



KENAI PENINSULA BOROUGH

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MIKE NAVARRE
BOROUGH MAYOR

MEMORANDUM

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

THRU: Mike Navarre, Mayor *MN*

FROM: Elizabeth Leduc, Assistant Borough Attorney *el*

DATE: June 25, 2015

SUBJECT: Sectional analysis of 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

This ordinance presents a significant revision of KPB chapter 14.40. The following sectional analysis is intended to provide you with an explanation of substantive changes to aid your review of the proposed amendments. Those sections that have only been amended to clean up confusing language or otherwise have non-substantive changes are not included here.

14.40.010, 14.40.020, and 14.40.030. No substantive changes.

14.40.035 Prohibited activities within rights-of-way. Adds paragraph D, creating a prohibition against unpermitted encroachments.

14.40.040 Right-of-way use permits. Deletes use of maintenance permits to improve borough rights-of-way because improvements are permitted under KPB 14.40.050. Adds paragraph D to reference new encroachment permits. Renumbers remaining paragraphs and makes minor grammatical changes.

14.40.050 Right-of-way construction permit required. Adds language to paragraph B, making it clear that an encroachment permit is needed for any encroachments not directly related to a permitted construction project.

14.40.060 Construction permit applications and conditions. Adds the word "complete" to describe applications for construction permits to make clear that the review process will not commence until the applicant provides all information required in the application. Deletes portion of paragraph B(11), as it is redundant to KPB 14.40.040(A). Changes format of KPB 14.40.060(C)(2), regarding the posting of a security, and adds a requirement that the security will

be held for a period of one year after the termination of the construction permit. This is consistent with the bonding requirement in KPB 14.06.140, and will give the road service area a better ability to deal with hidden defects that may not be readily apparent immediately after construction is completed. Amends this section to use the broader term "security" rather than bond to give the borough more options, and to make KPB 14.40.060 and .065 consistent.

14.40.061 Additional requirements for waterbody access and crossing permits. This provision was adopted at or around the same time state statutes were amended regarding anadromous waterbodies. The proposed amendments to this provision delete outdated references to old state statutes and regulatory bodies. The section now requires the applicant to provide copies of their state and federal permits, rather than just their applications for those permits, before a RSA construction permit can be granted. A permit condition is added to require review of the construction permit application by Kenai River Center ("KRC") staff given their expertise in this area, and to allow the KRC to make recommendations regarding mitigation measures for the RSA's consideration.

14.40.065 Maintenance permits. No substantive changes. Deletes the reference to "snow removal" in KPB 14.40.065(B), as it contradicts subsection (A). Snow removal was removed from the list of maintenance activities requiring a permit by Ordinance 2000-57.

14.40.070 Oversize and overweight permits – Size and weight restrictions. No substantive changes.

14.40.080 Oversize and overweight permits – Application. Updates contact information to include email addresses, as email has become a common method of communication between the road service area and third parties such as contractors and permit applicants.

14.40.090 Oversize and overweight permits – Mandatory conditions. Amends paragraph A so hold harmless provisions in this chapter are consistent. The hold harmless clause in 14.40.060 was amended via Ordinance 2003-16, however it appears that the same clause in other sections was overlooked at that time.

14.40.100 and 14.40.110. No substantive changes.

14.40.115 Encroachment permits. This provision creates a new type of permit for encroachments within the right-of-way. Impermissible encroachments have become an increasing problem throughout the borough, and by instituting a permit process the road service area can establish greater control over both allowing encroachments that do not impact the right-of-way and enforcing against non-permitted encroachments. It is intended that no existing encroachment will be "grandfathered" in, but rather, anyone currently or in the future desiring to encroach upon the right-of-way will be required to file an application with the road service area. If the proposed amendments are approved by the assembly, the RSA board will adopt an appropriate permit fee as allowed under KPB 1.26.020(C).

14.40.120 Permit application initial review – Decision. No substantive changes. Clarifies application review process. Applies to all right-of-way permits governed by this chapter. Adds reference to email as permissible manner of communication.

14.40.130 Permit appeal – Decision final – Appeal. Clarifies the appeal process for permits that are denied or revoked, or when the RSA director issues a cease and desist order.

14.40.135 Permit Compliance. New section, states that no new permits may be issued when the permittee is subject to an enforcement order for outstanding violation(s).

14.40.140 Permit appeal – Penalty. Deleted, redundant (see KPB 14.40.380, Fine Schedule).

14.40.150 Right-of-way use permits – Repair and maintenance of rights-of-way. Clarifies the types of permit subject to terms of this provision (construction, maintenance, and encroachment permits). Adds reference to email as permissible method of communication. Broadens possible remedies to include all those available under the chapter, at law or in equity.

14.40.155 Road closures. Broadens RSA director's ability to close roads that are damaged or pose a threat to public safety. At times, permanent closures may be necessary – for example, if a road to the bluff erodes to the point of creating a public safety hazard and there is no safe way to repair and re-open the road. Adds the requirement that the RSA director must report closures to the RSA board, to maintain accountability.

14.40.160 and 14.40.170. No substantive changes.

14.40.175 Damage to right-of-way. Clarifies that any person or entity that causes damage to a right-of-way will be liable to the borough for the cost of repairs and any other remedies available under the chapter, at law or in equity. Deletes last sentence as repetitive.

14.40.260 Civil penalties – Schedule. Removed and replaced by KPB 14.40.380.

14.40.270 Civil penalties – Citation – Answer – Hearing – Appeal. Removed and replaced by KPB 14.40.320 - .370.

New Enforcement Procedures: Sections 14.40.290 - .370 were inspired by the planning code enforcement provisions in KPB chapter 21.50, which was adopted in 2011 and appears to be working well, but modified to apply to borough rights-of-way, which are public rather than private property. The current hearing procedure, set forth in 14.40.270, was vague, difficult to administer, and put the RSA director in the position of deciding whether the citation he issued was valid and enforceable. The proposed procedures provide an appropriate level of due process to respondents balanced with timely resolution of violations that impact borough rights-of-way, to ensure that rights-of-way remain safe and accessible.

14.40.290 Investigation – Warning. New provision, describes discretionary investigation and warning procedure as a precursor to any enforcement proceeding.

14.40.300 Remedies for violations. New provision, describes the range of remedies for violations outlined in this chapter. Remedies range from those that the RSA director can impose (cease and desist orders and permit revocations), to administrative enforcement proceedings, to court action. All remedies are cumulative and not intended to be exclusive.

14.40.310 Stipulated agreement. New provision, allows the RSA to enter into an agreement with a person who has committed a violation in lieu of going forward with an enforcement proceeding, which can be time and resource intensive. These agreements will be binding, and failure to comply with the terms subjects the violator to enforcement and fines.

14.40.320 Enforcement Hearing – Jurisdiction. New provision, notes that the RSA board will handle administrative enforcement proceedings and outlines the subject matter over which the board has jurisdiction.

14.40.330 Enforcement Hearing – Enforcement Notice. New provision, sets forth process by which RSA director issues an enforcement notice and starts the enforcement proceeding.

14.40.340 Enforcement Hearing – Procedure. New provision, describes the enforcement proceeding in detail, including: scheduling, discovery, evidence, decision process, remedies available to the RSA board under this provision; availability of collection actions for unpaid fines; and dismissal of enforcement notice by RSA director when applicable.

14.40.350 Enforcement Hearing -- Appeal. New provision, explains that a party may appeal the administrative enforcement decision to the Alaska superior court.

14.40.360 Enforcement Hearing -- Ex Parte contacts prohibited. New provision, specifies that no board member may have contact with either party regarding the subject matter of an enforcement proceeding, outside of that proceedings. Provides a process for remedying such communications.

14.40.370 Abatement of violation. New provision, establishes a process for abatement after the RSA board has issued an enforcement order under KPB 14.40.340.

14.40.380 Civil fines – Schedule. Replaces KPB 14.40.270. Amendment updates fine amounts and includes violations that were previously described in code but not included in the fine schedule. The fine amounts are consistent with other fines required by code, such as those included in KPB chapter 21.50.

14.40.390 Definitions. Removes numbering system to improve ease of adding definitions as needed. Updates references to Alaska statutes and other non-substantive changes. Adds definition for “encroachment.” Adds definition of “respondent” relative to enforcement proceedings. Updates the definition of “road” to be inclusive of borough maintained and unmaintained rights-of-way.