

Agenda

Planning Commission - Title 49 Committee City and Borough of Juneau

July 19, 2017
Marine View Building, 4th Floor Conference Room
3:15 PM

- I. ROLL CALL
- II. APPROVAL OF AGENDA
- III. APPROVAL OF MINUTES
 - A. June 28, 2017 Draft Minutes, Title 49 Committee
- IV. AGENDA TOPICS
 - A. Review of Title 49's Nonconforming Development Policies
- V. COMMITTEE MEMBER COMMENTS AND QUESTIONS
- VI. ADJOURNMENT

Meeting Agenda of the
City and Borough of Juneau
Title 49 Committee of the Planning Commission

Wednesday, June 28, 2017
Community Development Department, Large Conference Room
3:15 p.m. to 4:30 p.m.

Members Present:

Dan Miller, Carl Greene, Paul Voelckers, Dan Hickok (Alternate)

Members Absent:

Kirsten Shelton-Walker

Staff Present:

Laura Boyce (CDD), Jill Maclean (CDD), Beth McKibben (CDD), Marjorie Hamburger (CDD)

Public Present:

I) Call to Order

Meeting called to order at 3:15 pm.

II) Approval of Minutes

April 26, 2017 Draft Minutes

MOTION: *by Mr. Voelckers to approve the April 26, 2017 minutes.*

The motion passed with no objection.

III) New Business

a) Non conforming code

This was a follow up from the previous night's Planning Commission meeting where the Director's report included a review of Title 49's nonconforming development policies. Ms. McKibben asked if the committee wanted to incorporate this topic into the Title 49 Committee's workload or establish an ad hoc committee to address the topic. Discussion ensued about what the committee currently has on its plate or anticipates addressing the near future.

Mr. Voelckers suggested that the committee start work on the third Wednesday of July and then determine if additional meetings might be needed. Members checked their calendars and determined that Mr. Miller, Mr. Greene and Mr. Voelckers will be in attendance then, also it is likely that Mr. Hickok will be able to attend as well..

Ms. McKibben had some policy questions to bring to the committee and said there is a need to look at the issue in light of what financing institutions are doing or not doing when nonconforming property is being sold. What is new, asked Mr. Voelckers, in this respect? We need to figure out if the financial institutions need some particular language from the city to support the lending of mortgage money, said Ms. McKibben.

At a conceptual level, said Mr. Voelckers, it is easy to add density but what if it is an "icky" use that we don't want to roll into perpetuity. It is our job to monitor use and qualities of a neighborhood, he said. How do we decide when something is on the bad side of the ledger? Other communities ask this question too, said Ms. McKibben. It is a key thing to focus on,

she said. Mr. Miller said a working on nonconforming development policies is a piece of the puzzle that fits with the recently created overlay districts and builds in flexibility and relief value when every house in an area is nonconforming.

Ms. McKibben said it is necessary to break the task into three categories: lots, structures and uses. The uses will be the hardest to deal with, she said. CBJ code does not do a good job of separating these categories.

b) Panhandle Code Changes

Committee Members received a memo on the topic of the proposed changes to city code governing panhandle lots. Ms. McKibben summarized by saying that staff looked at amending the panhandle section to create more flexibility and options for subdivision development. Key concepts are indicated with italics in the memo. There is a buffet menu of development options. Lot areas are reduced and meet minimum dimensions, she said.

Mr. Voelckers said that some funky old language in the code is begging to be corrected. When subdivision rules were changed, the code was shed of minimum rectangle rules. So this needs to be applied to smaller lots around town, he said.

Ms. McKibben led the Committee through a number of points outlined in the memo:

- The flagpole stem is reduced from 30 to 20 feet. There was discussion about the driveway grade. Language has been modified as required by the fire code; the Fire Marshall can have flexibility to set this.
- Page 9 of the panhandle memo, Lot size and marine outfall: Current code requires a 36,000 sq. ft. lot. This is a hold out from when the Department of Environmental Conservation (DEC) maintained minimum lot sizes, however DEC has suggested that this requirement be removed. Based on this conversation, it is recommended that paragraph A2 be amended as described in the memo.
- Illustrations: Staff likes including illustrations in the code for circumstances such as panhandles. Ms. McKibben wants to find examples to use for these sorts of things. Mr. Voelckers and Mr. Greene said they were in favor of such an addition.
- Page 3 of the panhandle memo, Setbacks: Staff met with Law and they recommended that the setback for front lots be consistent with private shared access. Ms. McKibben wondered why this is treated differently from corner lots. Mr. Palmer thought this was a good question and suggested amending private shared access in this way. Ms. McKibben stated that there is not yet draft language for the committee, but if the concept is deemed a good one, staff will continue to work on the draft. Ms. McKibben drew pictures for the Committee to illustrate how this would work for panhandles.
- Ms. McKibben had concept maps from Quinn Tracy (CDD cartographer) about how it would look if these concepts were applied to a panhandle. Mr. Voelckers requested that the committee receive some more information and drawings from staff, then that they respond if they think the committee needs more time with the revisions or if they are ready for the Committee of the Whole.
- There is another section of code that will need to be linked between the two sections, regarding a 30 feet setback. Ms. Boyce is familiar with this and took note of this task.
- Specifying how many lots: If you put in that language it is not going to prohibit pairs of panhandle lots existing side by side. Also include language about shared driveways. Staff reports will indicate the intent.

Is keeping in two acceptable, asked Ms. McKibben? Mr. Voelckers thought that with shared access, this language should be acceptable.

- Driveways: Allow the director the discretion to approve driveways; however Law said that the City is at risk for takings if this is done.
- The Committee directed Ms. McKibben to work on language and schedule a time to come before the Committee again. It is important to talk about the why of these revisions such as presenting options for infill development and for other subdivision development. These revisions can implement policies for housing from the Comprehensive Plan.
- Text question in the draft ordinance, item (E) *In a D-1 zoning district, 30 feet of the width of the panhandle of the rear lot may be used in determining the width of the front lot:* Why is there something specific about D-1, asked Mr. Voelckers? This is old language because we used to require a larger lot size. It was added in specifically for some lots in N. Douglas. Why not apply to any of the lots, asked Mr. Voelckers? This needs to be looked at to determine if it should stay in. It seems “precious”, said Mr. Voelckers. There is not yet consensus about keeping it in or not, said Ms. McKibben.
- Page 21, item (I) *The portion of the driveway in the right of way or the first 20 feet from the edge of the public roadway shall be paved, whichever length is greater:* Mr. Voelckers asked if this was consistent with private easement access. Yes, said Ms. McKibben, the Assembly did this.

c) Proposed minor change to privately maintained access roads in public rights-of-way

Ms. Boyce stated that the proposed code change to Privately Maintained Access Roads (PMAs) is a minor change with a big impact. This concept was proposed along with the subdivision rewrite. When the rewrite was presented to the Assembly, they talked about gravel roads not being an urban amenity and they made a change. Since then, the Assembly has reconsidered and they want the Planning Commission to add language saying that gravel PMAs are permissible in the urban service area. If the Committee approves this, it will move on to the full Planning Commission so that they may make a recommendation to the Assembly, said Ms. Boyce.

Mr. Voelckers had question about 49.35.273(b)(5). He said that it seems to say that privately maintained access is required in order to be consistent with fire code.

d) Variances

Mr. Miller requested consideration of this topic. The new interpretation of how variances are applied is a change from case law, he said. At the previous night’s Planning Commission meeting, he said he asked Mr. Palmer questions pertaining to the Olmo decision. Mr. Palmer indicated that it only references court cases from 1979. Is this what he is hanging his hat on, asked Mr. Miller? Yes, replied Mr. Palmer. That was 38 years ago, said Mr. Miller. In 1995 another Planning Commission revised the variance criteria with the benefit of the court case to make that revision. Title 49 states clearly that it is the Board of Adjustment’s (BOA) job to interpret the text of code. Mr. Miller’s opinion is that it is the 6 criteria that the BOA must apply that define a unique circumstance, rather than determining the unique circumstance first and then applying the six criteria.

Mr. Voelckers said he essentially agrees. The key point is the Assembly appeal of Olmo was that you had to meet the first threshold about a unique circumstance before proceeding. These are our new marching orders, as relayed to the commissioners, said Mr. Voelckers.

Ms. Maclean said she thinks it best to move forward as suggested by Mr. Levine. Fix the variance section to read the way we want it to read instead of fighting a battle with law or case law. Mr. Voelckers said that last year the Title 49 Committee had simplified the criteria to 5 elements and discussion ensued about continuing work to rephrase the unique criteria. Would law support this, asked Mr. Voelckers? Ms. Boyce said that the final draft would need to be submitted to Law for review.

Mr. Voelckers said that previous language concerning variances has been awkward but has the potential to be cleaned up. Mr. Miller said that the drive at present is a response to what the applicant at last night's Planning Commission meeting said – variances are impossible to get so they had to ask for the rezone. That is worrisome, said Mr. Miller. They need two variances for their project, that should be easy to give, said Mr. Greene, because the property is completely non-conforming plus they could claim financial hardship. Mr. Greene said if the case had been heard by the Board of Adjustment last night, it would have been approved.

The city could be vulnerable, said Mr. Voelckers, due to inconsistency. Mr. Miller agreed it was worrisome and said he though Ms. Maclean's advice was sound. He suggested the Planning Commission redouble their efforts to get this moving forward. Get rid of criteria No. 2, he said. No one has ever met this criteria in the history of variances, said Mr. Miller.

The Title 49 Committee requests a Committee of the Whole meeting for July 25 to look at variances. (*Ed note – later this was put on the schedule to take place on August 8.*) Mr. Voelckers pushed for new variance language using the word “compelling” rather than “unique” circumstances. He said that revising the language now also points to all the research that has been done based on the Olmo decision and other actual situations in the recent past. This will allow for common sense to enter into the decision, he said. Mr. Voelckers brought up the Tyler rental case as an example of something the commissioners wanted to approve. There were unique features in that location and for that use like the size of the equipment.

VI. Next Meeting

Wednesday, July 19, 3:15 pm

VII. Adjournment

The meeting adjourned at 4: 23pm.

Chapter 49.30 - NONCONFORMING DEVELOPMENT

49.30.010 - Purpose.

It is the intent of this section to provide standards for the continued use of property made nonconforming by adoption of this title.

49.30.100 - Continuation of nonconforming situations.

Unless otherwise specifically provided in this chapter and subject to the restrictions and qualifications set forth in sections 49.30.200—49.30.700, nonconforming situations that were otherwise lawful on the effective date of the ordinance codified in this chapter may be continued.

49.30.200 - Residences in industrial and waterfront commercial industrial zones.

The restrictions of this chapter shall not apply to existing dwellings in the industrial and waterfront commercial industrial zones.

Comment [BM1]: This is an interesting policy. I can do some research into this if you're interested

49.30.300 - Nonconforming lots.

(a) A lot rendered substandard in size by the adoption of this title may nonetheless be used in conformity with applicable use regulations, provided that no use, including duplexes and multifamily dwellings, requiring a lot size greater than the minimum for that zone shall be permitted except as provided in subsections 49.25.510(h) and (i)

(b) This section applies only to nonconforming lots undeveloped at the time of the adoption of this Code. A change in use of a developed nonconforming lot shall be accomplished in accordance with section 49.30.600.

(c) If, on the date the ordinance from which this section derives becomes effective, an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, each lot may be developed with single-family dwellings if community or approved individual waste systems are provided.

49.30.400 - Aggravation of nonconforming situations.

(a) Except as provided in this section, section 49.25.430, section 49.25.440, section 49.25.510, and section 49.40.210(d)(6), nonconforming situations may not be aggravated. As used herein, "aggravate" includes the physical alteration of structures or the placement of new structures on open land if such results in:

Comment [BM2]: This applies to all situations....discussion for all non-conforming situations? Some? Particular uses?

(1) An increase in the total amount of space devoted to a nonconforming use; or

(2) A greater invasion in any dimension of setback requirements or height limitations, a further violation of density requirements or further deficiencies in parking or other requirements.

(b) A use made nonconforming by the adoption of the ordinance codified in this title may be extended throughout any portion of a completed building manifestly designed or arranged to accommodate such use, but may not, except as provided in section 49.30.800, be extended to other buildings or to land outside the original building.

49.30.500 - Reconstruction.

(a) Except as provided in subsections (b) and (c) of this section, if a building is damaged by any change so that the cost of renewal of the damaged parts exceeds 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials, then such building shall not be rebuilt, unless the building and its intended use comply with this title. The determination of whether a building is destroyed to the extent described shall be made by the building official.

Comment [BM3]: Codes range....most are 50% most don't exclude the foundation

(b) If a single-family dwelling, duplex, or multifamily dwelling in a residential district is damaged by any involuntary change, including fire, flood, landslide, avalanche, or earthquake, so that the cost of renewal of the damaged parts exceeds 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials, then such building may be replaced or reconstructed to the same footprint on the original location with the exception of encroachments into public rights-of-way or adjacent property; provided, the intended use of the building is the same as, or less intensive than, the prior use and is a permissible use in the district. The determination of whether a building is destroyed to the extent described shall be made by the building official. If the building official determines that the foundation of the building is not reusable due to damage or substantial noncompliance with Title 19, the building regulations code, then the building may be replaced or reconstructed to the same footprint and the footprint shall be relocated on the lot so as to reduce, to the extent reasonably feasible, the occurrence or severity of any nonconforming setbacks, taking into consideration topography, shape, and size of the lot, and all other relevant factors. However, if such relocation is not reasonably feasible, the building may be replaced or reconstructed to the same footprint on the original location. Projections beyond the footprint including architectural features, roof eaves, foundation footings, porches, decks, terraces, patios, unenclosed stairways, and fire escapes, and attached structures, may also be replaced or reconstructed as they existed on the original building, with the exception of encroachments into public rights-of-way or adjacent property. An as-built survey or other proof of the footprint and location of the original building and projections beyond the footprint is to be provided to the City and Borough at the time the building is to be replaced or reconstructed. A building may be replaced or reconstructed under this subsection with the same number of off-street parking spaces as were provided for the original building. Nothing in this subsection constitutes an approval or waiver of an encroachment of the building or its footprint or projections beyond the footprint into a public right-of-way or adjacent property, nor does it authorize the building or projections beyond the footprint of the building to be replaced or reconstructed so as to encroach into a public right-of-way or adjacent property. Nothing in this subsection waives any other applicable laws or regulations including Title 19, the building regulations code, and this title.

(c) The commission, through the conditional use permit process, may allow the replacement or reconstruction of a multifamily dwelling in any multifamily residential, general commercial, light

commercial, mixed use, or waterfront commercial district when the dwelling is damaged by any involuntary change, including fire, flood, landslide, avalanche, or earthquake, and the cost of renewal of the damaged pans exceeds 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials, provided the intended use of the building is the same as, or less intensive than, the prior use. The determination of whether a building is destroyed to the extent described shall be made by the building official. A building may be replaced or reconstructed under this subsection with the same number of off-street parking spaces as were provided for the original building unless additional spaces are required under the Federal Americans with Disabilities Act. Nothing in this subsection constitutes an approval or waiver of an encroachment of the building or its footprint or projections beyond the footprint into a required yard, nor does it authorize the building or projections beyond the footprint of the building to be replaced or reconstructed so as to encroach into a required yard, except as provided in subsection 49.25.430(5). Nothing in this subsection waives any other applicable laws or regulations, including title 19, the building regulations code; and title 49, the land use code.

(d) The director may allow a building in the MU zoning district which has been converted from residential to nonresidential use to revert to residential use at the original density and parking requirement, if the reversion results in no additional floor space.

49.30.600 - Change in use of property.

(a) A substantial change in the use of property containing a situation made nonconforming by the adoption of the ordinance codified in this title may be made only after review and approval according to the procedures applicable to an initial use.

(b) Property changed in use pursuant to subsection (a) of this section may not thereafter revert to its nonconforming status. As used in this subsection the term "substantial change" means a change sufficient to require a new development permit.

49.30.700 - Abandonment and discontinuance of nonconforming situations.

(a) If a nonconforming use is discontinued for 365 consecutive days, or discontinued for any period of time without a present intention to reinstate the nonconforming use, the property involved may thereafter be used only for conforming purposes.

(b) For purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities and operations maintained on a lot shall be considered as a whole. Discontinuance of part of a use or the use of part of the property shall not necessarily terminate rights to the nonconformity, but if a nonconforming use is maintained in conjunction with a conforming use, discontinuance of the nonconforming use for the required period shall terminate the right to maintain it thereafter.

Comment [BM4]: This is a common period of time. Some codes have more some less.

(c) When a structure or operation made nonconforming by this chapter is vacant or discontinued at the effective date of the ordinance codified in this chapter, the 365-day period for purposes of this section begins to run on the effective date of the ordinance codified in this chapter.

49.30.800 - Completion of nonconforming developments.

(a) Completion of structures. Any structure for which a building permit has been issued prior to the effective date of the ordinance codified in this chapter may be completed in accordance with such permit.

(b) Completion of developments other than structures.

Comment [BM5]: This section is worthy of discussion....

(1) Any development for which a variance, planned unit development certificate, conditional use permit, or temporary permit has been issued prior to the effective date of the ordinance codified in this chapter may be completed in accordance with a building permit issued prior to the expiration of and in accordance with such variance, planned unit development certificate, conditional use permit or temporary permit. Such expiration shall occur as specified prior to the adoption of the ordinance codified in this title or six months after the effective date of the ordinance codified in this title, whichever is later.

(2) A preliminary plat approval issued prior to the effective date of the ordinance codified in this chapter shall expire 18 months after issuance, or six months after the effective date of the ordinance codified in this title, whichever is later, unless the development for which it was issued is first awarded a public transmission facilities permit.

(3) A final plat approval issued prior to the effective date of the ordinance codified in this chapter shall expire two years after such effective date, unless the plat is recorded.

(c) Allowance for completion. When it appears from the developer's plans or otherwise that a project was intended to be or reasonably could be completed in phases, stages, segments or other discrete units, the developer shall be allowed to complete nonconforming units only if they were the subject of a building permit issued prior to the effective date of the ordinance codified in this chapter and if they were included in the initial phase.



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June 21, 2017

From: Beth McKibben, AICP, Planning Manager

To: Planning Commission

Subject: Review of Title 49's Nonconforming Development Policies

The Planning Commission has expressed interest in examining CBJ's Nonconforming Development code. The impetus for this review is that recent changes in practice by the mortgage industry have made it difficult for some buyers to get mortgages for properties with nonconforming situations. Staff has previously identified this section of code as needing revisions to provide clarity.

CBJ's Nonconforming Development code, found at Title 49 Chapter 30, codifies policies that are very typical of other municipal land use codes. It addresses three types of nonconformity: use, lot dimensions, and structures. It appears buyers are encountering most financing challenges when the current zoning does not support the existing density.

Community Development staff has begun reviewing the policies expressed in the Nonconforming Development code and will present an analysis and recommendations to the Title 49 Committee later this summer. Attached to this memo is a succinct summary of nonconformities with recommendations from the American Planning Association. Also attached is Chapter 49.30 of Title 49.

QUICKNOTES

Managing Zoning Nonconformities

In zoning, a nonconformity is an existing lot, structure, or use that fails to comply with existing standards. Legal nonconformities are lots, structures, or uses that either predate zoning or were in conformity with the zoning standards in effect at the time of their establishment, while illegal nonconformities were noncompliant when established.

Most discussions of zoning nonconformities focus exclusively on legally nonconforming lots, structures, or uses. This is because legal nonconformities may remain a part of the community fabric indefinitely, but illegal nonconformities have no protection from code enforcement actions to bring them into compliance. Consequently, in the sections below the term nonconformity refers only to a legal nonconformity.

Zoning changes often result in a net increase in nonconformities. Some common nonconformities in older communities include building setbacks or lots that are too small and corner stores in areas zoned for exclusive residential use. While it makes sense to assume that all nonconformities are undesirable and should be brought into compliance, in reality community members often don't mind if some nonconformities continue or even expand.

Background

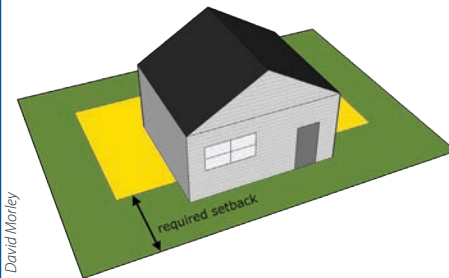
Communities have typically applied zoning standards prospectively. In other words, new standards only apply to new development. Existing nonconforming lots, structures, and uses are grandfathered under new zoning standards. The early framers of zoning law did this on purpose to take the sting out of new regulation. In fact, it's unlikely that zoning would have caught on if all property owners were required to immediately extinguish nonconformities. However, this grandfathered status comes with limitations.

These limitations are most relevant in situations where owners want to modify or expand a structure or use or rebuild after a fire, flood, or storm. Generally, property changes that cross a certain threshold, whether physical or monetary, trigger a requirement that an owner must bring the property into compliance with the current zoning standards. The purpose of these triggers is to encourage redevelopment that is in line with the community's vision for the zoning district. But, as a side effect, these building and use limitations can actually slow the pace of change. Owners may be reluctant to make costly conforming improvements, and banks are typically hesitant to make loans on nonconforming properties. Because nonconforming status creates a barrier to reinvestment, it is important for communities to carefully consider how new zoning standards will affect the types and location of nonconformities.

Not all nonconformities have negative effects on adjacent properties or the larger community. In fact, in some instances, continuance or expansion of a nonconformity does not threaten public health or safety and may even be preferable to the alternative of disinvestment. For this reason, it makes sense for communities to treat nonconformities that are relatively benign differently than those likely to have significant detrimental effects. The following sections contain three broad recommendations for managing nonconformities through zoning.

Recommendation 1: Rezone to Minimize Nonconformities

When communities map new zoning districts, multiple contiguous blocks or even entire neighborhoods may be rendered nonconforming. If the intended goal is to facilitate dramatic redevelopment of these areas, this may make sense. But, if the structures and uses in these neighborhoods are generally viewed as desirable, widespread nonconformities may be a sign that the new districts are a poor fit for older areas of the community.



David Morley

The home in this illustration would be a nonconforming structure, since it does not comply with the minimum front setback.



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In these instances it makes sense to change the zoning to minimize nonconformities. This can be accomplished by remapping mature neighborhoods to a more appropriate zoning district, adjusting the use permissions or dimensional standards of the current district to better match existing conditions, or creating a new zoning district that fits the character of these areas. All of these approaches have the net effect of reducing inadvertent nonconformities and decreasing the likelihood of hardships for property owners.

Recommendation 2: Sanction Benign Nonconformities

For nonconformities that are not geographically concentrated, it often makes sense to distinguish between those that pose a significant potential threat to public health or safety and those that are largely benign. Examples of benign nonconformities may include small deviations from required setbacks or lot area requirements, unlisted uses that are similar to explicitly permitted uses, and minor shortfalls in off-street parking spaces.

While each community will need to establish its own criteria for what constitutes a benign nonconformity, the most effective way to sanction the continuance or expansion of these lots, structures, or uses is to state this tolerance clearly in the zoning ordinance. This may be as simple as adding a provision to a new set of zoning standards that authorizes the expansion or rebuilding of any existing development, subject to the standards in effect when the lot, structure, or use was established. Or communities may want to create a special permit process that allows local officials to grant conforming status on a case-by-case basis. Both of these approaches remove the stigma associated with nonconformance, which is especially important to lenders.

Recommendation 3: Phase Out Detrimental Nonconformities

In contrast to a benign nonconformity, a detrimental nonconformity has a high probability of eventually harming public health or safety. Consequently, zoning should encourage the elimination of detrimental nonconformities. Examples of detrimental nonconformities may include a bar or restaurant with late-night hours in a quiet residential district or a heavy industrial use in a floodplain.

As communities try to phase out potentially harmful nonconformities, they usually focus on limiting expansion and preventing rebuilding or reoccupancy. Typically, this means prohibiting any building expansions or site modifications that do not reduce or eliminate the nonconformity, changing one nonconforming use for another, reestablishing a nonconforming use or structure after a period of vacancy, or reconstructing a severely damaged or demolished nonconforming structure.

In instances where continuance of a nonconformity poses an especially acute risk to public health and safety, communities may take more drastic measures. These measures include nuisance abatement actions, amortization schemes that require conformance after a specified period of time, or public buy-outs for willing sellers. Because these options carry significant legal risks for local governments, local officials should always engage competent legal counsel before taking action.

Summary

Nonconforming lots, structures, and uses are a natural byproduct of new zoning standards. While most zoning ordinances encourage phasing out nonconformities, not all nonconformities pose risks to public health and safety. Instead of treating all nonconformities the same, it makes more sense to distinguish between benign and detrimental nonconformities. Communities can transform benign nonconformities into conforming lots, structures, or uses through rezoning, explicit exemptions from new standards, or special permit processes. And they can expedite the elimination of detrimental nonconformities through strict limits on expansion, rebuilding, or reoccupancy.

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RECOMMENDED READING

1. Published by the American Planning Association

Easley, V. Gail. 2009. "Distinguishing Between Detrimental and Benign Nonconformities." *Zoning Practice*, November. Available at www.planning.org/zoningpractice.

Rosenthal, Deborah. 2010. "Nonconforming Uses: Part 1." *The Commissioner*, Fall. Available at www.planning.org/thecommissioner.

Rosenthal, Deborah. 2011. "Nonconforming Uses: Part 2." *The Commissioner*, Winter. Available at www.planning.org/thecommissioner.

2. Other Resources

Elliott, Donald L. 2008. *A Better Way to Zone: Ten Principles to Create More Livable Cities*. Washington, D.C.: Island Press. Available at <http://islandpress.org/ip/books/book/islandpress/B/bo7003715.html>.

Markham, Lynn and Diane Milligan. 2005. *Zoning Nonconformities: Application of New Rules to Existing Development*. Stevens Point, Wis.: Center for Land Use Education. Available at www.uwsp.edu/cnr-ap/clue/Documents/Zoning/Zoning_Nonconformities.pdf.

Chapter 49.30 - NONCONFORMING DEVELOPMENT

49.30.010 - Purpose.

It is the intent of this section to provide standards for the continued use of property made nonconforming by adoption of this title.

(Serial No. 87-49, § 2, 1987)

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Unless otherwise specifically provided in this chapter and subject to the restrictions and qualifications set forth in sections 49.30.200—49.30.700, nonconforming situations that were otherwise lawful on the effective date of the ordinance codified in this chapter may be continued.

(Serial No. 87-49, § 2, 1987)

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The restrictions of this chapter shall not apply to existing dwellings in the industrial and waterfront commercial industrial zones.

(Serial No. 87-49, § 2, 1987)

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- (a) A lot rendered substandard in size by the adoption of this title may nonetheless be used in conformity with applicable use regulations, provided that no use, including duplexes and multifamily dwellings, requiring a lot size greater than the minimum for that zone shall be permitted except as provided in subsections 49.25.510(h) and (i)
- (b) This section applies only to nonconforming lots undeveloped at the time of the adoption of this Code. A change in use of a developed nonconforming lot shall be accomplished in accordance with section 49.30.600.
- (c) If, on the date the ordinance from which this section derives becomes effective, an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, each lot may be developed with single-family dwellings if community or approved individual waste systems are provided.

(Serial No. 87-49, § 2, 1987; Serial No. 91-01, § 4, 1991)

49.30.400 - Aggravation of nonconforming situations.

- (a) Except as provided in this section, section 49.25.430, section 49.25.440, and section 49.25.510, nonconforming situations may not be aggravated. As used herein, "aggravate" includes the physical alteration of structures or the placement of new structures on open land if such results in:
 - (1) An increase in the total amount of space devoted to a nonconforming use; or
 - (2) A greater invasion in any dimension of setback requirements or height limitations, a further violation of density requirements or further deficiencies in parking or other requirements.

- (b) A use made nonconforming by the adoption of the ordinance codified in this title may be extended throughout any portion of a completed building manifestly designed or arranged to accommodate such use, but may not, except as provided in section 49.30.800, be extended to other buildings or to land outside the original building.

(Serial No. 87-49, § 2, 1987; Serial No. 91-03, § 4, 1991; Serial No. 91-50, § 3, 1991)

49.30.500 - Reconstruction.

- (a) Except as provided in subsections (b) and (c) of this section, if a building is damaged by any change so that the cost of renewal of the damaged parts exceeds 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials, then such building shall not be rebuilt, unless the building and its intended use comply with this title. The determination of whether a building is destroyed to the extent described shall be made by the building official.
- (b) If a single-family dwelling, duplex, or multifamily dwelling in a residential district is damaged by any involuntary change, including fire, flood, landslide, avalanche, or earthquake, so that the cost of renewal of the damaged parts exceeds 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials, then such building may be replaced or reconstructed to the same footprint on the original location with the exception of encroachments into public rights-of-way or adjacent property; provided, the intended use of the building is the same as, or less intensive than, the prior use and is a permissible use in the district. The determination of whether a building is destroyed to the extent described shall be made by the building official. If the building official determines that the foundation of the building is not reusable due to damage or substantial noncompliance with Title 19, the building regulations code, then the building may be replaced or reconstructed to the same footprint and the footprint shall be relocated on the lot so as to reduce, to the extent reasonably feasible, the occurrence or severity of any nonconforming setbacks, taking into consideration topography, shape, and size of the lot, and all other relevant factors. However, if such relocation is not reasonably feasible, the building may be replaced or reconstructed to the same footprint on the original location. Projections beyond the footprint including architectural features, roof eaves, foundation footings, porches, decks, terraces, patios, unenclosed stairways, and fire escapes, and attached structures, may also be replaced or reconstructed as they existed on the original building, with the exception of encroachments into public rights-of-way or adjacent property. An as-built survey or other proof of the footprint and location of the original building and projections beyond the footprint is to be provided to the City and Borough at the time the building is to be replaced or reconstructed. A building may be replaced or reconstructed under this subsection with the same number of off-street parking spaces as were provided for the original building. Nothing in this subsection constitutes an approval or waiver of an encroachment of the building or its footprint or projections beyond the footprint into a public right-of-way or adjacent property, nor does it authorize the building or projections beyond the footprint of the building to be replaced or reconstructed so as to encroach into a public right-of-way or adjacent property. Nothing in this subsection waives any other applicable laws or regulations including Title 19, the building regulations code, and this title.
- (c) The commission, through the conditional use permit process, may allow the replacement or reconstruction of a multifamily dwelling in any multifamily residential, general commercial, light commercial, mixed use, or waterfront commercial district when the dwelling is damaged by any involuntary change, including fire, flood, landslide, avalanche, or earthquake, and the cost of renewal of the damaged parts exceeds 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials, provided the intended use of the building is the same as, or less intensive than, the prior use. The determination of whether a building is destroyed to the extent described shall be made by the building official. A building may be replaced or reconstructed under this subsection with the same number of off-street parking spaces as were provided for the original building unless additional spaces are required under the Federal Americans with Disabilities Act. Nothing in this subsection constitutes an approval or waiver of an encroachment of the building or its footprint or projections beyond the footprint into a required yard, nor does it authorize the

building or projections beyond the footprint of the building to be replaced or reconstructed so as to encroach into a required yard, except as provided in subsection 49.25.430(5). Nothing in this subsection waives any other applicable laws or regulations, including title 19, the building regulations code; and title 49, the land use code.

- (d) The director may allow a building in the MU zoning district which has been converted from residential to nonresidential use to revert to residential use at the original density and parking requirement, if the reversion results in no additional floor space.

(Serial No. 87-49, § 2, 1987; Serial No. 89-05, § 3, 1989; Serial No. 89-33, §§ 3, 4, 1989; Serial No. 91-46, § 2, 1991; Serial No. 2001-02, § 2, 4-2-2001; Serial No. 2006-15, § 7, 6-5-2006; [Serial No. 2012-36, § 4, 9-17-2012](#).)

Cross reference— Right-of-way encroachment permits, CBJ Code ch. 62.55.

49.30.600 - Change in use of property.

- (a) A substantial change in the use of property containing a situation made nonconforming by the adoption of the ordinance codified in this title may be made only after review and approval according to the procedures applicable to an initial use.
- (b) Property changed in use pursuant to subsection (a) of this section may not thereafter revert to its nonconforming status. As used in this subsection the term "substantial change" means a change sufficient to require a new development permit.

(Serial No. 87-49, § 2, 1987)

49.30.700 - Abandonment and discontinuance of nonconforming situations.

- (a) If a nonconforming use is discontinued for 365 consecutive days, or discontinued for any period of time without a present intention to reinstate the nonconforming use, the property involved may thereafter be used only for conforming purposes.
- (b) For purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities and operations maintained on a lot shall be considered as a whole. Discontinuance of part of a use or the use of part of the property shall not necessarily terminate rights to the nonconformity, but if a nonconforming use is maintained in conjunction with a conforming use, discontinuance of the nonconforming use for the required period shall terminate the right to maintain it thereafter.
- (c) When a structure or operation made nonconforming by this chapter is vacant or discontinued at the effective date of the ordinance codified in this chapter, the 365-day period for purposes of this section begins to run on the effective date of the ordinance codified in this chapter.

(Serial No. 87-49, § 2, 1987)

49.30.800 - Completion of nonconforming developments.

- (a) *Completion of structures.* Any structure for which a building permit has been issued prior to the effective date of the ordinance codified in this chapter may be completed in accordance with such permit.
- (b) *Completion of developments other than structures.*

- (1) Any development for which a variance, planned unit development certificate, conditional use permit, or temporary permit has been issued prior to the effective date of the ordinance codified in this chapter may be completed in accordance with a building permit issued prior to the expiration of and in accordance with such variance, planned unit development certificate, conditional use permit or temporary permit. Such expiration shall occur as specified prior to the adoption of the ordinance codified in this title or six months after the effective date of the ordinance codified in this title, whichever is later.
 - (2) A preliminary plat approval issued prior to the effective date of the ordinance codified in this chapter shall expire 18 months after issuance, or six months after the effective date of the ordinance codified in this title, whichever is later, unless the development for which it was issued is first awarded a public transmission facilities permit.
 - (3) A final plat approval issued prior to the effective date of the ordinance codified in this chapter shall expire two years after such effective date, unless the plat is recorded.
- (c) *Allowance for completion.* When it appears from the developer's plans or otherwise that a project was intended to be or reasonably could be completed in phases, stages, segments or other discrete units, the developer shall be allowed to complete nonconforming units only if they were the subject of a building permit issued prior to the effective date of the ordinance codified in this chapter and if they were included in the initial phase.

(Serial No. 87-49, § 2, 1987)



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June 27, 2017

Memorandum

To: Title 49 Committee

From: Beth McKibben, AICP, Planning Manager

A handwritten signature in black ink, appearing to be "BMc", is written over the name "Beth McKibben".

RE: Proposed amendments to 49.30 – Nonconforming Development.

Attachments:

A – June 21, 2017 memorandum

B – CBJ 49.30 – with policy questions highlighted

Introduction

At the June 27, 2017 Planning Commission meeting the Commission referred the consideration of amendments to CBJ 49.30, Nonconforming Development, to the Title 49 Committee.

As discussed in the June memorandum, staff has previously identified this section of code as needing revisions to provide clarity. Additionally, recently prospective buyers have encountered challenges in financing non-conforming developments that previously have been financed, which has raised the level of urgency to improve this chapter.

Discussion

The stated purpose of the non-conforming section of code is to provide standards for the continued use of property made non-conforming by adoption of revisions to Title 49. Four categories of nonconformity are identified in 49.80.120, Definitions:

Nonconforming lot means a lot, the area, dimensions or location of which was lawful prior to the adoption, revision, or amendment of this Code, but which fails by reason of such adoption, revision or amendment to conform to present requirements.

Nonconforming situation means a nonconforming lot, use or structure, or any combination thereof.

Nonconforming structure means a structure, the size, dimensions or location of which was lawful prior to the adoption, revision, or amendment of this Code, but which fails by reason of such adoption, revision, or amendment, to conform to present requirements.

Nonconforming use means a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails, by reason of such adoption, revision or amendment, to conform to the present requirements of the zoning district.

Zoning nonconformities are existing uses, structures or lots that were legally established prior to a change in zoning provisions and which do not comply with new ordinance standards. As communities revise land use policies and zoning regulations they are faced with questions regarding the continued use, replacement or expansion of such nonconformities. How they answer these questions will affect political acceptance of new zoning standards and whether local land use objectives can be fully realized. Communities implement land use plans using a variety of strategies including regulations, public investment, education, and incentives. Zoning is one of the regulatory tools available. Zoning is a valid use of police power intended to protect public health, safety and welfare. Some specific reasons for zoning include:

- ensuring that new development and redevelopment are located according to the community plan;
- matching development to the environmental limitations of the landscape;
- promoting quality development to maintain property values and the quality of life by stabilizing the character of neighborhoods and business districts;
- controlling densities to avoid overcrowding, develop housing and promote land conservation;
- providing predictability for property owners and efficiency related to demands for public services and facilities; and
- moving traffic safely and efficiently based on road standards and layout.

As you may recall from the 2016 Planning Commission training, the Alaska Constitution and Alaska State Statutes provide maximum jurisdiction to municipalities to adopt and implement planning and zoning powers to protect public health, safety, and general welfare. The use of zoning police power must be reasonable and fair.

With this background in mind, CBJ 49.30 is in need of revision. The various non-conforming situations are discussed and combined into single paragraphs, the reconstruction section is poorly written and combines many ideas and concepts in a way that is challenging to understand. Staff proposes a complete rewrite of the chapter rather than attempting to edit the existing code. Additionally, policy direction will be needed from the Committee.

Zoning ordinances vary considerably in how they treat nonconformities. There are four general options:

- Phase them out over time.
- Maintain the status quo.
- Allow limited modification and expansion.
- Change zoning standards to make certain uses, structures or lots conforming.

The American Planning Association Planning Advisory Service Quick Notes attached to the June 2017 memorandum to the Planning Commission discusses the management of non-conformities. The article suggests, and staff agrees, that not all nonconformities have negative effects on adjacent properties or the larger community or do not further the long term land use objectives. In fact, in some instances, continuance or expansion of nonconformity does not threaten public health or safety, have no impact on the long term land use objectives and may even be preferable to the alternative of disinvestment. For this reason, it makes sense for communities to treat nonconformities that are relatively benign differently than those likely to have significant detrimental effects. Therefore, staff recommends an approach that mixes

the phasing out of those non-conformities that have negative effects on adjacent properties or the larger community, and perhaps maintaining the status quo, or allowing limited modification and expansion to those nonconformities that do not threaten public health or safety. Additionally, over time, and separate from this project, the Commission and staff will work to review and revise zoning standards throughout the borough and will continue to consider the impacts of those proposed changes on various non-conforming situations. Additionally, staff recommends a process for a property owner to establish that a given non-conforming situation was legal when it was created. This places the burden on the property owner rather than the Community Development Department. The determination could be made by the Commission or staff and will be spelled out in the ordinance.

The current code language is attached and I have highlighted the areas that I have identified as policy, where discussion is needed. I have not yet attempted to identify “benign” uses or “non-benign” uses. I have not yet attempted to create policy that will address the current challenges potential buyers are having in obtaining financing on non-conforming properties. I recommend that each non-conforming situation have an independent section of code; non-conforming lots and their use will be addressed in one section; non-conforming structures, their expansion/continuation/replacement addressed in one section; non-conforming uses, their expansion/continuation/replacement addressed in one section. This will provide clarity and will assist in the evaluation of those non-conformities that include more than one non-conforming situation, for example a non-conforming lot (too small) with a non-conforming structure (encroaching into setbacks) with a non-conforming use (something not currently allowed in that zoning district).

Key policies for discussion:

- A substandard lot may be used in conformity with applicable use regulations, provided that no use, including duplexes and multifamily dwellings that require a lot size greater than the minimum for that zone shall be permitted except as provided elsewhere in the non-conforming code.
- When an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, each lot may be developed with single-family dwellings if community or approved individual waste systems are provided.
- Nonconforming situations may not be aggravated. As used herein, "aggravate" includes the physical alteration of structures or the placement of new structures on open land if such results in:
 - (1) An increase in the total amount of space devoted to a nonconforming use; or
 - (2) A greater invasion in any dimension of setback requirements or height limitations, a further violation of density requirements or further deficiencies in parking or other requirements.

(b) A non-conforming use may be extended into any portion of a completed building intended for that use, but may not, except as provided in section 49.30.800, be extended to other buildings on the site or to other lots.
- If a building is damaged by any change so that the cost of renewal of the damaged parts exceeds 75 percent the building cannot be rebuilt, unless the building and its intended use comply with this title.
- Single-family dwelling, duplex, or multifamily dwellings damaged by involuntary change so that the cost of renewal of the damaged parts exceeds 75 percent of the cost of the replacement then such building may be rebuilt on the same footprint except that it cannot have any encroachments into public rights-of-way or adjacent property. This reconstruction is allowed if the intended use of the building is the same as, or less intensive than, the prior use and is a permissible use in the district. It can have the same number of parking spaces as the original building (use?).
- The commission, through the conditional use permit process, may allow the replacement or reconstruction of a multifamily dwelling in any multifamily residential, general commercial, light

commercial, mixed use, or waterfront commercial district when the dwelling is damaged by any involuntary change and the cost of renewal exceeds 75 percent of the cost of the replacement building with same number of off-street parking spaces as were provided for the original building.

- The director may allow a building in the MU zoning district which has been converted from residential to nonresidential use to revert to residential use at the original density and parking requirement, if there is no additional floor space. (Density for MU has changed to no cap but parking can be limiting to the number of units)
- Substantial change to a nonconforming use may be made only after review and approval according to the procedures applicable to an initial use. Meaning if the use needed a conditional use permit to be allowed the substantial change requires a conditional use permit. A use permitted by this process may not revert to its nonconforming status.
- When a nonconforming use is discontinued for 365 consecutive days, or discontinued for any period of time without intention to reinstate the nonconforming use, the property can only be used in conformance with the current code.

I have a collection of non-conforming codes from other communities. Additionally, I have reached out to the American Planning Association for a Planning Advisory Service report that will include a collection of codes and information on non-conforming situations from across the U.S.. I have not yet received this report. As mentioned at the June 27th Planning Commission meeting, I have also reached out to representatives in the finance community, but we have not yet had an opportunity to have a discussion.

For this first meeting, there are many policies and concepts that we can discuss as well and other overall structure of the code. The focus of the discussion should be on concepts and policy, not language. It will most efficient if the discussion focuses on each non-conforming situation independently – lot, structure and use. The discussion on non-conforming lots and structures is anticipated to be fairly straightforward. The discussion on non-conforming uses will be more challenging.