



## **KENAI PENINSULA BOROUGH**

PLANNING DEPARTMENT

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**DAVID R. CAREY**  
**BOROUGH MAYOR**

### **MEMORANDUM**

**TO:** Gary Knopp, Assembly President  
Kenai Peninsula Borough Assembly Members

**THRU:** *DK* David R. Carey, Borough Mayor

**FROM:** *MB* Max J. Best, Planning Director

**DATE:** August 25, 2011

**SUBJECT:** Ordinance 2011-34; An ordinance repealing KPB 21.24, Administration and Penalty, and enacting KPB 21.50 establishing an enforcement process for violations of Title 21.

The Planning Commission reviewed the subject ordinance during their regularly scheduled August 22, 2011 meeting. A motion passed by unanimous consent to recommend adoption of the ordinance.

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

AGENDA ITEM F. PUBLIC HEARINGS

4. Ordinance 2011-\_\_\_\_; An ordinance repealing KPB 21.24, Administration and Penalty, and enacting KPB 21.50 establishing an enforcement process for violations of Title 21.

Staff Report / Memorandum reviewed by Max Best

PC Meeting: 8/22/11

The material site (currently KPB 21.29) and anadromous stream protection (KPB 21.18) ordinances were first adopted in 1996. The borough substantially amended the code enforcement chapter, KPB 21.24, to address violations of land use regulations in 1997. While the enforcement ordinance is applicable to all land use regulation chapters in Title 21, material site and habitat protection generate the most enforcement issues. The chapter has had a rather uneven amount of workability for staff. While the borough enjoys a high level of voluntary compliance the code presents the following challenges: resolving issues with recalcitrant respondents, minimal fines that encourage noncompliance, having the planning commission sit as the hearing tribunal for violations, and lack of clarity in the underlying codes being enforced. The varying fine schedule for infractions handled through the minor infraction process in court and the separate daily civil fine of \$300.00, both contained in the current code, has lead to some confusion as well over which process is applicable.

The lack of clarity in underlying codes has been or continues to be addressed through an omnibus rewrite of the material site code in 2006 and with a partially complete rewrite of KPB 21.18. These rewrites however do not resolve the other challenges the current enforcement code presents. The assembly accepted grant funding in 2010 from the federal Coastal Impact Assistance Program for the Habitat Protection Education and Code Revision project in part to evaluate and make recommendations regarding the borough's code enforcement of land use regulations. A committee was formed consisting of representatives from the planning department, the River Center, and the legal department. The committee researched how other municipalities handled enforcement of land use regulations. The committee continued to meet regularly discussing various enforcement scenarios and how best they could be resolved. The committee is recommending replacement of the process where the planning commission determines violations and hears fines in favor of an independent hearing officer. The committee created a draft ordinance which was reviewed by outside counsel who also answered specific legal questions with regard to land use regulation enforcement. The committee interviewed the Chief of Code Compliance for the Municipality of Anchorage as well as the Municipality of Anchorage's Hearing Officer. These representatives from the Municipality of Anchorage reported favorably on the hearing officer process.

In summary the enforcement process proposed would generally start with a warning from the department administering the chapter of the code being violated. A stipulation may also be entered by the borough and property owner or occupant to bring the property into compliance and pay a lesser fine than if the case were fully adjudicated before the hearing officer. If the warning does not result in voluntary compliance, an enforcement notice would be issued. The enforcement notice would provide a hearing date before the hearing officer. If the respondent corrects the violation the enforcement notice could be dismissed prior to hearing. The hearing officer has the ability to require corrective work to cure a violation, assess the payment of fines, and revoke a permit. A party of record could ask for reconsideration within 15 days of the notice of the hearing officer's decision. An appeal within 30 days of the hearing officer's decision may be taken to superior court.

If a respondent continues the violation after the hearing officer issues an order, depending on the circumstances, the borough could request a supplemental order from the hearing officer or proceed to court to collect fines and/or seek a statutory injunction pursuant to AS 29.40.190 to gain compliance. The borough may also seek a court order to have the respondent abate a violation or request the ability for the borough to abate the violation at the respondent's cost. At this time, staff is recommending a daily fine not to exceed the amount in accord with the fine schedule contained in 21.50.050 of the ordinance.

It is the Administration's recommendation that only a part time contract hearing officer would be needed to assist in the resolution of violations of Title 21 of the KPB code of ordinances. It is recommended that hearing officers have an appropriate background in land use regulation and quasi-judicial experience.

END OF STAFF REPORT

Chairman Bryson opened the meeting for public comment. Seeing and hearing no one wishing to speak, Chairman Bryson closed the public comment period and opened discussion among the Commission.

**MOTION:** Commission Ecklund moved, seconded by Commissioner Holsten to recommend enactment of Ordinance 2011-\_\_\_; An ordinance repealing KPB 21.24, Administration and Penalty, and enacting KPB 21.50 establishing an enforcement process for violations of Title 21.

Commissioner Ecklund asked how much more work would be created by the adoption of this ordinance. Mr. Best replied that the warning process would typically be the permitter. Borough staff would make the initial contact because they are the ones that are the most familiar with permitting requirements. Commissioner Ecklund asked if that process was similar to how it was done now. Mr. Best replied that was correct. Commissioner Ecklund understood that adoption of the ordinance would not be a lot of additional work compared to what was being done now other than the process of a Hearing Officer. Mr. Best replied that was correct.

Commissioner Ecklund referred to Section 21.50.120 which states that a list persons who have been retained as hearing officers will be maintained by the borough clerk. She asked if that would be an on call list and how many officers will be on a retainer. Mr. Best replied that he has spoken with the Purchasing Department regarding a RFP. They anticipate having 2 or 3 hearing officers that possible would be used on a rotating basis. Commissioner Ecklund felt there could be a conflict of interest by having just one hearing officer.

Commissioner Holsten thought the hearing officer would be a cyclic thing as opposed to having a Planning staff member who has been involved in the case. She understood that this could make it a little more objective. Mr. Best replied that they hoped to take the politics out of this process as far as it being an appointment by the mayor or an elected official. They would have someone who meets certain judicial type requirements and can administer the Code. Commissioner Holsten thought there was a great deal of flexibility for staff. It appeared to her that now it could almost be cheaper to not get a permit where it may be more advantageous to get a permit with the enactment of this ordinance. Mr. Best replied yes, the permit fee doubles if the hearing officer administers an order that a permit is required. Commissioner Holsten understood that the fining process was not triggered until a violation notice was issued. Mr. Best replied that was correct.

Commissioner Carluccio referred to the following statement and asked how that was determined. *"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."* Mr. Best deferred to Ms. Montague. Ms. Montague replied that part of this code was developed from the American Planning Association Enforcement Code and part of it came from Anchorage because they are very satisfied with their hearing officer process. She stated that some of the ordinance was designed to fit their situation. The measurement could be larger than 500 feet.

Commissioner Tauriainen asked if there was a timeframe that people need to follow for the removal of a structure or compliance with a violation once a warning was issued. Mr. Best replied that it would depend on the severity of it. It would be up to the permitter. Typically, staff instructs people of what they need to do. It is left up to staff to come up with a timeline of when an issue needs to be finalized. He stated that staff tries to educate people on what the needs are and what the borough requirements are.

Commissioner Tauriainen expressed concern to ensure that they are making rules that will be fair to all property owners. He also expressed concern of a violation being issued that is not given a certain time to resolve as well as the possibility of someone abusing the power behind this in issuing fines. Ms. Montague stated that was the purpose of the warning prior to the fine being issued. That would give people the opportunity to cure the violation prior to a fine being issued. There was still a timeframe where someone could come into compliance once the enforcement order was issued. She felt there shouldn't be an abusive process if the process that is laid out in the code is followed. The hearing officer would ensure that the process that was laid out in the code was followed.

Commissioner Ruffner asked what the process would be regarding record keeping. Mr. Best stated that he

met with the IT Department to come up with a program to track these items. Sometimes issues get resolved with a warning and sometimes issues go through the whole process. This tracking would give them the ability for all the departments to be able to view the infractions or warnings through computers so they would have a tracking system with specialized software that a staff member could check the status of a particular violation. Commissioner Ruffner thought there would be some sort of database that people will be able to track the information. He felt that was important to be able to see how long these cases have been in the process.

Commissioner Ruffner wondered if the hearing officer could be used in other areas or other departments such as the Roads Department. Ms. Montague replied that the Roads Department already has processes set up within their code that are somewhat untested. This would be something they could do if they wanted to adopt a hearing officer process and even use the same hearing officer however there is a fundamental difference between zoning violations and right of way violations. They would be regulating someone else's property with zoning violations which has a lot of due process associated with that. The roads belong to the Borough so staff has a lot of ability to tell people what they can and can't do on Borough roads. She stated there has been discussion of that and it may be possible that they would want to adopt an independent hearing officer process.

Commissioner Ruffner asked if easements fall under Title 21 and Planning. Ms. Montague asked if he was talking about public or private easements. Commissioner Ruffner stated that there are cases where there are public access easements where people are using them for access. It is an easement on top of someone's property. He wasn't sure what classification that would fall into. Ms. Montague replied that it could and has fallen into several classifications. There are prescriptive easements; the public has the right to continue to use an easement when the public has used a certain path whether it is vehicular or otherwise for a number of years. The underlying property owner would have to try to eject them. She stated the other kind of easements would be easements that have been dedicated by a person to the public decades ago. The Borough may not have even existed when that was dedicated.

Chairman Bryson called for a recess at 8:37 p.m. Chairman Bryson reconvened the meeting at 8:44 p.m.

Commissioner Carluccio asked what CAFO meant. Mr. Best replied that it was Confined Animal Feeding Operations. Commissioner Carluccio asked if that should be under definitions. Mr. Best replied that it was in KPB 21.28.

**VOTE:** The motion passed by unanimous consent.

BRYSON YES	CARLUCCIO YES	COLLINS YES	ECKLUND YES	FOSTER ABSENT	GROSS ABSENT	HOLSTEN YES
ISHAM YES	LOCKWOOD YES	MARTIN ABSENT	PARKER ABSENT	RUFFNER YES	TAURIAINEN YES	9 YES 4 ABSENT

**AGENDA ITEM G.** ANADROMOUS STREAM HABITAT PROTECTION (KPB 21.18) - None

**AGENDA ITEM H.** VACATIONS NOT REQUIRING A PUBLIC HEARING - None

**AGENDA ITEM I.** SPECIAL CONSIDERATIONS

1. Building Setback Exception; Tract E, Block 2, River Quest Phase 2; KPB File 2011-115; KPB File Resolution No. 2011-19; Location: On Porter Road, Soldotna area

Staff Report given by Paul Voeller

PC Meeting: 8/22/11

**Petitioner:** Rob Nash – Leland Corporation

**Submittal:** This is a resubmittal to allow additional findings to be presented. Due to the lot configuration and existing land features there is very limited space to locate the community well. The well was drilled within the setback, and it is an artesian well that has a heavy flow coming from it. A well house is required to be built around the well.