

Introduced	Popp, Brown
Date:	05/06/97
Hearing:	06/03/97
Action:	Enacted as Amended
Vote:	7 Yes, 2 No

**KENAI PENINSULA BOROUGH  
ORDINANCE 97-33**

**AN ORDINANCE REPEALING IN PART AND AMENDING  
CHAPTER 21.20 HEARINGS AND APPEALS AND AMENDING 14.40,  
RIGHT-OF-WAY REGULATIONS**

**WHEREAS,** the borough adopted several new land use ordinances in 1996 including regulations regarding the Kenai River, gravel pits, and community correctional residential facilities (KPB 21.18 and 21.13, respectively); and

**WHEREAS,** KPB 21.20.070-.120 addressing appeals to the board of adjustment was adopted prior to the 1996 land use ordinances; and

**WHEREAS,** the restrictive nature of the scope of review in KPB 21.20 does not allow the board of adjustment flexibility to admit new evidence or review the planning commission's deliberations; and

**WHEREAS,** the purpose of the board of adjustment is to correct errors at the municipal level in order to moot judicial controversy and to make a thorough factual record; and

**WHEREAS,** it is difficult to carry out the board's functions of making a complete record and correcting errors unless the board has the flexibility to consider all relevant evidence as well as the full proceedings before the planning commission; and

**WHEREAS,** other provisions of the current board of adjustment code are difficult to administer and do not adequately identify procedures, parties, and rights;

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

**SECTION 1.** That KPB 14.40.130 shall be amended as follows:

The applicant for a construction permit or oversize/overweight permit may appeal the director's decision to the superior court in Kenai, Alaska, pursuant to Part 6 of the Alaska Rules of Appellate procedure. Nothing in this regulation shall prohibit utilization of a mutually-acceptable alternative dispute resolution procedure.

**SECTION 2.** That KPB 14.40.270(D) is amended as follows

D. Appeal. The recipient may appeal the director's decision pursuant to Part 6 of the Alaska Rules of Appellate Procedure to the Superior Court in Kenai, Alaska.

**SECTION 3.** That KPB 21.20.070.120 are hereby repealed.

**SECTION 4.** That 21.20 is hereby amended as follows:

**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" means a party adversely impacted by the decision of the board of adjustment who participated in the board of adjustment hearing 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 "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 petitioner for a borough entitlement or the recipient of a borough enforcement order.
  4. "Board" means the Kenai Peninsula Borough Board of Adjustment.
  5. "De novo hearing" means hearing a matter anew as if it had not been heard before and as if no decision had been previously rendered.
  6. "Ex parte" means by or for one party; done for, on behalf of, or on the application of, one party only.
  7. "Party of record" means:
    - a. the applicant before the planning commission,
    - b. any person or government agency affected by the decision 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.
  8. "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

**21.20.220 Board of adjustment - Established; Quorum;**

- A. Established. The board of adjustment is established to perform the appellate functions required by AS 29.40.050.
- B. Composition. The board of adjustment is comprised of the borough assembly.
- C. Quorum. Five members of the board of adjustment must be present and qualified to deliberate and vote on the matter before the board of adjustment. If membership of the board of adjustment changes while an appeal is pending the 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.

- D. Chairperson. The assembly president or his designee is the chair of the board of adjustment.

**21.20.230 Jurisdiction.**

- A. Unless a different appellate procedure is provided by this code, the board of adjustment is authorized to hear and decide appeals from the following planning commission decisions:
  - 1. Appeals regarding alleged errors in enforcement of Title 21;
  - 2. Appeals regarding permits, conditional uses, variances, and pre-existing or nonconforming uses;
  - 3. A denial of a petition for a vacation of a public interest in land shall be processed in accordance with KPB 20.28.110.

**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.
- B. Ex parte contact. Board of adjustment members shall be impartial in all administrative decisions, both in fact and in appearance. No member may 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 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.

**21.20.250 Appeal of planning commission decision to board of adjustment.**

- 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 of \$300. All appeals shall be to the assembly sitting as a board of adjustment, and shall be conducted in accordance with the provisions of this chapter, unless otherwise provided by the Kenai Peninsula Borough Code.
- B. 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.
- C. Entry of appearance. The borough clerk shall mail 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. Any party desiring to participate in the appeal process must file an entry of appearance containing that party's name and address, or the address of the party's representative, within 15 days of the date of mailing of the notice of appeal by the borough clerk. 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, the decision below is stayed until the appeal becomes final

before the board of adjustment. 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; and
  7. The minutes of the planning commission, or, if provided by a party, 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 \$5.00 per tape copying fee.
- B. Record; preparation. The planning director shall certify the paginated and indexed record and minutes on appeal within 15 days after the deadline for filing entries of appearance. One copy of the record shall be provided to the 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. A notice of certification of record shall be provided to all parties. Copies of the record may be provided to other parties or any other persons upon payment of a handling charge of 25 cents per page. 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 of 25 cents per page.

**21.20.280 Written arguments.**

- A. Opening argument. Each party to the appeal shall submit a written argument 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 transcript has been filed. The written argument 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 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.
  - 3. Persons filing entries of appearance or witnesses supporting appellant, 5 minutes each.
  - 4. Appellee, 15 minutes.
  - 5. Persons filing entries of appearance or witnesses supporting appellee's position, 5 minutes each.
  - 6. Appellant's rebuttal, 5 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

mere passage of time is not a change in circumstances.

**21.20.350 Reconsideration by board of adjustment.**

A denial of an appeal is the final decision.

**21.20.360 Appeal from board of adjustment.**

G. Pursuant to AS 29.40.060, appeals from the final written decisions of the board of adjustment 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.

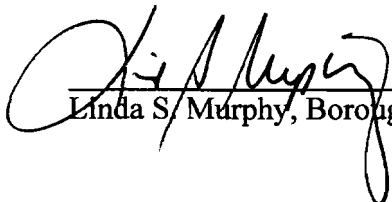
H. The borough clerk shall estimate the cost of preparing the transcript of the proceeding and compiling the record on appeal. The appellant to the court shall deposit the estimated costs with the clerk in advance. Upon completion of the record on appeal, the clerk shall refund any excess deposit or charge the appellant for costs exceeding the deposit. The record may not be released to the appellant until full payment is made.

**SECTION 5.** That this ordinance shall take effect immediately upon its enactment.

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 3<sup>rd</sup> DAY OF JUNE, 1997.**

  
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Jack Brown, Assembly President

ATTEST:

  
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Linda S. Murphy, Borough Clerk