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NOV 23 2020

Borough Clerk's Office  
Kenai Peninsula Borough

Borough Assembly Members  
c/o Johni Blankenship, Borough Clerk  
Kenai Peninsula Borough  
144 N. Binkley St.  
Soldonta, AK 99669

RE: Ordinance 2020-45

Dear Assembly members,

Rita and I would like to offer our input in regards to the proposed changes being made to KP  
20.25.070.

In regards to para. F and section 11, as they pertain to "travel ways":

- 1) Travel ways typically have not been surveyed, thus, their placement on the plat is a guess or estimate. This would apply to their actual width/dimensions as well as any ditching (if any).
- 2) The legal status of existing travel ways is often unknown and it is the courts, not the borough, who has the final say on determining the legality of a travel ways status.

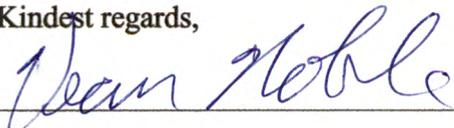
For these two reasons, we believe the borough is going in the wrong direction with this particular requirement.

Our feelings are that the platting process, both with preliminary and final, should be to create a plat that is unambiguous and only reflects what are known legal ROW's.  
I.E., ...platted roads/row's or recorded easements with appropriate legal descriptions.

This is valuable, in that it helps the general public avoid buying a property that may have a questionable, or illegal access situation.

Finally, if the assembly decides that these travel ways with unknown legal and location status should be placed on the plat, we ask that you consider requiring plat note language with the disclaimer that the travel way has not been surveyed and it's legal status is unknown.

Kindest regards,



11-19-20

Veau Noble



Rita Rothgeb

# MOLLOY SCHMIDT LLC

ATTORNEYS AT LAW

110 South Willow Street, Suite 101  
Kenai, Alaska 99611  
(907) 283-7373 • (907) 283-2835 (Fax)

## MEMORANDUM

**TO:** Borough Mayor Pierce  
cc: Planning Department, Legal Department

**FROM:** Robert J. Molloy • Kristine A. Schmidt

**DATE:** November 23, 2020

**SUBJECT:** Ordinance 2020-45 and Vacation of State Easements

<b>Current Ordinance:</b>	<b>Ord. 2020-45, Sec. 37, new KPB 20.65.020</b>
<ul style="list-style-type: none"><li>• There is no current ordinance on vacating <i>all</i> “public easements of the state;” just:</li><li>• <b>KPB 20.70.010, Section line easement vacations:</b> “... the petition must be reviewed and approved by the planning commission but final authority for approval and platting authority rests with DNR.”</li></ul>	<b>20.65.020. Planning commission recommendation on state easements.</b> 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 easements within the borough. Applications to vacate a section line easement or other <i>public easements of the state</i> must comply with KPB 20.65.040 and <i>will be considered in accordance with KPB 20.65.050</i> . 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.

### ***Requested Amendment:***

<b>20.65.020. Planning commission recommendation on state easements.</b> The planning commission serving as the platting authority has no authority to vacate <u>state-owned</u> public easements <del>under the jurisdiction of the state</del> . The planning commission <u>may will</u> provide a recommendation on proposed vacations of <u>state-owned public</u> easements within the borough; <u>but may also decline to provide a recommendation on the ground that the easement is not platted or is an RS 2477 right-of-way</u> . Applications to vacate a section line easement or other <u>state-owned public easements of the state</u> must comply with KPB 20.65.040 and <del>will be considered in accordance with KPB 20.65.050</del> . The applicant is responsible for all submittals required by the state. Final authority for approval and platting of the vacation of any <u>state-owned public easement under the jurisdiction of the state</u> rests with the state.
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- KPB 20.65.020 creates *new barriers* to vacating an easement, and *increases Borough jurisdiction and regulation* of those easements, which will increase the expense of a vacation petition, and prevent private development of land in the Borough.
- KPB 20.65.020 *expands current Borough regulation* over public easements owned by the State of Alaska – from current KPB 20.70.010 (section line easements), to all “Public easement under the jurisdiction of the state,” which is not defined. State regulation 11 AAC 51.065(a) (attached) uses the term “state-owned public easement.”
- KPB 20.65.020 *expands Borough jurisdiction* from KPB 20.65.010 (only easements “on borough approved plats”) to all “public easements under the jurisdiction of the state,” whether “on a borough approved plat” or not; *with no explanation*.
- State regulation 11 AAC 51.065(c) gives the Borough platting authority the option to *decline to comment* on easements which are not platted or are RS 2477 easements; KPB 20.65.020 has no exceptions, but should give the planning commission this option.
- KPB 20.65.020 incorporates KPB 20.65.050 -- KPB 20.65.050 creates *new “one size fits all” requirements* for vacations that will increase expense and prevent private development. State regulation 11 AAC 51.065(a) contains a list of many different types of State-owned easements. The Borough should use planning department policies to determine what interest it may have in a particular type of State-owned easement.

§ 11 AAC 51.065. Vacation of easements.

**Alaska Administrative Code**

**Title 11. Natural Resources**

**Part 6. Lands**

**Chapter 51. Public Easements**

**Article 2. Identification, Reservation, and Modification of Public Easements**

*Current through October 30, 2020*

**§ 11 AAC 51.065. Vacation of easements**

- (a) An affected person or a municipal assembly or city council may petition the department to vacate, modify, or relocate,
  - (1) in accordance with AS 19.30.410, an R.S. 2477 right-of-way, including a section-line easement under AS 19.10.010 that the department manages under AS 19.30.400 and AS 38;
  - (2) in accordance with AS 38.05.127(d), an access easement reserved under AS 38.05.127 and 11 AAC 51.045 ;
  - (3) In accordance with AS 40.15.300 - 40.15.380, a platted easement dedicated to public use and managed by the department under AS 38;
  - (4) on land that the state currently owns or formerly owned, a public easement reserved along a section line under AS 19.10.010 ; or
  - (5) another state-owned public easement managed by the department.
  
- (b) A petition to the department under (a) of this section must also be submitted to the platting authority for consideration, including public notice and a public hearing, in accordance with the procedures set out in
  - (1) AS 29.40.120 - 29.40.150, if the platting authority is established under AS 29.40.080 by a municipality described in AS 40.15.070(a) ; or
  - (2) AS 40.15.305 and 11 AAC 53.250, as applicable, if the platting authority is the department In accordance with AS 40.15.070(b).
  
- (c) If a municipal platting authority declines to consider the petition in accordance with the procedures set out in AS 29.40.120 - 29.40.150, on the grounds that the public easement is unplatted or is an R.S. 2477 right-of-way, the department will give notice of the petition in a newspaper of general circulation in the vicinity of the public easement and provide a comment period of at least 30 days. The petitioner shall reimburse the department for the costs of notice.
  
- (d) In addition to a notice, comment opportunity, or hearing provided under (b) - (c) of this section by a municipal platting authority or the department, the department will give notice of a petition under (a) of this section and provide a comment period of at least 30 days by

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## MEMORANDUM

**TO:** Borough Mayor Pierce  
Kenai Peninsula Borough Assembly Members

**FROM:** Robert J. Molloy • Kristine A. Schmidt

**DATE:** November 23, 2020

**SUBJECT:** Ordinance 2020-45 and Title to Vacated Area

<b>Current Ordinance:</b>	<b>Ord. 2020-45, Sec. 37, new KPB 20.65.060(C)</b>
<ul style="list-style-type: none"><li>• The current ordinance, KPB 20.70.150, <b>Title to Vacated Area</b>, does not contain this language.</li></ul>	<b>Title to vacated area.</b> C. Other provisions of this subsection notwithstanding, the planning commission may determine all or a portion of a vacated area <i>should be dedicated to another purpose</i> , and if so, title to the area vacated and held for another public purpose remains in the borough or city, as applicable.

### ***Requested Amendment: strike KPB 20.65.060(C).***

- As written, new paragraph (C) appears to ***apply to all vacations***: so if a private property owner had an easement for one purpose (for example, a roadway), the Planning Commission could approve vacating that easement, but then turn around and ***dedicate*** the vacated easement area to another purpose – ***which would be an unconstitutional taking***.
- The current Borough Subdivision Code does not give the Planning Commission authority to dedicate an area proposed to be vacated to another public purpose; so paragraph (C) ***grants a new power to the Planning Commission, without any explanation***.
- New paragraph (C) ***appears to conflict with State statute***, and could subject to legal attack. AS 29.160a) states that when an easement is vacated, the interest in the easement (“title”) reverts to the underlying private property owner, not the municipality (Borough). AS 29.40.160(c) states that 29.40.160(a) applies “to home rule and general law municipalities” such as the Borough. AS 29.40.160 does not allow for an exception by ordinance, as in new paragraph (C). See attached.
- If Paragraph C is enacted, professionals will need to advise private property owners of the risk that Paragraph C poses to their development plans. Paragraph C is an ***unnecessary barrier to private property development***; and, as written, a ***violation of private property rights***.

## NOTES TO DECISIONS

**Applicability.** — Borough's platting board provided adequate notice by publication of a site visit, which was a meeting as defined in AS 44.62.310(h)(2)(A); the board was not required to mail notices to property owners. Moreover, a subsequent

public hearing at which the public could comment cured any defect. *Gold Country Estates Pres. Group, Inc. v. Fairbanks North Star Borough*, 270 P.3d 787 (Alaska 2012).

**Sec. 29.40.140. Hearing and determination.** (a) The platting authority shall consider the alteration or replat petition at a hearing and make its decision on the merits of the proposal.

(b) Vacation of a city street may not be made without the consent of the council. Vacation of a street in the borough area outside all cities may not be made without the consent of the assembly. The governing body shall have 30 days from the decision of the platting authority in which to veto a vacation of a street. If no veto is received by the platting authority within the 30-day period, consent is considered to have been given to the vacation. (§ 11 ch 74 SLA 1985)

## NOTES TO DECISIONS

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public hearing at which the public could comment cured any defect. *Gold Country Estates Pres. Group, Inc. v. Fairbanks North Star Borough*, 270 P.3d 787 (Alaska 2012).

**Sec. 29.40.150. Recording.** If the alteration or replat is approved, the revised plat shall be acknowledged, filed, and recorded in accordance with AS 40.15.010 — 40.15.020. (§ 11 ch 74 SLA 1985; am § 5 ch 161 SLA 1988)

**Sec. 29.40.160. Title to vacated area.** (a) The title to the street or other public area vacated on a plat attaches to the lot or land bordering the area in equal proportions, except that if the area was originally dedicated by different persons, original boundary lines shall be adhered to so that the street area that lies on one side of the boundary line shall attach to the abutting property on that side, and the street area that lies on the other side of the boundary line shall attach to the property on that side. The portion of a vacated street that lies inside the limits of a platted addition attaches to the lots of the platted addition bordering on the area. If a public square is vacated, the title to it vests in a city if it lies inside the city, and in the borough if it lies inside the borough but outside all cities. If the property vacated is a lot, title vests in the rightful owner.

(b) If the municipality acquired the street or other public area vacated for legal consideration or by express dedication to the municipality other than as a subdivision platting requirement, before the final act of vacation the fair market value of the street or public area shall be deposited with the platting authority to be paid to the municipality on final vacation.

(c) The provisions of (a) and (b) of this section apply to home rule and general law municipalities.

(d) The council of a second class city located outside a borough may vacate streets, alleys, crossings, sidewalks, or other public ways that may have been previously dedicated or established when the council finds that the streets, alleys, crossings, sidewalks, or other public ways are no longer necessary for the public welfare, or when the public welfare will be enhanced by the vacation. If the council determines that all or a portion of the area vacated under this subsection should be devoted to another public purpose, title to the area vacated and held for another public purpose does not vest as provided in (a) of this section but remains in the city. (§ 11 ch 74 SLA 1985)

Dear President Hibbert, Policies and Lands Chairs, & Assembly Members, through the Borough Clerk:

**RE: Ordinance 2020-45**

We did appreciate the Assembly postponing action on Ordinance 2020-45 to the 12/01/20 meeting, and also appreciated the opportunity provided by Mayor Pierce to meet with him and his staff for further dialogue on issues and concerns about the major changes proposed to be made in this ordinance. We also appreciate the fact that amendments addressing some of our concerns are proposed in Legal Department's most recent amendment memo.

However, the Deputy Borough Attorney was out on leave 11/20/20 through 11/27/20, and we were unable to continue this productive dialogue.

Given demands of other business and the Thanksgiving holiday, we have been unable to comment further, except for the two memos that we sent. Both memos propose some amendments which are different from the Legal Department's memo.

**Memo 1:** We continue to recommend that vacation of state-managed easement should be an easier process, and there is no reason to require the Planning Commission to consider the same factors under proposed 20.65.050 that this Ordinance would have the Commission consider for Borough platted easements.

**Memo 2:** We continue to recommend that paragraph (C) of proposed KPB 20.65.060 be deleted.

We did not have time to submit suggestions for changes to proposed KPB 20.65.050 on factors to be considered by the Planning Commission when the Commission considers the merits. Based on past experience, we know that the present amended proposal will still cause more difficult and expensive process for applicants.

We ask that the Assembly either table or postpone action for an additional time period, or make the effective date July 1, 2021, or vote this ordinance down, so that there still will be opportunity for additional dialogue about other amendments before the proposed new code is effective

Thank you for your consideration.

Bob Molloy & Kristine Schmidt

Molloy Schmidt LLC, Attorneys At Law  
110 S. Willow Street Suite 101  
Kenai, Alaska 99611  
(907) 283-7373 • (907) 283-2835 fax  
[bob@molloyschmidt.com](mailto:bob@molloyschmidt.com)