes of the proceeding before the commission;
 4. The report of the initial investigation by the planning department, and where applicable the enforcement order or decision of the planning director;
 5. All testimony and all documents or other evidence received by the planning commission from the parties or other witnesses during the proceedings;
 6. The decision of the planning commission;
 7. The planning commission's findings of fact; and
 8. The minutes of the planning commission and a verbatim transcript of the planning commission hearing.
- B. *Record; preparation.* The planning department shall complete and file the transcript with the borough clerk within 30 days after the deadline for filing entries of appearance. The planning director shall certify the paginated and indexed record and minutes on appeal within 30 days after the deadline for filing entries of appearance. One copy of the record shall be provided to a party paying the filing fee. A copy shall also be provided to the applicant if the applicant is not the appellant. A notice of certification of record shall be provided to all parties by the borough clerk. Copies of the record may be provided to other parties or any other persons upon payment of a handling charge in the amount listed in the most current Kenai Peninsula Borough Schedule of Rates, Charges and Fees.
- C. *Appeal on the record; new evidence.* Appeals to the hearing officer shall be on the record. No new evidence, or illustrative documents or attachments to written statements, may be filed without prior approval of the hearing officer after a showing by the moving party that there exists cause for supplementing the record and that even with due diligence the new evidence could not have been provided at the public hearing before the planning commission and a reasonable opportunity for all other parties of record to submit comments.

SECTION 14. That KPB Chapter 21.20.280 is hereby amended as follows:

21.20.280. Written statements.

- A. *Opening statement.* A party of record who entered an appearance in the appeal [APPELLANT, STAFF AND THE APPLICANT IF THE APPLICANT IS NOT THE APPELLANT] shall submit a written statement which shall be filed with the borough clerk within 20 days of the clerk issuing notice that a completed record and transcript have been filed. The written statement may include a statement of facts as derived from the record on appeal, a statement of the party's perception of the correctness of the planning commission decision, a list of asserted errors, and any citations to applicable statutes, ordinances, regulations or other legal authority for the position taken by the party to the appeal. Failure to timely submit the opening written statement will result in dismissal of that party from the appeal. Multiple parties may preserve their party status by filing a single written statement; however, the written statement must clearly identify all parties filing the single statement. The hearing officer may waive irregularities in the content of the notice of appeal or written statements. In appeals where staff does not enter an appearance, the staff overview may be provided in writing when opening statements are due.
- B. *Reply statement.* Each party filing an opening statement may submit a reply statement within 20 days of the filing deadline for the initial written statements. The reply shall be limited to response to matters specifically raised in the statement responded to. A party shall file a single reply statement in response to all opening statements filed.
- C. *Extension.* The hearing officer, upon good cause shown, may grant an extension of time to any party or legal representative for the completion of any act required under this section, except for the filing of the notice of appeal, where the remaining parties will not appear to be unduly prejudiced by the delay. An extension permitted one party shall be extended to all parties by notice from the borough clerk. Motions for extensions shall comply with the provisions of KPB 21.20.280(D) and 21.20.300.
- D. *Service.* Service of written statements shall be made on all parties of record for briefs and on parties permitted to file motions and respond to motions by KPB 21.20.300. Service shall be made by the borough clerk either by mail or personal delivery within two business days of the filing deadline. Service by email or facsimile is permitted when the party to be served has affirmed in writing the acceptance of alternate forms of service.
- E. *Additional written statements.* Unless the hearing officer requests supplemental written statements from the parties of record or staff, no additional written statements shall be accepted.

SECTION 15. That this ordinance take effect immediately upon enactment.

ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS * DAY OF *, 2020.

Kelly Cooper, Assembly President

ATTEST:

Johni Blankenship, MMC, Borough Clerk

Yes:

No:

Absent: