

Introduced by: Mayor  
Date: 08/01/17  
Hearing: 09/05/17  
Action: Enacted as Amended  
Vote: 8 Yes, 0 No, 0 Absent

**KENAI PENINSULA BOROUGH  
ORDINANCE 2017-22**

**AN ORDINANCE AMENDING KP.B 20.25.120 - REVIEW AND APPEALS, KP.B  
21.06.060(A)(3) - EXCEPTIONS PROCEDURE, KP.B 21.20 - HEARING AND APPEALS,  
AND KP.B 21.25.100 - APPEALS**

**WHEREAS,** some provisions of KP.B Chapter 21.20 which governs hearings and appeals were initially enacted in 1966 and have become obsolete or are in conflict with more recently adopted code provisions; and

**WHEREAS,** several provisions of the appeals code have been subject to interpretation issues and should be clarified; and

**WHEREAS,** the borough has successfully been using a hearing officer rather than the Board of Adjustment ("BOA") to hear enforcement matters; and

**WHEREAS,** AS 29.40.060 and 29.40.170 authorize use of a hearing officer for appeals of land use related decisions; and

**WHEREAS,** it is more efficient to have a hearing officer than the BOA as an attorney is required to advise the BOA and using a hearing officer would eliminate the time and expense associated with board meetings; and

**WHEREAS,** there have been problems with the BOA approach including difficulty recruiting qualified members, lack of a quorum and difficulty scheduling meetings; and

**WHEREAS,** when these are postponed due to lack of quorum it inconveniences the parties, public and other board members as well as incurs unnecessary legal expenses; and

**WHEREAS,** the most qualified persons to be on the BOA are also the most likely to have conflicts in serving because of their involvement in the businesses subject to BOA hearings, making recruitment of BOA challenging; and

**WHEREAS,** the Planning Commission heard this ordinance at its regularly scheduled meeting of August 14, 2017, and recommended approval by unanimous consent;

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

**SECTION 1.** That KPB 20.25.120 is amended as follows:

**20.25.120. Review and appeal.**

A party of record may request that a decision of the plat committee be reviewed by the planning commission by filing a written request within 10 days of notification of the decision in accordance with KPB 2.40.080. A decision of the planning commission may be appealed to the [BOARD OF ADJUSTMENT] hearing officer by a party of record within 15 days of the date of notice of decision in accordance with KPB 21.20.250.

**SECTION 2.** That KPB 20.50.010(D) is amended as follows:

**20.50.010. Exceptions to regulations—Procedure—Commission authority.**

- A. Unless prohibited under this title, the commission may authorize exceptions to any of the requirements set forth in this title. Application for an exception shall present the commission with substantial evidence, justifying the requested waiver or exception stating fully the grounds for the application and the facts relied upon. The commission shall make findings of fact meeting the following standards before granting any exception:
1. That special circumstances or conditions affecting the property have been shown by application;
  2. That the exception is necessary for the preservation and enjoyment of a substantial property right and is the most practical manner of complying with the intent of this title;
  3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the area in which said property is situated.
- B. Where a design requirement of this title is addressed by a zoning regulation adopted by the borough assembly or city council, the variance procedures of the applicable zoning code shall be utilized in lieu of the exception procedures.
- C. All exceptions must be requested and granted at the time of preliminary plat approval. Exceptions may not be requested with a final plat submittal.
- D. Upon reconsideration of a plat committee decision following the procedure in KPB 20.25.120, an appeal of a decision of the planning commission made under this section shall be taken to the [BOARD OF ADJUSTMENT] hearing officer, in accordance with the requirements of KPB Chapter 21.20.

**SECTION 3.** That KPB 21.01.010(A) is amended as follows:

**21.01.010. Powers of the borough and the cities.**

- A. The borough shall exercise all planning, zoning and platting powers on an areawide basis within that portion of the borough designated as the rural district by Section 21.04.010(B). Appeals from decisions of the borough planning commission shall be made to the [BOARD OF ADJUSTMENT] hearing officer.

**SECTION 4.** That KPB 21.06.060(A)(3) is amended as follows:

A. *Appeal Board.*

1. The Kenai Peninsula Borough Planning Commission shall hear and decide appeals and requests for exceptions from the requirements of this chapter.
2. The planning commission shall hear and decide appeals when it is alleged there is an error in any requirement, decision, or determination made by the planning department in the enforcement or administration of this chapter.
3. Those aggrieved by the decision of the planning commission may appeal such decision to the [BOARD OF ADJUSTMENT, AS PROVIDED IN AS 29.40.050] hearing officer in accordance with the provisions of AS 29.40.050 and KPB 21.20.

...

**SECTION 5.** That KPB 21.20 is hereby amended as follows:

**[21.20.010. AMENDMENT OR CHANGE OF REGULATIONS—PUBLIC HEARING REQUIRED—NOTICE.**

THE ASSEMBLY MAY BY ORDINANCE AMEND, SUPPLEMENT OR CHANGE REGULATIONS AND RESTRICTIONS NOW IN EFFECT AND THE BOUNDARIES OF ESTABLISHED DISTRICTS. NO SUCH ACTION BY THE ASSEMBLY IS EFFECTIVE UNTIL AFTER A PUBLIC HEARING UPON THE PROPOSED ORDINANCE AT WHICH PARTIES IN INTEREST AND CITIZENS HAVE AN OPPORTUNITY TO BE HEARD. AT LEAST 15 DAYS' NOTICE OF THE TIME AND PLACE OF THE HEARING UPON THE ORDINANCE SHALL BE PUBLISHED IN A PAPER OF GENERAL CIRCULATION IN THE BOROUGH.

**21.20.020. AMENDMENT OR CHANGE OF REGULATIONS—PROTESTS—EFFECT—APPLICABILITY OF PROVISIONS.**

IF THERE IS A PROTEST AGAINST A CHANGE, SIGNED BY THE OWNERS OF 20 PERCENT OR MORE EITHER OF THE AREA OF THE LOTS INCLUDED IN THE PROPOSED CHANGE, OR BY THE OWNERS OF 20 PERCENT OR MORE OF THE AREA OF THE LOTS IMMEDIATELY ABUTTING EITHER SIDE OF THE TERRITORY INCLUDED IN THE PROPOSED CHANGE, OR SEPARATED FROM IT BY AN ALLEY OR STREET, THE AMENDMENT MAY NOT BECOME EFFECTIVE EXCEPT BY THE FAVORABLE VOTE OF A SIMPLE MAJORITY OF THE FULL ASSEMBLY. THE PROVISIONS RELATING TO PUBLIC HEARINGS AND NOTICE APPLY TO ALL CHANGES OR AMENDMENTS.

**21.20.030. APPEALS AND EXCEPTIONS—COMMISSION AUTHORITY.**

THE PLANNING COMMISSION SHALL HEAR AND DECIDE:

- A. APPEALS FROM THE RURAL DISTRICT REGARDING ALLEGED ERRORS IN ENFORCEMENT OF THIS TITLE UPON MAKING SPECIFIC FINDING CONCERNING THE SECTION OF THE TITLE SPECIFIED IN THE APPEAL;
- B. REQUESTS FOR EXCEPTIONS IN THE RURAL DISTRICT.

**21.20.040. APPEALS AND EXCEPTIONS—TIME FOR FILING.**

APPEALS AND APPLICATIONS SHALL BE FILED WITH THE PLANNING COMMISSION AT LEAST 15 DAYS BEFORE THE MEETING AT WHICH IT WILL BE HEARD.

**21.20.050. APPEALS AND EXCEPTIONS—NOTICE REQUIRED WHEN.**

NOTICE SHALL BE MAILED TO THE OWNERS, AS SHOWN ON THE LATEST TAX ASSESSMENT ROLLS, OF ANY PROPERTY WITHIN 300 FEET OF THE PROPERTY INCLUDED IN THE APPLICATION FOR AN EXCEPTION AT LEAST 5 DAYS BEFORE THE MEETING.

**21.20.060. APPEALS AND EXCEPTIONS—COMMISSION AUTHORITY—FINDINGS TO BE IN WRITING.**

THE PLANNING COMMISSION SHALL HEAR ANY INTERESTED PARTIES AND MAKE ITS FINDINGS ON ANY APPLICATION OR APPEAL IN WRITING.

**21.20.070—21.20.120. - RESERVED.**

**21.20.200. BOARD OF ADJUSTMENT.**

KPB 21.20.200 THROUGH 21.20.370 GOVERNS THE PROCEEDINGS OF THE BOARD OF ADJUSTMENT.]

### 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 [BOARD OF ADJUSTMENT] hearing officer who participated [IN THE BOARD OF ADJUSTMENT] 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.
  - [3]. THE "APPELLEE" IS THE PETITIONER FOR A BOROUGH ENTITLEMENT OR RECIPIENT OF A BOROUGH ENFORCEMENT ORDER WHERE ANOTHER PARTY IS THE APPELLANT. THE APPELLEE IS THE BOROUGH WHERE THE APPELLANT IS THE RECIPIENT OF A BOROUGH ENFORCEMENT ORDER.
  4. "BOARD" MEANS THE KENAI PENINSULA BOROUGH BOARD OF ADJUSTMENT.]
  - [5]4. "Ex parte" means by or for one party; done for, on behalf of, or on the application of, one party only.
  - [6]5. "Party of record" means:
    - a. The applicant before the planning commission,
    - b. Any party or person [OR GOVERNMENT AGENCY AFFECTED] 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;
      - (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.
    - c. [THE PERSON TO WHOM AN ENFORCEMENT ORDER IS ISSUED.] A government agency affected by the decision which appeared before the planning commission with either a written or oral presentation.
  - [7]6. "Quasi-judicial decisions" are those decisions where general law or policy are applied or affect an individual's property interests. Such decisions include but are not limited to preliminary and final plat

approvals, conditional use permits, and exception and variance applications.

[8]Z. "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

**21.20.220. [BOARD OF ADJUSTMENT] Hearing officer—Established[; QUORUM].**

- A. *Established.* The [BOARD OF ADJUSTMENT] hearing officer [IS ESTABLISHED TO] performs the appellate functions required by AS 29.40.050.
- B. [COMPOSITION. THE BOARD SHALL CONSIST OF FIVE MEMBERS SELECTED FROM THE PUBLIC. TWO ALTERNATES SHALL BE APPOINTED TO SERVE IN THE EVENT THERE ARE FEWER THAN FIVE MEMBERS PRESENT FOR A PROCEEDING. THE ALTERNATE SHALL MEET THE QUALIFICATIONS FOR BOARD MEMBERSHIP.]
- [C.] *Qualifications.* [TWO OR MORE MEMBERS SHALL HAVE PREVIOUS EXPERIENCE IN PLANNING OR PLATTING, AND PREFERENCE SHALL BE GIVEN TO APPLICANTS WHO HAVE QUASI-JUDICIAL EXPERIENCE. ADDITIONALLY, EACH MEMBER SHALL BE A RESIDENT OF THE BOROUGH.] The hearing officer shall have the qualifications set forth in KPB 21.50.110.
- [D.] *QUORUM.* FIVE MEMBERS OF THE BOARD MUST BE PRESENT AND QUALIFIED TO DELIBERATE AND VOTE ON THE MATTER BEFORE THE BOARD.
- E. IF THE MEMBERS SEATED FOR A HEARING CHANGES WHILE AN APPEAL IS PENDING, A NEW MEMBER MAY PARTICIPATE ONLY BY MAKING AN ORAL OR WRITTEN STATEMENT ON THE RECORD THAT THE MEMBER HAS REVIEWED THE RECORD AND PROCEEDINGS THUS FAR AND FEELS QUALIFIED TO RENDER AN INFORMED AND IMPARTIAL DECISION. THIS PARAGRAPH DOES NOT APPLY TO APPEALS TO THE BOARD OF ADJUSTMENT OF A CASE THAT HAS BEEN PREVIOUSLY REMANDED TO THE PLANNING COMMISSION BY THE BOARD.
- F. *OFFICERS.*
  - 1. THE BOARD ANNUALLY SHALL SELECT FROM ITS MEMBERSHIP A CHAIRPERSON AND VICE CHAIRPERSON. THE CHAIRPERSON SHALL PRESIDE AT MEETINGS OF THE BOARD AND SHALL REPRESENT THE BOARD AS DIRECTED BY ITS MEMBERSHIP.
  - 2. THE VICE CHAIRPERSON SHALL ACT IN THE ABSENCE OF THE CHAIRPERSON.
  - 3. THE BOROUGH CLERK SHALL ACT AS SECRETARY TO THE BOARD.
- G. *APPOINTMENT.* BOARD MEMBERS SHALL BE APPOINTED BY A MAJORITY VOTE OF THE BOROUGH ASSEMBLY.
- H. *TERM.* BOARD MEMBERS' TERMS SHALL BE THREE YEARS WITH THE FIRST BOARD APPOINTED SO THAT EXPIRATION DATES OF TERMS SHALL BE STAGGERED.

I. *VACANCIES.* A VACANCY IS CREATED UNDER THE FOLLOWING CONDITIONS AND UPON A DECLARATION OF VACANCY BY THE BOARD:

1. FAILS TO TAKE OFFICE WITHIN 30 DAYS AFTER HIS OR HER APPOINTMENT;
2. RESIGNS AND THE RESIGNATION IS ACCEPTED;
3. IS PHYSICALLY OR MENTALLY UNABLE TO PERFORM THE DUTIES OF HIS OR HER OFFICE;
4. IS REMOVED FROM OFFICE;
5. MISSES THREE CONSECUTIVE REGULAR MEETINGS UNLESS EXCUSED;
6. IS CONVICTED OF A FELONY OR OF AN OFFENSE INVOLVING A VIOLATION OF HIS OR HER OATH OF OFFICE;
7. CHANGES HIS OR HER RESIDENCY TO A LOCATION OUTSIDE OF THE BOROUGH FOR A PERIOD LONGER THAN 60 DAYS.

A VACANCY ON THE BOARD SHALL BE FILLED BY ASSEMBLY APPOINTMENT OF A PERSON QUALIFIED TO SERVE UNDER THIS SECTION FOR THE UNEXPIRED TERM, OR FOR A THREE-YEAR TERM IF NO UNEXPIRED TERM REMAINS.

J. *COMPENSATION AND REIMBURSEMENT.* BOARD MEMBERS SHALL BE COMPENSATED AT THE RATE OF \$100.00 PER MEETING EXCEPT THE BOARD CHAIR, WHO SHALL BE COMPENSATED AT THE RATE OF \$150.00 PER MEETING. BOARD MEMBERS SHALL BE REIMBURSED FOR ACTUAL EXPENSES INCURRED ON AUTHORIZED BOARD BUSINESS AT THE SAME RATE AS ARE KENAI PENINSULA BOROUGH EMPLOYEES.]

**21.20.230. Jurisdiction.**

- A. Unless a different appellate procedure is provided by this Code, the [BOARD OF ADJUSTMENT] 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.

**21.20.240. Conflict of interest—Ex parte contact.**

- A. *Conflict.* [A BOARD OF ADJUSTMENT MEMBER MAY NOT PARTICIPATE IN DELIBERATION OR VOTE ON A QUESTION IF DOING SO WOULD VIOLATE THE CONFLICT OF INTEREST PROVISIONS OF KPB 2.58.] A hearing officer may not hear or decide a case:
  1. In which the hearing officer:
    - a. Has a direct or indirect financial interest in the property that is the subject of the case, or that is located within 500 feet of property that is the subject of the case;

b. Is related by blood, adoption, or marriage to any party to the case or to an owner of property that is the subject of the case, or who resides at or owns property within 500 feet of property that is the subject of the case.

2. In which either:

a. A party demonstrates that, due to factors external to the case, the ability of the hearing officer to make an impartial decision is actually impaired, or

b. Reasonable persons would conclude the ability of the hearing officer to make an impartial decision is impaired due to circumstances of the proceeding, including without limitation instances in which the hearing officer or an immediate family member is a party, material witness or represents a party.

B. Ex parte contact. [BOARD OF ADJUSTMENT MEMBERS] A hearing officer shall be impartial in all administrative decisions, both in fact and in appearance. [NO MEMBER] A hearing officer may not receive or otherwise engage in ex parte contact with any party of record, or members of the public, concerning an application [FOR A BOROUGH ENTITLEMENT OR AN ENFORCEMENT ORDER] filed pursuant to KPB Title 20 or 21 from the time the application is submitted [OR ENFORCEMENT ORDER IS ISSUED] through any period of time the matter is submitted for decision or subject to reconsideration before the [BOARD OF ADJUSTMENT] hearing officer.

**21.20.250. Appeal of planning commission decision to [BOARD OF ADJUSTMENT] 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 [CHAIR OF THE BOARD OF ADJUSTMENT] 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 [CHAIR] 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 [BOARD OF ADJUSTMENT] 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 [THE] 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. Proof of service of the entry of appearance upon each party shall be [FILED] 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.

#### **21.20.260. Stay on appeal.**

Upon commencement of an appeal, [ENFORCEMENT ORDERS MUST BE OBEYED AND] any entitlement granted is stayed [MAY NOT BE OPERATED] until a final decision is issued by the [BOARD OF ADJUSTMENT] hearing officer. If an entitlement has conditions associated with it that must be performed within a certain time period, the time frame for performance or compliance does not start until the [BOA's] hearing officer's final decision is distributed or as otherwise specified by the [BOA] hearing officer. [RECIPIENTS OF ENFORCEMENT ORDERS MUST ABIDE BY THE ORDER UNTIL THE BOA ISSUES ITS FINAL DECISION. IF NECESSARY THE BOARD OF ADJUSTMENT OR A COURT MAY ISSUE AN ENFORCEMENT ORDER BASED ON A CERTIFICATE OF IMMINENT PERIL TO LIFE OR PROPERTY MADE BY THE ENFORCEMENT OFFICER.]

#### **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[, OR, IF PROVIDED BY A PARTY,] and a verbatim transcript of the planning commission hearing. [ALL ARRANGEMENTS AND COSTS FOR PREPARATION OF A TRANSCRIPT ARE THE RESPONSIBILITY OF THE PARTY DESIRING THE

TRANSCRIPT. PARTY SUBMITTALS OF TRANSCRIPTS MUST BE PREPARED AND CERTIFIED AS ACCURATE BY A COURT REPORTER IN ORDER TO BE ADMITTED. COPIES OF TAPES FOR TRANSCRIPTION WILL BE PROVIDED FOR A PER TAPE COPYING FEE IN THE AMOUNT LISTED IN THE MOST CURRENT KENAI PENINSULA BOROUGH SCHEDULE OF RATES, CHARGES AND FEES.]

- 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 [15] 30 days after the deadline for filing entries of appearance. One copy of the record shall be provided to [THE] a party paying the [INITIAL] filing fee. A copy shall also be provided to [THE APPELLEE, IF THE APPELLEE WAS] the [INITIAL ENTITLEMENT] applicant [OR RECIPIENT OF AN ENFORCEMENT ORDER] 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. [IF A PARTY HAS REQUESTED A TRANSCRIPT OF THE HEARING BEFORE THE PLANNING COMMISSION, AN ADDITIONAL 15 DAYS SHALL BE ALLOWED FOR THE COMPLETION OF THE TRANSCRIPT WHICH SHALL BE ADDED TO THE COMPLETED RECORD. COMPLETION OF A TRANSCRIPT WITHIN THE TIME SPECIFIED IS THE RESPONSIBILITY OF THE PARTY REQUESTING THE TRANSCRIPT. ANY MEMBER OF THE BOARD OF ADJUSTMENT MAY REQUEST THAT THE BOROUGH CLERK PREPARE A CERTIFIED TRANSCRIPT FOR THE BOARD'S REVIEW. THE TRANSCRIPT WILL BE AVAILABLE TO THE PARTIES AT A CHARGE IN THE AMOUNT LISTED IN THE MOST CURRENT KENAI PENINSULA BOROUGH SCHEDULE OF RATES, CHARGES AND FEES.]

**21.20.280. Written statements.**

- A. *Opening statement.* Appellant, [APPELLEE, AND] 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 NOTICE OF CERTIFICATION OF THE RECORD IS ISSUED, OR] within 20 days of the clerk issuing notice that a completed record and transcript [HAS] 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 [BOARD] hearing

officer may waive irregularities in the content of the notice of appeal or written statements.

- 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 [BOARD OF ADJUSTMENT CHAIR] 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 2 business days of the filing deadline. Service by email or facsimile is [PROHIBITED] permitted when the party to be served has affirmed in writing the acceptance of alternate forms of service. [PROOF OF SERVICE SHALL BE FILED BY THE PARTIES WITH THE CLERK AT THE SAME TIME THE DOCUMENT SERVED IS BEING FILED WITH THE CLERK. THE CERTIFICATE OF SERVICE MUST SPECIFICALLY STATE THE PERSONS WHO HAVE BEEN SERVED, THE DATE AND MANNER OF SERVICE.]

#### **[21.20.290. EVIDENCE.**

NO NEW EVIDENCE MAY BE PRESENTED TO THE BOARD OF ADJUSTMENT, EXCEPT IN SUPPORT OF A REQUEST FOR A REMAND TO THE PLANNING COMMISSION BASED ON NEW EVIDENCE, PURSUANT TO KPB 21.20.330(A).]

#### **21.20.300. Motions.**

- A. *Parties.* Motions for continuances, shortened time, or other matters may be filed by the following parties and served in the manner prescribed by KPB 21.20.280(D):
1. The appellant;
  2. The [APPELLEE] applicant if that party is not the appellant;
  3. A borough official.
- B. *Response.* The [BOARD OF ADJUSTMENT CHAIRPERSON] hearing officer shall allow a time for response to a motion by the nonmoving parties set forth in KPB 21.20.300(A). Any response shall be in writing and made

within the time frame required by the [CHAIR] hearing officer. The response shall be served in the manner prescribed by KPB 21.20.280(D).

- C. *Ruling.* The [BOARD OF ADJUSTMENT CHAIRPERSON MAY] hearing officer the motion[, APPOINT A DEPUTY CHAIR OR SUBCOMMITTEE TO CONSIDER AND RULE ON THE MOTION, OR REQUEST THE ENTIRE BOARD CONSIDER AND RULE ON THE MOTION].

**21.20.310. [BOARD OF ADJUSTMENT] [H]Hearing procedure.**

- A. *Time.* The [BOARD OF ADJUSTMENT CHAIRPERSON] hearing officer shall establish the date for consideration of the appeal [BY THE BOARD OF ADJUSTMENT] on a date that is not less than 40 nor more than 90 days after the service of the notice of certification of the record. The [BOARD OF ADJUSTMENT] hearing officer may for good cause shorten or extend the hearing date.
- B. *Participants.* The [BOARD OF ADJUSTMENT] hearing officer shall permit oral argument by any party who either filed the appeal or an entry of appearance and has filed a written argument. If more than one appeal is filed from the same planning commission decision the appeals shall be consolidated as a single appellate proceeding. Each appellant shall be entitled to file motions, written statements, and present arguments as set forth in KPB 21.20.280-310.
- C. *Agenda.* Argument shall be conducted in the following order:
1. Staff overview—Explanation of proceedings and decision before the planning commission, 10 minutes.
  2. Appellant, 15 minutes.
  3. Persons filing entries of appearance supporting appellant, 5 minutes each.
  4. [APPELLEE] Applicant, if the applicant is not an appellant, 15 minutes.
  5. Persons filing entries of appearance supporting [APPELLEE'S] applicant's position, 5 minutes each.
  6. Appellant's rebuttal, 5 minutes.
  7. [BOARD OF ADJUSTMENT] Hearing officer examination of staff, if any. If staff is the appellant [OR APPELLEE], Item 1 and 7 may be deleted from the agenda.
- D. *Agenda flexible.* The [BOARD OF ADJUSTMENT] hearing officer may question any party at any time, but the time for questions and answers shall not count against the time allotted to that party for argument. The [BOARD OF ADJUSTMENT] hearing officer may revise the agenda set forth in section C. for good cause. The [BOARD OF ADJUSTMENT CHAIR PERSON]

hearing officer may limit argument by any person to reduce cumulative or repetitive argument. The [BOARD] hearing officer for good cause shown may grant additional time for oral argument to the [ORIGINAL] appellant or [APPELLEE] applicant. In such event, the opposing party, if any [WHERE THE OPPOSING PARTY IS THE ORIGINAL APPELLANT OR APPELLEE], shall be granted equal additional time. Failure to observe the procedures set forth in section C. may not affect the validity of the [BOARD OF ADJUSTMENT] hearing officer's decision so long as the parties have had reasonable opportunity to be heard.

- E. *Deliberations.* The [BOARD OF ADJUSTMENT] hearing officer may undertake deliberations immediately upon the conclusion of the hearing on appeal or may take the matter under advisement [AND MEET AT SUCH OTHER TIME AS IS CONVENIENT FOR DELIBERATIONS UNTIL A DECISION IS RENDERED. DELIBERATIONS NEED NOT BE PUBLIC]. Deliberations and development of findings may be done by or in consultation with legal counsel.
- [F. *VOTE.* THE BOARD'S DECISION MUST BE MADE BY MAJORITY VOTE. THE VOTE OF EACH BOARD OF ADJUSTMENT MEMBER SHALL BE MADE PUBLIC, EITHER ORALLY OR IN THE BOARD'S WRITTEN DECISION. WHEN THE BOARD PUBLICLY ANNOUNCES ITS DECISION THE VOTE OF EACH MEMBER SHALL BE ANNOUNCED AT THAT TIME.]

#### **21.20.320. Scope of appellate review.**

After the hearing the [BOARD] hearing officer shall apply the following rules to its decision:

1. The [BOARD OF ADJUSTMENT] hearing officer may exercise [ITS] independent judgment on matters that relate to the interpretation or construction of ordinances or other provisions of law; however, due consideration shall be given to the expertise and experience of the planning commission in its interpretations of KPB titles 20 and 21.
2. The [BOARD OF ADJUSTMENT] hearing officer shall defer to the judgment of the planning commission regarding findings of fact if they are supported in the record by substantial evidence.
3. The hearing officer may revise and supplement the planning commission's findings of fact. Where the [BOARD OF ADJUSTMENT] hearing officer decides that a finding of fact made by the planning commission is not supported by substantial evidence, the [BOARD OF ADJUSTMENT] hearing officer may make a different finding on the factual issue, based upon the evidence in the record developed before the planning commission if it concludes a different finding was supported by substantial

evidence, or may remand the matter to the planning commission as provided in [THIS CHAPTER] KPB 21.20.330(B).

**21.20.330. Remand by [BOARD OF ADJUSTMENT] hearing officer.**

- A. *Changed circumstances.* An appeal alleging changed circumstances or new relevant evidence, which with due diligence could not have been presented to the planning commission, [MAY] shall be remanded to the planning commission.
- B. *Lack of findings.* Appeals from planning commission decisions which lack [ADEQUATE] findings of fact and conclusions by the planning commission or contain findings of fact and conclusions which are not supported by substantial evidence shall be remanded to the planning commission with an order to make adequate findings of fact and conclusions.
- C. *Findings for remand.* The [BOARD OF ADJUSTMENT] hearing officer shall make findings of fact and conclusions setting forth the basis for the remand and shall include instructions to the planning commission regarding whether additional evidence, notice, hearing or findings are required.

**21.20.340. Decision.**

- A. *Scope of decision.* The [BOARD OF ADJUSTMENT] hearing officer shall base [ITS] the hearing officer's decision upon the record. The [BOARD OF ADJUSTMENT] hearing officer may remand, affirm, or reverse, or modify, in whole or in part, the appealed decision or order. The decision, where appropriate, may include further instructions to staff or the planning commission to [E]affect the [BOARD OF ADJUSTMENT] hearing officer's decision. If the [BOARD OF ADJUSTMENT] hearing officer does not remand the decision or order appealed, the decision or order of the [BOARD OF ADJUSTMENT] hearing officer is final.
- B. *Written decision.* The [BOARD OF ADJUSTMENT] hearing officer's decision shall be in writing and shall state that it is a final decision, include the [BOARD OF ADJUSTMENT] hearing officer's findings of fact and conclusions, and notify the parties of their right to appeal. The findings shall be reasonably specific so as to provide the parties, and where appropriate, reviewing authorities, a clear and precise understanding of the reason for the decision.
- C. *Time.* The decision shall be filed with the clerk within [30] 15 calendar days after the completion of the hearing.
- D. *Service.* The [BOARD OF ADJUSTMENT] hearing officer's decision shall be mailed or personally delivered, within 10 days after the board of

adjustment's written decision is signed by the board of adjustment chair, to the parties of record who filed a written argument.

- E. *Similar petitions.* An [PERSON] applicant aggrieved by a [BOARD OF ADJUSTMENT] hearing officer's decision may not submit a substantially similar petition to the lower level decision maker as that which was appealed to the [BOARD OF ADJUSTMENT] hearing officer unless a significant change of circumstances has occurred. The mere passage of time is not a change in circumstances.

**21.20.350. Reconsideration by [BOARD OF ADJUSTMENT] hearing officer.**

[MOTIONS FOR RECONSIDERATION ARE PROHIBITED].

- A. Within 14 days of issuance of the written decision a party that participated in the hearing may request reconsideration of a hearing officer's decision based only on the following criteria:
1. The hearing officer overlooked, misapplied, or failed to consider a code provision directly controlling;
  2. The hearing officer overlooked or misconceived a material fact;
  3. The hearing officer overlooked or misconceived a material question in the case; or
  4. Fraud or misrepresentation by a party.
- B. Motions for reconsideration are prohibited more than 14 days after the hearing officer's written decision is issued.
- C. The hearing officer shall rule on a motion for reconsideration or request the other party to respond within 10 days after the date of filing the motion with the borough clerk. If 10 days pass without the hearing officer issuing a decision on the motion or providing the other parties an opportunity to respond, the motion is considered denied. The motion for reconsideration shall not be granted without giving the parties not filing the motion an opportunity to respond to the motion. Where an opposition to the motion for reconsideration has been requested by the hearing officer and filed with the borough clerk by the respondent, the hearing officer shall issue a written decision on the matter within 10 days of the deadline for filing an opposition or the date the opposition is filed, whichever occurs first.
- D. The filing of a motion for reconsideration suspends the time in which an appeal must be taken to superior court. The time period in which to file an appeal shall begin when the hearing officer issues the decision on reconsideration or 10 days after the motion for reconsideration is filed if the hearing officer does not issue a decision on the motion.
- E. An appeal from a hearing officer decision under this section may be filed in the superior court within 30 days after the date of distribution of the hearing officer decision to the parties, and is governed by Part 6 of the



Alaska Rules of Appellate Procedure. A hearing officer decision remains in effect while an appeal is pending unless stayed by the superior court.

**21.20.360. Appeal from [board of adjustment] hearing officer.**

- A. Pursuant to AS 29.40.060, appeals by an aggrieved party from the final written decisions of the [BOARD OF ADJUSTMENT] hearing officer shall be filed with the State of Alaska Superior Court at Kenai, Alaska, and shall conform with the Rules of Appellate Procedure of the State of Alaska, Part VI.
- B. The borough clerk shall estimate the cost of preparing the transcript of the proceeding and compiling the record on appeal. The appellant to the court shall deposit the estimated costs with the clerk in advance. Upon completion of the record on appeal, the clerk shall refund any excess deposit or charge the appellant for costs exceeding the deposit. The record may not be released to the appellant until full payment is made.

**SECTION 6.** That KPB 21.25.100 is hereby amended as follows:

**21.25.100. Appeals.**

An aggrieved party may appeal the denial, modification, or approval [OR REVOCATION OF A PERMIT] by filing an appeal to the [BOARD OF ADJUSTMENT] hearing officer within [FIFTEEN (] 15[)] days of the date of notice of the decision. Appeals from actions taken under this chapter shall be conducted in accordance with the appellate procedures established in Chapter 21.20 of this code.

**SECTION 7.** That KPB 21.50.110 is hereby amended as follows:

**21.50.110. Hearing officers.**

- A. The borough shall retain one or more hearing officers to conduct adjudicative proceedings under this chapter. A hearing officer shall have experience in quasi-judicial proceedings and the administration of land use regulations. A person may not act as hearing officer while serving on the borough planning commission [OR BOARD OF ADJUSTMENT OF THE BOROUGH] or a [CITY] planning commission or board of adjustment of a city located within the borough.

**SECTION 8.** That KPB 22.10.050(A) is hereby amended as follows:

**22.10.050. Responsibilities.**

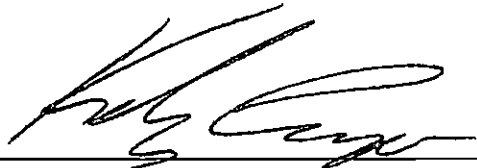
The borough clerk shall:

- A. Prepare and distribute the meeting agenda packets and give notice of the time and place of meetings of the Assembly and its committees, [THE BOARD OF ADJUSTMENT,] Board of Equalization, and such other legislative and adjudicatory boards and commissions as may be established by the assembly to that body, to the public, and appropriate governmental agencies and officials, including such legal notice as required by law, and attend those meetings and keep the journals;

...

**SECTION 9.** That this ordinance takes effect immediately upon its enactment.

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 5TH DAY OF SEPTEMBER, 2017.**

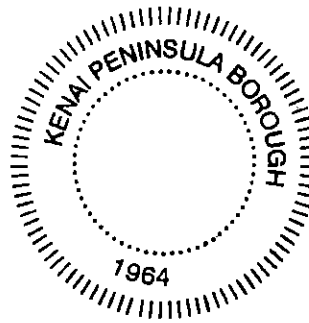


Kelly Cooper, Assembly President

ATTEST:



John Blankenship, MMC, Borough Clerk



Yes: Bagley, Carpenter, Dunne, Fischer, Hibbert, Ogle, Schaefer, Cooper  
No: None  
Absent: None