

MEMORANDUM

TO: Borough Assembly

FROM: Bob Molloy • Kristine Schmidt, Molloy Schmidt LLC
Attorneys for Echo Trading Company, LLC

cc: Borough Clerk
Borough Administration through Legal Department
AnnaLisa Cox

DATE: 10/24/19

SUBJECT: Comment on proposed Ordinance 2019-29, Establishing Appeal
Procedure for the Appeal filed by Echo Trading Company, LLC

This memo is to provide proposed amendments to Ordinance 2019-29 and brief supporting comments.

1. Several of the WHEREAS clauses appear to prejudice the merits of the appeal, by adopting the Legal/Planning Department's position on the appeal points. For example, whether the easement is a utility easement at all. This is a point on appeal for the Assembly to decide. These types of WHEREAS clauses should be removed. See, Attachment A, which shows requested revisions/amendments to the Legal Department's proposed Ordinance 2019-29.

2. There are major due process problems with the hearing officer procedures that the Borough Administration/Legal Department wants the Assembly to adopt for the Echo Trading Company appeal. In KPB 21.20.230(B), the Borough Assembly singled out vacation appeals, and reserved them to the Assembly. Echo Trading Company requests that the Assembly use some Assembly/Board of Adjustment procedures that were in effect from 1997-2017 for vacation appeals. These prior BOA procedures were more neutral, more fair, and less strict than the new hearing officer ordinance.

3. The old BOA procedures that Echo Trading Company requests the Assembly adopt in place of the current hearing officer procedures are in Attachment B to this memo:

a. **Ordinance 97-33, Section 4, 21.20.290 – Evidence**, in place of current KPB 21.20.290. The old BOA procedure allowed for new evidence, to supplement the Planning Commission meeting materials (the new hearing officer ordinance does not). Supplemental materials are helpful to understand a case; restricting the Assembly appeal to just Planning Commission meeting materials in an easement vacation appeal such as this one is unfair.

b. **Ordinance 97-33, Section 4, 21.20.320 – Scope of Assembly Review** , in place of current KPB 21.20.320. The old BOA procedure gave the Assembly an opportunity to consider new evidence from the appeal hearing, not restricted to the Planning Commission record. The new hearing officer ordinance does not.

4. We also request changes to **KPB 21.20.310 – Hearing Procedure**, subsection (C), which limits the Appellant to a 15-minute presentation. This does not give the Appellant sufficient time to make a presentation, especially one in which the Appellant wants to explain an alternate easement proposal for an easement that the Planning Commission vacated without an alternative. We request 25 minutes with 10 minutes for rebuttal, for the appellant and applicant.

In addition, Echo Bay Trading requests that the Assembly delete “Staff overview” on the hearing agenda. In this appeal the staff is supporting their own proposed findings to the Planning Commission, which were adopted by the Planning Commission; therefore, giving the staff an extra opportunity to lobby the Assembly with an “overview” is unfair. No “overview” is necessary. See, Attachment C, which shows requested changes to the existing ordinance for purposes of this appeal.

These requests may require other changes to the new hearing officer ordinance.

Introduced by: Mayor
Date: 10/08/19
Hearing: 11/05/19
Action:
Vote:

**KENAI PENINSULA BOROUGH
ORDINANCE 2019-29**

**AN ORDINANCE ESTABLISHING THE APPEAL PROCEDURE BEFORE THE
BOROUGH ASSEMBLY FOR THE APPEAL FILED BY ECHO TRADING
COMPANY, LLC OF A PLANNING COMMISSION DECISION**

WHEREAS, Echo Trading Company, LLC has filed an appeal of a planning commission decision vacating an ~~utility (drainage)~~ easement; and

~~WHEREAS, after the appeal was filed it was determined that borough code does not contain a specific procedure for appeals of a utility easement vacation decision; and~~

WHEREAS, in order to timely resolve the present appeal, it is necessary that the borough set a one-time procedure for this appeal; and

WHEREAS, KPB 21.20.230(B) states that the assembly shall consider vacation petitions approved by the planning commission in accordance with the procedures in KPB Chapter 20.70; and

WHEREAS, KPB Chapter 20.70 does not include procedures for the assembly to consider vacation petitions of ~~utility~~ easements approved by the planning commission ~~pursuant to KPB 20.70.080~~; and

WHEREAS, this ordinance will establish that for the appeal filed by Echo Trading Company, LLC the full assembly will ~~hear~~ ~~sit as the hearing officer for~~ the appeal, with the assembly president serving as presiding officer, and the appeal will follow the ~~same~~ procedures as set forth ~~in this ordinance~~ ~~KPB Chapter 21.20~~;

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

SECTION 1. This is an uncodified ordinance.

SECTION 2. For purposes of complying with KPB 21.20.230(B) to address the appeal filed by Echo Trading Company, LLC, regarding the planning commission's vacation approval decision in KPB File NO. 2019-048V, the assembly will ~~sit as the hearing officer and~~ follow the appeal procedures set forth in KPB 21.20.210 through KPB 21.20.360, except as follows.

SECTION 3. The procedures from Ordinance 97-33, Section 4, KPB 21.20.290 - Evidence and KPB 21.20.320 - Scope of Appellate Review, will be used in place of existing KPB 21.20.290 and KPB 21.20.320.

SECTION 4. The procedures in KPB 21.20.310 - Hearing Procedure, Paragraph C are replaced with the following procedures:

21.20.310, Hearing Procedure.

C. *Agenda.* The hearing will be conducted in the following order:

1. Appellant, 25 minutes.
2. Persons filing entries of appearance supporting appellant, 5 minutes each.
3. Applicant, if the applicant is not an appellant, 25 minutes.
4. Persons filing entries of appearance supporting applicant's position, 5 minutes each.
5. Appellant's rebuttal 10 minutes.

SECTION ~~5.3~~. The assembly president will act as the presiding officer.

SECTION ~~6.4~~. For purposes of this appeal, the current landowner of the parcel encumbered by the easement and the appellant, Echo Trading Company, LLC, will both be considered a "party of record."

SECTION ~~7.5~~. That this ordinance shall take effect immediately upon its enactment.

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS *
DAY OF *, 2019.**

regulations or other legal authority for the position taken by the party to the appeal. Failure to timely submit the opening written argument will result in dismissal of that party from the appeal. Multiple parties may preserve their party status by filing a single written argument, however, the written argument must clearly identify all parties filing the single argument. The board may waive irregularities in the content of the notice of appeal or written arguments.

- B. Reply argument. Each party may submit a reply argument within 15 days of the filing deadline for the initial written arguments. The reply shall be limited to response to matters specifically raised in the argument responded to. A party shall file a single reply argument in response to all opening arguments filed.
- C. Extension. The board of adjustment chair, 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 arguments 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 and 350. 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.

- A. All evidence including but not limited to maps, documents, correspondence, and photographs that a party wishes the board of adjustment to consider in its deliberations must be submitted with the parties' written arguments or reply arguments. Witness lists must also be submitted by the date the reply briefs are due. Parties are discouraged from resubmitting evidence which already appears in the record certified by the planning department.
- B. Evidence which is not submitted with the written arguments may not be submitted at the hearing unless it is evidence that with due diligence could not have been submitted with the arguments. If the new evidence is admitted the opposing parties upon request shall be provided adequate opportunity to respond to the new evidence.

21.20.300 Motions.

- A. Parties. Motions for continuances, shortened time, or other matters may be filed by the following parties:
 - 1. the appellant;
 - 2. the appellee;
 - 3. a borough official.
- B. Response. The president shall allow a time for response to a motion by the nonmoving parties set forth in KPB 21.20.300(A).
- C. Ruling. The assembly president may rule on 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 hearing procedure.

- A. Time. The assembly president shall establish the date for consideration of the appeal by the board of adjustment on a date that is not less than 35 nor more than 90 days after the service of the notice of certification of the record. The assembly may for good cause shorten or extend the hearing date.
- B. Participants. The board of adjustment shall permit oral argument or testimony by any party who either filed the appeal or an entry of appearance and has filed a written argument.
- C. Agenda. Testimony and 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.~~ 25 minutes
 - 3. Persons filing entries of appearance or witnesses supporting appellant, 5 minutes each.
 - 4. Appellee, ~~15 minutes.~~ 25 minutes
 - 5. Persons filing entries of appearance or witnesses supporting appellee's position, 5 minutes each.
 - 6. Appellant's rebuttal, ~~5 minutes.~~ 10 minutes
 - 7. Board of adjustment examination of staff, if any. If staff is the appellant or appellee, Item 1 and 7 may be deleted from the agenda.
- D. Sworn testimony. Parties and witnesses shall be sworn in, but advocates for parties who are making oral argument rather than providing testimony, need not be sworn in.
- E. Agenda flexible. The board of adjustment may revise the agenda set forth in section © for good cause. The board of adjustment chair person may limit testimony by any person to reduce cumulative or repetitive testimony. The board of adjustment may independently call persons to testify who are not party to the appeal or included on witness lists, if it believes the testimony will aid its decision in the matter. The board for good cause shown may grant additional time for oral argument to the original appellant or appellee. On such event, the opposing party, 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 © may not affect the validity of the board of adjustment's decision so long as the parties have had reasonable opportunity to be heard.
- F. Deliberations. The board of adjustment 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. The board of adjustment by majority vote may appoint a subcommittee of the board of adjustment membership to develop findings based on the board of adjustment's deliberations. Deliberations and development of findings may be done in consultation with legal counsel.
- G. 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. If 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 *de novo* hearing the board shall apply the following rules to its decision:

1. The board of adjustment may exercise its independent judgment on matters that relate to the interpretation or construction of ordinances or other provisions of law.
2. The board of adjustment shall defer to the judgment of the planning commission regarding findings of fact if they are supported in the record by substantial evidence.
3. Where the board of adjustment decides that a finding of fact made by the planning commission is not supported by substantial evidence, the board of adjustment shall make a finding on the factual issue, based upon the following:
 - a. The evidence in the record developed before the planning commission; and
 - b. The record developed at a de novo hearing before the board of adjustment.

21.20.330 Remand by board of adjustment

- A. Changed circumstances. An appeal alleging changed circumstances, which with due diligence could not have been presented to the planning commission, may be remanded to the planning commission or heard by the board of adjustment.
- B. Lack of findings. Appeals which lack findings of fact and conclusions by the planning commission may be heard by the board of adjustment or remanded to the planning commission with an order to make findings of fact and conclusions.
- C. Findings for remand. The board of adjustment 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 shall base its decision upon the record, prefiled evidence, and testimony presented at the hearing. The board of adjustment may remand, affirm, 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 effect the board of adjustment's decision. If the board of adjustment does not remand the decision or order appealed, the decision or order of the board of adjustment is final.
- B. Interim order. If upon entering deliberations the board of adjustment finds that additional information is needed to make a fully informed and fair decision the board of adjustment may issue an interim order requesting additional testimony, evidence, or written presentations from any parties. Interim orders shall be served on all parties to the appeal.
- C. Written decision. The board of adjustment's decision shall be in writing and shall state that it is a final decision, include the board of adjustment'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.
- D. Time. The decision shall be filed with the clerk within 30 calendar days after the completion of the hearing.
- E. Service. The board of adjustment 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.
- F. Similar petitions. A person aggrieved by a board of adjustment decision may not submit a substantially similar petition to the lower level decision maker as that which was appealed to the board of adjustment unless a significant change of circumstances has occurred. The

21.20.310, Hearing Procedure.

C. *Agenda.* The hearing **Argument** will be conducted in the following order:

1. ~~Staff overview. Explanation of proceedings and decision before the planning commission, 10 minutes.~~

~~2.~~ Appellant, ~~25~~ **15** minutes.

~~2.3.~~ Persons filing entries of appearance supporting appellant, 5 minutes each.

~~3.4.~~ Applicant, if the applicant is not an appellant, ~~25~~ **15** minutes.

~~4.5.~~ Persons filing entries of appearance supporting applicant's position, 5 minutes each.

~~5.6.~~ Appellant's rebuttal ~~10~~ **5** minutes.

~~6.7.~~ **Hearing officer examination of staff, if any. If staff is the appellant, Item 1 and 7 may be deleted from the agenda.**

My name is AnnaLisa Cox and I am the current owner of Lot 24-A, AA Mattox Peggi's Addition, granted by AA Mattox Peggi's Addition (Plat HM 99-64) in Homer. I am writing in support of the proposal to use the appeal procedures, as set forth in KPB 21.20.210 through KPB 21.20.360, to determine if the Utility Drainage Easement Vacation should be allowed to record or if it should be vetoed. The equal times allotted to each party as outlined in 21.20.310(c) are also acceptable to me and I do not feel that they require any additional revision.

Initially my intent was to only vocalize support for the proposed hearing procedure. However, I would like to take a moment to address the suggestions set forth by Echo Trading Co. and vocalize my concern regarding a few of the proposed processes and their request to remove Utility Easement from the presented Ordinance.

1. There is no need to remove Utility Easement from the Ordinance as this is the proper term for this Utility (Drainage) Easement that runs across the middle of of Lot 24-A, AA Mattox Peggi's Addition, granted by AA Mattox Peggi's Addition (Plat HM 99-64) in Homer.

KPB 20.90.010. - Definitions generally –

"**Easement**" means the grant of a certain right to the use of the land by parties other than the owner. An easement is generally perpetual; if temporary, the condition for termination must be stated.

B. Utility Easement. The right to install and maintain utilities normally associated with developed land such as electric, telephone, gas, drainage, wastewater disposal, and water facilities. The right of ingress and egress for conducting utility operations is implicit.

2. **Evidence:** A letter was sent to the 17 property owners within 300 feet of our property notifying each one of the requested Utility Drainage Easement Vacation petition. At that time, they were given the opportunity to send in public comment with supporting documents or appear at the Planning Commission meeting. Tony Neal send the information that he felt was pertinent to this Utility Drainage Easement and the proposed vacation. His 2 emails in opposition to the vacation were included in the packet for the Borough Planning Commission Meeting. The Assembly/Board of adjustment procedure that is suggested by Mr Malloy should not be considered. KPB voted to remove KPB 21.20.290 in Ordinance 2017-22 for a reason and as such it should not be implemented as it could directly conflict with current KPB codes:

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). There is no justification for additional evidence to be submitted as nothing has changed, he had the chance to submit evidence with his public statement prior to the approval of the Utility Drainage Easement vacation.

3. The "Staff Overview" & "Examination of Staff" portions of the Hearing Agenda are necessary as they will provide important information that is relevant to the approval of the Vacation by the Planning Commission. The Utility Drainage Easement was approved for vacation by the Planning Commission. The request to veto prior to recording claimed that the vacation was not "legally obtained". To properly determine the legality/validity of the vacation the staff overview portion will provide necessary clarification from the borough attorney and planning commission about the case up to the point of approval of the vacation. It will additionally give the assembly the chance to ask follow up questions at the end of the hearing.

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