

Kenai Peninsula Borough Planning Department

MEMORANDUM

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

THRU: Charlie Pierce, Borough Mayor *ch*

FROM: Marcus A. Mueller, Interim Planning Director *ma*

DATE: May 14, 2020

RE: Ordinance 2020-17, Authorizing a Lease to New Cingular Wireless PCS LLC for Approximately 1,600 Square Feet of Borough Land in Kenai for a Communications Site

The Kenai Peninsula Borough Planning Commission reviewed the subject ordinance during their regularly scheduled May 11, 2020 meeting.

A motion passed by majority vote (9 Yes, 2 No, 1 absent) to recommend approval of Ordinance 2020-17 with the following recommended language changes:

Section 1. That the Assembly finds that leasing this land to New Cingular Wireless PCS, LLC for a communication tower site [IS IN THE BEST INTEREST OF THE PUBLIC AND THE BOROUGH] would benefit the public and borough by improving communication capabilities.

Section 3.3 Delete this section of language in its entirety

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

WHEREAS, the Kenai Peninsula Borough Planning Commission at its regularly scheduled meeting of May 11, 2020 recommended approval with certain amendments by majority vote.

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

AGENDA ITEM E. PUBLIC HEARINGS

3. Ordinance 2020-23, Authorizing a One-Time Extension of KPB 20.70.130 Which Sets a One-Year Deadline to Record a Final Plat Following Vacation Approval

Staff Report was given by Scott Huff

KPB 20.70.130, Vacation Plats, establishes a one-year deadline to record a final plat following vacation approval. Due to unavoidable no-fault delays related to the current COVID-19 public disaster emergency it is in the best interest of the borough to extend the deadline established under KPB 20.70.130.

This uncodified one-time extension ordinance applies to all plats where the one-year deadline expired after April 1, 2020. Due to the fact that the deadline cannot be extended administratively, assembly action is required.

END OF STAFF REPORT

Chairman Martin asked if anyone from the public wished to comment on this item. Seeing and hearing no one wishing to comment, Chairman Martin closed public comment and opened discussion among the Commission

MOTION: Commissioner Carluccio moved, seconded by Commissioner Ruffner to forward to the Assembly a recommendation to approve Ordinance 2020-23, authorizing a One-Time Extension of KPB 20.70.130 Which Sets a One-Year Deadline to Record a Final Plat Following Vacation Approval

MOTION PASSED: Seeing and hearing no discussion or objection, the motion passed by unanimous consent.

AGENDA ITEM E. PUBLIC HEARINGS

4. Ordinance 2020-17, Authorizing a Lease to New Cingular Wireless PCS LLC for Approximately 1,600 Square Feet of Borough Land in Kenai for a Communications Site

Staff Report was given by Bryan Taylor

New Cingular Wireless PCS, LLC (New Cingular), a Delaware Limited Liability Company, has submitted an application for a negotiated lease of a 1,600 square-foot area located within S1/2SE1/4NW1/4, Section 31, T. 6N., R. 11W., S.M. Kenai Recording District, Third Judicial District, State of Alaska for construction and maintenance of a communications tower. The eastern half of this parcel contains the campus of Kaleidoscope Elementary School. The lease agreement includes the following terms:

- An option term of one year in which the lessee may investigate the site and pursue any needed authorizations. The lessee may choose to exercise the option to lease at any time during the option term. Consideration for the option is \$3,500.
- For the lease, there is an initial rental rate of \$1,400 per month that will increase annually by 2.5%.
- An initial term of five years, with the option to renew the lease for four additional five-year terms.
- For any sublessees, a revenue share of 33% of sublease rent to KPB.
- Requirements for a perimeter fence and gate installation around leased area with buffer landscaping.
- An easement to the tower for 24-hour site access for maintenance and emergency purposes.

New Cingular originally requested a location directly adjacent to the Kaleidoscope Elementary School campus. The KPB coordinated with the school principal and KPBSD staff regarding the location. New Cingular agreed to move the site to the west into the forested area to provide a buffer between the site and

the school. The lease agreement would also require buffer landscaping be installed around the perimeter of the lease area.

This ordinance would authorize the mayor to enter into the lease agreement. Revenue from the lease would support the borough's Land Trust Fund.

END OF STAFF REPORT

Chairman Martin asked if anyone from the public wished to comment on this item. Seeing and hearing no one wishing to comment, Chairman Martin closed public comment and opened discussion among the Commission

MOTION: Commissioner Ecklund moved, seconded by Commissioner Carluccio to forward to the Assembly a recommendation to approve Ordinance 2020-17, authorizing a lease to New Cingular Wireless PCS LLC for approximately 1,600 square feet of borough land in Kenai for a communications site.

Commissioner Ecklund asked staff if there was a picture of the proposed communication tower. Mr. Taylor said that there is a technical drawing in the information packet and that the type of tower New Cingular is looking at using is a monopole tower. General schematics of a monopole tower were submitted with the application that shows it to be a freestanding tower with no guy-wires approximately 150 ft. in height. Commissioner Ecklund followed up with the question asking if this tower was going to be one of those that look like a tree. Mr. Taylor responded and said no, that this tower would have no aesthetic embellishment.

Commissioner Morgan informed the commission that she, as a school board member, had received comment on this topic from the community that the commission has not received. She wondered if she should recuse herself from this matter or whether the commission feels that this is not a matter of concern. Commissioner Martin stated that he did not think that this would be a reason for Morgan to recuse herself. Commissioner Ecklund made the commented that commission is not the final decision on this matter so she did not believe that there was a quasi-judicial issue with Commissioner Morgan receiving comment and that she might share the comment with the commission. Commissioner Ruffner asked that the commission hear from Borough Attorney Kelly on this matter. Mr. Kelly echoed Commissioner Ecklund's comment and stated that this is a legislative matter and that you can have ex parte contact or bias on legislative matters as long as you do not feel that you or a family member has a financial conflict of interest. Commissioner Morgan shared a summary of the comment, which was that the individual did not support this use due to health and safety concerns with the tower being so close to a school.

Commissioner Ruffner expressed concerns regarding this location as it was close to area nature trails used by the schoolchildren and other community members.

Commissioner Fikes sits on the City of Kenai Planning Commission and echoes the concerns expressed in the comment Commissioner Morgan received. She is aware of extensive trail usage in the area and would like to see more feedback from the City of Kenai on specific health concerns as well as more information on the type of tower the applicants are proposing. Mr. Taylor responded that he did meet with the principal of Kaleidoscope to walk the area and discussed the existing use of the area trails and during that meeting, he took a GPS unit to track the trails and outdoor meeting space in order to identify the best location away from the trails for the tower. He and the principal thought that this location along with the requirement of buffer landscaping was a compatible use to the trails. With regard to safety concerns, that is part of the FCC review process and there are limitations as to what a local government can review in regards to safety concerns from radio frequencies. Mr. Taylor also stated that those concerns would be reviewed later on in the permitting process and what the commission was reviewing at this time is whether this is an appropriate use of borough land. Further questions regarding site development will be addressed through the FCC and City of Kenai permitting processes.

Commissioner Ruffner stated he knows that the school has done quite a bit of work developing that area and that he is concerned that they do not have a sketch of this proposed development. They also do not know what future development plans the school might have in relation to the trail system. Based on the

information he has before him he is uncomfortable recommending that the Assembly approve this ordinance.

Commissioner Ecklund asked Commissioner Fikes if this matter had gone before the Kenai City Council and Commissioner Fikes answered that it had not. Commissioner Ecklund then asked Mr. Taylor if this had been introduced to the Borough Assembly yet. Mr. Taylor stated that it was introduced at the April 21, 2020 meeting and will go back to May 19, 2020 Assembly meeting for a public hearing. Mr. Taylor also stated that the project had not been applied for to the City of Kenai because it is not a step that the company is willing to take until they have an agreement that this borough land is an appropriate site for this tower. If this lease were to be approved, the applicant would then start applying for permits later this year. These permit applications can still be denied at the city or FCC levels and in that case tower would not be built and the lease would terminate automatically. Commissioner Ecklund then clarified with staff that all the commission was being asked is whether the borough should lease land to a cell tower company. Mr. Taylor stated that she was correct, and that this lease was an appropriate use of borough land. Commissioner Ecklund then stated that what he was asking of the planning commission is not just, whether or not the land should be leased but that it is an appropriate site for a cell tower and that she did not feel comfortable stating that this was an appropriate site. Mr. Taylor then said the commission was being asked to make a determination whether or not this is a good use of borough property. Staff recommendation has been that this is a compatible use of this property. That this site is west of the existing trail systems and that the current use of the property can still go on with the addition of this new use.

Commissioner Fikes stated that she did not agree that this was an appropriated use of borough land. Living in Kenai, being aware of the trail use of this property, and being the parent of a schoolchild she cannot personally agree that this is appropriate. She feels that the terminology being used in the ordinance is ambiguous and she feels that she does not have enough information to make a decision that this is an appropriate use, and she doesn't feel comfortable recommending this ordinance to the Assembly. Mr. Taylor then asked Commissioner Fikes if there was additional information that they could get for the Planning Commission that would help them with this consideration. Commissioner Fikes responded that she would like more information on health and safety requirements, what kind of tower was being considered – is it 4G or 5G, what kind of fencing and what kind of site obstruction will be used. Was this site their first choice or were other sites considered and are there any fee considerations that will be extended to the City of Kenai. Mr. Taylor responded that they had asked the applicant to move the site once, that initially they wanted the site to be adjacent to the school campus and were required to move it 400 feet to the west. They are being we required to build a six foot high sight obscuring perimeter fence around the site along with a locked gate. They are being required to install buffer landscaping around the fenced area to create a buffer to the trails on the property. Health and safety concerns will be addressed through the FCC permitting process as well as through City of Kenai code. Commissioner Fikes then followed up with stating that there is already an AT&T tower in the City of Kenai that is obscured from residential properties with an extensive buffer. There are also no schools near that tower. Now you are talking about putting one not only near a school but also in the middle of a highly populated area and she is not sure that this tower will be well received.

Commissioner Ecklund stated that section 1 of the ordinance states that the assembly finds that leasing this land to New Cingular Wireless PCS, LLC is in the best interest of the public and the borough – so if we forward this on we are agreeing with that statement. Section 3.3 states that granting this exception will not be detrimental to the public welfare or injurious to other property in the area. Now if you just took those two statements out and we were only talking about leasing land and that the FCC and others have to be concerned about those two things, that would be one thing, but you are asking the Planning Commission to support those statements by forwarding them to the Assembly. Mr. Taylor replied that she was correct that this was the ordinance introduced and reviewed by the Assembly at April 21, 2020 meeting. He then said that the public interest benefit is that this will increase the communications network for AT&T and that they have identified this, as a need for their customers and it will also make productive use of borough land while not interfering with the ongoing use of the existing trails.

Commissioner Ruffner stated that one of the questions that Commissioner Fikes had was not addressed which was, were there other sites considered. He questioned are we doing something on public lands near

a school that would be better used for future school purposes, as well as possibly competing with private sector interests. Both of these are troubling issues for him. Mr. Taylor responded in terms of consideration of potential sites outside of borough property that is something that AT&T has considered and they have determined that this is their site of preference and they are just asking if they can use it. We did ask them to consider other sites on this property but he does not have knowledge of other sites considered by AT&T within the City of Kenai.

Commissioner Brantley asked staff if this was going to be a 150 ft. ROHN tower. Mr. Taylor answer that he was not sure of exact type of tower. The company will be using engineering company in the valley that installs communication towers. Commissioner Brantley replied that this information would be helpful, as the commission would have an idea about the aesthetics of the tower.

Land Management Officer Marcus Mueller stated that communication tower leases are something that the Land Management program has been working on for a long time. The Land Management program is funded through land revenues and communication tower leases are one of the revenue sources. Recently the Land Trust Fund was restructured so that we were no longer selling land to pay salaries. Now land sale revenues go into the bank into a long-term investment fund. This makes the Land Management program more dependent on reoccurring funding streams. Reoccurring funding opportunities are limited and communication tower leases are a steady revenue stream. This particular lease has the revenue potential of anywhere from \$20,000 to \$50,000 per year. One of the goals Land Management has under the restructuring of the Land Trust Fund is required to come up with \$25,000 of new revenue sources each year in order to flat line the new trust fund otherwise it crashes into the ground and we will have to come up with a new strategy. New revenue sources are important to the program. Another important measure in this lease is that the Kenai Peninsula Borough (KPB) has a reservation of communication tower space. The KPB Emergency Management & IT functions have a goal of beefing their communication capabilities. This lease will provide an additional communication tower asset that will be important to our internal communications and emergency management purposes. We are also living in an age where communication tower sites are an important part of our landscape as we are in a communications age where network connectivity is important. There are a limited number of places that this communication tower can go. This property is zoned as institutional by the City of Kenai. This zoning allows for communication towers, and not every zone allows for this, which is important in the planning context. Mr. Mueller realizes that there are many different aspects that the Planning Commission takes into consideration when making decisions. He appreciates all the concerns and considerations being brought up by the Commission and the holistic approach of their decision-making. He would like to add that this issue is brought to the Commission under the Land Management code, which takes into consideration the Borough as a landowner and how they make use of the land assets.

Commissioner Ecklund would like to suggest making an amendment to the ordinance, changing some of the language. This language change would make it easier for her to support the ordinance. In Section 1 after "*That the Assembly finds that leasing this land to New Cingular Wireless PCS, LLC, for a communication tower site*" delete the language "*is in the best interest of the public and the borough*" and change language to "*that would benefit the public and the borough by improving communication capabilities*". The next change would be to delete section 3.3 in total, which talks about this tower being compatible with the school and not injurious to other property in the area. Commissioner Ecklund believes more investigation is needed before she could support that statement. Commissioner Ecklund then asked Mr. Mueller if her proposed recommended language changes to the ordinance would still allow the lease to move forward. Mr. Mueller replied yes, proposed language changes would still allow the lease to move forward.

AMENDMENT: Commissioner Ecklund moved, seconded by Commissioner Morgan to recommend to the Assembly the following change in the ordinance language:

- Section One: That the Assembly finds that leasing this land to New Cingular Wireless PCS, LLC for a communication tower site *would benefit the public and borough by improving communication capabilities*
- Deletion of Section 3.3

AMENDMENT MOTION PASSED: Seeing and hearing no discussion or objection, the motion passed by unanimous consent.

AMENDED MAIN MOTION PASSED BY MAJORITY: Yes – 9 No – 2
Yes: Brantley, Venuti, Whitney, Ernst, Ecklund, Morgan, Carluccio, Bentz, Martin
No: Ruffner, Fikes

AGENDA ITEM E. PUBLIC HEARINGS

- 5. Ordinance 2020-22, Authorizing the Negotiated Lease of Rental Space at the Nikiski Community Recreation Center with the Kenaitze Indian Tribe

Staff Report was given by Marcus Mueller

The Nikiski Community Recreation Center ("NCRC") is operated and budgeted by the North Peninsula Recreation Service Area ("NPRSA"). The Kenaitze Indian Tribe ("Kenaitze") has inquired about renting space within the NCRC to provide youth programs. Their programs include camps for youth ages 5-12 years of age.

Two rooms have been made available and configured at the NCRC and a lease agreement has been drafted for an initial three-month period with month-to-month extensions thereafter by mutual agreement. The anticipated span of the lease is three to six months, and will not exceed twelve months without further approval from the assembly.

The lease rental for the 1,792 square foot space is \$4,856.32 payable monthly to NPRSA. A monthly fee of \$500.00 will also be charged for shared use of the kitchen, gymnasium and includes janitorial services in common restrooms. The lease revenue would help to offset NPRSA's operational and building costs.

Borough code does not specifically address the leasing of building space. Several of the requirements of KPB 17.10 for the leasing of land are not applicable to the leasing of building space. While KPB 17.10.100(l) authorizes negotiated leases, the code does not specifically address negotiated leases of borough property at fair market value.

The attached ordinance would authorize the mayor to lease space at the NCRC to Kenaitze for programming space and providing terms for Kenaitze's scheduled use of other facility areas.

Chairman Martin asked if anyone from the public wished to comment on this item. Seeing and hearing no one wishing to comment, Chairman Martin closed public comment and opened discussion among the Commission

MOTION: Commissioner Whitney moved, seconded by Commissioner Morgan to forward to the Assembly a recommendation to approve Ordinance 2020-22, authorizing the negotiated lease of rental space at the Nikiski Community Recreation Center with the Kenaitze Indian Tribe.

MOTION PASSED: Seeing and hearing no discussion or objection, the motion passed by unanimous consent.

AGENDA ITEM F. ANADROMOYS WATERS HABITAT PROTECTION DISTRICT (21.18 PUBLIC HEARINGS

- 1. Appeal of permit application denial to rebuild a grandfathered structure within the 50-foot Habitat Protection District 8-feet away from Ordinary High Water (OHW) and 8-feet to the west of the parcel property line.